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Sharon N. Freytag

Michelle E. McCoy

APPELLATE PRACTICE AND PROCEDURE

*Sharon N. Freytag**
*Michelle E. McCoy***

I. INTRODUCTION

OPINIONS in the area of appellate practice and procedure during the Survey period provide appellate practitioners in Texas some guidance, some concern, and some confusion.[1] Guidance comes from the Texas Supreme Court's continued refusal to bar access to appeal based on technicalities. The court has made it clear that a bona fide attempt to comply with the necessary procedural requirements will invoke appellate jurisdiction.[2] The concern exists over decisions like *Commonwealth Lloyd's Ins. Co. v. Thomas*,[3] in which the Dallas court of appeals interpreted Texas Rules of Civil Procedure 301 and 329b to require that a motion for judgment notwithstanding the verdict must be filed within thirty days after judgment, even though the rule does not specifically impose that time limit. Finally, some confusion has resulted following the Texas Supreme Court's decision in *Walker v. Packer*.[4] The Dallas and Houston courts of appeal, for example, have interpreted this important mandamus decision differently in applying it to the availability of mandamus relief from orders on special appearance.[5]

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* B.S., University of Kansas; M.A., University of Michigan; J.D., *cum laude*, Southern Methodist University, Attorney, Haynes and Boone, L.L.P., Dallas, Texas.

** B.S. Louisiana State University; J.D., Southern Methodist University, Attorney, Haynes and Boone, L.L.P., Dallas, Texas.

1. The Survey period extends from late 1991 to late 1992.

2. *See, e.g.*, Mueller v. Saravia, 826 S.W.2d 608 (Tex. 1992) (per curiam); *see also* City of San Antonio v. Rodriguez, 828 S.W.2d 417 (Tex. 1992) (per curiam). Intermediate appellate courts may still rely more heavily on technicalities than the Texas Supreme Court. *See, e.g.*, Moore v. State of Texas, 825 S.W.2d 172 (Tex. App.—Dallas 1992), *rev'd*, 840 S.W.2d 439 (Tex. Crim. App. 1992). When in doubt, practitioners should take the conservative approach to procedural issues.

3. 825 S.W.2d 135 (Tex. App.—Dallas 1992, writ granted), *opinion vacated*, 843 S.W.2d 486 (Tex. 1993). On January 20, 1993, the supreme court granted the parties' agreed motion to dismiss and vacate. The Dallas court of appeals opinion, therefore, cannot be relied upon as precedent. Nonetheless, it is an instructive insight for practitioners into this court of appeals' inclination on the issue of the timeliness of a motion for judgment notwithstanding the verdict.

4. 827 S.W.2d 833 (Tex. 1992).

5. *Compare* Laykin v. McFall, 830 S.W.2d 266 (Tex. App.—Amarillo 1992, orig. proceeding) *with* N.H. Helicopters, Inc. v. Brown, 841 S.W.2d 425 (Tex. App.—Dallas 1992, orig. proceeding).

II. APPEALS BEFORE FINAL JUDGMENT

In rare instances, that became even rarer during this Survey period as a result of the supreme court's opinion in *Walker v. Packer*,[6] "appeal" may be taken before final judgment in the trial court. Petitions for writ of mandamus and appeals of certain interlocutory orders are the two available methods.

A. MANDAMUS

1. The Texas Supreme Court's Comment on Adequate Remedy

Generally, a party seeking mandamus relief must show: (1) a clear abuse of discretion or violation of a duty imposed by law; and (2) no adequate remedy by appeal. The six to three decision by the Texas Supreme Court in *Walker v. Packer*[7] is an important departure from earlier opinions reflecting a flexible approach to the second prong: whether a party has an adequate remedy by appeal.

In *Walker*, the trial court denied the plaintiffs' request for discovery of documents to impeach one of the defendant's expert witnesses. The court of appeals denied mandamus relief. The plaintiffs then sought relief from the Texas Supreme Court. The court denied the petition because, although the trial court abused its discretion in denying discovery, the plaintiffs did not demonstrate that the remedy offered by an ordinary appeal was inadequate.[8] The majority in *Walker* expressly disapproved of cases implying that the expense of additional delay or other costs may justify mandamus in lieu of a regular appeal.[9] Thus, *Walker* establishes a considerably stricter standard for mandamus relief in Texas.

The majority emphasized that an adequate remedy does not exist when the appellate court cannot cure the trial court's discovery errors after trial.[10] The court cited three examples:

(1) when the trial court erroneously orders the disclosure of
  (a) privileged information that will materially affect the rights of a party[11] or

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6. 827 S.W.2d 833 (Tex. 1992).

7. *Id.*

8. *Id.* The majority pointed out that it did not even discuss the "well-settled requirement" of inadequate remedy by appeal in some of its earlier mandamus opinions. *Id.* at 840-41 (citing Allen v. Humphreys, 559 S.W.2d 798 (Tex. 1977); Barker v. Dunham, 551 S.W.2d 41 (Tex. 1977)). To the extent earlier opinions did not discuss the adequate remedy prong, they are partially overruled. *Id.* at 842.

9. *Id.* (disapproving of Cleveland v. Ward, 285 S.W. 1063 (Tex. 1926); Jampole v. Touchy, 673 S.W.2d 569 (Tex. 1984); Crane v. Tunks, 328 S.W.2d 434 (Tex. 1959)). In disapproved cases the court had applied the standard that the remedy by appeal must be "equally convenient, beneficial, and effective as mandamus." *Id.* (citing *Cleveland*, 285 S.W. 1063, 1068 (Tex. 1926)). The *Walker* court decided that this standard is too lenient. *Id.*

10. 827 S.W.2d at 843.

11. "Once disclosed, retraction of a privileged document is not possible." K.P. v. Parker, 826 S.W.2d 664, 668 (Tex. App.—Dallas, 1992, orig. proceeding); *cf.* Westheimer v. Tennant, 831 S.W.2d 880 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding). In *Westheimer*, the real parties in interest had sued an accountant for professional malpractice in connection with a failed tax shelter investment. The accountant sought to depose a tax attorney who had

(b) trade secrets without a confidentiality order or
(c) "patently" irrelevant or duplicative documents that cause harassment or undue burden, and
(2) when the trial court's error effectively denies a party a reasonable opportunity to develop the merits of a claim or defense,[12] and
(3) when the trial court denies discovery and the discovery cannot be included in the appellate record or the trial court refuses to make it part of the record, thereby precluding appellate review.[13]

Justice Doggett, who dissented in *Walker*, described the majority opinion as a victory for those who would "circumvent discovery and conceal information,"[14] and described the newly-announced criteria for proof of inadequate remedy as a "pseudo-standard," an "excuse for ignoring wrongdoing."[15]

2. *Mandamus Cases in the Discovery Context After* Walker v. Parker

Justice Doggett's concern that mandamus relief is more readily available to the party seeking to "conceal" documents is supported by some recent intermediate court decisions but assuaged by the supreme court's opinions in *Chapa v. Garcia*[16] and *Granada v. First Court of Appeals*.[17]

In *Kern v. Gleason*,[18] for example, the Amarillo court of appeals granted a writ to preclude discovery of the individual defendant's financial statements, tax returns, and other financial information. The court emphasized that the individual did not have an adequate remedy by appeal after disclosure of "virtually all income earned and assets owned by him since 1987,"[19] because once the information is revealed, the error cannot be cured.[20] The court, however, did not explain why the exclusion of all such evidence in a second trial would not cure the error.[21] The court appears not to have held the documents protected by attorney-client privilege or the work product doctrine but rather based its decision on the grounds that the order compelling

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previously advised the real parties in interest about the same tax shelter. The real parties in interest filed a motion for a protective order on the day of the deposition asserting the attorney-client privilege. The accountant filed a motion to compel. The trial court denied the accountant's motion to compel the deposition and the accountant successfully sought mandamus relief from the court of appeals. The court of appeals concluded that the plaintiffs' offensive use of the attorney-client privilege was improper because the prior advice received by the plaintiffs on the same matter that was the subject of their lawsuit cannot be protected from discovery. *Id.* at 884.

12. The inquiry is whether the trial would be a "waste of judicial resources." 827 S.W.2d at 843. The court cited TransAmerican Natural Gas Corp. v. Powell, 811 S.W.2d 913 (Tex. 1991), as an example.

13. 827 S.W.2d at 843-44.

14. *Id.* at 847.

15. *Id.* at 856, 855.

16. No. C-9639, 1992 WL 387404 (Tex. Dec. 31, 1992). *Chapa* is a plurality opinion.

17. 844 S.W.2d 223 (Tex. 1992) (orig. proceeding).

18. 840 S.W.2d 730 (Tex. App.—Amarillo 1992, n.w.h.).

19. *Id.* at 734.

20. *Id.*

21. The information could potentially be excluded in the first trial as the trial court had only ruled on discoverability, not admissibility.

production invaded the individual's privacy.[22] It suggested, however, that a renewed motion to compel would be appropriate if the plaintiffs could not obtain the same information from the corporate defendant.[23] It then stated that the "order compelling discovery . . . was overly-broad, irrelevant and is not reasonably calculated to lead to the discovery of material evidence."[24] The two approaches to the same financial information seem confusing and internally inconsistent.

In *Keene Corp. v. Caldwell*,[25] the appellate court granted the writ to preclude discovery of certain documents sealed in a suit in federal court as well as documents claimed to be privileged or covered by the work product doctrine. The trial court ordered production after *in camera* review because the documents did not "on their face reveal themselves to qualify . . . based on the claims of privilege made for them."[26] Reversing, the appellate court chided the trial court for ignoring the affidavits submitted in support of the privileges claimed as well as the federal court protective order shielding the documents. No adequate appellate remedy exists, stated the court, when privilege and exemptions are the issue.[27]

At the end of the year, the supreme court decided two opinions finding mandamus relief necessary to command discovery of documents. The Texas Supreme Court's opinion in *Granada Corp. v. First Court of Appeals*[28] indicates that mandamus will issue if denial of discovery effectively deprives a party of "a reasonable opportunity to develop the merits of his or her case, so that the trial would be a waste of judicial resources."[29] In this case, a group of investors sued Granada Corporation alleging that Granada had defrauded the plaintiff investors. Documents produced by Granada in response to the investors' discovery request included four memoranda containing communications between Granada's lawyers and Granada's officers. After learning that the memoranda had been disclosed, Granada moved for a protective order, claiming that the memoranda had been inadvertently produced. The trial court granted the protective order and the

22. *Kern*, 840 S.W.2d at 734.

23. *Id.* at 737.

24. *Id.* at 738. The court no doubt meant that the documents were irrelevant and not reasonably calculated to lead to admissible evidence, not the order.

25. 840 S.W.2d 715 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).

26. *Id.* at 728.

27. *Id.* at 721; *see also* GAF Corp. v. Caldwell, 839 S.W.2d 149 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding) (using nearly identical language as *Keene* to reach the same conclusion). The privilege must be substantiated in the trial court, however. A mandamus proceeding is not a hearing *de novo* and the court of appeals considers only the evidence that was before the trial court. *See* Methodist Home v. Marshall, 830 S.W.2d 220, 232 (Tex. App.—Dallas 1992, orig. proceeding). In *Methodist Home*, the relators failed to produce in the trial court any evidence to support their claim that certain documents were protected by the attorney-client privilege. The court held that the relators waived their privilege claim by failing to produce any supporting evidence and rejected the relators' belated attempt to supplement the mandamus record with new evidence. *Id.* at 224, 232.

28. *Granada*, 844 S.W.2d at 223.

29. *Id.* at 226 (citing Walker v. Packer, 827 S.W.2d 833, 843 (Tex. 1992).

investors successfully sought mandamus relief from the court of appeals.[30] The supreme court upheld the court of appeals' determination that the trial court's protective order effectively prevented the investors from maintaining their cause of action against Granada because the four memoranda were "essential" to proving the investors' fraud claims.[31]

In *Chapa v. Garcia*,[32] a plurality of the court conditionally granted a writ to vacate the trial court's order in a products liability action denying discovery of documents concerning design improvements of the Remington Model 700 Rifle. 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."[33] Justice Hecht filed a dissenting opinion, joined by Justices Phillips, Gonzalez and Cornyn, observing 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 example of the supreme court's micromanaging discovery in the trial court.[34]

3. *When Mandamus Relief May Be Available Outside the Discovery Context*

a. Orders on Special Appearance

The Amarillo and Dallas courts of appeal disagreed during the Survey period about the availability of mandamus relief to correct the trial court's erroneous overruling of a special appearance. In *Laykin v. McFall*,[35] the Amarillo court concluded that the erroneous overruling of a special appearance was analogous to one of the three situations outlined by the supreme court in *Walker v. Packer* where appeal is an inadequate remedy because of the excessive burden of going forward. The court stated:

> [w]hen a nonresident's special appearance is erroneously overruled, the burden on the nonresident is great; he must go through an entire trial in order to have the action dismissed on appeal. Furthermore, the burden is far out of proportion to any benefit that may obtain to the other party. In fact, there is no benefit to the other party in having to go through the expense and delay of an entire trial when the action will be dismissed on appeal with the result that the trial was an exercise in futility.[36]

The court granted relief after finding that the defendant had insufficient minimum contacts with Texas.[37]

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30. *See* Freeman v. Bianchi, 820 S.W.2d 853 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding).
31. *Granada*, 844 S.W.2d at 226.
32. No. 3-9639, 1992 WL 387404 (Tex. Dec. 31, 1992) (orig. proceeding).
33. *Id.* at *1.
34. *Id.* at *9.
35. 830 S.W.2d 266 (Tex. App.—Amarillo 1992, orig. proceeding).
36. *Id.* at 268.
37. *Id.* at 271.

The Dallas court of appeals declined to follow *Laykin* and denied mandamus relief from an order overruling a special appearance in *N.H. Helicopters, Inc. v. Brown*.[38] The court refused to distinguish, for purposes of mandamus, a ruling on a special appearance from a ruling on a challenge to subject matter jurisdiction from which appeal after a final judgment is an adequate remedy.[39] The Dallas court's opinion seems a more logical application of *Walker* than the opinion in *Laykin*.

b. Void Orders

Mandamus may issue to correct a void order of the trial court.[40] In *Decker v. Lindsay*,[41] the court decided that a trial court's mediation referral order is void if it requires an unwilling party to negotiate a resolution in good faith. The court of appeals observed that a trial court may refer parties to mediation but it cannot order them to negotiate. To do so violates the open courts provision.[42]

c. Sanction Orders

If a monetary sanction precludes a party from continuing the litigation, the party has no adequate remedy by appeal unless the court defers payment of the sanction until the court renders final judgment.[43] In *Susman Godfrey L.L.P. v. Marshall*,[44] the trial court ordered a law firm to pay $25,000.00 as a sanction before final judgment. The law firm sought mandamus relief on the ground that the trial court's order deprived it of any opportunity to supersede or appeal the order. It argued that under *Braden v. Downey*,[45] payment of a monetary sanction must coincide with the entry of a final judgment. The law firm, however, did not contend that it was unable to pay the sanction or that the sanction would affect its ability to appeal the sanction order after final judgment. The court of appeals therefore denied mandamus relief on the ground that the law firm had an adequate remedy by appeal.[46]

Mandamus will lie if the sanction order prevents the defendant from presenting evidence to develop its defenses and precludes a decision on the

38. 841 S.W.2d 424 (Tex. App.—Dallas 1992, orig. proceeding). The court distinguished Hutchings v. Biery, 723 S.W.2d 347 (Tex. App.—San Antonio 1987, orig. proceeding) (child custody cases raise unique concerns regarding the adequacy of remedy by appeal), and United Mexican States v. Ashley, 556 S.W.2d 784 (Tex. 1977) (assertion of sovereign immunity by a foreign nation presents special considerations not present in the instant case).

39. *N.H. Helicopters*, 842 S.W.2d at 425 (citations omitted).

40. Decker v. Lindsay, 824 S.W.2d 247, 249 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding). This rule does not apply, however, to voidable orders. *Ex parte* Rhodes, 352 S.W.2d 249 (Tex. 1961).

41. 824 S.W.2d 247 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding).

42. *Id.* at 251.

43. *See* Braden v. Downey, 811 S.W.2d 922, 929 (Tex. 1991).

44. 832 S.W.2d 105 (Tex. App.—Dallas 1992, orig. proceeding).

45. *Braden*, 811 S.W.2d at 929.

46. *Susman Godfrey L.L.P.*, 832 S.W.2d at 109. A contention that a monetary sanction may impair a party's ability to continue the litigation must be raised in the trial court or the assertion will be considered waived. *See Braden*, 811 S.W.2d at 929; *Susman Godfrey L.L.P.*, 832 S.W.2d at 109; TEX. R. APP. P. 52(a).

merits as it did in *United States Fire Insurance Co. v. Millard*,[47] where the court struck the defendant's pleadings for failure to comply with discovery requests.

d. Order Denying Postjudgment Motion to Recuse

In *Metzger v. Casseb*,[48] the court of appeals issued a conditional writ mandating that Judge Casseb, a colleague of the trial judge, hear a postjudgment motion to recuse the trial judge. Judge Casseb had originally refused to do so on the basis of lack of jurisdiction. The court of appeals held the trial court had jurisdiction to rule on postjudgment motions to recuse.[49]

4. Mandamus Procedure

A party requesting emergency relief from the appellate court should file its original proceeding sufficiently before the deadline to give the appellate court enough time to determine the merits of the request, rather than seeking such relief at the eleventh hour.[50] In *J. A. and Susie L. Wadley Research Institute and Blood Bank v. Whittington*,[51] the relator filed, at 4:15 p.m. the day before two discovery orders became effective, a motion for leave to file a petition for writ of mandamus and tendered a thirty-eight-page petition and over 200 pages of exhibits. The relator requested that the court of appeals, by the end of the business day (within forty-five minutes) grant an emergency stay to place the discovery on hold pending a decision on the merits of the mandamus petition. The court granted the emergency stay to enable it to examine the petition.[52]

The next morning, the court denied leave to file the petition for writ of mandamus on some points and requested that the real parties in interest respond to the other issues raised in the petition. In its opinion denying the remainder of the relator's request for mandamus relief, the court cautioned practitioners of the dangers of waiting until the last minute to request emergency relief from the court of appeals.[53] Further, the court noted that Texas Rule of Appellate Procedure 121, by its terms, presupposes that the court of appeals has granted the motion for leave to file before it grants temporary relief; the rule does not authorize the court to issue a stay for the sole pur-

47. 838 S.W.2d 935 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding).

48. 839 S.W.2d 160 (Tex. App.—Houston [1st Dist.] 1992, orig. proceeding).

49. *Id.* at 161.

50. *See* J.A. and Susie L. Wadley Research Institute and Blood Bank v. Whittington, 843 S.W.2d 77 (Tex. App.—Dallas 1992, orig. proceeding).

51. *Id.*

52. *Id.* at 79.

53. *Id.* at 83-84. The court's precise warning follows:

> [w]e are convinced that Wadley simply did not consider the position that it was putting this Court in when it sought an emergency stay in so little time. We caution, however, that we might not allow ourselves to be placed in a similar position in the future, whatever the consequences to the relator might be. We say so deliberately, for the guidance of the bar.

Id. at 84.

pose of allowing the court time to review the mandamus petition.[54] Petitioners are well-advised to pay heed to the court's warning that it may not again grant temporary relief solely to give it time to read a mandamus petition.[55]

Although mandamus relief generally must first be sought in the court of appeals, Texas Rule of Appellate Procedure 121 provides an exception to the general rule if there is a "compelling reason" for initially requesting that the supreme court issue a writ of mandamus. In *LaRouche v. Hannah*,[56] the Texas Supreme Court granted a petition for writ of mandamus ordering the Chairman of the State Democratic Executive Committee to place the relator's name on the primary ballot as a candidate for President of the United States. The court found that the "impending election" was a "compelling reason" within the meaning of Rule 121 for the relator's failure to first seek mandamus relief from the court of appeals and found mandamus relief was appropriate because the respondent had failed to fulfill his statutory duties under the Election Code.[57]

B. INTERLOCUTORY APPEALS

1. Orders Denying Motions for Summary Judgment on Sovereign Immunity

Ordinarily, an order denying a motion for summary judgment is interlocutory and non-appealable. Section 51.014(5) of the Texas Civil Practice and Remedies Code, however, provides that "[a] *person* may appeal from an interlocutory order . . . . that . . . . denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state."[58]

During the Survey period, the Dallas court of appeals and the Houston court of appeals for the Fourteenth District disagreed on the issue of whether Section 51.014(5) allows a city to appeal an interlocutory order denying a motion for summary judgment on the basis of sovereign immunity. In *Huddleston v. Maurry*,[59] the Dallas court of appeals concluded that "person" within the meaning of Section 51.014(5) includes the government and its subdivisions.[60] The court rejected the appellees' argument that interpreting "person" to include the government and its subdivisions would result in an overly broad category of appellants under Section 51.014(5) and would allow a governmental subdivision to appeal an interlocutory order based on an individual's immunity even if the individual did not appeal the order.[61] The court reasoned that a governmental subdivision should have an in-

54. *Id.* at 83; *see* TEX. R. APP. P. 121(d) ("[t]he court may grant temporary relief *after granting the motion for leave to file*, ...") (emphasis added)).

55. *J. A. and Susie L. Wadley Research Institute*, 843 S.W.2d at 84.

56. 822 S.W.2d 632 (Tex. 1992).

57. *Id.* at 634.

58. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(5) (Vernon Supp. 1992) (emphasis added).

59. 841 S.W.2d 24 (Tex. App.—Dallas, 1992, writ denied).

60. *Id.* at 29.

61. *Id.*

dependent right to an interlocutory appeal because the governmental subdivision's liability is based on its employee's action.[62]

Just four weeks after the opinion in *Huddleston*, the Houston court of appeals for the Fourteenth District, without citing *Huddleston*, reached the opposite conclusion in *City of Houston v. Kilburn*.[63] The court dismissed, for lack of jurisdiction, the City of Houston's appeal from an order denying its motion for summary judgment based on sovereign immunity, holding that under Section 51.014(5), only an individual may appeal.[64] The court determined that the language of the section, ("who is an officer or employee of the state or [of] a political subdivision of the state") limits who may appeal under Section 51.014.[65] Applications for writ of error were filed in both *Huddleston* and *Kilburn*.[66]

2. *Orders Related to Sealing Court Records*

Rule 76a of the Texas Rules of Civil Procedure provides for appeal of an interlocutory order if it relates to sealing or unsealing court records.[67] In *Chandler v. Hyundai Motor Co.*,[68] the Texas Supreme Court, following its previous holding in *Eli Lilly & Co. v. Marshall*[69], held that an interlocutory appeal under Texas Rule of Civil Procedure 76a(8) is the proper method for complaining of a trial court's denial of a hearing and entry of an order limiting public disclosure of documents.[70] The supreme court disagreed with the court of appeals' opinion that Rule 76a did not address protection from disclosure or dissemination of documents during discovery[71] and remanded the case to the court of appeals for consideration of the petitioner's challenges to the trial court's order restricting dissemination of the documents.[72]

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62. *Id.*

63. 838 S.W.2d 344 (Tex. App.—Houston [14th Dist.] 1992, writ requested).

64. *Id.* at 345.

65. The court stated:

> [i]f Subsection (5) had been written to include the word 'by' before the phrase 'a political subdivision,' or to include a comma after the phrase 'employee of the State,' this Court would have jurisdiction to hear the appeal; however, it was not written in such a way as to grant a political subdivision of the State the right to appeal the denial of a summary judgment.

Id.

66. On March 24, 1993, the Texas Supreme Court issued a per curiam opinion in *Kilburn* denying the application for writ of error. *See* City of Houston v. Kilburn, No. D-3192, 1993 WL 82682 (March 24, 1993). The court concluded that the city could not appeal under 51.014(5) because the city employee had never asserted the defense of qualified immunity. *Id.* at *2. The supreme court's denial of the appeal for writ of error "should not be viewed as approving the court of appeals' assertion that a political subdivision of the state has no right under 51.014(5) to appeal the denial of a motion for summary judgment." *Id.*

67. *See* TEX. R. CIV. P. 76a(8).

68. 829 S.W.2d 774 (Tex. 1992).

69. 829 S.W.2d 157 (Tex. 1992) (per curiam). Practitioners will note the increased use of per curiam opinions by the supreme court and may wish to indicate, if appropriate, in an application for writ of error that the issue(s) presented can be determined per curiam.

70. *Chandler*, 829 S.W.2d at 775. Rule 76a(8) provides that "[a]ny order . . . relating to sealing or unsealing court records shall be deemed to be. . . a final judgment. . . ." TEX. R. CIV. P. 76a(8).

71. *Chandler*, 829 S.W.2d at 774-75.

72. *Id.* at 775.

If the documents are not "court records" under Rule 76a, however, an order sealing documents is "nothing more than a Rule 166b protective order that is not reviewable by [an appellate court] on direct appeal prior to trial."[73] In *Dunshie v. General Motors Corp.*,[74] the trial court granted General Motors' request for a protective order sealing documents under Texas Rule of Civil Procedure 166b(5)(c) and entered a separate order granting alternative relief under Texas Rule of Civil Procedure 76a. The appellant challenged the order by an interlocutory appeal.

As the disputed documents were not made available to the court of appeals for review, the court reviewed the expert testimony presented at the hearing on the motions for protection and concluded that the testimony supported the trial court's finding that the documents "[did] not concern matters that have a probable adverse effect upon the general public health and safety"[75] and that the documents were not governed by Rule 76a.[76] The court dismissed the appeal because the provisions for interlocutory appeal in Rule 76a(8) do not apply if the disputed documents do not fall under the Rule.[77]

3. *Orders Certifying Class Actions*

Section 51.014(3) of the Texas Civil Practice & Remedies Code provides for interlocutory appeal of a class action certification.[78] In *Pierce Mortuary Colleges, Inc. v. Bjerke*,[79] the court of appeals dismissed for want of jurisdiction an appeal from an amended order increasing the size of an existing certified class. The appellant did not timely appeal the order certifying the class, and, as a result, the provisions in Texas Rule of Appellate Procedure 43(f) providing for appellate review of subsequent orders of the trial court in an appeal from an interlocutory judgment, were inapplicable.[80]

The court rejected the appellant's argument that the amended interlocutory order superseded the original order and stated that an amended order certifying a class action must satisfy Section 51.014(3) to be an appealable interlocutory order.[81] "[A]n amended order increasing the size of an existing certified class does not *certify* or *refuse to certify* a class" and therefore does not fall under Section 51.014(3).[82]

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73. *See* Dunshie v. General Motors Corp., 822 S.W.2d 345, 348 (Tex. App.—Beaumont 1992, n.w.h.).

74. *Id.*

75. *Id.* at 347.

76. *Id.* at 348.

77. *Id.*

78. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(3) (Vernon Supp. 1992) ("A person may appeal from an interlocutory order . . . that . . . certifies or refuses to certify a class in a suit brought under [TEX. R. CIV. P. 42]").

79. 841 S.W.2d 878 (Tex. App.—Dallas, 1992, writ denied).

80. *Id.*

81. *Id.*

82. *Id.* (emphasis added).

III. PRESERVATION OF ERROR

A. INTRODUCTION

Goswami v. Thetford[83] is a primer on waiver by failure to preserve error properly. The appellant waived his right to complain of the trial court's admission of evidence by failure to object to the challenged testimony,[84] waived the right to complain of the trial court's failure to submit a definition by failing to request the definition in substantially correct form,[85] waived the right to complain that a definition was misleading by failing to object to its submission,[86] and waived the right to complain of improper jury argument by failing to object, failing to request an instruction, or to move for a mistrial.[87] With that brief introduction on preservation of error generally, this section focuses primarily on the harmful error rule with regard to the admission or exclusion of evidence and leaves other areas of preservation of error, such as mistakes at the jury charge stage, to other Articles in this Survey.

B. EXCLUSION OF EVIDENCE

Rule 52(b) of the Texas Rules of Appellate Procedure requires that a party make a proper offer of proof in order to complain on appeal about the trial court's exclusion of evidence.[88] The record on appeal must show the offer of proof, the objections made to the offer, and the ruling on the objections. An offer and ruling that does not include the basis of the objections is insufficient.[89]

C. ADMISSION OF EVIDENCE

To assure preservation of error, a party must object to each attempt to admit the evidence. When a party properly objects to the admission of evidence but essentially the same evidence is later admitted on other grounds without objection, that party waives any complaint regarding its admission.[90]

In *Marling v. Maillard*,[91] the trial court first sustained the objection of

83. 829 S.W.2d 317 (Tex. App.—El Paso 1992, writ denied).
84. *Id.* at 319.
85. *Id.* at 319-20.
86. *Id.* at 320.
87. *Id.*
88. If, however, the excluded testimony is otherwise in the record, the court of appeals may consider, without a bill of exception, whether exclusion of the evidence was error. Riggs v. Sentry Ins., 821 S.W.2d 701 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
89. Kelly v. Diocese of Corpus Christi, 832 S.W.2d 88, 95 (Tex. App.—Corpus Christi 1992, writ dism'd w.o.j.). The court of appeals in *Kelly* held that the appellant's bill of exception containing the appellant's offer of proof and the trial court's ruling, but not containing the basis of the objection, was insufficient to preserve the appellant's complaint that the trial court improperly excluded a newspaper article because the appellate court could not determine whether the objection was based on hearsay or prejudice to the appellee. *Id.*; *see also*, Crawford v. Deets, 828 S.W.2d 795 (Tex. App.—Fort Worth 1992, writ denied).
90. *See* Circle Y of Yoakum v. Blevins, 826 S.W.2d 753, 756 (Tex. App.—Texarkana 1992, writ denied). *Circle Y* also held that a bystander's bill of exceptions is defective if supported only by affidavits of the attorneys in the case. *Id.* at 755-56.
91. 826 S.W.2d 735 (Tex. App—Houston [14th Dist.] 1992, no writ).

appellant's counsel to the qualifications of an expert witness. The opposing attorney then elicited additional testimony to establish the witness' qualifications, and the court overruled further objections by appellant's counsel. Without objection, the witness then answered a question asking for his opinion. The court of appeals held that the appellant waived the right to complain of the admission of the testimony.[92] By refraining from further objection to the testimony, the appellant's counsel created the impression that she had decided against challenging the testimony in light of the additional predicate.[93]

To preserve error regarding the admission of evidence, objections must, of course, be timely. In *Perez v. Bagous*,[94] for example, the appellant's motion to instruct the jury to disregard two exhibits, made during the second day of jury deliberations, came too late because the appellant had discovered during closing argument that the exhibits had been "tampered with."[95]

D. THE HARMFUL ERROR REQUIREMENT

Proper preservation of error and proof of error in the admission or exclusion of evidence must be accompanied by a showing on appeal that the error "was reasonably calculated to cause and probably did cause rendition of an improper judgment" in the case.[96]

1. Harmful Error in the Admission of Evidence

In *Litton v. Hanley*,[97] the court of appeals found the error harmful because the "whole case turn[ed] on" the trial court's improper admission of parol evidence to vary the terms of an unambiguous agreement.[98] In *Klein Independent School District v. Noack*,[99] a wrongful discharge case, the court of appeals held that the trial court committed reversible error in admitting an unauthenticated copy of findings of the Texas Employment Commission.[100] The Commission's findings negated the employer's defense to the employee's wrongful discharge claim and concerned "a material issue dispositive of the case."[101]

2. Harmful Error in the Exclusion of Evidence

In *Farr v. Wright*,[102] the court of appeals reversed and remanded for a new trial a medical malpractice case based upon the erroneous exclusion of evidence. The trial court excluded evidence of a doctor's treatment of sev-

92. *Id.* at 739.
93. *Id.*
94. 833 S.W.2d 671 (Tex. App.—Corpus Christi 1992, no writ).
95. *Id.* at 675.
96. TEX. R. APP. P. 81(b).
97. 823 S.W.2d 428 (Tex. App.—Houston [1st Dist.] 1992, no writ).
98. *Id.* at 430-31.
99. 830 S.W.2d 796 (Tex. App.—Houston [1st Dist.] 1992, writ denied).
100. *Id.* at 798.
101. *Id.* at 799 (citing Boothe v. Hausler, 766 S.W.2d 788, 789 (Tex. 1989)).
102. 833 S.W.2d 597 (Tex. App.—Corpus Christi 1992, writ denied).

eral similar cases and rendered judgment based on the jury's finding that the doctor was not negligent. The court of appeals concluded that the trial court erred in excluding evidence of the prior cases and further held that the error was harmful because the jury probably would have found the doctor negligent had the evidence been admitted.[103]

The Texas Supreme Court, in *McCraw v. Maris*,[104] found the erroneous exclusion of evidence to be harmful and reversed. The dispute in *McCraw* was whether the surviving spouse or the surviving children were entitled to the proceeds of the decedent's federal employee group life insurance policy. Under a federal statute, the proceeds of the policy go to the surviving spouse unless the decedent signed and filed a written beneficiary designation form. The surviving children claimed that their mother had signed and filed the appropriate form but the form had been lost. The trial court admitted testimony of two witnesses that the decedent routinely completed handwritten duplicate forms before typing and filing an original form. The trial court, however, excluded a handwritten beneficiary designation form designating the surviving children as beneficiaries under the life insurance policy and ruled that the surviving spouse was entitled to the proceeds. The court of appeals affirmed.

The supreme court first concluded that the handwritten duplicate beneficiary designation form was admissible because it was offered only to prove its existence and not for the truth of any matter asserted within the document.[105] In considering whether the trial court's error in excluding the duplicate beneficiary designation form was reversible error, the court noted that it is not necessary for a party to show that "but for" the exclusion of evidence, a different judgment would have resulted; rather, the question is whether the exclusion of evidence "probably resulted in the rendition of an improper judgment."[106] A majority of the court concluded that the error in excluding the duplicate beneficiary designation form was harmful, because the form, coupled with the testimony regarding the decedent's habit of initially completing handwritten duplicate forms prior to typing and filing the original, constituted "crucial circumstantial evidence" that the decedent had filed the appropriate form designating her children as beneficiaries under the policy.[107]

IV. POST-TRIAL MOTIONS

A. MOTIONS FOR NEW TRIAL

1. The Timing and Procedure for Filing

In *Mueller v. Saravia*,[108] the court held that a motion for a new trial which was filed under the original cause number rather than the severed

103. *Id.* at 603.
104. 828 S.W.2d 756 (Tex. 1992).
105. *Id.* at 757.
106. *Id.* at 758 (citations omitted).
107. *Id.*
108. 826 S.W.2d 608 (Tex. 1992) (per curiam).

cause number extended the trial court's plenary power and thus also extended the time for appeal of the severed cause.[109] The trial court had granted a take-nothing summary judgment in favor of one of the defendants, severed the plaintiff's claims against that defendant, and assigned a new cause number. Approximately two weeks later, the trial court granted a take-nothing summary judgment in favor of the other defendant in the original cause. The plaintiff filed a timely motion for new trial under the original cause number and later appealed the summary judgment in the severed cause. The court of appeals held that the appeal was not timely perfected because the motion for new trial filed under the original cause number did not extend the trial court's plenary power.

The Texas Supreme Court reversed, holding that the motion for new trial was sufficient to invoke appellate jurisdiction and avoid dismissal.[110] The court emphasized that the challenged judgment was itself filed under the original cause number and all postjudgment motions by the parties were filed and rulings by the court were made under the original cause number rather than the severed cause number.[111] The attempt to perfect an appeal was bona fide because the motion for new trial was filed under the cause number contained in the challenged judgment and was filed within the thirty-day time period in Rule 329b(a).[112]

Under the Texas Rules of Civil Procedure and Texas Rules of Appellate Procedure, if a filing deadline falls on a Saturday, Sunday, or legal holiday, the deadline is extended to the end of the next day which is not a Saturday, Sunday, or legal holiday.[113] The Texas Supreme Court recently decided whether a day on which the courthouse is closed by order of a county commissioners' court is a "legal holiday" for the purposes of extending the filing deadlines.[114]

In *Miller Brewing Co. v. Villarreal*,[115] the issue was whether a motion for a new trial was timely filed the Monday following Good Friday on which the courthouse was closed by order of the county commissioners' court. The court of appeals had held that Good Friday was not a legal holiday, based on an earlier decision of the supreme court defining "legal holiday" as including only those days specifically designated by the legislature and expressly de-

109. *Id.*

110. *Id.* at 609.

111. *Id.* The court reasoned:

> [a] party should not be punished for 'failure to comply with the terms of an order of severance ignored by [both the opposing party] and the court . . . [and] should be able to look to [the] judgment to determine the cause number under which he should file his motion for new trial.'

Id. (citing Southland Paint Co. v. Thousand Oaks Racket Club, 687 S.W.2d 455, 457 (Tex. App.—San Antonio 1985, no writ).

112. *Mueller*, 826 S.W.2d at 609. *Mueller* is one of several cases demonstrating the Texas Supreme Court's refusal to deny appellate review based on mere technicalities.

113. *See* TEX. R. CIV. P. 4, 5(a).

114. *See* Miller Brewing Co. v. Villarreal, 829 S.W.2d 770 (Tex. 1992).

115. *Id.*

clining to include holidays designated by commissioners' courts.[116] In *Miller Brewing Co.*, the supreme court characterized as dicta the language upon which the court of appeals based its holding and concluded that a restrictive construction of "legal holiday" was not warranted.[117] The court held that under Texas Rule of Civil Procedure 4 "legal holiday" includes days declared as holidays by the county commissioners court and days on which the clerk's office is officially closed.[118] The court further instructed that a party who finds the courthouse closed on the day a document must be filed may mail the document that day and, if received by the clerk within ten days, it will be considered to be timely filed.[119]

2. *The Substance*

A motion for a new trial is the proper vehicle for a complaint of excessive damages.[120] In *Pipgras v. Hart*,[121] the appellants filed a motion for judgment n.o.v. and asked for judgment denying recovery of future medical expenses beyond the amount pled. The court of appeals held that error was waived because the appellants failed to object in a motion for new trial or a motion to limit recovery to the amount pled.[122]

A complaint that the evidence is factually insufficient to support a jury finding must also be preserved in a motion for new trial.[123] In *Hill v. Clayton*,[124] the appellant argued that the jury's finding that the defendant was not negligent was against the great weight and preponderance of the evidence. Although the appellant had filed a motion for new trial urging that

116. *See Miller Brewing Co.*, 822 S.W.2d at 178 (Tex. App.—Antonio 1991), *rev'd*, 829 S.W.2d 770 (Tex. 1992) (citing Blackman v. Housing Auth., 254 S.W.2d 103, 105 (1953).

117. *Miller Brewing Co.*, 829 S.W.2d at 771.

118. *Id.* at 772. In an opinion issued the same day as *Miller Brewing Co.*, the court held that the "legal holiday" language in Texas Rule of Appellate Procedure 5(a) should be interpreted consistently with the same language in Texas Rule of Civil Procedure 4. In *In re V.C.*, 829 S.W.2d 772, 773 (Tex. 1992), the appellants timely filed their affidavits of inability to pay costs of appeal on the next business day following Martin Luther King, Jr. Day, a county holiday by order of the commissioners' court. *Id.* Effective June 11, 1991, Martin Luther King, Jr. Day is a state holiday under Article 4591 of the Texas Revised Civil Statutes ("the holidays statute"). *Id.* at 773 n.1.

119. *Miller Brewing Co.*, 822 S.W.2d at 771; TEX. R. CIV. P. 5, 4(b).

120. TEX. R. CIV. P. 324b(4).

121. 832 S.W.2d 360 (Tex. App.—Fort Worth 1992, writ denied).

122. *Id.* at 367 (citing Siegler v. Williams, 658 S.W.2d 236, 240 (Tex. App.—Houston [1st Dist.] 1983, no writ); William S. Baker, Inc. v. Sims, 589 S.W.2d 492, 493 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.)).

123. TEX. R. CIV. P. 324b(2). Under Texas Rule of Appellate Procedure 52(d) complaints regarding sufficiency of the evidence need not be presented to the trial court in a non-jury case to preserve error on appeal. *See* TEX. R. CIV. P. 52(d). A party may not claim on appeal, however, that the judgment is based on improper conclusions of law if this complaint is not brought to the trial court's attention. *See* Winters v. Arm Refining Co., 830 S.W.2d 737, 738-39 (Tex. App.—Corpus Christi 1992, writ denied). In *Winters v. Arm Refining Co.*, the appellants argued that the trial court's judgment was based on improper conclusions of law. The court of appeals held that any error was waived because the appellants did not object to the judgment or in any way direct the trial court's attention to the error. *Id.* (citing TEX. R. CIV. P. 52(a); Spradley v. Hutchison, 787 S.W.2d 214, 216 (Tex. App.—Fort Worth 1990, writ denied) ("failure to complain to trial court, at any time, about error in its final order so that court might correct the error, if any, will not preserve that error for appellate review")).

124. 827 S.W.2d 570 (Tex. App.—Corpus Christi 1992, no writ).

the evidence was factually insufficient to support the damage award, the appellant waived the right to complain on appeal that the evidence was factually insufficient to support the jury's finding on the negligence issue by his failure to raise this complaint in his motion for new trial.[125]

Complaints of specific jury misconduct must likewise be preserved in a motion for new trial.[126] General allegations of improper motive are not sufficient. The appellant in *Hill v. Clayton* also argued that the jury's failure to find the defendant negligent was a result of jury misconduct. The appellant, however, did not include in his motion for new trial any supporting affidavits and did not allege any specific facts showing jury misconduct.[127] The court therefore found the appellant's "[b]road general allegations" of jury misconduct insufficient to preserve error.[128]

A party complaining of incurable jury argument must raise the argument in a motion for a new trial[129] and satisfy five requirements: (1) the presence of error; (2) that was not invited or provoked; (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial; (4) that was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand from the trial court; and (5) that the argument by its nature, degree, and extent constituted reversible harmful error.[130] In reviewing a complaint of improper jury argument, the appellate court evaluates the entire case, and the appellant must show, considering all of the applicable factors, that the probability that the improper argument caused harm exceeds the probability that the verdict was based on the evidence.[131]

B. PREMATURE MOTIONS FOR NEW TRIAL

Texas Rule of Civil Procedure 306c provides that a prematurely filed motion for a new trial or a request for findings of fact and conclusions of law is effective and will be "deemed to have been filed on the date of but subsequent to" the time of signing of the judgment the motion for new trial assails or the time the judgment is signed.[132] Thus, even a prematurely filed motion for new trial may invoke the extended appellate timetable for perfecting an appeal.[133]

Does a motion for new trial that is both filed and overruled before a final

125. *Id.* at 574 (citing TEX. R. CIV. P. 324(b); TEX. R. APP. P. 52(d)).
126. TEX. R. CIV. P. 324b(1).
127. *Hill*, 827 S.W.2d at 574.
128. *Id.* (citing TEX. R. CIV. P. 327).
129. TEX. R. CIV. P. 324(b)(5).
130. *See* Macedonia Baptist Church v. Gibson, 833 S.W.2d 557 (Tex. App.—Texarkana 1992, writ denied) (citing Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 839 (Tex. 1979)).
131. *Standard Fire Ins. Co.*, 584 S.W.2d at 840. In *Gibson*, the court of appeals rejected each of the appellant's eleven complaints of improper jury argument. 833 S.W.2d at 561-63. Portions of the argument were not properly objected to. Other portions of the argument did not constitute error. As to the remainder of the argument, the court concluded that the appellant failed to show that the error constituted reversible error. *Id.* at 563.
132. TEX. R. CIV. P. 306c.
133. TEX. R. APP. P. 58(a), 41(a)(1).

judgment is signed serve to extend the appellate timetable? The Dallas court of appeals answered no to this question in *A.G. Solar & Co., Inc. v. Nordyke*.[134] The court reasoned that if a premature motion for new trial has already been overruled, it can no longer assail a later judgment under Rule 306c and can no longer "be properly applied" to that judgment under Rule 58(a).[135]

The Houston court of appeals for the First District refused to follow *A. G. Solar & Co.*, however. In *Harris County Hospital District v. Estrada*,[136] the court withdrew its earlier opinion dismissing an appeal for lack of jurisdiction and held that the timetable was extended by a premature motion for new trial that was overruled by written order six days before a final judgment was signed.[137] The court noted that requiring a "live" pleading for application of Civil Rule 306c or Appellate Rule 58(a) would defeat the purpose of those rules to assure that cases are not dismissed simply because a motion for new trial was prematurely filed.[138] The court found "no significant difference" between a premature motion that has been prematurely overruled and a premature motion that has not been previously overruled.[139] The court thus held:

> [w]hen the trial judge denies some or all relief sought in a premature motion for new trial, the motion can 'assail' those particular parts of a subsequent judgment under Rule 306c of the Texas Rules of Civil Procedure and can 'be properly applied' to the subsequent judgment under Rule 58(a) of the Texas Rules of Appellate Procedure.[140]

C. POSTJUDGMENT PLENARY POWER

When no motion for a new trial is filed, a trial court has plenary power under Rule 329b(d) of the Texas Rules of Civil Procedure to make additional orders within thirty days after the judgment is signed.[141] Orders signed after this thirty-day period are void. In *Giles v. Giles*,[142] the trial court, over four months after the final judgment was signed, signed an order awarding additional attorneys' fees and ordering that a cash bond be posted to cover these fees. The court of appeals held that the trial court's order was a nullity because it was signed outside the period of the trial court's plenary power and further held that the trial court lacked authority to order an additional cash bond because its power under Texas Rule of Appellate Procedure 46(c) to increase or decrease the amount of the cost bond or a deposit had expired thirty days after the bond or certificate was filed.[143]

134. 744 S.W.2d 646 (Tex. App.—Dallas 1988, no writ).
135. *Id.* at 647-48.
136. 831 S.W.2d 876 (Tex. App.—Houston [1st Dist.] 1992, no writ).
137. *Id.* at 878.
138. *Id.* at 880.
139. *Id.*
140. *Id.*
141. *See* TEX. R. CIV. P. 329b(d).
142. 830 S.W.2d 232 (Tex. App.—Fort Worth 1992, no writ).
143. *Id.* at 239.

Moreover, in *Carrera v. Marsh*,[144] the court held the trial court had no authority to grant a new trial because the defendant did not properly invoke Texas Rule of Civil Procedure 306a to extend the period of the court's plenary power.[145] Rule 306a allows a litigant who did not receive notice or acquire actual knowledge of the judgment within twenty days of the signing of the judgment to petition the court for a new trial, if done within ninety days of the signing of the judgment.[146] In *Carrera*, the party failed to file a verified motion for new trial to establish a prima facie case of no notice and also failed to obtain a hearing. Both are required to invoke Rule 306a.[147] The trial court therefore had no jurisdiction to grant a new trial.[148]

D. POSTJUDGMENT MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Although neither Rule 301 nor Rule 329b contains a time limit for filing a motion for judgment notwithstanding the verdict, the Dallas court of appeals recently held in a case that was subsequently vacated by agreement that this motion must be filed within thirty days after the judgment is signed. In *Commonwealth Lloyds Insurance Co. v. Thomas*,[149] a case involving breach of the duty of good faith and fair dealing in the insurance context, the appellant timely filed a motion for judgment n.o.v. and a motion for new trial. Then, more than thirty days after the judgment was signed, the Texas Supreme Court issued its opinion in *Murray v. San Jacinto Agency, Inc.*,[150] regarding the statute of limitations for a bad faith claim. Based on the *Murray* decision, the appellant filed an amended motion for judgment n.o.v. asserting that the plaintiffs' claim was barred by limitations. The trial court denied the amended motion.

The court of appeals affirmed, holding that the amended motion for judgment n.o.v. was untimely and a nullity.[151] It relied on Rule 329b which specifically requires that certain postjudgment motions be filed within thirty days after the judgment is signed.[152] The court equated an amended postjudgment motion for judgment n.o.v. with an amended motion to modify, correct, or reform the judgment and held that each is governed by subdi-

144. No. 08-92-00335-CV, 1992 WL 34858 (Tex. App.—El Paso, Nov. 25, 1992, orig. proceeding).

145. *Id.* at *6.

146. TEX. R. CIV. P. 306a(4).

147. *Id.* 306a(5).

148. *Carrera*, 1992 WL 34858 at *6; *see also* Hjalmarson v. Langley, 840 S.W.2d 153 (Tex. App.—Waco 1992, no writ) (a trial court cannot enter sanctions order after plenary power expires).

149. 825 S.W.2d 135 (Tex. App.—Dallas 1992, writ granted), *opinion vacated*, 843 S.W.2d 486 (Tex. 1993).

150. 800 S.W.2d 826 (Tex. 1990).

151. *Commonwealth*, 825 S.W.2d at 140-41 (citing Voth v. Felderhoff, 768 S.W.2d 403, 412 (Tex. App.—Fort Worth 1989, writ denied); Equinox Enter., Inc. v. Associated Media, Inc., 730 S.W.2d 872, 875 (Tex. App.—Dallas 1987, no writ)).

152. Under Rule 329b, motions and amended motions for new trial and motions to modify, correct or reform a judgment must be filed within thirty days after the judgment is signed. *See* TEX. R. CIV. P. 329b(a),(b),(g); *Commonwealth*, 825 S.W.2d at 141.

vision (g) of the Rule, as is any post-judgment motion that would result in a "substantive change" in the judgment. It ruled that each must be filed within thirty days after the judgment is entered.[153] The court recognized that subdivision (g) does not specifically refer to *amended* motions, but emphasized that the same deadline applies to amended motions as original motions for new trial.[154]

The order vacating and dismissing erases the precedential value of *Commonwealth*. Practitioners should nonetheless take note of the original holding that is contrary to the numerous cases holding that a motion for judgment n.o.v. may be filed any time before or after judgment as long as the filing occurs before the court's plenary power expires.[155]

E. Postjudgment Trial Amendments

A party may ask the trial court for permission to amend its pleading after a verdict but before judgment.[156] In *Border to Border Trucking v. Mondi, Inc.*,[157] the appellant argued that the trial court abused its discretion in permitting the appellee, thirty-nine days after the judgment was signed, to amend its pleadings to conform with the jury verdict and the judgment. The majority acknowledged that the trial court has broad discretion in permitting post-verdict trial amendments but held that this discretion does not extend to postjudgment trial amendments.[158] The court stated: "[t]here should be a time in the trial of the cause when amendments to the pleadings should end, and it seems to us that time is after judgment has been rendered in a cause."[159]

Justice Hinojosa concurred in the result but would hold that the trial court has discretion to permit post-trial amendments to pleadings after the judgment is signed.[160] Rule 63 does not specify an outer limit on the trial court's power to allow amendments to pleadings and, under Rule 329b(e), the trial court, within its plenary power could vacate its judgment, grant the trial amendment, and then enter a new judgment.[161] The concurrence expressed the view that the trial court should have the power to permit amendments to the pleadings after the judgment is signed without "going through the motions" of vacating the first judgment, permitting the amendment, and

153. *Commonwealth*, 825 S.W.2d at 141; *cf.* United States Fire Ins. Co. v. State of Texas, 843 S.W.2d 283 (Tex. App.—Austin 1992, n.w.h.) (motion to correct and/or modify judgment requested a "substantive change" in judgment and thus extended time for appeal).

154. 825 S.W.2d at 141.

155. *See, e.g.*, Eddings v. Black, 602 S.W.2d 353, 356 (Tex. App.—El Paso 1980, writ ref'd n.r.e.).

156. *See* Greenhalgh v. Service Lloyds Ins. Co., 787 S.W.2d 938, 940 (Tex. 1990); Tex. R. Civ. P. 63, 66.

157. 831 S.W.2d 495 (Tex. App.—Corpus Christi 1992, no writ).

158. *Id.* at 499 (citing Morris v. Hargrove, 351 S.W.2d 666, 668 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.); Warren v. Ward Oil Corp., 87 S.W.2d 501, 502-03 (Tex. Civ. App.—Texarkana 1935, writ dism'd)).

159. *Id.*

160. *Id.* (Hinojosa, J., concurring).

161. *Id.* at 500 (citing Candelier v. Ringstaff, 786 S.W.2d 41, 43 (Tex. App.—Beaumont 1990, writ denied)).

then rendering a second identical judgment.[162]

V. SUPERSEDEAS BONDS

An appellant cannot be compelled to post a supersedeas bond that includes the amount of appellate attorneys' fees because such fees are not final until after the appeal is determined.[163] In *Hughes v. Habitat Apartment*[164] the trial court included in the amount of the bond an award of appellate attorneys' fees. The court of appeals granted the appellant's motion to review the amount of the bond and observed that a supersedeas bond is not intended to provide security for damages that have not been finally determined.[165] It therefore ordered the amount of the supersedeas bond reduced by the amount of the appellate fees.[166]

Rule 48 provides that a party may file, in lieu of a supersedeas bond, a cash deposit of certain negotiable obligations.[167] In some circumstances, an appellant is not allowed to withdraw his cash deposit even if the appellate court reverses and remands for a new trial.[168] If, for example, the appellant becomes insolvent during the appeal and the appellate court affirms liability and reverses and remands only for a determination of the amount of damages and attorneys' fees, the appellant's cash deposit in lieu of a supersedeas bond may be legally retained to protect the injured party pending retrial. In *Resolution Trust Corp. v. Chair King, Inc.*,[169] the court held that a deposit of cash in lieu of a supersedeas bond remains in effect to secure a judgment that has been reversed as to damages only if the deposit is made with the conditional language prescribed by Rule 47(a).[170] The underlying action was a wrongful eviction claim by Chair King against Gill Savings Association. The trial court rendered judgment for Chair King, awarding it damages and attorneys' fees. Gill made a cash deposit in the registry of the court to supersede the judgment.[171]

The court of appeals reversed the damage award, reduced the attorneys' fees award, and remanded for a retrial on damages. While the case was pending before the Texas Supreme Court, the Resolution Trust Corporation was appointed Gill's receiver. The supreme court upheld the liability findings, affirmed part of the attorneys' fees award, and remanded the case on the limited issue of the amount of damages and certain attorneys' fees.

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162. *Id.* at 501.

163. *See* Hughes v. Habitat Apt., 828 S.W.2d 794 (Tex. App.—Dallas 1992, leave denied) (per curiam).

164. *Id.*

165. *Id.* at 795 (citing TEX. R. APP. P. 47).

166. *Id.*

167. TEX. R. APP. P. 48.

168. *See* Resolution Trust Corp. v. Chair King, 827 S.W.2d 546 (Tex. App.—Houston [14th Dist.] 1992, writ requested).

169. *Id.*

170. *Id.* at 550.

171. *See* TEX. R. APP. P. 48. Rule 48 states that a deposit of cash or a negotiable obligation may be filed in lieu of a surety bond, "conditioned in the same manner as would be a surety bond for the protection of other parties." *Id.*

Chair King successfully sought a temporary injunction preventing the RTC from withdrawing the cash deposited to supersede the judgment against Gill.

The court of appeals rejected the RTC's argument that the money deposited in lieu of a bond should be returned to it because the judgment had been reversed on appeal.[172] It acknowledged that case law holds that "under the explicit language in a supersedeas bond, a surety is not liable where the judgment awarding damages is reversed on appeal."[173] The issue in *Chair King*, however, was whether a cash deposit made without such "conditional language" remained in effect.[174] The majority in *Chair King* refused to follow *AmWest Saving Association v. Farmers Market of Odessa, Inc.*[175] In *AmWest* the judgment debtor deposited negotiable securities in lieu of a supersedeas bond as permitted by Rule 48 and did not include any language limiting the deposit to the judgment on appeal. The appellate court in *AmWest* remanded the case for a new trial and the district court held that the negotiable securities deposited must be released.[176]

The *Chair King* court distinguished *AmWest* on the basis that the appellate court in *AmWest* remanded the entire case for a new trial on both liability and damages, whereas the remand in *Chair King* was limited only to damages.[177] Although the portion of the judgment relating to damages was reversed and remanded for a new trial, the court held that the RTC was not entitled to return of the deposit.[178] "To hold otherwise would render the Rule 48 requirement of conditional language meaningless."[179]

According to Justice Robertson's dissent, once Gill obtained a reversal of the damages portion of the judgment on appeal, he had "prosecute[d] [his] appeal with effect" and was entitled to his deposit.[180] Justice Robertson criticized the majority for refusing to follow *AmWest* and two Texas appellate court decisions holding that the same principles and rules of law apply to supersedeas bonds as to cash deposits in lieu of a supersedeas bond.[181]

A cash deposit does not suspend execution of the judgment unless it covers the full amount of the judgment, costs, and postjudgment interest for one year.[182] The judgment creditor who contests the sufficiency of the deposit must seek a ruling from the trial court on the sufficiency of the amount

172. 827 S.W.2d at 549-51.

173. *Id.* at 550.

174. *Id.* Rule 48 states a cash deposit may be conditioned in the same manner as a security bond.

175. 753 F. Supp. 1339 (W.D. Tex. 1990).

176. *Id.* at 1342-44 (citing Neeley v. Bankers Trust Co., 848 F.2d 658, 659 (5th Cir. 1988)) (quoting Aetna Cas. & Sur. Co. v. LaSalle Pump & Supply Co., 804 F.2d 315, 317 (5th Cir. 1986)).

177. 827 S.W.2d at 551.

178. *Id.*

179. *Id.*

180. *Id.* at 554-55 (Robertson, J. dissenting).

181. *Id.* at 555. Justice Robertson cited Mea v. Mea, 464 S.W.2d 201 (Tex. Civ. App.—Tyler 1971, no writ), and Robertson v. Land, 519 S.W.2d 227 (Tex. Civ. App.—Tyler 1975, no writ), for the proposition that the same rules apply to supersedeas bonds and cash deposits.

182. *See* Gullo-Haas Toyota, Inc. v. Davidson, Eaglesen & Co., 832 S.W.2d 418, 419 (Tex. App.—Houston [1st Dist.] 1992, no writ).

before obtaining review by the appellate court.[183]

VI. PERFECTING THE APPEAL

A. THE APPEAL BOND OR NOTICE OF APPEAL

1. The Sufficiency of the Notice

In *City of San Antonio v. Rodriguez*,[184] the Texas Supreme Court affirmed the policy that "the decisions of the courts of appeals [should] turn on substance rather than procedural technicality."[185] An instrument that is a "bona fide attempt to invoke appellate court jurisdiction" is a sufficient notice of appeal.[186] In *Rodriguez* the city timely filed a notice of appeal with an incorrect cause number. When the clerk discovered the error, she corrected it by substituting the correct cause number on the notice of appeal. The clerk's office then informed the city's attorney of the correction.

The court of appeals granted the appellees' motion to dismiss on the ground that the notice of appeal containing the incorrect cause number was ineffective to perfect the city's appeal.[187] The Texas Supreme Court reversed,[188] concluding that *Philbrook v. Berry*,[189] upon which the court of appeals relied in dismissing the appeal, was inapposite because in *Philbrook* the named parties in each cause of action were identical, and the separate cause numbers were crucial to avoid confusion.[190] In *Rodriguez*, however, the court concluded that the incorrect cause number could not have been confused with the case on appeal, and the trial court entered only one judgment from which the city could have appealed.[191] Because the city's notice of appeal complied with Texas Rule of Appellate Procedure 40(a)(2), "but for the erroneous cause number," the Texas Supreme Court held that the city had timely perfected its appeal.[192]

In *Smith v. Steen*[193] the court followed the "bona fide attempt" rule and withdrew its earlier opinion dismissing the appeal for lack of jurisdiction.[194] In *Steen*, after the trial court denied the plaintiff's petition for increased child support, the Attorney General of Texas filed a notice of appeal. The court of appeals concluded that it "[had] no choice but to dismiss the appeal" be-

183. *Id.* at 420.
184. 828 S.W.2d 417 (Tex. 1992) (per curiam).
185. *Id.* at 418 (quoting Crown Life Ins. Co. v. Estate of Gonzalez, 820 S.W.2d 121 (Tex. 1991) (per curiam)).
186. *Id.* (quoting Grand Prairie Indep. Sch. Dist. v. Southern Parts Imports, Inc., 813 S.W.2d 499, 500 (Tex. 1991) (per curiam)).
187. 810 S.W.2d 405, 407-08 (Tex. App—San Antonio 1991), *rev'd*, 828 S.W.2d 417 (Tex. 1992).
188. 828 S.W.2d at 418. The Court stated that whether the clerk's actions were proper or authorized by the rules should not be determinative of the city's ability to pursue an appeal. *Id.* at 417 n.3.
189. 683 S.W.2d 378 (Tex. 1985) (per curiam).
190. *Rodriguez*, 828 S.W.2d at 418.
191. *Id.* (citing El Paso Cent. Appraisal Dist. v. Montrose Partners, 754 S.W.2d 797, 799 (Tex. App.—El Paso 1988, writ denied)).
192. *Id.*
193. 833 S.W.2d 178 (Tex. App.—Austin 1992, no writ).
194. *Id.* at 179.

cause the notice of appeal was not filed by a party to the trial court's final judgment.[195]

After the dismissal, the attorney general filed an amended notice of appeal. On the attorney general's motion to reinstate the appeal, the court withdrew its earlier judgment, held that the original notice of appeal was a bona fide attempt to invoke the court's jurisdiction, and granted the motion to reinstate based on the amendment of the defective notice of appeal.[196]

2. *The Filing of the Cost Bond*

a. The Authorized Signators

An appeal is perfected when a bond, cash deposit or affidavit in lieu thereof is filed.[197] A party's attorney may sign an appeal bond on behalf of the party.[198] In Massey v. Galvan[199] the appellees moved to dismiss the appeal because the appellant's attorney signed on the line designated for the principal's signature with the words "David R. Weiner, attorney for Janet Massey, et al." typewritten above the attorney's signature.[200] The court of appeals denied the motion to dismiss, holding that an appellant's attorney has authority to execute the bond "on behalf of the appellant."[201]

b. Requests for Extension

Under Texas Rule of Appellate Procedure 41(a)(2) the court of appeals may grant an extension of time for the late filing of a cost bond if the bond is filed within fifteen days after the last day allowed and a motion is filed in the court of appeals reasonably explaining the need for the extension.[202] The motion for extension of time to file a cost bond must be timely filed with the *appellate* court, not the trial court, to avoid dismissal for want of jurisdiction.[203]

In *El Paso Sharkey's Billiard Parlor, Inc. v. Amparan*,[204] the appellants filed their cost bond with the trial court within fifteen days after it was due. The motion for extension of time to file the cost bond was filed with the trial court, however, rather than the appellate court. The appellants later filed a motion for extension of time in the court of appeals; however, the motion

195. Attorney Gen. v. Steen, 833 S.W.2d 175, 178 (Tex. App.—Austin 1992), *judgment withdrawn, appeal reinstated*, Smith v. Steen, 833 S.W.2d 178 (Tex. App.—Austin 1992, no writ).

196. *Smith*, 833 S.W.2d at 179.

197. TEX. R. APP. P. 40.

198. Massey v. Galvan, 822 S.W.2d 309, 312-13 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

199. 822 S.W.2d 309.

200. *Id.* at 312.

201. *Id.* (citing Jefferies v. David, 759 S.W.2d 6, 8 (Tex. App.—Corpus Christi 1988), *writ denied per curiam*, 764 S.W.2d 559 (Tex. 1989)). The court distinguished cases in which a non-party or one without legal authority to act on behalf of the party appeared on the bond as principal. *Id.* at 313.

202. *See* TEX. R. APP. P. 41(a)(2).

203. *Id.*

204. 831 S.W.2d 3 (Tex. App.—El Paso 1992, writ denied).

was filed four days after it was due. Even though the appellants attempted to offer a reasonable explanation for failing to file their motion for extension of time, they did not explain their failure to timely file the cost bond.[205] The court emphasized that the reasonable explanation requirement of Rule 41(a)(2) pertains to the failure of a party to timely file a cost bond, not to the untimely filing of a motion for extension of time to file the bond.[206] The court thus dismissed the appeal for want of jurisdiction.[207]

c. The Proper Addressee

The Court of Criminal Appeals of Texas recently reversed an *en banc* decision of the Dallas court of appeals addressing whether a cost bond which was addressed to the bond forfeiture clerk without specifying district or county clerk was sent to the proper clerk and properly addressed within the meaning of Texas Rule of Appellate Procedure 4(b).[208] In *Moore v. State*[209] the cost bond, due on September 9, 1992, was mailed on September 5, 1991 in an envelope addressed to the bond forfeiture clerk on the second floor of the Frank Crowley Courts Building. The district clerk's file stamp showed that the bond was not received by the clerk until September 16, 1991. The appellant did not file a timely motion to extend the time for filing the cost bond.

In a 7-6 opinion, a majority of the court of appeals concluded that the envelope was not "properly addressed" because it did not identify whether the district clerk or the county clerk was the intended recipient.[210] The majority held that for a paper to be considered "sent to the proper clerk" and "properly addressed" for purposes of Rule 4(b) of the Texas Rules of Appellate Procedure (the "mailbox rule"), the address on the envelope "must identify with sufficient specificity the exact clerk for whom it is intended."[211] The dissent criticized this "hypertechnical interpretation" of Rule 4(b) and the resulting dismissal of the appeal on the "slimmest of technical grounds."[212] Recognizing that the appellate rules "should be construed to accomplish their manifest purpose to eliminate jurisdictional pitfalls that result in dismissals on technical grounds,"[213] the dissent "would refuse to elevate a trivial omission in an address to an empty technicality that deprives a litigant of his appeal."[214]

The Texas Court of Criminal Appeals agreed with Justice Kaplan's dis-

205. *See* TEX. R. CIV. P. 41(a)(2).
206. *El Paso Sharkey's Billiard Parlor, Inc.*, 831 S.W.2d at 5.
207. *Id.* (citing Davies v. Massey, 561 S.W.2d 799, 800-01 (Tex. 1978)).
208. 840 S.W.2d 439 (Tex. Crim. App. 1992) (per curiam) (court of appeals opinion at 825 S.W.2d 172 (Tex. App.—Dallas 1992)).
209. *Id.*
210. 825 S.W.2d at 173.
211. *Id.* at 174.
212. *Id.* at 175-76 (Kaplan, J., dissenting).
213. *Id.* at 176 (quoting Miller v. Hernandez, 708 S.W.2d 25, 27 (Tex. App.—Dallas 1986, no writ)).
214. *Id.*

sent, reversed the court of appeals and ordered the appeal reinstated.[215] Relying on two cases the court of appeals expressly refused to follow,[216] the Court of Criminal Appeals held that the cost bond was within the constructive custody or control of the district clerk when it arrived in the receiving department, was received and file-stamped within the ten day period provided in Rule 4, and, therefore, was timely filed.[217] Justice Campbell, concurring, would not rely on the principle of constructive possession but would reach the same result based on the fact that the bond was timely mailed and was filed within the ten day grace period of Rule 4.[218] Justice Campbell stated that "to hold that constructive possession applies to the present case could mean that once an instrument arrives in a building's mail department, the instrument has been properly filed."[219]

B. PERFECTING APPEAL AFTER PERMISSION TO APPEAL AS INDIGENT DENIED

Texas Rule of Appellate Procedure 41(a)(2) gives an appellant an additional ten days to file a cost bond if the trial court sustains a contest to the appellant's affidavit of indigency.[220] This rule, however, does not increase the time provided in Rule 41(a)(1) for perfecting the appeal. Therefore, a potential problem arises if the appellant challenges through mandamus the trial court's order denying him permission to appeal as an indigent.

In *White v. Baker & Botts*[221] the appellant timely filed an affidavit of inability to give cost bond, and the district clerk timely contested the affidavit.[222] The appellant had filed a motion for new trial and therefore was required to perfect his appeal within ninety days after the judgment was signed.[223] The trial court sustained the contest.[224] On December 4, 1991, the deadline for perfecting the appeal, the appellant filed in the court of appeals a motion for leave to file a petition for writ of mandamus.[225] The court

215. 840 S.W.2d at 441.

216. 825 S.W.2d at 173-74. In Mister Penguin Tuxedo Rental & Sales, Inc. v. NCR Corp., 787 S.W.2d 371, 372 (Tex. 1990) (per curiam), the Texas Supreme Court ruled that a motion for new trial timely delivered to the court administrator and later turned over to the district clerk was timely filed. In Gonzalez v. Vaello, 91 S.W.2d 904, 905 (Tex. Civ. App.—San Antonio 1936, writ dism'd), the court held that an original petition picked up by the courthouse janitor at the post office on the last day before the statute of limitations ran and left in the district clerk's internal mailbox was timely filed, even though the district clerk did not see the petition until two days later.

217. 840 S.W.2d at 441.

218. *Id.* (Campbell, J., concurring).

219. *Id.*

220. *See* TEX. R. APP. P. 41(a)(2).

221. 833 S.W.2d 327 (Tex. App.—Houston [1st Dist.] 1992, writ requested).

222. *See* TEX. R. APP. P. 40(a)(3)(A), 40(a)(3)(C).

223. 833 S.W.2d at 328 (citing TEX. R. APP. P. 41(a)(1)).

224. If the trial court sustains the contest and the 90 days has expired, Rule 41(a)(2) gives the appellant an additional 10 days to perfect the appeal. TEX. R. APP. P. 41(a)(2). With the ten day extension provided in Rule 41(a)(2), the appellant in *White* was required to file his bond by December 2, 1991, but the 90 day period under Rule 41(a)(1) had not yet expired; therefore, December 4, 1991 was the deadline for perfecting the appeal. 833 S.W.2d at 328.

225. Mandamus is the proper method of reviewing the trial court's ruling on an affidavit of indigence. *Id.* at 329 (citing Allred v. Lowry, 597 S.W.2d 353, 354 n.2 (Tex. 1980)).

of appeals denied leave to file the petition for writ of mandamus, and the appellant timely filed a motion for rehearing, which was overruled on January 23, 1992. Eight days after the court of appeals overruled the motion for rehearing, the appellant filed a cost bond with the trial court. A divided court of appeals held that the appeal bond was not timely filed.[226] The majority noted that "Rule 41(a)(2) extends the deadline to perfect an appeal by ten days when the *trial* court refuses to permit a party to appeal as an indigent;" however, the rule does not provide for an extension of time if the *court of appeals* denies leave to file a petition for mandamus to review the trial court's order.[227] The majority concluded that it did not have the authority to enlarge its jurisdiction by interpreting Rule 41(a)(2) to give the appellant an additional ten days from the date the mandamus petition was disposed of within which to perfect an appeal.[228] The court observed that "[o]nly the supreme court can interpret Rule 41(a)(2) to enlarge a jurisdictional time limit."[229]

This holding, as the court recognized, effectively eliminates appellate review of a case if an appellant is unsuccessful in challenging by mandamus the trial court's order sustaining the contest.[230] A party will not likely be able to obtain a final ruling by the appellate court on the mandamus action and post a bond within such a short time period.[231]

The court of appeals urged the supreme court to resolve this problem, but until the matter is resolved, the court offered the following advice: "[A]n appellant who attempts to challenge by mandamus the trial court's order denying him leave to appeal as an indigent, should ask the court of appeals to enter a temporary order suspending the time to file the appeal bond under Rule 41(a)(2). Such an appellant should be prepared to file the appeal bond within the ten days permitted by Rule 41(a)(2), as suspended by the court of appeals."[232]

The dissenting justice disagreed with the majority's narrow reading of Rule 41(a)(2)[233] because the majority's decision renders meaningless the right to seek mandamus review from an order denying a party permission to appeal as an indigent.[234] If a party has filed a motion for leave to file a petition for mandamus relief from such an order, filing an appeal bond within ten days after the contest is sustained would render the mandamus proceeding moot because the filing of an appeal bond operates as an aban-

226. 833 S.W.2d at 331.

227. *Id.* at 329. The court stated that Rule 41(a)(2), by its own terms, applies "only to the court that *sustains* the contest, not one that *reviews* the ruling on the contest." *Id.* at 330.

228. *Id.* at 329 (citing TEX. R. APP. P. 2(a)); Sifuentes v. Texas Employers' Ins. Ass'n, 754 S.W.2d 784, 788 (Tex. App.—Dallas 1988, no writ).

229. *Id.*

230. *Id.* at 330.

231. *Id.* at 329-30. The court noted that under Rule 41(a)(2) the appellant actually has 25 days from the trial court's ruling because the appellant may file a motion to extend time to file the appeal bond within 15 days of the date it is due. *Id.* at 329 n.7.

232. *Id.* at 331.

233. *Id.* at 331-32 (Mirabel, J., dissenting).

234. *Id.* at 331.

donment of any attempt to appeal as an indigent.[235] According to the dissent, the contest to an affidavit of inability to pay costs is not *finally sustained* within the meaning of Rule 41(a)(2) until the court of appeals has ruled on any challenge to the trial court's order.[236]

VII. SUMMARY JUDGMENT

A. PRESERVATION OF ERROR

Defects regarding the timing or service of a motion for summary judgment cannot be raised for the first time on appeal.[237] In *Negrini v. Beale*[238] the appellants did not file a response to the motion for summary judgment or otherwise complain in the trial court of improper or untimely notice of the motion under Rule 166a(c).[239] Accordingly, they waived their complaint.[240] Likewise, Rule 166a(f) states that "[d]efects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection."[241] Thus, just as objections to improper or untimely notice, objections to affidavits or attachments in support of or in opposition to a motion for summary judgment cannot be raised for the first time on appeal.[242]

In ruling on a motion for summary judgment, a trial court may consider only pleadings and proof "on file at the time of the hearing, or filed thereafter and before judgment with permission of the court."[243] In *Leinen v. Buffington's Bayou City Service Co.*[244] the plaintiff, two weeks after the hearing on the defendant's motion for summary judgment, amended his petition to allege, for the first time, fraud and misrepresentation. Several weeks later, the trial court, without considering the plaintiff's amended petition, granted summary judgment. The record did not show that the plaintiff had obtained leave of court to file its amended petition or that the amended pleading had been brought to the trial court's attention.[245] The court of appeals held that the trial court did not abuse its discretion in refusing to consider the amended petition filed after the summary judgment hearing.[246]

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235. *Id.* (citing Stein v. Frank, 575 S.W.2d 399, 400 (Tex. Civ. App.—Dallas 1978, orig. proceeding)). The majority also recognized this problem. 833 S.W.2d at 329 n.5.

236. *Id.* at 331. The rule itself does not refer to either the trial court or the court of appeals and would allow the liberal reading the dissent gives it. TEX. R. APP. P. 41(a)(2).

237. TEX. R. CIV. P. 166a(c).

238. 822 S.W.2d 822 (Tex. App—Houston [14th Dist.] 1992, n.w.h.).

239. *See* TEX. R. CIV. P. 166a(c).

240. 822 S.W.2d at 823-24.

241. TEX. R. CIV. P. 166a(f).

242. *See* Einhorn v. Lachance, 823 S.W.2d 405, 410 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.) (failure to object to inadmissable hearsay evidence contained in summary judgment affidavit waived such objection).

243. *See* TEX. R. CIV. P. 166a(c).

244. 824 S.W.2d 682 (Tex. App.—Houston [14th Dist.] 1992, no writ).

245. 824 S.W.2d at 685.

246. *Id.* at 685 (citing Hill v. Milani, 678 S.W.2d 203, 205 (Tex. App.—Austin 1984), *aff'd*, 686 S.W.2d 610 (Tex. 1985)).

B. APPEAL FROM A SUMMARY JUDGMENT

In *Wilburn v. State*[247] the court of appeals reaffirmed the general rule that a party may challenge the legal sufficiency of the movant's summary judgment proof even if the nonmovant did not file an answer or response to the motion for summary judgment.[248] The court considered the nonmovant's position that there was no evidence of the date any tax liability was created or incurred to be a legal sufficiency challenge and allowed her to raise the point.[249] Thus the nonmovant's failure to challenge the legal sufficiency in her response or cross-motion did not preclude her from raising the challenge on appeal.[250]

Furthermore, if both parties file motions for summary judgment, and the appellant challenges only the trial court's granting of the appellee's motion for summary judgment and not the denial of its own, the court of appeals, upon finding error, can only reverse and remand.[251] It cannot render judgment for the appellant.[252]

C. FINALITY OF A SUMMARY JUDGMENT

A summary judgment that does not dispose of all parties and issues is interlocutory and not appealable without a severance or nonsuit of unresolved parties and issues.[253] *Ross v. Arkwright Mutual Insurance Co.*[254] involved an appeal from eight orders granting summary judgment which, although not identical, generally stated that the motion for summary judgment was granted in favor of each particular defendant and that the plaintiffs "take or recover nothing" from that defendant.[255] The orders did not contain a "Mother Hubbard" clause[256] or expressly refer to all issues decided.[257]

The *Ross* court emphasized that the presence of a Mother Hubbard clause should not be dispositive.[258] Rather, any order granting a motion for summary judgment that fails to address all the issues or all of the parties should

247. 824 S.W.2d 755 (Tex. App.—Austin 1992, no writ).

248. *Id.* at 763 (citing City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979)).

249. *Id.* at 763 n.12.

250. *Id.* at 763.

251. Pine v. Salzer, 824 S.W.2d 779, 780 (Tex. App.—Houston [1st Dist.] 1992, no writ) (citing Buckner Glass & Mirror v. T. A. Pritchard Co., 697 S.W.2d 712, 714 (Tex. App.—Corpus Christi 1985, no writ)).

252. *Id.* In *Pine*, neither party responded to the other's motion for summary judgment. Accordingly, the court of appeals could consider only whether the appellee's grounds for summary judgment were insufficient as a matter of law. *Id.* at 394.

253. *See* Ross v. Arkwright Mut. Ins. Co., 834 S.W.2d 385, 390 (Tex. App.—Houston [14th Dist.] 1992, writ granted) (citing Pan Am. Petroleum Corp. v. Texas Pac. Coal & Oil Co., 324 S.W.2d 200, 201 (1959)). *Id.* at n.4.

254. 834 S.W.2d 385.

255. *Id.* at 394.

256. The typical Mother Hubbard clause states, "[A]ll relief not expressly granted is hereby denied." *Id.* at 391.

257. *Id.*

258. *Id.* at 391, 393.

be considered interlocutory.[259] It concluded, however, that under present supreme court authority, if an order contains Mother Hubbard language or refers to all issues or parties, it is considered final, regardless of whether all issues were decided.[260] Although the court opined that "Mother Hubbard language has no place in an order granting a motion for summary judgment"[261] and expressly approved of two other courts of appeals' holdings that a motion for summary judgment that does not address all parties and issues is interlocutory despite the inclusion of Mother Hubbard language, the *Ross* court, "constrained by law to follow precedent set by the Texas Supreme Court," dismissed the appeal because the "take nothing" language used by the trial court did not constitute Mother Hubbard language.[262]

To render an interlocutory summary judgment final and appealable, a party may seek a severance or take a non-suit. The party appealing from the summary judgment is best advised, however, to appeal within thirty days of the notice itself rather than any related order because there is a split of authority regarding whether the filing of a notice of non-suit or the signing of the order on non-suit renders final and appealable an interlocutory summary judgment.[263] Rule 162 of the Texas Rules of Civil Procedure provides that a party may take a non-suit and that "[n]otice of the dismissal or non-suit shall be served in accordance with Rule 21a . . . *without necessity of court order.*"[264] Before the current version of Rule 162 became effective on January 1, 1988, non-suits were governed by former Rule 164, which did not contain the emphasized language.[265] Thus, under the current rule, an order granting a non-suit is unnecessary, although some courts prefer that the notice be reinforced with an order.[266]

The Fourteenth court of appeals held in *Merrill Lynch Relocation Management, Inc. v. Powell*[267] that the "interlocutory summary judgment order

259. *Id.* at 393.

260. *Id.* at 392-93 (citing New York Underwriters Ins. Co. v. Sanchez, 799 S.W.2d 677 (Tex. 1990); Teer v. Duddleston, 664 S.W.2d 702 (Tex. 1984); Chessher v. Southwestern Bell Tel. Co., 658 S.W.2d 563 (Tex. 1983)).

261. *Id.* at 394 n.6.

262. *Id.* at 393-94. The Dallas and Amarillo courts of appeal have held that the trial court's inclusion of a Mother Hubbard clause in an order granting summary judgment does not render that judgment final and appealable if the judgment does not otherwise dispose of all parties and issues. *See* Bethurum v. Holland, 771 S.W.2d 719, 722 (Tex. App.—Amarillo 1989, no writ); Sasker v. Fitze, 708 S.W.2d 40, 43 (Tex. App.—Dallas 1986, no writ).

On rehearing, the court of appeals distinguished the situation in *Ross* from its decision in Merrill Lynch Relocation Management v. Powell, 824 S.W.2d 804 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding). *See Ross*, 834 S.W.2d at 394-95. In *Merrill Lynch Relocation Management*, the order granting summary judgment referred to motions and responses raising all issues in the case and therefore disposed of causes not addressed in the motion for summary judgment. 824 S.W.2d at 806. In contrast, the order in *Ross* did not dispose of all parties and issues; it simply stated that plaintiffs should take nothing. 834 S.W.2d at 395.

263. *See infra* notes 267-72 and accompanying text (discussing the disagreement of these courts).

264. TEX. R. CIV. P. 162 (emphasis added).

265. *Id.*, historical note.

266. *See* Avmanco, Inc. v. City of Grand Prairie, 835 S.W.2d 160 (Tex. App.—Fort Worth 1992, writ dism'd); *see also* notes 270-72 and accompanying text (discussing the *Avmanco, Inc.* court's requirement of a signed order).

267. 824 S.W.2d 804 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).

became final and appealable" when a notice of non-suit was filed and when the opposing party properly filed its motion for new trial within thirty days after the notice of non-suit was filed.[268] Although the trial court did not sign an order of non-suit, the *Merrill Lynch Relocation Management* court, citing Rule 162, properly recognized that "[n]o court order was necessary to effect a final judgment."[269]

The Fort Worth court of appeals reached a different conclusion in *Avmanco, Inc. v. City of Grand Prairie*.[270] The trial court granted the city's motion for summary judgment, and the city filed a notice of non-suit to dismiss its counterclaim to render the interlocutory summary judgment final and appealable. Two days after the city filed its notice of non-suit, the trial court signed an order of non-suit. The appellant filed a motion for new trial on the thirtieth day after the trial court signed the order of non-suit but thirty-two days after the city had filed its notice of non-suit. The appellant filed its cost bond ninety-four days after the notice of non-suit was filed, and the city moved to dismiss the appeal on the grounds that the appellant's motion for new trial was untimely and, therefore, its appeal bond was also untimely. The court of appeals held that the trial court's signing the order of non-suit, not the mere filing of the notice of non-suit, triggered the appellate timetable.[271] Thus, the Fort Worth court apparently requires an order of non-suit even though Rule 162 does not require an order and despite the fact that Texas courts have long recognized that the trial court's granting of a non-suit is merely a ministerial act.[272]

VIII. RECORD ON APPEAL

A. TIMELY FILING OF THE RECORD

Under Texas Rule of Appellate Procedure 54(a), the transcript and statement of facts must be filed in the court of appeals within sixty days after the judgment is signed or within 120 days after the judgment is signed if a party timely files a motion for new trial or to modify the judgment or timely files a request for findings of fact and conclusions of law in a case tried without a jury.[273] Rule 54(c) provides that a party seeking an extension of time for late filing of a transcript or statement of facts must reasonably explain any

268. *Id.* at 806.

269. *Id.*

270. 835 S.W.2d 160 (Tex. App.—Fort Worth 1992, writ dism'd).

271. *Id.* at 163-64. The court in *Avmanco Inc.* cited as partial support for its holding cases decided prior to the 1988 amendments to Rule 162. *Id.* at 164. The court stated that "[t]he finality of a judgment for the purpose of appeal should be determined from the terms of the trial court's orders. Otherwise, the opposing party . . . might not be advised as to when the time for [filing a motion for new trial or cost bond] begins to run." *Id.* Rule 162's requirement that a notice of non-suit be served in accordance with Rule 21a ensures, however, that a party to an interlocutory judgment receives notice that the judgment has become final. *See* TEX. R. CIV. P. 162.

272. *See* BHP Petroleum Co., Inc. v. Millard, 800 S.W.2d 838, 840-41 (Tex. 1990, orig. proceeding); Shadowbrook Apts. v. Abu-Ahmad, 783 S.W.2d 210, 211 (Tex. 1990); Greenberg v. Brookshire, 640 S.W.2d 870, 872 (Tex. 1982) (orig. proceeding).

273. TEX. R. APP. P. 54(a).

delay in requesting the court reporter to prepare the statement of facts.[274] The Dallas court of appeals has held that an appellant who fails to request the statement of facts timely cannot rely upon a cross-appellant's timely request in conjunction with a motion to extend time to file the statement of facts under Rule 54(c).[275]

In *Inman's Corp. v. Transamerica Commercial Finance Corp.*[276] Inman's timely perfected an appeal from the trial court's final judgment. On the last date for perfecting an appeal and for making a request to the court reporter, Transamerica filed a cash deposit in lieu of bond and made a written request to prepare the statement of facts. Inman's later filed an untimely request for the statement of facts, a timely motion and a timely supplemental motion to extend the time to file the statement of facts. Transamerica objected to Inman's motions because neither motion explained Inman's delay in making its request to the court reporter as required by Rule 54(c).[277] The court of appeals rejected Inman's argument that Transamerica's timely request inured to Inman's benefit.[278]

The court criticized as "ill-advised" Inman's assumption that it could rely on the actions taken by Transamerica and denied Inman's motion to extend time to file the statement of facts.[279] Inman's simply did not give a reasonable explanation for its delay in making a written request for the statement of facts to the court reporter as required by Rule 54(c).[280] Although recognizing that its ruling was "harsh," the court emphasized that Inman's, "like any other appellant, had the opportunity to timely request the statement of facts" and "had an opportunity to reasonably explain the delay."[281]

The Tyler court of appeals was the first court to interpret a 1990 amendment to Rule 54(a) providing additional time for filing the record if a timely request for findings of fact and conclusions of law is filed in a non-jury case.[282] *Smith v. Smith*,[283] a divorce case, was tried to a jury. After the verdict, the wife filed a motion for judgment n.o.v. The trial court signed a divorce decree granting the divorce on the no-fault grounds found by the jury and made its own division of certain properties not submitted to the jury.

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274. *Id.* (c).

275. Inman's Corp. v. Transamerica Commercial Fin. Corp., 825 S.W.2d 473, 475-76 (Tex. App.—Dallas 1991, no writ).

276. 825 S.W.2d 473.

277. TEX. R. APP. P. 54(c).

278. *Inman's Corp.*, 825 S.W.2d at 475-77. Inman's argument was that it did not need to explain the delay for its untimely request. Inman's argued that one party's request to prepare the statement of facts "should be for the benefit of all parties in the same manner a motion for new trial filed by one party extends the appellate timetables for all parties." *Id.* at 475. However, Rule 41(a)(1) expressly provides that a timely motion for new trial extends the appellate timetables for all the parties, but Rule 53(a) does not contain such a provision. *See* TEX. R. APP. P. 41(a)(1), 53(a).

279. *Inman's Corp.*, 825 S.W.2d at 477.

280. *Id.*

281. *Id.* at 478.

282. *See* TEX. R. APP. P. 54(a), historical note.

283. 835 S.W.2d 187 (Tex. App.—Tyler 1992, no writ).

The husband filed a timely request for findings of fact and conclusions of law but did not file a motion for new trial. Later, the wife moved to dismiss the husband's appeal on the ground that the record was not timely filed. In response, the husband argued that he was entitled to the extended time period for filing the record because he had timely requested findings of fact and conclusions of law. The husband urged that because the trial judge made certain fact findings regarding disposition of the properties not submitted to the jury, the case was " 'tried without a jury' within the meaning of Rule 54(a)."[284]

Despite the novel argument, the court dismissed the appeal.[285] Although a trial judge is not bound by the jury's division of marital property, the fact that the judge made additional findings did not convert the case into a non-jury case within the meaning of Rule 54(a).[286] A timely motion for new trial would have extended the time for filing the record in the court of appeals but a request for findings of fact and conclusions of law in any aspect of a jury case does not.[287]

B. THE RECORD'S CONTENTS

Documents and exhibits not filed of record in the trial court are not properly part of the record on appeal.[288] In *Martinez v. Valencia* the court of appeals refused to consider an attorney's letter and settlement papers, although the court had previously granted the appellees' motion to supplement the record with these documents on appeal.[289] The court cited the general rule that documents and exhibits not filed of record in the trial court are not properly considered on appeal.[290] The court observed it would be acting as a court of original jurisdiction rather than an appellate court if it were to consider evidence not before the trial court.[291]

An appellant seeking review of a municipal ordinance must include the ordinance in the trial court record.[292] In *Metro Fuels, Inc. v. City of Austin* the trial court had taken judicial notice of the municipal ordinance, but the ordinance itself was not made part of the record.[293] Although a court, on its own motion, may take judicial notice of an ordinance under Texas Rule of Civil Evidence 204, the appellate court in *Metro Fuels Inc.* refused to do so

284. *Id.* at 190.
285. *Id.*
286. *Id.*
287. *Id.*; *see also* TEX. R. APP. P. 54(a).
288. Martinez v. Valencia, 824 S.W.2d 719, 722 (Tex. App.—El Paso 1992, no writ).
289. *Id.*
290. *Id.* (citing Noble Exploration, Inc. v. Nixon Drilling Co., 794 S.W.2d 589, 592 (Tex. App.—Austin 1990, no writ); Deerfield Land Joint Venture v. Southern Union Realty Co., 758 S.W.2d 608, 609 (Tex. App.—Dallas 1988, writ denied); City of Galveston v. Sheu, 607 S.W.2d 942, 944 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ)).
291. *Martinez*, 824 S.W.2d at 722.
292. Metro Fuels, Inc. v. City of Austin, 827 S.W.2d 531, 532 (Tex. App.—Austin 1992, no writ).
293. In response to the appellate court's request that the appellants file a supplemental transcript, the appellants responded that the ordinance was not part of the trial court record. Instead, the appellants provided the court of appeals with a certified copy of the ordinance.

because there was no showing that the version proffered by the appellants was the version of the ordinance upon which the trial court relied.[294] The court noted that municipal and county ordinances are difficult to research and verify and concluded that the appellants had failed to present a sufficient record to show error requiring reversal.[295]

The sufficiency of the record is the appellant's burden.[296] In *City of Austin v. Gifford*[297] the appellants waived any complaint as to the trial court's denial of their motion for leave to file a trial amendment because they did not raise this complaint in any of their points of error, and the record did not contain any reference to a trial amendment or any order overruling the appellants' motion.[298]

Under Rule 53(k), the appellant has the duty to timely file the statement of facts in the court of appeals.[299] In *Wells v. Kansas University Endowment Association*[300] the appellant did not do so. Without a statement of facts, the court of appeals must presume that sufficient evidence supports the findings upon which the judgment was based.[301] Therefore, the court in *Wells* could not consider the appellant's challenge to the sufficiency of the evidence to support the trial court's judgment.[302]

A party complaining that the trial court abused its discretion has the burden to bring forward on appeal a record showing that the trial court's decision was arbitrary and unreasonable.[303] In *Sutton v. Eddy*[304] the court of appeals overruled ten of the appellant's points of error complaining of the trial court's abuse of discretion because the appellant did not bring forward a complete statement of facts from the various hearings in which the trial judge made the challenged rulings.[305] Thus, the court of appeals presumed that the evidence supported the trial court's rulings.[306]

In *Johnson v. Whitney Sand & Gravel, Inc.*[307] the trial court entered a sanction order dismissing with prejudice the defendants' counterclaim. The appeal was submitted only on the transcripts because the defendants did not timely file a statement of facts from the sanctions hearing. Therefore, the

294. 827 S.W.2d at 532.
295. *Id.* (citing TEX. R. APP. P. 50(d)).
296. TEX. R. APP. P. 50(d).
297. 824 S.W.2d 735 (Tex. App.—Austin 1992, n.w.h.).
298. *Id.* at 741.
299. TEX. R. APP. P. 53(k).
300. 825 S.W.2d 483 (Tex. App.—Houston [1st Dist.] 1992, writ denied).
301. *Id.* at 487 (citing Ward v. Lubojasky, 777 S.W.2d 156, 157 (Tex. App.—Houston [14th Dist.] 1989, no writ); Men's Wearhouse v. Helms, 682 S.W.2d 429, 430 (Tex. App.—Houston [1st Dist.] 1984), *cert. denied*, 474 U.S. 804 (1985)).
302. *Id.*; *see also* Watson v. Century Condominiums, Ltd., 825 S.W.2d 551 (Tex. App.—Houston [14th Dist.] 1992, no writ) (stating that appellate court had to presume that the trial court's judgment was supported by sufficient evidence when appellant filed only a transcript and no statement of facts).
303. Sutton v. Eddy, 828 S.W.2d 56, 58 (Tex. App.—San Antonio 1991, no writ) (citing Englander Co. v. Kennedy, 428 S.W.2d 806, 807 (Tex. 1968); TEX. R. APP P. 50(d)).
304. *Sutton*, 828 S.W.2d at 56.
305. *Id.* at 58-59.
306. *Id.* at 59.
307. 828 S.W.2d 801 (Tex. App.—Waco 1992, no writ).

record was insufficient to show that the trial court abused its discretion in imposing a "death penalty" sanction.[308]

C. LIMITATION OF THE APPEAL

An appellant may limit the scope of an appeal if he complies with Texas Rules of Appellate Procedure 40(a)(4) and 53(a).[309] In *Kwik Wash Laundries, Inc. v. McIntyre*[310] the appellant defined the issue in his Limitation of Appeal as: "[t]he existence and liability on the Kwik Wash Laundries, Inc. lease and the damages and attorneys' fees recoverable by Kwik Wash Laundries, Inc. for breach of the Kwik Wash Laundries, Inc. lease."[311] Appellant also requested a partial statement of facts under Rule 53(d) that requires a "statement of the points to be relied on."[312] Kwik Wash did not include the points to be relied on in its request for a statement of facts, and the court found the statement of the issue in the Limitation of Appeal to be an insufficient substitute.[313] The appellee made the same errors in its cross-appeal. The court therefore dismissed the appeal because neither party had properly stated the points on appeal or provided a sufficient record for review.[314]

IX. BRIEFS ON APPEAL

A. FAILURE TO TIMELY FILE

An appellant's failure to timely file its brief may result in dismissal on the court's own motion for want of prosecution.[315] The appellant in *Sentinel Pipe Service Inc. v. Tandy Computer Leasing*,[316] having obtained two extensions of time for filing its brief, failed to file its brief by the due date. Approximately five weeks later, the court of appeals, on its own motion, dismissed the appeal for want of prosecution because the appellant had not provided the court with an explanation for its third failure to file its brief timely.[317]

B. WAIVER BY FAILURE TO BRIEF POINTS

Points of error not supported with argument and authorities are

308. *Id.* at 805 (citing TEX. R. APP. P. 50(d); Walker v. Packer, 827 S.W.2d 833 (Tex. 1992, orig. proceeding).

309. *See* TEX. R. APP. P. 40(a)(4), 53(a). Rule 40(a)(4) provides: "[n]o attempt to limit the scope of an appeal shall be effective unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on all other parties." TEX. R. APP. P. 40(a)(4).

310. 840 S.W.2d 739 (Tex. App.—Austin 1992, no writ).

311. *Id.* at 741.

312. TEX. R. APP. P. 53(d). Rule 53(a) provides: "[t]he appellant, at or before the time prescribed for perfecting the appeal, shall make a written request to the official reporter designating the portion of the evidence and other proceedings to be included therein." *Id.*

313. 840 S.W.2d at 741.

314. *Id.* at 742-43.

315. TEX. R. APP. P. 71(l)(1).

316. 825 S.W.2d 212 (Tex. App.—Fort Worth 1992, n.w.h.).

317. *Id.* (citing TEX. R. APP. P. 74(l)(1)).

waived.[318] In *White v. Bath* the court held that the appellant waived seven points of error that were not supported.[319] The "scant discussion" under these points of error consisted only of "conclusory statements and questions," and one point of error was merely stated without any argument.[320]

C. BRIEFS ON APPEAL FROM TEMPORARY INJUNCTION

An appellant appealing from an order granting a temporary injunction may move the court to allow the case to be submitted without briefs; the appellant must, however, show good cause why briefs should not be required.[321] In *Lagrone v. John Robert Powers Schools, Inc.*[322] the appellants appealed from a temporary injunction enforcing an anti-competition clause in a franchise agreement. On the date the appellants' brief was due, the appellants filed a motion to give priority to the appeal under Texas Rule of Appellate Procedure 42(b) but did not file a brief. In their motion, the appellants argued that the disputed issues were clear from the record and briefs were unnecessary.

The court of appeals emphasized that although under Rule 42(c) accelerated appeals may be decided without briefs, the court of appeals, not the appellant, decides whether briefs will be required.[323] Prior case law under former article 4662, which gave the appellant the right to decide whether to file a brief, is no longer valid.[324] Apart from the appellant's thwarting Rule 42(c)'s intent to provide for expedient determination of accelerated appeals by announcing on the last possible date that it did not intend to file a brief, the appellants failed to show good cause why briefs should not be required.[325] The court therefore ordered the appellants to file a brief within twenty days or face dismissal or affirmance under Rule 42(a)(3) without further notice.[326]

X. COSTS ON APPEAL

If the court of appeals reverses, the appellee may be required to pay costs,

318. White v. Bath, 825 S.W.2d 227, 230 (Tex. App.—Houston [14th Dist.] 1992, writ denied), *pet. for cert. filed*, No. 72-7783 (Feb. 26, 1993) (citing Trenholm v. Ratcliff, 646 S.W.2d 927, 934 (Tex. 1983)).

319. *Id.*

320. *Id.*

321. *See* TEX. R. APP. P. 42(c) (allowing for submission of accelerated appeals without briefs); *see also* TEX. R. APP. P. 42(a)(3) ("[f]ailure to file either the record or appellant's brief within [20 days after the record is filed], unless reasonably explained, shall be ground for dismissal or affirmance under Rule 60 . . . .").

322. 841 S.W.2d 34 (Tex. App.—Dallas 1992, no writ).

323. *Id.* at 37.

324. *Id.* Article 4662 became Texas Rule of Civil Procedure 385. *See* TEX. R. CIV. P. 385, historical note (Vernon 1985). Rule 385 was amended, effective in 1981, to give the court of appeals discretion as to whether briefs are required in an appeal from a temporary injunction. *Id.* This provision of Rule 385 is now part of Texas Rule of Appellate Procedure 42(a)(3). *See* TEX. R. APP. P. 42(a)(3).

325. *Lagvone*, 841 S.W.2d at 38.

326. *Id.*

including the costs of the transcript and statement of facts.[327] On the other hand, Rule 84 of the Texas Rules of Appellate Procedure provides that the court of appeals may, as part of its judgment, award a prevailing appellee damages if it determines that the appellant has taken the appeal "for delay and without sufficient cause."[328] The court in *Schmidt v. Centex Beverage, Inc.*[329] refused to assess damages under Rule 84, however, because after the appeal was filed, the Texas Supreme Court reversed one of the primary cases relied upon by the appellant.[330] Accordingly, the court of appeals refused to find that the appeal was brought without sufficient cause.[331]

In *Roever v. Roever*[332] the appellate court awarded damages.[333] The husband in that case appealed from a judgment of divorce dividing the parties' assets and debts and challenged the trial court's award of $7500 in attorneys' fees to the wife. He relied on the trial court's docket sheet notations that the community property estate was of nominal value. The court of appeals affirmed the trial court's judgment and sustained the wife's cross point requesting an award of damages for delay under Rule 84.[334] The court concluded that the husband's lawyer "had no reasonable grounds to believe" that the court of appeals would reverse the trial court's judgment.[335] The husband's contention regarding the value of the community estate was unsupported by the record, and the husband's lawyer did not bring to the court's attention the "legion of contrary law" in connection with his reliance on the trial court's docket entries.[336]

X. DISMISSAL OF APPEAL

A. MOTIONS TO DISMISS

If the parties to an appeal file a joint motion to dismiss, the appeal is moot and the court of appeals must dismiss the case.[337] In *Merrill Lynch, Pierce, Fenner & Smith v. Hughes*,[338] the parties settled after the appeal was perfected and filed a joint motion to dismiss the appeal. The court of appeals, however, issued an opinion dismissing the case for want of jurisdiction.[339]

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327. TEX. R. APP. P. 89; *see* Holloway v. Butler, 828 S.W.2d 810, 813 (Tex. App.—Houston [1st Dist] 1992, writ denied).

328. TEX. R. APP. P. 84.

329. 825 S.W.2d 791 (Tex. App.—Austin 1992, n.w.h.).

330. *Id.* at 794-95.

331. *Id.* at 795.

332. 824 S.W.2d 674 (Tex. App.—Dallas 1992, n.w.h.).

333. *Id.* at 677.

334. *Id.* The court awarded five times the total taxable costs of the appeal, or $5,355.00. *Id.*

335. *Id.* (citing Naydan v. Naydan, 800 S.W.2d 637, 643 (Tex. App.—Dallas 1990, no writ)).

336. *Id.* As a further justification for imposing damages for delay, the court noted that the husband's lawyer was a family law specialist. *Id.* Justice Ovard dissented, stating that counsel's "reliance on the docket sheet entries, albeit in error, was some indication that he had a basis for a successful appeal." *Id.* at 678 (Ovard, J., dissenting).

337. Merrill Lynch Pierce, Fenner & Smith v. Hughes, 827 S.W.2d 859 (Tex. 1992).

338. *Id.*

339. *See* 809 S.W.2d 679, 681 (Tex. App.—Corpus Christi 1991), *vacated*, 827 S.W.2d 859 (Tex. 1992).

The Texas Supreme Court vacated the court of appeals' judgment and opinion because the appeal became moot once the parties settled and jointly moved to dismiss the appeal.[340] The court held that "[i]f no controversy continues to exist between [the parties], the appeal is moot and [the appellate court] must dismiss the cause."[341]

In *Teague v. Espinosa*[342] the appellee's counsel filed a motion to dismiss the appeal as well as an affidavit in support stating that he did not receive notice that an appeal bond had been filed or notice that the appellant filed a designation of documents to be included in the transcript. Rule 46(d) requires that the appellant notify "all parties in the trial court" of the filing of the appeal bond or cash deposit in lieu of bond.[343] Rule 51(b) requires that the other parties receive notice of the appellant's designation of documents to be included in the transcript.[344] Counsel for the appellees did not know that the appeal was pending until two days after the appellant had filed its brief.

The court of appeals denied the motion to dismiss because "[a]ctual harm, rather than a bald allegation of prejudice," is necessary to support dismissal of an appeal based on lack of notice that an appeal bond has been filed.[345] The court was "troubled," however, by the appellant's counsel's "flaunting of the mandatory notice requirements of the appellate rules" and ordered that the appellant pay ten times the total taxable costs of court as a sanction under Rule 46(d).[346]

B. Reliance on Docket Entries on Appeal May Lead to Dismissal

First National Bank v. Birnbaum[347] illustrates the danger of relying on trial court docket entries on appeal. Docket entries are not a substitute for court orders or judgments.[348] In *First National Bank*, the court of appeals dismissed for want of jurisdiction an appeal from an award of sanctions under Texas Rule of Civil Procedure 13.[349] The sanctions were imposed in connection with an application for turnover relief to enforce the trial court's judgment, and the court of appeals concluded that the sanctions order was not appealable because the record did not indicate that the trial court had determined the merits of the application for turnover relief.[350]

The appellant filed a motion for rehearing and a motion to supplement the record to include a copy of the trial court's docket sheet showing that the

340. 827 S.W.2d at 859.
341. *Id.* (quoting General Land Office v. OXY U.S.A., Inc. 789 S.W.2d 569, 570 (Tex. 1990) (second alteration in original)).
342. 824 S.W.2d 340 (Tex. App.—San Antonio 1992, no writ).
343. Tex. R. App. P. 46(d).
344. *Id.* 51(b).
345. 824 S.W.2d at 341 (citations omitted).
346. *Id.* at 341-42.
347. 826 S.W.2d 189 (Tex. App.—Austin 1992, n.w.h.).
348. *Id.* at 190.
349. *Id.*
350. *Id.*

application for turnover relief had been denied before the appeal was taken from the sanctions order. Although the court acknowledged that the supreme court has "relaxed the absolute prohibition" against the use of docket entries in some circumstances, courts of appeal have limited the use of docket entries "to correct clerical errors in judgments or orders."[351] Overruling the appellant's motion to supplement the record and motion for rehearing, the court of appeals noted that docket entries are "inherently unreliable" because they lack the formality of orders and judgments.[352] The court based its decision on a long line of Texas cases holding that judgments and orders must be entered of record to be effective and that docket entries may not take the place of a separate order or judgment.[353]

In *State Farm Fire & Casualty Co. v. Reed*,[354] an appeal from a summary judgment, the insurer urged the court of appeals to consider several notes in the trial court's docket sheet. The court of appeals cited the general rule that "[a]n appellate court may not consider docket entries since they are only made for the clerk's convenience and are usually unreliable."[355] The court determined that the facts presented did not fall within the limited situations in which docket entries may be considered and noted that it would be "especially inappropriate" to consider the docket entries in that case because the court would be reviewing the docket entries as if they were findings of fact and conclusions of law, which the trial court does not file in summary judgment proceedings.[356]

XII. MANDATE

A mandate is defined as "the official notice of the action of the appellate court, directed to the court below, advising it of the action of the appellate court and directing it to have its judgment duly recognized, obeyed, and executed."[357] In *Lewelling v. Bosworth*, the Dallas court of appeals concluded that although a trial court's refusal to act in compliance with the

351. *Id.* at 190-91. In N-S-W Corp. v. Snell, 561 S.W.2d 798, 799 (Tex. 1977) (orig. proceeding), the Texas Supreme Court stated that "[a] docket entry may supply facts in certain situations, but it cannot be used to contradict or prevail over a final judicial order." *Id.* (citation omitted). At least two courts of appeal have held that the "certain situations" in which a docket entry may supply facts are limited to correction of clerical errors in judgments or orders. *See* Energo Int'l Corp. v. Modern Indus. Heating, Inc., 722 S.W.2d 149, 151 n.2 (Tex. App.—Dallas 1986, no writ); Intercity Management Corp. v. Chambers, 820 S.W.2d 811, 812-13 (Tex. App.—Houston [1st Dist.] 1991) (orig. proceeding) (limiting holding in Charles L. Hardtke, Inc. v. Katz, 813 S.W.2d 548, 550 (Tex. App.—Houston [1st Dist.] 1991, no writ), that a signed docket entry can qualify as an order setting aside a written dismissal order)).

352. *First National Bank*, 826 S.W.2d at 191 (citing *Energo*, 722 S.W.2d at 151 n.2).

353. *Id.* at 190 (citing Emerald Oaks Hotel/Conference Ctr, Inc. v. Zardenetta, 776 S.W.2d 577, 578 (Tex. 1989) (orig. proceeding); Clark & Co. v. Giles, 639 S.W.2d 449, 450 (Tex. 1982) (orig. proceeding); McCormack v. Guillot, 597 S.W.2d 345, 346 (Tex. 1980) (orig. proceeding); Hamilton v. Empire Gas & Fuel Co., 110 S.W.2d 561, 566 (Tex. 1937)).

354. 826 SW.2d 659 (Tex. App.—Houston [14th Dist.] 1992, writ granted).

355. *Id.* at 661 (citing Miller v. Kendall, 804 S.W.2d 933, 944 (Tex. App.—Houston [1st Dist.] 1990, no writ)).

356. *Id.* (citing TEX. R. CIV. P. 296).

357. Lewelling v. Bosworth, 840 S.W.2d 640, 642 (Tex. App.—Dallas 1992, orig. proceeding).

mandate may be a proper basis for a mandamus action, the mandate does not necessarily give the prevailing party a right of action against another party unless the appellate court has actually rendered judgment rather than remanding with instructions to the lower court.[358] In *Lewelling*, the Texas Supreme Court's judgment reversing and remanding the case to the trial court with instructions for rendition of a judgment did not constitute a "court order" under Section 14.10 of the Texas Family Code upon which the mother could rely to proceed against the father.[359]

The trial court cannot grant relief in addition to that contained in a mandate from an appellate court.[360] The supreme court's mandate in *Martin v. Credit Protection Association, Inc.*[361] declared void a restrictive covenant, dissolved a temporary injunction, and provided that the plaintiff pay all court costs and that the defendant recover his costs from the plaintiff.[362] The defendant also sought to recover attorneys' fees in the district court.[363] He argued that his recovery of attorneys' fees on his counterclaim would not interfere with or contradict the supreme court's mandate. The trial court denied his request, and the court of appeals affirmed.[364] The court noted that in cases involving remand with specific instructions, the district court's discretion is limited by the instructions in the mandate.[365] The court emphasized that if the supreme court had intended that the trial court address the defendant's additional claims, it would have included such a direction in its mandate.[366]

XIII. MOTIONS FOR REHEARING

Rule 100(d) of the Texas Rules of Appellate Procedure governs further motions for rehearing in the courts of appeal.[367] During the Survey period, the Texas Supreme Court eliminated a source of confusion among practitioners and clarified circumstances in which a party may file a further mo-

358. *Id.* at 642-43.

359. *Id.* at 643. The court of appeals noted that if the supreme court had rendered judgment naming the mother as the managing conservator, the mother could have relied upon the mandate as a "court order." *Id.*

360. Martin v. Credit Protection Ass'n, 824 S.W.2d 254, 255-56 (Tex. App.—Dallas 1992, writ dism'd w.o.j.).

361. *Id.*

362. *Id.*

363. The plaintiff also sought to recover unreimbursed business expenses that were the subject of his counterclaim in the district court.

364. *Id.* at 256-57.

365. *Id.* at 256. The defendant in *Martin* relied upon Texacally Joint Venture v. King, 719 S.W.2d 652, 653 (Tex. App.—Austin 1986, writ ref'd. n.r.e.), for the proposition that "the trial judge must be allowed some reasonable exercise of discretion in fulfilling the terms of the mandate." *Martin*, 824 S.W.2d at 256 (quoting *Texacally Joint Venture*, 719 S.W.2d at 653). In *Texacally*, however, it was necessary for the trial court to exercise its discretion to set a deadline to comply with the mandate's instructions regarding specific performance. *Id.* at 256. The defendant in *Martin*, however, sought affirmative relief beyond that provided in the supreme court's mandate. *Id.*

366. *Martin*, 824 S.W.2d at 257 (citing TEX. R. APP. P. 184).

367. TEX. R. APP. P. 100(d).

tion for rehearing as a matter of right.[368] In *Havner v. E-Z Mart Stores, Inc.*,[369] the respondent challenged the supreme court's jurisdiction over the petitioner's application for writ of error on the basis that the application was not timely filed. The supreme court had granted the petitioner's motion for extension of time for filing an application for writ of error and ordered that the application be filed within forty days of the date the last timely filed motion for rehearing was overruled.[370] The court of appeals overruled the first motion for rehearing but changed its opinion on rehearing.[371] The petitioner filed a second motion for rehearing and filed its application for writ of error within forty days after the second motion for rehearing was overruled.

The respondent argued that the petitioner's second motion for rehearing was invalid because the opinion on rehearing contained only "minor nonsubstantive changes" and the petitioners had no need to complain of the modification.[372] The Texas Supreme Court overruled the respondent's motion to dismiss and held that a party may file a further motion for rehearing as a matter of right if, in conjunction with the overruling of a prior motion for rehearing, the court of appeals alters in any way its opinion or judgment.[373] The Court reasoned that the uncertainty injected into the appellate process by a case by case basis determination of further filings outweighed any risk of delay from parties filing further motions for rehearing.[374]

XIV. CONCLUSION

The Texas Supreme Court's opinions during the Survey period demonstrate, among other things, that procedural technicalities should not inhibit unnecessarily the right to appeal. The amendments to the Texas Rules of Appellate Procedure proposed by the Committee on State Rules of the Appellate Practice and Advocacy Section support that policy as well.[375] The proposed amendments include a number of methods to make appeal less expensive and less complicated.[376] For example, the Committee proposes adopting the federal practice of allowing the original trial court transcript to be sent to the appellate court.[377] The proposed amendment to Texas Rule of Appellate Procedure 51 would thus allow that practice for "good cause, including the time or expense of preparing copies . . ."[378] In addition, the

368. Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456 (Tex. 1992).
369. *Id.*
370. *Id.* at 457 n.1 (citing TEX. R. APP. P. 130(d)).
371. *Id.* at 458.
372. *Id.*
373. *Id.*
374. *Id.*
375. *See* STATE BAR OF TEXAS, REPORT OF THE COMMITTEE ON STATE APPELLATE RULES: RECOMMENDED AMENDMENTS TO THE TEXAS RULES OF APPELLATE PROCEDURE AND TEXAS RULES OF CIVIL PROCEDURE (1992) (objective of proposed amendments is to make appellate procedure "easier and less expensive for both the appellate practitioner and the appellate courts").
376. *Id.*
377. *Id.* at 8 (proposed amendment to Texas Rule of Appellate Procedure 51(e)).
378. STATE BAR OF TEXAS, PROPOSED AMENDMENTS TO TEXAS RULES OF APPELLATE PROCEDURE 14 (1992).

proposed amendments to Texas Rules of Appellate Procedure 81 and 131 assist absent parties in protecting their rights.[379] In essence, both the Court and the Committee are working to eliminate procedural traps and to make the process of appeal easier for both the bench and the bar.

379. *Id.* at 17-18, 20-22 (proposed amendments to Rules 81 and 131).