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APPELLATE PRACTICE AND PROCEDURE

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I. INTRODUCTION

DECISIONS by the Texas Supreme Court in the mandamus and summary judgment areas raise important considerations for the appellate practitioner. A tension still exists among members of the court regarding the appropriate role of mandamus relief in the discovery area. On the one hand, the dissent in *Chapa v. Garcia*¹ charged the plurality with micromanaging discovery by forcing the production of three or four pages of material. On the other hand, the dissent in *Remington Arms Co. v. Caldwell*² chided the majority for meddling with trial courts who find discovery abuse and “possess the fortitude to utilize penalties against those who thwart the objective of the discovery process—the search for truth.”³ Practitioners should take note that frequently during the Survey period the court found no adequate remedy by appeal from discovery orders.

Further, the court set out significant directives in *McConnell v. Southside Independent School District*⁴ for summary judgment procedure. A movant’s grounds for summary judgment must be expressly set out in the motion.⁵ Placing grounds for summary judgment in a brief is not sufficient.⁶ Moreover, although a non-movant need not object to the deficiency of a motion if the motion does not contain any or all grounds, the non-movant must object if the motion is ambiguous or he waives the deficiency.⁷

II. APPELLATE REVIEW BEFORE FINAL JUDGMENT

A. MANDAMUS

During the past five years, the number of mandamus actions reviewed by the Texas Supreme Court has almost doubled over the number reviewed in

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1. 848 S.W.2d 667 (Tex. 1992) (orig. proceeding).

2. 850 S.W.2d 167 (Tex. 1993) (orig. proceeding).

3. *Id.* at 174.

4. 858 S.W.2d 337 (Tex. 1993).

5. *Id.* at 339.

6. *Id.*

7. *Id.*

the preceding five years.⁸ A large number of the mandamus cases during the last year occurred in the discovery area.⁹ The supreme court appears to be dealing with the quandary of denying mandamus relief and forcing parties to years of expensive litigation or granting relief on matters challenged by some justices as adequately appealable after final judgment.¹⁰

1. *Death Penalty Sanctions*

Although during the last Survey period in *Walker v. Packer*¹¹ the Texas Supreme Court set forth a more stringent approach to enforcing the "no adequate remedy by appeal" requirement in granting mandamus relief, numerous recent cases reinforce the court's decision in *Transamerican Natural Gas Corp. v. Powell*.¹² In that case the court held that a party does not have an adequate remedy at law when the trial court imposes death penalty sanctions without the rendition of a final, appealable order.¹³ Specifically, the court held in *Transamerican*, "Whenever a trial court imposes sanctions which have the effect of adjudicating a dispute, whether by striking pleadings, dismissing an action or rendering a default judgment, but which do not result in rendition of an appealable judgment, then the eventual remedy by appeal is inadequate."¹⁴

In *Chrysler Corp. v. Blackmon*¹⁵ Chrysler sought a writ of mandamus to vacate the trial court's order striking Chrysler's pleadings and rendering a default judgment against Chrysler on all issues of liability. Chrysler argued that the trial court's order violated the *Transamerican* standards. After extensive production and numerous hearings on discovery disputes between the parties, the plaintiff complained that Chrysler acted in bad faith by refusing to produce certain crash tests and a crash test index, an organizational chart and information about Chrysler's document retention policies. Chrysler responded that it had produced everything it was able to produce and that many of the requests were for crash tests not relevant to the type of crash involved in this case. For example, some of the crash test files requested by the plaintiff dated back more than six model years and had been destroyed pursuant to Chrysler's document retention policy, and numerous requests involved rear-end impacts when this lawsuit concerned a frontal impact. The trial court rejected Chrysler's position, struck its pleadings and

8. National Union Fire Ins. Co. v. Ninth Court of Appeals, 37 Tex. Sup. Ct. J. 84, 89 (Oct. 27, 1993) (orig. proceeding).

9. See *id.* at 88.

10. See *id.* at 87 & n.8, 88-89 (Phillips, C. J., dissenting); National Tank Co. v. Brotherton, 851 S.W.2d 193 (Tex. 1993) (orig. proceeding); Otis Elevator Co. v. Parmelee, 850 S.W.2d 179 (Tex. 1993); Remington Arms Co. v. Caldwell, 850 S.W.2d 167 (Tex. 1993) (orig. proceeding); Eli Lilly and Co. v. Marshall, 850 S.W.2d 155 (Tex. 1993) (orig. proceeding); Chapa v. Garcia, 848 S.W.2d 667 (Tex. 1992) (orig. proceeding); Chrysler Corp. v. Blackmon, 841 S.W.2d 844 (Tex. 1992) (orig. proceeding); Walker v. Packer, 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).

11. 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).

12. 811 S.W.2d 913 (Tex. 1991) (orig. proceeding).

13. *Id.* at 919.

14. *Id.*

15. 841 S.W.2d 844 (Tex. 1992) (orig. proceeding).

ordered the case to trial on damages alone; it also ordered that Chrysler could not call expert witnesses regarding any aspect of liability at the trial on the issue of damages.¹⁶

The supreme court held that discovery sanctions must be just and that two factors mark the bounds of the trial court's discretion to impose sanctions: "first, a direct relationship between the offensive conduct and the sanction imposed must exist; and second, the sanction imposed must not be excessive. In other words, 'the punishment should fit the crime.'"¹⁷ The supreme court concluded that the trial court's sanctions failed the first test because plaintiffs did not show they would be unable to prepare for trial without the additional crash-test reports they sought and no evidence existed in the record showing that the missing tests were within Chrysler's possession.¹⁸ The court further held that the sanctions imposed failed the second test because striking the pleadings and rendering a default judgment on liability was more severe than necessary to satisfy the legitimate purposes of sanctions for discovery abuse when the trial court did not first impose a lesser sanction.¹⁹ According to the supreme court, death penalty sanctions should not be used unless the trial court "finds that the sanctioned party's conduct 'justifies a presumption that its claims or defenses lack merit' and that 'it would be unjust to permit the party to present the substance of that position [which is the subject of the withheld discovery] before the court.'"²⁰ The *Chrysler* record offered no such presumption.²¹

Similarly, in *Otis Elevator Co. v. Parmelee*²² the supreme court held that the trial court's case-determinative discovery sanctions barring defendant from introducing evidence supporting its defenses and entering judgment for plaintiff did not meet the requirements of *Transamerican*.²³ The Houston Court of Appeals erroneously decided that without a statement of facts or findings of fact and conclusions of law, the trial court was presumed to have made all findings necessary to support sanctions.²⁴ The supreme court emphasized that the trial court took no evidence but based its decision strictly on the papers and arguments of counsel.²⁵ According to the supreme court, the record did not reflect that the trial court considered the availability of lesser sanctions to curb any abuse it found, and there was "nothing in the

16. *Id.* at 849.

17. *Id.* (quoting *Transamerican*, 811 S.W.2d at 917).

18. *Id.* at 849-50.

19. *Id.* at 850.

20. *Id.* (quoting *Transamerican*, 811 S.W.2d at 918).

21. The supreme court in *Chrysler* noted that the correct standard for reviewing a trial court's order for sanctions is an "abuse of discretion" standard, not the legal and factual sufficiency standard of review applicable to appeals of nonjury trials regardless whether the trial court makes express findings of facts and conclusions of law in support of its sanctions order. *Chrysler*, 841 S.W.2d at 852 (rejecting the San Antonio Court of Appeals' conclusion in *Hartford Accident & Ins. Co. v. Abascal*, 831 S.W.2d 559, 560 (Tex. App.—San Antonio 1992, orig. proceeding) that the legal presumptions in favor of a judgment following a nonjury trial likewise applied to its review of the order for sanctions on mandamus).

22. 850 S.W.2d 179 (Tex. 1993).

23. *Id.* at 181.

24. *Id.*

25. *Id.*

record which even approaches the flagrant bad faith or abuse necessary for the imposition of such sanctions."²⁶

A particularly arresting example of the imposition of the death penalty occurred in *Remington Arms Co. v. Caldwell*²⁷ where the trial court allowed trial to proceed to a jury verdict, then declared a mistrial, struck defendant Remington's pleadings, partly for pre-trial discovery abuse, and rendered a default judgment against Remington. The supreme court held that Remington could not properly be sanctioned for pretrial discovery abuse because the plaintiff waived any objections to the incidents of pretrial misconduct cited in the trial court's sanctions order by failing to request a pretrial hearing on the alleged discovery abuse and by requesting a preferential trial setting.²⁸ The court further held that *Transamerican* standards did not justify death penalty sanctions for failure to designate an expert witness, a single instance of discovery abuse to which objection was made.²⁹ The court held that no direct relationship existed between Remington's failure to designate a witness as a ballistics expert and the trial court's striking of Remington's pleadings, which act was "plainly excessive."³⁰ The trial court accomplished the legitimate purposes of discovery sanctions when it refused to allow Remington the benefit of the undisclosed ballistics testimony.³¹

In *GTE Communications Systems Corp. v. Tanner*³² the supreme court reviewed the trial court's actions in striking defendant GTE's pleadings and awarding the plaintiffs attorneys' fees for GTE's failure to produce a single document that allegedly showed that GTE knew of the dangers inherent in a sharp-edged metal cable.³³ According to the supreme court, the record did not establish that GTE had "possession, custody or control" of the document within the meaning of Texas Rule of Civil Procedure 166b(2)(b). Further, even if the production of the document had been required, the supreme court found the trial court's sanctions excessive.³⁴ "Case 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."³⁵

2. *Mandamus Relief in Non-Death Penalty Discovery Matters*

In a second Remington Arms case, *Chapa v. Garcia*,³⁶ a plurality of the supreme court conditionally granted a writ to vacate the trial court's order

26. *Id.*

27. 850 S.W.2d 167 (Tex. 1993) (orig. proceeding).

28. *Id.* at 170. The court did not hold that discovery sanctions could never be imposed post-trial for pretrial discovery abuse. Discovery abuses may not be revealed until during or after trial. *Id.*

29. *Id.* at 171. The plaintiff also complained of trial misconduct, which was not governed by Rule 215 that applies only to pretrial conduct. *Id.*; see also TEX. R. CIV. P. 215.

30. *Remington Arms Co.*, 850 S.W.2d at 171.

31. *Id.*

32. 856 S.W.2d 725 (Tex. 1993) (orig. proceeding).

33. *Id.* at 726-27.

34. *Id.* at 729.

35. *Id.*

36. 848 S.W.2d 667 (Tex. 1992) (orig. proceeding).

in a products liability action denying discovery of documents concerning design improvements of the Remington Model 700 rifle. The supreme court held the trial court had abused its discretion by protecting some of Remington's documents from discovery.³⁷ The plaintiff asserting the right to discovery of the documents was injured when a Model 700 rifle discharged as he was loading it. The court decided that "because denial of these discovery materials severely vitiates Relator's ability to present a viable claim at trial, remedy by appeal is inadequate."³⁸ In his dissenting opinion, Justice Hecht, joined by Justices Phillips, Gonzalez and Cornyn, observed that a grant of mandamus to require the production of three or four pages when there is an adequate remedy through ordinary appeal is an unfortunate example of the supreme court's "micromanaging" discovery in the trial court.³⁹

In *Kennedy v. Eden*⁴⁰ the supreme court held that the trial court abused its discretion when it issued a broad order prohibiting a potential witness at a deposition from attending the deposition, from conversing with anyone but the attorney of record about the case, and from reading any report on the testimony for an indefinite period of time.⁴¹ The supreme court held that mandamus was appropriate because there was no adequate legal remedy from such an order as the order restrained the visitor in his speech throughout the duration of trial and appeal.⁴² "The harm thus suffered could not be repaired on appeal."⁴³

Public interest played an important role in the reversal of the trial court's order in *Eli Lilly and Co. v. Marshall*,⁴⁴ which directed defendant Eli Lilly, a manufacturer of the drug Prozac, to produce the names of health care providers that had reported adverse reactions to the drug Prozac to Lilly.⁴⁵ Lilly, as required under federal law, had turned the reports over to the Food & Drug Administration (FDA). Federal regulations require the FDA to keep confidential the names of the health care providers and patients involved in such reports.⁴⁶ The supreme court held that while the FDA regulations did not preempt Texas discovery law, the trial court's order was improper.⁴⁷ The disclosure of otherwise discoverable information is circumscribed by the compelling public interest in confidential voluntary reporting that would be eviscerated by a manufacturer's compelled disclosure.⁴⁸ In the supreme court's opinion, the trial court ordered full disclosure without according due consideration to the public interest in the vol-

37. *Id.* at 668.

38. *Id.* (quoting *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding)).

39. *Id.* at 680 (Hecht, J., dissenting).

40. 837 S.W.2d 98 (Tex. 1992) (orig. proceeding) (per curiam).

41. *Id.* at 98.

42. *Id.* at 98-99.

43. *Id.* at 99.

44. 850 S.W.2d 155 (Tex. 1993) (orig. proceeding).

45. *Id.* at 156.

46. The FDA filed a statement of interest in the proceeding at both the trial and appellate level. *Id.* at 157 and n.5.

47. *Id.* at 160.

48. *Id.*

untary reporting system.⁴⁹

Protection of investigative reports was at issue in *National Tank Co. v. Brotherton*.⁵⁰ The trial court ordered defendant National Tank to disclose reports containing statements of witnesses prepared by National Tank in connection with its internal investigation of an explosion that killed one worker and injured others. National Tank claimed that the documents had been prepared in anticipation of litigation and were therefore protected. The supreme court, in a plurality opinion, held that the trial court improperly ordered disclosure.⁵¹ The court noted that in *Walker* it concluded "that the remedy by appeal is not adequate when the trial court erroneously orders disclosure of privileged information which will materially affect the rights of the aggrieved party."⁵² The supreme court held that the information ordered disclosed by the trial court, which included statements of witnesses to the explosion taken shortly after it occurred, "obviously could have a significant impact on the assignment of liability," and thus, National Tank had no adequate remedy by appeal.⁵³

3. *Mandamus Relief Available Outside Discovery Context*

a. Order Denying Motion to Compel Arbitration Under Federal Arbitration Act

No right to an interlocutory appeal exists in state court from an order denying a motion to compel arbitration under the Federal Arbitration Act; the present method to obtain relief after denial of such motion is to seek a writ of mandamus.⁵⁴ The supreme court acknowledged in *Jack B. Anglin Co. v. Tipps*⁵⁵ that its ruling requires a party to pursue parallel proceedings—an interlocutory appeal from the trial court's denial to compel arbitration under the Texas Arbitration Act⁵⁶ and a writ of mandamus from the denial under the Federal Arbitration Act.⁵⁷ The court thus urged the legislature to consider amending the Texas Act to permit interlocutory appeals of

49. *Id.*

50. 851 S.W.2d 193 (Tex. 1993) (orig. proceeding).

51. *Id.* at 207.

52. *Id.*

53. *Id.* The supreme court acknowledged in *National Tank* that its holding on this point represents a modification of its own "investigative privilege" test set forth in *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 40-41 (Tex. 1989). *National Tank*, 851 S.W.2d at 203. Specifically, in *Flores*, the supreme court held that the scope of the investigative privilege included only investigative reports prepared "in anticipation of litigation," which meant "when litigation is imminent." *Flores*, 777 S.W.2d at 41. In *National Tank*, the supreme court expanded the investigative privilege to cover reports and documents prepared when the circumstances surrounding the investigation indicate to a reasonable person that a "substantial chance of litigation" exists. *National Tank*, 851 S.W.2d at 204.

54. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992) (orig. proceeding). Both the Texas and Federal Arbitration Acts allow a party to appeal from an interlocutory order granting or denying a request to compel arbitration, but federal procedure does not apply in Texas courts, even when Texas courts apply the Federal Act. *Id.* at 271-72 and n.10.

55. 842 S.W.2d 266 (Tex. 1992) (orig. proceeding).

56. TEX. REV. CIV. STAT. ANN. art. 238-2, § A(1) (Vernon 1973).

57. 842 S.W.2d at 272; see also *International Bank of Commerce v. Caquias*, 846 S.W.2d 496 (Tex. App.—Corpus Christi 1993, no writ (per curiam)).

orders issued pursuant to the Federal Act.⁵⁸ Until such a change occurs, mandamus is appropriate from a denial of arbitration under the Federal Arbitration Act because a party has no adequate remedy on appeal; he would otherwise "be deprived of the benefits of the arbitration clause . . . contracted for and the purpose of providing a rapid, inexpensive alternative to traditional litigation would be defeated."⁵⁹

b. Order Granting or Denying Motion to Transfer Venue

As a general rule, a trial court's order granting or denying a motion to transfer venue may be adequately corrected on appeal and is not subject to a mandamus action in the appellate court.⁶⁰ Limited exceptions exist to this general rule, however. When, for example, the trial court fails to follow the procedural requirements of Rule 87 of the Texas Rules of Civil Procedure concerning each party's right to sufficient notice of the venue hearing, mandamus lies.⁶¹ Further, mandamus relief may be available in the context of a mistaken transfer of venue.⁶² In *HCA Health Services v. Salinas*⁶³ before hearing a motion to transfer venue, the judge of the 288th District Court in Bexar County mistakenly granted the motion by signing an order inadvertently included in a stack of papers presented to him. The Bexar County deputy district clerk then transmitted the record to the Hidalgo County district clerk, who docketed the case. The Bexar County judge signed a second order vacating the order transferring venue immediately after the error came to his attention. After a hearing, the judge denied the motion to transfer. In the meantime, the Hidalgo County judge entered an order that the case had been properly transferred and ordered the case to be prosecuted to final judgment in Hidalgo County.

The supreme court granted mandamus relief, holding that the Bexar County judge timely and properly corrected its mistake by vacating the order transferring venue.⁶⁴ Furthermore, the Hidalgo County judge abused

58. *Anglin*, 842 S.W.2d. at 272.

59. *Id.* at 272-73; *see also* *Central Nat'l Ins. Co. v. Lerner*, 856 S.W.2d 492, 494 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding) (appropriate method to obtain relief after denial of motion to compel arbitration under the Federal Arbitration Act is to seek a writ of mandamus).

60. *See* '21' *International Holdings, Inc. v. Westinghouse Elec.*, 856 S.W.2d 479, 484 (Tex. App.—San Antonio 1993, no writ). In a significant Texas Supreme Court decision decided during the Survey period, the supreme court held that the scope of appellate review of a venue determination is not limited to whether the trial court abused its discretion in ruling on the motion to transfer but extends to whether the venue issue was in fact properly decided based upon the *entire* record in the trial court. *See Ruiz v. Conoco, Inc.*, 868 S.W.2d 752 (Tex. 1993). If, based on the entire record, including trial on the merits, there is no evidence of proper venue, the error cannot be harmless and the case must be remanded either for transfer to the court where venue lies or for further proceedings on the venue issue. *Id.*

61. *Mauro v. Banales*, 858 S.W.2d 651, 653 (Tex. App.—Corpus Christi 1993, orig. proceeding) (citing *Henderson v. O'Neill*, 797 S.W.2d 905 (Tex. 1990) (orig. proceeding)).

62. *Id.*

63. 838 S.W.2d 246 (Tex. 1992) (orig. proceeding).

64. *Id.* at 248. The order transferring venue was interlocutory as to the parties but final as to the transferring court, which had plenary jurisdiction for thirty days to correct the order, which was done. *Id.*

his discretion in ordering the parties to proceed in Hidalgo County.⁶⁵ Mandamus was proper because of the resulting deadlock in the litigation that left no adequate remedy by appeal from the conflicting orders.⁶⁶

c. Order Denying Special Appearance

The majority of the intermediate appellate courts hold that mandamus relief is not available from an order overruling a special appearance. The El Paso Court of Appeals recently adopted this position in *National Industrial Sand Association v. Gibson*⁶⁷ following the Dallas Court of Appeals decision in *N.H. Helicopters, Inc. v. Brown*.⁶⁸ Both the El Paso Court of Appeals in *Gibson* and the Eastland Court of Appeals in *Aktiengesellschaft v. Kirk*⁶⁹ expressly declined to follow the Amarillo Court of Appeals' contrary conclusion in *Laykin v. McFall*.⁷⁰

d. Order Overruling Plea to Jurisdiction

The Austin Court of Appeals in *Brown v. Herman*⁷¹ recently concluded that mandamus is inappropriate to challenge an order overruling a plea to the jurisdiction, declining to follow the contrary holding in *Qwest Microwave, Inc. v. Bedard*⁷² because questions of jurisdiction can be challenged on appeal.

e. Order Overruling Motion to Sever Claims

Mandamus relief is available from an order overruling a motion to sever when the trial court's failure to sever will cause the loss of substantial rights, as it did in *F.A. Richard and Associates v. Millard*.⁷³ In *Millard*, the court held there was no adequate remedy by appeal when the trial court refused to sever a bad faith claim against the insurance company and the insurance adjuster from plaintiff's tort action against the driver of the car in the accident at issue.⁷⁴ The party's rights not to have their respective defenses prejudiced by evidence about insurance and settlement could only be protected by severance and abatement, therefore warranting a writ of mandamus compelling these protections.⁷⁵

65. *Id.*

66. *Id.*

67. 855 S.W.2d 790 (Tex. App.—El Paso 1993, orig. proceeding).

68. 841 S.W.2d 424 (Tex. App.—Dallas 1992, orig. proceeding).

69. 859 S.W.2d 651 (Tex. App.—Eastland 1993, orig. proceeding). The court listed compelling factors, such as protecting the rights of children and parents in family matters, that may justify mandamus relief. *Id.* at 653.

70. 830 S.W.2d 266 (Tex. App.—Amarillo 1992, orig. proceeding).

71. 852 S.W.2d 91 (Tex. App.—Austin 1993, orig. proceeding).

72. 756 S.W.2d 426 (Tex. App.—Dallas 1988, orig. proceeding).

73. 856 S.W.2d 765 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding); *see also* United States Fire Ins. Co. v. Millard, 847 S.W.2d 668 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding) (no adequate remedy by appeal if only severance or separate trials will avoid prejudice and limiting instructions used as means to prevent prejudice against one party will not eliminate prejudice).

74. 856 S.W.2d at 767.

75. *Id.*

f. Refusal to Fix Amount of Supersedeas Bonds

The Texas Rules of Appellate Procedure do not provide a method to review a trial court's order refusing to allow appellant to file a supersedeas bond.⁷⁶ Thus, the trial court may be compelled by writ of mandamus to fix the amount of a supersedeas bond as it was in *Vineyard v. Irving*.⁷⁷ This is a clear example of the stated principle that mandamus lies only to correct a clear abuse of discretion or violation of a duty imposed by law when that abuse cannot be remedied by appeal.

g. Order Overruling Motion to Recuse

A litigant may petition for writ of mandamus to compel a retired judge to accept the litigants' timely objection and remove himself from the case.⁷⁸ A motion to recuse is timely filed if filed at least ten days before the date set for trial,⁷⁹ but a party waives recusal if he does not raise the issue by proper motion.⁸⁰ In contrast, a motion to disqualify a judge "survives silence" — disqualification may be raised at any time.⁸¹ In fact, disqualification may be introduced for the first time in a collateral attack on the judgment, and either a trial or appellate court may raise the issue of disqualification on its own motion.⁸²

h. Order Sustaining Motion to Quash Execution

An order sustaining a motion to quash execution is not a final, appealable judgment,⁸³ and a trial court's disposition of a motion to quash a writ of execution is not in the nature of an appealable mandatory injunction.⁸⁴ Mandamus will thus lie to compel a trial court to aid a judgment creditor to obtain satisfaction of a judgment rendered in that court.⁸⁵

i. Appellate Court's Refusal to Accept Electronic Statement of Facts

Mandamus is an appropriate remedy when an appellate court abuses its discretion by refusing to accept a party's untimely filed electronic statement of facts if the party has a reasonable explanation for its delay.⁸⁶ In *National Union Fire Insurance Co. v. Ninth Court of Appeals*,⁸⁷ the party's "reasonable

76. *Vineyard v. Irving*, 855 S.W.2d 208 (Tex. App.—Corpus Christi 1993, orig. proceeding).

77. *Id.* at 209.

78. *Discovery Operating, Inc. v. Baskin*, 855 S.W.2d 884, 888 (Tex. App.—El Paso 1993, orig. proceeding).

79. TEX. R. CIV. P. 18a(a).

80. *Gulf Maritime Warehouse Co. v. Towers*, 858 S.W.2d 556, 559 (Tex. App.—Beaumont 1993, writ requested).

81. *Id.* at 560.

82. *Id.*

83. *Gonzales v. Daniel*, 854 S.W.2d 253, 255-56 (Tex. App.—Corpus Christi 1993, orig. proceedings).

84. *Id.* at 256.

85. *Id.*

86. *National Union Fire Ins. Co. v. Ninth Court of Appeals*, 37 Tex. Sup. Ct. J. 84 (Oct. 27, 1993) (orig. proceeding).

87. *Id.*

explanation" was its mistake as to its obligations under Liberty County's special rules for electronic recordings.⁸⁸ Under these circumstances, the appellant had no adequate remedy by appeal because the party's appeal, without the statement of facts, "is a clear, and useless waste of judicial resources."⁸⁹

j. Trial Court's Refusal to Comply with Supreme Court Mandate

If a trial court fails to issue a judgment in accordance with a supreme court mandate, the aggrieved party may seek either a writ of prohibition or a writ of mandamus to ensure compliance with the supreme court's judgment.⁹⁰ The trial court's refusal to conform to the supreme court directive in itself is an abuse of discretion.⁹¹

k. Order Granting Temporary Visitation

In *Little v. Daggett*,⁹² a paternity suit, the Texas Supreme Court held that since a temporary order granting out-of-state visitation rights is not appealable, mandamus relief is available upon the determination that the trial court abused its discretion in granting the temporary rights when it had no jurisdiction to do so.⁹³ In so holding, the supreme court acknowledged that ordinarily mandamus is not an appropriate remedy for errors in subject matter jurisdiction because appeal is an adequate remedy.⁹⁴ Had the case involved a permanent order, mandamus would not lie.⁹⁵

l. Order Denying Motion to Disqualify Counsel

The supreme court held in *Mauze v. Curry*⁹⁶ that mandamus will lie from a trial court's abuse of discretion in denying a motion to disqualify counsel when counsel testifies as an expert witness in a controverting affidavit responding to a motion for summary judgment and the testimony does not fall into any of the five exceptions to Texas Disciplinary Rule of Professional Conduct 3.08(a).⁹⁷ Rule 3.08(a) prohibits a lawyer from continuing employ-

88. *Id.* at 86.

89. *Id.* at 87 n.8.

90. *Lee v. Downey*, 842 S.W.2d 646, 648 (Tex. 1992) (orig. proceeding).

91. *Id.*

92. 858 S.W.2d 368 (Tex. 1993) (orig. proceeding) (per curiam).

93. *Id.* at 369.

94. *Id.*

95. *See id.*

96. 36 Tex. Sup. Ct. J. 1265 (Sept. 10, 1993) (orig. proceeding) (per curiam).

97. TEX. R. DISCIPLINARY P. art. X, § 9, Rule 308 (1990) (repealed effective May 1, 1992, except to the extent that it applies to then pending disciplinary matters by order of the Supreme Court of Texas).

The five exceptions occur when:

(1) the testimony relates to an uncontested issue; (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) the testimony relates to the nature and value of legal services rendered in the case; (4) the lawyer is a party to the action and is appearing pro se; or (5) the lawyer has promptly notified opposing counsel that the lawyer expects to testify in the matter and disqualification of the lawyer would work substantial hardship on the client. *Id.*

ment in a proceeding if he knows or believes he is or may be a witness necessary to establish an essential fact on behalf of his client.⁹⁸

m. Order Referring All Discovery Matters to a Master

A writ of mandamus is an appropriate remedy from a trial court's blanket order appointing a master and referring all pending and future discovery matters to the master.⁹⁹ In *Academy of Model Aeronautics, Inc. v. Packer*¹⁰⁰ the trial court appointed a special master, upon a motion, to hear all pending and future discovery matters. At the time the motion was heard, there were four pending discovery motions; a fifth discovery motion had been heard by a visiting judge. The supreme court held that pursuant to Rule 122 of the Texas Rules of Appellate Procedure the trial judge had abused her discretion by entering a blanket order referring all pending and future discovery matters to the master.¹⁰¹

n. Order Sustaining Contest of Pauper's Affidavit

Mandamus will issue when a trial court sustains a contest to an application for an affidavit of inability to pay the costs of appeal after the expiration of the 10-day period allowed by Rule 40(a)(3) of the Texas Rules of Appellate Procedure. The court in *Lovall v. West*¹⁰² emphasized that ten days after the application for the affidavit is filed, the allegations in the affidavit are taken as true and any later contest is untimely.¹⁰³

o. Rule 215(5) Order Excluding Witnesses

Under the Texas Supreme Court's holding in *Aetna Casualty & Surety Co. v. Specia*,¹⁰⁴ mandamus relief is available when the trial court refuses to vacate a rule 215(5) discovery sanction order excluding a plaintiff's witnesses after the plaintiff takes a nonsuit and refiles a subsequent suit against the same defendant.¹⁰⁵ In *Specia*, the plaintiff failed to designate several expert and fact witnesses resulting in the trial court's granting of the defendant's motion to exclude the witnesses.¹⁰⁶ The plaintiff nonsuited and refiled a second lawsuit against the same defendant. In the second lawsuit, the defendant filed a motion to enforce the sanctions from the previous lawsuit and the trial court granted the motion and precluded the plaintiff from presenting the witnesses at trial.¹⁰⁷

In the plaintiff's mandamus proceeding, the supreme court noted that

98. *Id.*

99. *Academy of Model Aeronautics, Inc. v. Packer*, 36 Tex. Sup. Ct. J. 1266 (Sept. 10, 1993) (orig. proceeding).

100. *Id.*

101. *Id.* at 1267.

102. 859 S.W.2d 544 (Tex. App.—Houston [1st Dist.] 1993, orig. proceeding) (per curiam).

103. *Id.* at 545.

104. 849 S.W.2d 805 (Tex. 1993) (orig. proceeding).

105. *Id.* at 807-08.

106. *Id.* at 806.

107. *Id.*

whether a discovery sanction survives a nonsuit depends upon the nature of the sanction involved.¹⁰⁸ "If," the court held "a sanction is aimed at insuring a party is given a fair trial and not subjected to trial by ambush, the reason for imposing the sanction no longer exists after a party takes a nonsuit" and thereby postpones the trial.¹⁰⁹ In such a case, the court concluded, the sanctions do not survive a nonsuit and mandamus relief is available to compel the trial court to vacate the sanctions order from the previous lawsuit.¹¹⁰

4. *Mandamus Relief Must Be Expeditiously Sought*

While mandamus relief may appear to be available in a number of circumstances, the Texas Supreme Court recently held in *Rivercenter Associates v. Rivera*¹¹¹ that such relief is not available to help those who do not diligently pursue their rights.¹¹² Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles.¹¹³ One such principle "is that [e]quity aids the diligent and not those who slumber on their rights."¹¹⁴ In *Rivercenter*, the defendant filed a jury demand and, over four months later, the plaintiff filed a motion to quash the jury demand based on jury waiver provisions in the contracts in dispute.¹¹⁵ The trial court, after hearing and review of the contracts, overruled Rivercenter's motion to quash. The supreme court held that under the circumstances of Rivercenter's unexcused delay in asserting its rights under the jury waiver provisions, Rivercenter had not shown "diligent pursuit" of any right to a non-jury trial. As a result, the court held, Rivercenter was not entitled to mandamus relief.¹¹⁶

5. *Writs of Prohibition*

In a per curiam opinion in *Dallas/Fort Worth International Airport Board v. City of Irving*,¹¹⁷ the Texas Supreme Court remanded a zoning case to the trial court for consideration of the effect of new legislation on the case and specifically ordered the trial court to consider the applicability, validity and constitutionality of the new statute. Before the remand, a Tarrant county trial court had enjoined certain parties to the Dallas suit from contesting the constitutionality of the new legislation. On remand of the case to the Dallas

108. *Id.* at n.3.

109. *Id.* at 806-07.

110. *Id.* at 807. As evidenced by this case and others, the Texas Supreme Court appears to favor a flexible application of Texas Rule of Civil Procedure 215(5). See also *H.B. Zachry Co. v. Gonzales*, 847 S.W.2d 246 (Tex. 1993) (orig. proceeding) (mandamus relief available to set aside trial court's order excluding witnesses under rule 215(5) when trial setting was continued more than thirty days from date of trial from which witnesses had been excluded).

111. 858 S.W.2d 366 (Tex. 1993) (orig. proceeding).

112. *Id.* at 367.

113. *Id.*

114. *Id.* (citing *Callahan v. Giles*, 155 S.W.2d 793, 795 (Tex. 1941) (orig. proceeding)).

115. *Id.*

116. *Id.* at 367-68.

117. 37 Tex. Sup. Ct. J. 89 (Oct. 27, 1993) (per curiam).

court, the Tarrant county trial court refused to modify this order. One of the parties filed an ancillary petition for writ of prohibition with the supreme court. The supreme court conditionally granted writ, holding that the trial court's order interfered with the supreme court's jurisdiction over the remanded matter.¹¹⁸ The court held that once the supreme court has remanded a cause to a lower court, the supreme court has exclusive jurisdiction over the remanded proceeding and will permit no interference from any other court.¹¹⁹ The supreme court granted a writ of prohibition directing the Tarrant County trial court to delete its injunctive orders and issue no other orders that would interfere with the supreme court's jurisdiction.¹²⁰

The proper remedy to seek if a visiting judge continues to act in a case without proper assignment may be an application for writ of prohibition preventing the judge from taking any further action.¹²¹ A retired visiting judge who is not qualified to serve is without authority to act in the cases to which the judge is assigned, and the judge's orders entered in connection with the assigned cases are, therefore, void.¹²² Under these circumstances, the El Paso Court of Appeals held in *Houston General Insurance Co. v. Ater*¹²³ that mandamus, as opposed to a writ of prohibition, is not the proper remedy.

B. INTERLOCUTORY APPEAL

Sections 51.012 and 51.014(4) of the Texas Civil Practice & Remedies Code permit appellate review of an interlocutory order that grants a temporary injunction. Determining what constitutes a temporary injunction is the essential inquiry. The supreme court in *Del Valle Independent School District v. Lopez*¹²⁴ held that a trial court's order that provided mandatory, temporary relief by implementing an interim election plan pending the final resolution of the case granted "injunctive" relief despite the fact that it was not issued in accordance with Section 65.022 of the Texas Civil Practice & Remedies Code.¹²⁵ The court rejected the notion that "such matters of form control the nature of the order itself—it is the character and function of an order that determine its classification."¹²⁶

Because an appeal of an order granting or denying a temporary injunction is an appeal from an interlocutory order, the merits of the movant's case are

118. *Id.* at 90.

119. *Id.*

120. *Id.*

121. *Houston Gen. Ins. Co. v. Ater*, 843 S.W.2d 225 (Tex. App.—El Paso 1992, orig. proceeding).

122. *Id.* at 227.

123. *Id.* at 229.

124. 845 S.W.2d 808 (Tex. 1992).

125. *Id.* at 809. In a class action challenging the constitutionality of the Del Valle ISD board election system, the trial court entered an "Order Adopting and Implementing Interim Election Plan" pending disposition of the dispute. *Id.*

126. *Id.*

not presented for appellate review.¹²⁷ The courts held in *Car Wash Systems, Inc. v. Brigance*¹²⁸ and *Metcalf v. Walling*¹²⁹ that the trial court's scope of review is strictly limited to whether the trial court abused its discretion.

III. PRESERVATION OF ERROR

A. CHARGE ERROR

The Texas Supreme Court in *State Department of Highways & Public Transportation v. Payne*¹³⁰ attempted to alleviate some of the complexity of the current method for charge error preservation when it stated:

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.¹³¹

The supreme court continues to make efforts to limit decisions based strictly on the technicalities of charge procedure. In *Payne* it pointed out that it has asked a special task force to recommend changes in the rules to simplify charge procedures. The court observed that any rules changes must await the completion of that process, however, because the supreme court does not revise rules by opinion.¹³² Nonetheless, the court noted it could "begin to reduce the complexity that caselaw has contributed to charge procedures."¹³³

1. Instructions to the Jury

Following the principles stated in *Payne*, the supreme court in *Spencer v. Eagle Star Insurance Co.*¹³⁴ stated that an objection to a defective instruction without submission of an alternative is sufficient to preserve error for appellate review. Rule 278 of the Texas Rules of Civil Procedure, which

127. *Car Wash Sys., Inc. v. Brigance*, 856 S.W.2d 853 (Tex. App.—Ft. Worth 1993, no writ).

128. *Id.* at 857.

129. 856 S.W.2d 580 (Tex. App.—Houston [14th Dist.]), *rev'd on other grounds*, 37 Tex. Sup. Ct. J. 18 (Oct. 6, 1993).

130. 838 S.W.2d 235 (Tex. 1992).

131. *Id.* at 241. Despite this attempt, some courts of appeal emphasize that the test set forth in *Payne* is merely dicta and continue to insist that parties strictly comply with the letter of Rules 271-279 of the Texas Rules of Civil Procedure, no matter how complex and intricate the rules may be. The Corpus Christi Court of Appeals in *Borden, Inc. v. Rios*, 850 S.W.2d 821, 827 n.3 (Tex. App.—Corpus Christi), *judgment set aside per settlement*, 859 S.W.2d 70 (Tex. 1993), decided to attempt to examine the question of preservation in light of both Rule 274 and the *Payne* test, although it noted that application of the *Payne* test is much more problematic than application of Rule 274. The court in *Borden* pointed out that the *Payne* test requires the court of appeals to determine whether "the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling," but the test does not tell how to measure awareness or plainness of the complaint. *Id.* (quoting *Payne*, 838 S.W.2d at 241).

132. 838 S.W.2d at 241.

133. *Id.* at 870-71.

134. 1994 WL 37481 at *2 (Tex. Feb. 9, 1994). The court withdrew the original opinion in *Spencer*, published at 860 S.W.2d 868, issued a new opinion and denied the motion for rehearing.

states in pertinent part: "Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment," does not apply to a party objecting to a defective instruction.¹³⁵ Rather, the rule applicable to defective instructions is rule 274 of Texas Rules of Civil Procedure, which states in part: "A party objecting to a charge must point out distinctly the objectionable matter and the grounds of the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission or fault in pleading, is waived unless specifically included in the objections."¹³⁶ The court held an objection alone is sufficient to preserve error in a defective instruction, and a request of substantially correct language is not required.¹³⁷

While a proper objection to the charge will preserve error as to a defective instruction, it will not preserve error as to an omitted instruction. In *Lopez v. Southern Pacific Transportation Co.*¹³⁸ the court held that the plaintiff waived any error in the trial court's refusal to include an instruction on an evidentiary presumption because the plaintiff failed to request and tender, in writing, a proposed instruction in substantially correct form.¹³⁹

A trial court's refusal to include a substantially correct instruction on an issue central to the parties' entire dispute constitutes reversible error.¹⁴⁰ In *Southwestern Bell Telephone Co. v. John Carlo Texas, Inc.*¹⁴¹ the plaintiff/contractor alleged that Southwestern Bell intentionally interfered with its contract with the city of Houston to widen a road. The central dispute at trial was whether Southwestern Bell's interference with the contract was justified. The trial court refused Southwestern Bell's substantially correct request to define "justification" for the jury, and the supreme court held that such refusal was reversible error under the circumstances of this case.¹⁴²

Following *Payne's* directive, the court of appeals in *Oechsner v. Ameritrust Texas, N.A.*¹⁴³ held that despite the appellant's failure to get the trial court's signature on a requested instruction and failure to have the trial court endorse the instruction as "refused" or "modified" as required by Rule 276, the appellant preserved its charge error.¹⁴⁴ The record clearly demonstrated that the instruction was timely presented.¹⁴⁵ Furthermore, opposing counsel knew it was before the trial court and the trial court clearly refused to sub-

135. *Id.*; TEX. R. CIV. P. 278.

136. *Spencer*, 1994 WL 37481 at *3; TEX. R. CIV. P. 274.

137. *Spencer*, 1994 WL 37481 at *3. Justice Doggett in dissent opined that Eagle Star did not properly object to the instruction because it merely cross-referenced an objection to the related question. *Id.* (Doggett, J., dissenting). Practitioners are well-advised to make specific objections to both question and instruction.

138. 847 S.W.2d 330 (Tex. App.—El Paso 1993, no writ).

139. *Id.* at 332-33.

140. *Southwestern Bell Tel. Co. v. John Carlo Tex., Inc.*, 843 S.W.2d 470 (Tex. 1992).

141. *Id.*

142. *Id.*

143. 840 S.W.2d 131 (Tex. App.—El Paso 1992, writ denied).

144. *Id.* at 133.

145. *Id.*

mit it.¹⁴⁶

2. *Submission of Questions*

The supreme court held in *H.E. Butt Grocery Co. v. Warner*¹⁴⁷ that the trial court's failure to submit a tendered proper broad-form question with appropriate instructions was error but not harmful error.¹⁴⁸ While the court noted that Rule 277 of the Texas Rules of Civil Procedure mandates broad-form submissions whenever they are "feasible,"¹⁴⁹ it found that the granulated form of submission contained the proper elements of a premises liability action.¹⁵⁰ The court held that when the charge fairly submits to the jury the disputed issues of fact and incorporates a correct legal standard for the jury to apply, the trial court's refusal to submit a proper broad-form question with instructions is not reversible error.¹⁵¹ Justice Mauzy argued in dissent that the granulated questions improperly restricted the scope of the determination of the store's knowledge of the hazard, which, in his opinion, effectively prevented the plaintiff from prevailing on her claim.¹⁵²

In *Mexico's Industries, Inc. v. Banco Mexico Somex, S.N.C.*,¹⁵³ the court held that a trial court has great discretion in submitting broad form jury questions.¹⁵⁴ "This discretion," the court continued, "is subject only to the requirement that the questions submitted must control the disposition of the case being raised by the pleadings and evidence and properly submit the disputed issues for the jury's determination."¹⁵⁵ As a result, because the plaintiff failed to plead ratification affirmatively, the trial court erred in submitting a question on that issue.¹⁵⁶

To preserve error for a trial court's refusal to submit a question to the jury, a party must submit the question in writing and obtain a ruling on the request.¹⁵⁷ The trial court's overruling a party's objections to the jury charge does not constitute a ruling on the request under Rules 276 and 279 of the Texas Rules of Civil Procedure.¹⁵⁸

3. *Objections to Damages*

An appellant's failure to complain of the possibility of a double recovery in its objections to the charge or in its motion for new trial waives his complaint that the trial court's award of damages for lost profits constitutes a

146. *Id.*

147. 845 S.W.2d 258 (Tex. 1992).

148. *Id.* at 260.

149. *Id.* at 259-60.

150. *Id.* at 260.

151. *Id.*

152. *Id.* at 262 (Mauzy, J., dissenting).

153. 858 S.W.2d 577 (Tex. App.—El Paso 1993, writ requested).

154. *Id.* at 582 (citing *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 246 (Tex. 1974)).

155. *Id.*

156. *Id.*

157. TEX. R. CIV. P. 276 and 279.

158. *Satterwhite v. Safeco Land Title*, 853 S.W.2d 202 (Tex. App.—Fort Worth 1993, writ denied). *Cf. Oechsner v. Ameritrust*, 840 S.W.2d 131 (Tex. App.—El Paso 1992, writ denied). For discussion, see *supra* notes 143-46 and accompanying text.

double recovery.¹⁵⁹ The Dallas court pointed out in *D/FW Commercial Roofing Co. v. Mehra*¹⁶⁰ that Rule 52(a) of the Texas Rules of Appellate Procedure requires that "a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling he desired the court to make, if the specific grounds were not apparent from the context" in order to preserve appellate complaints.¹⁶¹ In *Mehra*, because the appellant failed to complain of a double recovery both at trial and in its motion for a new trial and merely asserted insufficiency of the evidence to support the jury's damage award, he did not preserve the issue of double recovery for appellate review.¹⁶²

B. CHALLENGES TO THE JUDGMENT

A party does not waive his alternative grounds for denying recovery by failure to object to the judgment in the trial court that does not specifically state those grounds.¹⁶³ In *Oak Park Townhouses v. Brazosport Bank, N.A.*, the bank sued the borrowers on a note and the jury returned answers against the bank on several grounds, including mutual mistake, economic duress, breach of contract, and fraud. The trial court rendered judgment against the bank based on usury and awarded damages based on usury and breach of fiduciary duty.¹⁶⁴ The judgment incorporated the jury's verdict "for all purposes," but it did not refer to the alternative grounds for denying the bank recovery.

The court of appeals reversed the trial court's judgment based on usury and breach of fiduciary duty and allowed the bank to recover on the note.¹⁶⁵ In a motion for rehearing, the borrowers argued that the court of appeals should render judgment based on their other grounds for denying recovery. The supreme court held that the court of appeals erred in allowing the bank to recover without first considering the alternative grounds for denying recovery raised in the borrowers' motion for rehearing.¹⁶⁶ The court concluded that the borrowers did not waive the alternative grounds by failing to object to the judgment in the trial court.¹⁶⁷

IV. POST-TRIAL MOTIONS

A. MOTIONS FOR NEW TRIAL

In *Old Republic Insurance Co. v. Scott*¹⁶⁸ the supreme court held: "The

159. *D/FW Commercial Roofing Co. v. Mehra*, 854 S.W.2d 182 (Tex. App.—Dallas 1993, no writ).

160. *Id.*

161. *Id.* at 189.

162. *Id.*

163. *Oak Park Townhouses v. Brazosport Bank, N.A.*, 851 S.W.2d 189 (Tex. 1993) (per curiam).

164. *Id.*

165. *Id.*

166. *Id.* at 190-91.

167. *Id.* at 190.

168. 846 S.W.2d 832 (Tex. 1993) (per curiam).

filing of a motion for new trial in order to extend the appellate timetable is a matter of right, whether or not there is any sound or reasonable basis for the conclusion that a further motion is necessary."¹⁶⁹ In *Old Republic* the trial court signed a default judgment on February 1, 1990. The defendant timely filed a motion for new trial, and on April 16, 1990, the trial court granted, in part, the motion for new trial, set aside the damages finding and granted a hearing on plaintiff's damages. Then, on May 14, 1990, the trial court set aside the April 16, 1990, order, effectively reinstating the original default judgment. On June 8, 1990, the defendant filed a second motion for new trial, which the trial court purported to strike by order dated July 17, 1990. The defendant filed its appeal bond on August 9, 1990. The court of appeals dismissed the appeal for want of jurisdiction because it found the appeal bond had not been timely filed.¹⁷⁰

The supreme court reversed. It held that the May 14, 1990, order operated as an order modifying, correcting or reforming the original default judgment and that the appellate timetable began anew from that date.¹⁷¹ The defendant's motion for new trial, timely filed on June 8, 1990, extended the time for filing the appeal bond for 90 days from May 14, 1990 (the date the modified judgment was signed), or until August 12, 1990. As a result, the supreme court held the defendant's appeal bond was timely filed on August 9, 1990, and dismissal by the court of appeals was improper.¹⁷² The supreme court further noted that the trial court's July 17, 1990, order purporting to strike the defendant's June 8, 1990, motion for new trial was a nullity.¹⁷³

If a motion for severance is granted and the party's severed claims are dismissed but the clerk of the appellate court fails to assign a new number promptly to the severed cause, a party may file a motion for new trial under the original cause number.¹⁷⁴ The Texas Supreme Court in *McRoberts v. Ryals*¹⁷⁵ held that a party should not be punished for failing to file a motion for new trial timely in the severed cause when he faces the impossible dilemma of having to file his motion for new trial under a nonexistent cause number.¹⁷⁶ The court therefore concluded that the appellant's motion for new trial filed under the original cause number, which was the same cause number on the judgment sought to be appealed, was effective to extend the timetable for appeal, causing his original appeal to be timely and free from any non-curable defects.¹⁷⁷

169. *Id.* at 833.

170. *Old Republic Ins. Co. v. Scott*, 834 S.W.2d 608 (Tex. App.—Tyler 1992), *rev'd*, 846 S.W.2d 832 (Tex. 1993) (per curiam).

171. *Scott*, 846 S.W.2d at 832.

172. *Id.* at 833-34.

173. *Id.* at 833. Whenever a court modifies its original judgment in any way, practitioners should seek a revised judgment that clearly states it modifies, corrects or reforms the earlier judgment so a second motion for new trial will extend the appellate timetable. *See generally Scott*, 834 S.W.2d 832. *See also* TEX. R. APP. P. 41.

174. *McRoberts v. Ryals*, 36 Tex. Sup. Ct. J. 1093 (June 30, 1993).

175. *Id.*

176. *Id.* at 1097 (citing *Mueller v. Saravia*, 826 S.W.2d 608 (Tex. 1992)).

177. *Id.* The court continues to recognize bona fide attempts to appeal.

Under the supreme court's ruling in *Levit v. Adams*¹⁷⁸ the provisions of Rule 306a(4) of the Texas Rules of Civil Procedure, allowing additional time for filing various post-judgment pleadings when a party does not receive notice or acquire actual knowledge within twenty days after a judgment is signed, do not apply if more than ninety days has passed after the judgment is signed.¹⁷⁹ The supreme court clarified in *Levit* that the period for filing a motion to reinstate after dismissal under Rule 306a(4) shall in no event begin to run more than ninety days after the dismissal is signed.¹⁸⁰ In *Levit*, the supreme court resolved the disagreement among the courts of appeals over the application of Rule 306a(4) when a party learns of judgment or dismissal between the 90th and 120th days after the judgment or order was signed. The supreme court observed that its holding would allow a party not receiving timely notice a full thirty days to file a motion to reinstate if he learns of dismissal before ninety days have elapsed.¹⁸¹ If more than ninety days have elapsed, a party must seek a bill of review, as in *Levit*.¹⁸²

A party's complaints in her motion for new trial must provide the trial court an opportunity to cure any errors by granting a new trial.¹⁸³ To provide such an opportunity, the allegations in the motion for new trial, in accordance with Rule 321 of the Texas Rules of Civil Procedure, must be sufficiently specific to enable the trial court to understand clearly what is being alleged as error.¹⁸⁴

When an unchallenged "no damages" finding supports a take-nothing judgment, any error in the liability findings is harmless.¹⁸⁵ In *San Antonio Press, Inc. v. Custom Bilt Machinery*¹⁸⁶ the plaintiff did not attack in any way the jury's finding of no damages. Rather, the points of error challenged only the jury's resolving the liability issues against the plaintiff. The plaintiff failed to challenge the no-damage finding in its motion for new trial as required by Rule 329b and therefore failed to preserve error. The court held that the unchallenged no-damage finding supported the judgment regardless of any error in the liability findings.¹⁸⁷ Even if the jury had found liability, the no-damage finding would have resulted in a take-nothing judgment unless it was successfully challenged, for example, as against the overwhelming weight of the evidence.¹⁸⁸

178. 850 S.W.2d 469 (Tex. 1993) (per curiam).

179. *Id.* at 470.

180. *Id.*

181. *Id.*

182. *Id.* The trial court in *Levit* had entered summary judgment against *Levit* because he had failed to use Rule 306(a)(4) after he learned of dismissal on the 91st day after the order. *Id.* at 469.

183. *Mehra*, 854 S.W.2d at 189.

184. *Id.* (Appellant's complaint in motion for new trial did not alert the trial court that it was complaining about the possibility of a double recovery and was not preserved for review on appeal).

185. *San Antonio Press, Inc. v. Custom Bilt Mach.*, 852 S.W.2d 64 (Tex. App.—San Antonio 1993, no writ).

186. *Id.*

187. *Id.* at 66.

188. *Id.*

B. MOTIONS FOR DIRECTED VERDICT

As recently noted in *Sipco Services Marine, Inc. v. Wyatt Field Service Co.*,¹⁸⁹ Texas law has traditionally imposed two requirements for challenging the trial court's overruling a motion for directed verdict: "first, . . . the ruling must appear in the judgment or be recited in a separate order; (s)econd, . . . a defendant who introduces evidence after the motion for directed verdict is overruled must urge the motion at the close of the case, or else he waives it."¹⁹⁰ Justice Cohen, concurring in *Sipco*, made rational proposals for abandoning these two requirements. He suggested that the first rule is a creation of the intermediate appellate courts and that an oral ruling recorded in the statement of facts should preserve error.¹⁹¹ In his opinion, the second rule is also a creation of the intermediate appellate courts and should not be applied in nonjury cases.¹⁹²

The Houston Court of Appeals in *Hudson v. Winn*¹⁹³ held that the trial court in a nonjury trial does not err by failing to state the specific grounds relied on in granting judgment at the close of the plaintiff's case, despite the mandate of rule 268 of the Texas Rule of Civil Procedure, which specifies that "a motion for directed verdict shall state specific grounds therefor."¹⁹⁴ The court considered the motion in a nonjury case to be a motion for judgment, not a motion for directed verdict.¹⁹⁵ The court observed that a motion for judgment in a nonjury trial and a motion for directed verdict in a jury trial are inherently different because the judge in a nonjury trial has the power to decide fact issues and make a determination on the merits and is authorized to rule on both the factual and legal issues at the close of the plaintiff's case-in-chief.¹⁹⁶ The court decided that by granting the defendant's motion for judgment, the trial court is presumed to have ruled on the sufficiency of the factual evidence.¹⁹⁷

C. THE TRIAL COURT'S PLENARY POWER

1. *Setting Aside Order Granting New Trial*

According to the Texas Supreme Court in *Fruehauf Corp. v. Carrillo*¹⁹⁸ a trial court has the authority to reconsider its own order for new trial during its plenary power.¹⁹⁹ In *Fruehauf* the trial court signed a take-nothing judgment. On the seventy-fourth day after the judgment was signed, the trial

189. 857 S.W.2d 602 (Tex. App.—Houston [1st Dist.] 1993, no writ).

190. *Id.* at 608 (Cohen, J. concurring).

191. *Id.* at 609.

192. *Id.* Justice Cohen emphasized that on review of a denial of a motion for directed verdict at the close of plaintiff's case, the court should not consider evidence introduced after the motion was denied. *Id.* at 611. Practitioners may want to raise this point in the appropriate cases.

193. 859 S.W.2d 504 (Tex. App.—Houston [1st Dist.] 1993, writ requested).

194. *Id.* at 507.

195. *Id.*

196. *Id.*

197. *Id.*

198. 848 S.W.2d 83 (Tex. 1993) (per curiam).

199. *Id.* at 84.

court granted the plaintiffs' motion for new trial. On the seventy-fifth day, the trial court set aside its order granting a new trial and denied the motion. The court of appeals held that the trial court did not have the authority during the seventy-five-day period provided in rule 329b of the Texas Rules of Civil Procedure to vacate the previously granted motion for new trial.²⁰⁰

The supreme court reversed the court of appeals, noting that an order granting a new trial is an interlocutory order, and the trial court has the power to set aside its interlocutory orders at any time before final judgment.²⁰¹ In addition, it has plenary power over a judgment until it becomes final.²⁰² Therefore, the court concluded, the trial court had the authority to set aside the order granting a new trial on the seventy-fifth day after the judgment was signed.²⁰³

Section (e) of Rule 329b gives the trial court an additional thirty days of plenary power beyond the original seventy-five but limits that power to rulings on motions for new trial that have been overruled, not granted.²⁰⁴ Therefore, the trial court acts without authority when during that thirty days, it enters an order denying a new trial previously granted more than seventy-five days after the judgment was signed.²⁰⁵

2. Necessity for Written Order

In *Faulkner v. Culver*²⁰⁶ the trial court granted the defendant's motion for summary judgment on December 15, 1989, and the plaintiffs timely filed a motion for new trial on January 15, 1990. At a hearing on March 1, 1990, the trial court orally vacated the summary judgment and made a corresponding entry on the docket. The plaintiffs' attorney apparently tried to determine whether the judge signed a written order but was told that the file was in the judge's chambers and could not be retrieved. The judge did not sign a written order vacating the summary judgment until November 8, 1990. When a replacement judge ruled the November 8, 1990 order effective and ordered the parties to trial, the defendant sought a writ of mandamus.

The supreme court held that the November 8, 1990 order vacating the summary judgment was a nullity because it was signed after the court's plenary power had expired.²⁰⁷ Rule 329b(c) requires that an order granting a new trial or correcting, modifying, or reforming a judgment must be written and signed.²⁰⁸ The trial court's oral pronouncement on March 1, 1990 and the corresponding docket entry were ineffective. Therefore, the motion for new trial was overruled by operation of law seventy-five days after the sum-

200. See *Carrillo v. Fruehauf Corp.*, 838 S.W.2d 573 (Tex. App.—San Antonio 1992), *rev'd*, 848 S.W.2d 83 (Tex. 1993) (*per curiam*).

201. *Carillo*, 848 S.W.2d at 84.

202. *Id.*

203. *Id.*

204. TEX. R. CIV. P. 329b(e).

205. *Hunter v. O'Neill*, 854 S.W.2d 704 (Tex. App.—Dallas 1993, no writ) (*orig. proceeding*).

206. 851 S.W.2d 187 (Tex. 1993).

207. *Id.* at 188.

208. TEX. R. CIV. P. 329b(c).

mary judgment was signed, the trial court's plenary power expired thirty days later, and the summary judgment became final.²⁰⁹ The November 8, 1990 order purporting to vacate the summary judgment was a nullity.²¹⁰

D. MOTIONS THAT EXTEND THE APPELLATE TIMETABLE

1. *Premature Motions*

Under Texas Rule of Civil Procedure 306c and Texas Rule of Appellate Procedure 58(a), certain pleadings are effective even if prematurely filed. For example, Rule 306c provides that a motion for new trial filed before the judgment is signed is deemed filed on the date of, but subsequent to, the signing of the judgment. Thus, the premature motion for new trial extends the appellate timetable just as a motion for new trial that is timely filed after the judgment is signed.²¹¹

If, however, the premature motion is prematurely overruled (*i.e.*, overruled before the judgment is signed), a different result may occur. While the Court of Appeals for the First District held in *Harris County Hospital District v. Estrada*²¹² that a motion for new trial that is both filed and overruled before the judgment is signed is effective to extend the appellate timetable, the Dallas court reached the opposite conclusion in *A.G. Solar and Company, Inc. v. Nordyke*.²¹³ In light of the purpose of Rule 306c and Rule 58(a), the *Estrada* court's refusal to apply a different rule to a premature motion that had been prematurely overruled than to a premature motion that had not been prematurely overruled seems preferable.

2. *Motions to Reinstate*

The supreme court has recognized that a motion to reinstate after a case is dismissed for want of prosecution is analogous to a motion for new trial.²¹⁴ Thus, a motion to reinstate filed after an order of dismissal is signed extends the appellate timetable. Motions to reinstate, however, are not specifically included in Rule 306c governing "Prematurely Filed Documents." On this basis, the Fort Worth Court of Appeals held in *Brim Laundry Machinery Co. v. Washex Machinery Corp.*²¹⁵ that a premature motion to reinstate does not extend the appellate timetable.²¹⁶

209. *Faulkner*, 851 S.W.2d at 188.

210. *Id.*

211. *Dunn v. City of Tyler*, 848 S.W.2d 305, 306 (Tex. App.—Eastland 1993, no writ). Likewise, an appeal bond prematurely filed before a final judgment is entered may be effective to invoke appellate court jurisdiction over an appeal from a subsequent judgment disposing of all parties and issues before the trial court. *Berry-Parks Rental Equip. v. Sinsheimer*, 842 S.W.2d 754, 756-57 (Tex. App.—Houston [1st Dist.] 1992, no writ).

212. 831 S.W.2d 876 (Tex. App.—Houston [1st Dist.] 1992, no writ).

213. 744 S.W.2d 646 (Tex. App.—Dallas 1988, no writ).

214. *Butts v. Capitol City Nursing Home*, 705 S.W.2d 696, 697 (Tex. 1986).

215. 854 S.W.2d 297 (Tex. App.—Fort Worth 1993, writ denied).

216. *Id.* at 301.

V. APPEALS FROM SUMMARY JUDGMENT

The supreme court decided two significant summary judgment cases during the Survey period. In *McConnell v. Southside Independent School District*²¹⁷ it held that the grounds for summary judgment must be expressly presented in the summary judgment motion itself.²¹⁸ A party may not rely on appeal upon grounds presented in a brief filed in support of the motion or in the summary judgment evidence.²¹⁹ To preserve a complaint that a summary judgment motion is defective, the non-movant need not object or except to a defective motion for summary judgment if (1) the grounds are not expressly presented in the motion itself, or (2) the motion expressly presents certain grounds, but not all grounds for summary judgment.²²⁰ The non-movant must object, however, if the grounds asserted by the movant are unclear or ambiguous.²²¹

The nonmovant must also be specific in answer or response to the summary judgment.²²² Nonetheless, even if a non-movant does not present any issues in response or answer, the movant must still establish its entitlement to summary judgment.²²³ Summary judgment by default is not the result of a non-movant's failure to respond.²²⁴ The consequence is that the non-movant is limited on appeal to arguing the legal sufficiency of the grounds presented by movant.²²⁵

In its recent decision in *Mafridge v. Ross*²²⁶ the Texas Supreme Court addressed the issue of whether the inclusion of "Mother Hubbard" language or its equivalent in an order granting summary judgment makes an otherwise partial summary judgment final for appeal purposes. The court concluded that it does. A Mother Hubbard clause recites that all relief not expressly granted is denied.²²⁷ An acceptable equivalent of such a clause is a statement that the summary judgment is granted as to all claims asserted by plaintiff or a statement that plaintiff takes nothing against defendant.²²⁸ If a summary judgment appears to be final, as evidenced by the inclusion of language purporting to dispose of all claims or parties, "the judgment should be treated as final for purposes of appeal."²²⁹ If, due to the Mother Hubbard language, the judgment grants more relief than requested, the appellate

217. 858 S.W.2d 337 (Tex. 1993).

218. *Id.* at 341.

219. *Id.*

220. *Id.* at 342.

221. *Id.* at 342-43. If defects occur in an affidavit rather than a motion, a party must have the opportunity to amend defective affidavits after objection before those defects are used to defeat a summary judgment opponent. In *Wyatt v. McGregor*, 855 S.W.2d 5, 18 (Tex. App.—Corpus Christi 1993, writ denied), the court held that a trial court's failure to allow a party to amend cancels any objection and the defect is waived.

222. *Id.* at 341.

223. *Id.* at 343.

224. *Id.* at 342.

225. *Id.* at 343.

226. 866 S.W.2d 590 (Tex. 1993).

227. *Id.* at 590 n.1.

228. *Id.*

229. *Id.* at 592.

court should reverse and remand the judgment but not dismiss it.²³⁰

The language in the summary judgment order in *Mafridge*, stated, "It is therefore ordered, adjudged and decreed that the Motion for Summary Judgment of Defendant should in all things be granted and that Plaintiff take nothing against Defendant."²³¹ The supreme court held that the language in the judgment clearly evidenced the trial court's intent to dispose of all claims, and the appellate court erred in dismissing the appeal for want of jurisdiction.²³² The supreme court remanded the case to the court of appeals for that court to determine the propriety of the trial court's granting of the summary judgment on the merits.²³³

A summary judgment is not entitled to the same deference given to a judgment following a trial on the merits.²³⁴ If a movant for summary judgment fails to prove entitlement to judgment as a matter of law, the court of appeals must remand the case for a trial on the merits.²³⁵ The exception to this rule is when both parties move for summary judgment and one motion is granted and the other is denied. In that case, the appellate court should determine all questions presented and may reverse the trial court's judgment and render such judgment as the trial court should have rendered.²³⁶

VI. DUTIES AND LIMITS OF THE APPELLATE COURT

A. DUTY TO ADDRESS MERITS

Under Texas Rule of Appellate Procedure 80(b), the court of appeals may dispose of an appeal by: (1) affirming the trial court's judgment; (2) modifying the trial court's judgment by correcting or reforming it; (3) reversing the trial court's judgment and dismissing the case or rendering the judgment or decree that the court below should have rendered; or (4) reversing the trial court's judgment and remanding for further proceedings. The supreme court held in *Blair v. Fletcher*²³⁷ that a court of appeals has no authority to decline to decide an appeal on the merits when it has jurisdiction to do so.²³⁸ The court of appeals cannot vacate the trial court's judgment and remand the case for reconsideration by the trial court because of a change in the applicable law while the appeal was pending. It must apply the law as it exists at the time of the appeal.²³⁹

230. *Id.*

231. *Id.* at 591.

232. *Id.* at 592.

233. *Id.*

234. *Orix Credit Alliance v. OmniBank*, 858 S.W.2d 586 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

235. *Id.* at 589.

236. *Id.*

237. 849 S.W.2d 344 (Tex. 1993).

238. *Id.* at 345-46. Although TEX. R. APP. P. 180 authorizes the supreme court to vacate the court of appeals' judgment and remand to that court without first rendering a decision on the merits, the courts of appeals are not authorized to do so with respect to the judgments of the trial court. *Id.* at 346.

239. *Blair*, 849 S.W.2d at 345.

B. GRANTING RELIEF NOT SOUGHT

In *Horrocks v. Texas Department of Transportation*²⁴⁰ the supreme court held that the court of appeals erred in *rendering* judgment based on a no evidence point preserved solely in a motion for new trial. The court noted that “[w]hen reversing trial court judgments, the [appellate] court shall proceed to render such judgment or decree as the court below *should have rendered*”²⁴¹ Because the defendant requested only a new trial, that was the only relief to which it was entitled.

In *Caballero v. Central Power and Light Co.*²⁴² the appellant filed an application for writ of error complaining of the appellate court’s reversal and remand for a new trial. In response to the appellant’s application for writ of error, the appellee asserted “rendition” points of error. The appellee, however, did not file a separate writ of error asserting that the appellate court should have reversed and rendered rather than reversed and remanded for a new trial. The Texas Supreme Court held that the appellee’s failure to file a separate application for writ of error seeking affirmative relief beyond the reversal and remand afforded by the court of appeals’ judgment constituted a waiver of its rendition points.²⁴³

C. REFUSAL TO VACATE OPINION UPON SETTLEMENT

After a jury trial resulting in a judgment in favor of plaintiffs and affirmance by the Houston Court of Appeals of the Fourteenth District, the parties in *Houston Cable TV, Inc. v. Inwood West Civil Association*²⁴⁴ decided to settle. Prior to reaching the settlement agreement, the defendants filed an application for writ of error with the Texas Supreme Court. After settling, the parties filed a joint motion to grant application for writ of error. In their joint application, the parties stated that “as a condition precedent to [the] settlement, the parties have agreed that the petitioners’ application for writ of error should be granted; the judgments of the court of appeals and the trial court should be vacated; [and] the opinion of the court of appeals should be vacated.”²⁴⁵

The supreme court first overruled the parties’ joint motion for writ but on rehearing granted it. It refused to vacate the opinion of the court of appeals, however. The court emphasized that courts are endowed with “a public purpose—they do not sit merely as private tribunals to resolve private disputes.”²⁴⁶ While settlement is to be encouraged, the court stated, “a private agreement between litigants should not operate to vacate a court’s writing on matters of public importance.”²⁴⁷ Although it granted the parties’ application for writ, set aside the judgments of the appellate and trial courts and

240. 852 S.W.2d 498 (Tex. 1993) (per curiam).

241. *Id.* at 498 (emphasis in original); TEX. R. APP. P. 81(c).

242. 858 S.W.2d 359 (Tex. 1993).

243. *Id.* at 362.

244. 860 S.W.2d 72 (Tex. 1993).

245. *Id.* at 73.

246. *Id.*

247. *Id.*

remanded the cause to the trial court for entry of judgment in accordance with the settlement agreement of the parties, the supreme court did not vacate the opinion of the court of appeals.²⁴⁸ Despite the granting of the application for writ of error, the supreme court held that the precedential authority of a court of appeals' opinion that is not vacated under the circumstances of this case is equivalent to a "writ dismissed" case.²⁴⁹

D. DISMISSAL FOR MOOTNESS

In *Speer v. Presbyterian Children's Home and Service Agency*²⁵⁰ the supreme court emphasized that a dismissal for mootness is not a ruling on the merits.²⁵¹ In that case, the plaintiff sought injunctive and declaratory relief when she was denied employment as an adoption worker with the defendant Agency because she was Jewish and the Agency hired only Christians. After the trial court rendered judgment in the Agency's favor, on the basis that the Agency was a religious corporation exempted from the general prohibition of discriminatory hiring practices contained in the Texas Commission on Human Rights Act, and the court of appeals affirmed the trial court's judgment, the plaintiff filed an application for writ of error to the Texas Supreme Court. Before the case was argued to the supreme court, the Agency withdrew from offering adoption services and abolished the position originally sought by the plaintiff.

At argument, the Agency asserted that the controversy upon which the case was based was moot and sought dismissal of the supreme court appeal. The supreme court agreed the appeal should be dismissed as moot.²⁵² In response to Justice Doggett's dissenting argument that such dismissal would endorse evasion of "our state prohibition against employment discrimination," the majority held that dismissal for mootness is not a ruling on the merits. The court noted that the court's duty to dismiss moot cases arises from a proper respect for the judicial branch's unique role under our constitution: to decide contested cases.²⁵³ Under the Texas Constitution, the court concluded, "[c]ourts simply have no jurisdiction to render advisory opinions."²⁵⁴

VII. PERFECTING THE APPEAL

A. PARTIES ENTITLED TO APPEAL

Relying on a case decided in 1893, the Texas Supreme Court in *Vanscot Concrete Co. v. Bailey*²⁵⁵ reversed the Fort Worth Court of Appeals and held that a corporation has the right to appeal a trial court's judgment

248. *Id.* at 74.

249. *Id.* at 73 n.3.

250. 847 S.W.2d 227 (Tex. 1993).

251. *Id.* at 229.

252. *Id.* at 230.

253. *Id.* at 229.

254. *Id.*

255. 853 S.W.2d 525 (Tex. 1993) (per curiam).

against it regardless of the corporation's legal existence.²⁵⁶ In *Vanscot*, the plaintiff was burned when he was splashed by contaminated concrete, which was delivered by a truck labeled "Express Pennington." Vanscot had previously done business under that name but had merged with another corporation and ceased doing business about three months before the accident. The new company, Tarmac Texas, acquired the name "Express Pennington" but failed to update the county clerk's assumed name certificate record. Although Vanscot raised the issue of its nonexistence in a motion for summary judgment prior to trial, the plaintiff, nonetheless, obtained a judgment against Vanscot.

Vanscot appealed. The Fort Worth Court of Appeals dismissed Vanscot's appeal on the ground that a corporation that is no longer in existence cannot prosecute an appeal.²⁵⁷ Relying on the Texas Supreme Court's holding in *Texas Trunk Co. v. Jackson*,²⁵⁸ the supreme court held that "corporations have the same right to have judgments against them revised by the appellate courts as have persons, and even extinguished corporations are entitled to a hearing before the appellate courts."²⁵⁹

B. THE APPEAL BOND OR CASH DEPOSIT

1. Motion for Extension of Time to File Cost Bond

A motion for extension of time to file a cost bond must be filed in the *court of appeals* within fifteen days after the last day for filing the bond.²⁶⁰ The court of appeals has no authority to act upon a motion for extension erroneously filed in the *trial court*. Although the court of appeals has discretion under Rule 46(f) to permit the amendment of a defective bond, the court has no discretion to permit the late filing of a bond.²⁶¹

The Texarkana Court of Appeals in *Miller v. Miller*²⁶² properly sought guidance from the supreme court on this issue. Although the court of appeals was "bound by the clear and mandatory language of Rule 41(a)(2) that the [motion for extension] must be filed in the appellate court" and had no choice but to dismiss the appeal, the court stated:

We would prefer to reach the merits of this and similar cases . . . We invite the Texas Supreme Court to revisit Rule 41 and to consider amending the language of that rule so as to give appellate courts discretion to act on a timely filed motion for extension of time to file a bond, erroneously filed in the trial court, when the bond itself was properly

256. *Id.* at 526.

257. *Vanscot Concrete Co. v. Bailey*, 843 S.W.2d 193, 194 (Tex. App.—Fort Worth 1992), *rev'd*, 853 S.W.2d 525 (Tex. 1993).

258. 85 Tex. 605, 22 S.W. 1030 (1893), *overruled on other grounds by* *Scurlock Oil Co. v. Smith*, 724 S.W.2d 1 (Tex. 1986).

259. *Vanscot*, 853 S.W.2d. at 526 (citing *Texas Trunk*, 22 S.W.2d at 1032).

260. See TEX. R. APP. P. 41(a)(2).

261. See *Ludwig v. Enserch Corp.*, 845 S.W.2d 338, 340 (Tex. App.—Houston [1st Dist.] 1992, no writ) ("[t]he time limits for filing of bonds on appeal cannot be dispensed with or enlarged for any reason. These restrictions are mandatory and jurisdictional.").

262. 848 S.W.2d 344 (Tex. App.—Texarkana 1993, no writ) (*per curiam*).

filed pursuant to the rules.²⁶³

2. *Omission of Appellee's Name from Clerk's Certificate*

The appellants in *Vail v. First Gibraltar Bank, FSB*²⁶⁴ elected to make a cash deposit in lieu of a surety bond to perfect their appeal pursuant to Texas Rule of Appellate Procedure 46(b) and 48. The clerk filed his certificate showing that the deposit had been made but the clerk's certificate omitted one of the appellee's names. The missing appellee filed a motion to be dismissed from the appeal, contending that the Vails had failed to perfect their appeal as to him. The Dallas Court of Appeals held that appellate courts may not dismiss an appeal for procedural defects of substance or form in an appeal bond, or in a cash deposit made in lieu of an appeal bond.²⁶⁵ If such a defect exists, the appellate court must grant the appellants an opportunity to obtain and file an amended certificate. The court concluded that no defect existed in this case because the appeal was perfected by a cash deposit and the only defect was in the clerk's certificate of that deposit. An appeal is perfected by the cash deposit, not by the clerk's certificate.²⁶⁶

3. *Administrative Requirement of Cash or Supersedeas Bond*

In *Texas Association of Business v. Texas Air Control Board*²⁶⁷ the Texas Supreme Court held unconstitutional the requirement that a party seeking judicial review of an administrative decision either pay a supersedeas bond or cash deposit into an escrow account in the full amount of the penalties assessed by the administrative agency or forfeit the right to judicial review.²⁶⁸ The supreme court noted that under the open courts provision in Texas, citizens must have access to courts unimpeded by unreasonable financial barriers and that, in most other jurisdictions, similar administrative prepayment provisions are required only to stay execution of judgments and are not prerequisites to the right to appeal itself.²⁶⁹

4. *Exemption from Filing Appeal Bond*

A political subdivision of the state or governmental entity is exempt from filing an appeal bond.²⁷⁰ The appeal, when perfected, automatically supersedes the judgment of the trial court. The court in *Enriquez v. Hooten*,²⁷¹ noting that this exemption applies to a county and those who act in an official capacity for the county, held that the exemption applied to the respondent county commissioners and that the trial court's judgment was

263. *Id.* at 344.

264. 859 S.W.2d 425 (Tex. App.—Dallas 1993, no writ).

265. *Id.* at 426.

266. *Id.* at 427; see TEX. R. APP. P. 46(b).

267. 852 S.W.2d 440 (Tex. 1993).

268. *Id.* at 450; see TEX. HEALTH & SAFETY CODE ANN. §§ 382.089(a) and 382.089(b), 361.252(k) and 361.252(l) (Vernon 1992); and TEX. WATER CODE § 26.136(j) (Vernon 1988).

269. *Id.* at 448 n.11.

270. TEX. CIV. PRAC. & REM. CODE ANN. § 6.001 (Vernon 1986).

271. 857 S.W.2d 153 (Tex. App.—El Paso 1993, no writ).

superseded when the notice of appeal was filed.²⁷²

5. Order Increasing Amount of Appeal Bond

Under Texas Rule of Appellate Procedure 46(c), the trial court, on its own motion or the motion of any party, may increase or decrease the amount of the bond or deposit required for costs on appeal.²⁷³ A court's order increasing the amount of the bond or cash deposit, however, does not affect the perfecting of the appeal or the appellate court's jurisdiction. If the appellate court agrees with the trial court that the amount should be increased and the appellant fails to post the amount of the increased bond, the appellate court may dismiss the appeal.²⁷⁴

6. Pauper's Affidavit

The supreme court in *Hughes v. Habitat Apartments*²⁷⁵ held that a pauper's affidavit filed by a defendant suffices as a pro se answer, entitling the defendant to notice of a hearing on a motion for default judgment, if the affidavit supplies information identifying the case and parties and provides the defendant's current address. In *Prince v. First City Texas*²⁷⁶ the court held that Texas Rule of Appellate Procedure 40(a)(3)(B)'s requirement of notice to the court reporter that a pauper's affidavit has been filed does not apply in an appeal from a summary judgment even if there is a statement of facts from the summary judgment hearing.²⁷⁷

C. WAIVER OR MOOTNESS

A party does not waive the right to appeal by involuntarily paying a judgment after execution has issued. In *Riner v. Briargrove Park Property Owners, Inc.*²⁷⁸ the Texas Supreme Court noted that usually, when a judgment debtor voluntarily satisfies a judgment rendered against him, the cause becomes moot, the judgment debtor waives his right to an appeal and the case is dismissed.²⁷⁹ This rule prevents a party who voluntarily pays a judgment from later changing his mind and seeking the court's aid in recovering payment.²⁸⁰ The judgment debtor's appeal is not moot, however, if a party does not *voluntarily* pay a judgment. A party does not voluntarily pay a judgment if he satisfies that judgment *after* execution of a judgment.²⁸¹

272. *Id.* at 154-55. Absent a bona fide dispute as to whether an appellant is exempted from having to file an appeal bond to perfect his appeal, an appellate cost bond is a procedural requirement to perfect an appeal and properly invoke the jurisdiction of the appellate court. *Wilcox v. Seelbinder*, 840 S.W.2d 680, 682-83 (Tex. App.—El Paso 1992, writ denied).

273. TEX. R. APP. P. 46(c).

274. TEX. R. APP. P. 46(c), 60(a). See *Maniccia v. Johnson & Gibbs, P.C.*, 844 S.W.2d 296, 297 n.2 (Tex. App.—Austin 1992, no writ).

275. 860 S.W.2d 794 (Tex. 1993).

276. 853 S.W.2d 691 (Tex. App.—Houston [1st Dist.] 1993, no writ).

277. *Id.* at 693.

278. 858 S.W.2d 370 (Tex. 1993) (per curiam).

279. *Id.*

280. *Id.*

281. *Id.* In *Briargrove*, the judgment creditor obtained a writ of execution, and an order of

As a general rule, an appeal is moot when the court's action on the merits cannot affect the rights of the parties. When the court's action affects the rights of the parties, however, the appeal should not be dismissed as moot. In *VE Corp. v. Ernst & Young*²⁸² the trial court granted the defendant's motion to dismiss the plaintiff's lawsuit filed in Texas based on forum non conveniens.²⁸³ The plaintiff simultaneously appealed the trial court's dismissal and filed suit against the defendant in California. The defendant moved to dismiss the appeal, arguing that the filing of the California suit rendered the appeal moot because the California filing indicated VE's acquiescence that California was the forum of convenience, thereby mooting any controversy before the court of appeals. The court of appeals agreed and dismissed the plaintiff's appeal. Holding that the court of appeals erred in dismissing the appeal as moot, the Texas Supreme Court stated that the plaintiff's mere filing suit in California did not moot the issue of whether Texas was a proper forum for VE's suit against the defendant, nor did it, without more, indicate VE's agreement that California was the forum of convenience.²⁸⁴ Identical suits may be pending in different states.²⁸⁵

D. EXTENDING THE APPELLATE TIMETABLE

1. *Filing a Request for Findings of Facts and Conclusions of Law*

In *Zimmerman v. Robinson*²⁸⁶ the court held that the filing of a request for findings of fact and conclusions of law in a case that has not been tried is insufficient to expand the thirty-day period for perfection of appeal.²⁸⁷ In *Zimmerman*, the plaintiff attempted to appeal from an order dismissing his original petition brought against the independent executor of an estate to recover royalties paid to the estate. The trial court dismissed his petition for want of jurisdiction solely on the defendant's motion to dismiss without a hearing. The plaintiff filed his notice of appeal and a request for findings of fact and conclusions of law one week after the court signed the dismissal order but did not file his cost bond until eighty-two days after dismissal.

The Amarillo Court of Appeals acknowledged that under Texas Rule of Appellate Procedure 41(a)(1) a timely filing of a request for findings of fact and conclusions of law will extend the time for appeal to ninety days after the judgment is signed but noted that this extension occurs only in a case "tried" without a jury.²⁸⁸ To determine the meaning of the word "tried" in Rule 41(a)(1), the court looked to case law interpreting the word "tried"

sale of the property in dispute was issued. The judgment debtor, to avoid the sale of the property, paid the judgment. Both parties appealed and the court of appeals reversed and remanded, holding that the judgment-debtor had waived his right to an appeal by paying the judgment after its execution.

282. 860 S.W.2d 83 (Tex. 1993) (per curiam).

283. *Id.* at 84.

284. *Id.*

285. *Id.*

286. 862 S.W.2d 162 (Tex. App.—Amarillo 1993, no writ).

287. *Id.* at 164.

288. *Id.* at 163; TEX. R. APP. P. 41(a)(1).

under Texas Rule of Civil Procedure 296,²⁸⁹ which holds that a trial judge has the authority and duty to file requested findings and conclusions “where there has been an evidentiary hearing to the court or a bench trial on the merits.”²⁹⁰ The court noted that the case law interpreting the word “tried” under Rule 296 holds that a trial court does not have a duty to file requested findings and conclusions from postjudgment hearings, default judgments, or dismissed complaints.²⁹¹ The court concluded Rule 41(a)(1) should be construed consistent with rule 296 because any other interpretation would ignore the clear and concise language of Rule 41(a)(1) and render the word “tried” meaningless.²⁹² A case dismissed for lack of jurisdiction without an evidentiary hearing has not been “tried,” and the request for findings and conclusions does not extend the appellate timetable.²⁹³ The appellant in *Zimmerman*, therefore, failed to timely perfect his appeal when he filed his cost bond eighty-two days after the order of dismissal was signed.²⁹⁴

2. Failure to Receive Notice of Judgment

When a party fails to receive notice within twenty days of the signing of the trial court’s judgment as required by Texas Rule of Civil Procedure 306a(3), the trial court’s plenary power is extended, and the usual appellate timetable will not begin to run until the party or his attorney receives notice from the clerk of the court or acquires actual notice if within ninety days of the signing of judgment.²⁹⁵ To establish the application of 306a(4), the party adversely affected must (a) have received no notice or actual knowledge within twenty days after the judgment is signed; (b) received notice or acquire actual knowledge within ninety days after the judgment is signed; (c) prove in the trial court, on sworn motion and notice, the date on which the party first acquired notice or actual knowledge of the signing and that this date was more than twenty days after the judgment was signed.²⁹⁶ The appellant in *Carrera v. Marsh* learned the hard way that only a *sworn* motion and notice will do.²⁹⁷ The El Paso Court of Appeals found the unsworn motion filed with the trial court in that case insufficient to establish the application of Rule 306a(4), and the appellate timetable ran as usual, making

289. Rule 296 permits any party to request the court to state in writing its findings and conclusions in cases “tried” without a jury. TEX. R. CIV. P. 296.

290. *Zimmerman*, 862 S.W.2d at 163-64 (citing *Timmons v. Luce*, 840 S.W.2d 582, 586 (Tex. App.—Tyler 1992, no writ); *Electronic Power Design, Inc. v. R.A. Hanson Co., Inc.*, 821 S.W.2d 170 (Tex. App.—Houston [14th Dist.] 1991, no writ)).

291. *Zimmerman*, 862 S.W.2d at 163-64 (citing *Johnson v. J. W. Const. Co.*, 717 S.W.2d 464, 468 (Tex. App.—Fort Worth 1986, no writ); *Eichelberger v. Balette*, 841 S.W.2d 508, 510 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *Nixon v. Nixon*, 348 S.W.2d 434 (Tex. Civ. App.—Houston [1st Dist.] 1961, writ ref’d n.r.e.)).

292. *Zimmerman*, 862 S.W.2d at 163-64.

293. *Id.*

294. *Id.*

295. TEX. R. CIV. P. 306a(3), 306a(4); *Carrera v. Marsh*, 847 S.W.2d 337 (Tex. App.—El Paso 1993, no writ). See *Levit v. Adams*, 850 S.W.2d 469 (Tex. 1993) (per curiam).

296. 847 S.W.2d at 341; TEX. R. CIV. P. 306a(4) and (5).

297. *Id.* at 342.

the appeal untimely.²⁹⁸

VIII. SPECIAL APPEALS

A. APPEALING BY WRIT OF ERROR

To proceed by writ of error review under Texas Rules of Appellate Procedure 45, a petitioner must (1) file the writ within six months after the judgment is signed; (2) be a party to the suit; (3) not have participated in the actual trial of the case in the trial court; and (4) show error apparent from the face of the record. In *Girdley v. Southwestern Bell Yellow Pages, Inc.*,²⁹⁹ the El Paso Court of Appeals addressed the meaning of Rule 45's "nonparticipation in the actual trial" requirement. The party's participation, the court held, need not be at the actual trial on the merits; rather, participation in the decision-making event producing the final judgment adjudicating a party's right will cut off that party's ability to proceed by writ of error.³⁰⁰

In *Girdley*, the appellants were fully and actively represented by counsel during several critical stages of the case, including the hearing on a motion for sanctions after which the trial court entered an order striking the appellants' pleadings. They were also present at several critical hearings that led to the trial court's judgment against them. As a result, the court held the appellants did participate in the actual trial of the case in the trial court within the meaning of Rule 45.³⁰¹ Therefore, the court could not entertain their application for writ of error.

Earlier in the year, the Dallas Court of Appeals addressed a similar issue and reached a consistent result. In *South Mill Mushrooms Sales v. Weenick*³⁰² the appellants attempting to appeal by writ of error did not participate in the trial when default judgment was entered, but they did file a motion for new trial and attended the hearing on that motion. "Actual trial," the Dallas court stated, "is defined to be the hearing in open court, leading up to the rendition of judgment on the questions of law and fact".³⁰³ The extent of participation in the actual trial to disqualify a party is a matter of degree. The court noted that the Texas Supreme Court has held that the filing of a motion for new trial is not participation at trial.³⁰⁴ The appellees pointed out, however, that the appellants in *Weenick* not only filed a motion for new trial but also participated in the hearing on the motion and therefore participated in "actual trial" under Rule 45. The Dallas court rejected the appellee's argument, holding that the controlling requirement that a party not participate in the trial only eliminates the right of review by writ of error for "those who take part in a hearing that leads to the final judgment."³⁰⁵

298. *Id.*

299. 869 S.W.2d 409 (Tex. App.—El Paso 1993, writ denied).

300. *Id.* at 411.

301. *Id.*

302. 851 S.W.2d 346 (Tex. App.—Dallas 1993, writ denied).

303. *Id.* at 348.

304. *Id.* (citing *Lawyers Lloyds of Texas v. Webb*, 152 S.W.2d 1096, 1097-98 (Tex. 1941)).

305. *Id.* at 349.

Rule 45(b), the court concluded, "is not intended to cut off the right of those who discover that a judgment has been rendered against them and participate only to the extent of pursuing a motion for new trial."³⁰⁶

In *McKernan v. Riverside National Bank, N.A.*³⁰⁷ the Fort Worth Court of Appeals held that the defendant, appealing by writ of error from a default judgment, failed to show error apparent from the face of the record.³⁰⁸ The trial court in that case entered a default judgment against the defendant based on the plaintiff's first amended petition that was never served on defendant. The court held that error was not apparent from the face of the record because the first amended petition did not substantially alter the plaintiff's first petition and did not seek a more onerous judgment from the defendant.³⁰⁹

In *Robertson v. Hide-A-Way Lake Club, Inc.*³¹⁰ the court held that parties must strictly comply with the explicit conditions for appealing by petition for writ of error. Each of the four requisites of an appeal by writ of error is "mandatory and jurisdictional."³¹¹ Finding that the appellant in *Robertson* had participated in the actual trial, which disqualified him from suing out a writ of error, the court pointed out that counsel for the appellant prepared and submitted the non-suit order that directly caused the disposition of the case. Only the appellant and his counsel played a role in the termination of the suit. Preparing and submitting the non-suit order to the court constituted participation in the actual trial of the case.³¹² On the other hand, a party who seeks to get his case reinstated following dismissal for want of prosecution and seeks a nunc pro tunc order correcting the dismissal order does not "participate in actual trial" from which judgment was rendered to the extent that his rights to appeal by writ of error are cut off.³¹³

B. APPEALING BY BILL OF REVIEW

A bill of review is an equitable proceeding available in some circumstances to set aside a judgment after the time for ordinary appeal has run.³¹⁴ To obtain a bill of review, the complainant must allege and prove (1) a meritorious defense (2) which he was prevented from making by the fraud, accident or wrongful act of the opposite party, (3) unmixed with any fault or negligence of his own.³¹⁵ In *McRoberts v. Ryals* the supreme court considered by

306. *Id.* In response to the argument that appellants could have appealed from the denial of the motion for new trial, the court emphasized that the supreme court's test for participation at trial does not rest on the opportunity to appeal by ordinary means. *Id.*

307. 858 S.W.2d 613 (Tex. App.—Fort Worth 1993, no writ).

308. *Id.* at 614-15.

309. *Id.* at 615.

310. 856 S.W.2d 841 (Tex. App.—Tyler 1993, no writ).

311. *Id.* at 843.

312. *Id.*

313. *Brim Laundry Machinery Co., Inc. v. Washex Machinery Corp.*, 854 S.W.2d 297, 299 (Tex. App.—Fort Worth 1993, writ requested). See also *Johnson v. Johnson*, 841 S.W.2d 114 (Tex. App.—Houston [14th Dist.] 1992, no writ).

314. *McRoberts v. Ryals*, 863 S.W.2d 450 (Tex. 1993) (Enoch J., dissenting).

315. *Alexander v. Hagedorn*, 226 S.W.2d 996 (Tex. 1950).

bill of review the complaint engendered by the clerk's failure to timely assign a new cause number in a severed action and the subsequent dismissal of an appeal filed under the original cause number.³¹⁶

C. ACCELERATED APPEALS

Texas Rule of Appellate Procedure 42(c) allows an accelerated appeal to be submitted without briefs. In light of this rule, the First Court of Appeals of Houston reasoned that, by extension, it could rule on an issue in an accelerated appeal raised only by a general point of error, despite the fact that such point of error would not otherwise preserve error because of its lack of specificity.³¹⁷ The supreme court reversed the Houston Court of Appeals, stating that Rule 42 contains nothing that could permit a court of appeals to decide issues without briefing in cases that are otherwise fully briefed.³¹⁸ Rule 42, the supreme court held, grants the courts of appeals only the authority to permit the parties to an appeal to submit the whole case without briefs on accelerated appeal.³¹⁹

Apparently, however, appellate courts have broad authority to allow materials to be filed late in accelerated appeals. In *Merrill Lynch v. Eddings*³²⁰ the appellant appealed an order denying its motion to compel arbitration. Under Texas Rule of Appellate Procedure 42(a)(3), the record in the accelerated appeal was due thirty days after the order denying the motion was signed. The appellants tendered the record to the clerk approximately two weeks late, but it was not filed because it was not timely.³²¹ The Waco court granted the appellant's motion to extend the time for filing the record, holding that the language in Rule 42(a)(3), which states that "[f]ailure to file either the record or appellant's brief within the time specified, unless reasonably explained, shall be grounds for dismissal or affirmance under Rule 60, but shall not affect the court's jurisdiction or its authority to consider material filed late," gives appellate courts broad authority to allow materials to be filed late in accelerated appeals.³²²

D. APPEALS FROM BOARD OF DISCIPLINARY APPEALS

In *State Bar of Texas v. Humphreys*³²³ the Texas Supreme Court clarified the procedure for appeal under Rule 7.11 of the Texas Rules of Disciplinary Procedure. Rule 7.11 provides that an appeal to the Texas Supreme Court from a determination of the Board of Disciplinary Appeals must be filed with the clerk of the supreme court within fourteen days after the receipt by the appealing party of the Board's determination from which the appeal is

316. *McRoberts*, 863 S.W.2d at 451.

317. *Metcalfe v. Walling*, 856 S.W.2d 580, 584 (Tex. App.—Houston [1st Dist.], *rev'd*, 863 S.W.2d 56 (Tex. 1993).

318. *Walling*, 863 S.W.2d at 56.

319. *Id.*

320. 838 S.W.2d 874 (Tex. App.—Waco 1992, writ denied).

321. *Id.* at 876.

322. *Id.* at 877; TEX. R. APP. P. 42(a)(3) (emphasis added).

323. No. D-3811, 1993 WL 218649 (Tex. June 23, 1993) (per curiam).

taken. While the rule is unclear, the court held that only a notice of appeal, rather than the entire appeal, must be filed within the fourteen days after receipt of the notice of the Board's determination.³²⁴ The court observed that the procedures should resemble those on appeal from a trial court to the court of appeals. Therefore, the notice must be filed directly with the Texas Supreme Court within fourteen days, and the record must be filed within sixty days after the Board's determination.³²⁵ The appealing party's brief is due thirty days after the record is filed, and the responding party's brief is due within twenty-five days thereafter.³²⁶

E. APPEALS FROM ADMINISTRATIVE DECISIONS

1. *The Exhaustion Doctrine*

Only a party that has exhausted all available administrative remedies may seek judicial review of an agency decision. In *Texas Water Commission v. Dellana*³²⁷ the Texas Supreme Court held that the exhaustion doctrine, codified in the Administrative Procedure and Texas Register Act (APTRA),³²⁸ requires the filing of a motion for rehearing before the agency as a prerequisite to judicial review.³²⁹ Only after exhausting administrative remedies may the party petition for judicial review, and a court abuses its discretion by permitting a party to circumvent the exhaustion of remedies requirement.³³⁰

2. *The Record*

When seeking judicial review of an agency decision, a party must follow the procedural requirements of APTRA.³³¹ Section 19(d)(3) of APTRA provides that a party seeking judicial review of an agency decision (other than by trial de novo), "shall offer, and the reviewing court shall admit, the agency record into evidence as an exhibit." Failure to have the agency record admitted into evidence as an exhibit before the trial court and timely filed as part of the statement of facts on appeal prevents the agency record from being a proper part of the appellate record.³³²

IV. THE BRIEF ON APPEAL

A. POINTS OF ERROR

Texas Rule of Appellate Procedure 74(d) requires that "[a] statement of the points upon which an appeal is predicated shall be stated in short form

324. *Id.* at *1.

325. *Id.*

326. *Id.*

327. 849 S.W.2d 808 (Tex. 1993).

328. TEX. REV. CIV. STAT. ANN. art. 6252-13a, §§ 19(a), 16(e) (Vernon Supp. 1993).

329. *Dellana*, 849 S.W.2d at 810.

330. *Id.*

331. *Commerce Indep. Sch. Dist. v. Texas Educ. Agency*, 859 S.W.2d 627, 628 (Tex. App.—Austin 1993, writ denied); TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon Supp. 1993).

332. *See also Everett v. Texas Educ. Agency*, 860 S.W.2d 700 (Tex. App.—Austin 1993, writ denied).

without argument and be separately numbered."³³³ In *Copher v. First State Bank*³³⁴ the appellant listed his points of error under letters of the alphabet (a) through (i). The court of appeals considered the points in the form submitted but urged counsel to *number* points separately as the rule requires.³³⁵

Under Texas Rule of Appellate Procedure 74(f), a party must include a discussion of the facts and the authorities relied upon to support the issues raised on appeal. Failure to cite any authority in support of a point of error constitutes waiver of the point.³³⁶ Further, a party waives any arguments he fails to mention in his brief before the court of appeals, regardless of his challenges at the trial court level.³³⁷

A multifarious point of error that violates Texas Rule of Appellate Procedure 74 may nonetheless be considered in the interest of justice. In *Thompson v. Texas Department of Human Resources*,³³⁸ a paternity suit, appellant attacked the nunc pro tunc judgment that purportedly corrected a clerical error in a nonsuit order with a single point of error that stated: "There is no clerical error and the original judgment was not subject to correction by entry of judgment nunc pro tunc." The court of appeals held that the point of error violated Rule 74 but agreed to consider it in the interest of justice.³³⁹

The distinction between a point of error that complains that the evidence is insufficient to support a finding and a point of error that complains that the finding is against the great weight and preponderance of the evidence is important.³⁴⁰ A point of error complaining the finding is against the great weight and preponderance of the evidence is proper when an appellant is attacking an adverse finding on which the appellant had the burden of proof.³⁴¹ A point of error complaining the evidence is insufficient to support a finding is proper when the appellant is attacking an adverse finding regarding an issue on which the appellant did not have the burden of proof.³⁴² Appellants should not raise both complaints against the same finding as the appellate court will not consider the point of error.³⁴³

Finally, a point of error that recites a standard of evidentiary review other than either preponderance of the evidence or clear and convincing evidence does not raise a valid point of error and will not be reviewed on appeal.³⁴⁴

333. TEX. R. APP. P. 74(d).

334. 852 S.W.2d 738 (Tex. App.—Fort Worth 1993, no writ).

335. *Id.* at 739.

336. *D/FW Commercial Roofing Co., Inc. v. Mehra*, 854 S.W.2d 182, 188 (Tex. App.—Dallas 1993, no writ).

337. *Wilson v. Cinemark Corp.*, 858 S.W.2d 645, 647 (Tex. App.—Fort Worth 1993, no writ). *See also* *Hunter v. NCNB Texas Nat'l Bank*, 857 S.W.2d 722, 725 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (overruling point of error not supported by authority).

338. 859 S.W.2d 482, 483-84 (Tex. App.—San Antonio 1993, no writ).

339. *Id.* at 484.

340. *Cullen Ctr. Bank v. Texas Commerce Bank*, 841 S.W.2d 116, 120 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

341. *Id.*

342. *Id.*

343. *Id.* at 121.

344. *Browning-Ferris Indus., Inc. v. Lieck*, 845 S.W.2d 926, 935 (Tex. App.—Corpus Christi 1992, writ granted).

In *Browning-Ferris Industries, Inc. v. Lieck*, the points of error arguing that “there is no positive, clear, and satisfactory evidence” to support the jury’s answers did not correspond to either of the only two standards of evidentiary review in Texas and therefore did not raise a valid point of error.³⁴⁵

B. TIME FOR FILING

The rules of appellate procedure provide deadlines for filing the original briefs of both appellant and appellee.³⁴⁶ Although Rule 74(o) allows for amendment or supplementation of briefs “at any time when justice requires,” the appellate rules do not provide a deadline for filing reply briefs. Some appellate courts have local rules specifying time limits and page limits for reply briefs. Leave of court is often required within seven days prior to the date oral argument is scheduled.³⁴⁷

In *Cornerstone Municipal Utility District v. Monsanto Co.*³⁴⁸ the appellant—seven months after it received the appellee’s brief and two days before oral argument—filed a thirty page reply brief citing thirty-seven new cases not cited in its original brief. Although the court of appeals did not grant the appellee’s motion to strike the “reply” brief, the court urged the supreme court and the rules committee to amend Rule 74 to provide a specific deadline for the filing of a reply. The Texas Rules of Appellate Procedure, the court noted,

should provide a set time period to respond to the other side’s arguments if it is necessary. They should also provide that in no case should a reply be filed without leave of court within a minimum number of days before oral argument. . . . Counsel should be able to determine whether a reply will be necessary once the original brief is received. Justice is not served by the filing of a reply to a brief just two days before argument when the original brief has been in counsel’s possession for seven months.³⁴⁹

Under the Beaumont Court of Appeals’ interpretation of Texas Rule of Appellate Procedure 4(b), a metered stamp from a private office reflecting that an appellant’s brief was timely mailed, along with an attorney’s affidavit to the same effect, do not overcome the presumption of date of mailing established by a U.S. Postal Service postmark reflecting that the brief was mailed a day late.³⁵⁰

345. *Id.*

346. See TEX. R. APP. P. 74(k), (m).

347. See, e.g., Second Court of Appeals Local Rule 1.D; Fourth Court of Appeals Local Rule 1(A), (C); Fifth Court of Appeals Local Rule 1:74(d); Tenth Court of Appeals Local Rule 7(f); Thirteenth Court of Appeals Local Rule IV.

348. 845 S.W.2d 444 (Tex. App.—Houston [14th Dist.], *overruled on other grounds*, 865 S.W.2d 937 (Tex. 1993).

349. *Id.* at 445-46.

350. *Texas Beef Cattle Co. v. Green*, 862 S.W.2d 812, 814 (Tex. App.—Beaumont 1993, no writ).

IX. THE RECORD ON APPEAL

A. ABSENCE OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

When the record on appeal does not contain findings of fact or conclusions of law and the trial court's judgment dismissing the case for want of prosecution does not state the reason for the dismissal, the court of appeals must affirm the trial court's dismissal on any legal theory supported by the record.³⁵¹ All necessary findings to support the judgment must be considered as having been impliedly found by the trial court.³⁵²

B. UNNECESSARY DESIGNATION OF TRANSCRIPT

Under Rule 53(e) of the Texas Rules of Appellate Procedure, a party who requires more of the record than is necessary to present its appeal "shall be required" to pay the costs of the unnecessary material regardless of the outcome of the appeal.³⁵³ The Amarillo Court of Appeals in *Lopez v. Central Plains Regional Hospital*³⁵⁴ invoked this rule to require the appellants to bear sixty percent of the costs of the record on appeal because sixty percent of the record was unnecessary for presentation of their points of error.³⁵⁵

C. LOST OR DESTROYED RECORD ON APPEAL

The court in *Born v. Virginia City Dance Hall & Saloon*³⁵⁶ noted in interpreting Rule 50(e) regarding a lost or destroyed record³⁵⁷ that Texas courts hold that there are three requirements for a new trial: (1) that the appellant has made a timely request for a statement of facts; (2) that the court reporter's notes and records have been lost or destroyed without the appellant's fault; and (3) that the parties cannot agree on a statement of facts.³⁵⁸

In the case of lost trial exhibits, however, the Texas courts of appeal disagree as to whether Rule 50(e) allows the appellant to refuse to agree to a substitution without any reasonable basis or justification for refusing to agree. The Waco Court of Appeals has held that the appellant is entitled to a new trial if he does not agree to the substitution of other documents for

351. *Bilnoski v. Pizza Inn, Inc.*, 858 S.W.2d 55, 58 (Tex. App.—Houston [14th Dist.] 1993, no writ); see also *Thompson*, 859 S.W.2d at 484 (noting that the record before appellate court consisted of a statement of facts of a nunc pro tunc hearing only and the transcript, and the statement of facts contained no testimony but only the arguments of counsel).

352. *Thompson*, 859 S.W.2d at 484.

353. TEX. R. APP. P. 53(e).

354. 859 S.W.2d 600 (Tex. App.—Amarillo 1993, no writ).

355. *Id.* at 607.

356. 857 S.W.2d 951 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

357. Texas Rule of Appellate Procedure 50(e) provides that when the record or any portion thereof is lost or destroyed, it may be substituted in the trial court and when so substituted the record may be prepared and transmitted to the appellate court as in other cases. If the appellant has made a timely request for a statement of facts, but the court reporter's notes and records have been lost or destroyed without appellant's fault, the appellant is entitled to a new trial unless the parties agree on a statement of facts.

358. *Born*, 857 S.W.2d at 953.

lost trial exhibits regardless the reasonableness of his disagreement.³⁵⁹ The Corpus Christi and Texarkana Court of Appeals, on the other hand, have upheld a trial court's substitution of exact duplicates of lost documents even though the appellant did not agree to the substitution.³⁶⁰ To hold otherwise, the Texarkana court pointed out, when an original trial exhibit cannot be found, would allow the losing party always to refuse to accept the substitution in order to obtain a new trial.³⁶¹ This, result "would hinder the goal of judicial economy and would not be in keeping with the purposes of Rule 50(e)."³⁶² In the view of the Texarkana Court of Appeals, if the lost exhibits can be replaced with identical or substantially similar documents, a party's refusal to agree to the replacement exhibits should not automatically require a new trial under Rule 50(e).³⁶³

D. STATEMENT OF FACTS

1. *Electronic Recording*

Some trial courts have implemented programs for the use of an electronically recorded, audio-taped statement of facts, rather than a stenographically recorded statement of facts.³⁶⁴ The "statement of facts" in electronically recorded proceedings may consist of the following: (1) standard cassette recordings certified by the court recorder to be clear and accurate copies of the original recording of the entire proceeding; (2) a copy of the typewritten and original logs filed in the case and certified by the court reporter; and (3) all exhibits filed in the case.³⁶⁵ The deadline for filing an electronically recorded statement of facts is usually within fifteen days of the date the appeal is perfected.³⁶⁶ This deadline may cause problems for the practitioner who does not confirm the method of compiling the statement of facts.

In *National Union Fire Insurance Co. v. Ninth Court of Appeals* however,

359. *Hidalgo, Chambers & Co. v. FDIC*, 790 S.W.2d 700, 702 (Tex. App.—Waco 1990, writ denied).

360. *First Heights Bank, FSB v. Gutierrez*, 852 S.W.2d 596 (Tex. App.—Corpus Christi 1993, writ denied); *Hackney v. First State Bank of Honey Grove*, 866 S.W.2d 59 (Tex. App.—Texarkana 1993, writ denied).

361. *Hackney*, 866 S.W.2d at 61.

362. *Id.*

363. *Id.*

364. *See, e.g.*, Texas Supreme Court Orders, Misc. Docket No. 91-0017 (Harris County) No. 91-0058 (Liberty County); No. 91-0059 (Dallas County). Courts in twelve counties use electronic recording rules. *Nat'l Union Fire Ins. Co. v. Ninth Court of Appeals*, 864 S.W.2d 58 (Tex. 1993) (orig. proceeding). Copies of the relevant supreme court orders permitting electronic recordings are available to attorneys practicing before courts that electronically record proceedings. TEX. R. CIV. P. 3a(5).

365. *See Fazio v. Hames*, 866 S.W.2d 267 (Tex. App.—Dallas 1993, no writ). The rules governing electronically recorded proceedings generally require that the appellant file as an appendix to its brief a written transcription of the portion of the statement of facts that is relevant to the errors asserted on appeal. *Id.*

366. *Compare* TEX. R. APP. P. 54(a) (deadline is sixty or ninety days after judgment signed, depending upon whether party filed timely motion for new trial or motion to modify). Note that the orders governing electronically recorded statements of facts do not alter other filing deadlines such as the deadline for filing the transcript governed by Rule 54. TEX. R. APP. P. 54; *see Fazio*, 866 S.W.2d at 269.

the Texas Supreme Court recently issued a conditional writ of mandamus holding that a party's unintentional mistake regarding its obligations under county rules and procedures for filing an electronic statement of facts is a reasonable explanation for delay in filing under Texas Rule of Appellate Procedure 54(c).³⁶⁷ The Beaumont Court of Appeals had withdrawn the order granting an extension of time for filing the electronically recorded statements of facts in *National Union*. It also did so in *Marino v. Hartsfield*,³⁶⁸ where the appellant's motion urged as "reasonable explanation" for the extension the court reporter's busy schedule; however, an affidavit of the court reporter showed that she did not know that the case had been appealed until a few days before the statement of facts was due. The court noted the appellant's failure to make a timely request of the court reporter to prepare the statement of facts does not justify an extension of time.³⁶⁹

In *Fazio v. Hames* the Dallas Court of Appeals held that the appellant's explanation that the court reporter told them she had filed the statement of facts on the day they were due (although she had not), was a reasonable explanation for their motion to extend the time for filing.³⁷⁰ The Dallas court concluded that the requirements of Rule 54(c) were met since the appellant's noncompliance "was not deliberate or intentional and was the result of mistake."³⁷¹

2. *Incomplete Statement of Facts*

The appellant has the burden of presenting to the appellate court a sufficient record to show error requiring reversal.³⁷² In *Fisher v. Evans*³⁷³ the jury returned a verdict favorable to the appellant, but the trial court signed a judgment n.o.v. The appellant did not bring forward a complete statement of facts, and the court of appeals presumed that the omitted portions of the record supported the judgment.³⁷⁴

3. *Summary Judgment Hearing*

An appeal from a summary judgment does not require a statement of facts. A party is not required to obtain transcriptions of non-evidentiary hearings to preserve error.³⁷⁵

X. CONCLUSION

The Texas Supreme Court has assisted practitioners in its decision in *State*

367. 864 S.W.2d at 59-61.

368. 849 S.W.2d 835 (Tex. App.—Beaumont 1993), *overruled on other grounds by*, 868 S.W.2d 336 (Tex. 1994).

369. 849 S.W.2d at 837-38.

370. 866 S.W.2d at 269.

371. *Id.*

372. TEX. R. APP. P. 50(d).

373. 853 S.W.2d 839 (Tex. App.—Waco 1993, writ denied).

374. *Id.* at 841.

375. *Otis Elevator Co. v. Parmelee*, 850 S.W.2d 179, 181 (Tex. 1993); TEX. R. CIV. P. 243.

*Department of Highways & Public Transportation v. Payne*³⁷⁶ by making jury charge preservation of error less complex, but the area is still fraught with ambiguity and inconsistency.³⁷⁷ The court's appointment of a special task force to address the problems may offer much-needed reforms and allow the court to effectuate the policy of resolving appeals on their merits rather than on their technicalities. The decisions of the Survey period show a distinct tendency to move in that direction.

376. 838 S.W.2d at 235.

377. See *Spencer*, 860 S.W.2d 868.

