# PRESERVATION OF ERROR:
# POST TRIAL

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**CHAPTER 6**

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SCOPE NOTE: *This paper focuses on post-trial procedures and tactics often employed after the jury has returned a verdict.*

*This paper is updated from Levy, Alene Ross & Storey, JoAnn, POST-TRIAL MOTION PRACTICE.*

## INTRODUCTION

In addition to providing one final opportunity for victory in the trial court, post-trial motions are the vehicle through which a careful practitioner may set the stage for appeal of an adverse judgment. Even when the likelihood of success seems remote, there are valid reasons for filing post-trial motions. Proper use of post-trial motions may be critical to success on appeal, especially when these last-chance pleas to the trial judge fail. Similarly, the cautious victor will preserve the right to cross appeal in the event her opponent appeals.

## I. Motion for Judgment on the Verdict

If there is no irreconcilable conflict in the jury's findings, the trial judge has a ministerial duty to enter a judgment on the verdict. *See Traywick v. Goodrich*, 364 S.W.2d 190, 191 (Tex.1963) (orig. proceeding).

Although mandamus may be legally appropriate under *Traywick* to get the trial court to render judgment, as a practical matter the winning party will file a motion for entry of judgment together with a form of judgment.

There is no rule covering motions to enter judgment on the verdict; the procedure is governed entirely by case law.

### A. Form of motion.

No special form is required for a motion for judgment on the verdict. "Dear Judge, please sign the attached judgment" should do it.

### B. Deadline for filing.

There is no deadline for filing a motion for judgment.

### C. Effect on appellate timetable.

A motion for judgment on the verdict does not extend the appellate timetable. *Brazos Elec. Power Co-op, Inc. v. Callejo*, 734 S.W.2d 126, 128 (Tex.App.–Dallas 1987, no writ).

### D. Filing the motion preserves error.

Filing a motion for judgment on the verdict preserves a party's right to seek judgment on the verdict if the trial court disregards the verdict and enters judgment notwithstanding the jury's answers. *Emerson v. Tunnell*, 793 S.W.2d 947, 948 (Tex. 1990) (per curiam) (court entered judgment for less than amount of verdict).

### E. Filing the motion waives error.

Be careful what you ask for. In some instances, error is waived by filing a motion for judgment on the verdict.

A motion for judgment on the verdict is an affirmation that the jury's verdict is supported by the evidence. *See Litton Indus. Products, Inc. v. Gammage*, 668 S.W.2d 319, 322 (Tex. 1984); *Casu v. Marathon Ref. Co.*, 896 S.W.2d 388, 389-390 (Tex.App.–Houston [1st Dist.] 1995, writ denied); *Texas Commerce Bank v. Lebco Constructors, Inc.*, 865 S.W.2d 68, 80 (Tex.App.–Corpus Christi 1993, writ denied). Under that rule, courts have held that the moving party cannot challenge the sufficiency of the evidence to support any of those findings. *See Chuck Wagon Feeding Co., Inc. v. Davis*, 768 S.W.2d 360, 366 (Tex.App.–El Paso 1989, writ denied). *See also Cruz v. Furniture Technicians of Houston, Inc.*, 949 S.W.2d 34, 35 (Tex.App.–San Antonio 1997, pet. denied) (by moving for judgment on verdict that failed to find one of several defendants liable, plaintiff waived right to complain of jury's failure to find defendant liable); *Byrd v. Central Freight Lines, Inc.*, 976 S.W.2d 257, 259 (Tex.App.–Amarillo 1998) (by moving for judgment on verdict, plaintiff waived factual sufficiency challenge to jury's failure to award certain damages ), *pet. denied per curiam*, 992 S.W.2d 447 (Tex. 1999).

There is a split of authority regarding the extent of this waiver. Some courts hold that a party waives all challenges to the judgment;

others hold that only those challenges to the sufficiency of the evidence are waived. *Compare Stewart & Stevenson Servs., Inc. v. Enserve, Inc.*, 719 S.W.2d 337 (Tex.App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.) (holding motion for judgment on the verdict did not waive right to complain about error other than factual insufficiency, such as the measure of damages and the court's submission of affirmative defenses) *and Harry v. University of Texas Sys.*, 878 S.W.2d 342 (Tex.App.–El Paso 1994, no writ) (holding motion for entry of judgment waived only complaints about factual sufficiency and but not trial court's charge error) *with Casu v. Marathon Ref. Co.*, 896 S.W.2d 388, 389-391 (Tex.App.–Houston [1st Dist.] 1995, writ denied) (holding party that filed unqualified motion for judgment on verdict "can't complain *period*").

**F. Exceptions to Waiver Rule.**

Waiver may not occur under the following circumstances: (1) when the jury's findings are ambiguous, (2) when the points of error on appeal are not inconsistent with the motion for judgment, or (3) when the movant expressly reserves the right to complain about certain findings while seeking entry of judgment on other, favorable findings.

**1. Ambiguous findings.**

Appellate challenges may not be waived when the jury's findings are susceptible to more than one interpretation. *See Miner-Dederick Constr. Corp. v. Mid-County Rental Serv., Inc.*, 603 S.W.2d 193, 197-99 (Tex. 1980) (where parties argued two different interpretations of jury findings, party moving for judgment on its interpretation of the verdict did not waive its right to challenge the other party's interpretation of the same findings in the verdict).

**2. Complaints consistent with motion for judgment.**

The right to raise complaints about the judgment that are not inconsistent with a party's motion for judgment on the verdict are not waived by the filing of the motion. *See Litton Indus. Products, Inc. v. Gammage*, 668 S.W.2d 319, 322 (Tex. 1984).

**3. Express reservation preserves the right to complain.**

Appellate challenges are not be waived by a motion for judgment on the jury's verdict if the movant expressly reserves the right to complain on appeal about specific unfavorable jury findings and those aspects of the judgment that reflect them.

In *First Nat'l Bank of Beeville v. Fojtik*, the Texas Supreme Court recognized that there must be a method by which a party may move for judgment, thus setting the appellate process in motion, and yet avoid being bound by the judgment's unfavorable terms. *See First Nat'l Bank of Beeville v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989). The court concluded that an *express* reservation would preserve the party's right on appeal to challenge the sufficiency of the evidence to support the jury's findings. The reservation in *Fojtik* that was deemed to be sufficient 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.

*Fojtik*, 775 S.W.2d at 633.

This language preserved the appellant's right to argue on appeal that the jury's zero damage award was against the great weight and preponderance of the evidence and conflicted with the liability and causation findings. *Id. See also Melissinos v. Phamanivong*, 823 S.W.2d 339, 342 (Tex.App.–Texarkana 1991, writ denied) (defendant who requested that plaintiff's motion for judgment be denied and, alternatively,

requested that judgment be entered in a lesser amount than that found by the jury did not waive right to raise factual sufficiency challenge on appeal); *Transmission Exch., Inc. v. Long*, 821 S.W.2d 265, 275 (Tex.App.–Houston [1st Dist.] 1991, writ denied) (to preserve a complaint about the judgment entered, the party moving for entry of judgment should move for entry only as to form while noting its disagreement with the content and result of the judgment or some portion thereof); *Morse v. Delgado*, 975 S.W.2d 378, 381 (Tex.App.–Waco, 1998, no pet.) (holding that notation on judgment that it is "approved as to form" does not constitute a waiver of factual sufficiency challenges).

**Practice Tip**

A global reservation of the right to attack "any adverse judgment" is not sufficient under *Fojtik* and does not preserve the right to attack the judgment. *See Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d at 322.

To avoid waiver, track the language the supreme court approved in *Fojtik.*

**G. Compelling entry of judgment by mandamus.**

Mandamus is not available to compel the entry of a particular judgment. *See Trapnell v. Hunter*, 785 S.W.2d 426, 429 (Tex.App.–Corpus Christi 1990, orig. proceeding); *Cooke v. Millard*, 854 S.W.2d 134 (Tex.App.–Houston [1st Dist.] 1992, orig. proceeding); *Ratcliff v. Dickson*, 495 S.W.2d 35, 36 (Tex.Civ.App.–Houston [1st Dist.] 1973, orig. proceeding). Appellate courts are limited to directing the performance of a ministerial act.

To obtain a mandamus when a court refuses to enter judgment on the jury's verdict after a motion for judgment is filed, the relator must demonstrate to the court of appeals that only one judgment could be rendered on the verdict as a matter of law. *See Kroger v. Hughes*, 616 S.W.2d 287, 289 (Tex.Civ.App.–Houston [1st Dist.] 1981, orig. proceeding) (trial court could not refuse to enter judgment on partial verdict that was legally sufficient to support judgment when only ground urged for not entering judgment was that verdict was incomplete).

**II. Motion for Judgment Notwithstanding the Verdict.**

The trial court may render judgment non obstante veredicto – upon motion and reasonable notice – if a directed verdict would have been proper. *See* TEX.R.CIV.P. 301.

**Practice Tip**

A party may request a JNOV even if it requested the submission of the special issues it seeks to have disregarded. *See Neller v. Kirschke*, 922 S.W.2d 182, 187 (Tex.App.–Houston [1st Dist.] 1995, writ denied).

**A. Grounds for JNOV.**

A motion for judgment notwithstanding the verdict is appropriate in several instances.

*See 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.). *See also Neller v. Kirschke*, 922 S.W.2d 182, 187 (Tex.App.–Houston [1st Dist.] 1995, writ denied); *Fort Worth State School v. Jones*, 756 S.W.2d 445, 446 (Tex.App.–Fort Worth 1988, writ denied).

**1. Evidentiary complaints.**

Evidentiary defects warranting JNOV exist when there is no evidence to support the jury's verdict or when the evidence conclusively establishes a material fact contrary to the verdict. *See State Bar of Texas v. Cortez*, 692 S.W.2d 47 (Tex. 1985), *cert. denied*, 747 U.S. 980 (1985). A trial court may grant JNOV if there is no evidence to support the jury findings. *See Best v. Ryan*

*Auto Group, Inc.*, 786 S.W.2d 670, 671 (Tex. 1990).

**Practice Tip**

An objection to the charge is not necessary to preserve a no-evidence complaint in a motion for JNOV. *See Neller v. Kirschke*, 922 S.W.2d 182, 187 (Tex.App.–Houston [1st Dist.] 1995, writ denied); TEX.R.CIV.P. 279.

**2. Pleading defects.**

A JNOV is proper if the pleadings will not support a judgment on the jury's verdict. *See M. N. Dannenbaum, Inc. v. Brummerhop*, 840 S.W.2d 624, 629 (Tex.App.–Houston [14th Dist.] 1992, writ denied); *Kelley v. Diocese of Corpus Christi*, 832 S.W.2d 88, 90 (Tex. App--Corpus Christi 1992, writ dism'd w.o.j.).

In determining whether JNOV is appropriate on grounds that the pleadings do not support the judgment, the court must construe the pleadings liberally and in favor of the pleader. *See Roark v. Allen*, 633 S.W.2d 804, 809-810 (Tex. 1982). *See also Khalaf v. Williams*, 814 S.W.2d 854, 857 (Tex.App.–Houston [1st Dist.] 1991, no writ) (pleadings that request general relief consistent with relief that may be granted under the cause of action pleaded will support a judgment on that cause of action). A trial court's holding that a party's pleadings will not support the judgment in its favor is reviewed under a *de novo* standard. *See Steves Sash & Door*, 751 S.W.2d at 476. *See also City of San Benito v. Cantu*, 831 S.W.2d 416, 422 (Tex.App.–Corpus Christi 1992, no writ).

**Practice Tip**

To preserve a complaint regarding a pleading defect, the complaining party must have filed special exceptions. *See Steves Sash & Door Co., Inc. v. Ceco Corp.*, 751 S.W.2d 473, 476 (Tex. 1988).

**3. Other legal impediments to judgment.**

A motion for judgment notwithstanding the verdict may also be used to call the trial court's attention to any other legal impediment to entry of judgment on the verdict. Legal errors include rulings on pure legal issues such as preemption or pure matters of law raised by summary judgment.

**4. Immaterial issues.**

A motion for JNOV also may be used to preserve a complaint about immaterial issues. *See Brown v. Armstrong*, 713 S.W.2d 725, 728 (Tex.App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.).

**5. Factual insufficiency of the evidence.**

A motion for JNOV does not preserve a complaint about factual insufficiency for appeal. A party intending to challenge the factual sufficiency of the evidence to support the jury's verdict must file a motion for new trial. TEX.R. CIV.P. 324.

**B. Motion, notice, and hearing required.**

Although no particular form is required, a written motion and reasonable notice to the opposing party are required. *See St. Paul Fire & Marine Ins. v. Bjornson*, 831 S.W.2d 366, 369 (Tex.App.–Tyler 1992, no writ); *Gonzalez v. Mendoza*, 739 S.W.2d 120, 122 (Tex.App.–San Antonio 1987, no writ); *Dewberry v. McBride*, 634 S.W.2d 53, 55 (Tex.Civ.App.–Beaumont 1982, no writ). A trial court may not render judgment notwithstanding the verdict on its own motion. *See Olin Corp. v. Cargo Carriers, Inc.*, 673 S.W.2d 211, 213 (Tex.App.–Houston [14th Dist.] 1984, no writ).

It is reversible error to grant JNOV in the absence of notice and a hearing. *See McDade v. Texas Commerce Bank*, 822 S.W.2d 713, 717 (Tex.App.–Houston [1st Dist.] 1992, writ denied).

**Practice Tip**

If you are lucky enough to get a JNOV, the judgment should recite the filing of the motion, the fact of notice to all parties, the appearances, the hearing, and the ruling by the court. *See Moore v. Cotter & Co.*, 726 S.W.2d 237, 240 (Tex.App.–Waco 1987, no writ).

**C. Deadline for filing motion.**

A motion for JNOV may be filed any time before the judgment becomes final. *See 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). The rules do not establish a deadline for filing. *See id.*; *Spiller v. Lyons*, 737 S.W.2d 29, 29 (Tex.App.–Houston [14th Dist.] 1987, no writ) (motion for JNOV may be filed any time after court announces its judgment); *Cleaver v. Dresser Indus.*, 570 S.W.2d 479, 483 (Tex.Civ.App.–Tyler 1978, writ ref'd n.r.e.) (motion for JNOV that was filed and ruled on after judgment was entered and motion for new trial was filed was proper).

A motion for JNOV is timely if it is filed after a motion for new trial has been filed. However, it must be filed before the motion for new trial has been overruled, by order or by operation of law. *See Eddings*, 602 S.W.2d at 357; *Walker v. S&T Truck Lines, Inc.*, 409 S.W.2d 942, 943 (Tex.Civ.App.–Corpus Christi 1966, writ ref'd) (distinguishing between motion for JNOV and motion for new trial). A motion for JNOV must be filed before expiration of the trial court's plenary power. *See id.*

**Practice Tip**

Reasoning that a motion for JNOV is the equivalent of a motion to modify, correct or reform the judgment, the Dallas Court of Appeals has held, contrary to the majority rule, that a motion for JNOV must be filed within 30 days after the judgment is signed, even when the trial court's plenary power has been extended by a timely motion for new trial. *See Commonwealth Lloyd's Ins. Co. v. Thomas*, 825 S.W.2d 135, 141 (Tex.App.–Dallas 1992), *judgment vacated by agr.*, 843 S.W.2d 486 (Tex. 1993). Although no other reported opinion has followed *Thomas*, file a motion for JNOV within the 30-day period if you have that luxury.

**D. Deadline for ruling.**

At the latest, the trial court must act on a motion for JNOV before the challenged judgment becomes final, that is, within the trial court's plenary jurisdiction. *See Eddings v. Black*, 602 S.W.2d at 357; *Cleaver v. Dresser Indus.*, 570 S.W.2d at 483.

**Practice Tip**

Some courts have held that the trial court must rule on the motion before any motion for new trial is overruled, either by written order or by operation of law. *See, e.g., Spiller v. Lyons*, 737 S.W.2d 29 (Tex.App.–Houston [14th Dist.] 1987, no writ); *Commercial Standard Ins. Co. v. Southern Farm Bureau Cas. Inc. Co.*, 509 S.W.2d 387, 392 (Tex. Civ, App.–Corpus Christi 1974, writ ref'd n.r.e.).

Until these conflicts are resolved, and to avoid becoming the case that resolves them, file a motion for JNOV within 30 days after judgment, set the motion for hearing and obtain a ruling before any motion for new trial is overruled.

**E. Effect on appellate timetable.**

The conventional wisdom has been that the filing of a motion for JNOV does not extend the appellate timetable. *See First Freeport Nat'l Bank v. Brazoswood Nat'l Bank*, 712 S.W.2d 168, 170 (Tex.App.–Houston [14th Dist.] 1986, no writ); *Walker v. S & T Truck Lines, Inc.*, 409 S.W.2d 942, 943 (Tex.Civ.App.–Corpus Christi 1966, writ ref'd). *See also* TEX.R.CIV.P. 329b(g), (h).

The supreme court has created some confusion with its pronouncement in a bill of review case that "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." *Gomez v. Texas Dep't of Criminal Justice*, 896 S.W.2d 176, 177 (Tex. 1995) (citing *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)). *See also Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*, 10 S.W.3d 308, 312 (Tex. 1999). At least one court has held that "[i]n the aftermath of *Gomez*," a motion for JNOV filed within thirty days of the date the judgment was signed and which assails the trial court's judgment, extends the appellate timetable. *See Kirschberg v. Lowe*, 974 S.W.2d 844, 847-48 (Tex.–San Antonio 1998, no pet.).

**Practice Tip**

In the event the trial court grants JNOV, submit an order that simply states the motion was granted. If the trial court does not state its grounds in the order granting JNOV, the ruling will be upheld if any of the grounds urged in the motion are sufficient to support the JNOV. *See Fort Bend County Drainage Dist. v. Shrusch*, 818 S.W.2d 392, 394 (Tex. 1991). Thus, the appellant must negate each ground stated in the motion. *See id.*; *Kenneco Energy*, 921 S.W.2d at 259 (citing *Friedman v. Houston Sports Ass'n*, 731 S.W.2d 572, 573 (Tex.App.–Houston [1st Dist.] 1987, writ ref'd n.r.e.)); *Cannon v. ICO Tubular Servs. Co., Inc.*, 905 S.W.2d 380, 387 (Tex.App.–Houston [1st Dist.] 1995, no writ)..

**F. Complete statement of facts required.**

A complete statement of facts is required to review the granting or the denial of a motion for JNOV. *See Shafer v. Conner*, 813 S.W.2d 154, 155 (Tex. 1981) (to establish any complaint regarding the legal or factual sufficiency of the evidence, the record on appeal must contain a complete or agreed statement of facts). *See also Fisher v. Evans*, 855 S.W.2d 839, 841 (Tex.App.–Waco 1993, writ denied) (appellants who challenged entry of JNOV against them were required to present appellate court with complete statement of facts). In the absence of a complete record or an agreed partial record, the missing portions will be presumed to support the trial court's judgment. *See Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990).

**G. Review on appeal.**

A JNOV will survive appellate review only if a directed verdict would have been proper. *See Fort Bend County Drainage Dist. v. Shrusch*, 818 S.W.2d 392, 394 (Tex. 1991); *Dodd v. Texas Farm Prods., Co.*, 576 S.W.2d 812, 815 (Tex. 1979); *State v. Biggar*, 848 S.W.2d 291, 295 (Tex.App.–Austin 1993), *aff'd*, 873 S.W.2d 11 (Tex. 1994); TEX.R.CIV.P. 301. In other words, JNOV is warranted only when the evidence

conclusively demonstrates that no other judgment could be rendered. *See Bywaters v. Gannon*, 685 S.W.2d 593, 595 (Tex. 1985); *Beauchamp v. Hambrick*, 901 S.W.2d 747, 749 (Tex.App.–Eastland 1990, no writ).

In determining whether a JNOV is appropriate on no-evidence grounds, the court must apply the traditional test for legal insufficiency. *See* Robert W. Calvert, "*No Evidence" and "Insufficient Evidence" Points of Error*, 38 Tex. L. Rev. 361, 362-63 (1960). A no-evidence point will be sustained when the record demonstrates (a) a complete absence of evidence of a vital fact; (b) the only evidence offered to prove a vital fact is barred from consideration by rules of law or evidence; (c) the evidence offered to prove a vital fact is no more than a mere scintilla; or (d) the evidence conclusively establishes the opposite of a vital fact. *See id. See also Estate of Townes v. Townes*, 867 S.W.2d 414, 418 (Tex.App.–Houston [14th Dist.] 1993, writ denied); *Shelton Ins. Agency v. St. Paul Mercury Ins. Agency*, 848 S.W.2d 739, 742 (Tex.App.–Corpus Christi 1993, writ denied).

The court reviewing a JNOV must view the evidence in the light most favorable to the verdict, disregarding all contrary evidence and drawing all permissible inferences in support of the verdict. *See Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227-28 (Tex. 1990); *Best v. Ryan Auto Group, Inc.*, 786 S.W.2d 670, 671 (Tex. 1990).

If, on appeal, the reviewing court finds more than a scintilla of competent evidence to support the jury's findings, the JNOV will be reversed. *See Navarette v. Temple I.S.D.*, 706 S.W.2d 308, 309 (Tex. 1986); *Cannon v. ICO Tubular Servs., Inc.*, 905 S.W.2d 380, 386 (Tex.App.–Houston [1st Dist.] 1995, no writ); *Freeman v. Texas Compensation Ins. Co.*, 603 S.W.2d 186, 191 (Tex. 1980) (JNOV will be sustained if there is no more than a scintilla of evidence to support the verdict).

If the trial court denies a motion for JNOV and the court of appeals determines that JNOV should have been granted, the appellate court should render judgment notwithstanding the jury's verdict. *See McDade v. Texas Commerce Bank*, 822 S.W.2d 713, 721 (Tex.App.–Houston [1st Dist.] 1991, writ denied). If the trial court grants JNOV and the appellate court determines that the JNOV was improper, the appellate court should render judgment on the jury's verdict. *McDade*, 822 S.W.2d at 721.

**H. Cross points on appeal.**

The party that obtains a JNOV (the appellee on appeal) should consider cross-points on appeal to protect against rendition on the jury's verdict if the JNOV is reversed. Cross points include factual insufficiency challenges and any other challenges that would vitiate the jury's verdict or prevent affirmance of a judgment entered on the jury's verdict. *See Steves Sash & Door Co., Inc. v. Ceco Corp.*, 751 S.W.2d 473, 477 (Tex. 1988); *Kenneco Energy, Inc. v. Johnson & Higgins*, 921 S.W.2d at 259; *Winograd v. Clear Lake Water Auth.*, 811 S.W.2d 147, 159 (Tex.App.–Houston [1st Dist.] 1991, writ denied); TEX. R. CIV. P. 324(c).

**III. Motion to Disregard Jury Findings, TEX.R.CIV.P. 301.**

Rule 301 expressly recognizes only one basis for disregarding one or more jury findings:

> " . . . [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.

Motions to disregard a jury finding on no-evidence grounds are controlled by the same form, timing and notice requirements that apply to motions for JNOV, which are governed by the same rule.

Rule 301 is silent on the issue of disregarding an immaterial finding, although the ground of immateriality has long been recognized in case law. *See Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994); *Univ. Of Texas--Pan Am v. Valdez*, 869 S.W.2d 446, 448

(Tex.App.–Corpus Christi 1993, writ denied); *C & R Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966).

**A. Purpose of Motion.**

A motion to disregard one or several specific jury findings may be granted only under the following circumstances: (1) when the jury's finding was made in answer to a question that has no support in the evidence, (2) when the contrary finding is established as a matter of law, or (3) when the finding is immaterial to the judgment. *See Spencer v. Eagle Star Ins. Co. of America*, 876 S.W.2d 154, 157 (Tex. 1994); *C&R Transport, Inc., v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966); *Eubanks v. Winn*, 420 S.W.2d 698, 701 (Tex. 1967); *McDade v. Texas Commerce Bank*, 822 S.W.2d 713, 717 (Tex.App.–Houston [1st Dist.] 1991, writ denied).

A motion to disregard jury findings may be used to urge the trial court to disregard certain specific findings and enter judgment on the remaining findings. Unlike a motion for JNOV, a motion to disregard relies on the jury's verdict, at least in part, for entry of judgment. *See Kish v. Van Note*, 692 S.W.2d 463, 466-67 (Tex. 1985); *Wilson v. Burleson*, 358 S.W.2d 751, 753 (Tex.Civ.App.–Waco 1962, writ ref'd n.r.e.). Thus, a motion to disregard certain jury findings may be combined with a motion for entry of judgment. *E.g.*, *Kish*, 692 S.W.2d at 467.

**1. No evidence.**

A finding is supported by no evidence when the record demonstrates (a) there is a complete absence of evidence of the finding; (b) the only evidence offered to prove the finding is barred from consideration by rules of law or evidence; (c) the evidence offered to prove the finding is no more than a mere scintilla; or (d) the evidence conclusively establishes the opposite of the finding. *See* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362-63 (1960).

A trial court may not disregard a finding, however, on grounds that the finding is supported by factually insufficient evidence or is against the great weight and preponderance of the evidence. *See Alm v. Aluminum Co. of Am.*, 717 S.W.2d 588, 594 (Tex. 1986), *modified*, 753 S.W.2d 478, cert den., 498 U.S. 847 (1990); *Sassen v. Tanglegrove Townhouse Condominium Ass'n*, 877 S.W.2d 489, 492 (Tex.App.–Texarkana 1994, writ denied). In this situation, the trial court may grant only a new trial. *See Werner v. Colwell*, 909 S.W.2d 866, 870 n.1 (Tex. 1995) (opinion on rehearing); *St. Paul Fire & Marine Ins. Co. v. Bjornson*, 831 S.W.2d 366, 370 (Tex.App.–Tyler 1992, no writ).

**2. Absence of pleadings.**

Although not mentioned in rule 301, a motion to disregard also may be used to call the attention of the trial court to findings that are not supported by the pleadings. The trial court should submit the case to the jury on questions raised by the pleadings and the evidence that control the disposition of the case. *See* TEX.R.CIV.P. 278.

**B. Form of Motion.**

There is no particular form for a motion to disregard one or more jury findings. However, it is important to identify each objectionable issue specifically and state the reasons for disregarding each. *See Dewberry v. McBride*, 634 S.W.2d 53, 55 (Tex.Civ.App.–Beaumont 1982, no writ); *Colom v. Vititow*, 435 S.W.2d 187, 191 (Tex.Civ.App.–Houston [14th Dist.] 1968, writ ref'd n.r.e.) (trial court erred in disregarding jury answers because attempt to "waive" answers to certain special issues is not sufficient as motion to disregard).

**C. Written motion, notice, and hearing.**

The trial court may disregard a jury finding or findings on grounds of legally insufficient evidence only upon timely written motion and reasonable notice to the opposing party. *See St. Paul Fire & Marine Ins. Co. v. Bjornson*, 831 S.W.2d 366, 368 (Tex.App.–Tyler 1992, no writ); *Gonzalez v. Mendoza*, 739 S.W.2d 120, 122 (Tex.App.–San Antonio 1987, no writ); *Olin Corp. v. Cargo Carriers, Inc.*, 673 S.W.2d 211, 213 (Tex.App.–Houston [14th Dist.] 1984, no writ); TEX.R.CIV.P. 301.

**Practice Tip**

Be specific in any attack on a jury finding. A motion to disregard does not preserve a no-evidence complaint about any finding not expressly attacked in the motion. *Steves Sash & Door Co., Inc. v. Ceco Corp.*, 751 S.W.2d 473, 477 (Tex. 1988).

**D. Immateriality.**

A motion to disregard also may be used to bring an immaterial jury question to the attention of the trial court. *See Brown v. Armstrong*, 713 S.W.2d 725, 728 (Tex.App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.).

In contrast to the strict requirement of a motion and notice for no-evidence challenges, however, the trial court may disregard an immaterial finding on its own motion. *See Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994); *C & R Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966); *Clear Lake Water Auth. v. Winograd*, 695 S.W.2d 632, 639 (Tex.App.–Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Arch Const. Co. v. Tyburec*, 730 S.W.2d 47, 51 (Tex.App.–Houston [14th Dist.] 1987, writ ref'd n.r.e.); *Brown v. Armstrong*, 713 S.W.2d 725, 728 (Tex.App.–Houston 1986, writ ref'd n.r.e.).

In fact, the trial court may disregard an immaterial jury finding and enter judgment accordingly, even without providing the parties notice and a hearing. *See Bayliss v. Cernock*, 773 S.W.2d 384, 386 (Tex.App.–Houston [14th Dist.] 1989, writ denied) (trial court may disregard a jury finding on its own motion if special issue is immaterial); *Arch Construction, Inc. v. Tyburec*, 730 S.W.2d 47, 51 (Tex.App.–Houston [14th Dist.] 1987, writ ref'd n.r.e.).

A jury question and the jury's answer is immaterial when (1) the question does not concern a controlling issue and should not have been submitted in the first place, or when (2) the question, though properly submitted, is rendered immaterial by other findings. *See Spencer v. Eagle Star Ins. Co. Of America*, 876 S.W.2d 154, 157 (Tex. 1994) (question that calls for finding beyond province of jury, such as question of law, may be deemed immaterial); *C & R Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966); *Hughes v. Aycock*, 598 S.W.2d 370, 374 (Tex.Civ.App.–Houston [14th Dist.] 1980, writ ref'd n.r.e.); *Rideout v. Mobile Housing, Inc.*, 497 S.W.2d 66, 67 (Tex.Civ.App.–Austin 1973, writ ref'd n.r.e.) (issue is immaterial when finding is inapplicable to the case).

A question that calls for a jury finding that is beyond the province of the jury, such as a pure question of law, may be deemed immaterial. *See Spencer*, 876 S.W.2d at 157. Immaterial findings also include findings that are evidentiary only, *see Clark v. McFerrin*, 760 S.W.2d 822, 826 (Tex.App.–Corpus Christi 1988, writ denied), and findings that relate to damages when liability questions are answered negatively. *See Sinko v. City of San Antonio*, 702 S.W.2d 201, 208 (Tex.App.–San Antonio 1985, writ ref'd n.r.e.). An evidentiary issue is one that may be properly considered by the jury in deciding a controlling issue, but is not controlling itself and need not be submitted. *See Sell*, 611 S.W.2d at 903.

Controlling issues, however, are not immaterial. A litigant is entitled to have controlling questions of fact submitted to the jury if they are supported by some evidence. *See Wright Way Construction v. Harlingen Mall Co.*, 799 S.W.2d 415, 422 (Tex.App.–Corpus Christi 1990, writ denied). A controlling issue, if answered favorably, will sustain a basis for judgment for the proponent. *See Murphy v. Seabarge, Ltd.*, 868 S.W.2d 929, 934 (Tex.App.–Houston [14th Dist.] 1994, writ denied); *Bernal v. Garrison*, 818 S.W.2d 79, 83 (Tex.App.–Corpus Christi 1991, writ denied). A controlling or ultimate issue presents to the jury a complete ground of recovery or defense. *See Wright Way*, 799 S.W.2d at 422; *Sell v. C.B. Smith Volkswagen, Inc.*, 611 S.W.2d 897, 903 (Tex.Civ.App.–Houston [14th Dist.] 1981, writ ref'd n.r.e.) (controlling issue is essential to the party's right of action or matter of defense).

A question on an ultimate fact issue is not immaterial and cannot be disregarded. *See*

*Spencer*, 876 S.W.2d at 157 (instruction that went to the "heart of the plaintiff's case" could not be disregarded, even though defective, and remedy was new trial rather than JNOV); *Clear Lake Water Auth. v. Winograd*, 695 S.W.2d 632, 639 (Tex.App.–Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Orkin Exterminating Co., Inc. v. Lessassier*, 688 S.W.2d 651, 653 (Tex.App.–Beaumont 1985, no writ).

**E. Deadline for filing.**

Rule 301 does not establish a deadline for filing a motion to disregard. *See* TEX.R.CIV.P. 301. Although it is usually filed before entry of judgment, a motion to disregard one or more jury findings, like a motion for JNOV, may be filed anytime before the judgment has become final. *See id.*

**F. Motion for JNOV distinguished.**

A motion to disregard one or more jury findings attacks only a part of the jury's verdict, while a motion for JNOV attacks the verdict in its entirety. *See Dewberry v. McBride*, 634 S.W.2d 53, 55 (Tex.App.–Beaumont 1982, no writ). Some courts, however, use the terms interchangeably. *See First Nat. Indem. Co. v. First Bank & Trust*, 753 S.W.2d 405, 407 (Tex.App.–Beaumont 1988, no writ).

When a motion to disregard is granted, judgment is entered on the remaining jury findings. *See*, *e.g.*, *Kish v. Van Note*, 692 S.W.2d 463, 465 (Tex. 1985) (trial court disregarded some subparts of jury's damages findings and entered judgment on remaining findings). A judgment notwithstanding the verdict disregards the entire verdict, that is, all of the jury's findings. *See Dewberry v. McBride*, 634 S.W.2d 53, 55 (Tex.App.–Beaumont 1982, no writ).

**G. Effect on appellate timetable.**

Like a motion for JNOV, a motion to disregard certain jury findings does not extend the appellate timetable. TEX.R.CIV.P. 329b.

**H. Preservation of error.**

A motion to disregard jury finding(s) is one way to preserve a no-evidence point of error on appeal. *See Cecil v. Smith*, 804 S.W.2d 509, 510-11 (Tex. 1991). To adequately preserve the error, the motion must specifically demonstrate the absence of evidence as grounds for disregarding the finding. *See Steves Sash & Door Co. v. Ceco, Inc.*, 751 S.W.2d 473, 477 (Tex. 1988) (motion to disregard that did not complain of legal insufficiency of the evidence did not preserve no-evidence point for appeal); *Estate of Clifton v. Southern Pac. Transp.*, 709 S.W.2d 639, 640 (Tex. 1986).

**IV. Timing of and Filing Deadlines for Post-Trial Motions.**

Compliance with a deadline is required for (1) motions for new trial, TEX.R.CIV.P. 329b(a); (2) motions to modify, correct, or reform the judgment, TEX.R.CIV.P. 329b(g); and (3) requests for findings of fact and conclusions of law, TEX.R.CIV.P. 296. Calculating the time periods and other related considerations are discussed here.

**A. Commencement of time period.**

**1. General rule.**

The deadline runs from the signing date of whatever order makes a judgment final and appealable. *See Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995). Thus, when a judgment is interlocutory because unadjudicated parties or claims remain before the court, and when a party moves to have such 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. *See id.*

**EXAMPLE:**

• If the trial court grants a partial summary judgment and the plaintiff later amends its petition and abandons all unadjudicated claims or parties, the deadline begins to run from the date the trial court signs an order or judgment disposing of

those claims or parties. *See Farmer*, 907 S.W.2d at 496.

• If the trial court grants a partial summary judgment, the deadline begins to run from the date an order of severance is signed. *See McRoberts v. Ryals*, 863 S.W.2d 450, 452-53 (Tex. 1993); *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 510 (Tex. 1995). The court in *McRoberts* rejected the notion that a physically separate case file or newly-assigned cause number is required before the timetable will begin to run.

• If a nonsuit makes an otherwise interlocutory judgment a final judgment, the appellate timetables do not begin to run until the trial court signs an order granting the nonsuit or signs a final judgment that explicitly memorializes the nonsuit. *See Atchison v. Weingarten Realty Management Co.*, 916 S.W.2d 74, 75 n. 3 (Tex.App.–Houston [1st Dist.] 1996, no writ).

**2. Exception - enforcing foreign judgments.**

When a judgment creditor proceeds under the Uniform Enforcement of Judgments Act (UEJA), the filing of the foreign judgment comprises both a plaintiff's original petition and a final judgment. *See Walnut Equip. Leasing Co. v. Wu*, 920 S.W.2d 285, 286 (Tex. 1996). Thus, a motion for new trial must be filed within 30 days of the date the plaintiff files its original petition. *See id.*

**3. Exception - late notice of judgment.**

**a. Requirement of notice.**

The clerk is required to give immediate notice to the parties or their attorneys of record when the final judgment is signed. *See* TEX.R.CIV.P. 306a(3). At least one court has held that the rule requires the clerk to give notice of the fact that the judgment was signed and the date the judgment was signed. *See Winkins v. Frank Winther Investments, Inc.*, 881 S.W.2d 557, 558-59 (Tex.App.–Houston [1st Dist.] 1994, no writ).

**b. Effect of late notice.**

If, within 20 days of the date judgment is signed, the adversely affected party or the party's attorney has not received notice or does not have actual knowledge, the time begins to run when notice is received or 90 days from the date the judgment is signed, whichever is sooner. *See* TEX.R.CIV.P. 306a(4); *University of Texas at Austin v. Joki*, 735 S.W.2d 505, 507 (Tex.App.–Austin 1987, writ denied). Notice received after the 90th day is not covered by the rule. *See Levit v. Adams*, 850 S.W.2d 469, 470 (Tex. 1993); *Estate of Howley v. Haberman*, 878 S.W.2d 139, 140 (Tex. 1994).

**Practice Tip**

If notice is received after the 90th day, file a bill of review. *See Estate of Howley v. Haberman*, 878 S.W.2d at 140.

**c. Motion to establish date of notice of judgment.**

A motion under Rule 306a allows a party that did not receive timely notice of a judgment to establish the date on which that party received notice or actual knowledge of the judgment.

**(1) Requisites of motion.**

The movant must file a verified motion in the trial court, stating the date the party or its attorney received notice or acquired actual knowledge. *See* TEX.R.CIV.P. 306a(5); *Memorial Hosp. v. Gillis*, 741 S.W.2d 364, 366 (Tex. 1987).

**(2) Deadline for filing.**

☞ **Significant decision:** There is no deadline for filing the Rule 306a(5) motion. *See John v. Marshall Health Services, Inc.*, 58 S.W.3d 738 (Tex. 2001). Rather, the motion may be filed at any time within the trial court's plenary jurisdiction measured from the date determined under Rule 306a(4). *See id.*

The court in *John* disapproved the following cases that held the motion must be filed within 30 days of the date the party or its attorney first either receives the clerk's notice or acquires actual knowledge that the judgment was signed: *See Thompson v. Harco Nat'l Ins. Co.*, 997 S.W.2d 607, 618 (Tex.App.–Dallas 1998, pet. denied); *Gonzalez v. Sanchez*, 927 S.W.2d 218, 221 (Tex.App.–El Paso 1996, no writ) (per curiam); *Montalvo v. Rio Nat'l Bank*, 885 S.W.2d 235, 237 (Tex.App.–Corpus Christi 1994, no writ) (per curiam); *Womack-Humphreys Architects, Inc. v. Barrasso*, 886 S.W.2d 809, 816 (Tex.App.–Dallas 1994, writ denied).

**(3) Obtain a hearing.**

Upon proper request, the trial court is required to hold a hearing and make a finding of the date upon which the party acquired knowledge of the signing of the judgment. *See Cantu v. Longoria*, 878 S.W.2d 131, 132 (Tex. 1994).

**Practice Tip**

Mandamus may be available to compel the trial court to hold the requested hearing. *See Cantu v. Longoria*, 878 S.W.2d at 132.

**(4) Obtain a written order.**

Be sure to get the trial court to sign an order establishing the date notice of the judgment was received as the starting point for computing all applicable deadlines. *See Federal Ins. Co. v. Ticor Title Ins. Co.*, 774 S.W.2d 103, 104 (Tex.App.–Beaumont 1989, no writ).

**Practice Tip**

To prove the timeliness of your motion for new trial or other post verdict motion on appeal, the record should include the sworn motion and the order containing the trial court's finding of the date on which notice was received and any statement of facts from the hearing on the motion. *See Memorial Hospital v. Gillis*, 741 S.W.2d at 366; *Equinox Enter., Inc. v. Associated Media, Inc.*, 730 S.W.2d 872, 874 (Tex.App.–Dallas 1987, no writ).

**B. Computing time for filing.**

**1. Applicable rule.**

The day of the act or event is not included, but the last day of the period is counted unless it is a Saturday, Sunday, or legal holiday. *See* TEX.R.CIV.P. 4; TEX.R.APP.P. 4.1. If the last day of the period is a Saturday, Sunday, or legal holiday, the deadline is extended until the end of the next day which is not a Saturday, Sunday, or legal holiday. *See id.*

**2. Meaning of "legal holiday."**

The rules do not define "legal holiday." Therefore, to determine whether a day qualifies as a legal holiday within the meaning of the rules, look at the statute and Texas Supreme Court cases construing the rules.

**a. Statutory legal holidays.**

Under Section 662.021 of the Government Code, a legal holiday includes (1) a national holiday under Section 662.003(a); and (2) a state holiday under Sections 662.003(b)(1) through (6). *See* TEX. GOV'T CODE ANN. § 662.021.

**(1) Statutory national holidays**

The statutory national holidays are:

• the first day of January, "New Year's Day";
• the third Monday in January, "Martin Luther King, Jr., Day" in observance of the birthday of Dr. Martin Luther King, Jr.;

• the third Monday in February, "Presidents' Day";

• the last Monday in May, "Memorial Day";

• the fourth day of July, "Independence Day";

• the first Monday in September, "Labor Day";

• the 11th day of November, "Veterans Day," dedicated to the cause of world peace and to honoring the veterans of all wars in which Texans and other Americans have fought;

• the fourth Thursday in November, "Thanksgiving Day"; and

• the 25th day of December, "Christmas Day."

*See* TEX. GOV'T CODE ANN. § 662.003(a).

**(2) Statutory state holidays**

The statutory state holidays are:

• the 19th day of January, "Confederate Heroes Day," in honor of Jefferson Davis, Robert E. Lee, and other Confederate heroes;

• the second day of March, "Texas Independence Day";

• the 21st day of April, "San Jacinto Day";

• the 19th day of June, "Emancipation Day in Texas," in honor of the emancipation of the slaves in Texas in 1865;

• the 27th day of August, "Lyndon Baines Johnson Day," in observance of the birthday of Lyndon Baines Johnson; and

• every day on which an election is held throughout the state.

TEX. GOV'T CODE ANN. § 662.003(b)(1) - (6).

**b. Additional legal holidays.**

In addition to the statutory legal holidays, the Texas Supreme Court has defined "legal holiday" to include the following:

• days recognized by legislative declaration as being general holidays by popular acceptance. *See Dorchester Master Ltd. Partnership v. Hunt*, 790 S.W.2d 552, 553 (Tex. 1990);

• any day the commissioner's court in the county in which the case is pending has determined to be a holiday, *see Miller Brewing Co. v. Villarreal*, 829 S.W.2d 770, 772 (Tex. 1992); and

• any day on which the clerk's office for the court in which the case is pending is officially closed. *See id.*

Thus, it appears that the following state holidays, enumerated in Sections 662.003(b)(7) through (9) of the Government Code, although not defined as legal holidays by statute, should qualify as "general holidays by popular acceptance":

• the Friday after Thanksgiving Day;

• the 24th day of December; and

• the 26th day of December.

The Texas Supreme Court has also found that when certain statutory legal holidays fall on a Sunday, the following Monday is a legal holiday:

• Monday, December 26, the day following Christmas, is a legal holiday: *See Dorchester Master Ltd. Partnership v. Hunt*, 790 S.W.2d 552, 553 (Tex. 1990).

• Monday, March 3, the day following Texas Independence Day, is a legal holiday: *See Blackman v. Housing Auth. of Dallas*, 152 Tex. 21, 254 S.W.2d 103, 105 (1953).

• Monday, January 2, the day following New Year's Day, is a legal holiday: *See Mid-Continent Refrigerator Co. v. Tackett*, 584 S.W.2d 705, 706 (Tex. 1979).

• Monday, July 5, the day following Independence Day, is a legal holiday: *See Johnson v. Texas Employers Ins. Ass'n*, 674 S.W.2d 761, 762 (Tex. 1984).

**3. Clerk's office closed or inaccessible.**

If the act to be done is filing a document, and if the clerk's office where the document is to be filed is closed or inaccessible during regular hours on the last day for filing the document, the period for filing the document extends to the end of the next day when the clerk's office is open and accessible. *See* TEX.R.APP.P. 4.1(b). The closing or inaccessibility of the clerk's office may be proved by a certificate of the clerk or counsel, by a party's affidavit, or by other satisfactory proof, and may be controverted in the same manner. *See id. See also Miller Brewing*, 829 S.W.2d at 772 (suggesting that a legal holiday is a day where "weather or other conditions have made the office of the clerk inaccessible.").

**Practice Tip**

Be careful to check with the proper clerk of the proper court in determining whether the courthouse is closed. In *Seismic & Digital Concepts, Inc. v. Digital Resources Corp.*, 583 S.W.2d 442 (Tex. Civ. App.--Houston [1st Dist.] 1979, no writ), for example, the lawyer relied on incorrect information relayed to him by the county courthouse switchboard operator that the courthouse would be closed because of a holiday when, in fact, the court of appeals was open for business.

**C. Provisions relating to mailing.**

**1. Applicable rule**

A document received within ten days after the filing deadline is considered timely filed if:

• it was sent to the proper clerk by United States Postal Service first-class, express, registered, or certified mail;

• it was placed in an envelope or wrapper properly addressed and stamped; and

• it was deposited in the mail on or before the last day for filing.

*See* TEX.R.APP.P. 9.2(b)(1). *See also* TEX.R.CIV.P. 5.

**2. Proof of date of mailing.**

**a. Conclusive proof.**

Though it may consider other proof, the appellate court will accept the following as conclusive proof of the date of mailing:

• a legible postmark affixed by the United States Postal Service;

• a receipt for registered or certified mail if the receipt is endorsed by the United States Postal Service; or

• a certificate of mailing by the United States Postal Service.

*See* TEX.R.APP.P. 9.2(b)(2). *See also* TEX.R.CIV.P. 5; *Doyle v. Grady*, 543 S.W.2d 893, 894 (Tex.Civ.App.–Texarkana 1976, no writ); *Albaugh v. State Bank of La Vernia*, 586 S.W.2d 137, 137 (Tex.Civ.App.–San Antonio 1979, no writ).

**b. Attorney's affidavit.**

An attorney's uncontroverted affidavit may be evidence of the date of mailing. *See Lofton v. Allstate Ins. Co.*, 895 S.W.2d 693, 693-94 (Tex. 1995). However, an attorney's affidavit, coupled with an office postage meter postmark, will not overcome the presumption of the date of mailing established by the U.S. postmark. *See Texas Beef Cattle Co. v. Green*, 862 S.W.2d 812, 814 (Tex.App.–Beaumont 1993, no writ).

**Practice Tip**

• Do not use an office postage meter. *See Perez v. State*, 629 S.W.2d 834, 838 n.3 (Tex.App.–Austin 1982, no pet.); *Ector County Ind. School Dist. v. Hopkins*, 518 S.W.2d 576, 583 n.1 (Tex.Civ.App.–El Paso 1974, no writ)(on mot. for reh'g); *Albaugh v. State Bank of La Vernia*, 586 S.W.2d 137, 138 n.2 (Tex.Civ.App.–San Antonio 1979, no writ).

• Do not use a private delivery service such as UPS or Federal Express. *See Carpenter v. Town & Country Bank*, 806 S.W.2d 959, 960 (Tex.App.–Eastland 1991, writ denied); *Mr. Penguin Tuxedo Rental & Sales, Inc. v. NCR Corp.*, 777 S.W.2d 800, 802 (Tex.App.–Eastland 1989), *rev'd on other grounds*, 787 S.W.2d 371 (Tex. 1990).

## V. Motion for New Trial: TEX.R.CIV.P. 320-24, 327, 329b.

### A. Purpose.

The motion for new trial serves several purposes, including the following: (1) to avoid unnecessary appeals, *see Park v. Essa Texas Corp.*, 158 Tex. 269, 311 S.W.2d 228, 230 (1958), (2) to give the trial judge an opportunity to have his attention called to the alleged errors committed by him during the trial, *see Stillman v. Hirsch*, 128 Tex. 259, 99 S.W.2d 270, 275 (1936), and to provide an opportunity for the trial court to cure any errors by granting a new trial, *see D/FW Comm'l Roofing Co. v. Mehra*, 854 S.W.2d 182, 189 (Tex.App.–Dallas 1993, no writ), (3) to preserve error, *see* TEX.R.CIV.P. 324(b), and (4) for the sole purpose of extending the appellate timetable, whether or not there is any sound or reasonable basis for the conclusion that the motion is necessary, *see Old Republic Ins. Co. v. Scott*, 846 S.W.2d, 832, 833 (Tex. 1993).

### B. When required.

A point in a motion for new trial is not a prerequisite to a complaint on appeal in either a jury or a nonjury case, except as provided in TEX.R.CIV.P. 324(b). Rule 324(b) provides that a point in a motion for new trial is a prerequisite to the following complaints on appeal: (1) a complaint on which evidence must be heard such as one of jury misconduct, or newly discovered evidence or failure to set aside a default judgment; (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; (4) a complaint of inadequacy or excessiveness of the damages found by the jury; or (5) incurable jury argument if not otherwise ruled on by the trial court.

**Practice Tip**

The points that must be contained in the motion for new trial to preserve the complaint for appeal may not be limited to the list found in Rule 324(b). The movant should also include any other matter which has not already been brought to the trial court's attention. *See Luna v. Southern Pacific Transp. Co.*, 724 S.W.2d 383, 384 (Tex. 1987). Whether the complaint is raised in a motion for new trial, however, depends on the ultimate relief the party is seeking. If a new trial is desired, the complaint should be raised in a motion for new trial. On the other hand, if the complaining party is otherwise satisfied with the overall result, the complaint should be raised in a motion to modify, correct, or reform the judgment.

### C. Grounds for new trial.

#### 1. Jury misconduct.

#### a. Criteria.

To obtain a new trial on the basis of jury misconduct, the complaining party must prove each of the following:

• misconduct occurred,

• it was material, and

• based on the record as a whole, it probably resulted in harm.

*See* TEX. R. CIV. P. 327(a); *Redinger v. Living, Inc.*, 689 S.W.2d 415, 419 (Tex. 1985).

**b. Affidavit required.**

A motion for new trial based on jury misconduct must be supported by a juror's affidavit alleging "outside influences" were brought to bear upon the jury. *See* TEX.R.CIV.P.327(b); *Weaver v. Westchester Fire Ins. Co.*, 739 S.W.2d 23, 24 (Tex. 1987).

**c. Form and content of affidavits.**

**(1) Based on knowledge.**

Allegations of jury misconduct must be made on knowledge, not suspicion or hope. *See American Home Assurance Co. v. Guevara*, 717 S.W.2d 381, 384 (Tex.App.–San Antonio 1986, no writ).

**(2) Impermissible inquiries.**

Jurors are prohibited from testifying about activities and statements that occurred during their deliberations. *See* TEX.R.CIV.P. 327(b); TEX.R.CIV.EVID. 606(b). Under these rules, all testimony, affidavits, and other evidence is excluded from consideration by the court when an issue regarding jury misconduct is raised unless it is shown that an "outside influence" was improperly brought to bear upon any juror. *See Soliz v. Saenz*, 779 S.W.2d 929, 931 (Tex.App.–Corpus Christi 1989, writ denied) (court's emphasis).

**Practice Tip**

A juror may not be examined into the mental process by which he or she reaches a verdict. *See Texas Employers' Ins. Ass'n v. McCaslin*, 159 Tex. 273, 317 S.W.2d 916, 920 (1958).

**(3) "Outside influence".**

The phrase "outside influence" is not defined by our rules, but the term has been construed by the courts. An outside influence must emanate from *outside* the jury and its deliberations. *See Soliz v. Saenz*, 779 S.W.2d at 931-32 (court's emphasis). To constitute "outside influence," the source of the information must be one who is outside the jury, i.e., a non-juror who introduces the information to affect the jury's verdict. *See id.* at 932. An "outside influence" does not include information not in evidence, unknown to the jurors prior to trial, acquired by a juror and communicated to one or more other jurors between the time the jurors receive their instructions from the court and the rendition of the verdict. *See id.* Likewise, information gathered by a juror and introduced to the other jurors by that juror, even if the information is introduced specifically to prejudice the vote, does not add up to an outside influence. *See id.*

**EXAMPLE:** The following situations illustrate circumstances that do not constitute "outside influence":

• During deliberations in a wrongful termination case, the presiding juror told the others about a local company that purportedly closed down after many of its workers brought compensation cases. The jury discussed what effect plaintiff's victory in the case would have on the defendant, and their fear that if many suits were filed the defendant company might close down, leaving many people without jobs. Several jurors filed affidavits stating this influenced their deliberations. *See Durbin v. Dal-Briar Corp.*, 871 S.W.2d 263, 272 (Tex.App.–El Paso 1994, writ denied).

• A juror's statement to other jurors during deliberations that the plaintiff was supported by the Texas Civil Liberties Union (TCLU) and that the TCLU "is taking the constitution apart piece by piece." *Nelson v. Clements*, 831 S.W.2d 587, 591 (Tex.App.–Austin 1992, writ denied).

• A juror who voted "no" on an issue was excluded by the remaining jurors from further participation in deliberations and two jurors agreed to abstain on one issue unless they agreed with the remaining jurors on another issue in which case they would automatically vote "yes" rather than abstain on the other issue. *See Moody v. EMC Services, Inc.*, 828 S.W.2d 237, 243

(Tex.App.–Houston [14th Dist.] 1992, writ denied).

• One juror, who used his notes to persuade other members of the jury to change their opinions and who used a published article which had been mentioned during trial, but not offered into evidence, to argue for a particular result; another juror coerced other members to quickly reach a verdict; and, using a dictionary to retrieve a definition of the term "negligence." *See Perry v. Safeco Ins. Co.*, 821 S.W.2d 279, 280-81 (Tex.App.–Houston [1st Dist.] 1991, writ denied).

• A juror, who was a paralegal, told other jurors that plaintiffs would recover the damages assessed even though they found no negligence or proximate cause. *See Kendall v. Whataburger*, Inc., 759 S.W.2d 751, 755 (Tex.App.–Houston [1st Dist.] 1988, no writ).

• Two jurors visited the scene of the occurrence giving rise to the suit and told the other jurors their experiences and knowledge which they acquired. *See Baley v. W/W Interests, Inc.*, 754 S.W.2d 313, 315-16 (Tex.App.–Houston [14th Dist.] 1988, writ denied).

• A juror, who was a nurse, told other jurors that the medication plaintiff was taking could have made the plaintiff drowsy, causing a fall. *See Baker v. Wal-Mart Stores, Inc.*, 727 S.W.2d 53, 54-56 (Tex.App.–Beaumont 1987, no writ).

The following circumstances, on the other hand, may constitute outside influence:

• An overt act of the prevailing party in the trial court in seeking out a juror and attempting to persuade the juror to "do all you can to help me," which amounts to an overt attempt to tamper with the jury. *See Texas Employers' Ins. Ass'n v. McCaslin*, 317 S.W.2d at 921.

• Tampering with evidence by an attorney. *See Wiedemann v. Galiano*, 722 S.W.2d 335, 336-37 (7th Cir. 1983).

• A threat to a juror. *See Clancy v. Zale Corp.*, 705 S.W.2d 820, 829 (Tex.App.–Dallas 1986, writ ref'd n.r.e.).

**d. When hearing required.**

If a party files a proper motion for a new trial supported by sufficient affidavits alleging jury misconduct, the trial court must conduct a hearing. *See Roy Jones Lumber Co. v. Murphy*, 139 Tex. 478, 163 S.W.2d 644, 646 (1942); TEX.R.CIV.P. 327(a). It must be apparent from the motion and affidavits that the allegation of facts charging jury misconduct can be substantiated through admissible evidence at the hearing on the motion for new trial. *See Jordan v. Ortho Pharmaceutical, Inc.*, 696 S.W.2d 228, 238 (Tex.App.–San Antonio 1985, writ ref'd n.r.e.).

**Practice Tip**

• If the complaining party does not request a hearing on its motion, it waives the right to a hearing. *See County of El Paso v. Boy's Concessions, Inc.*, 772 S.W.2d 291-293 (Tex.App.–El Paso 1989, no writ).

• To obtain a hearing without a juror's affidavit, the motion for new trial must disclose a reasonable explanation and excuse as to why affidavits cannot be secured. *See Roy Jones Lumber Co. v. Murphy*, 163 S.W.2d at 646.

**e. When hearing not required.**

A hearing is not mandatory and the trial court does not abuse its discretion in failing to conduct a hearing if the allegations of the motion and the statements in the affidavits, even if proven, would be insufficient to show jury misconduct. *See Clancy v. Zale Corp.*, 705 S.W.2d at 828-29; *Jordan v. Ortho Pharmaceutical, Inc.*, 696 S.W.2d at 238-39.

**f. Review on appeal.**

**(1) Abuse of discretion.**

Whether jury misconduct occurred is question of fact for the trial court, and if there is conflicting evidence on this issue, the trial court's finding must be upheld on appeal. *See Strange v. Treasure City*, 608 S.W.2d 604, 606 (Tex. 1980).

Stated slightly differently, the trial court's determination as to whether jury misconduct occurred is ordinarily binding on the reviewing courts and will be reversed only where a clear abuse of discretion is shown. *See State v. Wair*, 163 Tex. 69, 351 S.W.2d 878, 878 (1961).

**(2) Showing of harm required.**

Misconduct will justify a new trial only if it reasonably appears from the record that injury probably resulted to the complaining party. *See* TEX.R.CIV.P. 327(a); *Pharo v. Chambers County*, 922 S.W.2d 945, 950 (Tex. 1996). To show probable injury, there must be some indication in the record that the alleged misconduct most likely caused a juror to vote differently than he would otherwise have done on one or more issues vital to the judgment. *See Pharo*, 922 S.W.2d at 950. Determining the existence of probable injury is a question of law. *See id.*

**Practice Tip**

Findings of fact and conclusions of law may be appropriate where the trial court denies a motion for new trial based on jury misconduct. *See Pharo*, 922 S.W.2d at 948.

**2. Newly discovered evidence.**

**a. Criteria.**

The party moving for a new trial based on newly discovered evidence must demonstrate to the trial court the existence of the following factors: (i) the evidence came to light since the time of trial or so late in the trial that it was impossible to present the evidence before the trial closed; (ii) it was not because of a lack of due diligence that the information did not come sooner; (iii) the new evidence is not merely cumulative to that already given and does not tend only to impeach the adversary's testimony; and (iv) the evidence is so material that it would probably produce a different result if the court granted a new trial. *See Jackson v. Van Winkle*, 660 S.W.2d 807, 809 (Tex. 1983); *Kirkpatrick v. Memorial Hosp.*, 862 S.W.2d 762, 775 (Tex.App.–Dallas 1993, writ denied).

**b. Affidavit required.**

The complaining party should establish each of the elements listed above by an affidavit of the party. *See In re Thoma*, 873 S.W.2d 477, 512 (Tex. Rev. Trib. 1994); *Brown v. Hopkins*, 921 S.W.2d 306, 311 Tex.App.–Corpus Christi 1996, no writ).

**c. Hearing required.**

The complaining party must introduce competent, admissible evidence at the hearing establishing each of the elements. *See Fettig v. Fettig*, 619 S.W.2d 262, 267 (Tex.Civ.App.–Tyler 1981, no writ). In the absence of a hearing on the motion, nothing is preserved for appellate review. *See Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 757 (Tex.App.–Amarillo, writ denied).

**d. Review on appeal.**

Whether a motion for new trial on the ground on newly discovered evidence will be granted or refused is generally a matter addressed to the sound discretion of the trial court and the trial court's action will not be disturbed on appeal absent an abuse of such discretion. *See Jackson v. Van Winkle*, 660 S.W.2d at 809. On appeal, the refusal to grant a motion for new trial will be reversed for abuse of discretion only when after searching the record, it is clear that the trial court's decision was arbitrary and unreasonable. *See In re Thoma*, 873 S.W.2d at 512. When a trial court refuses to grant a new trial based on newly discovered evidence, every reasonable presumption will be made to affirm the trial court's decision. *See Jackson*, 660 S.W.2d at 809-10. The courts do not favor motions for new trial on the grounds of newly discovered evidence and such motions are reviewed with careful scrutiny. *See Brown v. Hopkins*, 921 S.W.2d at 311.

**3. Setting aside a default judgment.**

**a. Criteria.**

A default judgment should be set aside and a new trial ordered in any case in which: (i) the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; (ii) provided the motion for new trial sets up a meritorious defense; and (iii) the motion is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff. *See Craddock v. Sunshine Bus Lines*, 134 (Tex.) 388, 133 S.W.2d 124, 126 (1939).

**(1) Intentional or consciously indifferent conduct.**

The defendant's motion and affidavits must set forth facts which, if true, would negate intentional or consciously indifferent conduct. *See Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984). When a defendant relies on its agent to file an answer, the defendant must demonstrate that both it and its agent were free of conscious indifference. *See Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992). Conscious indifference means more than mere negligence. *See Smith v. Babcock & Wilcox Constr. Co.*, 913 S.W.2d 467, 468 (Tex. 1995).

**EXAMPLE:** The following examples illustrate circumstances where the defendant established that its failure to answer was not intentional or the result of conscious indifference:

• Secretary was told to mail documents, but did not because she thought that the defendant had mailed them. *See Strackbein v. Prewitt*, 671 S.W.2d at 39.

• Insurance company inadvertently placed defendant's citation with mail not requiring immediate attention. *See Craddock*, 133 S.W.2d at 125.

• Insurance company made a filing mistake and the file never made it to the right person. *See State Farm Life Ins. Co. v. Mosharaf*, 794 S.W.2d 578 (Tex.App.–Houston [1st Dist.] 1990, writ denied).

• Answer was filed late due to staff shortage at defendant's insurance broker's office. *See Southland Paint Co. v. Thousand Oaks Racket Club*, 724 S.W.2d 809 (Tex.App.–San Antonio 1986, writ ref'd n.r.e).

• Failure to file answer was due to confusion in attorney's office rather than indifference on defendant's part. *See Evans v. Woodward*, 669 S.W.2d 154 (Tex.App.–Dallas 1984, no writ).

• Answer prepared by secretary was presumably lost by volunteer exchange student who was assisting defendant's attorney as an office boy. *See Drake v. McGalin*, 626 S.W.2d 786 (Tex.Civ.App.–Beaumont 1981, no writ).

• Inadvertence by secretary in failing to note on calendar date answer was due. *See Continental Airlines Inc. v. Carter*, 499 S.W.2d 673 (Tex.App.–El Paso 1973, no writ).

• Attorney forgot to prepare answer because his secretary placed the file with his general files rather than his active files. *See Republic Bankers Life Ins. Co. vs. Dixon*, 469 S.W.2d 646 (Tex.Civ.App.–Tyler 1971, no writ).

**Practice Tip**

Conclusory allegations are insufficient. *See Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992). Thus, a statement that no answer was filed "due to accident and mistake," with no explanation as to the nature of the mistake, is merely a conclusory allegation and will not support the first part of the *Craddock* test. *See id.*

A mistake of law is one type of mistake that may satisfy the first element of the *Craddock* test. *See Bank One, Texas, N.A. v. Moody*, 830 S.W.2d 81, 81-82 (Tex. 1992). Thus, freezing the garnishee's bank accounts in a garnishment proceeding and submitting a check for the balance of the garnishee's account to the clerk has been

held to satisfy the first element of the *Craddock* test. *See id.*

Not every act of a defendant that could be characterized as a mistake of law is a sufficient excuse. The following examples illustrate instances where the defendant did not establish that a mistake of law was sufficient to satisfy the first element of the *Craddock* test:

• Attorney did not understand effect of bankruptcy stay. *See Carey Crutcher, Inc. v. Mid-Coast Diesel Servs., Inc.*, 725 S.W.2d 500, 502 (Tex.App.–Corpus Christi 1987, no writ), *disapproved on other grounds*, *Director, State Emp. Workers' Comp. Div. v. Evans*, 889 S.W.2d 266, 268 (Tex. 1994).

• Response to writ of garnishment and freezing accounts but not submitting the funds to the court. *See First National Bank of Bryan v. Peterson*, 709 S.W.2d 276, 279 (Tex.App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.).

• Reading but not understanding the citation and doing nothing. *See Butler v. Daltex Mach. & Tool Co.*, 627 S.W.2d 258, 260 (Tex.App.–Fort Worth 1982, no writ).

**(2) Meritorious defense.**

The second *Craddock* test element requires the defendant to "set up" a meritorious defense. *See Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 392 (Tex. 1993). This does not mean that the motion should be granted if it merely *alleges* that the defendant has a meritorious defense. *See Ivy v. Carrell*, 407 S.W.2d 212, 214 (Tex. 1966) (court's emphasis). The motion must allege *facts* which in law would constitute a defense to the cause of action asserted by the plaintiff, and must be supported by affidavits or other evidence proving prima facie that the defendant has such a meritorious defense. *See id.* (Court's emphasis).

**EXAMPLE:** The following examples illustrate circumstances where the defendant "set up" a meritorious defense:

• Individual defendant in DTPA case stated in his affidavit that he acted solely as the agent for corporation in all of his dealings with the plaintiff and that he was not liable in his individual capacity as alleged in the plaintiff's petition. *Strackbein v. Prewitt*, 671 S.W.2d at 38.

• Defendant in workers' compensation case alleged that the plaintiff was injured in an automobile accident following her alleged job-related injury and that this accident, and not the job-related injury, was the cause of her damages. Director, State Emp. Workers' Comp. Div. v. Evans, 889 S.W.2d 266, 270 (Tex. 1994).

**Practice Tip**

• The defendant does not need to plead its meritorious defense in its answer. *Strackbein v. Prewitt*, 671 S.W.2d at 39.

• The defendant need not meet the meritorious defense requirement if it is not properly served. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 99 L.Ed.2d 75, 108 S.Ct. 896 (1987).

• In a post-answer default case, the defaulting party is not required to set up a meritorious defense if it does not have actual or constructive notice of the hearing at which the default judgment was entered. *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988).

**(3) Delay or injury.**

The defendant need only allege that granting a new trial will not cause delay or otherwise prejudice the plaintiff. *Estate of Pollack*, 858 S.W.2d at 393. Once the defendant makes this representation, the burden of going forward with proof of injury shifts to the plaintiff because these matters are peculiarly within the plaintiff's knowledge. *Cliff v. Huggins*, 724 S.W.2d 778, 779 (Tex. 1987).

**Practice Tip**

• If the defendant asserts that it is ready, willing, and able to go to trial immediately and offers to reimburse the plaintiff for the costs involved in obtaining the default, the court may look more favorably at the defendant's motion. *See Angelo v. Champion Restaurant Equip. Co.*, 713 S.W.2d 96, 98 (Tex. 1986). However, these important factors are not dispositive of whether the motion should be granted. *Id.*

• The plaintiff may be able to meet its burden of showing injury by presenting evidence that delay would result in a loss of witnesses or other valuable evidence. *See Director, State Emp. Workers' Comp. Div. v. Evans*, 889 S.W.2d at 270.

**b. Necessity of affidavits.**

The motion for new trial should be supported with affidavits that satisfy the *Craddock* test. *See Strackbein v. Prewitt*, 671 S.W.2d at 39; Ivy v. Carrell, 407 S.W.2d at 214; *Director, State Emp. Workers' Comp. Div. v. Evans*, 889 S.W.2d at 270.

**c. Plaintiff's response.**

The plaintiff should file a response to the motion for new trial together with affidavits that controvert the defendant's factual assertions regarding the conscious indifference/intentional act and delay/injury elements. In the absence of controverting evidence that the defendant's failure to appear was due to its intentional act or conscious indifference, the defendant's affidavits must be taken as true. *Director, State Emp. Workers' Comp. Div. v. Evans*, 889 S.W.2d at 269. Similarly, the plaintiff has the burden to prove prejudice or injury. *Estate of Pollack v. McMurrey*, 858 S.W.2d at 393. On the other hand, the trial court should not consider counter affidavits or conflicting testimony offered to refute the movant's factual allegations concerning the meritorious defense element. *Ivy v. Carrell*, 407 S.W.2d at 214. Thus, any controverting affidavits on the meritorious defense element are of no effect.

**Practice Tip**

Since the facts concerning whether the defendant's failure to answer was intentional or the result of conscious indifference are peculiarly within the defendant's knowledge, it may be difficult for the plaintiff to file a controverting affidavit. Therefore, the plaintiff should consider deposing the defendant's affiants to determine the underlying facts. *See Estate of Pollack v. McMurrey*, 858 S.W.2d at 390-91.

**d. Necessity of hearing.**

If the plaintiff controverts the defendant's evidence regarding the conscious indifference/intentional act element, the trial court must conduct a hearing. *See Estate of Pollack v. McMurrey*, 858 S.W.2d at 392.

**Practice Tip**

• If the defendant's motion and affidavits meet the *Craddock* requirements, and the plaintiff does not file any controverting affidavits, a hearing is not necessary and the trial court must grant a new trial. *See Strackbein v. Prewitt*, 671 S.W.2d at 38-39. Even if a hearing is held under these circumstances, the defendant does not need to introduce its supporting affidavits as evidence in order for them to be considered by the trial court. *Director, State Emp. Workers' Comp. Div. v. Evans*, 889 S.W.2d at 268.

• If the plaintiff controverts the defendant's evidence regarding the conscious indifference/intentional act element, the plaintiff has the burden of requesting a hearing. *Healy v. Wick Building Systems, Inc.*, 560 S.W.2d 713, 721 (Tex.Civ.App.–Dallas 1977, writ ref'd n.r.e.). If the plaintiff does not request an evidentiary hearing, the trial court is bound to accept as true the defendant's affidavits. *Id.* During the hearing, witnesses for both parties should present sworn testimony in person or by deposition. *See Estate of Pollack v. McMurrey*, 858 S.W.2d at 392.

• The plaintiff should also request a hearing to present evidence regarding the delay/injury element. *See Director, State Emp. Workers' Comp. Div. v. Evans*, 889 S.W.2d at 270.

**e. Review on appeal.**

A motion for new trial is addressed to the trial court's discretion and the court's ruling will not be disturbed on appeal in the absence of a showing of an abuse of discretion. *Director, State Emp. Workers' Comp. Div. v. Evans*, 889 S.W.2d at 268. However, a trial court abuses its discretion by not granting a new trial when all three elements of the *Craddock* test are met. *Id.* If the defendant's evidence is not controverted and supports the *Craddock* requirements, the court on appeal must look only to the motion and supporting affidavits to determine if the trial court abused its discretion in denying a new trial. *Id.*

In determining whether there was intentional disregard or conscious indifference, the appellate court looks to the knowledge and acts of the defendant. *Id.* at 269. Further, the court must look to all the evidence in the record to determine if the defendant's factual assertions are controverted. *Id.*

**Practice Tip**

If the trial court conducts a hearing, the defendant should request the court reporter to record the evidence and bring forward the statement of facts from the hearing to avoid the presumption, on appeal from the overruling of the motion for new trial, that the evidence introduced at the hearing supports the trial court's ruling. *See Wiseman v. Levinthal*, 821 S.W.2d 439, 442 (Tex.App.–Houston [1st Dist.] 1991, no writ).

**4. Challenges to the sufficiency of the evidence.**

A motion for new trial is *required* to preserve factual sufficiency complaints. Although no-evidence challenges may also be raised in a motion for new trial, *they should not be*, for the reasons discussed below.

**a. Factual-sufficiency challenges.**

"Insufficient evidence" points of error are points which call for a reversal of the trial court's judgment and remand of the cause for retrial. *See* Calvert, "*No Evidence" and "Insufficient Evidence" Points of Error*, 38 Tex.L.Rev. 361, 365 (1960). Factual insufficiency points of error are expressly required by TEX.R.CIV.P. 324(b) to be raised in a motion for new trial. *See Cecil v. Smith*, 804 S.W.2d 509, 512 (Tex. 1991).

**Practice Tip**

The courts have cautioned practitioners concerning the proper method of phrasing points challenging the factual sufficiency of the evidence. The party attacking an adverse finding on an issue on which that party had the burden of proof should assert that the finding is "against the great weight and preponderance of the evidence." *See Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). On the other hand, when the party without the burden of proof complains of the jury's adverse finding, that party should assert that there is "insufficient evidence" to support the finding. *See Barnes v. Western Alliance Ins. Co.*, 844 S.W.2d 264, 268 n. 2 (Tex.App.–Fort Worth 1992, writ dism'd by agr.).

The same standard of review applies in reviewing factual sufficiency challenges regardless of whether the court of appeals is reviewing a negative or affirmative jury finding and regardless of which party had the burden of proof. *See Blonstein v. Blonstein*, 831 S.W.2d 468, 473 (Tex.App.–Houston [14th Dist.] 1992), *writ denied per curiam*, 848 S.W.2d 82 (Tex. 1992). When reviewing a jury verdict to determine the factual sufficiency of the evidence, the court of appeals must consider and weigh all the evidence, and should set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *See Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). When a court of appeals reverses a case on insufficiency grounds, it must detail in its opinion the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias. *See Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986). Further, the courts should state in their opinions in what regard the contrary evidence greatly outweighs the evidence in support of the verdict. *See id.*

**b. Legal-sufficiency challenges.**

A motion for new trial may be used to preserve "no evidence" points. A party should *never* raise no-evidence points in a motion for new trial, however, because the appellate court cannot render judgment if it sustains the challenge; rather, the court may only remand for a new trial. *See Werner v. Colwell*, 909 S.W.2d 866, 870 n.1 (Tex. 1995); *Cecil v. Smith*, 804 S.W.2d at 512-13; *Aero Energy Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822-23 (Tex. 1985).

**5. Inadequacy or excessiveness of the damages.**

**a. Procedural basis for points.**

A point in a motion for new trial is a prerequisite to complaining on appeal about the adequacy or excessiveness of the damages found by a jury. *See McDade v. Texas Commerce Bank*, 822 S.W.2d 713, 721 (Tex.App.–Houston [1st Dist.] 1991, writ denied).

**Practice Tip**

Some courts have suggested that a complaint that a judgment awards damages in excess of the amount pleaded by the opposing party must be raised in a motion for new trial. *See, e.g.*, *Borden, Inc. v. Guerra*, 860 S.W.2d 515, 525 (Tex.App.–Corpus Christi 1993, writ dism'd by agr.); *Siegler v. Williams*, 658 S.W.2d 236, 240 (Tex.App.–Houston [1st Dist.] 1983, no writ).

In this situation, the complaining party should carefully consider the ultimate relief it seeks. If a new trial is desired, the complaint should be raised in a motion for new trial. On the other hand, if the complaining party is otherwise satisfied with the overall result, the complaint should be raised in a motion to modify, correct, or reform the judgment.

**b. Suggestion of remittitur by trial court.**

A trial court may not order a remittitur; a remittitur may only be suggested, not compelled. *See The Galveston County Fair & Rodeo, Inc. v. Glover*, 880 S.W.2d 112, 122 (Tex.App.–Texarkana), *writ denied per curiam*, 940 s.W.2d 585 (Tex. 1996). The trial court may deny the defendant's motion for new trial on the condition that the plaintiff remit the suggested amount. *See id.*

**c. Review on appeal.**

A court of appeals should uphold a trial court remittitur only when the evidence is factually insufficient to support the verdict. *See Larson v. Cactus Utility Co.*, 730 S.W.2d 640, 641 (Tex. 1987). Abuse of discretion is no longer the proper standard. *See id.* In determining whether damages are excessive, trial courts and courts of appeal should employ the same tests as for any factual insufficiency question. *See Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986). Lower courts should examine all the evidence in the record to determine whether sufficient evidence supports the damage award, remitting only if some portion is so factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust. *See id.* Courts of appeal also should detail the relevant evidence, and if remitting, state clearly why the jury's finding is so factually insufficient or so against the great weight and preponderance of the evidence as to be manifestly unjust. *See id.*

**6. Incurable jury argument.**

**a. "Curable" and "incurable" argument distinguished.**

Improper jury arguments are usually referred to as one of two types: "curable" or "incurable." *See Otis Elevator Co. v. Wood*, 436 S.W.2d 324, 333 (Tex. 1968). A jury argument is "curable" when the harmful effect of the argument can be eliminated by a trial judge's instruction to the jury to disregard what they have just heard. *Id.* The error is "cured" and rendered harmless by the instruction. *See id.* On the other hand, an argument may be so inflammatory that its harmfulness could not be eliminated by an instruction to the jury to disregard it. Id. The prejudicial nature of the argument is so acute that it is "incurable." *See id.* If the argument is "incurable," the failure to object does not result in a waiver. *See id.*

Whether the argument is "incurable" is sometimes determined by reference to a "test" defined variously as follows:

• Error that somehow strikes at the heart of the adversarial process, or appeals to deep-seated and universally execrated prejudices. *See Boone v. Panola County*, 880 S.W.2d 195, 198 (Tex.App.–Tyler 1994, no writ).

• Whether the argument, viewed in light of the entire record was so inflammatory, or so harmful or acutely prejudicial that an instruction from the court to disregard would not have eliminated the probability that an improper verdict was rendered. *See Goswami v. Thetford*, 829 S.W.2d 317, 321 (Tex.App.–El Paso 1992, writ denied).

In any event, there are only rare instances of incurable argument. *See Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979).

**EXAMPLE:** The following examples illustrate circumstances where the argument was found to be incurable:

• Unsupported charge of perjury. *See Howsley & Jacobs v. Kendall*, 376 S.W.2d 562, 566 (Tex. 1964).

• Appeal to racial prejudice. *See Texas Employers Ins. Ass'n v. Haywood*, 153 Tex. 242, 266 S.W.2d 856, 858-59 (1954).

• Unwarranted attacks against the integrity of opposing counsel (suggesting that counsel was dishonest, a convicted felon, and had been disbarred for filing frivolous lawsuits). *See Amelia's Automotive, Inc. v. Rogriguez*, 921 S.W.2d 767, 772-74 (Tex.App.–San Antonio 1996, no writ).

• Referring to a party as a "killer of families" in a civil suit involving a used car. *See Lone Star*

*Ford, Inc. v. Carter*, 848 S.W.2d 850, 855 (Tex.App.–Houston [14th Dist.] 1993, writ denied).

• Unsupported allegations that opposing counsel manufactured evidence and suborned perjury. *See Circle Y of Yoakum v. Blevins*, 826 S.W.2d 753, 756-59 (Tex.App.–Texarkana 1992, writ denied).

• Unsupported and uninvited attempt to link mother's cervical cancer with immoral conduct in custody dispute. *See In re W.G.W.*, 812 S.W.2d 409, 415-16 (Tex.App.–Houston 1991, no writ).

• Intentional appeal for a verdict on the basis of ethnicity. *See Texas Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859, 866-67 (Tex.App.–San Antonio 1990, writ denied).

• Unsupported demonstration of product's nonflammability by counsel's attempt to ignite his arm and plea to God to burn him if he were wrong. *See Howard v. Faberge, Inc.*, 679 S.W.2d 644, 649-50 (Tex.App.–Houston 1984, writ ref'd n.r.e.).

**b. Review on appeal.**

On appeal, the complaining party has the burden of showing that the argument by its nature, degree and extent constituted reversibly harmful error. *See Standard Fire Ins. Co. v. Reese*, 584 S.W.2d at 839. How long the argument continued, whether it was repeated or abandoned and whether there was cumulative error are proper inquiries. *See id.* at 839-40. All of the evidence must be closely examined to determine the argument's probable effect on a material finding. *See id.* at 840. A reversal must come from an evaluation of the whole case, which begins with voir dire and ends with the closing argument. *See id.* From all of these factors, the complainant must show that the probability that the improper argument caused harm is greater than the probability that the verdict was grounded on the proper proceedings and evidence. *See id.*

**7. Other grounds for new trial.**

**a. New trial "in the interest of justice."**

A trial court may grant a new trial in the interest of justice. *See Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985) (orig. proceeding).

**Practice Tip**

A party moving for a new trial should include in its motion, together with all other grounds for new trial, a request that a new trial be granted in the interest of justice. If the order granting the new trial states that a new trial is granted in the interest of justice, the trial court's order may not be reviewed on appeal or by mandamus. *See Johnson*, 700 S.W.2d at 918; *Champion Int'l Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988).

**b. "Good cause."**

Tex.R.Civ.P. 320 expressly provides that a new trial may be granted and the judgment set aside for "good cause." The most frequent "good cause" complaint concerns the conduct of a party's attorney. However, the courts uniformly hold that a final judgment will not be set aside when the failure to have a full presentation of the case resulted from the negligence, inadvertence, or mistake of either the party seeking the relief or by its counsel. *E.g.*, *Hicks v. Brooks*, 504 S.W.2d 942, 945 (Tex.Civ.App.–Tyler 1973, writ ref'd n.r.e.). In these circumstances, the courts reason that a motion for new trial is not a vehicle through which the case may be tried over or tried differently. *See id.* On the other hand, a party may be able to demonstrate "good cause" if its attorney agrees to an adverse judgment against the client without the client's consent. *See McMillan v. McMillan*, 72 S.W.2d 611, 612-13 (Tex.Civ.App.–Dallas 1934, no writ).

**D. New trial on court's own motion.**

Tex. R. Civ. P. 320 expressly provides that the trial court may grant a new trial on its

own motion. *See also Gulf Ins. Co. v. Adame*, 575 S.W.2d 87, 88 (Tex.Civ.App.–Amarillo 1978, no writ). The only limitation on the court's authority to grant a new trial on its own motion requires that the order be signed during the court's plenary power. *See id.* In these circumstances, the trial court is not required to give its reasons for granting a new trial. *See Brown v. American Finance Co.*, 432 S.W.2d 564, 567 (Tex.Civ.App.–Dallas 1968, writ ref'd n.r.e.).

**E. Scope of motion for new trial.**

The trial court may grant a partial new trial if (1) only part of the matters in controversy are affected, and (2) such part is clearly separable without unfairness to the parties. *See* TEX. R. CIV. P. 320; *State Dept. of Highways v. Cotner*, 845 S.W.2d 818, 819 (Tex. 1993). The trial court may not, however, grant a separate trial on unliquidated damages alone if liability issues are contested. *Id.*

To determine what issues are separable, it is helpful to consult the rules governing partial remand on appeal (TEX.R.APP.P. 44.1(b)), severance (TEX.R.CIV.P. 41), and separate trials (TEX.R.CIV.P. 174) and the cases construing those rules. However, Rule 320 is an exception to Rule 41; thus, a partial new trial may be ordered notwithstanding the prohibition in Rule 41 against post-submission severances if it does not result in unfairness to the parties. *See Cotner*, 845 S.W.2d at 819.

**EXAMPLE:** In a case involving two or more separate and distinct causes of action, a final judgment may be rendered as to one or more of such causes, and a new trial ordered as to the others. *See Valdez v. Gill*, 537 S.W.2d 477, 482 (Tex.Civ.App.–San Antonio 1976, writ ref'd n.r.e.).

**F. Deadline for filing.**

A motion for new trial must be filed within 30 days of the date the judgment is signed. *See* TEX.R.CIV.P. 329b(a); *Padilla v. LaFrance*, 907 S.W.2d 454, 458 (Tex. 1995).

**Practice Tip**

The 30 day time limit is jurisdictional and cannot be extended by agreement of the parties or by the trial court. *See Lind v. Gresham*, 672 S.W.2d 20, 22 (Tex.App.–Houston [14th Dist.] 1984, no writ).

**G. Filing fee.**

**1. When payment required.**

A motion for new trial must be accompanied with a $15.00 filing fee. *See* TEX. GOV'T CODE ANN. § 51.317(b).

**Practice Tip**

Check with the district clerk in the county in which you are filing the motion for any additional local filing fee. For example, the Harris County District Clerk charges an additional $11.00.

**2. Failure to pay fee at time of filing motion.**

**a. Effect on timetable.**

A motion for new trial tendered without the necessary filing fee is nonetheless "*conditionally filed*" when it is presented to the clerk, despite the fact the clerk did not "accept" the motion for filing because the fee had not been paid. *See Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993) (emphasis in orig.). Thus, late payment of the fee will operate to extend the appellate timetable if:

• the filing fee is paid before the trial court overrules the motion and before the trial court loses plenary power. *See Jamar*, 868 S.W.2d at 319.

• the filing fee is paid after the motion is overruled by operation of law and before the trial court loses plenary power. *See Tate v. E.I. DuPont De Nemours & Co.*, 934 S.W.2d 83, 83 (Tex. 1996).

• the filing fee is paid after the appeal is perfected. *See Ramirez v. Get "N" Go # 103*, 888 S.W.2d 29, 31 (Tex.App.–Corpus Christi 1994, no writ); *Spellman v. Hoang*, 887 S.W.2d 480, 482 (Tex.App.–San Antonio 1994, no writ); *Polley v. Odom*, 937 S.W.2d 623, 626 (Tex.App.–Waco 1997, no writ).

*See also Finley v. J.C. Pace Ltd.*, 4 S.W.3d 319, 320 (Tex.App.–Houston [1st Dist.] 1999, no pet.), *appeal dism'd per curiam*, No. 01-99-00662-CV (Tex.App.–Houston [1st Dist.] November 4, 1999, no pet.) (unpublished).

**b. Effect on trial court's authority to consider motion.**

The supreme court in *Jamar* noted that the filing is not complete until the fee is paid and, absent emergency or other rare circumstances, the trial court should not consider the motion until the fee is paid. *See Jamar*, 868 S.W.2d at 319 n. 3. In *Tate* the court said that the failure to pay the fee before the motion is overruled by operation of law may forfeit altogether the movant's opportunity to have the trial court consider the motion. *See Tate*, 934 S.W.2d at 84. One court, however, has refused to grant mandamus relief to set aside the trial court's order granting a new trial where the filing fee was paid after the court lost plenary power. In *Kvanvig v. Garcia*, 928 S.W.2d 777, 779 (Tex.App.–Corpus Christi 1996, orig. proceeding), the court held that although the trial court has discretion to refuse to act upon a motion for new trial until the filing fee is paid, the court in its discretion may consider and rule on the motion from the time it is tendered to the clerk and "conditionally filed."

**c. Effect on preservation of error.**

Whether the late payment of the filing fee will operate as a waiver of the grounds raised in the motion for new trial is likely to be reviewed by the Texas Supreme Court. The court in *Tate* expressed no opinion about whether a motion for new trial, even though extending the appellate timetable, properly preserves error for appeal if the filing fee is not paid until after the motion is overruled by operation of law. *See Tate*, 934 S.W.2d at 84 n.1. The Corpus Christi court recently held that the failure to pay the filing fee until long after the motion was overruled by operation of law and the trial court lost plenary jurisdiction ***waived all factual sufficiency and excessive damage challenges***. *Marathon Corp. v. Pitzner*, 55 S.W.3d 114, 124 (Tex.App.–Corpus Christi 2001, mot. filed). The judgment against Marathon is nearly $8.0 million.

**H. Effect on timetable.**

A motion for new trial timely filed by any party extends the appellate timetable. *See* TEX.R.CIV.P. 329b. The **filing** of a motion for new trial in order to extend the appellate timetable is a matter of right, whether or not there is any sound or reasonable basis for the conclusion that a further motion is necessary. *See Old Republic Ins. Co. v. Scott*, 846 S.W.2d 832, 833 Tex. 1993) (emphasis in orig.). However, only a motion for new trial filed by a party of record automatically extends the trial court's plenary power and the appellate timetable. *See State and County Mut. Fire Ins. Co. v. Kelly*, 915 S.W.2d 224, 225 (Tex.App.–Austin 1996, orig. proceeding).

**I. Form of motion.**

Each point in the motion for new trial must be stated in such a manner that the objection can be clearly identified and understood by the court. *See* TEX.R.CIV.P. 321, 322; *Meyer v. Great Am. Indemnity Co.*, 279 S.W.2d 575, 578-79 (Tex. 1955). A motion which does not comply with Rules 321 and 322 does not preserve error for appeal. *See Vasquez v. Carmel Shopping Center Co.*, 777 S.W.2d 532, 534 (Tex.App.–Corpus Christi 1989, writ denied).

**EXAMPLE:** The following examples illustrate circumstances where the motion did not preserve error for appeal:

• Allegation of collusion between the trial lawyers did not preserve complaint that the evidence is legally or factually insufficient to support the jury's liability findings or the award of damages. *See Arroyo Shrimp Farm v. Hung Shrimp Farm*, 927 S.W.2d 146, 151 (Tex.App.–Corpus Christi 1996, no writ).

• Complaint that "[t]he take-nothing judgment entered against Plaintiffs, as well as the [amount] awarded by the jury to Defendant is against the great weight and preponderance of the evidence" did not preserve challenges to jury's answers to specific questions. *See Marino v. Hartfield*, 877 S.W.2d 508, 512-13 (Tex.App.–Beaumont 1994, writ denied).

• Complaint that "when the record is viewed as a whole, the jury's verdict is against the great weight and preponderance of the evidence" did not preserve error. *See Ramey v. Collagen Corp.*, 821 S.W.2d 208, 210-11 (Tex.App.–Houston [14th Dist.] 1991, writ denied).

• No error preserved by complaint that judgment was "not just." *See Vasquez v. Carmel Shopping Center Co.*, 777 S.W.2d at 534.

• Complaint that the verdict or answer to question is "contrary to law" or "contrary to the evidence" is insufficient. *See Smith v. Brock*, 514 S.W.2d 140, 142 (Tex.Civ.App.–Texarkana 1974, no writ).

**Practice Tip**

To preserve a factual sufficiency complaint, the following rules should be observed:

• A party who does not have the burden of proof on a particular issue should attack each adverse jury finding on the ground that the evidence is factually insufficient to support the jury's answer to the particular question.

• The party with the burden of proof should attack each adverse finding, or failure to find, on the ground that the jury's answer to the particular question is against the great weight and preponderance of the evidence.

*See Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983); *Superior Trucks, Inc. v. Allen*, 664 S.W.2d 136, 145 (Tex.App.–Houston [1st Dist.] 1983, writ ref'd n.r.e.).

**J. "No evidence" point preserved only in motion for new trial.**

A legal sufficiency point preserved only in a motion for new trial will not result in rendition if the point is sustained on appeal; rather, the only relief that will be granted is a new trial. *See Horrocks v. Texas Dep't of Transportation*, 852 S.W.2d 498, 499 (Tex. 1993); *Werner v. Colwell*, 909 S.W.2d 866, 870 n. 1 (Tex. 1995).

**K. Amended motions for new trial.**

An amended motion for new trial must be filed within the 30 day period and before any preceding motion for new trial is overruled. *See* TEX.R.CIV.P. 329b(b); *Liberty Mutual Fire Ins. Co. v. Ybarra*, 751 S.W.2d 615, 619 (Tex.App.–El Paso 1988, no writ).

**Practice Tip**

The trial court cannot extend the deadline for filing an amended motion for new trial. *See Lynd v. Wesley*, 705 S.W.2d 759, 762 (Tex.App.–Houston [14th Dist.] 1986, no writ).

**L. Premature motion for new trial.**

**1. General rule.**

As a general rule, a premature motion for new trial is deemed filed on the date of, but subsequent to, the date of signing of the judgment assailed by the motion. *See* TEX.R.CIV.P. 306c; *Sewell v. Adams*, 854 S.W.2d 257, 260 (Tex.App.–Houston [14th Dist.] 1993, no writ).

**2. Effect on appellate timetable.**

A premature motion intended to assail the court's final judgment will extend the appellate timetable. *See Padilla v. LaFrance*, 907 S.W.2d 454, 458 (Tex. 1995). A premature motion for new trial is effective to extend the timetable from the date of a subsequent judgment correcting the first as long as the substance of the motion is such as could properly be raised with respect to the

corrected judgment. *See Miller v. Hernandez*, 708 S.W.2d 25, 27 (Tex.App.–Dallas 1986, no writ).

**Practice Tip**

It is currently unclear whether a premature motion which has been prematurely overruled (i.e., overruled before the judgment is signed or before a second judgment correcting the first is signed) will extend the timetable. The courts of appeals have produced conflicting results. The court in *Harris County Hosp. Dist. v. Estrada*, 831 S.W.2d 876, 879 (Tex.App.–Houston [1st Dist.] 1992, no writ) held that a motion for new trial that is both filed and overruled before the judgment is signed is effective to extend the appellate timetable. *See also Nuchia v. Woodruff*, 956 S.W.2d 612, 614-15 (Tex.App.–Houston [14th Dist.] 1997, pet. denied). In *A.G. Solar & Co. v. Nordyke*, 744 S.W.2d 646, 647-48 (Tex.App.–Dallas 1988, no writ), the court held that because the premature motion was not "live" when the second judgment was signed, it could no longer "assail" a subsequent judgment. Interestingly, no other court has cited this case for this proposition.

Until the supreme court resolves the conflict between the appellate courts, the careful practitioner should file a second motion for new trial to re-start the appellate timetable.

**3. Preservation of error in subsequent judgment.**

A premature motion for new trial overruled by operation of law, which complains of error brought forward in a subsequent judgment, preserves the complaints to the extent applicable to the subsequent judgment. *See Fredonia State Bank v. American Life Ins. Co.*, 881 S.W.2d 279, 282 (Tex. 1994).

**M. Presentment not necessary in most cases.**

If the motion for new trial raises factual insufficiency or great weight and preponderance points, then error is preserved merely by filing the motion. *See Cecil v. Smith*, 804 S.W.2d 509, 511 (Tex. 1991). No presentment of the motion is necessary. However, if the motion for new trial raises an issue that requires the trial court to hear evidence, then the trial court does not abuse its discretion by overruling the motion if the movant fails to secure a hearing. *See Fluty v. Simmons Co.*, 835 S.W.2d 664, 667-68 (Tex.App.–Dallas 1992, writ denied).

**N. Trial court plenary power.**

If the motion is not resolved within 75 days after the judgment is signed, it will be overruled by operation of law. *See* TEX.R.CIV.P. 329b(c). The trial court has the authority during the 75-day period to vacate a previously granted motion for new trial. *See Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex. 1993). The court has an additional 30 days to grant a new trial previously denied. *See Hunter v. O'Neill*, 854 S.W.2d 704, 705-06 (Tex.App.–Dallas 1993, orig. proceeding). Thus, the trial court can grant a new trial for up to 105 days, even if it previously denied a new trial or the motion was overruled by operation of law. However, the trial court can only "ungrant" or vacate its order granting a new trial within the 75 day period, not afterward. *See Porter v. Vick*, 888 S.W.2d 789, 789-90 (Tex. 1994). *See also In re Charles Steiger*, 55 s.w.3d 168, 170 (Tex.App.–Corpus Christi 2001, orig. proceeding) and the cases cited in that opinion. *But see Biaza v. Simon*, 879 S.W.2d 349, 357 (Tex.App.–Houston [14th Dist.] 1994, writ denied). The longest the trial court's plenary power may extend is 105 days. *See L.M. Healthcare, Inc. v. Childs*, 920 S.W.2d 285, 288 (Tex. 1996).

**O. New trial granted: written order required.**

An order granting a new trial must be written and signed. *See* TEX.R.CIV.P. 329b(c); *Faulkner v. Culver*, 851 S.W.2d 187, 188 (Tex. 1993) (orig. proceeding).

**EXAMPLE:** The following examples illustrate insufficient "substitutions" for the requirement that the trial court must sign a written order granting a new trial:

• The oral granting of a motion for new trial, plus a docket sheet entry stating "MNT granted," plus the *additional* act of signing an order setting the case for trial, even when considered together, do not satisfy rule 329b(c). *See Estate of Townes v. Wood*, 934 S.W.2d 806, 807 (Tex.App.–Houston [1st Dist.] 1996, orig. proceeding) (court's emphasis).

• Parties' mistaken belief, supported by trial judge's affidavit, that docket entry granting new trial had been reduced to order, is not effective. *See Cortland Line Co. v. Paradise, Inc.*, 874 S.W.2d 178 (Tex.App.–Houston [14th Dist.] 1994, writ denied).

• Neither the trial court's act of orally granting a timely motion for new trial on the record, nor its docket sheet entry, nor the two taken together, are sufficient to constitute a "written order" under rule 329b(c). *See Faulkner v. Culver*, 851 S.W.2d at 188.

**Practice Tip**

The party moving for new trial should present a written order for the trial court to sign when the motion for new trial is granted. If no written order is signed, it may be possible to challenge the judgment in a bill of review proceeding if all elements of a bill of review are met. *See Faulkner v. Culver*, 851 S.W.2d at 188 n. 2.

**P. Review on appeal.**

**1. New trial granted.**

An order granting a new trial within the trial court's plenary power is not subject to review either by direct appeal from that order, or from a final judgment rendered after the second trial. *See Cummins v. Paisan Constr. Co.*, 682 S.W.2d 235, 236 (Tex. 1984).

**2. New trial denied.**

The trial court's order denying a motion for new trial is reviewed under the abuse of discretion standard. *See Jackson v. Van Winkle*, 660 S.W.2d 807, 808-809 (Tex. 1983).

**3. Availability of mandamus.**

Mandamus is available to set aside an order granting a new trial under two circumstances:

• if the order is wholly void; for example, it is signed outside the trial court's plenary power;

• if the order expressly states that the new trial is granted on the sole ground that the jury's answers to particular questions were conflicting.

*See Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985).

**VI. Motion to Reinstate after Dismissal for Want of Prosecution: TEX. R. CIV. P. 165a.**

A trial court has the authority to dismiss a case for want of prosecution pursuant to Tex. R. Civ. P. 165a or its inherent powers. *See State v. Rotello*, 671 S.W.2d 507, 508-509 (Tex. 1984); *Clark v. Yarbrough*, 900 S.W.2d 406, 408 (Tex.App.–Texarkana 1995, writ denied). A motion to reinstate is the proper procedural response to receipt of a notice that one's case has been dismissed for want of prosecution. Rule 165a provides for both the dismissal of a case for want of prosecution and its reinstatement.

**A. Dismissal.**

Under Rule 165a, a trial court may dismiss a case for want of prosecution (1) when any party seeking affirmative relief fails to appear for any hearing or trial of which the party had notice (TEX.R.CIV.P. 165a(1)); (2) when the case has not been disposed of within the supreme court's time standards (TEX.R.CIV.P. 165a(2)); or (3) when the case has not been prosecuted with due diligence (TEX.R.CIV.P.165a(4)). *City of Houston v. Thomas*, 838 S.W.2d 296, 297 (Tex.App.–Houston [1st Dist.] 1992, no writ); *Clark v. Yarborough*, 900 S.W.2d 406, 408 (Tex.App.–Texarkana 1995, writ denied). The bases for dismissal are cumulative and independent. *Ozuna v. Southwest Bio-Clinical*

*Lab.*, 766 S.W.2d 900, 901 (Tex.App.–San Antonio 1989 writ denied); TEX.R.CIV.P. 165a(4). A party is entitled to two types of notice in this situation.

**1. Notice of intent to dismiss.**

Rule 165a directs the clerk to send notice by mail of the court's intention to dismiss and the time and place of the dismissal hearing to each party of record, or that party's attorney. TEX.R.CIV.P. 165a(1). Any party desiring to avoid dismissal should appear at the dismissal hearing prepared to demonstrate good cause for retaining the case on the court's docket. TEX.R.CIV.P. 165a(1).

**2. Notice of dismissal.**

If no party appears, or if the appearing party fails to show good cause for retaining the case, the court shall dismiss the case for want of prosecution as specified in the notice. The clerk is required to send the notice specified by rule 306a to each party of record, or that party's attorney, notifying them that the case has been dismissed for want of prosecution. TEX.R.CIV.P. 165 a(1).

**B. Grounds for reinstatement.**

**1. Dismissal under rule 165a.**

When a case is dismissed because a party seeking affirmative relief did not appear for a hearing or trial of which the party had notice, the trial court must reinstate the case if, upon hearing, it is established that the failure to appear was not intentional nor the result of conscious indifference, but was due to accident or mistake or has been otherwise reasonably explained. *Smith v. Babcock & Wilcox Const. Co.*, 913 S.W.2d 467, 468 (Tex. 1995); *Clark v. Yarborough*, 900 S.W.2d 406, 408 (Tex.App.–Texarkana 1995, writ denied); TEX.R.CIV.P. 165a(3). The standard is essentially that as for setting aside a default judgment. *Smith*, 913 S.W.2d at 468.

Whether a party's conduct was intentional or the result of conscious indifference is a question of fact to be determined by the trial court in its discretion. *Clark v. Yarborough*, 900 S.W.2d 406, 409 (Tex.App.–Texarkana 1995, writ denied); *Price v. Firestone Tire & Rubber Co.*, 700 S.W.2d 730, 733 (Tex.App.–Dallas 1985, no writ).

**2. Dismissal pursuant to trial court's inherent authority.**

In determining whether to dismiss a case for want of prosecution, the court may consider the entire history of the case, including the length of time the case was on file, the amount of activity in the case, the request for a trial setting, and the existence of reasonable excuses for delay. *Frenzel v. Browning-Ferris Indus.*, 780 S.W.2d 844, 845 (Tex.App.–Houston [14th Dist.] 1989, no writ).

**Practice Tip**

No single factor is dispositive. *City of Houston v. Thomas*, 838 S.W.2d at 297. The central question is whether the complaining party exercised due diligence in prosecuting the case. *Id.* The assertion that the movant did not intend to abandon the case is immaterial. *Id.* When a court dismisses a case for want of diligent prosecution, rule 165a(3) does not apply and the court need not reinstate the case upon a mere showing that the lack of prosecution was not intentional but the result of accident or mistake. *Ozuna*, 766 S.W.2d at 903.

**C. Form of Motion.**

The motion to reinstate must set forth the grounds for reinstatement and must be verified by the party or his attorney. TEX.R.CIV.P. 165a(3). It must be served on each party or that party's attorney of record. The verification requirement is jurisdictional. A trial court abuses its discretion in granting an unverified motion to reinstate. *McConnell v. May*, 800 S.W.2d 194, 194 (Tex. 1990).

**Practice Tip**

A joint motion to reinstate, after dismissal for nonappearance at a pretrial conference, has the same effect as a verified motion to reinstate. *Federal Lanes, Inc. v. City of Houston*, 905 S.W.2d 686, 687 (Tex.App.–Houston [1st Dist.] 1995, writ denied). The trial court has the ministerial duty to grant relief in strict accordance with the parties' agreement and the motion is effective to extend the appellate timetable. *Id.* at 689, 690.

**D. Time for filing.**

A motion to reinstate must be filed within 30 days after the order of dismissal is signed. *McConnell v. May*, 800 S.W.2d 194, 194 (Tex. 1990). A court has no jurisdiction to consider motions filed outside the 30-day time period. *Nealy v. Home Indemnity Co.*, 770 S.W.2d 592, 593 (Tex.App.–Houston [14th Dist.] 1989, no writ); TEX.R.CIV.P. 165a(3).

**Practice Tip**

Dismissals for want of prosecution account for a high percentage of cases in which no notice of the final judgment is received. The party that does not obtain notice of the dismissal within 20 days of the date the order dismissing the case is signed must proceed under rule 306a to establish the date on which it obtained actual knowledge of the judgment. The complaining party then has 30 days from that date in which to move for reinstatement. TEX.R.CIV.P. 306a. However, a party that does not obtain actual knowledge of an order of dismissal within 90 days of the date it is signed cannot move for reinstatement. *Howley v. Haberman*, 878 S.W.2d 139, 140 (Tex. 1994) (per curiam) (citing *Levit v. Adams*, 850 S.W.2d 469 (Tex. 1993) (per curiam). The only option for review after the 90 day period expires is by equitable bill of review. *Levit*, 850 S.W.2d at 70.

Notice acquired by an attorney after the termination of the attorney-client relationship will not be imputed to the former client. *Cannon v. ICO Tubular Servs.*, 905 S.W.2d 380, 387 (Tex.App.–Houston [1st Dist.] 1995, no writ); *Langdale v. Villamil*, 813 S.W.2d 187, 190 (Tex.App.–Houston [14th Dist.] 1991, no writ).

**E. Rule 165a requires court to set hearing on Motion to Reinstate.**

"The clerk shall deliver a copy of the motion to reinstate to the judge, who *shall* set a hearing on the motion as soon as practicable. The court shall notify all parties or their attorneys of record of the date, time and place of the hearing." TEX.R.CIV.P. 165a(3).

There are two lines of cases on the mandatory nature of the hearing provision.

**1. Hearing is mandatory.**

Under the plain language of rule 165a, the setting of a hearing is mandatory. Several courts have held that a trial judge has no discretion in

whether to set a hearing on a timely filed motion to reinstate. *Thordson v. City of Houston*, 815 S.W.2d 550, 550 (Tex. 1991); *Gulf Coast Inv. Corp. v. NASA I Business Center*, 754 S.W.2d 152, 153 (Tex. 1988). Further, this mandatory requirement cannot be altered by a local rule requiring that motions be taken by submission. *NASA I Business Center v. American Nat'l Ins. Co.*, 747 S.W.2d 36, 38-9 (Tex.App.–Houston [1st Dist.] 1988), *writ denied per curiam*, 754 S.W.2d 152 (Tex. 1988).

Two courts have held that rule 165a requires the court to set a hearing on a timely, verified motion to reinstate even if the movant has not requested a hearing. *Bush v. Ward*, 747 S.W.2d 43, 45 (Tex.App.–Beaumont 1988, no writ); *Matheson v. American Carbonics*, 867 S.W.2d 146 (Tex.App.–Texarkana 1993, no writ) (movant's request is not controlling; hearing is required unless affirmatively waived).

**2. Hearing is discretionary.**

In spite of the mandatory language of the rule, several courts have held that the requirement to set a hearing is not triggered until a hearing is requested. The court does not abuse its discretion in failing to hold a hearing on a motion to reinstate unless the movant first requests a hearing. *Cabrera v. Cedarapids, Inc.*, 834 S.W.2d 615, 618 (Tex.App.–Houston [14th Dist.] 1992), *writ denied*, 847 S.W.2d 247 (Tex. 1993); *Hensley v. Amber Sky, Inc.*, 624 S.W.2d 774, 775 (Tex.App.–Beaumont 1981, no writ) (rule's mandatory language that "court shall set the motion for a hearing" does not relieve movant of burden to request a hearing); *Calaway v. Gardner*, 525 S.W.2d 262, 264 (Tex.Civ.App.–Houston [14th Dist.] 1975, no writ) (same).

**F. Court may reinstate on its own motion.**

Likening reinstatement to a new trial, the Houston courts of appeals have held that a trial court may reinstate a case on its own motion during the period of its plenary power over its judgment dismissing the case for want of prosecution. *Neese v. Wray*, 893 S.W.2d 169, 170 (Tex.App.–Houston [1st Dist.] 1995, no writ) (citing *Stelter v. Longoria*, 687 S.W.2d 498, 499 (Tex.App.–Houston [14th Dist.] 1985, no writ).

**G. Written order required.**

An oral pronouncement and/or docket entry purporting to reinstate a case is not an acceptable substitute for the written order required by TEX.R.CIV.P. 165a(3). *Emerald Oaks Hotel/Conference Center, Inc. v. Zardenetta*, 776 S.W.2d 577, 578 (Tex. 1989) (orig. proceeding). To effect reinstatement, a written order is required. *Id.*

**H. Trial court's ruling on timely filed motion.**

The filing of a motion to reinstate extends the trial court's plenary power in the same manner as does the filing of a motion for new trial. *McConnell*, 800 S.W.2d at 194; *Butts v. Capitol City Nursing Home, Inc.*, 705 S.W.2d 696, 697 (Tex. 1986); TEX.R.CIV.P. 165a(3). If the motion to reinstate is not decided by signed written order within seventy-five days after the judgment is signed, or within such other time as may be allowed by rule 306a, the motion shall be deemed overruled by operation of law. The trial court, regardless of whether an appeal has been perfected, has plenary power to reinstate the case until 30 days after all timely filed motions are overruled, either by a written, signed order or by operation of law. TEX.R.CIV.P. 165a.

**I. Premature Motion to Reinstate.**

Unlike a premature motion for new trial, a premature motion to reinstate is not deemed to have been filed on the date of but subsequent to the judgment. *Brim Laundry Machinery Co. v. Washex Machinery Corp.*, 854 S.W.2d 297, 301 (Tex.App.–Fort Worth 1993, writ denied) (motion to reinstate not deemed to have been filed on date of but subsequent to the order of dismissal); *Christopher v. Fuerst*, 709 S.W.2d 266, 268 (Tex.App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.); *Hales v. Chubb & Son, Inc.*, 708 S.W.2d 597, 599 (Tex.App.–Houston [1st Dist.] 1986, no writ) (TEX.R.CIV.P. 306(c), the rule that rescues premature motions for new trial, does not list motions to reinstate in its savings provision). Thus, the party who files a motion to reinstate

after receiving notice of the trial court's intent to dismiss but before the dismissal, must refile the motion after the dismissal for want of prosecution is signed.

**J. Effect on appellate timetable.**

A timely, verified motion to reinstate extends the time for perfecting appeal in the same manner as a timely filed motion for new trial. *Butts v. Capitol City Nursing Home, Inc.*, 705 S.W.2d 696, 697 (Tex. 1986); *Neese v. Wray*, 893 S.W.2d 169, 170-71 (Tex.App.–Houston [1st Dist.] 1995, no writ); *Nealy v. Home Indemnity Co.*, 770 S.W.2d 592, 594-95 (Tex.App.–Houston [14th Dist.] 1989, no writ); TEX.R.CIV.P. 165a(3).

**Practice Tip**

An unverified motion to reinstate does not extend the appellate timetable. *Butts v. Capitol City Nursing Home, Inc.*, 705 S.W.2d 696, 697 (Tex. 1986); *Neese v. Wray*, 893 S.W.2d 169, 170-71 (Tex.App.–Houston [1st Dist.] 1995, no writ); *City of McAllen v. Ramirez*, 875 S.W.2d 702, 704-705 (Tex.App.–Corpus Christi 1994, orig. proceeding); *Benyo v. Hem*, 833 S.W.2d 714, 716 (Tex.App.–Houston [1st Dist.] 1992, no writ); *Hales v. Chubb & Son, Inc.*, 708 S.W.2d 597, 598 (Tex.App.–Houston [1st Dist.] 1986, no writ). A trial court abuses its discretion in granting an unverified motion to reinstate. *McConnell v. May*, 800 S.W.2d 194, 194 (Tex. 1990).

**K. Review on appeal.**

A trial court's denial of a motion to reinstate is reviewed for a clear abuse of discretion, as is the order dismissing the case for want of prosecution. *Nawas v. R & S Vending*, 920 S.W.2d 734, 737 (Tex.App.–Houston [1st Dist.] 1996, no writ); *Clark v. Yarborough*, 900 S.W.2d 406, 409 (Tex.App.–Texarkana 1995, writ denied); *Leverman v. Cartall*, 715 S.W.2d 728, 729 (Tex.App.–Texarkana 1986, writ ref'd n.r.e.). The abuse of discretion standard applies whether the court dismissed the case under rule 165a or pursuant to its inherent powers. *State v. Rotello*, 671 S.W.2d at 509.

**L. Mandamus.**

The improper granting of a motion to reinstate may be challenged by mandamus. *See McConnell v. May*, 800 S.W.2d 194 (Tex. 1990).

## VII. Motions to Modify, Correct or Reform Judgment: TEX.R.CIV.P. 329(b).

**A. Purpose.**

The obvious purpose of a motion to modify, correct or reform a judgment is to enable the trial court to correct some error in the judgment.

**EXAMPLE:** A motion to modify, correct or reform the judgment would be appropriate under the following circumstances: (1) to correct the award or calculation of prejudgment interest, *see Delhi Gas Pipeline Corp. v. Lamb*, 724 S.W.2d 97, 100-01 (Tex.App.–El Paso 1986, writ ref'd n.r.e.) (op. on rhg.); (2) to complain of the failure to award costs to the prevailing party, *see Portland Sav. & Loan Ass'n v. Bernstein*, 716 S.W.2d 532, 541 (Tex.Civ.App.–El Paso 1976, writ ref'd n.r.e.); or (3) to ask for sanctions. *Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*, 10 S.W.3d 308, 312 (Tex. 1999).

**B. Deadline for filing.**

A motion to modify, correct, or reform a judgment must be filed within 30 days after the judgment is signed. TEX.R.CIV.P. 329b(g).

**C. Effect on timetable.**

A timely filed postjudgment motion that seeks a substantive change in an existing judgment qualifies as a motion to modify under Rule 329b(g), thus extending the trial court's plenary jurisdiction and the appellate timetable. *Lane Bank*, 10 S.W.3d at 314. In contrast, a timely filed postjudgment motion that merely seeks to correct clerical errors, such as

punctuation, grammar or misspellings, will not qualify under Rule 329b(g). *Id.*

**D. Restarting the timetable.**

If a judgment is modified, corrected or reformed during the trial court's plenary power, the time for appeal runs from the time the modified, corrected or reformed judgment is signed. TEX.R.CIV.P. 329b(h); *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988). Any change, whether or not material or substantial, made in a judgment while the trial court retains plenary power, operates to delay commencement of the appellate timetable until the modified, corrected or reformed judgment is signed. *Id.*

**EXAMPLE:** The following changes in a judgment have been held sufficient to extend the appellate timetable:

• Deletion of a recital that the court granted a directed verdict "for the reason that no expert witness was presented by plaintiff as to defendant's negligence." *Miller v. Hernandez*, 708 S.W.2d 25, 26 (Tex.App.–Dallas 1986, no writ);

• A change in the date of signing of a reinstated judgment qualifies as a modification, correction and/or reformation of the judgment to start anew the timetable for appellate review. *Clark v. McFerrin*, 760 S.W.2d 822, 825 (Tex.App.–Corpus Christi 1988, writ denied).

The appellate timetable does not begin to run from the date of a modified or corrected judgment, if the face of the record reveals that the trial court entered the new order for the sole purpose of extending the appellate timetable. *Mackie v. McKenzie*, 890 S.W.2d 807, 808 (Tex. 1994).

**Practice Tip**

• 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, no writ).

• If a court grants a post-judgment motion to modify but only signs an order modifying the previous judgment, use *Landmark American Ins. Co. v. Pulse Ambulance Serv., Inc.*, 813 S.W.2d 497 (Tex. 1991) as authority that the appellate timetable begins from the order modifying the judgment. In that case, an order which modified the judgment by reducing the damages awarded, following "motion for new trial or in the alternative, for remittitur" started the time for appeal.

**VIII. Findings of Fact and Conclusions of Law: TEX.R.CIV.P. 296, 297, 298, 299, 299a.**

**A. Request for findings of fact and conclusions of law.**

**1. Written request.**

In any case tried without a jury, any party may request the court to state in writing its findings of fact and conclusions of law. TEX.R.CIV.P. 296. The request must be entitled "Request for Findings of Fact and Conclusions of Law." *Id.*

**2. File request with clerk.**

The request must be filed with the clerk, who is required by the rule to immediately call the request to the attention of the judge who tried the case. TEX.R.CIV.P. 296.

**3. Deadline for filing request.**

The request must be filed with the clerk within 20 days after the judgment is signed. TEX.R.CIV.P. 296. A party is not entitled to findings of fact or conclusions of law if the request is not timely filed. *Harmon v. Harmon*, 879 S.W.2d 213, 216 (Tex.App.–Houston [14th Dist.] 1994, writ denied).

**Practice Tip**

A party desiring findings of fact and conclusions of law should always comply with the deadline. If a deadline is missed, however, it may be possible to persuade the trial court to grant an extension for late filing. *See Electronic Power Design, Inc. v. R.A. Hanson Co.*, 821 S.W.2d 170, 171 (Tex.App.–Houston [14th Dist.] 1990, no writ).

**4. Premature request.**

A request filed before the court signs a judgment is deemed filed on the date the judgment was signed. *Echols v. Echols*, 900 S.W.2d 161, 162-63 (Tex.App.–Beaumont 1995, writ denied).

**5. Trial court's deadline.**

The trial court must file requested findings of fact and conclusions of law within twenty days after the request is filed. TEX.R.CIV.P. 297.

**B. Effect on timetable.**

A timely request for findings of fact and conclusions of law extends the timetable for appeal when findings and conclusions are required by Rule 296, or when they are not required by Rule 296 but are not without purpose - that is, they could properly be considered by the appellate court. *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440 (Tex. 1997).

**EXAMPLE:** A timely request for findings of fact and conclusions of law will extend the appellate timetable in the following instances:

• Conventional trial before the court.

• Default judgment on a claim for unliquidated damages.

• Judgment rendered as sanctions.

• Any judgment based in any part on an evidentiary hearing.

*Id.*

A request for findings of fact and conclusions of law does not extend the time for perfecting appeal of a judgment rendered as a matter of law, where findings and conclusions can have no purpose and should not be requested, made, or considered on appeal. *Id.*

**EXAMPLE:** The appellate timetable is not extended in the following instances:

• Summary judgment.

• Judgment after directed verdict.

• Judgment non obstante veredicto.

• Default judgment awarding liquidated damages.

• Dismissal for want of prosecution without an evidentiary hearing.

• Dismissal for want of jurisdiction without an evidentiary hearing.

• Dismissal based on pleadings or special exceptions.

• Judgment rendered without an evidentiary hearing.

**C. Notice of Past Due Findings/Conclusions.**

If the court fails to prepare findings and conclusions, a "Notice of Past Due Findings of Fact and Conclusions of Law" must be filed. TEX.R.CIV.P. 297. The notice must state the date the original request was filed and the date the findings and conclusions were due. *Id.*

**1. Deadline for filing notice.**

The notice must be filed with the clerk within 30 days of the original request. TEX.R.CIV.P. 297.

**2. Trial court's deadline.**

The court has 40 days from the date of the original request to file the findings and conclusions. TEX.R.CIV.P. 297.

**3. Premature notice.**

A prematurely filed notice of past due findings will not be deemed timely filed. *Echols v. Echols*, 900 S.W.2d at 162-63.

**D. Additional or amended findings and conclusions.**

**1. Deadline for filing request.**

After the court files findings of fact and conclusions of law, any party may file with the clerk a request for specified additional or amended findings and conclusions within 10 days of the filing of the original findings and conclusions. TEX.R.CIV.P. 298.

**Practice Tip**

A prematurely filed notice for additional findings will not be deemed timely filed and will waive error on the trial court's failure to make additional findings. *Mohnke v. Greenwood*, 915 S.W.2d 585, 590 (Tex.App.–Houston [14th Dist.] 1996, no writ).

**2. Trial court's deadline.**

The court must file any additional or amended findings and conclusions within 10 days after the request is filed. TEX.R.CIV.P. 298.

**3. Proposed findings and conclusions must be submitted.**

Rule 298 contemplates that the request for further additional or amended findings shall specify the further additional or amended findings the party making the request desires the trial court to make and file. *Wagner v. Riske*, 142 Tex. 337, 178 S.W.2d 117, 119-20 (1944). A bare request is not sufficient; proposed findings must be submitted. *Alvarez v. Espinoza*, 844 S.W.2d 238, 241-42 (Tex.App.–San Antonio 1992, writ dism'd w.o.j.).

**4. When appropriate.**

The trial court is required to make additional findings of fact and conclusions of law only if they relate to ultimate or controlling issues. *Rafferty v. Finstad*, 903 S.W.2d 374, 376 (Tex.App.–Houston [1st Dist.] 1995, writ denied). The trial court is not required to make additional findings that are unsupported in the record, that relate merely to other evidentiary matters, or that are contrary to other previous findings. *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 838 (Tex.App.–Texarkana 1996, denied).

An ultimate fact issue is one that is essential to the right of action. *Finch v. Finch*, 825 S.W.2d 218, 221 (Tex.App.–Houston [1st Dist.] 1992, no writ). Such an issue seeks a fact that would have a direct effect upon the judgment. *Id.* In contrast, an evidentiary issue is one that the fact finder may consider in deciding the controlling issue, but that is not a controlling issue itself. *Id.*

**EXAMPLE:** A trial court is not required to file findings of fact listing the value of each item of property owned by the estates of the parties to a divorce suit. *Finch*, 825 S.W.2d at 221.

**E. Findings of fact must be separately filed.**

Findings of fact shall not be recited in a judgment. TEX.R.CIV.P. 299a. Rather, findings of fact are filed as a document or documents separate and apart from the judgment. *Id.*; *Valley Mechanical Contractors, Inc. v. Gonzales*, 894 S.W.2d 832, 834 (Tex.App.–Corpus Christi 1995,

no writ). The appellate court will not treat recitations of fact in the judgment as valid findings of fact. *Valley Mechanical*, 894 S.W.2d at 834.

The appellate court may not look to any oral comments that the judge may have on the record as being a substitute for findings of fact and conclusions of law. *In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984).

**F. Review on appeal.**

**1. Trial court's refusal to file.**

Following a proper request and reminder, the trial court's duty to file findings of fact and conclusions of law is mandatory. *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 771 (Tex. 1989). The failure to respond where all requests have been made is presumed harmful, unless the record affirmatively shows no injury. Id. The appropriate question to consider in determining harm in such a case is whether the appellant will be forced to guess the reason or reasons that the trial court ruled against it. *City of Los Fresnos v. Gonzales*, 830 S.W.2d 627, 629 (Tex.App.–Corpus Christi 1992, no writ).

**Practice Tip**

The appellate court may, in the appropriate case, abate the appeal for the trial court to make findings and conclusions. *See Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d at 773.

**2. Findings and conclusions not requested or filed.**

Where findings are neither requested or filed, the court on appeal will imply that the trial court made all necessary findings to support its judgment. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992). When a statement of facts is brought forward, the trial court's implied findings may be challenged by factual or legal sufficiency points in the same manner as jury findings or a trial court's findings are challenged. *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989). If the evidence supports the implied findings, the court on appeal must uphold the judgment on any theory of law applicable to the case. *In re W.E.R.*, 669 S.W.2d at 717.

**3. Effect of findings on appeal.**

Findings of fact have the same force and dignity as a jury's verdict. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). A trial court's findings of fact are not conclusive when a complete statement of facts appears in the record. *Mohnke v. Greenwood*, 915 S.W.2d 589. A trial court's findings of fact are reviewable for legal and factual sufficiency of the evidence by the same standards that are applied in reviewing the evidence supporting a jury's verdict. *Id.*

**Practice Tip**

Unless the trial court's findings are challenged by a point of error on appeal, they are binding on the appellate court. *County of El Paso v. Ortega*, 847 S.W.2d 436, 440 (Tex.App.–El Paso 1993, no writ).

**4. Effect of conclusions on appeal.**

A trial court's conclusions are not binding upon the appellate court and the court on appeal is free to make its own legal conclusions. *County of El Paso*, 847 S.W.2d at 441. Where the trial court's findings of fact conflict with its conclusions of law, findings of fact will be deemed to control. *Id.*

**IX. Bill of Review: TEX.R.CIV.P. 329(f).**

Rule 329b sets out the time periods for filing post verdict motions for new trial and to modify, correct or reform the judgment. It also provides a procedure for challenging a judgment when a party has missed those time periods:

> On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill or review for sufficient cause, filed within the time allowed by law . . . . TEX.R.CIV.P. 329b(f).

**A. Purpose of bill of review.**

A bill of review is an equitable proceeding brought by a party to a former action seeking to set aside a judgment that is no longer appealable or subject to a motion for new trial. *Ortega v. First RepublicBank*, 792 S.W.2d 452, 453 (Tex. 1990); *Transworld Fin. Serv. v. Briscoe*, 722 S.W.2d 407 (Tex. 1987).

**B. Elements of bill of review.**

The petitioner seeking to show entitlement to an equitable bill of review must allege with particularity facts showing the following: (1) a meritorious defense to the cause of action that supports the judgment and (2) that the judgment was rendered as a result of fraud, accident, wrongful act of the opposite party, or official mistake, (3) unmixed with the petitioner's own negligence. *Baker v. Goldsmith*, 582 S.W.2d 404, 406 (Tex. 1979).

**Practice Tip**

The U.S. Supreme Court has eliminated the requirement to show a meritorious defense when the bill of review petitioner establishes that he was not validly served with process and had no notice of the judgment. *Peralta v. Heights Medical Center*, 485 U.S. 80, 108 S. Ct. 896, 898 (1988); *see Brooks v. Associates Fin. Serv. Corp.*, 892 S.W.2d 91, 94 (Tex.App.–Houston [14th Dist.] 1994, rule 130d motion filed).

**1. Fraud.**

To be entitled to a bill of review, the petitioner must show that he was prevented from proving his defense because of extrinsic rather than intrinsic fraud. *Alexander v. Hagedorn*, 226 S.W.2d 996, 1001 (Tex. 1950). Extrinsic fraud is a wrongful act of the opposing party that prevented the petitioner either from knowing his rights or defenses or from having a fair opportunity to present them at trial. *Lawrence v. Lawrence*, 911 S.W.2d 443, 447 (Tex.App.–Texarkana 1995, writ denied). The extrinsic fraud is collateral to the matter that was tried and not something that was actually or potentially an issue at trial. *Id.*; *Law v. Law*, 792 S.W.2d 150, 153 (Tex.App.–Houston [1st Dist.] 1990, writ denied). Extrinsic fraud includes false testimony, fraudulent instruments, and any fraudulent matter the court heard and considered in rendering judgment. *Lawrence*, 911 S.W.2d at 447 n.2.

**2. Extrinsic fraud.**

Only extrinsic fraud will entitle a petitioner to bill of review. *Nichols v. Jack Eckerd Corp.*, 908 S.W.2d 5, 8 (Tex.App.–Houston [1st Dist.] 1995, no writ) (petitioner who alleged that he suffered an adverse judgment because of fraudulent or wrongful act of his attorney was not excused from pleading and proving extrinsic fraud on the part of his opponent) (citing *Transworld Fin. Serv. v. Briscoe*, 722 S.W.2d 407 (Tex. 1987). *See also Lawrence v. Lawrence*, 911 S.W.2d 443, 447 Tex.App.–Texarkana 1995, writ denied) (where husband's fraud allegations were based on wife's acknowledgment at trial that she had not included certain community funds in her inventory, the allegations at best raised intrinsic fraud because the court heard and considered the wife's admission in rendering judgment; thus the allegations were not sufficient to support a bill of review which requires a showing of extrinsic fraud).

The negligence of a party's attorney is insufficient to fulfill the second requirement (fraud) for bill of review relief. *Transworld Fin. Serv. v. Briscoe*, 722 S.W.2d 407 (Tex. 1987) (expressly declining to adopt the reasoning in *Pierce v. Terra Mar Consultants, Inc.*, 566 S.W.2d 49, 53 (Tex.Civ.App.–Texarkana 1978, writ dism'd w.o.j.)).

**3. Official mistake.**

The failure of the court clerk to send notice of a judgment is equivalent to official mistake. *Nichols*, 908 S.W.2d at 8; *Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240, 244-45 (Tex. 1974).

**4. Meritorious defense.**

The assertion of a meritorious defense to the underlying cause of action must be set out with particularity and must be substantiated by affidavit or verified. *Nichols*, 908 S.W.2d at 9. The petitioner must allege with particularity sworn facts sufficient to constitute a defense and, as a pretrial matter, support the allegations with prima facie proof. *Baker v. Goldsmith*, 582 S.W.2d 404, 408 (Tex. 1979).

**C. Jurisdiction over bill of review.**

**1. Trial court.**

Only the trial court rendering the original judgment has jurisdiction over a bill of review proceeding attacking that judgment. *Solomon, Lambert, Roth & Assoc., Inc. v. Kidd*, 904 S.W.2d 896, 900 (Tex.App.–Houston [1st Dist.] 1995, no writ) (requirement that bill of review be filed in same court that rendered the judgment under attack is a matter of jurisdiction, not merely a matter of venue).

**2. Appellate court.**

An appellate court has no appellate jurisdiction over an interlocutory bill of review. *Jordan v. Jordan*, 907 S.W.2d 471 (Tex. 1995). A bill of review that sets aside a prior judgment but does not dispose of the underlying case on the merits is interlocutory and not appealable. *Tesoro Petroleum v. Smith*, 796 S.W.2d 705 (Tex. 1990); Jordan, 907 S.W.2d at 472.

**D. A bill of review is not available to a party that had a remedy at law.**

A party seeking bill of review must show that he exercised due diligence to avail himself of all adequate legal remedies against the former judgment. *Lawrence*, 911 S.W.2d 443, 448 (Tex.App.–Texarkana 1995, writ denied). If he had legal remedies but ignored them, the equitable remedy of bill of review is not available. *Id.*

**1. Party who neglects to appeal cannot later proceed by bill of review.**

As an equitable proceeding, a bill of review may not be used by a party who neglected to urge a motion for new trial or to appeal when he had the right to do so. *Rizk v. Mayad*, 603 S.W.2d 773, 776 (Tex. 1980). A bill of review is not available to correct a party's or its attorney's oversight or lack of diligence. *French v. Brown*, 424 S.W.2d 893, 895 (Tex. 1967) (bill of review denied because party failed to explain failure to appeal); *Conrad v. Orellana*, 661 S.W.2d 309, 313 (Tex.App.–Corpus Christi 1983, no writ) (bill of review denied when attorney failed to make reasonable inquiries regarding pending litigation).

A party's misplaced reliance on his attorney does not constitute official mistake. *Lawrence v. Lawrence*, 911 S.W.2d 443, 448 (Tex.App.–Texarkana 1995, writ denied) (husband's failure to prosecute an appeal or writ of error was result of his or his attorney's negligence or mistake, not official mistake); *Swearingen v. Swearingen*, 487 S.W.2d 784, 786 (Tex.Civ.App.–San Antonio 1972, writ dism'd).

Financial hardship is not a sufficient excuse for failure to appeal. *Lawrence*, 911 S.W.2d at 448 (citing *Trigg v. Trigg*, 83 S.W.2d 1066, 1070 (Tex.Civ.App.–Fort Worth 1935, writ dism'd).

**2. Party who is unsuccessful on appeal cannot later proceed by bill of review.**

Moreover, a bill of review cannot be used as an additional remedy after a party has made an unsuccessful appeal. *Rizk*, 603 S.W.2d at 776; *Wadkins v. Diversified Contractors, Inc.*, 734 S.W.2d 142, 144 (Tex.App.–Houston [1st Dist.] 1987, no writ) (party that failed to file appeal bond timely could not obtain relief by bill of review). A petitioner for bill of review may not raise points of error in a bill of review that have

been or could have been raised by appeal in the original proceeding. *Wadkins*, 734 S.W.2d at 144.

**F. A bill of review is not available to a party whose negligence caused or contributed to its failure to challenge the judgment.**

**1. Petitioner's negligence.**

Where the alleged accident or wrongful act of the opposing party is mixed with the petitioner's own negligence, the petitioner cannot pursue a bill of review. *See State v. 1985 Chevrolet Pickup Truck*, 778 S.W.2d 463, 464 (Tex. 1989); *French v. Brown*, 424 S.W.2d 893, 895 (Tex. 1967).

**2. Attorney's negligence.**

Where the alleged wrongful act is the act of the petitioner's attorney, the petitioner's bill of review will be denied. *Nichols v. Jack Eckerd Corp.*, 908 S.W.2d 5, 8 (Tex.App.–Houston [1st Dist.] 1995, no writ).

**F. Allegations in the petition for bill of review may be vulnerable to special exceptions.**

Statements in a party's petition may establish that the party cannot meet the threshold requirements for a bill of review. Dismissal on special exceptions is proper when the petitioner's allegations affirmatively negate satisfaction of the threshold requirements for obtaining a bill of review. *See Steward v. Steward*, 734 S.W.2d 432, 435 (Tex.App.–Fort Worth 1987, no writ) (when facts affirmatively alleged in petition show petitioner had right of appeal, bill of review is precluded); *Lerma v. Bustillos*, 720 S.W.2d 204, 206 (Tex.App.–San Antonio 1986, no writ) (petitioner failed to allege facts showing entitlement to bill of review); *see also Podgoursky v. Frost*, 394 S.W.2d 185, 190 (Tex.Civ.App.–San Antonio 1965, writ ref'd n.r.e.).

**1. No hearing is required before dismissal.**

Where the petition on its face does not support the right to a bill of review, the petitioner is not entitled to a hearing. *See Steward v. Steward*, 734 S.W.2d 432, 435-36 (Tex.App.–Fort Worth 1987, no writ) (no hearing required when petition shows on its face that threshold requirements are not met); *Lerma v. Bustillos*, 720 S.W.2d 204, 206 (Tex.App.–San Antonio 1986, no writ) (no hearing required when petitioner failed to allege facts showing that prior judgment was the result of fraud or wrongful act of opponent).

**2. Court is not required to allow opportunity to replead.**

Further, when fundamental defects in the petition cannot not be cured by repleading, the trial court need not provide the petitioner an opportunity to replead. *See Steward*, 734 S.W.2d at 435-36; *Lerma*, 720 S.W.2d at 206.

**G. Other defenses to bill of review.**

**1. No underlying cause of action against defendant.**

A defendant may obtain a take-nothing judgment in a bill of review proceeding by showing that the petitioner had no cause of action against him in the underlying case. *Westchester Fire Ins. Co. v. Nuckols*, 666 S.W.2d 372, 375 (Tex.App.–Eastland 1984, writ ref'd n.r.e.).

**2. Statute of limitation.**

Absent a showing of extrinsic fraud, a bill of review is barred by a four year statute of limitations. *Sutherland v. Sutherland*, 560 S.W.2d 531, 533 (Tex.Civ.App.–Texarkana 1978, writ ref'd n.r.e.); TEX. CIV. PRAC. & REM. CODE ANN. §16.051.