

**PRESERVATION OF ERROR AND
AVOIDANCE OF WAIVER IN
POST-TRIAL MOTIONS**

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**2ND ANNUAL CONFERENCE ON TECHNIQUES FOR
HANDLING CIVIL APPEALS IN STATE & FEDERAL COURT**
June 4 & 5, 1992
Austin, Texas

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WAIVER IN POST-TRIAL MOTIONS**

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May, 1992

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PRESERVATION OF ERROR AND AVOIDANCE OF WAIVER IN POST-TRIAL MOTIONS

I. PRELIMINARY MATTERS.

A. Scope of the Article.

This paper addresses the preservation of appellate error in civil trial courts between the receipt of the jury verdict and the filing of the appeal bond. Accordingly, the paper is predominantly devoted to post-trial motion practice. It will not treat any motions filed before or during trial. Likewise, it excludes all motions filed in the appellate court. It also does not treat instruments filed in the trial court, but exclusively directed to the appellate process (such as the written requests to prepare the statements of facts, and the designation of items to be included in transcript), even though those instruments must be filed at or before the time of filing the appeal bond.

Subjects that are covered include motions filed for the purpose of entering a judgment (motion for judgment on the verdict, motion to disregard jury findings, motion for judgment n.o.v.), motions that attack the judgment (motion for new trial, motion for remittitur, motion for judgment nunc pro tunc, and motions to vacate, correct, modify or reform the judgment), and post-trial motions in a bench trial (request for findings of fact and conclusion of law).

B. Structure of Article.

Because several types of error may be preserved by using the same type of post-trial motion, this paper is organized around the motions themselves, rather than around the error to be preserved. That way, instead of discussing identical remedies for different problems several times, each remedy will be discussed thoroughly one time.

However, because many practitioners using this article will be approaching it from the standpoint of particular types of error to be preserved, a cross-reference chart is provided at the end of the paper. By listing the various types of appellate error and the motions required to preserve them, this chart should facilitate the use of the paper.

II. MOTIONS TO ENTER A JUDGMENT.

A. Motion for Judgment on the Jury Verdict.

The "motion for judgment on the verdict" or "motion for judgment" (where the judgment is based on the jury verdict) are not discussed in the Texas Rules of Civil Procedure. If anything, Rule 300 suggests that a motion for judgment is not necessary because it states, "Where a special verdict is rendered, . . . the court *shall* render judgment thereon unless set aside and a new trial is granted, or judgment is rendered notwithstanding the verdict or jury findings under these rules." Tex. R. Civ. P. 300. Rule 305 provides that any party *may* prepare a judgment and submit it to the court, Tex. R. Civ. P. 305, but the rules do not require that a judgment be forwarded to the court. *But see Bishop v. Wollyang*, 705 S.W.2d 312, 314 (Tex. App.--San Antonio 1986, writ ref'd n.r.e.). (Contains language saying prevailing party has duty to prepare judgment and submit it to court. When party did not do so for ten years,

court's failure to dismiss for want of prosecution was not abuse of discretion, and trial court's grant of new trial was proper because court reporter's notes were lost and the losing party did not have adequate record for appeal.)

Rule 305 also does not require that a judgment be accompanied by a motion for judgment. However, the use of the motion format is a more direct request for action than simply forwarding the judgment to the court and hoping that the judge will sign it. Moreover, there may be some psychological benefit in filing a motion for judgment if the attorney is aware of any dispute concerning the way in which the jury verdict will be converted into a judgment. In that situation, if the prevailing party merely forwards a judgment to the court for signature, then the opposing party has the first opportunity to confront the judge with argument concerning the disputed matter in an adversarial pleading that attacks the proposed judgment. If the party proposing the judgment wants to be the first to confront the judge with the matter in dispute, and take the opportunity to frame the issue in a way that is most favorable to him, the first chance to do that arises in a motion for judgment.

Although motions for judgment are not required to preserve error, in some circumstances the filing of a motion for judgment may *waive* error. The party moving for judgment on the verdict may waive the right to complain on appeal about any portion of that verdict. The problem arises when some of the jury findings are favorable to a litigant, but other findings are adverse, and need to be challenged on appeal. In order to begin the appellate process, the litigant needs to get a judgment entered. The temptation is to file a motion for judgment on the verdict, and then challenge the adverse findings on appeal. However, Texas courts have held that a motion for judgment on the verdict is an affirmation that the jury findings were supported by the evidence, and therefore waives of the right to challenge those findings on appeal. See *Litton Indus. Products, Inc. v. Gammage*, 668 S.W.2d 319, 322 (Tex. 1984); *Chuck Wagon Feeding Co. v. Davis*, 768 S.W.2d 360, 366 (Tex. App.--El Paso 1989, writ denied); *Russell v. Dunn Equipment, Inc.*, 712 S.W.2d 542, 545 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.). In two of those cases, *Litton* and *Russell*, the party moving for judgment attempted to reserve the right to challenge the evidentiary support for jury findings, despite filing a motion for judgment. In *Litton*, the motion reserved the right to "challenge any adverse judgment based upon the verdict." *Litton*, 668 S.W.2d at 322. In *Russell*, the motion stated that it was filed "without waiver of appeal or the right to file a motion for new trial or any other subsequent pleadings." *Russell* 712 S.W.2d at 545. In both cases, the appellate court held that the attempt to reserve rights and avoid waiver was unsuccessful. But see *Emmerson v. Tunnell*, 793 S.W.2d 947, 948 (Tex. 1990) (partially prevailing party moved for judgment on the verdict, but the trial court entered a judgement for less than the verdict, and the Texas Supreme Court held that error was preserved).

In *First National Bank of Beeville v. Fojtik*, 775 S.W.2d 632 (Tex. 1989), the Texas Supreme Court recognized that this rule places litigants with a partially successful result in a difficult position. The court observed, "There must be a method by which a party who desires to initiate the appellate process may move the trial court to render judgment without being bound by its terms." *Id.* at 635. The court, however, stopped short of overruling its previous decision in *Litton*, and failed to eliminate the waiver rule entirely. Rather, the court distinguished *Fojtik* from *Litton* in two ways. First, in *Fojtik* the party moving for judgment had partially prevailed,

but still wanted to appeal part of the jury verdict, and the only way to begin the appellate process was to move for judgment. Second, the reservation of the right to attack the jury verdict in the motion for judgment in *Fojtik* was more thorough and explicit, and was contained in the motion for judgment itself, not a separate document. The *Fojtik* motion for judgment stated:

While plaintiffs disagree with the findings of the jury and feel there is a fatal defect which will support a new trial, in the event the Court is not inclined to grant a new trial prior to the entry of judgment, plaintiffs pray the Court enter the following judgment. Plaintiffs agree only as to the form of the judgment but disagree and should not be construed as concurring with the content and the result.

Id.

In *Melissinos v. Phamanivong*, 823 S.W.2d 339 (Tex. App.--Texarkana 1991, writ denied), the losing defendant filed a Response to Plaintiff's Motion for Judgment which included an alternative request to enter judgment for a lesser amount, based on a dispute over interest calculations. The Court of Appeals discussed *Gammage* and *Fojtik*, and chose to apply *Fojtik*, despite the fact that Melissinos' attorney did not attempt to reserve the right to challenge factual sufficiency at all. The court noted that the judgment requested was in the alternative, and held that procedural rules should not be used to elevate form over substance. *Id.* at 342.

Nevertheless, the safest course for a litigant with a partially successful jury verdict is to file a motion for judgment that includes a paragraph that copies the disclaimer in *Fojtik*. Anything less may result in the waiver of the right to challenge any jury findings on evidentiary grounds.

B. Motion to Disregard Jury Findings.

1. **Source of authority.** Rule 301 of the Texas Rules of Civil Procedure provides, " . . . [T]he court may, upon . . . motion and notice, disregard any jury finding on a question that has no support in the evidence." Tex. R. Civ. P. 301.

2. **Description of motion.** A motion to disregard jury findings is appropriate when the movant is asking the trial judge to ignore one or more particular jury findings (but not the whole verdict), and to render judgment based upon the remaining findings. *See Dewberry v. McBride*, 634 S.W.2d 53, 55 (Tex. App.-- Beaumont 1982, no writ). A proper motion to disregard must 1. designate the finding or findings sought to be disregarded; 2. specify the reason for disregarding the disputed findings; and 3. contain a request that judgment be entered upon the remaining findings after the designated erroneous findings have been disregarded. *Dupree v. Piggly Wiggly Shop Rite Foods, Inc.*, 542 S.W.2d 882, 892 (Tex. Civ. App.--Beaumont 1976, writ ref'd n.r.e.); *Dewberry*, 634 S.W.2d at 55.

A jury finding may be disregarded in only two circumstances: if there is no evidence in the record to support the finding, or if the finding is immaterial. *C & R Transp., Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966); *Stout v. Clayton*, 674 S.W.2d 821, 824-25 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.). A jury finding is immaterial when the question should not have been presented to the jury because there was no evidence to support an affirmative answer, *Robberson Steel, Inc. v. J.D. Abrams, Inc.*, 582 S.W.2d 558, 564 (Tex. Civ. App.--El Paso 1979, no writ), or when the jury question, though properly submitted, has been rendered immaterial by other findings. *C & R Transp., Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966); *Blue Bell, Inc. v. Isbell*, 545 S.W.2d 563 (Tex. Civ. App.--El Paso 1976, no writ). A jury finding on an immaterial jury question should be disregarded by the trial court, because it cannot affect the judgment to be entered. *City of San Augustine v. Roy W. Green Co.*, 548 S.W.2d 467, 470-71 (Tex. Civ. App.--Tyler 1977, writ ref'd n.r.e.).

When a trial court disregards particular jury findings there must be enough of a verdict remaining to support a judgment after the disregarded issues have been stricken. When matters are disputed, the trial court has no authority to substitute its finding for that of the jury. *Highlands Ins. Co. v. Baugh*, 605 S.W.2d 314, 319 (Tex. Civ. App.--Eastland 1980, no writ). However, when facts are undisputed, the trial court may disregard the jury findings and render judgment based on undisputed facts for which no jury finding was necessary. *City of San Antonio v. Theis*, 554 S.W.2d 278, 284 (Tex. Civ. App.--Tyler 1977, writ ref'd n.r.e.), *cert. denied*, 439 U.S. 807 (1978). See also *Long v. Tascosa Nat'l Bank*, 678 S.W.2d 699 (Tex. App.--Amarillo 1984, no writ). In other words, the trial court may not disregard a jury's negative finding and substitute its own affirmative finding unless the evidence conclusively established the opposite affirmative finding. *Texas Paper Stock Co. v. Corpus Christi Food City, Inc.*, 609 S.W.2d 259, 261-62 (Tex. Civ. App.--Corpus Christi 1980, no writ).

3. **Evidentiary standard.** The standard for determining whether to grant a motion to disregard a jury finding is a legal sufficiency or "no evidence" standard. A trial court may disregard a jury finding only if there is no evidence of probative force to support the finding. *Overstreet v. Gibson Product Co.*, 558 S.W.2d 58, 59-60 (Tex. Civ. App.--San Antonio 1977, writ ref'd n.r.e.). If there is any contrary evidence of a probative nature, and the finding is on a material issue, then the finding may not be disregarded by the trial court. *Long*, 678 S.W.2d at 704. The trial court is prevented from disregarding a jury finding that is supported by probative evidence, even though that finding may be against the great weight and preponderance of the evidence. *Texas Paper Stock*, 609 S.W.2d at 261; *Everman Corp. v. Haws & Garrett General Contractors, Inc.*, 578 S.W.2d 539, 542-44 (Tex. Civ. App.--Fort Worth 1979, no writ).

When reviewing the trial court's action in disregarding a jury finding, an appellate court may consider only that evidence, together with reasonable inferences drawn from it, which supports the jury finding that was disregarded. *Overstreet*, 558 S.W.2d at 60. All evidence will be considered in a light most favorable to the jury finding that was disregarded, every reasonable intendment deductible from the evidence will be indulged in favor of the jury finding, only the evidence and inferences which support the finding will be considered, and all evidence and

inferences contrary to the finding will be rejected. *Campbell v. Northwestern Nat'l Life Ins. Co.*, 573 S.W.2d 496 (Tex. 1978); *Duren v. United States Fire Ins. Co.*, 579 S.W.2d 32 (Tex. Civ. App.--Tyler 1979, no writ).

4. **Necessity for motion.** A trial court has no authority to disregard a jury finding on its own initiative, *Durham v. Uvalde Rock Asphalt Co.*, 599 S.W.2d 866, 876 (Tex. Civ. App.--San Antonio 1980, no writ), but can only disregard a jury finding upon written motion and reasonable notice. *Dewberry*, 634 S.W.2d at 55; *Gonzalez v. Mendoza*, 739 S.W.2d 120, 122 (Tex. App.--San Antonio 1987, no writ); *see also Scholl v. Home Owners Warranty Corp.*, 810 S.W.2d 464, 467 (Tex. App.--San Antonio 1991, no writ). The record must reflect that notice of the motion that was given to all the parties, and that the motion was presented and ruled upon by the court. *Moore v. Cotter & Co.*, 726 S.W.2d 237, 240 (Tex. App.--Waco 1987, no writ); *Douglas v. Winkle*, 623 S.W.2d 764, 768 (Tex. App.--Texarkana 1981, no writ). Granting judgment in the absence of notice and hearing is error. *Hines v. Parks*, 128 Tex. 289, 96 S.W.2d 970, 973 (1936). A similar showing of motion and notice is necessary to preserve a complaint about the denial of the motion. *Houston County v. Leo L. Landauer & Assoc. Inc.*, 424 S.W.2d 458, 465-466 (Tex. Civ. App.--Tyler 1968, writ ref'd n.r.e.). The only exception to this rule is that the trial court may disregard a jury finding on an *immaterial* question, even on the court's own motion. *Spencer v. Eagle Star Ins. Co.*, 780 S.W.2d 837, 844 (Tex. App.--Austin 1989, no writ); *Brown v. Armstrong*, 713 S.W.2d 725, 728-29 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.) (trial court rendered judgment for doctor in medical malpractice case, despite informed consent findings against the doctor, and without a motion by doctor to disregard jury findings on informed consent, where informed consent issues were immaterial).

5. **Time for filing.** The rules do not contain any deadlines for the filing of a motion to disregard jury findings. It make sense to file the motion soon after the jury verdict is received, so that the first judgment signed will reflect that the disputed findings have been disregarded. A motion to disregard jury findings *may* be filed after a judgment has been signed, but it must be acted upon by the trial court before the original judgment becomes final. *Eddings v. Black*, 602 S.W.2d 353, 356-57 (Tex. Civ. App.--El Paso 1980), writ ref'd n.r.e. *per curiam* 615 S.W.2d 168 (Tex. 1981).

C. **Motion for Judgment Non Obstante Verdicto (N.O.V.).**

1. **Source of authority.** Rule 301 of the Texas Rules of Civil Procedure provides, " . . . [U]pon motion and reasonable notice the court may render judgment non obstante verdicto if a directed verdict would have been proper," Tex. R. Civ. P. 301.

2. **Description of motion.** Unlike a motion to disregard jury findings, which only complains of certain findings and asks that judgment be based upon the remaining findings, a motion for judgment n.o.v. complains of the entire jury verdict, and seeks a judgment that is contrary to the jury verdict. As Rule 301 plainly states, a judgment n.o.v. is appropriate when a directed verdict would have been justified. *Monk v. Dallas Brake & Clutch Serv. Co.*, 697

S.W.2d 780, 783-84 (Tex. App.--Dallas 1985 writ ref'd n.r.e.); *Stout v. Clayton*, 674 S.W.2d 821, 824-25 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.); *Rowland v. City of Corpus Christi*, 620 S.W.2d 930, 932-33 (Tex. Civ. App.--Corpus Christi 1981, writ ref'd n.r.e.). A judgment n.o.v. is a harsh remedy, which should be used only in very limited circumstances. *Wood v. Texas Farmers Ins. Co.*, 593 S.W.2d 777, 780 (Tex. Civ. App.--Corpus Christi 1979, no writ). Those circumstances were described in the *Rowland* case, which stated that a judgment n.o.v. is proper when: 1. a defect in the opposing party's pleading makes that pleading insufficient to support a judgment; 2. the truth of the fact propositions which, under the substantive law, establish the right of the movant, or negates the right of his opponent to judgment, is conclusively established; or 3. the evidence is insufficient to raise an issue about one or more fact propositions which must be established for the opponent to be entitled to judgment. *Rowland*, 620 S.W.2d at 932-33; *McCarley v. Hopkins*, 687 S.W.2d 510, 512 (Tex. App.--Houston [1st Dist.] 1985, no writ).

3. **Evidentiary standard.** Like the motion to disregard jury findings, the motion for judgment n.o.v. is evaluated on the basis of legal sufficiency, or a "no evidence" test, rather than a factual sufficiency, or "great weight and preponderance of the evidence" test. The trial court may not render a judgment n.o.v. based on factual insufficiency grounds. *Siderius, Inc. v. Wallace Co.*, 583 S.W.2d 852, 861 (Tex. Civ. App.--Tyler 1979, no writ); *Frost v. Sun Oil Co.*, 560 S.W.2d 467, 474 (Tex. Civ. App.--Houston [1st Dist.] 1977, no writ). If there is some evidence that amounts to more than a scintilla to support the jury verdict, the court must enter judgment consistent with the verdict, even if the verdict is against the great weight and preponderance of the evidence. *Basin Operating Co. v. Valley Steel Prods. Co.*, 620 S.W.2d 773, 776 (Tex. Civ. App.--Dallas 1981, writ ref'd n.r.e.). The court may enter a judgment n.o.v. only when there is no evidence warranting the submission of a question to the jury, and when there is no evidence to support the jury's answer to that question. *San Antonio Indep. School Dist. v. National Bank of Commerce*, 626 S.W.2d 794, 795-96 (Tex. App.--San Antonio 1981, no writ). This rule does not require that there be "no evidence at all" to sustain a motion for judgment n.o.v., but comprehends those situations in which the evidence is deemed legally insufficient to establish an asserted fact. *Marquez v. Sears, Roebuck & Co.*, 625 S.W.2d 52 (Tex. App.--San Antonio 1981), *rev'd on other grounds*, 628 S.W.2d 772 (Tex. 1982); *Basin Operating Co.*, 620 S.W.2d at 776.

When acting upon a motion for judgment n.o.v., the trial court must consider all testimony in a light most favorable to the party against whom the motion is sought, and every reasonable intendment deducible from the evidence must be indulged in that party's favor. *Dowling v. NADW Mktg., Inc.*, 631 S.W.2d 726, 728 (Tex. 1982); *James v. Vigilant Ins. Co.*, 674 S.W.2d 925, 926 (Tex. App.--Amarillo 1984, writ ref'd n.r.e.). Moreover, when reviewing a judgment n.o.v., the appellate court must also consider all evidence in a light most favorable to the party against whom the judgment n.o.v. was rendered; must indulge every reasonable intendment deducible from the evidence in that party's favor; and should consider only that evidence and those inferences from it which support the jury verdict, disregarding all contrary evidence and inferences. *McDade v. Tex. Commerce Bank, Nat'l Ass'n*, 822 S.W.2d 713, 717 (Tex. App.--Houston [1st Dist.] 1991, writ requested); *Best v. Ryan Auto Group, Inc.*, 786

S.W.2d 670, 671 (Tex. 1990); *Freeman v. Texas Compensation Ins. Co.*, 586 S.W.2d 172 (Tex. Civ. App.--Fort Worth 1979, *modified on other grounds*, 603 S.W.2d 186 (Tex. 1980). See also *Mancorp, Inc.*, 802 S.W.2d at 227.

4. **Necessity for motion.** A trial judge is not empowered to enter a judgment n.o.v. on his own initiative, but can do so only upon written motion and reasonable notice. *Dewberry*, 634 S.W.2d at 55. In fact, the requirement of a motion for judgment n.o.v. is jurisdictional, and if a trial court grants a judgment n.o.v. without a proper motion seeking that relief, the trial court errs. *Olin Corp. v. Cargo Carriers, Inc.*, 673 S.W.2d 211 (Tex. App.--Houston [14th Dist.] 1984, no writ). However, in determining whether a motion for judgment n.o.v. has been filed, the appellate court will look to the substance of the pleading, as gleaned from the body and the prayer of the instrument, rather than limiting its inquiry to the caption of the instrument. *Dittberner v. Bell*, 558 S.W.2d 527, 531 (Tex. Civ. App.--Amarillo 1977, writ ref'd n.r.e.).

5. **Time for filing.** As with the motion to disregard jury findings, there are no time limits contained in the rules for filing a motion for judgment n.o.v. The better practice is to file the motion soon after the jury verdict so that the first judgment signed is the judgment n.o.v. However, a motion for judgment n.o.v. may be filed and acted upon after a contrary judgment is entered, as long as the judgment is not yet final. *Cleaver v. Dresser Indus.*, 570 S.W.2d 479, 483-84 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.); *Needville Indep. School Dist. v. S.P.J.S.T. Rest Home*, 566 S.W.2d 40, 42 (Tex. Civ. App.--Beaumont 1978, no writ).

III. **MOTIONS ATTACKING THE JUDGMENT.**

A. **Motion for New Trial.**

1. **Source of authority.** Motions for new trial are discussed in Rules 320-329b of the Texas Rules of Civil Procedure.

Rule 320 says that new trials may be granted for good cause, either upon a written, signed motion, or the court's own motion. The rule also provides for partial new trials of severable issues. Tex. R. Civ. P. 320.

Rule 321 states that a motion for new trial must specifically identify the action by the trial court of which the movant complains so that the objection can be clearly identified and understood by the court. Tex. R. Civ. P. 321. In that same vein, Rule 322 says that objections couched in general terms shall not be considered by the court. Tex. R. Civ. P. 322.

Rule 324 states the general rule that a complaint need not be raised in a motion for new trial in order to be preserved for purposes of appeal. The rule also outlines five exceptions to that general principle. For these required exceptions, raising a point in a motion for new trial is a required to preserve a point on appeal. Tex. R. Civ. P. 324.

Rule 326 provides that no more than two new trials can be granted to the same party in the same case based on factual insufficiency or great weight of the evidence. TEX R. CIV. P. 326.

Rule 327 discusses the standard for granting a new trial based on jury misconduct. Tex. R. Civ. P. 327.

Rule 329b describes the time for filing a motion for new trial, and the effect that the filing of a motion for new trial has on the court's retention of plenary power. Tex. R. Civ. P. 329b.

2. Description of motion.

a. **Purpose.** A motion for new trial is a condensed version of an appeal, although it is usually heard by the same judge who rendered judgment. The movant in a motion for new trial is seeking the trial court equivalent of a reversal and remand by the appellate court.

The purpose of a motion for new trial is to give the trial court a chance to examine assigned errors in the trial, and to have the opportunity to cure those errors by granting a new trial rather than have the case go up on appeal. *Mushinski v. Mushinski*, 621 S.W.2d 669, 670-71 (Tex. Civ. App.--Waco 1981, no writ); *Townsend v. Collard*, 575 S.W.2d 422, 423-24 (Tex. Civ. App.--Fort Worth 1978, no writ). However, the hearing on a motion for new trial is not a means by which the case may be tried over again, or tried differently. *Mushinski*, 621 S.W.2d at 671; *Scheffer v. Chron*, 560 S.W. 2d 419, 420 (Tex. Civ. App.--Beaumont 1977, writ ref'd n.r.e.).

b. **Requirement of specifics.** Rules 321 and 322 of the Texas Rules of Civil Procedure require that a motion for new trial specifically identify complaints, and not plead error generally. No point of error on appeal may be predicated upon an improper, general assignment in the motion for new trial, *Powell v. Powell*, 554 S.W.2d 850, 855 (Tex. Civ. App.--Tyler 1977, writ ref'd n.r.e.), and assignments couched in general terms will not be considered by the appellate courts. *Mitchell v. Chaparral Chrysler-Plymouth Sales, Inc.*, 572 S.W.2d 359, 360 (Tex. Civ. App.--Fort Worth 1978, writ ref'd n.r.e.). For example, a general objection in a motion for new trial that the trial court erred in overruling all of the movant's objections to the charge is insufficiently clear and certain to preserve the point of error on appeal. See *Southwest Title Ins. Co. v. Plemons*, 554 S.W.2d 734, 735-36 (Tex. Civ. App.--Dallas 1977, writ ref'd n.r.e.). An assignment of error in a motion for new trial that directs the trial court to scan the movant's objections at trial, without setting forth particular objections, is an inadequate predicate for a point of error on appeal. *Lee v. Andrews*, 545 S.W.2d 238, 247 (Tex. Civ. App.--Amarillo 1976, writ dism'd).

c. **"Presentation" not required.** The mere conclusion of a complaint in a motion for new trial, and the proper and timely filing of that motion, is sufficient to preserve error. In other words, the movant need not "present" the complaint to the court in an oral hearing prior to the time when the motion is overruled by operation of law. *See Cecil v. Smith*, 804 S.W.2d 509, 511-12 (Tex. 1991).

d. **As a prerequisite for appeal.** Raising a ground of error in a motion for new trial is not a prerequisite for making an argument on appeal unless the error is listed in Rule 324(b). That list includes:

1. a complaint upon which evidence must be heard, such as jury misconduct, newly discovered evidence, or failure to set aside a default judgment;
2. a complaint of factually insufficient evidence to support a jury finding;
3. a complaint that a jury finding is against the great weight and preponderance of the evidence;
4. a complaint of inadequate or excessive damages awarded by the jury;
5. incurable jury argument, if it has not been previously ruled upon by the court.

Tex. R. Civ. P. 324. No other grounds of error need to be raised in a motion for new trial in order to preserve the right to make those arguments on appeal. *See e.g. Wilson v. Dunn*, 800 S.W.2d 833, 837 (Tex. 1990) (complaint of defective service need not be raised in motion for new trial because its not part of list in Rule 324). However, there may be some advantage in including all of a party's potential points of error in a motion for new trial, regardless of whether Rule 324 requires their inclusion. First, an appellate court is more likely to be impressed with an appellant who did everything possible to give the trial judge the opportunity to correct his own mistakes before taking the case to the appellate court. Second, there is always a chance that the trial judge may be impressed with an assignment of error, and grant the motion for new trial. As long as there is a chance of that happening, it makes little sense to reserve any arguments until the appellate brief.

Although "no evidence" points of error need not be included in a motion for new trial, they may be preserved by inclusion in a motion for new trial if they have not been preserved in any other way. *Cecil v. Smith*, 804 S.W.2d at 510-511.

e. **Particular grounds.** There are as many different grounds for a motion for new trial as there are reasons to reverse and remand a case on appeal. A partial list of particular grounds includes:

(1) **Jury misconduct.** Rule 327(a) provides that a motion for new trial may complain of misconduct of the jury, improper communication made to the jury, or an incorrect answer given on voir dire examination. When confronted with such a motion, the court must hear evidence concerning the jury misconduct in open court, and may grant a new trial if the misconduct is proved, if it is material, and if it reasonably appears that harm resulted to the movant. Tex. R. Civ. P. 327(a). However, rule 327(b) severely limits the proof of jury misconduct by providing that a juror may not testify about any matters discussed during the jury's deliberations, except for situations where "any outside influence was improperly brought to bear upon any juror." Tex. R. Civ. P. 329(b). See, e.g., *Palmer Well Servs. v. Mack Trucks, Inc.*, 776 S.W.2d 575, 577 (Tex. 1989) (10-2 verdict for Defendant, but one of ten jurors in majority failed to reveal a felony indictment on voir dire; harm presumed).

(2) **Inadequate record.** When a party seeking to appeal from a judgment exercises due diligence, but is unable, through no fault of his own, to obtain a proper record of the evidence introduced at trial, a new trial should be granted in order to preserve his right to appeal. *Hawkins v. Hawkins*, 626 S.W.2d 332, 333 (Tex. App.--Tyler 1981, no writ); *Garcia v. Smith*, 612 S.W.2d 255, 256 (Tex. Civ. App.--Beaumont 1981, no writ); *O'Neal v. County of San Saba*, 594 S.W.2d 185, 186 (Tex. Civ. App.--Austin 1980, writ ref'd n.r.e.). However, a new trial should be granted only where it appears that no other action will adequately protect the right of the aggrieved party to a review by the appellate court. *Wolters v. Wright*, 623 S.W.2d 301, 305-06 (Tex. 1981). But see *Hidalgo Chambers & Co. v. F.D.I.C.*, No. 10-89-153-CV (Tex. App.--Waco, March 22, 1990, n.w.h.) (not yet reported) (appellate court ordered new trial because trial exhibits lost).

(3) **Newly discovered evidence** Motions for new trials based on newly discovered evidence are committed to the sound discretion of the trial court. *Wilkins v. Royal Indem. Co.*, 592 S.W.2d 64, 68-69 (Tex. Civ. App.--Tyler 1979, no writ). Motions for new trial on grounds of newly discovered evidence are not favored by the courts, and are received with careful scrutiny. *Posey v. Posey*, 561 S.W.2d 602, 605 (Tex. Civ. App.--Waco 1978, writ dismissed). In order to prevail on a motion for new trial based on newly discovered evidence, the movant must: 1. introduce the newly discovered evidence in admissible form at the hearing on motion for new trial; 2. show that he had no notice of the existence of the evidence before trial; 3. demonstrate that due diligence was used to obtain the evidence before trial; 4. demonstrate that the evidence is not merely cumulative, nor does it tend only to impeach; 5. show that the evidence would produce a different result if a new trial were granted. *Fettig v. Fettig*, 619 S.W.2d 262, 267 (Tex. Civ. App.--Tyler 1981, no writ); *Wilkins*, 592 S.W.2d at 68-69; *Estate of Arrington v. Fields*, 578 S.W.2d 173, 179-81 (Tex. Civ. App.--Tyler 1979, writ ref'd n.r.e.). The due diligence requirement is not satisfied if it appears that the same effort used to produce the testimony after the trial would have produced the testimony if those same efforts had been used prior to trial. *Wilkins*, 592 S.W.2d at 69; *Scheffer*, 560 S.W.2d at 423.

f. **Evidentiary standard.** Unlike the motion to disregard jury findings and the motions for judgment n.o.v., which are based on a legal sufficiency, or "no evidence" standard, a motion for a new trial may be granted based on legal sufficiency, or an "against the great weight and preponderance of the evidence" standard. Thus, if jury findings are contrary to the great weight and preponderance of the evidence, but supported by some evidence, the court cannot disregard that finding or enter a judgment notwithstanding that finding, but it can grant a new trial. *Basin Operating Co.*, 620 S.W.2d at 776; *de Anda v. Blake*, 562 S.W.2d 497, 499-500 (Tex. Civ. App.--San Antonio 1978, no writ).

The failure to grant a motion for new trial can form the basis for a point of error on appeal. *See Jackson v. Van Winkle*, 660 S.W.2d 807, 808-09 (Tex. 1983). However, the granting of a motion for new trial is, in most circumstances, not appealable. *Napier v. Napier*, 555 S.W.2d 186, 188-89 (Tex. Civ. App.--El Paso 1977, no writ). The only exceptions to this rule are if the trial court's order is wholly void, or if the reason stated for granting the motion for new trial is a conflict in the jury findings, and the complaint on appeal is that the jury findings are not in conflict as a matter of law. *Johnson v. Court of Civil Appeals*, 162 Tex. 613, 350 S.W.2d 330, 331 (Tex. 1961); *St. Paul Mercury Ins. Co. v. Tri-State Cattle Feeders, Inc.*, 628 S.W.2d 844, 847-48 (Tex. App.-- Amarillo 1982, writ ref'd n.r.e.). If the trial court states any other reason for granting the motion for new trial, or fails to state a reason for granting the motion for new trial, then the decision is not appealable.

If the denial of a motion for new trial is appealed, the standard of review on appeal is abuse of discretion. *Jackson*, 660 S.W.2d at 809.

g. **Necessity of motion.** Rule 320 explicitly provides that a trial judge may grant a new trial upon motion by one of the litigants, "or on the court's own motion..." Tex. R. Civ. P. 320. Moreover, even if a motion is filed, the trial court is not restricted to the reasons set out in the motion for new trial, but may grant a new trial on its own motion, for its own reasons, and does not have to give the reasons for granting a new trial. *Zaragosa v. State*, 588 S.W.2d 322, 324-26 (Tex. Crim. App. 1979).

h. **Time for filing.** A motion for new trial must be filed within thirty days after the judgment is signed. Tex. R. Civ. P. 329b(a). If the motion for new trial has not been ruled upon within seventy-five days after the judgment (not the motion itself) is signed, it is automatically overruled by operation of law. *Id.* at 329b (c). If a motion for new trial is filed on time, the court retains plenary power to grant a new trial, or to vacate, modify, correct, or reform the judgment until thirty days after the motion for new trial is overruled, whether by signed order or by operation of law. *Id.* at 329b(e).

B. **Motion for Remittitur.**

1. **Source of authority.** Rule 315 of Texas Rules of Civil Procedure provides that any party in whose favor a judgment is granted may remit any part of that judgment, either by statement in open court, or by the filing of a written remittitur. Tex. R. Civ. P. 315. Rules

306a and 329b indicate that the trial court may modify, correct or reform a judgment. *See* Tex. R. Civ. P. 306a(1), 329b(d).

2. **Description of motion.** A litigant who files a remittitur voluntarily reduces the amount of the judgment that has been entered in his favor. Ordinarily, the reason for filing a motion for remittitur is that the prevailing party realizes that they may not be entitled to the full amount of the judgment that has been entered and would prefer to voluntarily reduce the amount of the judgment in order to avoid the time and expense of an appeal, as well as the possibility of reversal.

In addition to the completely voluntary remittitur contemplated by Rule 315, the concept of remittitur also arises when the trial court or the appellate court concludes that damages are excessive, and offers the litigant the opportunity to remit a portion of the damages in lieu of reversal. Even when the litigant is strongly persuaded by a court, remittitur is voluntarily undertaken by the litigant, and not something ordered by a court. Although the trial court has the power to involuntarily reduce the amount of damages in a judgment, that act constitutes a modification, correction or reformation of the judgment under the court's plenary power, and not a remittitur under Rule 315.

3. **Evidentiary standard.** Although a remittitur may be presented in the form of a motion, the motion is not something that may be granted or overruled by the trial court, but is a matter of right on the part of any litigant. *See* Tex. R. Civ. P. 315; *but see Landmark American Ins. Co.*, 813 S.W.2d 497, 498-99 (Tex. 1991).

If, however, the litigant fails to file a motion for remittitur in the trial court, the opposing party may challenge the excessiveness of the damages awarded by the judgment in the appellate court. At that point, the Court of Appeals has the authority to reverse and remand for new trial, or to direct a remittitur. *Tejas Gas Corp. v. Magers*, 619 S.W.2d 285 (Tex. Civ. App.--Texarkana 1981, writ ref'd n.r.e.). The sole standard for remittitur is factual sufficiency. The factual sufficiency standard is to be employed by both the trial court and the courts of appeals. *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986). Any other standard would allow a court to substitute its determinations of damages for those of the jury. *Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1987).

If a court of appeals determines that no evidence supports a damages verdict, a take nothing judgment should be rendered. If any part of a damages verdict lacks sufficient evidentiary support, the court should suggest a remittitur of that part of the verdict. The prevailing party at trial should be given the option to accept the remittitur or have the case remanded. *Id.*

4. **Necessity of motion.** As previously indicated, any litigant may remit voluntarily with or without a motion. Additionally, a trial judge has the power to require a remittitur on his own motion as part of his power to order a new trial, as long as the trial court still has plenary jurisdiction. *Union Carbide Corp. v. Burton*, 618 S.W.2d 410, 416 (Tex. Civ. App.--Houston [14th Dist.] 1981, writ ref'd n.r.e.).

5. **Time for filing.** Rule 315 does not address when a voluntary remittitur may be filed, though presumably the remittitur would fall within the description of a motion to modify, correct or reform judgments described in Rule 329b. Those motions must be filed within thirty days of the signing of the judgment, unless a motion for new trial is timely filed, in which case a motion to modify or reform a judgment must be filed within thirty days of the overruling of the motion for new trial. Tex. R. Civ. P. 329b.

Additionally, once the trial court has lost plenary jurisdiction and a case is on appeal, a party to an appeal has a right to remit a part of the judgment in order to save excessive expenses from prolonged litigation, and to prevent a reversal. *Texas Elec. Service Co. v. Nix*, 575 S.W.2d 304, 307 (Tex. Civ. App.--Fort Worth 1978, writ ref'd n.r.e.).

C. **Motion for Judgment Nunc Pro Tunc.**

1. **Source of authority.** Rule 316 provides that clerical mistakes in the record of any judgment may be corrected by the judge, in open court, after notice to all interested parties. Tex. R. Civ. P. 316.

2. **Description of motion.** Prior to the time that a judgment becomes final and the court loses plenary jurisdiction, the court has the power to grant a motion to correct the judgment. See Tex. R. Civ. P. 329b. However, even after the judgment has become final, any clerical errors in the entry of the judgment may be corrected by judgment nunc pro tunc. Judicial errors in the rendition of the judgment, however, may not be corrected. *Humphries v. Chandler*, 597 S.W.2d 2, 3 (Tex. Civ. App.--Beaumont 1980, no writ); *In re Dunn*, 589 S.W.2d 166 (Tex. Civ. App.--Amarillo 1979, no writ). An error in the judgment is "clerical" if the judgment entered incorrectly records the judgment that was rendered. *Nolan v. Bettis*, 562 S.W.2d 520, 522 (Tex. Civ. App.--Austin 1978, no writ); *Perry v. Nueces County*, 549 S.W.2d 239, 241-42 (Tex. Civ. App.--Corpus Christi 1977, writ ref'd n.r.e.). Put another way, a clerical error results when the official records of the court do not accurately reflect the judgment rendered by the trial judge in open court. *Ortiz v. O.J. Beck & Sons, Inc.*, 611 S.W.2d 860, 863 (Tex. Civ. App.--Corpus Christi 1980, no writ). If, however, the error is one that resulted from judicial reasoning or determination, then the error is a judicial error, rather than a clerical error, and a judgment nunc pro tunc is inappropriate. *Nolan*, 562 S.W.2d at 522.

Errors in judgments are not clerical merely because they are based on, or grow out of, clerical mistakes. Even though a misstatement in the judgment arises from a clerical mistake, the error may be judicial rather than clerical if the correction of the error deprives a party of a right that it would have possessed if the judgment had been entered correctly before the trial court's plenary power expired. *West Texas State Bank v. General Resources Management Corp.*, 723 S.W.2d 304, 306 (Tex. App.--Austin 1987, writ ref'd n.r.e.).

The following errors are clerical, and therefore correctable by judgment nunc pro tunc:

Incorrect spelling of a party's name. *Cockrell v. Estevez*, 737 S.W.2d 138, 140 (Tex. App.--San Antonio 1987, no writ).

Oral rendition of judgment in divorce case awarded house to husband "as his separate property" but the written judgment awarded the house to the husband without reciting the words "as his separate property". *Mizell v. Mizell*, 624 S.W.2d 782, 784-85 (Tex. App.--Fort Worth 1981, no writ).

Failure to award attorney's fees in judgment, where the judge had announced his judgment, including attorney's fees, by letter, and requested that counsel prepare an appropriate judgment, and the judgment prepared by counsel omitted attorney's fees. *Hutcherson v. Lawrence*, 673 S.W.2d 947, 948-49 (Tex. App.--Tyler 1984, no writ).

Judgment for defendant on a promissory note secured by a ring, which inadvertently awarded possession of the ring to plaintiff, when the balance of the judgment clearly indicated that the court intended to award possession of the ring to the defendant. *Mathes v. Kelton*, 565 S.W.2d 78, 81 (Tex. Civ. App.--Amarillo 1977), *aff'd* 569 S.W.2d 876 (1978).

The following errors are judicial rather than clerical, thus rendering judgment nunc pro tunc inappropriate:

Modification of divorce decree to set out conservatorship and visitation rights on behalf of the mother allegedly arising from a mistake on the part of the mother's attorney. *Stock v. Stock*, 702 S.W.2d 713, 716 (Tex. App.--San Antonio 1985, no writ).

Amendment of judgment which changed name of party affected by the judgment to reflect the judgment intended to be rendered by the court. *West Texas State Bank*, 723 S.W.2d at 306.

Amended judgment deleting stepchild from an order of the termination of heirship in connection with her stepmother's estate. *Humphries*, 597 S.W.2d at 3.

Regardless of whether an error is clerical or judicial, the failure to give all interested parties notice of the motion for judgment nunc pro tunc after the trial court has lost plenary jurisdiction renders any correction of the original judgment a nullity. *West Texas State Bank*, 723 S.W.2d at 307.

3. Evidentiary standard. The question of whether an error corrected by nunc pro tunc judgment is a clerical error or judicial error is a question of law, and the trial court's finding or conclusion is not binding on the appellate court. *Humphries*, 597 S.W.2d at 3. Relief by means of a judgment nunc pro tunc should be granted only if the evidence of clerical error is clear, satisfactory, and convincing. *Perry*, 549 S.W.2d at 242.

When a clerical error in a judgment is discovered, the trial court has the inherent power to correct the judgment so that it accurately reflects the judgment rendered. In doing so, the court may consult the records of the case to determine if there is any instrument that might be of

assistance in correcting the error. *Petroleum Equip. Fin. Corp. v. First Nat'l Bank*, 622 S.W.2d 152, 154 (Tex. Civ. App.--Fort Worth 1981, writ ref'd n.r.e.). Evidence on a motion for judgment nunc pro tunc may be in the form of oral testimony of witnesses, written documents, the court's docket sheet, or the judge's personal recollection. *Pruet v. Coastal States Trading, Inc.*, 715 S.W.2d 702, 705 (Tex. App.--Houston [1st Dist.] 1986, no writ). The trial judge may rely solely on his personal recollection of the judgment rendered, and if he grants the judgment nunc pro tunc to correct the written decree, a presumption arises that his personal recollection supports the finding of clerical error. *Davis v. Davis*, 647 S.W.2d 781, 783 (Tex. App.--Austin 1983, no writ); *Bockemehl v. Bockemehl*, 604 S.W.2d 466, 469 (Tex. Civ. App.--Dallas 1980, no writ).

The trial court's failure to grant a motion for judgment nunc pro tunc is not an appealable order. *Shadowbrook Apartments v. Abu-Ahmad*, 783 S.W.2d 210 (Tex. 1990) (per curiam).

4. **Necessity of motion.** The trial court is not prohibited from correcting its own judgment if it does not attempt to make new findings of fact or usurp the authority of the jury. *First Nat'l Bank v. Walker*, 544 S.W.2d 778, 782 (Tex. Civ. App.--Dallas 1976, no writ). If the court corrects the judgment before the judgment has become final, it is exercising its inherent power to correct or modify the judgment while it retains plenary power, and may act on its own motion and without notice to any party. *Go Leasing, Inc. v. Groos Nat'l Bank*, 628 S.W.2d 143, 144 (Tex. App.--San Antonio 1982, no writ). However, if the judgment has become final, notice must be given. *Id.*

5. **Time for filing.** A trial court has the power to correct clerical errors in its judgment by entering a judgment nunc pro tunc at any time, either during the term during which the judgment was rendered, or after the term. *Conmark Equip., Inc. v. Harris*, 595 S.W.2d 145, 147 (Tex. Civ. App.--Tyler 1980, no writ). Even if the incorrect judgment has been appealed, the trial court may correct a clerical error by judgment nunc pro tunc during the pendency of the appeal. *Wiegand v. Riojas*, 547 S.W.2d 287, 291 (Tex. Civ. App.--Austin 1977, no writ).

D. Motions to Vacate, Modify, Correct or Reform the Judgment.

Motions to vacate, modify, correct, or reform the judgment are not discussed in much detail in the rules of appellate procedure, and there is not an extensive body of case law pertaining to these motions. However, the court's plenary power to vacate, modify, correct, or reform a judgment is referred to in Rule 306a with reference to the time period for the court's plenary power beginning to run with the date of judgment, *See* Tex. R. Civ. P. 306a(1), and is also referred to throughout Rule 329b, which pertains to the time for filing motions. *See* Tex. R. Civ. P. 329b(d-h). Most of the comments about these motions in the rules pertain to the time for filing them, and those deadlines follow the same deadlines as a motion for new trial. Tex. R. Civ. P. 329b(g). These motions must be filed during a time in which the court has plenary power, which originally is thirty days after the judgment is signed. Tex. R. Civ. P. 329b(d). However, the filing of a motion for new trial or a motion to vacate, modify, correct, or reform the judgment extends the plenary power of the court "until thirty days after all such timely-filed

motions are overruled, either by a written and signed order or by operation of law, whichever occurs first." Tex. R. Civ. P. 329b(e). If the court does not sign an order overruling the motion, it is overruled by operation of law after seventy-five days from the date the judgment is signed. Tex. R. Civ. P. 329b(c).

The only guidance that the rules give about motions to vacate, modify, correct, or reform the judgment is that they must be in writing, signed by the party or their attorney, and must "specify the respects in which the judgment should be modified, corrected, or reformed." Tex. R. Civ. P. 329b(g). These motions are appropriate when there are mistakes in the judgment that are judicial, rather than clerical, so that nunc pro tunc is not appropriate, but errors that do not require further litigation in a new trial.

If a judgment is modified, corrected, or reformed, the previous judgment should be vacated in its entirety, and an entirely new judgment should be submitted to the court for signature, rather than an order specifying the changes in the previous judgment, or an attempt to strike out erroneous information in the previous judgment. *See Garza v. Serrato*, 671 S.W.2d 713, 714 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.); *Stephens v. Miller*, 667 S.W.2d 250, 252 (Tex. App.--Dallas 1984, writ dismissed by agr.); *P.V. Intern. v. Turner, Mason, and Solomon*, 700 S.W.2d 21, 22-23 (Tex. App.--Dallas 1985, no writ).

IV. POST-TRIAL MOTIONS IN A BENCH TRIAL: REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Up to this point, this paper has focused on the post-trial preservation of error in jury trials. Some of these motions are also appropriate in a trial before the court; others obviously are not. There is no need to file motions to enter judgment on the jury verdict, disregard the jury verdict, or enter judgment notwithstanding the jury verdict, when there is no jury verdict. On the other hand, it is entirely appropriate to file a motion for new trial in a bench trial. A motion for remittitur is proper, even though the amount from which the remittitur is sought was determined by the judge rather than a jury. It is also appropriate to move for a judgment nunc pro tunc to correct a clerical error in the written judgment entered in a bench trial.

In addition to these motions which may be filed in a jury trial or a bench trial, there is another series of post-trial steps that are unique to bench trials, and which are extremely important, particularly to the non-prevailing party. These steps involve the procedures by which litigants may request findings of fact and conclusions of law from the judge who presided over the bench trial.

A. Source of Authority.

Rule 296 provides that a litigant may request that the judge state in writing his findings of fact and conclusions of law, that the request must be made within twenty days of the signing of the final judgment. Tex. R. Civ. P. 296.

Rule 297 states that when findings of fact and conclusions of law are requested, the court *shall* prepare and file them within twenty days after the request is tried. If the judge fails to file the findings of fact and conclusions of law within twenty days, the party making the request *must* file with the clerk a notice of the court's failure to act within thirty days of the original request. Upon receipt of this written complaint, the judge's deadline for filing his findings is extended to forty days from the original request. *Id.* at 297.

After the judge files findings of fact and conclusions of law, either party may request that the judge make additional or amended findings or conclusions. This request for further findings must be made within ten days of the filing of the original findings and conclusions, and upon receipt of the request for additional findings, the judge shall prepare and file additional findings, if appropriate, within ten days of the request. *Id.* at 298.

B. Disclaimer Concerning Change in the Law.

Rules 296-98 were substantially changed effective September 1, 1990. Although the primary changes concerned time limits and the duty to bring matters to the attention of the court, there were other changes of wording that may make case law under the old rules obsolete. Not many cases have been decided yet under the new rules, so study the new rules carefully when relying on cases decided under the old rules.

C. Description.

Findings of fact and conclusions of law in a bench trial are roughly equivalent to the jury verdict in a jury trial. Findings of fact made by a trial judge after a bench trial have the same force and dignity as jury findings, *In re Galliher*, 546 S.W.2d 665, 666 (Tex. Civ. App.--Beaumont 1977, no writ), and, on appeal, the findings of fact by the trial judge carry the same presumption of conclusiveness and weight as a jury verdict. *Chitsey v. Pat Winston Interior Design, Inc.*, 558 S.W.2d 579, 581 (Tex. Civ. App.--Austin 1977, no writ); *Vandyke v. Austin Indep. School Dist.*, 547 S.W.2d 354, 355-56 (Tex. Civ. App.--Austin 1977, no writ).

When findings of facts and conclusions of law are not filed as a separate document, but incorporated as recitals in the judgment, they are still treated as valid findings of fact and conclusions of law under these rules. *Flowers v. Texas Dept. of Human Resources*, 629 S.W.2d 891, 893 (Tex. App.--Fort Worth 1982, no writ); *Precipitair Pollution Control v. Green*, 626 S.W.2d 909, 910-911 (Tex. App.--Tyler 1981, writ ref'd n.r.e.); *Cottle v. Knapper*, 571 S.W.2d 59, 63-64 (Tex. Civ. App.--Tyler 1978, no writ). Similarly, findings of fact and conclusion of law contained in a letter to the parties, that was filed with the clerk and became a part of the record, also constituted valid findings, despite the fact that they were not filed as formal pleadings. *Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120, 124 (Tex. App.--Corpus Christi 1986, no writ). However, oral pronouncements of the court about the basis for the judgment cannot be treated as findings of fact or conclusions of law under these rules, and cannot be considered on appeal. *Southwestern Newspapers Corp. v. Curtis*, 584 S.W.2d 362, 366 (Tex. Civ. App.--Amarillo 1979, no writ). *See also Nagy v. First Nat'l Gun Banque Corp.*, 684 S.W.2d 114, 115-16 (Tex. App.--Dallas 1984, writ ref'd n.r.e.).

D. Importance and Strategy.

Findings of fact and conclusions of law can be critically important, particularly to the non-prevailing party, because of the strong presumptions that favor the judgment on appeal in the absence of findings of fact and conclusions of law. When no conclusions of law are filed, the judgment of the trial court must be affirmed if the appellate court can find *any* legal theory (supported by the pleadings and the evidence) to provide a basis for the judgment. *Raymond v. Aquarius Condominiums Owners Ass'n, Inc.*, 662 S.W.2d 82, 85-86 (Tex. App.--Corpus Christi 1983, no writ); *Gunter v. Molk*, 663 S.W.2d 674, 675 (Tex. App.--Beaumont 1983, writ ref'd n.r.e.). See also *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990), *citing In re W.E.R.*, 669 S.W.2d 716, 717 (Tex. 1984). *Worford* at 109 *citing Lemons v. EMW Mfg. Co.*, 747 S.W.2d 372, 373 (Tex. 1988). If no findings of fact are filed, the appellate court must presume that the trial judge found all necessary facts to support the judgment. See also *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990), *citing In re W.E.R.*, 669 S.W.2d 716, 717 (Tex. 1984). *Worford* at 109 *citing Lemons v. EMW Mfg. Co.*, 747 S.W.2d 372, 373 (Tex. 1988). *Salinas v. Levrie*, 570 S.W.2d 20, 21 (Tex. Civ. App.--San Antonio 1978, no writ); *Harrison v. Humphries*, 567 S.W.2d 884, 886-87 (Tex. Civ. App.--Amarillo 1978, no writ). The appellate court not only presumes fact findings in favor of the judgment, but, in reviewing the record, can consider only the evidence that is favorable to the court's implied findings, and must disregard all evidence or inferences to the contrary. *Worford* at 019, *citing Renfro Drug Co. v. Lewis*, 149 Tex. 507, 513, 235 S.W.2d 609, 613 (1950); *Krueger v. Swann*, 604 S.W.2d 454, 456 (Tex. Civ. App.--Tyler 1980, writ ref'd n.r.e.).

Because of these strong presumptions in favor of the judgment in the absence of findings of fact and conclusions of law, a non-prevailing party virtually sacrifices any chance of success on appeal by failing to file a request for these findings. By the same token, the prevailing party is in a much better position on appeal if no findings of fact and conclusions of law are filed. Accordingly, at the conclusion of a bench trial, the prevailing party should see to it that a judgment is entered in his behalf, but should not be in a hurry to obtain findings of fact and conclusions of law. If the winner lays low, and the loser neglects to file a request within ten days of the judgment, then the winner is in a much better position on appeal. However, if the loser follows the rules and makes a request within ten days, the winner then has an interest in assisting the court to draft findings of fact and conclusions of law which will be favorable to him. Therefore, if the request has been made properly, the prevailing party should then draft proposed findings of fact and conclusions of law, and tender those proposed findings to the trial judge. Similarly, when the non-prevailing party makes his request for findings of fact and conclusions of law, he should accompany that request with proposed findings that will enhance his position in the appellate court. Trial judges are not likely to spend time drafting findings of fact and conclusions of law themselves, so they will probably sign proposed findings that one of the parties has prepared and put before them. If the loser files proposed findings, but the winner fails to, then the court is likely to sign the proposed findings filed by the loser. If this occurs, and the loser has been careful in drafting his proposed findings, they form the basis for eventually snatching victory from the jaws of defeat on appeal.

E. Evidentiary Standards.

In arriving at the findings of fact and conclusions of law, the trial judge may consider all facts and circumstances in evidence and may indulge in reasonable inferences that can be drawn from the evidence. *Chitsey*, 558 S.W.2d at 581.

When findings of facts and conclusions of law are challenged on appeal, they are treated the same way as a jury verdict. If they are challenged on legal sufficiency grounds, they must be sustained on appeal if there is any probative evidence to support them. *Chitsey*, 558 S.W.2d at 581; *Rankin v. Carpenter*, 568 S.W.2d 198, 203 (Tex. Civ. App.--Tyler 1978, no writ). In order to reverse a case based on the legal insufficiency of the findings of fact, there must be no evidence to support those findings, or the evidence against the findings must be conclusive. *Hellman v. Kincy*, 632 S.W.2d 216, 219 (Tex. App.--Fort Worth 1982, no writ). If the trial court's findings of fact are challenged on factual sufficiency grounds, they can be set aside only if they are so contrary to the overwhelming weight and preponderance of the evidence that they are manifestly unjust. *Rodriguez v. Montgomery*, 630 S.W.2d 826, 828 (Tex. App.--Waco 1982, writ ref'd n.r.e.); *Lambert v. Gearhart-Owen Industr., Inc.*, 626 S.W.2d 845 (Tex. App.--Corpus Christi 1981, no writ).

Just as the jury is the sole judge of the credibility of the witnesses in a jury trial, the trial judge is the sole judge of the credibility of witnesses in a bench trial. The trial judge's judgment about the credibility of the witnesses is accorded the same weight as jury findings, *Church of Life v. Elder*, 564 S.W.2d 111, 113 (Tex. Civ. App.--Beaumont 1978, no writ), and will not be reversed unless it appears from the record as a whole that the judge has abused his discretion in evaluating the credibility of witnesses. *In re H.D.O.*, 580 S.W.2d 421, 424 (Tex. Civ. App.--Eastland 1979, no writ). When a finding of the trial court is supported by some evidence, it may not be disturbed by the appellate court, even if the evidence is conflicting, and the appellate court might have reached a different conclusion. *Diaz v. Deavers*, 574 S.W.2d 602, 608 (Tex. Civ. App.--Tyler 1978, writ dismissed).

If an appellate court determines that a conclusion of law was erroneous, but the proper judgment was rendered, the erroneous conclusion of law does not require reversal. *Scholz v. Heath*, 642 S.W.2d 554, 559 (Tex. App.--Waco 1982, no writ).

F. Necessity to Complain of Court's Failure to File.

Rule 297 provides that if a party requests findings of fact and conclusions of law, and the trial judge does not file any findings within thirty days of the signature of judgment, the requesting party must bring this failure to the court's attention within five days of the missed deadline. Tex. R. Civ. P. 297. The failure to file this reminder constitutes a waiver of the right to complain on appeal about the judge's failure to file findings. *Las Vegas Pecan & Cattle Co. v. Zavala County*, 682 S.W.2d 254, 255-56 (Tex. 1984). It is important to note that the rule requires that the requesting party "call the omission to the attention of the judge." Tex. R. Civ. P. 297. This requirement has been strictly interpreted. In cases where requests were filed, but not brought to the *personal* attention of the trial judge, appellate courts have held that error was waived. *Arrington v. Arrington*, 613 S.W.2d 565, 568 (Tex. Civ. App.--Fort Worth 1981,

no writ); *Shaw's D.B. & L., Inc. v. Fletcher*, 580 S.W.2d 91, 94 (Tex. Civ. App.-- Houston [1st Dist.] 1979, no writ). A similar holding concerned a request for additional findings made to the clerk of the court, but not directly brought to the attention of the trial judge. *Mosolowski v. Mosolowski*, 562 S.W.2d 24, 25 (Tex. Civ. App.--San Antonio 1978, no writ). In light of these cases, the better practice is to hand deliver a letter to the judge notifying him of his failure to make the necessary findings within the time required, rather than simply filing a notice with the clerk of the court.

G. Consequences of Trial Court's Failure to File.

If a litigant makes a timely request for findings of fact and conclusions of law, followed by a timely reminder to the judge of his failure to file findings on time, and the court still fails to make findings of fact and conclusions of law, the appellate court has several options. This failure by the trial court constitutes reversible error, and harm is presumed, but the presumption of harm may be overcome, and reversal avoided, if the record affirmatively shows that the complaining party suffered no injury. *Carr v. Hubbard*, 664 S.W.2d 151, 153 (Tex. App.--Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Rose v. Rose*, 598 S.W.2d 889, 892 (Tex. Civ. App.--Dallas 1988, writ dismissed); *Texas Eastern Transmission Corp. v. Sealy Indep. School Dist.*, 572 S.W.2d 49, 50 (Tex. Civ. App.--Houston [1st Dist.] 1978, no writ). Some courts have held that the appeal should be abated until the trial court prepares and files findings of fact and conclusions of law with the court of appeals. *Daughtrey v. Super Spray, Inc.*, 738 S.W.2d 785, 786 (Tex. App.--Fort Worth 1987, no writ). Other courts have said that the error may be corrected by specific remand and instructions, but should not be made the sole basis for reversal. *White v. Pope*, 664 S.W.2d 105, 107 (Tex. App.--Corpus Christi 1983, no writ). One court of appeals has held that the harm resulting to the appellant from the failure of the trial court to make the requested findings mandates reversal rather than abatement. *Joseph v. Joseph*, 731 S.W.2d 597, 598-600 (Tex. App.--Houston [14th Dist.] 1987, no writ). Finally, the trial court's failure to make timely findings can be cured during the pendency of the appeal if the trial judge makes and files the necessary findings with the court of appeals, and leave is granted to both parties to file supplemental briefs after the findings of fact and conclusions of law are filed. *Rose*, 598 S.W.2d at 892.

H. Time for Filing.

The times for filing and refiling requests for findings of fact and conclusions of law are clearly set out in Rule 297, and are summarized in section IV-A of this paper. These deadlines are strictly enforced, and the failure to comply with any of them will waive any argument arising from the absence of findings of fact and conclusions of law on appeal. *See Las Vegas Pecan & Cattle Co.*, 682 S.W.2d 254. In addition to the deadlines stated in Rule 297, however, there are two other rules concerning the time for filing requests that arise from the case law that should be noted. These rules were created under the old rules 296-98, but presumably the same principles would apply to the new rules.

First, the time for filing a request for findings of fact and conclusions of law is extended when a motion for new trial is filed. *International Specialty Prod., Inc. v. Chem-Clean Prod., Inc.*, 611 S.W.2d 481, 483 (Tex. Civ. App.--Waco 1980, no writ). If a motion for new trial is filed,

the request for findings of fact and conclusions of law may be filed at any time after judgment has been rendered, but before the tenth day after the motion for new trial is overruled. *Id.* at 482. In other words, instead of the ten-day period commencing with the judgment, it commences with the overruling of the motion for new trial, either by signed order or by operation of law.

Finally, requests for findings of fact and conclusions of law that are filed prematurely (i.e. before the final judgment is signed), used to be considered a nullity. *Ratcliff v. State Bar*, 673 S.W.2d 339, 341-42 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Williams v. Royal American Chinchilla, Inc.*, 560 S.W.2d 479, 480 (Tex. Civ. App.--Beaumont 1977, writ ref'd n.r.e.). However, Rule 306c was amended in 1984 to provide that prematurely filed requests for findings of fact and conclusions of law shall be deemed to have been filed on the date of, but subsequent to, the date the judgment is signed. Tex. R. Civ. P. 306c.

V. FORMAL BILLS OF EXCEPTION.

A. Source of Authority.

Rules pertaining to Formal Bills of Exception are set forth in Rule 52(c) of the Texas Rules of Appellate Procedure.

B. Description of Motion.

Rule 52(a) of the Texas Rules of Appellate Procedure states, "In order to preserve a complaint for appellate review, a party must have presented to the trial court a *timely* request, objection or motion, stating the specific grounds for the ruling he desired the court to make if the specific grounds were not apparent from the context." Tex. R. App. P. 52(a) (emphasis added). There is some question about what is meant by the word "timely." Ordinarily, the complaint must be presented during trial, at the time that the objectionable ruling occurs. If the ruling involves the exclusion of evidence, the attorney must get the evidence into the record, or at least a description of what the evidence would have been, in order to preserve error. This is accomplished by an offer of proof, also known as an informal bill of exception, which must be made before the court's charge is read to the jury. Tex. R. App. P. 52(b).

In addition to this procedure, however, there is another means of preserving error in the post-trial stage, in the event that the informal bill of exception was not perfected at trial. This technique is the formal bill of exception. The formal bill of exception must state an objection to a ruling or action by the trial court, and may be accompanied by whatever evidence is necessary to explain the objection. Tex. R. App. P. 52(c)(2). If the evidence necessary is already included in the statement of facts, it need not be set out in the bill. *Id.* at 52(c)(2). The formal bill of exception is presented to the judge for his signature. *Id.* at 52(c)(4). The bill is presented to opposing counsel, and, if approved, is signed by the judge and filed with the clerk. *Id.* at 52(c)(5). If the judge determines that the formal bill of exception incorrectly describes what happened during trial, he suggests corrections to the counsel who filed it; if the corrections are agreed upon they are made, the judge signs the bill, and files it with the clerk. *Id.* at 52(c)(6). If the party filing the bill does not agree to the correction suggested by the

judge, then the judge marks the bill refused and returns it to counsel, and the judge then prepares, signs, and files with the clerk a bill of exception which accurately describes the ruling made by the court. *Id.* at 52(c)(7). If the counsel who originally filed the bill is dissatisfied with the bill filed by the judge he may file his own bill if it is accompanied by the signatures of three "respectable" bystanders who swear that his bill is correct. The truth of the matters contained in the bill may then be controverted or supported by affidavits, no more than five for each side, which must be filed within ten days after the filing of the bill. On appeal, the truth of the matters contained in the bill is determined from the affidavits. *Id.* at 52(c)(8).

C. Operation.

Strict compliance with Rule 52(c) is essential in order to preserve error by means of a formal bill of exception. A formal bill of exception that is not approved by the trial court and opposing counsel, and not filed as a bystander's bill, does not preserve error. *Raw Hide Oil & Gas, Inc. v. Maxus Exploration, Co.*, 766 S.W.2d 264,274-75 (Tex. App.--Amarillo 1988, no writ.) When the judge files his own bill in response to a proposed bill of exception by a party, and the party fails to file a bystander's bill to controvert the judge's bill, the judge's bill of exception, or corrections to the original bill of exception, is presumed to be accurate. *Lara v. State*, 740 S.W.2d 823, 826-28 (Tex. App.--Houston [1st Dist.] 1987, pet. ref'd).

D. Time for Filing.

Formal bills of exception must be filed within sixty days after judgment is signed, or, if a motion for new trial has been filed, within ninety days. Tex. R. App. P. 52(c)(11). Affidavits controverting or supporting a bystander's bill must be filed within ten days of the filing of the bill. *Id.* at 8.

POST-TRIAL PRESERVATION OF ERROR TABLE

TYPE OF ERROR	METHOD OF PRESERVING	AUTHORITY	LOCATION IN ARTICLE
Legal Insufficiency	<p>Either:</p> <ol style="list-style-type: none"> 1) Motion for Instructed Verdict 2) Objection to submission of jury question 3) Motion for Judgment N.O.V. 4) Motion to disregard jury's answer to a vital fact issue 5) Motion for New Trial 	<p>Cecil v. Smith, 804 S.W.2d 509, 510-11 (Tex. 1991)</p>	<p>Mtn. for Judgment N.O.V. - 5</p> <p>Mtn. to Disregard - 3</p> <p>Mtn. for New Trial - 7</p>
Factual Insufficiency	Motion for New Trial	Tex. R. Civ. P. 324(b)	7
Inadequacy or Excessiveness of Damages by Jury	Motion for New Trial	Tex. R. Civ. P. 324(b)	7
Incurable Jury Argument (if not otherwise ruled on by the trial court)	Motion for New Trial	Tex. R. Civ. P. 324(b)	7
Complaint on Which Evidence Must Be Heard	Motion for New Trial	Tex. R. Civ. P. 324(b)	7
Any Complaint in a Bench Trial	Request for Findings of Fact and Conclusion of Law	Tex. R. Civ. P. 296	16
Exclusion of Evidence (not preserved by informal bill of exception or offer of proof)	Formal Bill of Exception	Tex. R. App. P. 52	21