2005

Evolving Standards of Evidentiary Review: Revising the Scope of Review

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EVOLVING STANDARDS OF EVIDENTIARY REVIEW: REVISING THE SCOPE OF REVIEW

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I. INTRODUCTION

In 1960, then Associate Justice Robert W. Calvert penned what has become the most influential law review article ever written concerning the standard and scope of evidentiary review of jury verdicts under Texas law.[1] Following another important article written by Associate Justice W. St. John Garwood,[2] which was concerned primarily with the significant differences between legal and factual sufficiency review of jury findings, the Calvert article was designed to inform and, in fact, set the standard and scope of evidentiary review in

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1. *See generally* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361 (1960) (discussing the standard and scope of evidentiary review of jury verdicts under Texas law).

2. *See generally* W. St. John Garwood, *The Question of Insufficient Evidence on Appeal*, 30 TEX. L. REV. 803 (1952) (concerning the differences between legal and factual sufficiency review of jury findings).

Texas courts for more than thirty years.

Among other things, the Calvert article explained that when considering a legal sufficiency complaint, in order to review the evidence in its most favorable light in support of the verdict, a Texas court must consider only the evidence and inferences supporting the jury finding in question, disregarding all contrary evidence and inferences.[3] Justice Calvert's article influenced many Texas Supreme Court opinions to define the scope of review in this way.[4] By the late 1990s, however, courts and commentators in Texas began to reexamine the standards and scope of legal sufficiency review. Some commentators and jurists suggested that in another line of cases,[5] the Texas Supreme Court had expanded the scope of legal sufficiency review and its own powers of judicial review without expressly repudiating the traditional approach.[6] Nonetheless, despite other significant changes in the process of evidentiary review,[7] including the recognition of an exception to the limited scope of review for undisputed evidence,[8] it seemed reasonably clear that the traditional scope of "no evidence review" had not been modified or replaced with another standard as the twentieth century came to a close.[9] That is no longer so.

Recently, the Texas Supreme Court has embraced an important recapitulation of the scope of evidentiary review in cases governed by

3. *See* Calvert, *supra* note 1, at 364 (citing Cartwright v. Canode, 106 Tex. 502, 507–08, 171 S.W. 696, 698 (1914)).

4. *See, e.g.*, Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965) ("In deciding that question [i.e., legal sufficiency of the evidence], the appellate court must consider only the evidence and the inferences tending to support the finding and disregard all evidence and inferences to the contrary.").

5. *See, e.g.*, Harbin v. Seale, 461 S.W.2d 591, 592 (Tex. 1970) ("[A]ll evidence must be considered in a light most favorable to the party in whose favor the verdict has been rendered, and every reasonable inference deducible from the evidence is to be indulged in such party's favor.").

6. *See* W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 478–79 (1998); *see also* Ford Motor Co. v. Gonzalez, 9 S.W.3d 195, 198 (Tex. App.—San Antonio 1999, no pet.).

7. *See* William V. Dorsaneo, III, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. 1497, 1498, 1507–16 (2000). Statistics concerning reversal rates of judgments rendered on jury verdicts seemed to support the interim conclusion that significant changes had been made in the process of judicial review because more cases were reversed on no evidence grounds than in prior years. *See also* Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. TEX. L. REV. 431, 434–35, 444 (2003); *cf.* Susan L. Gellis, *Reasons for Case Reversal in Texas: An Analysis*, 16 ST. MARY'S L.J. 299, 301 (1985).

8. *See* Provident Am. Ins. Co. v. Castañeda, 988 S.W.2d 189, 194–95 (Tex. 1998).

9. *Id.*

the preponderance of the evidence standard of review.[10] A similar approach has been applied by the court to cases controlled by the clear and convincing evidence standard of review.[11] This article explores and explains these important developments.

II. THE SCOPE OF REVIEW

A. *Traditional Texas Standards*

The traditional Texas standard and scope of legal sufficiency review is prescribed in Judge Calvert's 1960 article as follows:

> "No evidence" points must, and may only, be sustained when the record discloses one of the following situations: (a) a complete absence of evidence of a vital fact; (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; (d) the evidence establishes conclusively the opposite of the vital fact.
>
> . . . .
>
> . . . [I]n deciding "no evidence" points in situation (c) [the evidence offered to prove a vital fact is no more than a mere scintilla] . . . the courts follow the further rule of viewing the evidence in its most favorable light in support of the finding of the vital fact, considering only the evidence and the inferences which support the finding and rejecting the evidence and the inferences which are contrary to the finding.[12]

Because most cases are governed by the "scintilla rule" formulation, which applies to challenges made to affirmative findings on which the verdict winner had the burden of persuasion, this scope of review has commonly been regarded as the general rule.[13] A similar approach has been applied by Texas appellate courts to Judge Calvert's situation (d), which applies if the party with the burden of persuasion on an issue challenges a jury's negative finding by contending that the evidence conclusively establishes an affirmative

10. City of Keller v. Wilson, 168 S.W.3d 802, 810–28 (Tex. 2005).

11. *See, e.g., id.* at 817; Sw. Bell Tel. Co. v. Garza, 164 S.W.3d 607, 628–30 (Tex. 2004).

12. Calvert, *supra* note 1, at 364.

13. *See* Wal-Mart Stores, Inc. v. Gonzalez, 968 S.W.2d 934, 936–37 (Tex. 1998); Cont'l Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444, 450 (Tex. 1996).

finding.[14] In this situation, the record is first examined for evidence that supports the failure to find. But "[i]f there is no evidence to support the fact finder's [negative] answer, then secondly, the entire record must then be examined to see if the contrary [affirmative] proposition is established as a matter of law."[15]

Both of these methods of reviewing the sufficiency of the evidence are designed to prevent the reviewing court from weighing the evidence by requiring the court to focus on the evidence that supports the finding without viewing it through the prism of the entire record, which may include evidence opposing the finding.[16] Both require contrary evidence to be disregarded in determining whether any evidence supports the affirmative or negative finding, so that the record evidence is in fact viewed "in its most favorable light in support of the finding."[17] Thus, the scope of legal sufficiency review has differed from the scope of factual insufficiency review in which a court of appeals is required to consider all of the evidence to decide if the evidence supporting a finding is so weak or the evidence to the contrary is so overwhelming that the finding should be set aside and a new trial ordered.[18]

Although Judge Calvert's 1960 law review article does not mention it, more than a decade before the Calvert article a significant exception had been recognized by the Texas Supreme Court concerning the jury's ability to disregard "undisputed" evidence. For example, in *Texas & New Orleans Railroad Co. v. Burden*,[19] the Texas Supreme Court had ruled that "where there is evidence upon an issue and there is no evidence to the contrary, then the jury has not the right to disregard the undisputed evidence and decide such issue in accordance with their wishes."[20] In *Burden*, this exception was applied to the testimony of a disinterested witness.[21] Decades later, Texas appellate courts expanded the concept by applying the same

14. *See, e.g.*, CTTI Priesmeyer, Inc. v. K & O Ltd. P'ship, 164 S.W.3d 675, 680 (Tex. App.—Austin 2005, no pet.).

15. Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982).

16. *See* Dorsaneo, *supra* note 7, at 1503.

17. *Id.* at 1504.

18. Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965) ("Factual insufficiency of the evidence does not... authorize the court to disregard the finding entirely or make a contrary finding in entering final judgment for one of the parties.").

19. 146 Tex. 109, 203 S.W.2d 522 (1947).

20. *Id.* at 123, 203 S.W.2d at 530; *see also* Grand Fraternity v. Melton, 102 Tex. 399, 402, 117 S.W. 788, 789 (Tex. 1909) ("The jury were the judges of the credibility of witnesses; but they had not the right to arbitrarily reject the evidence of an unimpeached witness, against whom there was no discrediting fact or circumstance.").

21. *Burden*, 146 Tex. at 130–31, 203 S.W.2d at 534 (Taylor, J., dissenting).

undisputed evidence concept to both disinterested and interested witnesses[22] as long as the testimony was clear, direct and positive, free from contradictions, inaccuracies and circumstances tending to cast suspicion on the evidence.[23] By the late 1990s, the Texas Supreme Court had also noted somewhat cryptically that a legal sufficiency review cannot "disregard undisputed [circumstantial] evidence that allows of only one logical inference."[24]

How then should these developments be synthesized? An important preliminary question concerning the scope of review is: To what extent must an appellate court look at the "entire record" in applying the legal sufficiency standard of review? First, from a practical standpoint, it is necessary for a reviewing court to review the entire record at the beginning of the review process to ascertain what evidence favors the finding and what evidence is in derogation of the finding, regardless of whether the finding is an affirmative one or a negative one.[25] Second, in applying the "scintilla rule" in Calvert's situation (c), a reviewing court must make a threshold evaluation of the reasonableness of inferences supporting a jury finding, before disregarding contrary evidence.[26] Because the reasonableness of an inference under the "reasonable minds" test requires a consideration of all of the circumstantial evidence that the jury was authorized to give credence, the entire record is reviewed to determine the reasonableness of the inference.[27]

To recapitulate: The process must begin with a review of the entire record to identify favorable direct and circumstantial evidence. Once this evidence is identified, a reviewing court must determine whether inferences in support of a finding are reasonable ones under

22. Schwartz v. Pinnacle Commc'ns, 944 S.W.2d 427, 434 (Tex. App.—Houston [14th Dist.] 1997, no writ).

23. *Id.*

24. Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 51 n.1 (Tex. 1997); *see also* St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 519–20 (Tex. 2002). Because the totality of the circumstantial evidence must be considered to evaluate whether an inference drawn from the circumstances is reasonable, this cryptic ruling probably only means that if undisputed evidence leads to only one reasonable inference, that inference cannot be disregarded and maybe is conclusive.

25. *See In re* J.F.C., 96 S.W.3d 256, 266 (Tex. 2002).

26. *See id.*; *see also* Lozano v. Lozano, 52 S.W.3d 141, 149 (Tex. 2001) (per curiam) (Phillips, C.J., concurring and dissenting).

27. *See Lozano*, 52 S.W.3d at 149 (Phillips, C.J., concurring and dissenting); *id.* at 166 (Baker, J., concurring and dissenting); *see also* Simmons & Simmons Constr. Co. v. Rea, 155 Tex. 353, 359–60, 286 S.W.2d 415, 419 (1955); Seymour v. Am. Engine & Grinding Co., 956 S.W.2d 49, 59 (Tex. App.—Houston [14th Dist.] 1996, writ denied).

the totality of the circumstantial evidence.[28] If the circumstances themselves are disputed, a reviewing court may not consider a circumstance in derogation of an inference made by the jury, unless the unfavorable circumstantial evidence is itself undisputed, because the jury may determine the circumstances like any other fact question.[29] Finally, in order to view the direct and circumstantial evidence in the most favorable light in support of the finding, unfavorable direct evidence and unfavorable reasonable inferences must be disregarded by the reviewing court, unless the evidence cannot be disregarded because it is undisputed direct evidence or undisputed circumstantial evidence that allows only one logical inference.[30]

The apparent complexity of the legal sufficiency review process described above is somewhat misleading because individual cases commonly do not require application of each component of the review process. The following four examples illustrate how the process should work in typical cases. The first two examples present no difficulties. The third and fourth examples involve more complexity because the issue to be determined rests on circumstantial evidence and the possible presence of undisputed evidence that the jury may be bound to consider:

- If the determination of an ultimate fact involves a clash in the direct evidence, whether the direct evidence that favors the finding made by the jury is legally sufficient evidence should be determined by a reviewing court without regard to the direct evidence favoring the opposite finding. In this situation, because a conflict in the direct evidence creates a classic jury question about the disputed issue, a reviewing court should assess the sufficiency of the direct evidence favoring the finding without comparing it with conflicting evidence.
- If evidence on an issue is undisputed, both the jury and a reviewing court must credit that evidence and it may determine an ultimate fact and the outcome of a case as a matter of law.
- If an ultimate fact question involves circumstantial

28. Texas courts use a variety of tests to evaluate the reasonableness of inferences. *See, e.g.*, Marathon Corp. v. Pitzner, 106 S.W.3d 724, 728 & n.8 (Tex. 2003); *see also Lozano*, 52 S.W.3d at 148–49 (Phillips, C.J., concurring and dissenting).

29. *See In re J.F.C.*, 96 S.W.3d at 266.

30. *See* St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 519–20 (Tex. 2002).

evidence and no direct evidence favors the finding made by the jury, the totality of the circumstances, minus any disputed circumstance in derogation of the finding, must be reviewed to determine if a reasonable inference in support of the finding can be drawn from the evidence. If the inference is a reasonable one, a reviewing court should ultimately disregard opposing direct evidence and opposing inferences, whether they are reasonable or not.[31]

- If the ultimate fact question involves circumstantial evidence, but undisputed evidence exists that the jury is bound to credit and that evidence is in derogation of an otherwise reasonable inference that supports a finding, the undisputed evidence cannot be disregarded by a reviewing court and the undisputed evidence may make the first inference and the jury's finding unreasonable or legally immaterial.[32]

B. Relationship to Federal Practice

A similar methodology has been embraced by the United States Supreme Court in one of Justice Sandra Day O'Connor's most important opinions. In *Reeves v. Sanderson Plumbing Products, Inc.*,[33] the Court addressed and attempted to resolve differences concerning the scope of review that have existed for more than thirty years among the federal circuits.[34] *Reeves* is an age discrimination case in which a panel of the Fifth Circuit Court of Appeals reversed a district court judgment, based on a jury's verdict of willful discrimination on the ground that the verdict was not supported by probative evidence.[35] The court of appeals applied the Fifth Circuit's standard of whole record review established in *Boeing Co. v. Shipman*,[36] which requires a reviewing court to consider all of the evidence at all stages of the

31. *Cf.* Axelrad v. Jackson, 142 S.W.2d 418, 430 (Tex. App.—Houston [14th Dist.] 2004, pet. filed) ("purported inference from circumstantial evidence" can be "patently unreasonable . . . when direct evidence trumps and supervenes the purported inference").

32. *See* Provident Am. Ins. Co. v. Castañeda, 988 S.W.2d 189, 205–06 (Tex. 1998) (Gonzalez, J., dissenting); *see also* City of Keller v. Wilson, 168 S.W.3d 802, 830 (Tex. 2005).

33. 530 U.S. 133 (2000).

34. *Id.* at 140; *see also* Schwimmer v. Sony Corp. of Am., 459 U.S. 1007, 1009 (1982) (White, J., dissenting).

35. *See* Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 694 (5th Cir. 1999), *rev'd*, 530 U.S. 133 (2000).

36. 411 F.2d 365, 374–77 (5th Cir. 1969) (en banc), *overruled by* Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997).

evidentiary review process "but in the light and with all reasonable inferences most favorable to the party" in whose favor the finding was made.[37] The Supreme Court reversed the court of appeals for misapplying the evidentiary review standard to the evidence.[38]

The Supreme Court recognized that some federal decisions have stated that the scope of judicial review is limited to the evidence favorable to the nonmoving party,[39] while most hold that review extends to the entire record.[40] But the Court regarded this distinction as "more semantic than real."[41] Although the Court did not explicitly repudiate the *Shipman* review standard, it explained further that, while review of all of the evidence is required to determine a motion for judgment as a matter of law, the trial judge is required to give credence to the evidence and reasonable inferences that tend to support the finding and to disregard all contrary evidence that the jury was not required to believe.[42]

> The opinion explains the Court's methodology in clear terms:
>
> [T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. "Credibility

37. *Id.* at 374.

38. *Reeves*, 530 U.S. at 149. The Supreme Court explained:

> In holding that the record contained insufficient evidence to sustain the jury's verdict, the Court of Appeals misapplied the standard of review .... [T]he court disregarded critical evidence favorable to petitioner—namely, the evidence supporting petitioner's prima facie case and undermining respondent's nondiscriminatory explanation. The court also failed to draw all reasonable inferences in favor of petitioner. For instance, while acknowledging "the potentially damning nature" of [a supervisor's] age-related comments, the court discounted them on the ground that they "were not made in the direct context of Reeves's termination." And the court discredited petitioner's evidence that [the supervisor] was the actual decisionmaker by giving weight to the fact that there was "no evidence to suggest that any of the other decision makers were motivated by age." Moreover, the other evidence on which the court relied—that Caldwell and Oswalt were also cited for poor recordkeeping, and that respondent employed many managers over age 50—although relevant, is certainly not dispositive. In concluding that these circumstances so overwhelmed the evidence favoring petitioner that no rational trier of fact could have found that petitioner was fired because of his age, the Court of Appeals impermissibly substituted its judgment concerning the weight of the evidence for the jury's.

Id. at 152–53 (citations omitted).

39. *Id.* at 149 (citing Aparicio v. Norfolk & W. Ry. Co., 84 F.3d 803, 807 (6th Cir. 1996), *abrogated by Reeves*, 530 U.S. at 149; Simpson v. Skelly Oil Co., 371 F.2d 563, 567 (8th Cir. 1967), *abrogated by Reeves*, 530 U.S. at 149).

40. *Id.* at 149–50 (citing Tate v. Gov't Employees Ins. Co., 997 F.2d 1433, 1435–36 (11th Cir. 1993); *Shipman*, 411 F.2d at 374).

41. *Id.* at 150.

42. *Id.*

> determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that [it] comes from disinterested witnesses."[43]

Taken at face value, the Supreme Court reconciled the conflicting circuit decisions by restricting whole record review to the first part of the review process.[44]

III. REASSESSING THE TRADITIONAL SCOPE OF REVIEW

A. *Preponderance of the Evidence Cases*

In *City of Keller v. Wilson*, the Texas Supreme Court reassessed the scope of legal sufficiency review for civil cases controlled by the preponderance of the evidence standard of proof.[45] Recognizing that the limited scope of review formula expressed in Judge Calvert's 1960 law review article does not go far enough because it does not take into account evidence that the jury is required to credit, the court recapitulated the legal sufficiency review standard in the following terms:

> The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. Whether a reviewing court begins by considering all the evidence or only the evidence supporting the verdict, legal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could

43. *Id.* at 150–51 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2529 at 300 (2d ed. 1995)) (citations omitted).

44. Despite the unmistakable clarity of the *Reeves* opinion, some commentators and federal courts have balked at accepting it. *See* Steven Alan Childress, *Taking Jury Verdicts Seriously*, 54 SMU L. REV. 1739, 1741–47 (2001) (arguing that the rule announced in *Reeves* is unnecessary and creates a puzzling and problematic precedent for courts to follow). *But see* David Crump, *Jury Review After* Reeves v. Sanderson Plumbing Products, Inc.: *A Four-Step Algorithm*, 54 SMU L. REV. 1749, 1749–54 (2001) (stating that the *Reeves* standard gives a more coherent statement of the principles governing judicial review).

45. City of Keller v. Wilson, 168 S.W.3d 802, 809–10 (Tex. 2005).

not.[46]

This recapitulation is helpful because (i) it reinforces the principal characteristic of the traditional scope of review, i.e., that evidence contrary to the verdict must be disregarded in assessing the legal sufficiency of the evidence[47] and (ii) because it recognizes that "contrary evidence" cannot be disregarded when "reasonable jurors could not" do so.[48] But, in contrast to the federal scope of review in the *Reeves* opinion, the court's recapitulation does not itself clearly define what "contrary evidence" "reasonable jurors could not" disregard, even though that is a principal analytical difficulty.

The balance of the court's opinion must be examined to discern what cannot properly be disregarded by jurors or by reviewing courts. The court states that reviewing courts and "[j]urors cannot ignore undisputed testimony that is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted."[49] The opinion also explains that reviewing courts cannot "disregard undisputed evidence that allows of only one logical inference,"[50] and it affirms that a party's judicial admissions may conclusively establish a matter against that party.[51]

Beyond these familiar principles, the court's opinion identifies a number of other situations in which contrary evidence cannot be disregarded, including the following:

- Material Contextual Evidence[52]

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46. *Id.* at 827. Justice Brister's opinion, as reflected in this quotation, interprets the traditional scope of review to require a reviewing court to disregard "contrary evidence" at the beginning of the legal sufficiency review. But, as explained above, it is necessary to review the entire record at the threshold to decide what evidence favors the finding and what evidence is contrary to the finding. There is no other sensible way to proceed.

47. Justice Brister's opinion plainly recognizes that a reviewing court ultimately must disregard contrary evidence, if a reasonable jury could do so. *Id.* at 811. Not all procedural systems take this sensible approach to legal sufficiency review. *See, e.g.*, Boeing Co. v. Shipman, 411 F.2d 365, 374–75 (5th Cir. 1969) (en banc), *overruled by* Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997). For a critical evaluation of the *Shipman* standard and scope of review, see William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1717–18 (2001).

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

49. *Id.* at 820.

50. *Id.* at 814.

51. *Id.* at 815.

52. *Id.* at 811–12.

> [I]f evidence may be legally sufficient in one context but insufficient in another, the context cannot be disregarded even if that means rendering judgment contrary to the jury's verdict. Either "evidence contrary to the verdict" must be defined to exclude material contextual evidence, or it must be an exception to the general rule.

- Competency Evidence[53]
- Circumstantial Equal Evidence[54]
- Conclusive Evidence[55]
- Consciousness Evidence[56]
- Clear and Convincing Evidence[57]

Each of these categories requires evaluation. In doing so, it is important to remember that jurors are required to listen to and to consider all of the evidence. Justice Scott Brister's majority opinion in *City of Keller* sensibly explains that jurors may resolve factual disputes and draw reasonable inferences from circumstantial evidence so that they may decide what happened and answer mixed questions of law and fact concerning liability and damages.[58] In this process, contrary direct evidence and inferences may be disregarded when it is reasonable for jurors to do so under the evidence.[59] "Jurors are the sole judges of the credibility of witnesses"[60] as long as "'[t]he jury's decisions regarding credibility [are] reasonable.'"[61] Even if testimonial evidence is undisputed, it is ordinarily "the province of the jury to draw from it whatever inferences they wish, so long as more than one is possible," and reviewing courts "must assume jurors made all inferences in favor of their verdict if reasonable minds could, and

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Id. at 812.

53. *Id.* at 812–13. "[E]vidence that might be 'some evidence' when considered in isolation is nevertheless rendered 'no evidence' when contrary evidence shows it to be incompetent. Again, such evidence cannot be disregarded; it must be an exception either to the exclusive standard of review or to the definition of contrary evidence." *Id.* at 813.

54. *Id.* at 813–14. "[W]hen the circumstantial evidence of a vital fact is meager, a reviewing court must consider not just favorable but all the circumstantial evidence, and competing inferences as well" to determine whether the favorable inference is a reasonable one. *Id.* at 814.

55. *Id.* at 814–17. "Most often, undisputed contrary evidence becomes conclusive (and thus cannot be disregarded) when it concerns physical facts that cannot be denied." *Id.* at 815. "It is impossible to define precisely when undisputed evidence becomes conclusive." *Id.* "[P]roper review also prevents jurors from substituting their opinions for undisputed truth." *Id.* at 817.

56. *Id.* at 817–18. ("Reviewing courts assessing evidence of conscious indifference cannot disregard part of what a party was conscious of.")

57. *Id.* "[W]e have held that a legal sufficiency review must consider *all* the evidence (not just that favoring the verdict) in reviewing cases of parental termination, defamation, and punitive damages. In such cases, again, evidence contrary to a verdict cannot be disregarded." *Id.* (footnotes omitted).

58. *Id.* at 819–20.

59. *Id.* at 820.

60. *Id.* at 819.

61. *Id.* at 820 (quoting Bentley v. Bunton, 94 S.W.3d 561, 599 (Tex. 2002)) (alteration in original).

disregard all other inferences in their legal sufficiency review."[62] Hence, the court's new categories concern not only evidence that jurors must consider but also evidence a reviewing court should not disregard in conducting a legal sufficiency review.

1. *Material Contextual Evidence*

"[I]f evidence may be legally sufficient in one context but insufficient in another, the context cannot be disregarded even if that means rendering judgment contrary to the jury's verdict."[63] For example, the court explains that the relationship of the parties, the condition of the plaintiff, and other contextual circumstances may be considered in determining whether a defendant's actions were sufficiently outrageous to support a judgment for intentional infliction of emotional distress.[64]

The inclusion of "material contextual evidence" in the scope of no evidence review makes sense and is consistent with the rule that the totality of the circumstantial evidence must be considered in evaluating the reasonableness of an inference as long as the evidence is undisputed or indisputable under the laws of science. Otherwise, because jurors may resolve factual disputes, a reviewing court should conclude that the jury resolved a dispute about the context in favor of its verdict and disregard unfavorable contextual evidence while conducting a legal sufficiency review. Viewed this way, material contextual evidence does not constitute a distinct category of evidence that jurors and reviewing courts must credit.

2. *Competency Evidence*

The court also sensibly explains that evidence showing that other evidence supporting the verdict is incompetent cannot be ignored in assessing the probative value of lay or expert testimony.[65] For example, evidence showing that an expert witness—whose opinion supports a finding—is unqualified to give an opinion or that there is no scientific basis for an opinion, cannot be disregarded by a reviewing court.[66]

62. *Id.* at 821.
63. *Id.* at 812.
64. *Id.* at 811–12.
65. *Id.* at 812–13.
66. *Id.* at 813.

3. *Circumstantial Equal Evidence*

Similarly, "when the circumstantial evidence of a vital fact is meager, a reviewing court must consider not just favorable but all the circumstantial evidence, and competing inferences as well."[67] For example, "when injury or death occurs without eyewitnesses and only meager circumstantial evidence suggests what happened, [courts] cannot disregard other meager evidence of equally likely causes" in evaluating the reasonableness of an inference in support of a jury finding.[68]

With respect to the court's second and third categories, the inclusion of competency evidence and circumstantial equal inferences in the scope of review is desirable to enable a reviewing court to properly evaluate the admissibility of the testimony or, in cases involving meager circumstantial evidence, the reasonableness of an inference.[69] But once those determinations have been made, there is no other reason to include the evidence within the scope of review.

4. *Conclusive Evidence*

Justice Brister's opinion explains that proper legal-sufficiency review "prevents jurors from substituting their opinions for undisputed truth."[70] In other words, conclusive evidence is dispositive of the issue to which it is pertinent. Justice Brister's opinion also explains that conclusive evidence is almost always undisputed and that "[m]ost often, undisputed contrary evidence becomes conclusive (and thus cannot be disregarded) when it concerns physical facts that cannot be denied. Thus, no evidence supports an impaired-access claim if it is undisputed that access remains along 90 percent of a tract's frontage," or "when a party admits it is true."[71] In rare cases disputed evidence may be conclusive, such as blood tests that conclusively negate a man's paternity even though the mother testifies that she did not have conjugal relations with anyone else during the relevant time.[72]

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67. *Id.* at 814.
68. *Id.*
69. This does not mean that the jury is required to select what a reviewing court believes is the most reasonable inference. *See* Lozano v. Lozano, 52 S.W.3d 141, 149 (Tex. 2001) (per curiam) (Phillips, C.J., concurring and dissenting).
70. *City of Keller*, 168 S.W.3d at 817.
71. *Id.* at 815.
72. *Id.* at 816.

Although "undisputed truth" ought to be "conclusive evidence," it is hard to identify in the face of conflicting evidence and inferences. The closest a standard of review can come is to recognize that evidence can be conclusive on an issue if it is both undisputed (or indisputable) and dispositive under controlling legal principles. For example, undisputed evidence of actual reliance on an expert report may foreclose recovery[73] under insurance bad faith law. Similarly, probable cause may be established as a matter of law in a malicious prosecution case if undisputed evidence shows all the objective elements of a criminal offense have been committed, regardless of the surrounding circumstances.[74]

Justice Brister's opinion sensibly recognizes that "[i]t is impossible to define precisely when undisputed evidence becomes conclusive."[75] The opinion also identifies, in more traditional terms, particular types of undisputed evidence that reasonable jurors must give credence. Reasonable jurors and reviewing courts "cannot ignore undisputed testimony that is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted."[76] In addition, a legal sufficiency review cannot "disregard undisputed [circumstantial] evidence that allows of only one logical inference."[77] In these circumstances, as explained above in Part II of this article, the undisputed evidence must be considered and may be dispositive either because it makes the inference drawn by the jury and the jury's finding unreasonable or legally immaterial.

5. *Consciousness Evidence*

In legal sufficiency review of cases involving what a party knew or why it took a certain course, the court's opinion states that a reviewing court must consider "*all* of the surrounding facts, circumstances, and conditions."[78] Again, as in the case of material contextual evidence, jurors can resolve conflicts in the direct or circumstantial evidence, removing unfavorable evidence from the scope of review.

6. *Clear and Convincing Evidence*

When the standard of proof is clear and convincing evidence, the

73. *See* Provident Am. Ins. Co. v. Castañeda, 988 S.W.2d 189, 194–95 (Tex. 1998).
74. *See* Richey v. Brookshire Grocery Co., 952 S.W.2d 515, 517–18 (Tex. 1997).
75. *City of Keller*, 168 S.W.3d at 815.
76. *Id.* at 820.
77. Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 51 n.1 (Tex. 1997).
78. *Id.* at 75 (Hecht, J., concurring).

court states that *all* of the evidence must be reviewed to determine legal sufficiency.[79] However, as explained below, the scope of legal sufficiency review in clear and convincing evidence cases does enable the jury and a reviewing court to ultimately disregard all evidence that a reasonable fact finder could have disbelieved or found to have been incredible.[80]

Fundamentally, the court's attempt to categorize types of evidence that a reviewing court cannot disregard unnecessarily complicates the analytical process. Aside from undisputed evidence that both juries and reviewing courts are required to credit, there is no other "contrary evidence" that "reasonable jurors could not" disregard during the fact-finding process and that reviewing courts should not disregard in the judicial review process. The remainder of the court's opinion itself supports this conclusion by explaining that at least the following three types of evidence must be ignored by reviewing courts.[81]

(1) Credibility Evidence

Reviewing courts must assume that jurors decided all credibility questions in favor of the verdict if reasonable human beings could have done so.[82] For example, if both drivers in a traffic accident testify that they had the green light, an appellate court must presume that the prevailing party had the green light and ignore evidence to the contrary.[83]

(2) Conflicting Evidence

Similarly, the reviewing court must assume that the jury resolved all conflicts in accordance with its verdict and disregard conflicting evidence.[84]

(3) Conflicting Inferences

A reviewing court must also assume that jurors made all inferences in favor of their verdict if reasonable minds could have done so, disregarding all other inferences.[85]

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79. *City of Keller*, 168 S.W.3d at 817.
80. *See* text *infra* accompanying note 99.
81. *City of Keller*, 168 S.W.3d at 818–21.
82. *Id.* at 820.
83. *Id.* at 819.
84. *Id.* at 821.
85. *Id.*

The court's opinion concludes with the curious observation that the same result will be reached whether a reviewing court begins a legal sufficiency review by reviewing all the evidence in the light most favorable to the jury verdict (the "inclusive standard") or by disregarding evidence that does not support the verdict (the "exclusive standard").[86] The court reasoned that in either case, "the [reviewing] court must consider evidence in the light most favorable to the verdict and indulge every reasonable inference that would support it."[87] If the evidence allows of only one inference, neither jurors nor the reviewing court may disregard it. The court stated:

> Given these premises, it is no coincidence that the two standards should reach the same result—indeed they *must*. Any scope of appellate review smaller than what reasonable jurors could believe will reverse some verdicts that are perfectly reasonable; any scope of review larger than what reasonable jurors could believe will affirm some verdicts that are not.[88]

The court characterized the advantages of each standard as follows:

> In sum, the exclusive standard is helpful in recognizing the distinctive roles of judge and jury, intermediate and supreme court. By contrast, the inclusive standard is helpful in recognizing what courts actually do, and must be seen to do. Both are important; we should avoid choosing between them if we can.[89]

More significantly, however, because the court's inclusive standard considers all of the evidence at the beginning of the review process but ultimately disregards contrary evidence that the jury is not required to credit, it preserves the distinctive roles of judges, juries, and reviewing courts. The court's revised methodology does so because it does not require the favorable evidence to be outweighed by unfavorable evidence that jurors are not required to consider and believe. In contrast, the type of whole record review used in some jurisdictions allows or requires a reviewing court to consider all of the evidence at each stage of the evidentiary review process.[90] As the

86. *See id.* at 823. As explained above, what the court calls the "exclusive standard" is unworkable. It is also reasonably clear that Justice Calvert never intended contrary evidence to be somehow disregarded at the threshold. *See* Simmons & Simmons Constr. Co. v. Rea, 155 Tex. 353, 359–60, 286 S.W.2d 415, 419 (1955).

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

88. *Id.*

89. *Id.* at 827.

90. *See supra* Part II.A–B.

Reeves opinion shows, this approach is flawed because it fails to recognize that it is exceedingly difficult, if not impossible, for any reviewing court to view the evidence in the most favorable light in support of the verdict if the favorable evidence is not separated from the unfavorable evidence that the jury is not required to credit. Fundamentally, as Justice Brister's opinion recognizes, the more aggressive form of whole record review used by these jurisdictions is a poor policy choice because it may invade the jury's province.

B. Clear and Convincing Evidence Cases

As stated in the *City of Keller* opinion, a different standard of review applies if a required finding must be supported by clear and convincing proof.[91] Clear and convincing evidence means "the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established,"[92] and applies to defamation cases,[93] punitive damages awards,[94] cases involving the termination of parental rights,[95] cases involving involuntary commitment of an individual to a mental hospital,[96] and cases in which a statute requires proof by clear and convincing evidence.

If the burden of proof in termination cases is by clear and convincing evidence, an appellate court's legal sufficiency standard of review "must take into consideration whether the evidence [was] such that a fact finder could reasonably form a firm belief or conviction about the truth of the matter on which the State bears the burden of proof."[97]

> If, after conducting its legal sufficiency review of the record evidence, a court determines that no reasonable factfinder could form a firm belief or conviction that the matter that must be proven is true, then that court must conclude that the evidence is legally insufficient. Rendition of judgment . . . would generally be required if there is legally insufficient evidence.[98]

In clear and convincing evidence cases, the scope of legal sufficiency review has been more clearly defined by the Texas

91. *See City of Keller*, 168 S.W.3d at 817.
92. *In re* J.F.C., 96 S.W.3d 256, 264 (Tex. 2002).
93. *See* Bentley v. Bunton, 94 S.W.3d 561, 610 (Tex. 2002).
94. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003).
95. *See In re* C.H., 89 S.W.3d 17, 25 (Tex. 2002).
96. *See* State v. Addington, 588 S.W.2d 569, 570 (Tex. 1979).
97. *In re J.F.C.*, 96 S.W.3d at 265–66.
98. *Id.* at 266 (footnotes omitted).

Supreme Court than the scope of review in cases in which the preponderance of the evidence standard of proof applies. The procedure outlined by the court for conducting a no evidence review in clear and convincing evidence cases is as follows:

> In a legal sufficiency review, a court should look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its finding was true. To give appropriate deference to the factfinder's conclusions and the role of a court conducting a legal sufficiency review, looking at the evidence in the light most favorable to the judgment means that a reviewing court must assume that the factfinder resolved disputed facts in favor of its finding if a reasonable factfinder could do so. A corollary to this requirement is that a court should disregard all evidence that a reasonable factfinder could have disbelieved or found to have been incredible. This does not mean that a court must disregard all evidence that does not support the finding. Disregarding undisputed facts that do not support the finding could skew the analysis of whether there is clear and convincing evidence.[99]

Thus, the scope of review that the court devised for clear and convincing evidence cases is more complete than the one set forth in Judge Calvert's article and more straightforward and informative than the scope of review articulated in *City of Keller*. From my perspective, the standard used in clear and convincing evidence cases is perfectly compatible with the court's recapitulation of the scope of legal sufficiency review in the *City of Keller* opinion for cases governed by the preponderance of the evidence proof standard. Thus, I would go further by adopting the same scope of review to all civil cases, but without using the firm belief or conviction standard of review in preponderance cases.[100]

There is no principled reason for a reviewing court to disregard the existence of undisputed factual evidence concerning the circumstances in conducting a legal sufficiency review in cases controlled by the preponderance of the evidence proof standard, even if the evidence by itself or in combination with other evidence would contravene the jury's verdict. Under these circumstances, as suggested in the fourth example set forth above,[101] the undisputed evidence may

99. Sw. Bell Tel. Co. v. Garza, 164 S.W.3d 607, 627 (Tex. 2004) (quoting *In re J.F.C.*, 96 S.W.3d at 266).

100. *See* authority cited *supra* note 27.

101. *See supra* text accompanying note 32.

make an inference required to support the finding under review and the finding itself unreasonable or legally immaterial, thereby requiring a judgment as a matter of law notwithstanding the finding. Inclusion of undisputed evidence in the scope of review for cases governed by the preponderance of the evidence proof standard makes sense because evidentiary review of all of the undisputed facts and circumstances is necessary for the jury to draw inferences from the totality of the evidence in resolving mixed questions of law and fact, and because undisputed evidence can be conclusive under substantive legal principles.

IV. CONCLUSION

Texas appellate courts have conscientiously adhered to standards of legal and factual sufficiency review for many years. Because those standards establish and govern the relationships between judges, juries and reviewing courts, they are of enormous importance to the principled operation of any legal system that pretends to be governed by legal principles rather than a desire to achieve particular results. Nonetheless, periodic reexamination of the standards is necessary to ensure that they match what principled courts do and to give better guidance to the bench and bar.

The Texas Supreme Court's recapitulation of the scope of legal sufficiency review establishes that Judge Calvert's 1960 formulation does not go far enough because it does not explicitly recognize that reasonable juries and reviewing courts cannot fail to consider particular kinds of direct and circumstantial evidence in conducting a legal sufficiency review. Although a reviewing court must assume that a jury resolved disputed facts in favor of its verdict if a reasonable fact finder could do so and must disregard all contrary evidence, undisputed evidence that does not support the verdict should not be disregarded. Such evidence must be considered to properly determine the reasonableness of inferences and because the undisputed evidence may be conclusive.