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APPELLATE PRACTICE AND PROCEDURE

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TABLE OF CONTENTS

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I. INTRODUCTION

DURING this Survey period, the Texas Supreme Court reinforced its policy of easing the procedural complexity of appeals while at the same time continuing its effort to reduce the increasing numbers of mandamus actions.

In *Jamar v. Patterson*[1] the court decided that the failure to pay the accompanying filing fee would not prevent the appellant from relying on the extension of the appellate deadline achieved by filing a motion for

1. 868 S.W.2d 318 (Tex. 1993)(per curiam).

new trial because the motion is considered conditionally filed when tendered.[2] In *Fredonia State Bank v. General Am. Life Ins. Co.*[3] the court held that an appellant need not file a "redundant" second motion for new trial after the entry of a modified judgment on any point raised in the first motion for new trial that continues to apply to the second judgment, even though the first motion was overruled by operation of law before entry of the modified judgment.[4] Also, in *National Union Fire Ins. Co. v. Ninth Court of Appeals*[5] the court eased compliance with the rules governing filing of electronic recordings of statements of fact by deciding that any reasonable explanation provided in a timely filed motion for extension of time suffices to excuse a late filing so long as the failure is not deliberate, even if characterized as professional negligence.[6]

On the other hand, the court made clear in *Canadian Helicopters Ltd. v. Wittig*[7] that it (maybe) meant what it said in *Walker v. Packer*[8] about denying requests for writ of mandamus when an adequate remedy exists by appeal.[9] The court in *Canadian Helicopters Ltd.* resolved a conflict among the courts of appeals by deciding that an order overruling a special appearance is not generally reviewable by mandamus.[10] The court has since carved out two limited exceptions.[11] The third exception that the dissent in *Canadian Helicopters Ltd.* called the "really clear" abuse of discretion review of special appearance orders remains ambiguous, however.[12]

Other significant developments during the Survey period occurred in the supreme court's pronouncements on standards of review. In *Ruiz v. Conoco, Inc.*[13] the court, recognizing that the governing statute was fundamentally flawed,[14] decided that the appellate court must review a venue decision of the trial court by reviewing the entire record, including trial on the merits, despite the fact that the trial court makes the decision based on a more limited record.[15] While in *Ellis County State Bank v. Keever*[16] the court determined that an appellate court does not need to

2. *Id.* at 319.
3. 881 S.W.2d 279 (Tex. 1994).
4. *Id.* at 281.
5. 864 S.W.2d 58 (Tex. 1993).
6. *Id.* at 60.
7. 876 S.W.2d 304 (Tex. 1994).
8. 827 S.W.2d 833 (Tex. 1992).
9. In *National Union*, the dissenting justices observed that, rather than following *Walker*, the court stood *Walker*'s main principle on its head by allowing mandamus review when the relator could have raised the issue by writ of error after appeal to the court of appeals. 864 S.W.2d at 63.
10. 876 S.W.2d at 306.
11. *See* Geary v. Peavy, 878 S.W.2d 602 (Tex. 1994) (orig. proceeding) (per curiam); K.D.F. v. Rex, 878 S.W.2d 589 (Tex. 1994).
12. 876 S.W.2d at 310.
13. 868 S.W.2d 752 (Tex. 1993).
14. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986).
15. *Ruiz*, 868 S.W.2d at 757-58.
16. 888 S.W.2d 790 (Tex. 1994).

follow the requirements of *Pool v. Ford Motor Co.*[17] by detailing the evidence when the court affirms rather than reverses a decision of the trial court, the court in *Transportation Ins. Co. v. Moriel*[18] required courts of appeals to follow *Pool* in opinions affirming awards of punitive damages.[19]

II. APPELLATE REVIEW BEFORE FINAL JUDGMENT

A. MANDAMUS

1. Order Overruling Special Appearance

In three cases during the review period, the Texas Supreme Court clarified the availability of mandamus review of interlocutory decisions concerning personal jurisdiction. Resolving a conflict between the courts of appeals,[20] the supreme court held in *Canadian Helicopters Ltd. v. Wittig* that mandamus would not issue to overturn a trial court's order overruling a special appearance.[21] The court emphasized that an adequate remedy by appeal exists unless a party is in danger of "permanently losing substantial rights."[22] A party does not demonstrate an inadequate remedy by appeal through a "mere showing that appeal would involve more expense or delay than obtaining a writ of mandamus."[23] Rejecting the relator's arguments regarding inconvenience, loss of time and other "non-pecuniary" reasons it would suffer by having to go through an entire trial, the supreme court held "such factors alone can never justify mandamus relief."[24] The court also rejected the relator's argument that the due process rights implicated by a special appearance render appeal an inadequate remedy.[25] The court characterized the due process right at issue as "not being subject to the *binding judgments* of a forum with which [the

17. 715 S.W.2d 629 (Tex. 1986).
18. 879 S.W.2d 10 (Tex. 1994).
19. *Id.* at 31.
20. *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 424 (Tex. App.—Dallas 1992, orig. proceeding).
21. 876 S.W.2d 304, 308 (Tex. 1994).
22. *Id.* at 306. The underlying cause of action in *Canadian Helicopters Ltd.* concerned a fatal helicopter crash in British Columbia. The helicopter was owned by the relator, Canadian Helicopters Ltd. (CHL). The plaintiffs filed a wrongful death suit against CHL and defendant Bell Helicopter Textron in Texas state court. CHL entered a special appearance pursuant to TEX. R. CIV. P. 120a, contesting the personal jurisdiction of the trial court. CHL argued that it lacked minimum contacts with Texas. The trial judge appointed a special master to consider CHL's jurisdictional objection. The master filed a report concluding that the trial court lacked personal jurisdiction and recommended that CHL's special appearance be sustained. Subsequently, the trial court overruled CHL's special appearance in an order making no reference to the master's report. CHL filed a motion for leave to file a petition for writ of mandamus in the Court of Appeals in Houston in the Fourteenth District. The court of appeals overruled the motion. CHL subsequently filed a motion for leave to file a petition of mandamus in the Texas Supreme Court. The court granted the petition and denied the writ.
23. *Id.*
24. *Id.*
25. *Id.*

defendant] has established no meaningful 'contacts,' " not the right to avoid trial in the first instance.[26]

The court suggested exceptions to its holding. Distinguishing its decision in *United Mexican States v. Ashley*,[27] it observed that mandamus review of a special appearance is appropriate in cases involving the issue of sovereign immunity, implicating comity and foreign affairs concerns not present in the usual special appearance.[28] It also indicated that mandamus may be appropriate when denial of a special appearance implicates the rights of parents and children in family law situations.[29] Finally, it observed that a trial court, in denying a special appearance, "may act with such disregard for guiding principles of law that the harm to the defendant becomes irreparable, exceeding mere increased cost and delay, . . . and . . . remedy by appeal may be inadequate and mandamus therefore appropriate."[30]

While the third "exception" remains somewhat fuzzy,[31] two months after its decision in *Canadian Helicopters Ltd.*, the Texas Supreme Court in *K.D.F. v. Rex*[32] clarified the "comity exception" to the rule prohibiting mandamus review of a special appearance. Later, in *Geary v. Peavy*, the supreme court formally recognized the second *Canadian Helicopters Ltd.* exception in family law cases involving special appearances.[33]

In *K.D.F.* the plaintiff brought suit against an instrumentality of the Kansas government, the Kansas Public Employees' Retirement System (KPERS), in a Texas trial court.[34] Under a Kansas mandatory venue statute, however, all actions brought against KPERS must be filed in Shawnee County, Kansas.[35] The Texas trial court overruled KPERS' special appearance objection to jurisdiction, and KPERS sought mandamus relief.[36] Conditionally granting writ, the Supreme Court expressly adopted the comity exception enunciated in *Canadian Helicopters Ltd.*, noting the risk of "harm to interstate and international relations likely to occur if a Texas trial court erroneously exercises jurisdiction over another sover-

26. *Id.* at 307 (emphasis added).
27. 556 S.W.2d 784 (Tex. 1977).
28. *Canadian Helicopters Ltd.*, 876 S.W.2d at 306.
29. *Id.* at 308.
30. *Id.* at 308-09.
31. Justices Hecht and Gonzalez, in dissent, refer to this exception as the "really clear" abuse of discretion exception, though they state they do not know what the standard means. *Canadian Helicopters Ltd.*, 876 S.W.2d at 311. The dissent proposed avoiding further complicated distinctions in mandamus review of orders on special appearance by holding that remedy by appeal is inadequate and focusing on whether the trial court's ruling is a clear abuse of discretion, measured by the same standards as other mandamus cases, rather than a "really clear" abuse of discretion standard. *Id.*
32. 878 S.W.2d 589 (Tex. 1994) (orig. proceeding).
33. 878 S.W.2d 602 (Tex. 1994) (orig. proceeding) (per curiam).
34. 878 S.W.2d at 592.
35. *Id.* at 592. KPERS is subject to lawsuits only to the extent sovereign immunity was waived when the retirement system was created. Sovereign immunity was conditionally waived only to the extent all actions against the system are filed in Shawnee County, Kansas.
36. *Id.* at 591.

eign."[37] Mandamus review is appropriate, the court held, because such potential harm "plainly goes beyond the additional time and expense ordinarily required to pursue an appeal, and beyond the immediate interests of the parties to the suit."[38]

In *Geary v. Peavy*,[39] the Texas Supreme Court formally recognized the second *Canadian Helicopters Ltd.* exception — special appearances where child custody is in issue. *Geary* involved a child custody dispute fought in Minnesota and Texas. After Geary, who was appointed guardian in the deceased father's will, obtained an *ex parte* order for temporary custody of the children from a Minnesota court, the paternal grandmother filed a Suit Affecting Parent Child Relationship (SAPCR) in a Houston court seeking appointment as sole managing conservator. The Houston court subsequently named the grandmother sole managing conservator. Based on the temporary order from the Minnesota court, Geary filed a habeas corpus petition in Houston as well as a motion to vacate the SAPCR decree. The Houston court denied the motion to vacate. Geary did not appeal. The court subsequently denied Geary's habeas corpus petition. The Minnesota court then rendered a final decree, awarding custody to Geary. Geary sought mandamus relief in Texas compelling the Houston court to vacate its SAPCR decree and dismiss that proceeding for lack of jurisdiction.

Despite the fact that Geary could have appealed from the Houston court's order denying her motion to vacate the SAPCR decree, the supreme court nevertheless held that Geary could challenge the order through a petition for writ of mandamus.[40] The court declined to decide if the rule announced in *Dikeman v. Snell*[41] — that void or invalid trial court judgments rendered without jurisdiction could be challenged by mandamus — survived *Walker v. Packer*.[42] Instead, the court held that "the unique and compelling circumstances of this case dictate that [the *Dikeman* rule] be applied here to resolve this jurisdictional dispute that has led to conflicting child custody orders" regardless of "whether the *Dikeman* rule still generally prevails."[43]

2. *Order Enforcing Void Foreign Judgment*

The Texas Supreme Court's first opinion in *Enis v. Smith*[44] suggested that *Dikeman* survived *Walker v. Packer*.[45] The issue before the *Enis* court was whether a Texas trial court should vacate its turnover order against a debtor after the foreign judgment on which it was based was

37. *Id.* at 593.
38. *Id.* at 591.
39. 878 S.W.2d 602 (Tex. 1994) (orig. proceeding) (per curiam).
40. *Id.* at 603.
41. 490 S.W.2d 183, 186 (Tex. 1973).
42. 827 S.W.2d 833, 140 (Tex. 1992).
43. *Geary*, 878 S.W.3d at 603.
44. 37 Tex. S. Ct. J. 1013 (June 15, 1994) (opinion withdrawn and substituted, 883 S.W.2d 662 (Tex. 1994)).
45. 827 S.W.2d 833 (Tex. 1992).

declared void. The court initially held that "[m]andamus will lie to set aside a void order of a trial court without regard to the availability of a remedy by appeal," citing *Dikeman*.[46] It observed that the "theory underlying this rule is that a void judgment needs no appellate action to proclaim its invalidity."[47] Three months later it withdrew this opinion and substituted an opinion changing the above-quoted language. The court held that mandamus "will lie to set aside an order of a trial court that seeks to enforce a foreign judgment [that] has been vacated by the rendering foreign court."[48] The court no longer based its decision on the general statement that mandamus was available to review void orders but held that mandamus was appropriate in that case because the incompatibility of the appellate timetables of Texas and the foreign state could deprive litigants of the ability to file timely appeals of turnover orders in Texas.[49] In *Enis* the foreign court vacated its judgment more than thirty days after the Texas trial court granted the turnover motion.[50] The relator, therefore, had no adequate remedy by appeal because he had no grounds for appeal until *after* the deadline for appealing the turnover order had passed.[51] *Dikeman*, therefore, if not dead, appears to be severely debilitated.

The Texas Supreme Court's decisions in *Canadian Helicopters Ltd.* and *Enis* demonstrate the court's intent announced in *Walker v. Packer* to apply the adequate remedy requirement strictly to stem the increasing tide of mandamus cases.

3. *Order Compelling Arbitration without Agreement to Arbitrate*

Extending the rationale of *Jack B. Anglin Co. v. Tipps*,[52] the Texas Supreme Court held in *Freis v. Canales*,[53] that a party who is compelled to arbitrate without having agreed to do so has no adequate remedy on appeal.[54] In *Freis*, the relators/plaintiffs had contractually agreed with defendants that, in the event of a dispute, the relators could seek conciliation or arbitration. When a dispute arose, the relators inquired about conciliation. Then one defendant moved the court to order arbitration, but the trial court ordered the parties to mediation; when mediation failed to resolve the dispute, the trial court granted the defendant's motion to compel arbitration.[55] The relators sought mandamus relief. Finding that the relators' participation in the mediation was the "functional equivalent" of conciliation, the Texas Supreme Court held that the de-

46. *Enis*, 37 Tex. S. Ct. J. at 1014 (opinion withdrawn and substituted, 883 S.W.2d 662 (Tex. 1994)).
47. *Id.*
48. Enis v. Smith, 883 S.W.2d 663 (Tex. 1994) (orig. proceeding) (per curiam).
49. *Id.*
50. *Id.*
51. *Id.*
52. 842 S.W.2d 266 (Tex. 1992).
53. 877 S.W.2d 283 (Tex. 1994) (orig. proceeding) (per curiam).
54. *Id.* at 284.
55. *Id.* at 283.

fendant had no contractual right to compel the relators to arbitrate their claim, and the trial court had no power to order arbitration.[56] Ordinary appeal is not an adequate remedy from such an order, the court concluded, because, just as a party denied its bargained-for right to arbitration has no adequate remedy by appeal,[57] a party compelled to arbitrate without having agreed to do so will lose its right to have the dispute resolved by litigation.[58]

4. Order Reinstating Case After Expiration of Plenary Power

Mandamus will issue when a trial court erroneously reinstates a case after the expiration of the court's plenary jurisdiction.[59] In *Howley v. Haberman* the trial court dismissed the underlying lawsuit for want of prosecution.[60] More than ninety days later, the plaintiff filed a motion to reinstate, alleging that she had learned of the dismissal only two weeks earlier. The trial court reinstated the case. The defendant moved for summary judgment, arguing that the trial court had no power to reinstate. Conditionally issuing writ, the Texas Supreme Court held that under the rules of procedure, a party who does not have actual knowledge of an order of dismissal within ninety days of the date it is signed cannot move for reinstatement.[61] Since the plaintiff did not learn of the dismissal within the ninety-day period, the order of dismissal was final and the trial court had no jurisdiction over the subsequent proceedings.[62] The plaintiff's only possible recourse, therefore, was by bill of review.

5. Order Disqualifying Counsel

Observing that a party who fails to file a motion to disqualify opposing counsel in a timely manner waives the complaint, the Texas Supreme Court in *Vaughan v. Walther*[63] held that mandamus is proper when a trial court grants an untimely motion to disqualify because the order of disqualification is an abuse of discretion that cannot be remedied by appeal.[64]

6. Order Excluding Expert Witnesses

Mandamus may be proper where a trial court excludes all of a plaintiff's expert witnesses. In *Thomas v. Ray*[65] the parties entered into an agreement whereby Thomas was to designate all experts by February 17, 1993. The plaintiff's attorney presented verified and uncontroverted

56. *Id.*
57. *See* Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 272 (Tex. 1992).
58. *Freis*, 877 S.W.2d at 284.
59. Howley v. Haberman, 878 S.W.2d 139, 140 (Tex. 1994) (per curiam).
60. *Id.* at 139.
61. *Id.* at 140 (citing TEX. R. CIV. P. 306a(4) (Vernon Supp. 1994)).
62. *Id.*
63. 875 S.W.2d 690 (Tex. 1994) (orig. proceeding) (per curiam).
64. *Id.* at 690-91.
65. 889 S.W.2d 237 (Tex. 1994) (orig. proceeding).

proof through his affidavit that the designation of experts was mailed on February 3. The defendant failed to offer any proof to rebut the presumption that the designation had been received.[66] Under such circumstances, the exclusion of witnesses is an abuse of discretion by the trial court and there is no adequate remedy by appeal.[67]

7. Order to produce privileged documents

Mandamus may be proper where a trial court abuses its discretion in determining that a party has waived an asserted privilege under the "offensive use" doctrine. The discovery dispute in *TransAmerican Natural Gas Corp. v. Flores*,[68] arose out of conspiracy claim against Coastal Oil & Gas Corporation (Coastal) and Valero Transmission Company (Valero) alleging the manipulation of gas prices in a gas purchase agreement.

TransAmerican objected to one of Valero's requests for documents on the grounds that certain documents were protected by the attorney-client, work product, and/or party communication privileges. Valero sought a motion to compel discovery. The trial court granted that motion in part, finding that the privileges for two of the withheld documents were waived under the "offensive use" doctrine.[69] TransAmerican sought mandamus relief from this order; the court of appeals denied it. The Texas Supreme Court reversed, granting mandamus.

In granting mandamus, the Texas Supreme Court reviewed the documents and determined that they did not meet the second and third prongs of the "offensive use" doctrine. Specifically, the court concluded as to the second prong that "[i]t is difficult for us to conclude that, even if believed by the fact finder, in all probability, these documents would determine the outcome of Valero's case."[70] As to the third prong, the court concluded that "Valero has not proved that the disclosure of the confidential communication is the only means by which the aggrieved party may obtain that evidence."[71] The court held that the trial court's error in applying the "offensive use" test constituted a clear abuse of discretion.[72] Finally, the court reiterated that a party has no adequate remedy on ap-

66. *Id.*

67. *Id.* at 238. As a rule of thumb, practitioners should obtain proof of mailing to support any claim of mailing.

68. 870 S.W.2d 10 (Tex. 1994).

69. The Texas Supreme Court set out the test for the application of the offensive use doctrine in Republic Ins. Co. v. Davis, 856 S.W.2d 158 (Tex. 1993). Before a party can be found to have waived an asserted privilege under this doctrine, it must be determined that:

> (1) The party asserting the privilege is seeking affirmative relief;
> (2) the privileged information sought is such that, if believed by the fact finder, in all probability it would be outcome determinative of the cause of action asserted;
> (3) disclosure of the confidential communication is the only means by which the aggrieved party may obtain the evidence.

Id. at 163.

70. *TransAmerican Natural Gas Corp.*, 870 S.W.2d at 11.

71. *Id.*

72. *Id.* Even though the application of the test turned on the interpretation of documents, the failure to correctly apply a legal standard is an error of law.

peal when the trial court erroneously orders the disclosure of privileged information that will materially affect the rights of the aggrieved party.[73]

8. *Refusal to Grant Timely-Filed Uncontested Affidavit of Inability to Pay Costs*

The trial court in *Rios v. Calhoon*[74] refused the appellant's timely-filed and uncontested affidavit of inability to pay costs pursuant to Texas Rule of Appellate Procedure 40(a)(3)(A).[75] The appellant sought a writ of mandamus in the court of appeals directing the trial court to order the preparation and delivery of both a partial transcript and a partial statement of facts at no cost.[76] The court of appeals conditionally granted the writ but only ordered the preparation and delivery of the statement of facts, authorizing the trial court to determine whether the appellant had funds available to make partial payment for the statement of facts.[77] The court of appeals also overruled the appellant's request for a extension of time to file his brief pending receipt of the transcript. The trial court thereafter ordered the preparation and delivery of the statement of facts at a cost of $100 to the appellant.[78]

Conditionally granting writ, the Texas Supreme Court held that if a party properly perfects an appeal by filing an affidavit of inability to pay costs under Texas Rule of Appellate Procedure 40(a)(3)(A), the party is "absolutely entitled" to the exemption from paying costs on appeal.[79] The trial court, therefore, abused its discretion by ordering the appellant to pay $100 for the preparation of the statement of facts and by failing to order production of the transcript. The court further held that the court of appeals abused its discretion in overruling the appellant's motion for extension of time to file his appellate brief because his request was based on his inability to obtain the transcription for preparation of an adequate appellate brief.[80]

B. Interlocutory Appeals

A party is not entitled to an interlocutory appeal from the denial of a summary judgment motion if the motion is based on sovereign immunity.[81] Only if the motion is based on an assertion of *qualified* immunity does section 54.014(5) of the Texas Civil Practice and Remedies Code permit interlocutory appeal.[82]

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73. *Id.*
74. 889 S.W.2d 257 (Tex. 1994) (orig. proceeding) (per curiam).
75. *Id.* at 258.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 259.
81. City of Mission v. Ramirez, 865 S.W.2d 579 (Tex. App.—Corpus Christi 1993, no writ).
82. *Id.* at 582. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014 (Vernon Supp. 1993). Section 51.014 also allows interlocutory appeals from an order (1) appointing a receiver or

In *City of Mission v. Ramirez* a city employee sued the city and city officials for wrongful termination, slander and conspiracy.[83] Although the governmental employees had available to them the affirmative defense of qualified immunity in their individual capacity, the individual defendants sued in *Ramirez* did not move for summary judgment on that basis. Moreover, the city/defendant moved for summary judgment based only on sovereign immunity. Recognizing that a city's claims may be based on its employees' claim of qualified immunity, the court dismissed the appeal for want of jurisdiction because the appellants' grounds for summary judgment here were not based on qualified immunity, and section 51.014(5) did not afford them an interlocutory appeal from the denial of their summary judgment motion.[84]

III. PRESERVATION OF ERROR

A. OBJECTING TO THE CHARGE

In keeping with the Texas Supreme Court's attempt to alleviate some of the complexity of preserving charge error as announced in *State Department of Highways & Public Transportation v. Payne*,[85] the supreme court held during the last Survey period in *Spencer v. Eagle Star Insurance Co. of America* that an objection to a defective instruction without submission of an alternative is sufficient to preserve error for appellate review.[86] Although Texas Rule of Civil Procedure 278 states that the "[f]ailure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment," this rule applies to omitted instructions not defective instructions.[87] The rule applicable to defective instructions is Texas Rule of Civil Procedure 274, which provides:

> [a] party objecting to a charge must point out distinctly the objectionable matter and the grounds for the objection. Any complaint as to a question, definition, or instruction, on account of any defect, omission or fault in pleading, is waived unless specifically included in the objections.[88]

The court in *Spencer* held that an objection alone is sufficient to preserve error in a defective instruction, and a request of substantially correct language is not required.[89]

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trustee; (2) overruling a motion to vacate an order appointing a receiver or trustee; (3) certifying or refusing to certify a class; (4) granting or refusing to grant a temporary injunction or granting or overruling a motion to dissolve a temporary injunction; and (6) denying a motion for summary judgment based upon a claim against a member of the electronic or print media arising under the free speech clause of the U.S. Constitution.

83. 865 S.W.2d at 580.
84. *Id.*
85. 838 S.W.2d 235 (Tex. 1992).
86. 876 S.W.2d 154 (Tex. 1994).
87. TEX. R. CIV. P. 278.
88. TEX. R. CIV. P. 274.
89. 876 S.W.2d at 157.

Notably, however, this attempt to alleviate the complexity of objecting to the charge does not relieve the litigant of his duty to make his objections *specific*. For example, in *Hart v. Berko, Inc.*,[90] a case involving Texas Insurance Code and DTPA allegations, the El Paso Court of Appeals held that the appellants had waived their complaint that the imposition of treble damages under the Insurance Code was erroneous based on the multifarious nature of the "conduct" jury question that allowed the jury to answer "Yes" without finding that appellants had engaged in specific conduct that would give rise to treble damages.[91] The waiver occurred because appellants' objections to the charge included only objections based on a claim of redundancy and a complaint that the charge did not limit the jury to consideration of the misrepresentation that was the basis of the lawsuit. The objections were *not* based on the applicability of the Insurance Code trebling provision.[92] The court held that the appellants failed to make a sufficiently specific objection to the charge to inform the court of the nature of their complaints and, therefore, failed to preserve error.[93]

According to the Corpus Christi Court of Appeals, the Texas Supreme Court's holding in *Payne* does not alleviate the litigant's duty to strictly observe the timing requirements of Rule 273 of the Texas Rules of Civil Procedure when objecting to the trial court's refusal to submit a special issue to the jury. In *Alaniz v. Jones & Neuse, Inc.*,[94] the court held that the appellant had waived any error in the trial court's refusal to submit his special issue on future lost profits because, although he had submitted the requested issue in substantially correct and written form in his proposed charge filed *before* trial, he failed to submit it again *after* the trial court presented the draft charge to all counsel and parties.[95] Although recalling the court's holding in *State Department of Highways v. Payne*[96] that the "one test" for determining if a party has preserved error in the jury charge is "whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling,"[97] the Corpus Christi court in *Alaniz* concluded that, despite the fact that the appellant probably effectively alerted the trial court of his objection and obtained an ruling, his failure to comply with Rule 273's clear requirement regarding the timing of submitting proposed jury questions rendered any error waived.[98] Rule 273, the *Alaniz* court held, sets out three requirements for requests: "that they be written, submitted *after* presentation of the

90. 881 S.W.2d 502 (Tex. App.—El Paso 1994, writ denied).
91. *Id.* at 509.
92. *Id.*
93. *Id.*
94. 878 S.W.2d 244 (Tex. App.—Corpus Christi 1994), *writ denied per curiam*, No. 94-0767, 1995 WL 217816 (Tex. Apr. 13, 1995).
95. *Id.* at 245.
96. 838 S.W.2d 235 (Tex. 1992).
97. *Id.* at 241.
98. *Alaniz*, 878 S.W.2d at 244.

draft charge, and submitted separately from any objections."[99] Since the appellant's submission of the omitted question in writing was only part of a complete proposed charge filed *before* trial, he failed to comply with Rule 273 and his error was not preserved. The result in *Alaniz* seems harshly inconsistent with the policy expressed in *Payne*.[100]

B. Submitting Summary Judgment Evidence

1. Authenticating Deposition Excerpts

Overruling the Dallas Court of Appeals' holding in *Deerfield Land Joint Venture v. Southern Union Realty Co.*, the Texas Supreme Court in *McConathy v. McConathy*[101] held that under the 1990 amendment to Texas Rule of Civil Procedure 166a(d), deposition excerpts submitted as summary judgment evidence do not need to be authenticated by attorney affidavit or court reporter's certificate.[102] The court held that Rule 166a(d) outlines the procedures for use of unfiled discovery products as summary judgment evidence and supersedes any authentication requirement, including that stated in *Deerfield*.[103]

2. Referencing Summary Judgment Evidence in Accompanying Brief

In an extension of the Rule announced in *McConnell v. Southside Independent School District*[104] that the grounds on which a movant relies must be expressly presented within the summary judgment motion itself, the Tyler Court of Appeals in *Burford v. Wilson* held that the *motion* must also specifically refer to the *evidence* in support of the grounds for summary judgment.[105] In *Burford*, the defendants each filed motions for summary judgment based on the applicable statute of limitations.[106] With their motions, the defendants simultaneously filed briefs more specifically stating their positions and referencing the evidence that supported the motions.[107] The defendants did not incorporate the briefs or

99. *Id.* at 245.

100. *Id.* After this Article went to print, the Texas Supreme Court, in a per curiam denial of Alaniz's application for writ of error, disapproved of the Corpus Christi court's opinion in this regard, concluding that Alaniz preserved his jury charge complaint. *Alaniz*, 1995 WL 217816 at *2. The supreme court held that "[w]hile *Payne* does not revise the requirements of the rules of procedure regarding the jury charge, it does mandate that those requirements be applied in a common sense manner to serve the purposes of the rules, rather than in a technical manner which defeats them." *Id.* The court denied writ, however, because Alaniz had neither pleadings nor legally sufficient evidence to support submission on the jury question at issue. *Id.*

101. 869 S.W.2d 341 (Tex. 1994).

102. 758 S.W.2d 608 (Tex. App.—Dallas 1988, writ denied).

103. *Id.* at 342. Rule 166a(d) requires a statement of intent to use unfiled discovery as summary judgment proof. The supreme court held that this requirement is satisfied by attaching the discovery to the motion or response and clearly referencing the party's reliance upon the attached discovery. *Id.* at n.2.

104. 858 S.W.2d 337 (Tex. 1993). *See also* Sysco Food Service, Inc. v. Trapnell, 890 S.W.2d 796 (Tex. 1994).

105. 885 S.W.2d 253 (Tex. App.—Tyler 1994, writ requested).

106. *Id.* at 254.

107. *Id.*

the evidence attached to the briefs within the motions. The trial court granted the defendants' motions and rendered a take-nothing judgment against the plaintiffs.

The Tyler Court of Appeals reversed the trial court's summary judgment.[108] The court noted that while the defendants' motions sufficiently stated the grounds for their summary judgment as required by *McConnell*, under the precise language of Rule 166a of the Texas Rules of Civil Procedure, evidence relied upon in a motion or a response to a motion for summary judgment must also be "referenced or set forth in the motion or response."[109] The defendants' motions did not refer to their briefs or to any evidence to support the motions. "until Rule 166a(c) states otherwise," the court concluded "we hold that the movant must expressly present the grounds upon which he relies and must specifically refer to the evidence to support those grounds within the motion for summary judgment, and may not rely on briefs not referred to or incorporated within the motion."[110]

3. *Incorporating by Reference Grounds Asserted in Codefendant's Motion for Summary Judgment*

In *Camden Machine & Tool, Inc. v. Cascade Co.*[111] a summary judgment movant incorporated by reference the summary judgment grounds stated in its codefendants' summary judgment motions.[112] Reversing the trial court's summary judgment in favor of the movant, the Fort Worth Court of Appeals held that under *McConnell*,[113] a party's motion for summary judgment *itself* must assert grounds and establish entitlement to summary judgment. Referencing and incorporating the grounds stated in other parties' motions is insufficient as a matter of law to present grounds to support the summary judgment.[114]

4. *Pleadings and Discovery on File Reflecting Genuine Issues as to Material Facts*

In *Barragan v. Mosler*[115] the defendant/appellee moved for summary judgment.[116] The plaintiff/appellant never filed a written response to the motion for summary judgment, and the trial court rendered summary judgment in favor of the defendant. At the time of summary judgment, various discovery responses and pleadings were on file in the case. Relying on Rule 166a(c) of the Texas Rules of Civil Procedure, the appellant challenged the trial court's judgment on the basis that the pleadings, dis-

108. *Id.* at 255.
109. *Id.* TEX. R. CIV. P. 166a(c) (Vernon 1976).
110. *Burford*, 885 S.W.2d at 256.
111. 870 S.W.2d 304 (Tex. App.—Fort Worth 1993, no writ).
112. *Id.* at 310.
113. McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337 (Tex. 1993).
114. *Camden*, 870 S.W.2d at 310.
115. 872 S.W.2d 20 (Tex. App.—Corpus Christi 1994, no writ).
116. *Id.* at 21.

covery responses, admissions and answers to interrogatories on file at the time of judgment reflected that there were genuine issues of material fact.[117]

The Corpus Christi Court of Appeals rejected the appellant's argument, holding that although it might appear from Rule 166a(c) that interrogatory answers, pleadings and admissions are proper summary judgment evidence, well-established case law severely limits the trial court's ability to consider such evidence in the summary judgment context.[118] Moreover, summary judgment proof must be *attached* to the summary judgment motion or response.[119] Affirming the trial court's judgment, the court of appeals noted that not only did the appellants fail to attach any evidence to a summary judgment response, the appellants failed to even file a summary judgment response.[120]

C. Preserving Error Through Motion for New Trial Filed and Overruled Before Entry of Reformed Judgment

A timely motion for new trial, overruled by operation of law before entry of a reformed judgment, preserves error to the extent the motion for new trial is applicable to the reformed judgment.[121] The defendant in *Fredonia State Bank v. General Am. Life Ins. Co.* filed its motion for new trial following the trial court's initial entry of judgment.[122] The motion was overruled by operation of law, after which the trial court entered a modified judgment, deleting the award of attorneys' fees. The defendant did not file another motion for new trial.[123] The appellee argued that since the appellant did not challenge the subsequent judgment by a motion for new trial, the appellant waived any complaint about the factual sufficiency of the evidence supporting the jury's verdict.[124] The appellant argued that its motion for new trial preserved error in the subsequent modified judgment under Rule 58(c) of the Texas Rules of Appellate Procedure, which provides that "[i]n civil cases, if the trial court has signed an order modifying, correcting, or reforming the order appealed from, or has vacated that order and signed another, any proceedings relating to an appeal of the first order may be considered applicable to the second. . . ."[125]

Accepting the appellant's position, the Texas Supreme Court held that under Rule 58(c), "a motion for new trial relating to an earlier judgment may be considered applicable to a second judgment when the substance of the motion could properly be raised with respect to the corrected judg-

117. *Id.* Tex. R. Civ. P. 166a(c) (Vernon 1976).
118. *Barragan*, 872 S.W.2d. at 21.
119. *Id.*
120. *Id.*
121. Fredonia State Bank v. Gen. Am. Life Ins. Co., 881 S.W.2d 279 (Tex. 1994).
122. *Id.* at 280.
123. *Id.*
124. *Id.* at 281.
125. *Id.* Tex. R. App. P. 58(c) (Pamph. 1994).

ment."[126] Disapproving of the Dallas Court of Appeals' interpretation of Rule 58 in *A.G. Solar & Co., Inc. v. Nordyke*[127] and approving the Houston Court of Appeals, First District's analysis in *Harris County Hospital Dist. v. Estrada*,[128] the court held that the motion preserves error in the later judgment even if overruled by operation of law prior to entry of the later judgment.[129] To read into the rules a requirement that a redundant motion for new trial is necessary to preserve error, the court concluded, "would defeat the goal of hearing cases on their merits whenever possible, without advancing any corresponding policy considerations."[130]

D. Submitting Evidence in Support of Motion for New Trial

Affidavits attached to a motion for new trial following a default judgment do not have to be offered into evidence in order to be considered by the trial court in determining whether the default judgment should be set aside and a new trial ordered under the test set forth in *Craddock v. Sunshine Bus Lines, Inc.*[131] The plaintiff in *Director, State Employees Workers' Compensation Div. v. Evans*[132] obtained a default judgment, and the defendant filed a motion to set aside the judgment and for a new trial.[133] The defendant attached supporting affidavits to its motion for new trial but did not introduce the affidavits into evidence at the motion for new trial hearing.[134] The trial court refused to set aside the default judgment and grant a new trial, and the court of appeals affirmed the lower court, holding that the trial court could not consider the affidavits attached to the motion because they were not introduced at the hearing.[135] Reversing the court of appeals, the supreme court held that "[i]t is sufficient that the affidavits are attached to the motion for new trial and are part of the record."[136]

E. Preservation of Appellate Points

The Texas Supreme Court's holding in *Fredonia State Bank v. Gen. Am. Life Ins. Co.*[137] emphasizes that Rule 74(f) requires specificity in support of reply points.[138] An appellee cannot respond with conclusory statements but must address the specific statements of fact and references

126. *Fredonia*, 881 S.W.2d at 281.
127. 744 S.W.2d 646 (Tex. App.—Dallas 1988, no writ).
128. 831 S.W.2d 876 (Tex. App.—Houston [1st Dist.] 1992, no writ).
129. *Fredonia*, 881 S.W.2d at 282.
130. *Id.* The court explicitly declined to resolve the conflict between *Solar* and *Estrada* on the question of whether a motion for new trial overruled by operation of law is effective to extend the appellate deadline from a subsequent judgment. *Id.* at 282 n.2.
131. 134 Tex. 388, 133 S.W.2d 124 (1939).
132. 889 S.W.2d 266 (Tex. 1994).
133. *Id.* at 267.
134. *Id.*
135. *Id.*
136. *Id.*
137. 881 S.W.2d 279 (Tex. 1994).
138. *See* Tex. R. App. P. 74(f).

to the record in the appellant's brief.[139] Otherwise, the appellate court may accept them as true.[140] Rebriefing may not be allowed,[141] so appellees are well-advised to give detailed statements of fact and to support reply points with specific citations to the record and to case law.

IV. FINALITY OF JUDGMENTS

A final judgment subject to appeal must dispose of all issues and *all parties*.[142] In *Martinez v. Humble Sand & Gravel, Inc.*,[143] a multi-defendant products liability action, the trial court granted a summary judgment motion filed by some, but not all, defendants.[144] After doing so, the trial court signed a severance order purporting to make the judgment final and appealable. The order contained a standard "Mother Hubbard" clause, but it also purported to allow additional defendants to file late summary judgment motions after the date of the order and thus become severed into an appealable judgment.

The Texas Supreme Court observed that, on its face, the trial court's severance order allowed defendants to be added *after* the time allowed for appeal had expired.[145] This procedure, according to the court, "creates an inherent conflict between the two rules that appellate deadlines run from the signing of the order, and that a party cannot be subject to the appeal until the judgment or order actually applies to the party."[146] As a result, the court concluded, the severance order was not only interlocutory as to the added parties because all the parties disposed of were not specified as of the date the order was signed, it was also interlocutory as to the defendants originally moving for summary judgment.[147] The "order necessarily contemplate[d] a later 'final' order unambiguously designating all parties encompassed by the order as of the date it is signed."[148]

In *Springer v. Spruiell*,[149] the supreme court emphasized its holding from the last Survey period in *Mafrige v. Ross*[150] by reversing the Amarillo Court of Appeals' dismissal for want of jurisdiction. In dis-

139. *Fredonia*, 881 S.W.2d at 283. General American challenged on appeal a jury finding that an insurance application was not attached to the policy. It cited specific facts from the record. The bank replied: "THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S ANSWER TO QUESTION 2 AND 3 [in which the jury found the applications were not attached to the policies]." "Rather than support the point with record citations, however, the Bank argued that General American's points were moot because of the failure of the jury to find misrepresentation." *Id.* This response was insufficient. *Id.*

140. *Id.*

141. *Id.* at 284-85.

142. Northeast Indep. Sch. Dist. v. Aldridge, 400 S.W.2d 893, 895 (Tex. 1966).

143. 875 S.W.2d 311 (Tex. 1994).

144. *Id.* at 313.

145. *Id.* (citing TEX. R. APP. P. 5(b)(1)).

146. *Id.*

147. *Id.*

148. *Martinez*, 875 S.W.2d at 313.

149. 866 S.W.2d 592 (Tex. 1993).

150. 866 S.W.2d 590 (Tex. 1993).

missing the appeal, the Amarillo court reasoned that since Rule 166a of the Texas Rules of Civil Procedure requires the specific grounds supporting summary judgment to be set forth in the motion for summary judgment, "it is axiomatic that one may not be granted judgment as a matter of law on a cause of action not addressed in the summary judgment motion."[151] Since the motions for summary judgment in that case addressed only one of the plaintiffs' five live causes of action, the court of appeals concluded that the judgments were interlocutory and unappealable, despite the "Mother Hubbard" language in the summary judgments.[152]

The Texas Supreme Court reversed the court of appeals, holding that, under *Mafrige*, the express language in the judgment purporting to dispose of all claims makes the summary judgment final and appealable, in apparent disregard of the limited grounds upon which the summary judgment rests.[153]

When a judgment disposes of all named parties except those who have not been served and have not appeared, the judgment is considered final for purposes of appeal.[154] In *Ballard v. Portnoy*, the trial court granted summary judgment on October 13, 1993 in favor of a doctor, who, along with a drugstore, were named defendants in a wrongful death action.[155] On November 12, 1993, the plaintiff filed a second amended petition naming a nurse a third defendant. On December 22, 1993, the trial court granted summary judgment in favor of the drug store defendant. The newly named nurse was never served with citation. On January 27, 1994, the trial court signed a "final judgment" ordering that the plaintiff take nothing from the physician or the drug store on any theory. The court's order did not address the plaintiff's claims against the nurse. The plaintiff thereafter filed an affidavit of inability to pay, which the defendants contested, and the trial court sustained the contest on February 18, 1994. On March 8, 1994, the plaintiff filed a cost bond. The court of appeals dismissed the appeal for want of jurisdiction, holding that the January 27, 1994 judgment was final because the nurse was never served and never appeared, and the plaintiff filed neither a motion for new trial nor a motion for an extension of time to file a cost bond.[156] The plaintiff's cost bond, therefore, was due within thirty days after the judgment was signed (February 27, 1994) or ten days after the court sustained the contest (February 28, 1994). The plaintiff's cost bond, filed March 8, 1994, was, therefore, untimely.[157]

151. Springer v. First Nat'l Bank of Plainview, Texas, 866 S.W.2d 626, 630 (Tex. App.—Amarillo 1992), *rev'd sub nom.* Springer v. Spruiell, 866 S.W.2d 593 (Tex. 1993).
152. *Id.* at 631.
153. Springer v. Spruiell, 866 S.W.2d 593, 593 (Tex. 1993).
154. Ballard v. Portnoy, 886 S.W.2d 445 (Tex. App.—Houston [1st Dist.] 1994, no writ).
155. *Id.* at 445.
156. *Id.* at 447.
157. *Id.* at 446.

In *Fandey v. Lee*[158] the court of appeals noted that the well-established rule that an appeal may be taken only from a final judgment that disposes of all issues and parties applies to summary judgments.[159] A summary judgment in a bill of review proceeding, the court concluded, which merely sets aside a prior judgment and reinstates a case dismissed for want of prosecution without disposing of all of the issues of the reinstated case on the merits, is interlocutory in nature and not a final appealable judgment.[160]

V. EXTENDING THE APPELLATE TIMETABLE

A. Motion for New Trial

For purposes of calculating the appellate timetable, the date of "filing" a motion for new trial is when the document is first *tendered* to the clerk, even if the requisite statutory filing fee is not paid at that time.[161] The motion is conditionally filed on the date it is tendered, and the filing is completed when the fee is paid.[162] In *Jamar v. Patterson* the appellant tendered his motion for new trial to the district clerk within thirty days after judgment, but the clerk did not "accept" the motion for filing because the appellant had not paid the requisite statutory filing fee.[163] The clerk file-stamped the motion when the appellant paid the filing fee, which was more than thirty days after judgment. The appellant then filed an appeal bond, which was timely only if his motion for new trial was timely filed to extend the appellate deadline.[164] The court of appeals dismissed the appeal, stating that the motion for new trial was filed when it was file-stamped, rather than when it was tendered. The Texas Supreme Court reversed the judgment of the court of appeals, holding that the date of filing is when the document is first tendered to the clerk, not the date the filing fee is paid.[165]

Following *Jamar*, the Corpus Christi Court of Appeals held in *Ramirez v. Get "N" Go # 103*,[166] that the appellant's failure to pay the filing fee for his motion for new trial did not affect appellate deadlines.[167] Notably, the motion for new trial in *Ramirez* was overruled by operation of law *before* the movant paid the filing fee. In fact, the filing fee was not paid until 11 months after the motion was tendered. Interpreting the Texas Supreme Court's language in *Jamar* that filing without a fee is a "conditional filing," the Corpus Christi court held that if a movant fails to pay the required fee before the motion is ruled on or overruled by operation

158. 876 S.W.2d 458 (Tex. App.—El Paso 1994, no writ).
159. *Id.* at 459.
160. *Id.*
161. Jamar v. Patterson, 868 S.W.2d 318, 319 (Tex. 1993) (per curiam).
162. *Id.*
163. *Id.* at 318.
164. *Id.*
165. *Id.* at 319.
166. 888 S.W.2d 29 (Tex. App.—Corpus Christi 1994, no writ).
167. *Id.* at 30.

of law, the failure does not affect appellate deadlines but does affect the trial court's discretion to hear and determine the motion.[168] The trial court should *refuse* to consider the motion. The court observed that the movant may waive the specific grounds raised in the motion for new trial, but the court did not decide this issue.[169]

In *Spellman v. Hoang*[170] the movant's motion for new trial was heard and ruled on months before the filing fee was paid.[171] The San Antonio court noted the Texas Supreme Court's holding in *Jamar* that "[t]he filing is not completed until the fee is paid, and absent emergency or other rare circumstances, the court should not consider [the motion for new trial] before then."[172] The court observed but did not decide that under *Jamar* the failure to pay the filing fee before the expiration of the trial court's plenary jurisdiction may nullify the trial court's hearing and ruling on the motion for new trial.[173] Late payment, however, will retroactively complete the filing as of the date of tender in order to extend the appellate timetable.[174]

B. Request for Findings and Conclusions

The Texas Supreme Court recently resolved a split among the courts of appeals on the issue of whether, in a summary judgment proceeding, the filing of a request for findings of fact and conclusions of law extends the appellate deadlines under Rule 41(a)(1) of the Texas Rules of Appellate Procedure.[175] Both the Dallas and Amarillo courts of appeals previously held that such a request does *not* extend the thirty-day time limit; the El Paso Court of Appeals held that it does.[176] The El Paso court in *Chavez* reasoned that the filing of a request for findings and conclusions in a summary judgment case is analogous to those situations where courts of appeals have found that defective motions for new trial, although preserving nothing for review, nevertheless extend time for perfecting an appeal.[177] These cases focus on the *timeliness* of the post-judgment motion, rather than on its content or effectiveness, in determining whether the motion extended appellate deadlines.[178] The *Chavez* court further noted that neither a motion for new trial nor a request for findings and conclusions is actually the proper post-judgment filing in a summary judgment

168. *Id.*
169. *Id.*
170. 887 S.W.2d 480 (Tex. App.—San Antonio 1994, no writ).
171. *Id.*
172. *Id.* at 481 (quoting *Jamar*, 868 S.W.2d at 319 n.3) (First alteration in original).
173. *Id.*
174. *Id.*
175. Linwood v. NCNB Texas, 885 S.W.2d 102 (Tex. 1994) (per curiam).
176. *Compare* Linwood v. NCNB of Texas, 876 S.W.2d 393 (Tex. App.—Dallas), *rev'd on other grounds*, 885 S.W.2d 102 (Tex. 1994) and Besing v. Moffitt, 882 S.W.2d 79 (Tex. App.—Amarillo 1994, n.w.h.) *with* Chavez v. Housing Authority, 876 S.W.2d 416 (Tex. App.—El Paso 1994), *opinion withdrawn and substituted*, No. 08-93-00422-CV, 1995 WL 221764 (Tex. App.—El Paso, Apr. 13, 1995, n.w.h.).
177. 876 S.W.2d at 417.
178. *Id.*

case.[179] The more accurate name for the proper post-judgment pleading in the summary judgment context would be a "motion for reconsideration," but, the court noted, the rules of appellate procedure do not mention such a pleading.[180] "Thus, a literal reading of TEX. R. APP. P. 41 would preclude any extension of appellate deadlines in summary judgment cases," and the court did not believe the drafters intended this result.[181] It, therefore, ruled that the request for findings and conclusions did extend the deadline.[182]

In support of the position that a request for findings and conclusions does not operate to extend the appellate deadlines, the Amarillo court in *Besing* noted that the "Texas Supreme Court has held that a motion for new trial is not 'necessarily inappropriate' " in the summary judgment context,[183] but "the cases are legion holding that findings of fact and conclusions of law have no place in summary judgment proceedings."[184] In fact, the court noted, where such findings are made, they are correctly disregarded by the appellate court.[185] Thus, the court concluded, in view of the "longstanding, consistent and repeated holdings of the various courts that have determined that requests for findings of fact are inappropriate when the trial court decides a case by summary judgment, . . . a request for such findings does not operate to extend the appellate timetables in such instances."[186] The Dallas Court of Appeals made a similar analysis in *Linwood*.[187]

The Texas Supreme Court resolved the dispute by agreeing with the Dallas Court of Appeals in *Linwood*. The court held that "[b]ecause findings of fact and conclusions of law have no place in a summary judgment proceeding, the timetable [is] not extended."[188] The court agreed that the language "tried without a jury" in Rule 41(a)(1) does not include a summary judgment proceeding.[189]

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179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *See* Besing v. Moffitt, 882 S.W.2d 79, 82 (Tex. App.—Amarillo 1994, n.w.h.) (citing Torres v. Western Cas. and Surety Co., 457 S.W.2d 50, 51 (Tex. 1970)).
184. *Id.*
185. *Id.*
186. *Id.*
187. Linwood v. NCNB of Texas, 876 S.W.2d 393 (Tex. App.—Dallas), *rev'd on other grounds*, 885 S.W.2d 102 (Tex. 1994).
188. Linwood v. NCNB Texas, 885 S.W.2d 102, 102 (Tex. 1994)(per curiam). Notably, the El Paso court subsequently withdrew its original opinion in *Chavez* as having been "implicitly overruled" by *Linwood*. Chavez v. Housing Authority, No. 08-93-0042-CV, 1995 WL 221764, *1 (Tex. App.—El Paso, Apr. 13, 1995, n.w.h.).
189. Nonetheless, the court reversed the Dallas Court of Appeals in *Linwood* because, although the appellant had filed only an ineffective notice of appeal and an ineffective request for findings and conclusions, he did file a cost bond, albeit 53 days after the judgment was signed. *Id.* The supreme court held that, although the notice of appeal was the improper instrument to perfect appeal, the court of appeals, before dismissing the appeal, should have given the appellant an opportunity to correct his error by substituting the correct instrument. *Id.* The appellant, the court concluded, "made a bona fide attempt to

VI. PLENARY POWER OF THE TRIAL COURT

The trial court has plenary power or jurisdiction over a case for thirty days after the judgment is signed,[190] or, if a motion for new trial is timely filed, for thirty days after the timely-filed motion is overruled either by a signed order or by operation of law, whichever occurs first.[191]

The Texas Supreme Court recently held in *Porter v. Vick*[192] that, at any time during its plenary power over a judgment, a trial court may vacate an order granting a new trial, or "ungrant" a new trial.[193] An order vacating an order granting a new trial, however, is void if it is signed after the trial court's plenary power has expired.[194]

Conditionally granting a writ of mandamus, the Texas Supreme Court further held in *Howley v. Haberman* that a trial court may not reinstate a case dismissed for want of prosecution when the order was signed after its plenary power has expired.[195] "A party who does not have actual knowledge of an order of dismissal within 90 days of the date it is signed cannot move for reinstatement," the court held.[196] Under these circumstances, a bill of review proceeding is the party's only recourse to challenge the trial court's dismissal order.[197]

In a similar case addressing the trial court's power to act after expiration of its plenary jurisdiction, the Corpus Christi Court of Appeals held in *City of McAllen v. Ramirez*[198] that a trial court does not have the power to grant an unverified motion to reinstate a case dismissed for want of prosecution after its plenary jurisdiction has expired.[199] The court further noted that a plaintiff cannot circumvent the verification requirements of Rule 165a(3) of the Texas Rules of Civil Procedure by merely changing the caption of its motion to a motion for new trial.[200] "The provisions of rule 165a," the court concluded, "require such a motion to be verified, regardless of what label the plaintiff chooses to put on it."[201] Thus, an unverified "Motion to Reinstate and for New Trial" is ineffective to extend the trial court's jurisdiction over the dismissal beyond thirty days.[202]

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invoke the appellate court's jurisdiction sufficient to prevent dismissal for want of jurisdiction, . . ." *Id.*

190. "Plenary" is a formal word for "full." BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 419 (1987). The trial court's "plenary" power or jurisdiction, therefore, includes "[f]ull and complete" authority over the subject matter as well as the parties to a controversy. BLACK'S LAW DICTIONARY 1039 (5th ed. 1979).

191. TEX. R. CIV. P. 329b(d)-(e).

192. 888 S.W.2d 789 (Tex. 1994) (Tex. June 2, 1994) (orig. proceeding) (per curiam).

193. *Id.* at 789.

194. *Id.*

195. 878 S.W.2d 139 (Tex. 1994) (orig. proceeding) (per curiam).

196. *Id.* at 140 (citing TEX. R. CIV. P. 306a(4)).

197. *Id.* at 140.

198. 875 S.W.2d 702 (Tex. App.—Corpus Christi 1994, no writ) (orig. proceeding).

199. *Id.* at 705.

200. *Id.*

201. *Id.* (discussing TEX. R. CIV. P. 165a(3)).

202. *Ramirez*, 875 S.W.2d at 705.

VII. PERFECTION OF APPEAL

A. BONA FIDE ATTEMPT TO INVOKE APPELLATE COURT JURISDICTION

In *Blankenship v. Robins*,[203] after granting summary judgment against one of three defendants, the trial court signed an order stating that a new cause number would be assigned for the claims against the remaining defendants, leaving the summary judgment under the original cause number.[204] The abstract of judgment issued by the clerk, however, stated that the summary judgment would receive the new cause number.[205] The trial court and the parties followed the abstract of judgment. The appellant used the new cause number on appeal from the summary judgment.[206] The court of appeals dismissed the appeal from the summary judgment for lack of jurisdiction because the appellant's motion for new trial and appeal bond were not filed in the same cause as the judgment.[207] The Texas Supreme Court reversed the court of appeals' dismissal, reasoning that a party should not be punished for failure to comply with the terms of an order "ignored by both the opposing party and the court."[208] The court held that the appellant's actions constituted a bona fide attempt to invoke the appellate court jurisdiction.[209]

Similarly, in *Maxfield v. Terry*,[210] the Texas Supreme Court reversed the appellate court's dismissal of an appeal for want of jurisdiction because appellant made a "bona fide attempt" to invoke the court's jurisdiction.[211] Specifically, the appellant in *Maxfield* filed a single cash deposit in lieu of bond to appeal from two final and appealable orders rendered in the same probate proceeding under different cause numbers. After oral argument, the court of appeals dismissed one of the cases for want of jurisdiction, holding that the appellant was required to file a separate cost bond, cash deposit, or affidavit of inability to pay for each of the probate court's final orders.[212] Reversing the appellate court's dismissal, the Texas Supreme Court stated that under its policy of liberally construing the Rules of Appellate Procedure, the court of appeals should have given the appellant the opportunity to correct any defect in the appeal before dismissing.[213] The appellant "made a bona fide attempt to invoke the jurisdiction of the court of appeals by filing one 'instrument' for both probate orders."[214]

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203. 878 S.W.2d 138 (Tex. 1994) (per curiam).
204. *Id.*
205. *Id.*
206. *Id.*
207. *Blankenship*, 878 S.W.2d 138 (Tex. 1994) (per curiam).
208. *Id.* at 139.
209. *Id.*
210. 888 S.W.2d 809 (Tex. 1994) (per curiam).
211. *Id.* at 2.
212. *Id.*
213. *Id.*
214. *Id.* at 2.

B. Measuring the Appellate Timetable

When a judgment is signed following a nonsuit, the appellate timetable runs from the date of the latter order unless the trial court issued the latter order solely for the purpose of extending the appellate timetable.[215] In *Mackie v. McKenzie*,[216] the trial court signed an order granting an interlocutory summary judgment in favor of McKenzie on January 8, 1993, but the summary judgment order did not discuss or dispose of the counterclaim filed by McKenzie against Mackie.[217] McKenzie filed a motion to nonsuit his counterclaim and the trial court signed an order nonsuiting the claim on June 1, 1993.[218] At Mackie's request, the trial court signed a "Final Judgment on June 25, 1993," clearly delineating the disposition of McKenzie's motion for summary judgment as well as the counterclaim.[219] The order also contained a standard "Mother Hubbard" clause.[220]

Dismissing Mackie's subsequent appeal for want of jurisdiction, the court of appeals held that the appellate timetable began to run when the order of nonsuit was signed—not when the Final Judgment was signed. As a result, Mackie's cost bond was untimely.[221] The Texas Supreme Court disagreed. Recognizing that a second judgment that serves no purpose other than to enlarge the time of appeal is without effect, the Texas Supreme Court held that under Rule 329b(h) of the Texas Rules of Civil Procedure, "any change, whether or not material or substantial, made in a judgment while the trial court retains plenary power, operates to delay the commencement of the appellate timetable until the date the modified, corrected or reformed judgment is signed."[222] The court of appeals erred when it failed to measure the appellate timetable from the date of the June 25, 1993 order because that order varied the previous "final" judgment by stating that the interlocutory summary judgment and nonsuit order were final and by adding the "Mother Hubbard" language; the court issued the order while it still had plenary power over the case and there is no indication that the court issued the order solely for the purpose of extending the appellate timetable.[223]

C. Proving Insufficient Notice of Adverse Judgment

The Texas Supreme Court held in *Cantu v. Longoria*[224] that a trial court's refusal to conduct a hearing as required by Rule 5(b)(5) of the Texas Rules of Appellate Procedure to determine the date a party received actual notice of an adverse judgment constitutes an abuse of dis-

215. Mackie v. McKenzie, 890 S.W.2d 807 (Tex. 1994).
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 808.
223. *Id.*
224. 878 S.W.2d 131 (Tex. 1994) (per curiam) (orig. proceeding).

cretion, for which mandamus will lie.[225] In *Cantu* the trial court rendered judgment against the relator but waited more than a month before sending notice of the judgment to parties in the case. Thirty days after the date the relator claimed to receive notice, she filed a motion for new trial and a Rule 5(b)(5) motion for findings as to the date she received notice of the judgment. The trial court never set a hearing on the Rule 5(b)(5) motion and the motion for new trial was overruled by operation of law. Thereafter, when the relator attempted to perfect an appeal, the court of appeals informed her that the appeal would be dismissed for failure to meet appellate deadlines unless, within ten days, she obtained a trial court ruling making a sufficient finding under Rule 5(b)(5). The trial court again refused to hold a Rule 5(b)(5) hearing. The court of appeals refused mandamus relief. Conditionally granting writ, the Texas Supreme Court held that the trial court abused its discretion in refusing to conduct the Rule 5(b)(5) hearing to determine the date the relator received actual notice of the adverse judgment and that the relator had no adequate remedy by appeal because she had no appeal at all without the finding.[226]

In a similar case, the Corpus Christi Court of Appeals held in *Sharm, Inc. v. Martinez*[227] that the trial court abused its discretion by initially refusing to make a finding of the date on which the appellant received actual notice of a default judgment, as required by Rule 5 of the Texas Rules of Appellate Procedure, and, by finding that appellant failed to prove that it did not have timely notice of the default judgment in the face of undisputed evidence that it did not.[228]

The Houston Court of Appeals, First District, recently construed Rules 5(b)(3) and (4) of the Texas Rules of Appellate Procedure to require the clerk of the trial court to notify the parties or their attorneys immediately by first-class mail not only of the fact the judgment was signed but also of the *date* the judgment was signed.[229] In *Winkins v. Frank Winther Investments, Inc.*,[230] the appellants appealed a summary judgment signed on March 3, 1992. The judgment did not become final until September 18, 1992, when the trial court signed an order nonsuiting the appellees' counterclaims. The appellants did not file a motion for new trial and, therefore, had until October 18, 1992 to perfect their appeal. The appellants filed their appeal bond on November 5, 1992. On November 13, 1992, the appellants filed a Rule 306a motion to extend the effective date of the judgment, alleging they did not find out until November 10 that the final judgment had been signed on September 18. The appellants had telephoned the clerk of the court between October 6 and 8 to determine if the order of nonsuit had been signed, and the clerk erroneously told the

225. *Id.* at 132.
226. *Id.* at 132.
227. 885 S.W.2d 165 (Tex. App.—Corpus Christi 1993, no writ) (per curiam).
228. *Id.*
229. Winkins v. Frank Winther Invs., Inc., 881 S.W.2d 557, 558 (Tex. App.—Houston [1st Dist.] 1994, no writ).
230. 881 S.W.2d at 557.

appellants that the nonsuit had been signed on October 6, rather than September 18.

The appellants argued in the trial court that, because they did not receive notice of the date the final judgment was signed within twenty days after the judgment, they were entitled to the enlargement of time under Appellate Rule 5(b)(4) to file their appeal bond. The appellees argued that the rules do not require the clerk to give notice of the *date* the judgment was signed but only the fact of the signing of the judgment. The trial court granted the appellants' motion to extend the effective date of the judgment and the court of appeals affirmed, holding that notice of the *date* of the judgment is signed is required under the rules.[231]

D. Meeting the Costs of Perfecting an Appeal

Under the Houston Court of Appeals, Fourteenth District's holding in *Click v. Tyra*,[232] once an appellant perfects appeal by filing the appeal bond or cash deposit in lieu thereof, a district clerk cannot require cash payment of the costs before preparing the transcript for appeal.[233] An appeal bond perfects the appeal. Once filed, the bond is sufficient security for the costs of preparing the transcript, therefore, and the district clerk must do so.[234]

An appeal bond that is double the amount of judgment but does not cover "costs" is insufficient to perfect an appeal to county court from justice court.[235] The appellant in *Almahrabi v. Booe*[236] attempted to appeal from a $5000 default judgment entered against him in the justice court. The judgment also included $40 in costs. In an attempt to perfect his appeal from the justice court to the county court at law, the appellant filed a $10,000 appeal bond. A few days later, he was notified by the county clerk's office that he needed to pay the costs of the appeal ($110) to the county clerk's office within twenty days from the date of the notice or his appeal would be deemed unperfected under Rule 143a of the Texas Rules of Civil Procedure. The appellant did not tender the $110 until thirty-nine days after he received the notice concerning the costs. The trial court found that the payment of costs under Rule 143a was a jurisdictional prerequisite and dismissed the case for want of jurisdiction.[237]

The court of appeals noted that under the Texas Rules of Civil Procedure, in order to perfect an appeal to the county or district court from a justice court, an appellant must: (1) file an appeal bond (in double the

231. *Id.* at 558. *But see* St. Louis Fed. Sav. & Loan Ass'n v. Summerhouse Joint Venture, 739 S.W.2d 441, 442 (Tex. App.—Corpus Christi 1987, no writ) (construing Tex. R. App. P. 5(b)(4) to require only notice of the fact that the judgment was signed, rather than notice of the date the signed was signed).

232. 867 S.W.2d 406 (Tex. App.—Houston [14th Dist.] 1993, no writ).

233. *Id.* at 407.

234. *Id. See* Tex. R. App. P. 51(c).

235. Almahrabi v. Booe, 868 S.W.2d 8, 10 (Tex. App.—El Paso 1993, no writ).

236. *Id.*

237. *Id.* at 9.

amount of the judgment) pursuant to Rule 571 or file an affidavit of inability to pay under Rule 572; *and* (2) pay to the county clerk, within twenty days after being notified to do so, the costs of appeal pursuant to Rule 143a.[238] Compliance with these rules is jurisdictional.[239] The appellant argued that the $10,000 appeal bond is analogous to a supersedeas bond and sufficient to satisfy both Rules 571 and 143a. The court of appeals disagreed, stating that while a supersedeas bond may serve as a cost bond if it is sufficient to secure the costs, the $10,000 bond filed by appellant was only double the amount of the judgment. While this amount satisfies Rule 571, the court concluded, it is insufficient to cover the costs of appeal as required by Rule 143a. According to the court, "Appellant is $110 short."[240]

In *Laird v. King*,[241] an appeal from a $5 million judgment for the plaintiff in a personal injury lawsuit, the appellant moved for reduction or elimination of the supersedeas bond securing the judgment. The trial court reduced the bond amount to $1 million. In a mandamus proceeding challenging the bond reduction, the appellant argued that Rule 47(b)(1)(2) of the Texas Rules of Appellate Procedure authorizes a trial court to reduce the amount of the supersedeas bond upon a showing that the reduction would cause no substantial harm to the judgment creditor. The plaintiffs/relators argued that section 52.002 of the Texas Civil Practice and Remedies Code, which explicitly prohibits the reduction of the supersedeas bond in personal injury cases, governs the issue and supersedes Rule 47(b).

Acknowledging that Rule 47(b) appears to permit a lower supersedeas bond in personal injury cases, the court of appeals held that the plain language of section 52.002 prohibited the reduction and that Rule 47(b) therefore does not apply.[242] Section 52.005 explicitly states: "To the extent this chapter conflicts with the Texas Rules of Appellate Procedure, this chapter controls."[243] Conditionally granting writ, the court concluded that the plain language of section 52.002 does not allow a trial court to set security in an amount less than the amount of the judgment in a personal injury case.[244]

According to the Austin Court of Appeals, Rule 46 of the Texas Rules of Appellate Procedure permits the trial court to increase the amount of an appellant's cost bond to cover accrued trial court costs, the cost of the statement of facts, and the cost of the transcript even if the court increases the bond from the statutory $1000 to $30,000.[245] The court in

238. *Id.* at 10.
239. *Id.*
240. *Id.*
241. 866 S.W.2d 110 (Tex. App.—Beaumont 1993, no writ).
242. *Id.* at 113-14.
243. *Id.* at 113.
244. *Id.*
245. Maniccia v. Johnson & Gibbs, P.C., 876 S.W.2d 398, 400 (Tex. App.—Austin 1994, writ denied).

Maniccia v. Johnson & Gibbs, P.C., specifically pointed out that, under Rule 46(c), the trial court may, on its own motion, "increase or decrease the amount of the bond or deposit required. . . ."[246] The purpose of the appeal bond required by Rule 46, the court held, "is to ensure payment of *all* the costs of appeal, including (1) accrued costs of court not previously paid by the appellant, (2) the fee of the court reporter for preparing the statement of facts; and (3) the fee of the trial court clerk for preparing the transcript."[247] In *Maniccia* trial court costs totalled $22,000 and the court reporter estimated the statement of facts would cost $8000. The court of appeals therefore held that the trial court did not abuse its discretion in increasing the amount of the bond and dismissed the appeal pursuant to Rule 46(c) because the appellants had not filed the required cost bond.[248]

In *Cortez v. Longoria*[249] the appellants filed an affidavit of inability to pay cost bond and the appellees filed a motion contesting the affidavit. The trial court failed to rule on the motion contesting the affidavit within ten days after it was filed. However, the trial court granted appellees' motion for extension of time to contest the affidavit of inability twenty-nine days after the appellants filed their affidavit of inability to pay. The trial court also granted appellees' contest on the same day.

Conditionally granting writ, the court of appeals noted that under Rule 40(a)(3)(E) of the Texas Rules of Civil Procedure, if a contest to an affidavit is filed, the court is required to hear it within ten days after filing unless the court extends the time for hearing and determining the contest by a signed written order made within the ten day period and, if no ruling is made on the contest within the ten days (or within the period of time as extended by the court), the allegations of the affidavit "shall be taken as true."[250] Since the trial court made no ruling (on the contest itself or on a motion for extension of time) within the ten days after the appellees filed their motion contesting the affidavit, the contest was overruled by operation of law. Under Rule 40, the allegations in the appellants' affidavit of inability, therefore, should have been taken as true.[251]

VIII. THE RECORD ON APPEAL

A. FILING THE ELECTRONIC RECORD

Under the special rules adopted by the Texas Supreme Court for making a record of court proceedings by electronic recording, the court reporter is required to file the statement of facts with the court of appeals within fifteen days of the perfection of an appeal or writ of error.[252] Rule

246. *Id.*
247. *Id.* at 401.
248. *Id.* at 402. The court noted that the ability to pay was not an issue before the court on appeal. *Id.* at 400.
249. 875 S.W.2d 337 (Tex. App.—Corpus Christi 1994, no writ) (orig. proceeding).
250. *Id.* at 338.
251. *Id.*
252. National Union v. Ninth Court of Appeals, 864 S.W.2d 58, 59 (Tex. 1993) (orig. proceeding).

54 of the Texas Rules of Appellate Procedure provides that an appellant may be granted an extension of time for late filing in the court of appeals of a transcript or statement of facts, if a motion "reasonably explaining" the need for the extension is filed by the appellant no later than fifteen days after the last date for filing the record.[253] Rule 4 of the special electronic recording rules provides that "[n]o other filing deadlines as set out in the Texas Rules of Appellate Procedure are changed."[254] As a result, Rule 54(c) and other deadlines in the Texas Rules of Appellate Procedure not inconsistent with deadlines in the special electronic recording rules are applicable.[255]

In *National Union v. Ninth Court of Appeals*, the appellant perfected its appeal from an electronically recorded proceeding on September 15, 1992. Its statement of facts, therefore, was due on September 30, 1992. The appellant missed the filing deadline but filed a motion for extension under Rule 54(c) within the fifteen days' grace period allowed for such motions. Although the court of appeals initially granted the motion, it withdrew its order extending the deadline after the appellee argued that the appellant's motion did not "reasonably explain" the reason for delay. As a result, the appellant had no timely filed statement of facts upon which to base its appeal.

With respect to the appellant's mandamus proceeding, the Texas Supreme Court noted that Rule 54(c) is discretionary and that a court of appeals does not abuse its discretion by merely refusing to grant a motion for extension of time even in the presence of a reasonable explanation. However, it held that the court of appeals in *National Union* abused its discretion by basing its decision on an erroneous legal standard for judging the reasonableness of the movant's explanation.[256] A "reasonable explanation" means "any plausible statement of circumstances indicating that failure to file within the required period was not deliberate or intentional, but was the result of inadvertence, mistake or mischance."[257] In fact, the court held, "any conduct short of deliberate or intentional noncompliance qualifies, even if that conduct can also be characterized as professional negligence."[258] The court accepted appellant's "reasonable explanation" in *National Union* that it was confused about almost every element of the proper procedures that must be followed in counties authorized to make records of court proceedings by electronic recording.[259] Significantly, the court pointed out that had the court of appeals simply

253. TEX. R. APP. P. 54(c).
254. *National Union*, 864 S.W.2d at 59 n.2.
255. *Id.*
256. *Id.* at 59. *See also* Marino v. Hartsfield, 868 S.W.2d 336 (Tex. 1994) (per curiam) (where circumstances of case were, in all material respects, identical to those in *National Union*, and for the reasons given in *National Union*, supreme court reversed judgment of court of appeals and remanded the case to that court for filing of the statement of facts and consideration of all points of error not previously addressed).
257. *National Union*, 864 S.W.2d at 60.
258. *Id.*
259. *Id.*

refused to grant the extension on discretionary grounds, instead of on the basis that no reasonable explanation had been stated, the court of appeals would not have abused its discretion.[260] Conditionally granting a writ of mandamus, the supreme court concluded that the appellant had no adequate remedy by appeal because, absent mandamus, the appellant's relief would consist of proceeding through an appeal that, without a statement of facts, "amounts to a useless exercise."[261]

Despite its conclusion in *National Union* that only the filing deadlines set forth in the Texas Rules of Appellate Procedure are effectively "preempted" by inconsistent deadlines set forth in the special electronic rules,[262] the Texas Supreme Court held in *Uptmore v. Fourth Court of Appeals* that the court of appeals abused its discretion in refusing to accept and consider a statement of facts that was timely filed under Rule 54 of the Rules of Appellate Procedure, even though it was untimely filed under the rules governing electronically recorded trials.[263] The appellant in *Uptmore* did not file a copy of the recording with the court of appeals within fifteen days of perfecting his appeal, nor did he file a timely motion for extension. He did, however, file the statement of facts as defined by Rule 3 of the rules governing electronically recorded trials, *as well as a transcript of the recording*, within the time allowed for filing the appellate record under Rule 54 of the Rules of Appellate Procedure. Conditionally granting writ, the Texas Supreme Court held that the court of appeals abused its discretion in concluding that it was without authority to accept and consider the statement of facts and that the appellant had no adequate remedy by appeal.[264]

B. Lost or Destroyed Notes or Records

In preparing for a second appeal, the appellant in *Piotrowski v. Minns*[265] sent a written request to the court reporter to prepare a statement of facts from two ancillary pretrial hearings that took place nine years prior to his second appeal. The court reporter informed the appellant that the notes for the two hearings were no longer available as she destroyed the records after three years. Pursuant to Rule 50(e) of the Texas Rules of Appellate Procedure, the court of appeals reversed and

260. *Id.* at 60 n.4.

261. *Id.* at 61. Chief Justice Phillips dissented on this point, stating that the appellant clearly had an adequate remedy by appeal. *National Union*, 864 S.W.2d at 62. Specifically, Justice Phillips stated that, assuming the appellant did not ultimately prevail in the court of appeals, it could challenge that court's refusal to extend the time for filing the statement of facts by application for writ of error. *Id.* "How, then" Justice Phillips asked, "could the court of appeals' ruling inflict irreparable harm justifying expedited review by mandamus?" *Id.* Throughout his dissent, Justice Phillips expressed alarm at the growing number of mandamus actions passed upon by the supreme court, despite its decision in Walker v. Packer, 827 S.W.2d 833 (Tex. 1992). In his words, "[t]oday's decision, far from being an extension of *Walker*, stands that principle on its head." *Id.* at 63.

262. *National Union*, 864 S.W.2d at 59 n.2 (emphasis added).

263. 878 S.W.2d 601 (Tex. 1994) (per curiam).

264. *Id.*

265. 873 S.W.2d 368 (Tex. 1993).

remanded the case for a new trial.[266] The Texas Supreme Court reversed the decision of the court of appeals.

The Texas Supreme Court held that the appellant failed to satisfy Rule 50(e), which provides "[i]f the appellant has made a *timely request* for a statement of facts, but the court reporter's notes and records have been lost or destroyed *without appellant's fault*, the appellant is entitled to a new trial unless the parties agree on a statement of facts."[267] The Texas Government Code requires court reporters, upon request, to "preserve the notes for future reference for three years from the date on which they were taken . . . ."[268] Thus, by negative implication, the court reporter is authorized to destroy notes after three years when no party has requested that they be preserved.[269] To obtain the benefit of Rule 50(e), an appellant must ensure that notes are not destroyed. The duty to protect the record, the court held, does not begin at the conclusion of trial, when the appellant takes the steps to perfect an appeal, but exists at every stage of the proceedings in the trial court.[270] Litigants must exercise "some diligence to ensure that a record of any error will be available in the event that an appeal will be necessary."[271] The court concluded that the appellant in *Minns* was at fault for waiting to request preparation of the appellate record until it was time for him to appeal.[272] According to the court, he should have acted much earlier, even though he did not know that he would suffer an adverse judgment and find it necessary to appeal.[273]

Justices Hecht, Cornyn and Enoch dissented in *Minns*, emphasizing the burden imposed by effectively requiring litigants to have every hearing transcribed as litigation proceeds, even though no rule of procedure justifies this burden.[274]

C. Lost Exhibits

In *Hackney v. First State Bank of Honey Grove*[275] the original trial exhibits were lost and could not be made a part of the appellate record. The trial court held a hearing and found that the exhibits could be replaced and ordered that the replacement exhibits be made a part of the appellate record. The appellant objected, arguing that, pursuant to Rule 50(e) of the Texas Rules of Appellate Procedure, it was entitled to a new trial because it did not agree to the substituted exhibits.[276] The appellant relied on the Waco Court of Appeals' holding in *Hidalgo, Chambers &*

266. *Id.* at 369.
267. *Id.* at 370.
268. Tex. Gov't Code Ann. § 52.046(a)(4) (Vernon 1988).
269. *Minns*, 873 S.W.2d at 371.
270. *Id.* at 370.
271. *Id.*
272. *Id.*
273. *Id.* at 371.
274. *Id.* at 372-73.
275. 866 S.W.2d 59 (Tex. App.—Texarkana 1993, no writ).
276. *Id.*

Co. v. FDIC[277] to support its contention that it was entitled to a new trial regardless of whether it had any reasonable basis or justification for not agreeing to the substituted documents.[278] The Texarkana court rejected the appellant's contention and, relying on the Corpus Christi Court of Appeals' reasoning in *First Heights Bank, FSB v. Gutierrez*,[279] held that if lost exhibits can be replaced with identical or substantially similar documents, a party's refusal to agree to the replacements does not require a new trial under Rule 50(e).[280]

The Houston Court of Appeals, Fourteenth District, goes even farther. If the lost exhibits cannot be replaced with identical or substantially similar documents, the aggrieved party is entitled to a new trial under Rule 50(e) *only* if it can show that the portion of the record lost would have changed the outcome on appeal.[281] Otherwise, a remand would waste judicial resources.[282]

D. Late-Filed Statement of Facts

In *Office of Public Utility Counsel v. Public Utility Commission of Texas*,[283] the appellant timely filed its transcript, but not its statement of facts, with the court of appeals. Rule 54(a) of the Texas Rules of Appellate Procedure precluded the court of appeals from considering the late-filed statement of facts. The court of appeals therefore affirmed the trial court's judgment on the sole ground that the appellant did not timely file its statement of facts.[284] The Texas Supreme Court reversed the court of appeals, holding that an appellant's failure to timely file the statement of facts does not automatically require affirmance of the lower court's judgment as a matter of course.[285] The record on appeal, the court noted, consists of "a transcript and, *where necessary to the appeal*, a statement of facts."[286] Under Rule 90(a) of the Texas Rules of Appellate Procedure, the court of appeals must "address every issue raised and necessary to final disposition of the appeal," and resolution of some issues does not necessarily require a statement of facts.[287] While a court of appeals cannot generally conduct a sufficiency of the evidence review absent a statement of facts, the court can address issues, such as those involving legal error, the determination of which would not require a statement of facts.[288] The Texas Supreme Court held that the appellate court erred in

277. 790 S.W.2d 700, 702 (Tex. App.—Waco 1990, writ denied).
278. *Hackney*, 866 S.W.2d at 61.
279. 852 S.W.2d 596 (Tex. App.—Corpus Christi 1993, writ denied).
280. *Hackney*, 866 S.W.2d at 61.
281. Richards v. Suckle, 871 S.W.2d 239, 243 (Tex. App.—Houston [14th Dist.] 1994, no writ).
282. *Id.*
283. 878 S.W.2d 598 (Tex. 1994) (per curiam).
284. *Id.* at 599.
285. *Id.* at 599.
286. *Id.* (citing Tex. R. App. P. 50(a) (emphasis added)).
287. *Id.* at 599-600.
288. *Id.* at 600.

affirming the judgment without considering the legal issues raised by the appellant.[289]

E. Sua Sponte Extension of Time

In *Texas Instruments, Inc. v. Teletron Energy Management, Inc.*,[290] the court reporter did not complete the statement of facts for more than a year after it was originally due, and the appellant filed nine timely motions to extend the due date, none of which the appellee opposed and all of which the court of appeals granted. The deadline set by the court of appeals in response to the appellant's last motion was December 2, 1991. On its own motion, but *before* the December 2 deadline, the court of appeals postponed the December 2 deadline for filing the statement of facts until December 18. The petitioner argued to the Texas Supreme Court that the December 2 deadline could only be extended on the motion of a party, not on the court's own motion. The court rejected this contention.

The Texas Supreme Court noted that while a court cannot grant an untimely motion to extend the time for filing the appellate record and cannot accept the record after the time for filing it and the time for filing a motion for extension have both expired,[291] the court has discretion to set a new deadline after it grants a timely filed motion for extension.[292] The court reasoned that it would not make sense to allow the court discretion in setting the deadline, but not in adjusting it after it was set and before it expired.[293] The court specifically declined to address whether a court of appeals may extend a filing deadline in the complete absence of a timely motion to extend or whether a court can grant an extension, without a motion, after a previously extended deadline has expired.[294]

F. Burden of Presenting Complete Record to Court of Appeals

The appellant bears the burden of filing a complete record to support its points of error. In *Fiesta Mart, Inc. v. Hall*[295] the trial court assessed the defendant/convenience store guardian ad litem fees even though the store prevailed on the plaintiffs' claims. The store appealed the ruling but failed to include in the record on appeal a statement of facts of the hearing at which the trial court orally assessed the fees. The record on appeal included only the transcript and statement of facts from the trial on liability.

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289. *Id.*
290. 877 S.W.2d 276 (Tex. 1994).
291. *Id.* at 278 (citing Chojnacki v. First Court of Appeals, 699 S.W.2d 193 (Tex. 1985) and Meshwert v. Meshwert, 549 S.W.2d 383 (Tex. 1977)).
292. *Texas Instruments*, 877 S.W.2d at 278.
293. *Id.*
294. *Id.* at 278 n.2.
295. 886 S.W.2d 440 (Tex. App.—Houston [1st Dist.] 1994, no writ).

To obtain a reversal, an appellant must present the appellate court with a record that shows the error about which the appellant complains.[296] Without a statement of facts from the good cause hearing, the court of appeals found that it could not determine if the trial court made the necessary oral findings to satisfy Texas Rule of Civil Procedure 141's requirements for assessing costs.[297] Affirming the trial court's award, the court of appeals concluded that it was required to presume the trial court made all necessary findings to support its assessment of costs.[298]

Despite Texas Rule of Appellate Procedure 50(d)'s mandate that the burden is on the appellant to see that a sufficient record is presented to show error requiring reversal, an omission from the record that amounts only to a "defect of appellate procedure" under Rule 83 of the appellate procedure rules may be corrected by the filing of a supplemental transcript *after* submission. In *Crais v. Haynes*,[299] the appellant failed to request for inclusion in the transcript the court's charge, the jury verdict, and the judgment rendered on the verdict. After submission, the Waco Court of Appeals determined that it could not review the trial court's judgment without these documents.[300] Acknowledging that under Rule 50(d) the appellant has the burden to see that a sufficient record is presented to show error requiring reversal, the court of appeals nonetheless found that the omission of the charge, verdict and judgment from the transcript was merely a "defect of appellate procedure" under Rule 83.[301] Rule 83 states that "[a] judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend such defects or irregularities. . . ."[302] The court ordered the clerk to prepare and forward the missing documents to it by way of supplemental transcript, after which the case would be resubmitted for review without oral argument.[303]

296. *Id.* at 42.

297. *Id.* at 443. Rule 141 provides: "The court may assess costs against any party to the litigation upon a showing of good cause." TEX. R. CIV. P. 141.

298. *Fiesta Mart*, 886 S.W.2d at 443. *See* DeSai v. Islas, 884 S.W.2d 204, 205-06 (Tex. App.—Eastland 1994, writ denied) (appellant has duty to bring forth a sufficient appellate record and without one, the court of appeals must presume that the trial court heard sufficient evidence to support its decision and properly stated reasons for finding good cause and taxing guardian ad litem fees against appellant).

299. 867 S.W.2d 412 (Tex. App.—Waco 1993, no writ) (per curiam).

300. *Id.*

301. *Id.*

302. TEX. R. APP. P. 50(d), 83.

303. *Crais*, 867 S.W.2d at 413.

IX. THE LIMITED APPEAL

A. SEVERABILITY

Under Rule 40(a)(4), a limited appeal may only be taken from a "severable portion" of the judgment.[304] In its opinion in *Oliver v. Oliver*,[305] the Texas Supreme Court held that "severability" in the context of a limited appeal is not analogous to severability in the context of a compulsory counterclaim.[306] Claims may be severable under Rule 40(a)(4) even if they arise out of the same transaction or occurrence.[307] In *Oliver* the appellant/defendant asserted a compulsory counterclaim that would have been time-barred unless section 16.069 of the Texas Civil Practice and Remedies Code applied to extend the statute of limitations for a claim "arising out of the same transaction or occurrence" that was the basis of the appellee/plaintiff's lawsuit.[308] The trial court rendered a take-nothing judgment on the appellant's counterclaim, holding that section 16.069 did not apply, and the claim was time-barred.[309] The appellant filed a limited appeal under Rule 40(a)(4), arguing that section 16.069 permitted her counterclaim, but the court of appeals affirmed the trial court's judgment.

In the Texas Supreme Court, the appellee argued that the appellant was estopped from relying upon section 16.069 to extend the statute of limitations because, in limiting her appeal, she designated her counterclaim as "severable" from the remainder of the trial court's judgment and thus, according to appellee, it did not arise out of the same transaction or occurrence as plaintiff's claims. The appellee argued that if the appellant's counterclaim were compulsory, it would not be "severable" for purposes of pursuing a limited appeal. Reversing the judgment of the court of appeals, the supreme court held that the rationale proposed by the appellee does not extend to limitation of appeals, "as all challenges to a trial court's judgment are addressed together on appeal regardless of whether the appellant initially limits the appeal under Rule 40(a)(4)."[310] Claims may be severable, therefore, under Rule 40(a)(4) even though arising out of the same transaction or occurrence.[311]

B. FILING A LIMITED RECORD IN A LIMITED APPEAL

Although Rule 53(d) of the Texas Rules of Appellate Procedure permits the filing of a limited record on appeal, a party wishing to limit the record must comply with the strict requirements of this rule. For example, in *Matthews v. Land Tool Co.*,[312] the appellants attempted to limit

304. TEX. R. APP. P. 40(a)(4).
305. 889 S.W.2d 271 (Tex. 1994).
306. *Id.* at 273.
307. *Id.*
308. *Id.* at 272.
309. *Id.*
310. *Id.* at 273.
311. *Id.*
312. 868 S.W.2d 25 (Tex. App.—Houston [14th Dist.] 1993, no writ).

their appeal to review of the trial court's grant of the appellee's motion for directed verdict on its Deceptive Trade Practices Act cause of action. The appellants submitted only a limited statement of facts, which included primarily one witness' testimony and opening argument. Under Rule 53(d), however, the party who requests a limited statement of facts must also submit, either with the request or in an attached document, a statement of the points of error on which the party intends to rely.[313] The appellants did not file a statement of their points of error.

The court of appeals noted that when a party makes a proper request for a limited statement of facts, the requesting party receives a significant benefit from the presumption on appeal that nothing omitted from the record is relevant to any of the points specified or to the disposition of the appeal.[314] On the other hand, the court pointed out, the failure to comply with the procedural requirements of Rule 53(d) leads to "dire consequences" because the court of appeals must presume that the missing parts are relevant.[315] Affirming the trial court's judgment, the court of appeals concluded that, because the appellants failed to comply with the requirements of Rule 53(d), the court of appeals had to presume that the omitted evidence supported the trial court's judgment.[316]

X. STANDARDS OF REVIEW

A. Review of Trial Court's Grant of Summary Judgment

An appellate court cannot affirm a summary judgment on grounds not expressly set forth in the motion or response. In *Stiles v. Resolution Trust Corp.*,[317] involving a suit on a note, the RTC, as receiver for the plaintiff/bank, filed a motion for summary judgment but did not mention in its motion the *D'Oench, Duhme* doctrine or 12 U.S.C. section 1823(e).[318] The trial court rendered summary judgment for the RTC without specifying the grounds for its ruling.[319] The court of appeals affirmed because the evidence produced by the nonmovant did not satisfy the requirements of *D'Oench* and section 1823(e).[320] The court concluded that, even though the RTC had not raised *D'Oench* or section 1823(e) in the trial court, the nonmovant had the burden to negate the doctrine to raise a fact issue regarding his affirmative defenses.[321]

Reversing the judgment of the court of appeals, the Texas Supreme Court held that, although not expressly precluded by the language of

313. *Id.* at 26 (citing Tex. R. App. P. 53(d)).
314. *Id.* at 27.
315. *Id.*
316. *Id.*
317. 867 S.W.2d 24 (Tex. 1993).
318. *Id.* The D'Oench, Duhme doctrine originated in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). It prevents an obligor from asserting as a defense an oral side agreement with the obligee in an action to collect on a note.
319. *Stiles*, 867 S.W.2d at 26.
320. *Id.*
321. *Id.*

Rule 166a(c), an appellate court cannot affirm a summary judgment on grounds not expressly stated in the motion or response.[322] The court reasoned that the assertion of a new ground before the appellate court in support of summary judgment could prejudice the nonmovant's ability to demonstrate that the new issue raises a genuine issue of material fact.[323] Further, "in all cases it deprives the litigants and the appellate court of the benefit of the trial court's judgment on the issue."[324]

B. Review of Trial Court's Venue Determinations

Under the Texas Supreme Court's holding in *Ruiz v. Conoco, Inc.*,[325] an appellate court reviewing a trial court's ruling on venue must conduct an independent review of the *entire* record to determine whether venue was proper in the ultimate county of suit.[326] The Texas Civil Practice and Remedies Code governs the standard for appellate review of a denial of a motion to transfer venue: "On appeal from the trial on the merits, if venue was improper it shall in no event be harmless error. In determining whether venue was or was not proper, the appellate court shall consider the entire record, including the trial on the merits." [327] The court in *Ruiz* observed that the procedure mandated by this statute is "fundamentally flawed because it allows appellate review of venue on a basis different from that on which it was decided."[328] In deciding a motion to transfer venue, the court determined, the trial court is required by Rule 87 of the Texas Rules of Civil Procedure to take as true those facts of which prima facie proof is made by the party with the burden of such proof; "yet in reviewing the trial court's decision, an appellate court must reverse (there cannot be harmless error) if other evidence in the record, even evidence adduced after venue was determined, destroys the prima facie proof on which the trial court relied."[329] Despite the dubious wisdom of the statute, the court held that there is "no misunderstanding its plain language: an appellate court is obliged to conduct an independent review of the entire record to determine whether venue was proper in the ultimate county of suit."[330]

If there is any probative evidence in the entire record (including trial on the merits) to support the trial court's determination, even if the preponderance of the evidence is to the contrary, the appellate court must uphold the trial court's venue determination.[331] If there is no such evidence, but there is probative evidence that venue was proper in the county to which transfer was sought, the appellate court should instruct

322. *Id.*
323. 867 S.W.2d at 26.
324. *Id.*
325. 868 S.W.2d 752 (Tex. 1993).
326. *Id.* at 758.
327. Tex. Civ. Prac. & Rem. Code Ann. § 15.064(b) (Vernon 1986).
328. 868 S.W.2d at 757.
329. *Id.*
330. *Id.* at 757-58.
331. *Id.*

the trial court to transfer the case to that county.[332] Only if there is no probative evidence that venue was proper either in the county of suit or in the county to which transfer was sought should the appellate court remand the case to the trial court to conduct further proceedings on the issue of venue.[333]

C. Factual Sufficiency Review — Generally

In *Jaffe Aircraft Corp. v. Carr*,[334] a negligence action relating to an airplane crash, the jury answered "No" to the question "Did the negligence of [the defendant] proximately cause the occurrence in question?"[335] Based on this finding, the trial court entered a take-nothing judgment against the plaintiffs. The court of appeals, however, reversed the trial court's judgment and remanded the cause for a new trial on the ground that the jury's failure to answer "Yes" to this question "was so against the great weight and preponderance of the evidence as to be wrong and unjust."[336] While the court of appeals detailed the evidence supporting a "Yes" answer, it failed to discuss the evidence in the record supporting the jury's negative finding.[337] Rather, the court's opinion contained only a single reference to evidence supporting the verdict.[338] The Texas Supreme Court reversed the appellate court's judgment on the basis that it applied the incorrect legal standard in its review of the evidence.[339]

The court repeated the requirements first set out in *Pool v. Ford Motor Co.*[340] and held that these requirements apply to the review of both affirmative and negative jury findings.[341] A court of appeals *must* "detail the evidence *relevant* to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias."[342] The court of appeals should further, in its opinion, "state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict."[343]

In *Ellis County State Bank v. Keever*,[344] decided after *Jaffe*, the Texas Supreme Court held that although it requires that every appellate opinion involving a *reversal* of a trial court judgment on factual insufficiency grounds to detail the evidence as described in *Pool* and *Jaffe*, this requirement does not extend to cases in which the court of appeals *upholds* the

332. 868 S.W.2d at 758.
333. *Id.*
334. 867 S.W.2d 27 (Tex. 1993).
335. *Id.* at 28.
336. *Id.*
337. *Id.* at 29.
338. 867 S.W.2d at 29 n.2.
339. *Id.* at 29.
340. 715 S.W.2d 629, 634 (Tex. 1986).
341. 867 S.W.2d at 29.
342. *Id.* at 28 (quoting *Pool*, 715 S.W.2d at 634).
343. *Jaffe*, 867 S.W. 2d at 28 (quoting *Pool*, 715 S.W.2d at 634).
344. 888 S.W.2d 790 (Tex. 1994).

trial court judgment.[345] The court reasoned that the purpose for requiring the appellate court to detail the evidence supporting reversal is to discourage a court of appeals from merely substituting its judgment for that of the jury.[346] Requiring the detailing of all evidence supporting a judgment, the court concluded, imposes a burden on the court of appeals not consistent with this purpose.[347]

D. No Evidence Review — Generally

In *Browning-Ferris, Inc. v. Reyna*,[348] the Texas Supreme Court reaffirmed its limited role in reviewing the sufficiency of evidence to support a jury verdict. The court reviews only the evidence in support of the finding to determine whether there is some evidence that provides a legal basis for the finding.[349] If more than a scintilla of evidence exists, the claim is sufficient as a matter of law.[350] While the Texas Supreme Court cannot convert some evidence into no evidence, it also cannot "convert mere suspicion or surmise into some evidence."[351] In *Reyna*, the court reversed and rendered judgment for Browning-Ferris, Inc. because "some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence."[352]

E. Review of Evidence to Support Specific Claims

1. No Evidence Review of Finding of Bad Faith

In *Lyons v. Millers Casualty Ins. Co.*,[353] the Texas Supreme Court addressed legal sufficiency review of fact findings of bad faith against an insurer. The court noted that appellate review in a bad faith case presents unusual problems, primarily because the reviewing court must determine whether there is "no evidence" of a negative fact—that the insurer had no reasonable basis to deny or delay payment of a claim.[354] To aid the appellate court in its no evidence review, the supreme court articulated what it characterized as "nothing more than a particularized application of our traditional no evidence review."[355] The appellate court must focus on the relationship of the evidence arguably supporting the bad faith finding to the elements of bad faith.[356] The evidence must relate to the tort issue of "no reasonable basis" not just to the contract issue

345. *Id.* at 794. This rule does not apply to the review of punitive damages awards. *See* notes 372-75 and accompanying text.
346. *Id.* (*quoting Pool*, 715 S.W.2d at 635).
347. *Keever*, 888 S.W.2d at 794.
348. 865 S.W.2d 925 (Tex. 1993).
349. *Id.* at 927-28.
350. *Id.* at 928.
351. *Id.*
352. *Id.* at 927.
353. 866 S.W.2d 597 (Tex. 1993).
354. *Id.* at 600.
355. *Id.*
356. *Id.*

of coverage.[357] Justice Doggett in dissent concluded that the court's pronouncement to focus on the relationship of the evidence to the elements of bad faith inartfully camouflaged its attempt in bad faith cases to turn a legal sufficiency review into a factual sufficiency review.[358]

In *Lyons*, the petitioner's insurance carrier denied her claim under a homeowner's policy for damage to the house. The petitioner claimed that the damage to her house was caused by a windstorm, a covered peril, while the carrier claimed the damage was caused by the settling of the foundation, an excluded peril. The petitioner sued the carrier, alleging among other claims, breach of the duty of good faith and fair dealing. At trial, the carrier presented evidence that it had engaged the services of a professional engineer specializing in damage and failure analysis to inspect the property and that it had relied on this expert's report in denying the petitioner's claim. Nonetheless, the jury found (among other findings) that the carrier breached its duty of good faith and fair dealing in failing to pay the petitioner's claim.[359] The trial court rendered judgment on the verdict but the court of appeals reversed and rendered a take-nothing judgment on the petitioner's bad faith claim, holding that there was no evidence of the breach of a duty of good faith and fair dealing.[360]

Outlining the standards for appellate review of the legal sufficiency of evidence in bad faith cases, the Texas Supreme Court affirmed the court of appeals' finding of no evidence of no reasonable basis.[361] The supreme court pointed out that the evidence the petitioner offered in support of the bad faith finding consisted of an expert's opinion that the windstorm caused the damages and the testimony of the petitioner and her neighbors that the brick veneer on the house was visibly damaged after the storm.[362] This evidence, the court held, supported only the jury's finding that the petitioner's damage was caused in part by the wind and thus covered by the policy.[363] This evidence, therefore, showed only that the carrier was mistaken as to its *contract* liability. The evidence, however, did *not* show that the carrier's denial of the claim was *unreasonable*. To support a bad faith claim, the petitioner had to offer evidence that the reports of the carrier's experts were not objectively prepared, that the carrier's reliance on them was unreasonable, or that other evidence existed from which a factfinder could infer that the carrier acted without a reasonable basis, and that it knew or should have know that it lacked a reasonable basis for its actions.[364] The court thus emphasized that the evidence "must relate to the tort issue of no reasonable basis for denial or delay in payment of a claim, not just to the contract issue of coverage."[365]

357. *Id.*
358. 866 S.W.2d at 602.
359. *Id.* at 599.
360. *Id.*
361. *Id.* at 601.
362. 866 S.W.2d at 600-01.
363. *Id.* at 601.
364. *Id.*
365. *Id.* at 600.

2. *No Evidence Review of Gross Negligence Findings*

In *Transportation Ins. Co. v. Moriel*,[366] the Texas Supreme Court considered what constitutes legally sufficient evidence of gross negligence to support an award of punitive damages in a bad faith case. Claims for punitive damages in bad faith cases present the problem of distinguishing between simple bad faith and bad faith accompanied by aggravated conduct such as gross negligence.[367] In a "substantial clarification," the court held that gross negligence includes two elements, one objective and one subjective: "(1) viewed objectively from the standpoint of the actor, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others."[368] The court made clear that gross negligence in a bad faith case is identical to gross negligence in other cases.[369] It concluded that the evidence did not support either (1) the inference that the defendant had any subjective awareness that the plaintiff would probably suffer serious injury, or (2) the inference that the defendant's actions created any risk of serious harm to the plaintiff.[370] The court emphasized that the defendant could not be liable for punitive damages under a gross negligence theory unless it was "actually aware of an extreme risk—some genuine and unjustifiable likelihood of serious harm to [the plaintiff] that was independent and qualitatively different from the inconvenience" of a breach of the duty of good faith and fair dealing.[371]

3. *Review of Evidence of Punitive Damages*

The Texas Supreme Court in *Moriel* further held that the court of appeals, whether affirming or reversing the trial court, must detail the relevant evidence and explain why the evidence either supports or does not support a punitive damages award.[372] The court noted that under its decision in *Pool v. Ford Motor Co.*,[373] courts of appeals, when *reversing* on insufficiency grounds, should detail the evidence in their opinions and explain why the jury's finding is factually insufficient or is so against the great weight and preponderance of the evidence as to be manifestly unjust.[374] In *Moriel*, the court held that because a jury has broad discretion in awarding punitive damages, the same type of review is appropriate when a court of appeals affirms a punitive damage award.[375]

366. 879 S.W.2d 10 (Tex. 1994).
367. *Id.* at 18.
368. *Id.* at 23.
369. *Id.* at 24.
370. 879 S.W.2d at 26.
371. *Id.* at 25-26.
372. *Id.* at 30-31.
373. 715 S.W.2d 629, 635 (Tex. 1986).
374. *Moriel*, 879 S.W.2d at 31.
375. *Id.*

XI. CONCLUSION

As the decisions reviewed reflect, the Texas Supreme Court seems determined to assist practitioners in their bona fide efforts to invoke the jurisdiction of the appellate courts. Under *Springer v. Spruiell*,[376] a summary judgment clearly stating it is disposing of all claims and parties is final for purposes of appeal, regardless whether the summary judgment motion raised all causes of action.[377] Under *Linwood v. NCNB of Texas*,[378] *Blankenship v. Robins*[379] and *Maxfield v. Terry*,[380] the courts of appeals may not dismiss an appeal for want of jurisdiction when the appellant makes a bona fide attempt to invoke the court's jurisdiction, even if the appellant simply fails, as in *Linwood*, to follow the clear mandates of the Texas Rules of Appellate Procedure. The supreme court's clearing of the appellate jurisdictional path permits the resolution of more appeals on their merits; the court still warns, however, that appellate points can be waived through inadequate briefing.[381]

376. 866 S.W.2d 592 (Tex. 1993). The supreme court relied upon its reasoning in Mafrige v. Ross, 866 S.W.2d 590 (Tex. 1993).

377. *Id.* at 591. Under the Texas Supreme Court's holding in McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337 (Tex. 1993), all grounds for summary judgment must be expressly set forth in the movant's motion for summary judgment. *Id.* The movant may not recover under any grounds not expressly set forth in the motion. *Id.* Under the court's decision in *Springer*, however, even if the motion for summary judgment does not address all of the plaintiff's live causes of action, the movant may nonetheless obtain a judgment "final" for purposes of appeal disposing of all such causes of action if the trial court includes "Mother Hubbard" language in the summary judgment. 866 S.W.2d at 591-92. *See* Springer v. First Nat'l Bank of Plainview, 866 S.W.2d 626, 630-31 (Tex. App.—Amarillo 1992), *rev'd*, Springer v. Spruiell, 866 S.W.2d 592 (Tex. 1993).

378. 885 S.W.2d 102 (Tex. 1994) (per curiam).

379. 878 S.W.2d 138 (Tex. 1994) (per curiam).

380. 888 S.W.2d 809 (Tex. 1994).

381. Fredonia State Bank v. General Am. Life Ins. Co., 881 S.W.2d 279 (Tex. 1994).