



January 1996

Appellate Practice and Procedure

Sharon N. Freytag

LaDawn H. Conway

Recommended Citation

Sharon N. Freytag & LaDawn H. Conway, *Appellate Practice and Procedure*, 49 SMU L. REV. 653 (1996)
<https://scholar.smu.edu/smulr/vol49/iss4/2>

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APPELLATE PRACTICE AND PROCEDURE

Sharon N. Freytag*
LaDawn H. Conway**

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

** B.G.S. University of Texas at Arlington; J.D., *cum laude*, Southern Methodist University; Attorney, Haynes and Boone, L.L.P., Dallas, Texas.

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I. INTRODUCTION

A review of Texas Supreme Court mandamus decisions demonstrates an apparent increase in the uses of this extraordinary remedy to direct trial court actions. The Texas Supreme Court also continues to streamline appellate procedure by refusing, whenever possible, to decide cases on procedural technicalities. In this Survey period, for example, it did so in the areas of objecting to the jury to charge,¹ assuring a complete record,² and briefing points of error.³

1. Texas Dep't of Human Serv. v. Hinds, 904 S.W.2d 629 (Tex. 1995).

2. Silk v. Terrill, 898 S.W.2d 764 (Tex. 1995) (per curiam).

3. Anderson v. Gilbert, 897 S.W.2d 783 (Tex. 1995) (per curiam).

II. APPELLATE REVIEW BEFORE FINAL JUDGMENT

A. MANDAMUS

1. *Time Frame for Filing Mandamus*

No rule of procedure sets a deadline for filing a mandamus challenge to a trial court's order, but the extraordinary nature of the relief requested requires prompt action. In *Stafford v. O'Neill*,⁴ the court of appeals held that an appellant, seeking mandamus relief from an order sustaining a contest to his affidavit of inability to pay costs, filed his mandamus too late when he waited more than two months after the court sustained the contest before seeking mandamus relief from the order.⁵

2. *Denial of Mandamus Relief*

- a. Order selecting limited number of plaintiffs for initial separate trial in multi-plaintiff lawsuit

In *Polaris Inv. Management Corp. v. Abascal*,⁶ a case involving 2700 plaintiffs, the trial court ordered that the claims of a small group of the plaintiffs proceed in an initial separate trial. The defendants sought a writ of mandamus to correct the trial court's order, but the supreme court denied their petition, holding, "even if the trial judge erroneously selected the trial plaintiffs, mandamus relief is still inappropriate."⁷ According to the court, the selection of trial plaintiffs is an "incidental ruling," inappropriate for review by mandamus.⁸ Granting mandamus relief under these facts, the court concluded, would "severely impair the ability of trial judges to manage their dockets, and would require this Court to micromanage trials."⁹

The supreme court similarly denied the defendants' petition for writ of mandamus to correct the trial court's order limiting discovery to those plaintiffs selected in the initial separate trial in *Polaris*.¹⁰ The court held that the trial judge's decision to restrict discovery in this manner was not of such an "egregious nature that it goes to the heart of [defendants'] case," and hence mandamus was improper.¹¹ The court again noted that the order was a ruling incidental to the trial process that would not deprive defendants of substantial rights.¹² The court also reaffirmed that venue determinations are not reviewable by mandamus.¹³

4. 902 S.W.2d 67 (Tex. App.—Houston [1st Dist.] 1995, original proceeding).

5. *Id.* at 68.

6. 892 S.W.2d 860 (Tex. 1995) (original proceeding).

7. *Id.* at 861.

8. *Id.*

9. *Id.*

10. *Id.* at 861-62.

11. *Polaris*, 892 S.W.2d at 862.

12. *Id.*

13. *Id.* (citing *Bell Helicopter Textron, Inc. v. Walker*, 787 S.W.2d 954, 955 (Tex. 1990)).

b. Order denying plea in abatement

The San Antonio Court of Appeals in *Coastal Oil & Gas Corp. v. Flores*,¹⁴ held that although the trial court should have granted a plea in abatement, because a lawsuit filed in Zapata County was inherently inter-related to a previously filed suit in Dallas County, the court of appeals could not grant relators' petition for writ of mandamus because the supreme court has instructed that the refusal to abate is "an incidental ruling for which the relators have an adequate remedy by appeal."¹⁵

The court of appeals observed, paradoxically, that even though it was not authorized to mandate the abatement of the Zapata County action, it was authorized to issue writs of mandamus to correct errors in discovery matters that may arise during the pendency of the Zapata County action where the applicant has no adequate remedy by appeal.¹⁶ Thus, it would be forced to review a discovery ruling in a case that should have been abated and consequently forced to engage in a "wasteful expenditure of judicial resources."¹⁷ The court counseled refileing of the plea in abatement to permit the trial court to reconsider its ruling in light of the court of appeals' comments.¹⁸

In *Hall v. Lawlis*,¹⁹ the supreme court confirmed again the general rule that mandamus will not issue to correct an erroneous refusal to grant a plea in abatement. In *Lawlis*, two lawsuits involving the same parties were filed, the first in Harris County and the second in Jasper County. The defendants in the Jasper County lawsuit moved to have the lawsuit abated or dismissed on the basis that the Harris County court had acquired dominant jurisdiction.²⁰ While the motion to abate was pending, the Jasper County trial court granted a motion to compel the production of documents filed by the plaintiffs. The trial court overruled the motion to abate.²¹

The supreme court refused to review the ruling by mandamus, stating that in *Abor v. Black*, the court had "decided that it would not review by mandamus the refusal of a trial court to abate an action based on the pendency of another action unless the courts were directly interfering with each other by issuing conflicting orders or injunctions."²² Since the Harris County and Jasper County courts were not directly interfering with each other, the supreme court concluded mandamus was not

14. 908 S.W.2d 517 (Tex. App.—San Antonio 1995, orig. proceeding).

15. *Id.* at 518 (citing *Abor v. Black*, 695 S.W.2d 564 (Tex. 1985)). The lawsuits both concerned "the proper method of calculation and payment of royalties under the same mineral leases, covering the same land, and relating to the same production of gas from the same units and wells." *Id.*

16. *Id.* at 519.

17. *Id.*

18. *Id.*

19. 907 S.W.2d 493, 494 (Tex. 1995) (orig. proceeding).

20. *Id.* at 494.

21. *Id.*

22. *Id.* (citing *Abor*, 695 S.W.2d at 567).

appropriate.²³

c. Order denying petition in intervention

In *Segovia-Slape v. Paxson*,²⁴ the relator, the aunt of two children whose parents had filed for divorce, filed a petition in intervention in the divorce action seeking custody of the children. The judge refused to allow the aunt to intervene, stating he "never lets anyone intervene in divorce matters."²⁵

While not approving the trial court's policy precluding all interventions in divorce matters, the court of appeals held, "the right to intervene is subject to the court's wide discretion," and on the facts of the case before it, the court could not conclude the trial court clearly abused its discretion in striking the petition in intervention.²⁶

3. Grant of Mandamus Relief

a. Order overruling special appearance

The Texas Supreme Court analyzed the availability of mandamus to correct a trial court's denial of a special appearance in *National Industrial Sand Ass'n v. Gibson*.²⁷ In *Gibson* the court applied the rule from *Canadian Helicopters Ltd. v. Wittig*²⁸ that although "an appeal from a final judgment is ordinarily adequate to remedy denial of a special appearance" an exception to this rule exists "in cases in which the trial court's assertion of personal jurisdiction is 'with such disregard for guiding principles of law that the harm to the defendant becomes irreparable.'"²⁹ The court held that the order in *Gibson* fell within the exception "[b]ecause the traditional elements of personal jurisdiction were totally absent in the case."³⁰

Four justices dissented, concluding the defendants would have an adequate remedy by ordinary appeal.³¹ In fact, the defendants did not even argue that an ordinary appeal would be an inadequate appellate remedy.³² Noting that a showing of expense and delay is not enough to justify mandamus relief, the dissent emphasized that the court had recently reaffirmed in *Walker v. Packer* that an inadequate appellate remedy is a "fundamental tenet" of mandamus practice.³³ The dissent warned: "If

23. *Id.*

24. 893 S.W.2d 694 (Tex. App.—El Paso 1995, orig. proceeding).

25. *Id.* at 695-96.

26. *Id.* at 696; see *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992) (orig. proceeding).

27. 897 S.W.2d 769 (Tex. 1995) (orig. proceeding).

28. 876 S.W.2d 304 (Tex. 1994) (orig. proceeding).

29. *Gibson*, 897 S.W.2d at 771 (quoting *Canadian Helicopters*, 876 S.W.2d at 308).

30. *Id.* at 776 (noting that, unlike in *Canadian Helicopters* where the trial court was faced with a voluminous record filled with contradictory evidence of "contacts" with the forum state, the trial court here faced only the plaintiff's bare allegations of contacts).

31. *Id.* at 776-77 (Cornyn, J., dissenting) (joined by Chief Justice Phillips and Justices Gammage and Enoch).

32. *Id.* at 777.

33. *Id.* (citing *Walker*, 827 S.W.2d at 842).

the [c]ourt is free to ignore that tenet in this case, it may as well begin issuing extraordinary writs to correct denials of summary judgments."³⁴

b. Order denying motion to compel interrogatory answer

In *Able Supply Co. v. Moye*,³⁵ a mass products liability case with over 3,000 plaintiffs, the supreme court granted a writ of mandamus to correct a trial court's refusal to compel an answer to an interrogatory. The plaintiffs in *Able Supply* alleged that while employed and working at a Lone Star Steel plant, they were exposed to toxic materials delivered to the plant at various times from 1947 to the present. In 1987, the defendants directed a master set of interrogatories to the plaintiffs, asking the plaintiffs to state the name and address of every doctor who had attributed the plaintiffs' alleged injuries to exposure to defendants' products.

The trial court required only 30 plaintiffs each month to respond to the interrogatory, and at the time of the mandamus proceeding, only 800 of the more than 3000 plaintiffs had filed answers.³⁶ Most of those responses stated that the answer to the interrogatory "has not been determined at this time, but will be supplemented at a later date."³⁷

The defendants filed a motion to compel in 1991, which the trial court denied. The defendants tried again in 1993. Again, the trial court denied the motion. The defendants then petitioned the supreme court for relief from the trial court's refusal to compel an answer to the interrogatory.³⁸

The supreme court conditionally granted writ, holding that the trial court could have properly reached only one conclusion: that the motion to compel should be granted.³⁹ The motion to compel would have required the plaintiffs to answer an interrogatory linking their injuries with a particular product and would simplify the case, streamline costs to all parties, conserve judicial resources, and aid the lower court in preparing a plan for trial of the cases.⁴⁰ The trial court's denial of the motion to compel, therefore, constituted a clear abuse of discretion.⁴¹

The supreme court observed that the defendants *Able Supply* fell into one of the three situations the court had identified in *Walker v. Packer*, in which a remedy by an appeal may be inadequate.⁴² The situation exists, the court held, when a trial court's discovery order "imposes a burden on [one party] far out of proportion to any benefit to the [other] party."⁴³ The court noted that the defendants had spent eight years and millions of dollars defending against a lawsuit without access to the basic facts under-

34. *Id.*

35. 898 S.W.2d 766, 767 (Tex. 1995) (orig. proceeding).

36. Under the schedule set forth by the trial court, answers from the remainder would have required an additional seven to eight years.

37. *Id.* at 768.

38. *Id.*

39. *Id.* at 771.

40. *Id.*

41. *Able Supply*, 898 S.W.2d at 771.

42. *Id.* (citing *Walker*, 827 S.W.2d at 843).

43. *Id.*

pinning the claims against them.⁴⁴ The court concluded that the burden imposed by requiring the 294 defendants to continue to defend the claims of over 3,000 plaintiffs before discovering which defendants were actually implicated "is far out of proportion to any benefit to the plaintiffs in withholding this basic information."⁴⁵ The court held that mandamus was justified because the denial of the discovery in this matter "goes to the very heart of the defendants' case."⁴⁶

c. Order requiring response to over-broad interrogatory

In *Texaco, Inc. v. Sanderson*,⁴⁷ the Texas Supreme Court held that mandamus was appropriate to correct an overly broad interrogatory. In *Texaco*, the plaintiffs asserted that toxic materials and asbestos present at the work place resulted in the deaths of their husbands.⁴⁸ The principal issue in the case was "whether defendants were grossly negligent in exposing [the] decedents to asbestos, benzene, and other such toxic substances."⁴⁹ During discovery, the plaintiffs requested production of "all documents written by [Texaco's corporate safety director] that concern safety, toxicology, and industrial hygiene, epidemiology, fire protection and training."⁵⁰ The defendants argued that the request was over-broad "because it [was] not limited to information concerning employees' exposure to asbestos and benzene (the only substances . . . mentioned in the plaintiff's pleadings) or even to toxic substances generally."⁵¹ In fact, the request was not limited in any way to time, place or subject matter. The plaintiffs argued they were entitled to the documents to show defendants' "state of mind" about safety.⁵²

The supreme court held that a request for discovery reasonably tailored to include only matters relevant to the case is not over-broad merely because it may call for some information of doubtful relevance.⁵³ However, the court concluded that the request in *Texaco* was "not close" and observed that the defendants were entitled to relief by mandamus.⁵⁴

Similarly, in *Dillard Department Stores, Inc. v. Hall*,⁵⁵ the Texas Supreme Court conditionally granted mandamus, holding that a "twenty-state search for documents over a five-year period is [an] overly broad [request for production of documents] as a matter of law."⁵⁶ In *Dillard*, a false arrest case, the plaintiff sought, through requests for production of

44. *Id.*

45. *Id.* at 772.

46. *Able Supply*, 898 S.W.2d at 772.

47. 898 S.W.2d 813, 815 (Tex. 1995) (orig. proceeding) (per curiam).

48. *Id.* at 814.

49. *Id.* at 815.

50. *Id.* at 814.

51. *Id.*

52. *Texaco*, 898 S.W.2d at 814.

53. *Id.* at 815.

54. *Id.* The court held that the request was "not merely an impermissible fishing expedition; it [was] an effort to dredge the lake in hopes of finding a fish." *Id.*

55. 909 S.W.2d 491 (Tex. 1995) (orig. proceeding) (per curiam).

56. *Id.* at 492.

documents, incident reports and claims files for 668 customers who had filed false arrest claims against the defendant from stores across the country during the years 1984 through 1992. The trial court ordered production of the documents.⁵⁷

Although the plaintiff's petition stated only a simple claim for false arrest, in response to the defendant's mandamus petition, the plaintiff explained he needed the production of the requested reports and claims "to explore whether he [could] in good faith allege racial discrimination."⁵⁸ Conditionally granting mandamus, the supreme court held "this is the very kind of 'fishing expedition' that is not allowable under rule 167 of the Texas Rules of Civil Procedure."⁵⁹ Mandamus was proper, the court concluded, because the discovery order was "well outside the bounds of proper discovery" and therefore constituted an abuse of discretion.⁶⁰

In addition, the court held the trial court's denial of defendants' claim of privilege regarding this request was an abuse of discretion because defendants are not required to assert privilege except in response to an "appropriate discovery request."⁶¹

d. Order to answer interrogatories regarding attorneys' fees

Although only the plaintiffs in *MCI Telecommunications Corp. v. Crowley*⁶² sought recovery of attorneys' fees, the trial court ordered the defendant MCI to answer an interrogatory requesting detailed information about the names, billing rates, and number of hours billed by all MCI attorneys (in-house and outside counsel), as well as the total amount of legal fees incurred by MCI in the case. Concluding MCI's attorneys' fees in its defense of the case were "patently irrelevant" and not reasonably calculated to lead to the discovery of admissible evidence, the Fort Worth Court of Appeals held that the trial court had abused its discretion.⁶³ Determining that the request imposed a disproportionate burden on MCI that amounted to harassment, the court held that MCI had no adequate remedy by appeal.⁶⁴

e. Refusal to disqualify counsel

Mandamus is an appropriate remedy when a trial court refuses to disqualify counsel upon a showing of a conflict of interest. For example, in *Texaco Inc. v. Garcia*,⁶⁵ the trial court refused to grant the defendant's motion to disqualify the plaintiff's counsel although the evidence re-

57. *Id.* at 491.

58. *Id.* at 492.

59. *Id.* (citing *Loftin v. Martin*, 776 S.W.2d 145, 148 (Tex. 1989) (orig. proceeding)).

60. *Dillard*, 909 S.W.2d at 492 (quoting *Sanderson*, 898 S.W.2d at 815).

61. *Id.*

62. 899 S.W.2d 399 (Tex. App.—Fort Worth 1995, orig. proceeding).

63. *Id.* at 403-04. The court also held that MCI had not waived its relevance objection by not presenting evidence on it at the trial court hearing because information that is clearly irrelevant does not require proof. *Id.* at 402.

64. *Id.* at 404-05.

65. 891 S.W.2d 255 (Tex. 1995) (orig. proceeding) (per curiam).

flected that plaintiff's counsel was previously employed at a law firm that represented the defendant in substantially related matters. In fact, the plaintiff's counsel had defended the defendant in a lawsuit strikingly similar to the lawsuit brought by the plaintiff. The supreme court conditionally granted a writ of mandamus, holding that the trial court abused its discretion in denying the defendant's motion to disqualify.⁶⁶

In a similar case, the Texas Supreme Court held that the trial court abused its discretion in refusing to disqualify new co-counsel employed by the plaintiff's counsel about a month before trial.⁶⁷ The new co-counsel had been, during the pendency of the lawsuit, employed as a lawyer at defense counsel's law firm, although he had not worked directly on the case while at the firm. The supreme court conditionally granted mandamus, directing the trial court to vacate its order denying the plaintiff's motion for disqualification.⁶⁸

f. Order assessing excessive fine for contempt

In *Rosser v. Squier*,⁶⁹ the Texas Supreme Court held that mandamus will lie to remedy a court's order assessing an excessive fine for contempt because the fine is void. The trial court in *Rosser* assessed relator \$45,000 for six counts of contempt, but a trial court lacks jurisdiction to assess a fine of more than \$500 for each contempt.⁷⁰ The supreme court conditionally granted a writ of mandamus directing the trial court to reduce the fine to \$3000.⁷¹

g. Order sustaining affidavit of inability to pay

The supreme court in *Smith v. McCorkle*⁷² held that mandamus is the appropriate remedy when a contest to an affidavit of inability to pay is improperly sustained.⁷³ In *Smith*, the order sustaining the contest was oral, not written, so the appellate court had to disregard the order and look only to appellants' affidavit, which conclusively demonstrated inability to pay.

h. Order of continuance

The Waco Court of Appeals held in *Walls Regional Hosp. v. Altaras*⁷⁴ that mandamus will lie to require a trial court to dissolve an order continuing the relator/hospital's hearing on a staff doctor's application for reap-

66. *Id.* at 257.

67. *Henderson v. Floyd*, 891 S.W.2d 252, 253-54 (Tex. 1995) (orig. proceeding) (per curiam).

68. *Id.* at 255.

69. 902 S.W.2d 962 (Tex. 1995) (orig. proceeding) (per curiam).

70. See TEX. GOV'T CODE § 21.002(b) (Vernon 1988).

71. *Rosser*, 902 S.W.2d at 962.

72. 895 S.W.2d 692 (Tex. 1995) (orig. proceeding).

73. *Id.* at 692.

74. 903 S.W.2d 36 (Tex. App.—Waco 1994, orig. proceeding).

pointment to staff membership and clinical privileges.⁷⁵ The trial court had ordered a continuance, pending a pretrial hearing in a cause pending on its docket in which the doctor was suing the relator/hospital. The hospital argued the trial court had no jurisdiction to enter the order until its hearing was completed and the "continuance" was essentially an injunction that interfered with the hospital's administrative proceedings before they were completed.⁷⁶

The Waco Court of Appeals determined that the trial court had jurisdiction, but it did not address the injunction issue. Rather, the court based its decision on the exhaustion of remedies doctrine and found a clear abuse of discretion in the trial court's interference with the professional review proceedings prior to their exhaustion under the hospital's bylaws.⁷⁷ The appellate court noted the public interest served by the professional review process, created to provide an efficient and expeditious determination, within the peculiar expertise of those participating in the process, of whether the doctor's conduct negatively affected the quality of medical care at the hospital.⁷⁸

The court of appeals further held that the hospital had no adequate remedy at law because, without mandamus relief, "[the hospital] and the public will be deprived of the benefits of the professional-review process and, most importantly, the public interest served by an efficient and expeditious review process will be defeated."⁷⁹

i. Void orders

In *Thomas v. Miller*,⁸⁰ the trial court issued a summary judgment during the pendency of a bankruptcy action in violation of the automatic stay. The court of appeals held that "any order or judgment entered during the pendency of a proceeding in bankruptcy is void, being entered in contravention of the automatic stay provided by the Bankruptcy Code."⁸¹

Noting that a trial court has the duty to vacate the entry of a void judgment, and has no discretion to refuse to set aside such a judgment, the court of appeals held that "[m]andamus [is] a proper mode of attack upon the void judgment."⁸² The court of appeals observed that the relator had no adequate remedy by appeal; "there [was] no judgment from which an appeal [could] be taken because the order issued by the trial court was void."⁸³ The court held that the relator should not be required to attack the judgment collaterally in multiple proceedings every time an attempt

75. *Id.* at 37.

76. *Id.*

77. *Id.* at 43.

78. *Id.*

79. *Atras*, 903 S.W.2d at 44 (citing *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 272-73 (Tex. 1992) (orig. proceeding)).

80. 906 S.W.2d 260 (Tex. App.—Texarkana 1995, orig. proceeding).

81. *Id.* at 261. See 11 U.S.C.A. § 362 (West 1993 & Supp. 1995).

82. *Thomas*, 906 S.W.2d at 262-63.

83. *Id.* at 263.

to execute upon it was made.⁸⁴

B. INTERLOCUTORY APPEALS

1. Probate Court Rulings

Although some interlocutory orders are appealable under the general Probate Code provision governing appeals,⁸⁵ the Texas Supreme Court held that the partial summary judgment in *Crowson v. Wakeham*⁸⁶ was not final for purposes of appeal until the trial court entered the order severing the judgment. The probate order in that case was a ruling in an heirship proceeding brought by a woman claiming to be the decedent's common law wife and joined by other claimants to the decedent's property.

The court of appeals dismissed the appeal as untimely on the basis that the summary judgment order declaring that the appellant was not the decedent's common-law wife, and therefore not an heir of the decedent, appeared to have adjudicated all of the appellant's substantive rights concerning the decedent's estate and was final despite the pending claims of other would-be heirs.⁸⁷ The court therefore held that the appellate timetable ran from the date of that order, not from the order of severance.⁸⁸

The supreme court disagreed, holding that the appellate timetable ran from the date of the severance order. To be final, a probate order must dispose of "all issue(s) involved in that particular phase of the probate proceeding."⁸⁹ In *Crowson*, the "phase" was the entire heirship proceeding resolving all heirship claims.⁹⁰ Attempting to resolve the confusion about finality in the probate context, the supreme court held,

If there is an express statute . . . declaring a phase of the probate proceedings to be final and appealable, that statute controls. Otherwise, if there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or parties not disposed of, then the probate order is interlocutory.⁹¹

As only the appellant's heirship status had been determined by the particular summary judgment, and there were numerous other intervenors whose heirship status had yet to be determined, the partial summary judgment was not final for appeal purposes until severed, and the appeal from the severance order was timely.⁹²

84. *Id.*

85. Section 5(f) of the Texas Probate Code states: "(f) All final orders of any court exercising original probate jurisdiction shall be appealable to the courts of appeals." TEX. PROB. CODE ANN. § 5(f) (Vernon Supp. 1993).

86. 897 S.W.2d 779 (Tex. 1995).

87. *Id.* at 780.

88. *Id.* at 781 n.2; see TEX. PROB. CODE ANN. § 5(f) (Vernon Supp. 1993).

89. *Crowson*, 897 S.W.2d at 782 (quoting *Estate of Wright*, 676 S.W.2d 161, 163-64 (Tex. App.—Corpus Christi, writ ref'd n.r.e.)).

90. *Id.*

91. *Id.* at 783.

92. *Id.* at 782-83.

Applying the supreme court's new test from *Crowson*, the Houston Court of Appeals, First District, determined in *Forlano v. Joyner*,⁹³ that a county court's order granting a transfer of a breach of contract case to probate court was not immediately appealable.⁹⁴ Shortly after the appellant filed suit in county court, the probate court appointed a guardian of one of the defendants. The defendants then sought a transfer to the probate court, which the trial court granted.⁹⁵

Analyzing the appealability of the transfer order under the standards articulated by the supreme court in *Crowson*, the court of appeals noted that no express statutes existed declaring a decision to grant or deny a transfer of a case to probate court to be final and appealable.⁹⁶ Reaching the second prong of the *Crowson* test, the court observed that the transfer order was logically considered part of the appellant's lawsuit for breach of contract, not the guardianship proceeding.⁹⁷ Finding that the contract action still had issues not yet decided, the court of appeals concluded that the transfer order was interlocutory and dismissed the appeal.⁹⁸

2. Denial of Summary Judgment Based on Official Immunity

The Texas Civil Practice and Remedies Code authorizes interlocutory appeals of denials of motions for summary judgment based on official immunity.⁹⁹ Yet, despite the fact that the motion for summary judgment denied by the trial court in *City of Beverly Hills v. Guevara*¹⁰⁰ was based on the common-law doctrine of official immunity, the Waco Court of Appeals dismissed the appeal for want of jurisdiction, deciding that the City could not rely upon an individual officer's immunity.¹⁰¹ The plaintiff in that case sued the City of Beverly Hills for injuries allegedly caused by one of its police officers in handcuffing the plaintiff but did not sue the police officer individually. The court of appeals found that the denial of the City's motion for summary judgment was not subject to interlocutory appeal under section 51.014(5) because the City was claiming only that its police officer had official immunity, not that the City itself was im-

93. 906 S.W.2d 118 (Tex. App.—Houston [1st Dist.] 1995, no writ) (per curiam).

94. *Id.* at 120.

95. *Id.* at 119.

96. *Id.* at 119-20.

97. *Id.* at 120.

98. *Forlano*, 906 S.W.2d at 120.

99. See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (Vernon 1995). Under section 51.014(5),

A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

(5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state. . . .

Id.

100. 904 S.W.2d 655 (Tex. 1995) (per curiam).

101. *Id.*

muned.¹⁰² The supreme court reversed, making it clear that a city can rely on the official immunity of its employees and agents, and that the order was appealable under section 51.014(5) because the motion for summary judgment was clearly based on official immunity within the meaning of that section.¹⁰³

The Texas Supreme Court analyzed its jurisdiction over an interlocutory order denying a motion for summary judgment based on a claim of official immunity in *Gonzalez v. Avalos*.¹⁰⁴ Observing that section 51.014(5) of the Texas Civil Practices and Remedies Code confers jurisdiction upon the court of appeals, not the supreme court, to review such orders, the supreme court held that supreme court jurisdiction must be based on the Government Code provision conferring general supreme court jurisdiction.¹⁰⁵ The supreme court noted, however, that the general jurisdictional statute is subject to the more specific jurisdictional statutes applicable in a given case.¹⁰⁶ The court found that section 22.225(c) of the Texas Government Code, allowing appeals only when dissent or conflicts jurisdiction exists, was applicable to the interlocutory order before the court.¹⁰⁷ As there was no dissent in the court of appeals, the court analyzed its conflicts jurisdiction.

To establish conflicts jurisdiction, the supreme court explained, it must appear that the rulings in the two purportedly conflicting cases are "so far upon the same state of facts that the decision of one case is necessarily conclusive of the decision in the other."¹⁰⁸ Or, "in other words, the decision must be based practically upon the same state of facts, and announce antagonistic conclusions. An apparent inconsistency in the principles announced, or in the application of recognized principles, is not sufficient."¹⁰⁹ The court concluded that the decisions allegedly conflicting with the court of appeals' decision were "factually distinguishable," precluding the court from exercising jurisdiction.¹¹⁰

3. *Bill of Review Setting Aside Prior Judgment But Failing to Dispose of Case on Merits*

"A bill of review [that] sets aside a prior judgment but does not dispose of the case on the merits is interlocutory and not appealable."¹¹¹ Thus, when a trial court vacates a prior default judgment, and, instead of ren-

102. *Id.*

103. *Id.*; see *DeWitt v. Harris County*, 904 S.W.2d 650 (Tex. 1995).

104. 907 S.W.2d 443 (Tex. 1995).

105. See TEX. CIV. AND PRAC. REM CODE § 51.014(5) (Vernon Supp. 1996) and TEX. GOV'T CODE § 22.001 (Vernon 1988).

106. *Gonzalez*, 907 S.W.2d at 443.

107. *Id.* at 443-44; see TEX. GOV'T CODE §§ 22.225(b)(4) and (c) (Vernon 1988 & Supp. 1996).

108. *Gonzalez*, 907 S.W.2d at 444 (citing *Christy v. Williams*, 156 Tex. 555, 298 S.W.2d 565, (1957)).

109. *Id.*

110. *Id.*

111. *Jordan v. Jordan*, 907 S.W.2d 471 (Tex. 1995).

dering judgment for the defendant, orders a trial on the merits, the order is interlocutory and the court of appeals has no jurisdiction to reverse the trial court's ruling on the bill of review.¹¹²

4. Denial of Class Certification

A denial of class certification is one of the few appealable interlocutory orders.¹¹³ In fact, the order must be appealed immediately or an appellant loses the right to challenge the order after final judgment.

In *Buffalo Royalty Corp. v. Enron Corp.*,¹¹⁴ the plaintiff attempted to appeal the denial of class certification upon the trial court's entry of final judgment, two years after the date of the order denying class certification.¹¹⁵ The Amarillo Court of Appeals dismissed the appeal for want of jurisdiction, holding that an appellant must perfect its appeal from a denial of class certification within twenty days of the signing of the order or the appellate court loses jurisdiction to review it.¹¹⁶

5. Summary Judgments

The Fort Worth Court of Appeals, following *Mafrige v. Ross*,¹¹⁷ recently determined that the summary judgment order appealed in *Amerinvest, Inc. v. Bluebonnet Savings Bank, F.S.B.*¹¹⁸ was interlocutory because it contained no Mother Hubbard Clause.¹¹⁹ In *Amerinvest*, the plaintiff sought a declaratory judgment, the imposition of a constructive trust, and actual damages for breach of contract and conversion, as well as exemplary damages and attorneys' fees.¹²⁰ The plaintiff moved for summary judgment, requesting relief on all but its conversion and exemplary damages claims. The trial court granted summary judgment on all claims pled by the plaintiff except for conversion, exemplary damages, and attorneys' fees, but the summary judgment order did not contain a Mother Hubbard Clause. The Fort Worth Court of Appeals therefore

112. *Id.* at 472.

113. See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(3) (Vernon Supp. 1995). Under section 51.014(3),

A person may appeal from an interlocutory order of a district court, county court at law, or county court that:

(3) certifies or refuses to certify a class in a suit brought under Rule 42 of the Texas Rules of Civil Procedure. . . .

Id.

114. 906 S.W.2d 275 (Tex. App.—Amarillo 1995, no writ).

115. As it turns out, the "final judgment" was not "final" for purposes of appeal. *Id.* at 277. Regardless, even if it had been, the interlocutory appeal was still over two years late. *Id.* The court of appeals refused to adopt federal law which permits one to postpone review of a class certification order until entry of final judgment. *Id.*

116. *Id.* at 276-77.

117. 866 S.W.2d 590 (Tex. 1993).

118. 897 S.W.2d 513 (Tex. App.—Fort Worth 1995, writ denied).

119. A "Mother Hubbard Clause" is language to the effect that "all relief not expressly granted is denied" or "any other statement indicating that the court intended to dispose of all parties and all issues raised by the pleadings or that all relief not granted is denied." *Id.* at 515-16.

120. *Id.* at 514.

dismissed the appeal, holding the order was interlocutory, failing to dispose of all of the plaintiff's claims.¹²¹

6. *Staying Execution*

An order granting interlocutory relief is *not* suspended pending appeal unless supersedeas is granted in accordance with rule 43(b) of the Texas Rules of Appellate Procedure or unless the appellant is entitled to supersede the judgment without security by giving notice of appeal.¹²² The San Antonio Court of Appeals held in *City of San Antonio v. Scott*¹²³ that the trial court has discretion to decide whether to permit a governmental entity to supersede enforcement of a temporary injunction pursuant to rule 47(f).¹²⁴

In *Scott*, a trial court entered a temporary injunction on August 16, 1995, ordering the City of San Antonio to give notice to firefighters taking a promotional exam on August 18, 1995 that the plaintiff firefighter was suing the City for failure to promote him to an existing vacancy.¹²⁵ The next day, on August 17, 1995, the City filed a notice of appeal of the court's temporary injunction requiring the notice. The City did not give the notice to the firefighters at the exam on August 18. The plaintiff therefore filed a motion for immediate reinstatement of the trial court's injunction order, and the City responded that its failure to comply with the trial court's order to give notice rendered the injunctive order moot. Both the City and the plaintiff believed the City was entitled to supersede the temporary injunction merely by filing a notice of appeal.¹²⁶

The San Antonio Court of Appeals disagreed, pointing out that the City's conduct in *Scott* demonstrated why a temporary injunction against a governmental entity is *not* automatically superseded upon the filing of a

121. *Id.*

122. See TEX. R. APP. P. 43. Rule 43(a) states in pertinent part:

(A) EFFECT OF APPEAL. No order denying interlocutory relief shall be suspended or superseded by an appeal therefrom. . . . [T]he pendency of an appeal from an order granting interlocutory relief does not suspend the order appealed from unless supersedeas is granted in accordance with subdivision (b) or unless the appellant is entitled to supersede the judgment without security by giving notice of appeal.

TEX. R. APP. P. 43(a).

123. No. 04-95-00651-CV, 1995 WL 569067 (Tex. App.—San Antonio, Sept. 27, 1995), *withdrawn and vacated*, No. 04-9500651-CV, 1995 WL 696616 (Tex. App.—San Antonio, November 22, 1995, n.w.h.) (not designated for publication).

124. Rule 47(f) states:

(F) OTHER JUDGMENT. When the judgment is for other than money or property or foreclosure, the security shall be in such amount and type to be ordered by the trial court as will secure the judgment creditor for any loss or damage occasioned by the appeal. The trial court may decline to permit the judgment to be suspended on filing by the judgment creditor of security to be ordered by the trial court in such an amount as will secure the judgment debtor in any loss or damage caused by any relief granted if it is determined on final disposition that such relief was improper.

TEX. R. APP. P. 47(f).

125. 1995 WL 569067 at *1.

126. *Id.*

notice of appeal.¹²⁷ Permitting automatic supersedeas "would enable a swift-moving governmental entity to violate an interlocutory order with impunity."¹²⁸ The court of appeals overruled the plaintiff's motion to reinstate the injunctive order, concluding that order, never having been superseded, was still in effect.¹²⁹ The court instead viewed the plaintiff's motion as one for temporary relief pending appeal, and ordered the City to comply with the trial court's order by sending the notice required by the order to all August 18 exam participants.¹³⁰

III. PRESERVATION OF ERROR

A. OBJECTING TO THE CHARGE

Rule 278 of the Texas Rules of Civil Procedure outlines the procedure for preserving the right to complain on appeal about the trial court's error in refusing to submit a jury instruction. Rule 278 states, in pertinent part: "Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment."¹³¹ As reflected in the cases discussed below, the supreme court continues to interpret the rule flexibly. Even if rule 278 is not strictly followed, a party nonetheless has preserved error in the jury charge if the party makes the trial court reasonably aware of the complaint, timely and plainly, and obtains a ruling.¹³²

In *Lester v. Logan*,¹³³ the plaintiff sued the defendant for breach of the implied warranty of fitness for a particular purpose in connection with the defendant's sale of hay to the plaintiff because several of plaintiff's cows died after eating the hay. At the charge conference, the defendant objected to the charge and submitted his requested jury questions, instructions, and definitions. In his requests, defendant submitted a question on implied warranty and definitions and instructions relating to the terms in the question. These requests, however, were on a single piece of paper with one space provided for the trial court to grant and one space provided for the trial court to refuse the group of requests. The trial court refused the group of requests.¹³⁴

On appeal, the defendant complained about the trial court's refusal of

127. *Id.*

128. *Id.*

129. *Id.*

130. In an unpublished opinion, the San Antonio Court of Appeals later withdrew and vacated its opinion upon a showing that the City had complied with the temporary injunction. *City of San Antonio v. Scott*, No. 04-95-00651-CV, 1995 WL 696616 at *1 (Tex. App.—San Antonio, Nov. 22, 1995, n.w.h.) (not designated for publication).

131. TEX. R. CIV. P. 278.

132. See *State Dep't of Highways and Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992).

133. 893 S.W.2d 570 (Tex. App.—Corpus Christi 1994), writ denied per curiam, 907 S.W.2d 452 (Tex. 1995).

134. *Id.* at 577.

his group of requests.¹³⁵ Holding that the defendant waived this complaint, the Corpus Christi Court of Appeals stated that the defendant failed to submit his requested instruction in substantially correct form because "requested issues and instructions must be submitted separately."¹³⁶ Failure to tender the instruction on a separate page, the court held, results in waiver of any error in the trial court's refusal of the request.¹³⁷

The Texas Supreme Court denied the application for writ of error sought by the defendant, but, citing *State Department of Highways v. Payne*,¹³⁸ explicitly disapproved of the court of appeals' analysis in finding waiver of error in the trial court's refusal of the requested instruction.¹³⁹

Again applying *Payne*, the Texas Supreme Court in *Texas Department of Human Services v. Hinds*¹⁴⁰ accepted a request for a wrongly worded instruction on causation as adequate to apprise the court of the need for a causation instruction. In that case, the plaintiff/employee brought an action under the Texas Whistleblower Act¹⁴¹ against his former employer for discrimination occurring after he reported illegal activity by the former employer. At trial, the jury was asked: "Did the Department of Human Services constructively terminate, or otherwise discriminate, against Gary Hinds in retaliation for his report [that certain activity] was illegal?"¹⁴²

The defendant requested, and the trial court refused, the following "causation" instruction in relation to this question: "You are instructed that the reporting of these activities must have been the principal reason for the Texas Department of Human Services' retaliation. You are instructed that 'the principal reason' means that the reporting of a violation of law was the cause of the harassment or discrimination."¹⁴³

The trial court did not give any instruction regarding causation. Analyzing whether the defendant preserved error concerning its complaint about the refused instruction, the supreme court held that the trial court should have instructed the jury as follows: "An employer does not discriminate against an employee for reporting a violation of law, in good faith, to an appropriate law enforcement authority, unless the employer's action would not have occurred when it did had the report not been made."¹⁴⁴

Acknowledging that the defendant did not request the instruction that should have been given, the supreme court held that under *Payne* the

135. *Id.* at 576-77.

136. *Id.* at 577.

137. *Id.*

138. 838 S.W.2d 235 (Tex. 1992).

139. *Lester v. Logan*, 907 S.W.2d 452, 453 (Tex. 1995) (per curiam).

140. 904 S.W.2d 629 (Tex. 1995).

141. See TEX. GOV'T CODE ANN. §§ 554.001-.009 (Vernon 1995).

142. *Hinds*, 904 S.W.2d at 631.

143. *Id.*

144. *Id.* at 637.

defendant's requested instruction nevertheless preserved error because it "called the trial court's attention to the [missing] causation element."¹⁴⁵

B. PRESERVING ERROR THROUGH MOTION FOR NEW TRIAL

As the appellants discovered in *Wilson v. General Motors Acceptance Corp.*,¹⁴⁶ under Rule 324 of the Texas Rules of Civil Procedure, a motion for new trial is a prerequisite to appeal a complaint on which evidence must be heard.¹⁴⁷ In *Wilson*, the appellants complained on appeal that the trial court erred in granting the plaintiff's summary judgment because the plaintiff did not properly serve them with notice of the summary judgment hearing.¹⁴⁸ The appellants, however, made no motion for continuance or no post-trial motion, and specifically, no motion for new trial, complaining of the lack of notice. However, "[o]n the sixtieth day following the entry of judgment, the [appellants] filed a formal bill of exceptions asserting lack of notice of the [summary judgment] hearing."¹⁴⁹ The trial court refused to sign and file the bill of exceptions on the basis that it was untimely filed.¹⁵⁰

The court of appeals found that the appellants waived their objection to the summary judgment hearing and entry of judgment because a bill of exceptions (even if timely) cannot preserve the error of lack of notice for appellate review.¹⁵¹ The court held that the lack of notice was a situation "in which evidence must be heard," and a motion for new trial was the proper method by which appellants could introduce evidence to controvert proof of service.¹⁵² The bill of exceptions, the court concluded, was not based on evidence in the record and did no more than raise a fact issue.¹⁵³

In *Wirtz v. Massachusetts Mutual Life Insurance Co.*,¹⁵⁴ the appellant prematurely filed a motion for new trial after the jury verdict but before the trial court entered judgment. In his motion for new trial, the appellant complained that the jury's responses to three of eight jury questions were against the great weight and preponderance of the evidence. The court overruled the motion for new trial in its judgment. The appellant filed another motion for new trial twenty-nine days after judgment on grounds other than sufficiency of the evidence. He then filed an amended motion for new trial seventy-one days after judgment. Neither his second

145. *Id.* at 637-38.

146. 897 S.W.2d 818 (Tex. App.—Houston [1st Dist.] 1995, no writ.)

147. TEX. R. CIV. P. 324(b)(1); *see also* TEX. R. APP. P. 52(d).

Rule 52(d) states, in pertinent part: "A point in a motion for new trial is prerequisite to appellate complaint in those instances provided in Rule 324(b) of the Texas Rules of Civil Procedure." TEX. R. APP. P. 52(d).

148. 897 S.W.2d at 820.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Wilson*, 897 S.W.2d at 820.

154. 898 S.W.2d 414 (Tex. App.—Amarillo 1995, no writ).

nor amended motions were ruled upon by the trial court.¹⁵⁵

On appeal, the appellant attacked the jury's answers to all eight jury questions as being against the great weight and preponderance of the evidence.¹⁵⁶ The appellees argued the appellant failed to preserve error with respect to sufficiency of the evidence to support any of the jury questions because his second motion for new trial, filed within thirty days after judgment, was an amended motion for new trial that superseded his first motion.¹⁵⁷ They argued that, because the amended motion did not contain any challenge to the sufficiency of the evidence, appellant waived the contentions.¹⁵⁸

The court of appeals agreed that in order to preserve the contentions that the jury's responses were against the great weight and preponderance of the evidence, the appellant was required to point out each contention in a motion for new trial.¹⁵⁹ The court held, however, that under rules 306c and 329b(a) of the Texas Rules of Civil Procedure, the appellant's premature motion for new trial challenging the sufficiency of the evidence with respect to the jury's answers to three of eight jury questions was deemed to have been filed on the date of, but subsequent to, the time of signing of the judgment.¹⁶⁰ The court's overruling of the motion in its judgment was also deemed to have been subsequent to the signing of the judgment. As a result, the appellant's first motion for new trial, by which he challenged the jury's responses to three of the eight jury questions as being against the great weight and preponderance of the evidence, preserved those contentions for appellate review.¹⁶¹ The court also held, however, that the appellant's contentions regarding the remaining five jury questions had been waived because he raised no complaints

155. *Id.* at 418-19.

156. *Id.* at 419.

157. *Id.*

158. *Id.*

159. *Wirtz*, 897 S.W.2d at 419; *see* TEX. R. CIV. P. 324(b)(2)-(3); TEX. R. APP. P. 52(d). Rule 324 states, in pertinent part: "(B) MOTION FOR NEW TRIAL REQUIRED. A point in a motion for new trial is a prerequisite to the following complaints on appeal:

(2) A complaint of factual insufficiency of the evidence to support a jury finding;

(3) A complaint that a jury finding is against the overwhelming weight of the evidence."
TEX. R. CIV. P. 324(b)(2)-(3).

160. Rule 306c states:

No motion for new trial or request for findings of fact and conclusions of law shall be held ineffective because prematurely filed; but every such motion shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment the motion assails, and every such request for findings of fact and conclusions of law shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment.

TEX. R. CIV. P. 306c.

Rule 329b(a) states:

The following rules shall be applicable to motions for new trial and motions to modify, correct, or reform judgments (other than motions to correct the record under Rule 316) in all district and county courts:

(a) A motion for new trial, if filed, shall be filed prior to or within thirty days after the judgment or other order complained of is signed.

TEX. R. CIV. P. 329b(a).

161. *Wirtz*, 898 S.W.2d at 419-20.

about those questions in his first motion for new trial.¹⁶²

Notably, the court observed that the appellant's "second motion [for new trial], although filed within thirty days after the judgment was signed, was a nullity because it was not filed, as [rule 329b(b)] mandates, before the first motion was overruled."¹⁶³

C. REQUESTING ENTRY OF JUDGMENT

When a party asks the trial court to render judgment for a particular amount and the court complies with the request by rendering judgment for that amount, the party cannot challenge the judgment on appeal.¹⁶⁴ Without qualifying their request, the appellants in *Casu v. Marathon Refining Co.* moved the trial court to enter judgment awarding them \$50,000, plus pre-judgment interest of \$26,778, for a total amount of \$76,788. The final judgment entered by the trial court awarded the appellants everything they requested.

Holding that the appellants had waived their right to complain about the trial court's judgment, the court of appeals stated that, to preserve the right to complain about a judgment on appeal, "a movant for judgment should state in its motion to enter judgment that it agrees only with the form of the judgment, and note its disagreement with the content and result of the judgment."¹⁶⁵ An unqualified motion unreservedly inviting the trial court to enter the judgment requested may not be attacked on appeal.¹⁶⁶

D. SUBMITTING EVIDENCE AT TRIAL

To complain of the trial court's exclusion of evidence, a party must make an offer of the evidence excluded, state on the record the reasons why the evidence is admissible, and obtain a ruling from the trial court.¹⁶⁷ Without such information, the appellate court cannot determine whether the trial court erred.¹⁶⁸

E. CHALLENGES FOR CAUSE

To preserve error when the trial court overrules a challenge for cause to a prospective juror, a party must give notice to the trial court of two things, prior to exercising any peremptory challenges: (1) the party must inform the trial court that it will exhaust all peremptory challenges; and (2) the party must inform the trial court that after exercising all its peremptory

162. *Id.* at 420.

163. *Id.* at 419 n.2.

164. *Casu v. Marathon Refining Co.*, 896 S.W.2d 388, 389 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

165. *Id.* at 390; see *First Nat'l Bank v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989).

166. *Casu*, 896 S.W.2d at 390.

167. See *Veale v. Teledyne Indus., Inc.*, 899 S.W.2d 239 (Tex. App.—Houston [14th Dist.] 1995, writ denied). A motion *in limine* alone preserves nothing. *Id.* at 242.

168. *Id.* at 243.

challenges, specific objectionable jurors will remain on the jury list.¹⁶⁹

To avoid waiving such error, the party must timely bring the error to the attention of the trial court *prior* to making his peremptory challenges.¹⁷⁰

The critical issue in *Brown v. Pittsburg Corning Corp.*, where the appellant challenged the trial court's failure to strike a juror for cause, was the timing of the plaintiffs' delivery of their list of peremptory challenges to the trial court.¹⁷¹ In what the concurrence described as a hypertechnical application of the supreme court's rule in *Hallet*, the court of appeals in *Brown* held that *Hallet* required proof that the plaintiffs had given the trial court the two-part notice *prior* to exercising their peremptory strikes.¹⁷² The court held that a party exercises its peremptory strikes when the party physically delivers the list of strikes to the court.¹⁷³ As it was unclear from the appellate record whether counsel for the plaintiffs physically handed the list of peremptory challenges to the trial court immediately before or immediately after making the two-part announcement required under *Hallet*, the court of appeals in *Brown* held that the plaintiffs failed to bring forth a record demonstrating error.¹⁷⁴ As a result, any error was waived.¹⁷⁵

The *Brown* concurrence concluded that the supreme court in *Hallet* did not intend such a hypertechnical application of the delivery and announcement rule.¹⁷⁶ The record, according to the concurrence, reflected that counsel made his two-part announcement either moments before or moments after he physically tendered his strike list to the court and that this action was sufficient to preserve the issue for review.¹⁷⁷ Nonetheless, the concurrence found no error in the trial court's failure to strike the juror.¹⁷⁸

IV. EXTENDING THE APPELLATE TIMETABLE

A. REQUEST FOR FINDINGS AND CONCLUSIONS

1. Summary Judgment

A request for findings of fact and conclusions of law is inappropriate following entry of a summary judgment and will not operate to extend the appellate timetable. The appellant in *Chavez v. Housing Authority of*

169. *Brown v. Pittsburgh Corning Corp.*, 909 S.W.2d 101 (Tex. App.—Houston [14th Dist.] 1995, no writ) (citing *Hallet v. Houston N.W. Medical Ctr.*, 689 S.W.2d 888 (Tex. 1985)).

170. *Id.* at 102.

171. *Id.* at 104.

172. *Id.*

173. *Id.*

174. *Brown*, 909 S.W.2d at 104.

175. *Id.*

176. *Id.* at 105 (Hudson, J., concurring).

177. *Id.*

178. *Id.*

*the City of El Paso*¹⁷⁹ appealed from an adverse summary judgment in the county court. She filed a request for findings of fact and conclusions of law on July 19, 1993, and a notice of past due findings of fact and conclusions of law on August 13, 1993. She did not file a motion for new trial. The appellant filed a cash deposit in lieu of bond on September 27, 1993. On rehearing, the El Paso Court of Appeals withdrew its published opinion in *Chavez v. Housing Authority of the City of El Paso*¹⁸⁰ and dismissed the appeal for want of jurisdiction.¹⁸¹

The court of appeals noted that under rule 41(a)(1) of the Texas Rules of Appellate Procedure, an appellant has ninety days after the judgment is signed to perfect his appeal "if a timely motion for new trial has been filed by any party or if any party has timely filed a request of findings of fact and conclusions of law in a case *tried* without a jury."¹⁸² Under rule 296 of the Texas Rules of Civil Procedure, the court continued, only a party in a case "tried in the district or county court without a jury" is entitled to findings of fact and conclusions of law.¹⁸³ Findings of fact, the court determined, are appropriate only in those circumstances in which the trial court is "called upon to determine questions of fact."¹⁸⁴ In a summary judgment proceeding, where there is no genuine issue of material fact, the case has not been "tried" within the scope of rule 296 or for the purpose of requesting findings of fact and conclusions of law.¹⁸⁵

Noting the recent supreme court decision in *Linwood v. NCNB Texas*,¹⁸⁶ the court of appeals in *Chavez* reversed its earlier decision that the timeliness of a post-judgment motion, rather than its form content, or effectiveness, controlled the extension of appellate deadlines.¹⁸⁷ Because the appellant's summary judgment case was not "tried without a jury," and she did not file a motion for extension of time to file a cash deposit or appeal bond, her attempted appeal was held to be a nullity necessitating dismissal.¹⁸⁸ The court of appeals further noted that a request for findings of fact and conclusions of law is not a bona fide attempt to invoke appellate jurisdiction.¹⁸⁹ Only appeal bonds, notices of appeal, or affidavits of inability to pay costs on appeal invoke the jurisdiction of a court of appeals.¹⁹⁰

The court of appeals queried whether a motion for new trial is any more appropriate if findings of fact and conclusions of law are inappro-

179. 897 S.W.2d 523 (Tex. App.—El Paso 1995, writ denied).

180. 876 S.W.2d 416 (Tex. App.—El Paso 1994), *withdrawn and substituted*, 897 S.W.2d 523 (Tex. App.—El Paso 1995, writ denied).

181. 897 S.W.2d at 525.

182. *Id.* at 525; TEX. R. APP. P. 41(a)(1) (emphasis added).

183. *Chavez*, 897 S.W.2d at 525.

184. *Id.*

185. *Id.*

186. 885 S.W.2d 102 (Tex. 1994).

187. *Chavez*, 897 S.W.2d at 525.

188. *Id.* at 526.

189. *Id.*

190. *Id.*

priate to extend the appellate timetable because a summary judgment does not constitute a "trial," and no "trial" was actually had.¹⁹¹ Practitioners are well-advised to craft a motion for rehearing on summary judgment as a motion for new trial, or in the alternative, to modify, correct, or reform the judgment.

2. Dismissal for Want of Prosecution

The Fort Worth Court of Appeals declined to follow the *Chavez* court's conclusion that cases disposed of by an evidentiary hearing where the court resolves disputed issues of fact are cases that have been "tried" under rule 54(a) of the Texas Rules of Appellate Procedure. In *Phillips v. Beavers*,¹⁹² that court held that a request for findings of fact and conclusions of law will not extend the appellate timetable in a case dismissed for want of prosecution, even though the trial court held an evidentiary hearing on the motion to dismiss for want of prosecution.¹⁹³

3. Sanctions Dismissal

The appellate timetable for a case dismissed following the imposition of death penalty discovery sanctions is not extended by the filing of a request for findings of fact and conclusions of law because a hearing on a motion for sanctions is not a case "tried without a jury."¹⁹⁴ The appeal must be perfected within thirty days of the trial court's order dismissing the case.

B. POST-JUDGMENT MOTIONS ASSAILING THE TRIAL COURT'S JUDGMENT

In *Gomez v. Texas Department of Criminal Justice*,¹⁹⁵ the Texas Supreme Court held that an inmate's "bill of review" filed within thirty days of the signing of judgment operated to extend the appellate timetable from thirty to ninety days because it "assailed the trial court's judgment."¹⁹⁶ The court noted, "any post-judgment motion, which, if granted, would result in a substantive change in the judgment as entered, extends the time for perfecting the appeal."¹⁹⁷

191. *Id.* at 526 n.1.

192. 906 S.W.2d 254 (Tex. App.—Fort Worth 1995, writ requested) (per curiam).

193. *Id.* at 255.

194. *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 901 S.W.2d 568, 569 (Tex. App.—Dallas 1995, writ requested).

195. 896 S.W.2d 176 (Tex. 1995).

196. *Id.* at 176.

197. *Id.* at 177 (quoting *Miller Brewing Co. v. Villarreal*, 822 S.W.2d 177, 179 (Tex. App.—San Antonio 1991), *rev'd on other grounds*, 829 S.W.2d 770 (Tex. 1992)). The court also observed that the prisoner's request for findings of fact and conclusions of law was untimely because prison officials had to screen outgoing mail, posing the problem that one party must rely upon its opposing party to file pleadings timely. 896 S.W.2d at 176 n.1. The court did not, however, reach that issue.

C. PAUPERS' AFFIDAVITS

The court of appeals in *Stafford v. O'Neill*¹⁹⁸ detailed the deadline for perfecting an appeal after a contest to an affidavit of inability to pay has been sustained. Under the rules of appellate procedure, the court explained, an indigent whose affidavit of inability to pay is successfully challenged has ten days from the date the contest is sustained to file an appeal bond.¹⁹⁹ This ten-day period of time is in addition to the original time for perfecting the appeal.²⁰⁰ For example, if an appellant files a motion for new trial, he has ninety days from the date the judgment is signed to perfect his appeal. If this same appellant files an affidavit of inability to pay, and a contest to it is sustained, he has the *later* of two dates to perfect his appeal—ten days after the court sustained the contest or ninety days after the court signed the judgment.²⁰¹

D. SUBSEQUENT AND VACATED JUDGMENTS

The appellate timetable is affected when the judgment is modified, corrected, or reformed in any respect. For example, in *Wang v. Hsu*,²⁰² the trial court entered its first judgment on October 14, 1993. It then entered a second, identical judgment (except for the date) on November 10, 1993. On November 15, 1993, the appellants filed a motion for new trial, referring to the October 14 judgment. On November 17, 1993, the trial court made a notation on the November 10 judgment that it was "set aside," but made no mention of the October 14 judgment. On January 19, 1994, the trial court held a hearing on the motion for new trial, but apparently stemming from its belief that the October 14 judgment was in effect, determined the motion was already overruled by operation of law. On February 8, 1994, the appellants filed their cost bond.

The appellees argued that by setting aside the November 10 judgment, the trial court "revived" the October 14 judgment. The appellate timetable therefore ran from October 14, 1993, making the appellants' cost bond late, having been filed more than ninety days after the October 14 judgment was signed.²⁰³

The court of appeals disagreed. "There can only be one final appealable order," the court held.²⁰⁴ "If a judgment is modified, corrected, or reformed in any respect, the time for appeal runs from the correction

198. 902 S.W.2d 67 (Tex. App.—Houston [1st Dist.] 1995, orig. proceeding [leave denied]).

199. *Id.* at 67; see TEX. R. APP. P. 41(a)(2).

The rule states in pertinent part:

"[I]f a contest to an affidavit in lieu of bond is sustained, the time for filing the bond is extended until ten days after the contest is sustained unless the trial court finds and recites that the affidavit is not filed in good faith." *Id.*

200. *Stafford*, 902 S.W.2d at 67.

201. *Id.*

202. 899 S.W.2d 409 (Tex. App.—Houston [14th Dist.] 1995, writ denied).

203. *Id.* at 411; see TEX. R. APP. P. 41(a)(1).

204. *Wang*, 899 S.W.2d at 411.

date.”²⁰⁵ The second judgment vacates the first as if the first judgment was never entered.²⁰⁶ Even if the subsequent judgment is different from the first judgment only by the signature date, the second judgment replaces the first.”²⁰⁷ As a result, the court held, the November 10 judgment vacated the October 14 judgment.²⁰⁸

The court of appeals further held that the trial court’s “setting aside” of the November 10 judgment did not “revive” the vacated October 14 judgment.²⁰⁹ In so holding, the court concluded that any change made to a judgment must be written.”²¹⁰ Since the trial court’s written order setting aside the November 14 judgment did not “reinstate” the October 14 judgment, the October 14 judgment was not revived.²¹¹ The court concluded that by signing the November 10 judgment, the trial court vacated the October 14 judgment.²¹² After being set aside the November 10 judgment also became “dead” and the October 14 judgment was not revived because there was no written order reviving it.²¹³ Because no final judgment existed, the court of appeals dismissed the appeal for want of jurisdiction.²¹⁴

V. PERFECTION OF APPEAL

A. BONA FIDE ATTEMPT TO INVOKE APPELLATE COURT JURISDICTION

Rules 40 and 41 of the Texas Rules of Appellate Procedure establish the process of perfecting an appeal.²¹⁵ These rules govern juvenile as well as other civil appeals.²¹⁶ As a result, the failure of a juvenile to file a cost bond, cash deposit, or affidavit in lieu thereof, under Rules 40 and 41 results in an unperfected appeal.²¹⁷

In *In re C.F.*, the El Paso Court of Appeals found errors in the juvenile appellant’s attempt to perfect his appeal.²¹⁸ The appellant filed a written notice of appeal five days after the judgment was signed but missed his deadline for filing a cost bond. He did not file an extension of time to file

205. *Id.*

206. *Id.*

207. *Id.* The court noted that an exception to this rule exists “when the face of the record reveals that the trial judge signed a second judgment for the sole purpose of extending the appellate timetables.” *Id.* The court noted that there was no indication from the record as to why the trial court entered the November 10 judgment, but the record did *not* demonstrate that the judgment was signed solely to extend the appellate timetables.
Id.

208. *Wang*, 899 S.W.2d at 411.

209. *Id.* at 412.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Wang*, 889 S.W.2d at 412.

214. *Id.*

215. TEX. R. APP. P. 40, 41.

216. *See In re C.F. v. Texas*, 897 S.W.2d 464, 466 (Tex. App.—El Paso 1995, no writ).

217. *Id.*

218. *Id.*

cost bond, an affidavit of inability to pay, or a motion for new trial.²¹⁹ The notice of appeal filed five days after entry of judgment, the court held, was not an instrument that operated to perfect the appeal.²²⁰

The El Paso Court of Appeals refrained from dismissing the appeal for want of jurisdiction. Instead, citing *Grand Prairie Independent School District v. Southern Parks Imports, Inc.*,²²¹ the court analyzed the "present status of bona fide attempts to invoke appellate jurisdiction."²²² The court pointed out that in *Grand Prairie*, the supreme court held that "a court of appeals has jurisdiction over any appeal in which the appellant files an instrument 'that was filed in a bona fide attempt to invoke appellate court jurisdiction.'"²²³ In such a case, the court should not dismiss the appeal but permit the appellant an opportunity to amend or refile the instrument required to perfect the appeal.²²⁴ The court of appeals noted the supreme court's reliance on Rules 46(f) and 83 of the Texas Rules of Appellate Procedure for support in its holding.²²⁵ The court of appeals concluded that the appellant made a bona fide attempt to invoke appellate jurisdiction when he filed the notice of appeal.²²⁶ He cured the defect when he later filed an affidavit of inability to pay appellate expenses.²²⁷ As a result, the court of appeals had jurisdiction over the appeal.²²⁸

The proposed changes to rule 40 of Texas' appellate procedure provide that a notice of appeal is the proper instrument to perfect an appeal,²²⁹ as it is in federal court.²³⁰ Thus, a cost bond would not be required.

219. See TEX. R. APP. P. 41(a)(1)-(2).

220. *In re C.F.*, 897 S.W.2d at 466.

221. 813 S.W.2d 499 (Tex. 1991).

222. *In re C.F.*, 897 S.W.2d at 467.

223. *Id.* (quoting *Grand Prairie*, 813 S.W.2d at 499, in turn quoting *Walker v. Blue Water Garden Apts.*, 776 S.W.2d 578, 581) (Tex. 1989)).

224. *In re C.F.*, 897 S.W.2d at 467.

225. *Id.*; see TEX. R. APP. P. 46(f), 83 (Vernon 1995).

Rule 46(f) states:

On motion to dismiss an appeal or writ of error for a defect of substance or form in any bond or deposit given as security for costs, the appellate court may allow the filing of a new bond or the making of a new deposit in the trial court on such terms as the appellate court may prescribe.

TEX. R. APP. P. 46(f). Rule 83 states:

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 provided the court may make no enlargement of the time for filing the transcript and statement of facts

TEX. R. APP. P. 83.

226. *In re C.F.*, 897 S.W.2d at 468. The court also noted that the proposed amendments to the Texas Rules of Appellate Procedure would make filing a notice of appeal proper. *Id.* at 469.

227. *Id.* at 468.

228. *Id.*

229. Supreme Court Advisory Committee Proposed Amendments to Texas Rules of Appellate Procedure, March 21, 1995.

230. See FED. R. APP. P. 3.

B. THE MAILBOX RULE

The Texas Supreme Court ruled in *Lofton v. Allstate Ins. Co.*,²³¹ that an attorney's uncontroverted affidavit may, even in the absence of a postmark or a certificate of mailing, establish a date of mailing for compliance with Rule 4(b) of the Texas Rules of Appellate Procedure.²³² In *Lofton*, the Beaumont Court of Appeals dismissed the appeal for want of jurisdiction, stating that the appeal bond was due three days prior to the date it was actually filed. The appellant's attorney, however, filed a sworn affidavit stating that he mailed the appeal bond to the clerk on the last day for filing. The court of appeals did not address whether the appellant complied with Rule 4(b) of the Texas Rules of Appellate Procedure because there was no evidence of postmark or certificate of mailing.²³³

The supreme court noted that while a postmark under Rule 4(b) is prima facie evidence of mailing, there was no postmark available in *Lofton*.²³⁴ In the absence of a proper postmark or certificate of mailing, the court held, "an attorney's uncontroverted affidavit may be evidence of the date of mailing."²³⁵

C. FINALITY OF JUDGMENTS

When partial summary judgment disposes of one of the plaintiff's two claims and the plaintiff files a supplemental petition abandoning the remaining claim and a motion for rehearing of the partial summary judgment, the appellate timetable runs not from the date the plaintiff filed her supplemental petition (which effectively rendered the partial summary judgment final) but from the date the trial court signed a written order denying the plaintiff's "motion for rehearing." The Texas Supreme Court faced this issue in *Farmer v. Ben E. Keith Co.*,²³⁶ where the appellant perfected her appeal within thirty days from the date of the written order denying "rehearing." The court of appeals reasoned that the plaintiff's appeal was untimely because the time for perfecting the appeal ran from

231. 895 S.W.2d 693 (Tex. 1995) (per curiam).

232. *Id.* at 693-94.

233. Rule 4(b) states, in pertinent part:

If a motion for rehearing, any matter relating to taking an appeal . . . from the trial court to any higher court, . . . is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed as filed in time; provided, however, that a certificate of mailing by the United States Postal Service or a legible postmark affixed by the United States Postal Service shall be prima facie evidence of the date of mailing.

TEX. R. APP. P. 4(b).

234. 895 S.W.2d at 693.

235. *Id.* at 693-94 (affirming the same conclusion reached by the Dallas Court of Appeals in *Fellowship Missionary Baptist Church of Dallas, Inc. v. Sigel*, 749 S.W.2d 186, 188 (Tex. App.—Dallas 1988, no writ)).

236. 907 S.W.2d 495 (Tex. 1995) (per curiam).

the filing of her supplemental petition.²³⁷

Reversing the court of appeals and holding the appeal timely perfected, the supreme court stated that when a judgment is interlocutory because it does not dispose of all parties and issues and a party moves to have unadjudicated claims or parties removed by severance, dismissal, or nonsuit, "the appellate timetable runs from the signing of a judgment or order disposing of those claims or parties."²³⁸ The appellate timetable, the court concluded, does not begin running "other than by signed, written order, even when the signing of such an order is purely ministerial."²³⁹ The court determined that the trial court's order denying rehearing "is the only signed, written order which even purports to dispose of [plaintiff's] 'nonsuited' claim and the appeal was perfected within thirty days of when that order was signed."²⁴⁰

In *Molina v. Kelco Tool & Die, Inc.*,²⁴¹ a product liability lawsuit, one of the three defendants filed a motion for summary judgment, which the trial court granted on September 15, 1993. On September 14, 1993, the plaintiffs amended their original petition, dropping all parties except the defendant who had won the summary judgment. In the amended pleading, which was filed with the court on September 16, 1993, the plaintiffs essentially reasserted the claims against the remaining defendant that had been previously disposed of by summary judgment. The trial court signed a final take-nothing judgment against the plaintiffs on October 13, 1993. The plaintiffs did not file a motion for new trial but perfected their appeal on November 12, 1993.

The defendant argued that the court of appeals lacked jurisdiction to entertain the appeal because the interlocutory partial summary judgment entered September 13 was made final on either September 14 or 16, 1993, when the plaintiffs amended their original petition to dispose of all parties and issues except the defendant for whom summary judgment had been granted.²⁴² The plaintiffs did not file their cost bond until November 12, 1993, more than thirty days after the September 14 or 16 amendment.²⁴³

237. *Id.* at 496.

238. *Id.*

239. *Id.* (citing TEX. R. APP. P. 5). Rule 5 states, in pertinent part:

(B) BEGINNINGS OF PERIODS IN CIVIL CASES.

(1) *Date of Signing.* In civil cases, the date a judgment or order is signed as shown of record shall determine the beginning of the periods described by these rules for filing in the trial court the various documents in connection with an appeal, including but not limited to an appeal bond, certificate of cash deposit, or notice or affidavit in lieu thereof,

TEX. R. APP. P. 5(b)(1).

240. *Farmer*, 907 S.W.2d at 496.

241. 904 S.W.2d 857 (Tex. App.—Houston [1st Dist.] 1995, no writ).

242. *Id.* at 859.

243. The appellee argued that the partial summary judgment became final on September 14, 1993 because, under Rule 5 of the Texas Rules of Appellate Procedure, a petition is deemed filed on the date it was mailed. *Molina*, 904 S.W.2d at 859. The appellee argued, alternatively, that the judgment became final on September 16, 1993, the date the amended petition was received by the district clerk. *Id.* See TEX. R. APP. P. 41(a)(1) (if no motion

The court of appeals rejected the appellees' arguments, holding that the appellate timetable was not triggered until the *signing* of the October 13 order.²⁴⁴ Although the signing of the order was merely a "ministerial act," the court held, it was necessary to commence the appellate timetables.²⁴⁵ The November 12, 1993 filing of the cost bond properly perfected the appellants' appeal.²⁴⁶

VI. THE RECORD ON APPEAL

A. DESIGNATING THE RECORD

The appellants in *Birran v. Don Wetzel & Assoc.*²⁴⁷ filed a partial statement of facts under Rule 53(d) of the Texas Rules of Appellate Procedure. Unfortunately, the appellants failed to comply with the requirement of Rule 53(d) that "a statement of the points to be relied on" be included in a request for a partial statement of facts.²⁴⁸ Citing the Texas Supreme Court's decision in *Christiansen v. Prezelski*,²⁴⁹ the court in *Birran* held that although it is committed to liberality in the construction of briefing rules, no reversible error can be found when appellant fails to bring forward a complete statement of facts or comply with the requirements of Rule 53(d) by providing a list of points of error on which the appellant intends to rely on appeal.²⁵⁰

The court noted that under Rule 53(d), the appellant "receives the significant benefit of 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.'"²⁵¹ On the other hand, the failure to submit specified points leads to "dire" consequences—the missing portions of the record are *presumed* to be relevant and to support the trial court's judgment.²⁵²

B. LOST OR DESTROYED RECORD

The party requesting a remand for a new trial based on the argument that exhibits offered at trial were lost or destroyed has the burden of presenting evidence that the exhibits were in fact lost or destroyed and not just inadvertently omitted from the transmitted record.²⁵³ In *Owens-*

for new trial has been filed, an appeal bond or other perfecting instrument must be filed with the district clerk within thirty days after the signing of a final judgment).

244. *Molina*, 904 S.W.2d at 860.

245. *Id.*

246. *Id.*

247. 894 S.W.2d 552 (Tex. App.—Beaumont 1995, writ denied).

248. *Id.* at 553. TEX. R. APP. P. 53(d).

249. 782 S.W.2d 842 (Tex. 1990).

250. *Birran*, 894 S.W.2d at 553.

251. *Id.* at 554 (quoting *Steger & Bizzell, Inc. v. VandeWater Constr., Inc.*, 811 S.W.2d 687, 690 (Tex. App.—Austin, 1991, writ denied)).

252. *Id.*

253. See TEX. R. APP. P. 50(e). Rule 50(e) states:

When the record or any portion thereof is lost or destroyed it may be substituted in the trial court and when so substituted the record may be prepared and transmitted to the appellate court as in other cases. If the

Illinois, Inc. v. Chatham,²⁵⁴ the appellants asked the court of appeals to remand the case for a new trial because three summaries were missing from the appellate record: a summary of plaintiffs' interrogatory answers, medical record summaries presented as exhibits at trial, and summaries of biographical and medical information concerning each plaintiff.²⁵⁵ The court rejected the first two claims because although the interrogatory summary was unsuccessfully offered as an exhibit during trial, it was made part of the record during a bill of exceptions and there was no evidence in the record to show that the medical record summaries actually had been lost or destroyed.²⁵⁶ Absence from the appellate record alone is not sufficient.

The appellants successfully argued, however, that an original exhibit notebook containing medical evidence and biographical summaries of each of the 587 plaintiffs was lost or destroyed.²⁵⁷ The evidence in post-trial hearings reflected the notebook was clearly missing. At trial, the jurors were given an empty notebook to fill with copies of each summary as the summary was admitted into evidence; the jurors were *not* given duplicates of the original notebook. Rather, the jurors were responsible for compiling their own notebooks. After the verdict, one notebook was boxed and sealed as the original. Some of the jurors took their notebooks home and others left them in the jury deliberation room. The notebooks left in the deliberation room were destroyed and the sealed box containing the original notebook disappeared.

The trial court substituted one of the notebooks taken home by a juror for the lost original notebook, but the appellants argued that the trial court had no authority to make the substitution without the agreement of the appellants.²⁵⁸ The appellees argued that exhibits were part of the transcript and not the statement of facts, and therefore, under Rule 50(e), the trial court had the authority to make the substitution without the agreement of the appellants.²⁵⁹

The court of appeals rejected that argument. The court held that "exhibits" are part of the "statement of facts" and not the "transcript."²⁶⁰ The court further held that, as part of the statement of facts, exhibits are

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.

TEX. R. APP. P. 50(e).

254. 899 S.W.2d 722 (Tex. App.—Houston [14th Dist.] 1995, writ *dism'd*).

255. *Id.* at 725-27.

256. *Id.* at 727. The facts of the case do not reflect that the appellants even discussed the allegedly missing exhibits with the court reporter. Presumably, an affidavit from the court reporter stating that the exhibits had been in his or her possession and were lost or destroyed would have satisfied the appellant's evidentiary burden under Rule 50(e). *Id.*; *see* TEX. R. APP. P. 50(e).

257. *Chatham*, 899 S.W.2d at 728.

258. *Id.* at 728.

259. *Id.*

260. *Id.* at 729.

part of the court reporter's "notes and records," as referred to in Rule 50(e).²⁶¹ Because the exhibits were part of the statement of facts and, therefore, part of the court reporter's records, the trial court did not have authority under Rule 50 to substitute the juror's notebook for the lost notebook without the appellants' agreement.²⁶² The court held, as a result, that the appellants were entitled to a new trial.²⁶³

C. OBTAINING THE STATEMENT OF FACTS

The court reporter is under a duty to furnish a trial record upon proper request.²⁶⁴ The court reporter's failure to do so may warrant relief by mandamus. For example, in *Texas v. Creel*,²⁶⁵ the court reporter failed to prepare and file the statement of facts despite five extensions of time. The appellant sought, and was granted, a writ of mandamus from the Waco Court of Appeals compelling the court reporter to fulfill her duties under Rule 11 of the Texas Rules of Appellate Procedure.²⁶⁶

The incapacity and incompetency of the court reporter to prepare and file the statement of facts may render the statement of facts "lost," requiring a remand of the case for a new trial.²⁶⁷ In *Hernandez*, the court reporter did not complete and file the statement of facts, even after three extensions of time, because of a debilitating illness. After granting extensions of time and finally abating the appeal and remanding the case to the trial court for a hearing to ensure the filing of the statement of facts, the court of appeals determined that due to his illness, the court reporter would not be able to complete the statement of facts in a timely fashion, if at all.²⁶⁸

Instead of ordering another court reporter to transcribe the ill court reporter's notes, the San Antonio Court of Appeals concluded that the court reporter's illness rendered the statement of facts, "for all intents and purposes, lost, through no fault of the appellant" because another court reporter would not be able to certify to the accuracy of the resulting statement of facts.²⁶⁹ The court reversed and remanded for a new trial.²⁷⁰

261. *Id.* at 729.

262. *Chatham*, 899 S.W.2d at 733.

263. *Id.* The proposed amendment to TEX. R. APP. P. 50 provides for a new trial when "a significant portion of the court reporter's notes and records have been lost or destroyed without the appellant's fault."

264. TEX. R. APP. P. 11. Rule 11(a)(4) states that it is the court reporter's duty to prepare "official transcripts of all such evidence or other proceedings, or any portion thereof, subject to the laws of this state, these rules and the instructions of the presiding judge of the court . . ." The proposed amendment to TEX. R. APP. P. 55 makes it clear that it is the court reporter's duty to file the statements of facts but only after payment or arrangement to pay the fee for preparation. See Supreme Court Advisory Committee Proposed Amendments to Texas Rules of Appellate Procedure, March 21, 1995.

265. 895 S.W.2d 899 (Tex. App.—Waco 1995, no writ).

266. *Id.* at 899.

267. See *Hernandez v. JLG Indus., Inc.*, 905 S.W.2d 778 (Tex. App.—San Antonio 1995, no writ).

268. *Id.* at 780.

269. *Id.* (citing TEX. R. APP. P. 50(e)).

270. *Id.*

D. SUPPLEMENTING THE RECORD POST-SUBMISSION

Although a court of appeals has broad discretion under Rule 55 of the Texas Rules of Appellate Procedure to permit or deny supplementation of the record to include omitted matters, the Dallas Court of Appeals abused its discretion in *Silk v. Terrill*.²⁷¹ There the court refused to permit supplementation of an affidavit that was part of the trial court record but inadvertently omitted from the appellant's record designation.²⁷² In *Silk*, a summary judgment case, the appellant erroneously thought that an affidavit proffered by the appellee in support of his motion for summary judgment was attached to the appellee's summary judgment motion when, in fact, the affidavit had been filed as a document separate from the motion. Thinking the affidavit was attached to the motion, the appellant designated only the motion for summary judgment in her record designation. Although the appellant discovered her error prior to filing her appellate brief, she did not seek supplementation of the record but instead attached a copy of the affidavit to her brief and notified the appellee of the situation in case he wanted to cite to the affidavit in his response to her brief.

The appellee did not raise a reply point regarding the missing affidavit or challenge the sufficiency of the record for appellate review. Two minutes before oral argument, however, counsel for the appellee told appellant's attorney he intended to argue that the absence of the affidavit rendered the record insufficient for appellate review. He did so, and the Dallas Court of Appeals affirmed the summary judgment without reaching the merits because of the appellant's failure to bring forward a sufficient record.²⁷³ The appellant filed a post-submission motion to supplement the record with the affidavit, but the court of appeals denied

271. 898 S.W.2d 764 (Tex. 1995) (per curiam).

272. *Id.* at 765-66. Rule 55 states, in pertinent part:

(B) BEFORE SUBMISSION. If anything material to either party is omitted from the transcript or statement of facts, before submission the parties by stipulation, or the trial court, upon notice and hearing, either before or after the record has been transmitted to the appellate court, or the appellate court, on a proper suggestion or on its own initiative, may direct a supplemental record to be certified and transmitted by the clerk of the trial court or the official court reporter supplying such omitted matter. The appellate court shall permit it to be filed unless the supplementation will unreasonably delay disposition of the appeal.

(C) DEFECTS APPEARING AT OR AFTER SUBMISSION. Should it be apparent during the submission or afterwards that the case has not been properly prepared as shown in the transcript, or properly presented in the brief or briefs, or that the law and authorities have not been properly cited, which will enable the court to decide the case, it may decline to receive the submission; or, if received, may set it aside and make such orders as may be necessary to secure a more satisfactory submission of the case; or should it appear to the court, after submission of the cause, that the statement of facts has been prepared in violation of the rules, the court may require the appellant to furnish a proper statement of facts, and upon his failure to do so may disregard it.

TEX. R. APP. P. 55(b)-(c).

273. *Silk*, 898 S.W.2d at 765-66.

the motion.²⁷⁴

The Texas Supreme Court reversed and remanded the case to the court of appeals.²⁷⁵ In doing so, the supreme court noted that there was never any dispute that the affidavit had been part of the trial court record.²⁷⁶ "Judicial economy," the supreme court held, "is not served when a case, ripe for decision, is decided on a procedural technicality of this nature."²⁷⁷

E. LATE-FILED TRANSCRIPT

In *Knight v. Sam Houston Memorial Hospital*,²⁷⁸ the appellant's transcript was due to be filed in the court of appeals on April 4, 1995. The record was filed two days late, on April 6, 1995. The appellant did not file a motion for extension of time to file the transcript.²⁷⁹ The court of appeals held that it had no authority to consider a late transcript, and therefore had nothing to review because the appellant failed to timely file a motion for extension of time in which to file the transcript.²⁸⁰

The appellant argued that the court of appeals' granting one of the appellees' motion for extension of time made it unnecessary for the appellant to ask for an extension also.²⁸¹ The court rejected this argument on the basis that the appellee's request encompassed none of the material that must be included in the original transcript under Rule 51(a) of the Texas Rules of Appellate Procedure.²⁸² The appellee's request included

274. *Id.*

275. *Id.* at 766.

276. *Id.*

277. *Id.* The proposed amendment to Rule 55 of TEX. R. APP. P. would resolve the issue in *Silk* by allowing any party, the trial court or appellate court to supplement the record by sending a letter, either pre-submission or post-submission, to the trial court clerk requesting the supplement. See Supreme Court Advisory Committee Proposed Amendments to the Texas Rules of Appellate Procedure March 21, 1995. On remand in *Silk*, the Dallas Court of Appeals considered the omitted affidavit and reversed and remanded the case for new trial. See *Silk v. Terrill*, No. 05-94-00006-CV, 1995 WL 559984 *3 (Tex. App.—Dallas, Sept. 18, 1995, no writ) (not designated for publication).

278. 907 S.W.2d 847 (Tex. App.—Houston [1st Dist.] 1995, writ denied)

279. See TEX. R. APP. P. 54(c). Rule 54(c) states:

An extension of time may be granted for late filing in a court of appeals of a transcript or statement of facts, if a motion reasonably explaining the need therefor is filed by appellant with the court of appeals not later than fifteen days after the last date for filing the record. Such motion shall also reasonably explain any delay in the request required by Rule 53(a).

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

280. *Knight*, 907 S.W.2d at 848.

281. *Id.*

282. *Id.*; see TEX. R. APP. P. 51(a). Rule 51(a) states:

(A) CONTENTS. Unless otherwise designated by the parties in accordance with Rule 50, the transcript on appeal shall include copies of the following: in civil cases, the live pleadings upon which the trial was held; . . . the court's docket sheet; the charge of the court and the verdict of the jury, or the court's findings of fact and conclusions of law; the court's judgment or other order appealed from; any motions for new trial and the order of the court thereon; any notice of appeal; any appeal bond, affidavit in lieu of bond or clerk's certificate of a deposit in lieu of bond; any notice of limitation of appeal in civil cases made pursuant to Rule 40; any formal bills of exception

only documents that were not included in the appellant's request to prepare the transcript. In fact, the court construed the appellee's motion as a motion for leave to file a supplemental transcript.²⁸³ The court also noted that under Rule 50(d) of the Texas Rules of Appellate Procedure, the appellant has the burden to see that a sufficient record is presented to show error requiring reversal.²⁸⁴ As a result, the appellant "must independently insure that the appellate record upon which it relies is timely filed in the appellate court."²⁸⁵ "[A] party is ill-advised," the court held, "to assume that an action taken by another party will inure to its benefit."²⁸⁶

The Fort Worth Court of Appeals in *Phillips v. Beavers*²⁸⁷ agreed with the court of appeals in *Knight*, holding that the court of appeals has no authority to consider a late-filed record in the absence of a timely motion for extension of time.²⁸⁸ In *Phillips*, the appellants did not file their motion for extension of time within fifteen days after the last date for filing the record. The Fort Worth Court of Appeals held that the fifteen-day deadline in rule 54(c) "is not discretionary" and dismissed the appeal.²⁸⁹

VII. THE APPELLATE BRIEF

A. POINTS OF ERROR

In *Anderson v. Gilbert*,²⁹⁰ the defendant appealed from a judgment in a bench trial awarding the plaintiff the deficiency under a promissory note after foreclosure of the property securing the note. The court of appeals held that the appellant's first seven points of error did not present any justiciable question on appeal because they "attacked the judgment rather than the specific finding of fact by the trial court. . . ."²⁹¹ The supreme court reversed the court of appeals and remanded the cause to

provided for in Rule 52; in civil cases, a certified bill of costs, including the cost of the transcript and the statement of facts (if any), showing any credits for payments made; and, subject to the provisions of paragraph (b) of this rule, any filed paper any party may designate as material.

TEX. R. APP. P. 51(a).

283. *Knight*, 907 S.W.2d at 848.

284. *Id.* at 848-49; see TEX. R. APP. P. 50(d). Rule 50(d) states: "The burden is on the appellant, or other party seeking review, to see that a sufficient record is presented to show error requiring reversal." TEX. R. APP. P. 50(d).

285. *Knight*, 907 S.W.2d at 848-49.

286. *Id.* at 849 (quoting *Inman's Corp. v. Transamerica Commercial Fin. Corp.* 825 S.W.2d 473 (Tex. App.—Dallas 1991, no writ)).

287. 906 S.W.2d 254 (Tex. App.—Fort Worth 1995, writ requested).

288. *Id.* at 255.

289. *Id.*; see TEX. R. APP. P. 54(c). Rule 54(c) states:

An extension of time may be granted for late filing in a court of appeals of a transcript or statement of facts, if a motion reasonably explaining the need therefor is filed by appellant with the court of appeals not later than fifteen days after the last date for filing the record. Such motion shall also reasonably explain any delay in the request required by Rule 53(a).

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

290. 897 S.W.2d 783 (Tex. 1995) (per curiam).

291. *Id.*

that court.²⁹² The supreme court emphasized that courts are to construe rules on briefing liberally and an appellate court should not merely consider the wording of the points of error but also the arguments supporting each point.²⁹³

Noting that it had the option of either examining the merits of the case to determine whether any ground supported the court of appeals' judgment or remanding the case to the court of appeals to consider the points not addressed, the supreme court decided it best served the "goal of judicial economy" to remand the case to the court of appeals for consideration of the unaddressed points.²⁹⁴

The proposed amendment to Rule 74 of the Texas Rules of Appellate Procedure follows the federal model, allowing an appellant to present a "statement of issues or points presented" instead of the more technical points of error.²⁹⁵

B. LENGTH OF BRIEFS

In *Maranatha Temple, Inc. v. Enterprise Products Co.*,²⁹⁶ an appeal from a summary judgment in favor of the defendant, the appellant moved to file a brief in excess of the fifty-page limit set forth in Texas Rule of Appellate Procedure 74(h).²⁹⁷ The court granted the motion, ordering the appellant's brief "shall not be over 85 pages."²⁹⁸ Although the appellant's brief technically ended on page eighty-three, on page twenty-one of its brief, the appellant incorporated into its brief over 200 pages of argument from various pleadings filed in the trial court and made part of the record on appeal.

The court agreed with the appellees that the appellant's incorporation of the additional argument into its brief "violated the spirit of Rule 74(h)" as well as the court's order limiting the brief to eighty-five pages.²⁹⁹ The court struck from the appellant's brief the material the appellant sought to incorporate, although the court stated it would consider the material as part of the record.³⁰⁰

292. *Id.*

293. *Id.*

294. *Id.* at 785.

295. See Supreme Court Advisory Committee Proposed Amendments to Texas Rules of Appellate Procedure, March 21, 1995.

296. 893 S.W.2d 92 (Tex. App.—Houston [1st Dist.] 1994, writ dismissed).

297. *Id.* at 97; see TEX. R. APP. P. 74(h). Rule 74(h) states:

(H) LENGTH OF BRIEFS. Except as specified by local rule of the court of appeals, appellate briefs in civil cases shall not exceed 50 pages, exclusive of pages containing the list of names and addresses of parties, the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The court may, upon motion, permit a longer brief. A court of appeals may direct that a party file a brief, or another brief, in a particular case. If any brief is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn.

TEX. R. APP. P. 74(h).

298. *Maranatha Temple*, 893 S.W.2d at 97.

299. *Id.*

300. *Id.*

C. CITATION OF AUTHORITY

Rule 74(f) of the Texas Rules of Appellate Procedure requires appellate briefs to include "such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue."³⁰¹ The failure to do so results in waiver unless, in the appellate court's discretion, rebriefing should be permitted.³⁰²

The appellant in *Happy Harbor Methodist Home, Inc. v. Cowins*³⁰³ neglected to include any citation of authority or discussion of facts to support its assertions that the evidence was legally and factually insufficient to support the jury's findings. Refusing to "do the job of the advocate," the court of appeals held that the appellant waived its inadequately briefed arguments.³⁰⁴

On rehearing, the appellant complained that the court erred in refusing to give it an opportunity to rebrief.³⁰⁵ Citing the supreme court's decision in *Fredonia State Bank v. American Life Insurance*,³⁰⁶ the court of appeals in *Cowins* noted that it "has some discretion to choose between deeming a point waived and allowing amendment or rebriefing."³⁰⁷ Overruling the appellant's motion for rehearing and motion for leave to file an amended brief, the court of appeals recounted the procedural history of the appeal in which appellants had been granted two extensions of time to file their principal brief, had missed both extended deadlines, and had further missed their deadline for filing their motion for rehearing.³⁰⁸

VIII. ADMINISTRATIVE APPEALS

The Texas Supreme Court considered the timeliness of a motion for rehearing filed in an administrative appeal in *Temple Independent School District v. English*.³⁰⁹ The school district in *Temple* decided not to renew the respondent school principal's contract. The school district presented its recommendation to the district's board of trustees, which accepted the recommendation and, after a hearing, voted not to renew the principal's contract. The principal appealed to the Commissioner of Education, who

301. TEX. R. APP. P. 74(f)(2).

302. TEX. R. APP. P. 83. Rule 83 specifically provides:

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 provided the court may make no enlargement of the time for filing the transcript and statement of facts except pursuant to paragraph (c) of Rule 54

TEX. R. APP. P. 83.

303. 903 S.W.2d 884 (Tex. App.—Houston [1st Dist.] 1995, no writ).

304. *Id.* at 886.

305. *Id.*

306. 881 S.W.2d 279 (Tex. 1994).

307. 903 S.W.2d at 887.

308. *Id.* at 886-87.

309. 896 S.W.2d 167 (Tex. 1995). Under the Administrative Procedure Act, before seeking review of a final order in an administrative proceeding, the litigant must file a motion for rehearing with the agency. TEX. GOV'T CODE ANN. § 2001.145 (Vernon 1995).

upheld the district's decision. The Commissioner's decision was mailed to the principal on September 21, 1990. The principal filed his motion for rehearing on October 17, 1990, which was more than twenty days after the notice was mailed but within twenty days of the date he actually received notice. The motion was overruled and the principal appealed to the district court.

In the district court, the school district challenged the court's jurisdiction, claiming that the principal had not filed his motion for rehearing on time. The court rejected the school district's contention and affirmed the Commissioner's decision. The Austin Court of Appeals agreed that the district court had jurisdiction and the supreme court affirmed the court of appeals.³¹⁰

As the supreme court noted, the failure to file a timely motion for rehearing deprives the district court of jurisdiction to review the agency's decision on appeal.³¹¹ Under section 16(e) of the Administrative Procedure and Texas Register Act (APTRA), a motion for rehearing "must be filed by a party within twenty days after the date the party or his attorney of record is notified of the final decision or order as required by Subsection (b) of this section."³¹² Under section 16(b) of the APTRA, a party or attorney of record notified by mail of the agency's final decision is presumed to have been notified on the date the notice is mailed.³¹³

The school district argued that the presumption is rebuttable if a party fails to receive any notice within twenty days of the date of mailing, but irrebuttable if the notice is received within twenty days after it was mailed, making the motion for rehearing due within twenty days from the date notice was mailed.³¹⁴ The supreme court rejected the school district's argument, holding that the presumption disappears regardless of when notice is actually received when evidence to the contrary of the presumption is introduced.³¹⁵ A party, therefore, may rebut the presumption that he was notified on the date of mailing by offering evidence that he actually received notice of the decision at a later date.³¹⁶ The court affirmed the lower court's holding that the motion for rehearing was filed in a timely manner.³¹⁷

The issue in *The City of Lubbock v. Elkins*³¹⁸ was whether the ten-day window for appealing to the Civil Service Commission of the City of Lubbock from an indefinite suspension from the City's police force was a ten calendar days window or a ten working days window.³¹⁹

310. *Temple Indep. Sch. Dist.*, 896 S.W.2d at 167.

311. *Id.* at 169.

312. See TEX. GOV'T CODE ANN. § 2001.146(a) (Vernon 1995) (emphasis added).

313. *Id.* § 2001.0142(c).

314. *Temple Indep. Sch. Dist.*, 896 S.W.2d at 169.

315. *Id.*

316. *Id.*

317. *Id.*

318. 896 S.W.2d 346 (Tex. App.—Amarillo 1995, no writ).

319. *Id.* at 347.

Under the Texas Local Government Code, a party wishing to appeal from an indefinite suspension is required to file a written appeal with the Commission "within ten days after the date the person receives the copy of the [suspension order]."³²⁰ The suspended police officer in *Elkins* did not file his written appeal within ten calendar days of receiving the suspension order, although he did file it within ten working days. The Commission determined that it had no jurisdiction to hear the officer's appeal and dismissed the appeal because of its untimeliness.

The officer filed a lawsuit against the Commission seeking an order from the trial court determining that the Commission had jurisdiction to consider the merits of his appeal. The trial court determined that the officer timely filed his appeal. The Amarillo Court of Appeals reversed the trial court's finding, holding that the term "days" in the statute means "calendar days."³²¹ The appellate court noted that, under the Government Code, the notice of suspension is given to the suspended officer immediately upon suspension and identifies the precise civil service rules alleged to have been violated by the officer.³²² This information eliminates the need for an intensive fact finding investigation.³²³ Further, although the "notice" of appeal is due within ten days, the actual hearing on the matter is not held until a later date, either within thirty days or on a date agreed upon by the suspended officer.³²⁴ The court concluded that the Commission had no jurisdiction to consider the officer's appeal.³²⁵

In *Hamamcy v. Texas State Board of Medical Examiners*,³²⁶ a doctor appealed the Texas Board of Medical Examiner's decision to revoke his license to practice medicine. The Austin Court of Appeals noted that a motion for rehearing with the agency "must sufficiently notify the agency of the error claimed so that the agency can either correct or defend the error."³²⁷ The motion must specifically set forth the fact finding or legal conclusion or ruling complained of for each contention of error.³²⁸

Seeking judicial review of the Board's decision to revoke, the appellant in *Hamamcy* filed a document, which, although labeled "Motion for Rehearing," stated in its entirety that "the presentation of the discussion at the hearing will be done from the charts of the patients and from the records on file with the Board."³²⁹ The Austin Court of Appeals held that, although the specificity of a motion for rehearing is not jurisdic-

320. TEX. LOC. GOV'T CODE ANN. § 143.052(d) (Vernon 1995).

321. *Elkins*, 896 S.W.2d at 347. Amazingly, however, the court decided the time period began at the precise moment the police officer received his notice: 10:40 a.m., allowing until 10:40 a.m. ten days later to file an appeal. This decision flies in the face of the supreme court's warning about deciding appeals on technicalities.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. 900 S.W.2d 423 (Tex. App.—Austin 1995, no writ).

327. *Id.*

328. *Id.*

329. *Id.* at 425.

tional in nature, "a motion for rehearing can be so indefinite, vague and general" that it does not constitute a motion for rehearing.³³⁰ The court affirmed the trial court's dismissal of the case for lack of jurisdiction, holding that the motion filed by the appellant was not sufficient to confer jurisdiction on the district court.³³¹

In a similar administrative appeal, the Austin Court of Appeals in *Dolenz v. Texas State Board of Medical Examiners*³³² addressed the sufficiency of a doctor's motion for rehearing to the Texas Board of Medical Examiners upon suspension of his medical license. The court in *Dolenz* held that a motion for rehearing under the Administrative Procedure Act must set out two requirements pertaining to each contention by the appellant: (1) the particular ruling or action of the agency that the movant asserts is erroneous and (2) the legal basis upon which the claim of error rests.³³³ The Board asserted that the doctor's motion for rehearing did not satisfy these requirements, rendering the trial court without jurisdiction to review the Board's decision.³³⁴ The trial court agreed with the Board and dismissed the doctor's appeal for want of jurisdiction. Reversing the lower court, the Austin Court of Appeals reviewed the motion for rehearing and determined that it was not so general as to fail completely as a motion for rehearing.³³⁵

In another administrative appeal, *Simmons v. Texas State Board of Dental Examiners*,³³⁶ a dentist attempted to appeal an order of the Texas State Board of Dental Examiners revoking his dental license. The dentist initiated judicial review, however, by filing a petition in state district court while his motion for rehearing to the Board was still pending. The dentist was given notice of the Board's revocation of his license on September 20, 1993. On that same date, the dentist filed a motion for rehearing with the Board. On September 30, 1995, while the motion for rehearing was still pending, the dentist filed his petition in state court.

Realizing the prematurity of his state court lawsuit, the dentist filed a motion to stay proceedings in the district court on October 14, 1993, which was granted on October 18, 1993. On November 4, 1993, the motion for rehearing was overruled by operation of law. The dentist did not refile the suit for judicial review within thirty days of this ruling. The Board challenged the jurisdiction of the district court and the court dismissed the dentist's appeal.³³⁷

The Tyler Court of Appeals noted that an appeal from an administrative agency "is not a matter of right" and due process does not even re-

330. *Id.*

331. *Hamamcy*, 900 S.W.2d at 425.

332. 899 S.W.2d 809 (Tex. App.—Austin 1995, no writ).

333. *Id.* at 811; *see* TEX. GOV'T CODE ANN. § 2001.145(a) (Vernon 1995).

334. *Dolenz*, 899 S.W.2d at 811.

335. *Id.* at 812. The court suggested but did not *sua sponte* review the issue of the untimeliness of the motion. *Id.* at 810.

336. No. 12-94-00174-CV, 1995 WL 510598 (Tex. App.—Tyler 1995, writ requested).

337. *Id.* at *1.

quire such review.³³⁸ The Administrative Procedure Act, the court determined, governs the procedure necessary to perfect an appeal from an administrative agency such as the Board to the courts and requires that the motion for rehearing be *first* overruled before the agency order becomes an appealable final order.³³⁹ The court held that the requirement of having a motion for rehearing overruled, thus exhausting administrative remedies, "is a jurisdictional prerequisite to judicial review by the district court and cannot be waived by action of the parties."³⁴⁰ In this case, the court of appeals concluded, November 4, 1993, the date on which the dentist's motion for rehearing was overruled, was the date on which the decision became final and appealable.³⁴¹ Because the dentist did not file his petition within thirty days after the date on which the decision became final, the district court did not obtain jurisdiction over the case and properly dismissed the case for lack of jurisdiction.³⁴²

Finally, the supreme court held in *Board of Disciplinary Appeals v. McFall*³⁴³ that an attorney may only seek appeal to the Texas Supreme Court from an adverse ruling by State Board of Disciplinary Appeals (the "Board"), and may not seek relief from or enjoin the Board's ruling to state district court while the appeal is pending.³⁴⁴ In *McFall*, the Board suspended an attorney from the practice of law. The attorney filed a notice of appeal with the Texas Supreme Court but did not request a stay of his suspension. Instead, the day after he filed his appeal, the attorney petitioned for a temporary restraining order from a state district court in Lubbock, Texas. The Lubbock trial court granted a temporary restraining order and scheduled a hearing on a temporary injunction. The Board petitioned the supreme court for a writ of mandamus and a writ of prohibition.

The supreme court granted the writs, holding that under the disciplinary rules, an attorney may only appeal from a Board order directly to the supreme court.³⁴⁵ If the appeal is unsuccessful, only then can the attorney seek reinstatement in district court, with a jury trial if he desires one.³⁴⁶ Until conclusion of the appeal, however, the trial court lacks jurisdiction to provide interim equitable relief.³⁴⁷

338. *Id.* at *2.

339. *Id.* at *2-3; see TEX. GOV'T CODE ANN. § 2001.001 *et seq.* (Vernon Supp. 1995).

340. *Simmons*, 1995 WL 510598 at *2-3.

341. *Id.*; see TEX. GOV'T CODE ANN. § 2001.144(a)(2)(B). Section 2001.144(a)(2)(b) of the Administrative Procedure Act specifically states that: (a) A decision in a contested case is final . . . (2) if a motion for rehearing is filed on time, on the date . . . (b) the motion is overruled by operation of law. TEX. GOV'T CODE ANN. § 2001.144(a)(2)(B).

342. *Simmons*, 1995 WL 510598 at *3; see TEX. GOV'T CODE ANN. § 2001.176(a) (Vernon 1995). On appeal from district court to the court of appeals, Rule 306C of the Texas Rules of Civil Procedure would have applied to make the appeal timely.

343. 888 S.W.2d 471 (Tex. 1994) (orig. proceeding).

344. *Id.* at 472.

345. *Id.*; see TEX. R. DISCIPLINARY P. 7.11. (Vernon 1995).

346. *McFall*, 888 S.W.2d at 471-72; see TEX. R. DISCIPLINARY P. 12.06 (Vernon 1995).

347. *Id.*

IX. PROPOSED CHANGES TO THE TEXAS RULES OF APPELLATE PROCEDURE

The Texas Supreme Court has been reviewing proposed changes to the Texas Rules of Appellate Procedure submitted by the Supreme Court Advisory Committee in March, 1995.³⁴⁸ By the time this Article is published, the rules may have been approved. Readers are encouraged to determine the status of the rule changes.

The goal of the proposed amendments is to simplify. In many instances, they follow the federal system. For example, they allow the filing of a notice of appeal, rather than a cost bond, to perfect the appeal. The amendments place the burden of assuring a complete record on the court rather than counsel, once appeal has been perfected and the record designated, and they provide for the simpler "statement of issues" used in federal appellate practice rather than the draconian "points of error" now used in state appellate practice.³⁴⁹

348. See Supreme Court Advisory Committee Proposed Amendments to Texas Rules of Appellate Procedure, March 21, 1995.

349. Where relevant, the proposed rule changes have been discussed in the preceding sections.

