POST-TRIAL PRESERVATION OF ERROR: PRACTICE, PROCEDURE & STRATEGY

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SELECTED RECENT PRESENTATIONS and PAPERS

- "Winding down the trial, gearing up for appeal: Tips to get your case from the trial court to the court of appeals," Austin Bar Association Fourth Friday CLE Series (June 24, 2011)
- "Property in transit: Implications of recent cases and strategy considerations" Texas Oil & Gas Association 2011 Property Tax Representatives Annual Conference (February 2011) (co-presenter)
- "Appealing Bench Trials" State Bar Appellate Practice 101 (September 2010)
- "Statute of Limitations Issues in the Probate, Guardianship & Trust Context" THE ADVOCATE (Vol. 48 Fall 2009)
- "Appealing Bench Trials" State Bar Nuts and Bolts of Appellate Practice (September 2009)
- "Oil Tank Farm and Gas Storage Cases on Appeal" Texas Oil & Gas Association 2009 Property Tax Representatives Annual Conference (February 2009) (co-presenter)
- "Case Law Update" Austin Bar Association Nuts & Bolts of Administrative Law Seminar (February 2009)
- "Practice Before the Courts of Appeals" State Bar Appellate Boot Camp (September 2008)
- "Jury Charge Issues" State Bar 31st Annual Advanced Civil Trial Course (August/September/November 2008)
- "Midland Tank Farm Appeal Update" Texas Oil & Gas Association 2008 Property Tax Representatives Annual Conference (February 2008) (co-presenter)
- "Not Just for Toxic Tort Cases: Strategic Use of Multidistrict Litigation Consolidation" 71 TEX. BAR J. 98 (2008) (co-author with Lynne Liberato)
- "Preserving Issues in Post-Trial Motions" Austin Bar Association Civil Litigation Section Ultimate Trial Notebook Seminar (June 2007)
- "Appellate Practice Tips Every Lawyer Needs to Know" Austin Bar Association CLE series (December 2006)
- "Multidistrict Litigation" 20th Annual Advanced Civil Appellate Practice Course (September 2006)
- "Case Law Update" 7 TEX. TECH. ADMIN. L.J. 1 (Spring 2006) (co-author)
- "Appeals Involving the Government" 19th Annual Advanced Civil Appellate Practice Course (September 2005)
- "Case Law Update" Austin Bar Association Annual Advanced Administrative Law Seminar (2005, 2004, 2002)
- "Supreme Court Update" College of the State Bar Summer School (co-presenter) (July 2005)
- *Austin Lawyer*: "Third Court of Appeals Update" - monthly article (2001-present)
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INTRODUCTION[1]

Post-trial preservation involves balancing competing purposes. On one hand, post-trial motions provide one last chance to try to persuade the trial court to accept your view of the facts and law and perhaps avoid an appeal. On the other hand, post-trial motions are the opportunity to preserve error with an eye toward an appeal. This paper focuses on preservation issues with post-verdict and post-judgment motions and offers some practical, strategy considerations for each.

POST-VERDICT PRESERVATION OF ERROR

I. MOTION FOR JUDGMENT ON THE VERDICT

A. Purpose of the motion for judgment.

The prevailing party files a motion for judgment and a proposed judgment for the trial court to sign. This motion can be filed after a jury trial or a bench trial.

B. Mechanics of the motion and procedure to follow.

1. Form of the motion. There is no particular form for this motion. As discussed below, the only consideration on the form is to include qualifying language in the motion if there are portions of the judgment with which the party disagrees and intends to appeal. *See First Nat'l Bank v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989).

2. Deadline for filing. There is no deadline to file the motion for judgment.

3. Impact on appellate deadlines or plenary power. The motion has no effect on plenary power and does not extend any appellate deadlines.

4. Respondent's options. A respondent may need to respond to a motion for entry of judgment if the judgment contains more relief than the prevailing is entitled to receive or more relief than the verdict awarded.

Note also that a losing party may also file a motion for judgment to initiate the appellate process. *Fojtik*, 775 S.W.2d at 633. As set out below, the losing party must carefully indicate disagreement with the judgment's content and result to avoid waiver of arguments on appeal. *See Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 321-22 (Tex. 1984).

C. Practice points and strategy considerations

By filing the motion, the movant's ability to attack the judgment on appeal can be waived without specifically reserving the right to challenge the judgment. To preserve the right to complain on appeal, the movant should state in the motion for judgment that she disagrees with the content and result, agrees to form only, intends to appeal the judgment and reserve the right to attack the sufficiency of the evidence. The Texas Supreme Court approved the qualifying language to use in a motion for entry of judgment in *First Nat'l Bank v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989). In *Fojtik*, the jury found for plaintiffs but awarded zero damages. The Fojtiks wanted to have the judgment signed to initiate the appellate process and filed a motion for judgment with the following qualifying language:

> 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 result.

Id. The supreme court expressly approved the language as an appropriate means of preserving an appellant's right to appeal. *Id.*; *see also Beal Bank, SSB v. Biggers*, 227 S.W.3d 187, 190-91 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (instructing that best strategy in reserving right to appeal is to follow *Fojtik* language).

Without qualifying a motion for judgment in this manner a party waives taking a position on appeal contrary to the judgment it requested. *General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex. 1993) (party cannot challenge on appeal the very issue it requested); *Bluestar Energy, Inc. v. Murphy*, 205 S.W.3d 96, 101 (Tex. App.—Eastland 2006, pet. denied) (party cannot agree to omission of a cause of action and then object to the omission).

Courts disagree on the extent of waiver with a motion for entry of judgment when a party later seeks

[1] This paper is guided by two excellent post-trial preservation papers: Jeffrey L. Oldham & JoAnn Storey, *Preservation of Error Post-Trial*, NUTS AND BOLTS OF APPELLATE PRACTICE, ch. 3 (State Bar of Texas, Sept. 9, 2009) and Steven K. Hayes, *Preservation of Error Post-Trial: Mileposts, Tedium, Chaos*, CIVIL APPELLATE PRACTICE 101, ch. 4 (State Bar of Texas, Sept. 1, 2010).

to appeal. Some courts conclude that a motion for entry of judgment waives all grounds of appeal. *Sincerely Yours, L.P. v. NCI Bldg. Sys., L.P.*, No. 07-10-00280-CV, 2011 WL 446188 at *1-2 (Tex. App.—Amarillo Feb. 8 2011, pet. filed) (mem. op); *Casu v. Marathon Refining Co.*, 896 S.W.2d 388, 389 (Tex. App.—Houston [1st Dist.] 1995, writ denied). Other courts conclude that only a challenge to the sufficiency of the evidence is waived. *See, e.g., Harry v. University of Tex. Sys.*, 878 S.W.2d 342, 344 (Tex. App.—El Paso 1994, no writ).

The Houston Fourteenth Court looked beyond the motion for entry of judgment and considered the entire proceeding to determine whether a party's motion for entry of judgment waived its right to appeal. *DeClaris Assocs. v. McCoy Workplace Solutions, L.P.*, 331 S.W.3d 556, 560-61 (Tex. App.—Houston [14th Dist.] 2011, no pet.). In *DeClaris*, appellant filed a motion for entry of judgment and approved a judgment as to form and substance. *Id.* at 560. The court noted, however, that the case involved only a simple, single issue – breach of contract – and appellant had "consistently contested" the proceedings. *Id.* at 560-61. According to the court of appeals, "it is unlikely that the judge or McCoy was misled into thinking DeClaris did not plan to appeal . . . ." *Id.* at 561. The court held that appellant had not waived its right to appeal. *Id.* at 561.

The best practice is to use the language set out in *Fojtik*, cite *Fojtik*, state the matters with which the party disagrees and that the party intends to appeal. If representing the losing party, agree to form only, and not to the substance of a judgment.

II. MOTION TO DISREGARD JURY FINDINGS

A. Purpose of the motion to disregard.

A motion to disregard a jury finding allows a party to complain of certain findings that are not supported by the evidence or where a finding is immaterial to the outcome of the case, but to obtain a judgment on the remaining findings. A close relative of the motion for JNOV, the motion to disregard attacks only certain findings as opposed to attacking the entire jury verdict. Motions to disregard and motions for jnov are governed by similar legal principles.

B. Mechanics of the motion and procedure to follow.

Rule 301 provides that a motion to disregard a jury finding is proper when a finding has no evidence to support it. TEX. R. CIV. P. 301.

1. Form of the motion. A motion to disregard a jury finding must be in writing with notice to the opposing parties. TEX. R. CIV. P. 301; *see Walters v. Southern S.S. Co.*, 113 S.W.2d 320, 321-22 (Tex. Civ. App.—Galveston 1938, writ dism'd).

When filing a motion to disregard jury findings, the movant must set out: 1) the particular finding the party seeks to disregard; 2) the reasons for disregarding the finding; and 3) a request for entry of judgment on the remaining findings after the requested ones have been disregarded. *Dupree v. Piggly Wiggly Shop Rite Foods, Inc.*, 542 S.W.2d 882, 892 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.).

2. Deadline for filing. Rule 301 does not contain a deadline for filing a motion to disregard. TEX. R. CIV. P. 301. The motion, however, should be filed no later than thirty days after the judgment is signed.

3. Impact on appellate deadlines and plenary power. A motion to disregard does not extend the trial court's plenary power and does not extend the appellate deadlines. *See* TEX. R. CIV. P. 165a(3) & TEX. R. CIV. P. 329b(e), (g) (listing motions that extend plenary power); TEX. R. APP. P. 26.1(a) (listing motions that extend appellate deadlines).

Note, however, that cases split on whether a motion to disregard can extend the appellate deadlines. *First Freeport Nat'l Bank v. Brazoswood Nat'l Bank*, 712 S.W.2d 168, 170 (Tex. App.—Houston [14th Dist.] 1986, no writ) (motion to disregard does not extend appellate deadlines); *Fairfield Estates L.P. v. Griffin*, 986 S.W.2d 719, 723 (Tex. App.—Eastland 1999, no pet.) (motion for jnov extends appellate deadlines).

4. Role in preservation of error. A motion to disregard jury findings preserves two errors for appeal. A motion to disregard preserves no evidence points and complaints that a jury finding is immaterial. *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994).

First, the motion to disregard a jury finding is one of the five methods of preserving no-evidence points. *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 220-21 (Tex. 1992) (no evidence points are preserved by filing: 1) a motion for directed verdict; 2) a motion for jnov; 3) an objection to the charge on an issue; 4) a motion to disregard a jury's answer; or 5) a motion for new trial).

A motion to disregard based on no evidence should be drafted with the applicable standard of review on appeal in mind. *See Excel Corp. v. McDonald*, 223 S.W.3d 506, 508 (Tex. App.—Amarillo 2006, pet. denied) (appellate court review motion to disregard as a legal sufficiency challenge). A legal sufficiency challenge will be sustained when the record shows: (1) the complete absence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to

prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005).

When analyzing legal sufficiency of the evidence, the court of appeals review the record in the light most favorable to the trial court's finding, crediting favorable evidence if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *See City of Keller*, 168 S.W.3d at 827.

Second, the motion to disregard a jury finding also preserves a complaint that a jury finding is immaterial. *Daves v. Commission for Lawyer Discipline*, 952 S.W.2d 573, 578 (Tex. App.—Amarillo 1997, pet. denied). A jury finding is immaterial: 1) when the question should not have been submitted; 2) when the question was properly submitted by rendered immaterial by other jury findings; or 3) the question calls for a legal conclusion, beyond the province of a jury. *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 157.

A jury issue is "ultimate" if it is essential to the right of action and seeks a fact that would have a direct effect on the judgment. *Daves*, 952 S.W.2d at 578. An evidentiary issue is one that a jury considers in deciding a controlling issue but that is not a controlling issue itself. *Id.* Immaterial issues that can be disregarded are those that are solely evidentiary and not ultimate. *Id.*

For example, an issue that is evidentiary and not ultimate such that it should be submitted is one that addresses specific facts that may contribute to the creation of a dangerous condition but that alone only relate to evidentiary matters. *Perales v. Braslau's Furniture Co.*, 493 S.W.2d 638, 640 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.). In *Perales*, a slip and fall case, the court of appeals rejected plaintiff's proposed issues that requested a finding on whether too much wax had been applied to a floor and whether defendant applied the wax contrary to the product's instructions as purely evidentiary and immaterial and not ultimate issues. *Id.*

5. Trial court's duties. A trial court may disregard immaterial issues on its own motion. *Vann v. Brown*, 244 S.W.3d 612, 615 (Tex. App. –Dallas 2008, no pet.).

Given that the grounds in a motion to disregard jury findings are legal issues and not evidentiary, the trial court is not obligated to set a hearing.

A motion to disregard is not listed in Rule 329b(c) as being overruled by operation of law if not ruled on by the trial court. *See* TEX. R. CIV. P. 329b(c). Accordingly, a movant should obtain a ruling on its motion to disregard during the trial court's plenary power. *Tri v. J.T.T*, 162 S.W.3d 552, 561 (Tex. 2005) (trial court can grant jnov as long as it retains plenary power).

C. Practice points and strategy considerations

While the deadline is not specified in the rule, a motion to disregard should be filed within 30 days after the judgment is signed.

Do not rely on a motion to disregard as extending the appellate deadlines. File a motion for new trial or motion to modify to judgment to extend the deadlines and plenary power.

III. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A. Purpose of motion for jnov.

A motion for jnov raises the legal sufficiency of the evidence and allows the movant to request the court of appeals to render judgment as opposed to only order a remand for a new trial. The jnov is appropriate under the same standard for a directed verdict. A jnov can also be used to raise a legal bar to recovery.

B. Mechanics of the motion and procedure to follow.

A motion for JNOV is similar to a motion to disregard jury findings. A motion for JNOV, however, requests the trial court to disregard all of the jury findings and enter judgment contrary to the jury's findings. As stated above, the mechanics and procedure for both motions are the same.

1. Form of the motion. Like a motion to disregard jury findings, a motion for *non obstante veredicto* is governed by Rule 301. TEX. R. CIV. P. 301. Under Rule 301, a motion to disregard must be in writing with notice to opposing parties. TEX. R. CIV. P. 301; *Walters v. Southern S.S. Co.*, 113 S.W.2d at 321-22.

2. Deadline for filing. Rule 301 does not specify a deadline for filing a motion for jnov. TEX. R. CIV. P. 301. Cases go both ways on whether there is a deadline, even suggesting the motion for jnov could be filed after the judgment is signed. The motion should be filed no later than thirty days after the judgment is signed. *See Fairfield Estates L.P.*, 986 S.W.2d at 723 (court suggests a deadline for a motion for jnov, "defendants timely filed a post-judgment motion for judgment notwithstanding the verdict."). Other cases also suggest a motion could be filed as long as there is plenary power. *See, e.g., BCY Water Supply Corp. v. Residential Invs., Inc.*, 170 S.W.3d 596, 604-05 (Tex. App.—Tyler 2005, pet. denied).

3. Impact on appellate deadlines and plenary power. A motion to disregard does not extend the trial court's plenary power. *See* TEX. R. CIV. P. 165a(3) & TEX. R.

CIV. P. 329b(e), (g) (listing motions that extend plenary power). While a motion for jnov is not listed in TRAP 26.1 as a motion that extends the appellate deadlines, cases split on whether a motion for jnov extends appellate deadlines. *First Freeport Nat'l Bank v. Brazoswood Nat'l Bank*, 712 S.W.2d at 170 (motion to disregard does not extend appellate deadlines); *Fairfield Estates*, 986 S.W.2d at 723 (motion for jnov extends appellate deadlines); *Kirschberg v. Lowe*, 974 S.W.2d 844, 847 (Tex. App.—San Antonio 1998, no pet.) (jnov filed within 30 days of judgment that "assailed the trial court's judgment" extended the appellate deadlines).

4. Role in preservation of error.

A motion for jnov preserves legal sufficiency points. *Chappell Hill Bank v. Lane Bank Equip. Co.*, 38 S.W.3d 237, 243 (Tex. App.—Texarkana 2001, pet. denied.). A motion for JNOV should be granted when the evidence is conclusive and one party is entitled to recover as a matter of law or when a legal principle precludes recovery. *Morrell v. Finke*, 184 S.W.3d 257, 291 (Tex. App.—Fort Worth 2005, pet. denied) (jnov should have been granted when limitations barred claim); *B&W Supply, Inc. v. Beckman*, 305 S.W.3d 10, 15 (Tex. App.--Houston [1st Dist.] 2009, pet denied) (jnov appropriate where evidence is conclusive).

Under Rule 301, a motion for jnov is proper if a directed verdict would have been proper. A directed verdict is proper if no evidence of probative force raises a fact issue on a material question in the lawsuit and the trial court can render judgment for the movant. TEX. R. CIV. P. 301; *Prudential Ins. Co. of Amercia v. Financial Review Servs., Inc.*, 29 S.W.3d 74, 77 (Tex. 2000); *Tiller v. McLure*, 121 S.W.3d 709, 713 (Tex.2003) (per curiam).[2]

A motion for jnov based on no evidence should be drafted with the applicable standard of review on appeal in mind. *Wal-Mart Stores, Inc. v. Miller*, 102 S.W.3d 706, 709 (Tex. 2003); *Webb v. Stockford*, 331 S.W.3d 169, 173 (Tex. App.—Dallas 2011, pet. filed) (appellate court review a jnov is under legal sufficiency standard). A legal sufficiency challenge will be sustained when the record shows: (1) the complete absence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *City of Keller v. Wilson*, 168 S.W.3d at 810.

When analyzing legal sufficiency of the evidence, the court of appeals review the record in the light most favorable to the trial court's finding, crediting favorable evidence if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *See City of Keller*, 168 S.W.3d at 827.

5. Trial court's duties.

Given that the grounds in a motion for jnov are legal issues and not evidentiary, the trial court is not obligated to set a hearing.

A motion for jnov is not listed in Rule 329b(c) as being overruled by operation of law if not ruled on. *See* TEX. R. CIV. P. 329b(c). Accordingly, a movant should obtain a ruling on its motion for jnov during the trial court's plenary power. *Tri v. J.T.T*, 162 S.W.3d at 561 (trial court can grant jnov as long as it retains plenary power).

C. Practice points and strategy considerations

If a movant is successful on a motion for jnov, the party should raise as appellee on appeal cross-points on appeal any issue "that would have vitiated the verdict or that would have prevented an affirmance of the judgment if the trial court had rendered judgment on the verdict." *Holman Street Baptist Church v. Jefferson*, 317 S.W.3d 540, 547 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (quoting TEX. R. APP. P. 38.2(b)); TEX. R. CIV. P 324(c). The failure to bring forward this kind of cross-point waives the complaint on appeal. TEX. R. APP. 38.2(b).

POST-JUDGMENT PRESERVATION OF ERROR

I. MOTION TO RESET NOTICE OF JUDGMENT RULE 306A

A. Purpose of a motion to reset notice of judgment.

As the name suggests, a Rule 306a motion is used to restart the deadlines for filing post-trial motions and for the appeal by requesting the trial court to find the date a party obtained notice of a judgment. A Rule 306a motion can be used when notice of a judgment or other appealable order is received more than 20 days after, but within 90 days of the judgment being signed. This motion can be used with non-jury and jury trials.

B. Mechanics of the motion and procedure to follow.

1. Form of the motion.

The date a judgment is signed determines the beginning of the trial court's plenary power and beginning point to calculate post-judgment deadlines. TEX. R. CIV. P. 306a(1). As long as a party or her attorney receive notice of a judgment or appealable

[2] An extensive discussion of directed verdicts is contained in Steven K. Hayes, *Preservation of Error Post-Trial: Mileposts, Tedium, Chaos*, CIVIL APPELLATE PRACTICE 101, ch. 4, pp. 1-2 (State Bar of Texas, Sept. 1, 2010).

order within 20 days of it being signed, then the judgment signed date starts the periods running for plenary power and for the appellate deadlines. TEX. R. CIV. P. 306a(4).

Rule 306a(4) provides a means of shifting the "effective" date of a judgment to the date a party or her attorney became aware of the judgment. If a party or her attorney does not have written notice or have acquired actual knowledge of a judgment within 20 days after an appealable order or judgment is signed, then the date for starting the post-judgment timeline is moved. *Id.*; *see also* TEX. R. APP. P. 4.2. The deadlines shall begin on the date the party or her attorney receives actual notice or acquires actual knowledge of the signing of the judgment, whichever is earlier. TEX. R. CIV. P. 306a(4). The period cannot begin more than 90 days after the original judgment was signed. *Id.*

To establish the late-notice of judgment and the actual date of notice for starting the deadlines, a party must prove on sworn motion and with notice, the date the party or her attorney first received notice of the judgment or acquired actual knowledge of the signing of the judgment. *Id.* 306a(5); *In re Lynd Co.*, 195 S.W.3d 682, 685 (Tex. 2006) (orig. proceeding). The party must also establish that its date of notice was more than 20 days after the judgment was signed. TEX. R. CIV. P. 306a(5); *Lynd* 195 S.W.3d at 685.

2. Deadline for filing.

Rule 306a does not contain a deadline for filing a motion to establish late notice of judgment. *John v. Marshall Health Servs., Inc.*, 58 S.W.3d 738, 741 (Tex. 2001). The motion, however, must be filed while the trial court retains plenary power. *Lynd*, 195 S.W.3d at 685. The filing of a Rule 306a motion invokes the trial court's jurisdiction to consider the motion and to determine the date the party received notice. *In re Bokeloh*, 21 S.W.3d 784, 791 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding). Plenary power is calculated from the date a party or her attorney receives notice of the judgment. The trial court has 30 days of plenary power from the date the party or her attorney receives notice of the judgment to rule on a Rule 306a motion. If the party also files another motion that extends plenary power like a motion for new trial, then plenary power is extended up to 75 days from the date the party or her attorney received notice.

3. Impact on appellate deadlines and plenary power.

The effect of a Rule 306a motion is to restart the trial court's plenary power and to re-start the post-judgment and appellate deadlines. *In re Lynd Co.*, 195 S.W.3d at 686-87. If a movant meets Rule 306a(5), then the appellate deadlines and plenary power commence from the date of notice of the judgment not from the date the judgment was actually signed. TEX. R. CIV. P. 306a(4); *In re Bokeloh*, 21 S.W.3d at 791.

4. Role in preservation of error.

If successful, the late-notice of judgment motion can breathe life back into a case.

5. Respondent's options.

The respondent should challenge the evidentiary allegations and set out proof of service or proof of notice of the judgment.

6. Trial court's duties.

The movant needs to a request a hearing on the motion to establish late notice of a judgment under Rule 306a.

An appellate rule also addresses the issue of late notice of a trial court's judgment. *See* TEX. R. APP. P. 4.2. Unlike TRCP 306a which does not mention a signed order from the trial court, Rule 4.2 of the Appellate Rules of Procedure requires a written order finding the date the party or its attorney first received notice or acquired actual knowledge of the judgment. *Id.* If the trial court fails to issue a signed order finding the date a party received notice of a judgment, the finding may be implied. *Lynd*, 195 S.W.3d at 686.

C. Practice points and strategy considerations

If in the situation of receiving late notice of a judgment, as part of the triage, file a notice of appeal and a motion for new trial.

Make sure to obtain a written order on a Rule 306a motion to establish the date a party or her attorney received notice of the judgment.

If notice of a judgment or appealable order is received more than 90 days after it is signed, the losing party could challenge the judgment by a restricted appeal or by a bill of review.

II. MOTION TO REINSTATE AFTER DISMISSAL

A. Purpose of a motion to reinstate after dismissal under Rule 165a.

A motion to reinstate provides a movant with the opportunity to convince the trial court reinstate the case short of filing an appeal. The motion and procedure for it allow a movant to provide record evidence explaining the failure to appear to then use on an appeal.

B. Mechanics of the motion and procedure to follow.

Trial courts have authority to dismiss cases for want of prosecution based on two authorities: Rule 165a and their inherent power. *Villarreal v. San Antonio Truck & Equip.*, 994 S.W.2d 628, 630 (Tex. 1999); *Oliphant Fin., LLC v. Galaviz*, 299 S.W.3d 829,

839 (Tex. App.—Dallas 2009, no pet.); TEX. R. CIV. P. 165a.

Rule 165a provides two grounds for dismissal. First, Rule 165a permits a trial court to dismiss a case when a party fails to appear for a trial or hearing after noticed for same. Second, a case can be dismissed for failure to dispose of a case within the time standards set forth by the Texas Supreme Court. *Villarreal*, 994 S.W.2d at 630; TEX. R. CIV. P. 165a(1), (2).

A trial court can also dismiss case under its inherent power for failure to prosecute with due diligence. *Villarreal*, 994 S.W.2d at 630. When an unreasonable delay in a case occurs, courts can presume the case is abandoned and dismiss. *Bilnoski v. Pizza Inn, Inc.*, 858 S.W.2d 55, 57 (Tex. App.—Houston [14th Dist.] 1993, no writ).

1. Form of the motion.

The process of dismissal for want of prosecution starts with the court sending a notice of intent to dismiss. TEX. R. CIV. P. 165a(1). The trial court must give notice and provide a hearing before dismissing a case under Rule 165a or under the court's inherent power. *Villarreal*, 994 S.W.2d at 630. After receiving the notice of intent to dismiss, a plaintiff must file a motion to retain the case on the docket and must show good cause for the case to be maintained on the docket. *Id.* If the trial court denies the motion to retain and dismisses the case, a plaintiff can file a motion to reinstate under Rule 165a.

A motion to reinstate must be verified or supported by affidavits. TEX. R. CIV. P. 165a(3); *McConnell v. May*, 800 S.W.2d 194, 194 (Tex. 1991).

The standard for reinstatement is well-established. A movant must demonstrate that the failure of a party or her attorney to appear "was not intentional or the result of conscious indifference but was due to an accident or misstate or that the failure has been otherwise reasonably explained." TEX. R. CIV. P. 165a(3). "Conscious indifference" means more than mere negligence and has been defined as failing to take some action that a reasonable person would have taken under the circumstances. *Texas Mut. Ins. Co. v. Olivas*, 323 S.W.3d 266, 276 (Tex. App.—El Paso 2010 no pet.).

A motion to reinstate when a case has been dismissed under the court's inherent power should explain the entire history of the case, the length of time the case has been on file, any action taken in the case, request a trial setting, and provide a reasonable explanation for the delay. *Keough v. Cyrus USA, Inc*, 204 S.W.3d 1, 5 (Tex. App.—Houston [14th Dist.] 2006, pet. denied.). It is the movant's burden to bring forward evidence to support its reasons for maintaining a case on the docket. *Texas Mut. Ins.*, 323 S.W3d at 274.

2. Deadline for filing.

A motion to reinstate is due 30 days after the order of dismissal is signed. TEX. R. CIV. P. 165a(3). If the party did not have timely notice of the dismissal order, the motion to reinstate is due 30 days after the period provided in Rule 306a. *Id.*

Note that a prematurely filed motion to reinstate extends plenary power and the appellate deadlines. *In re Bokeloh*, 21 S.W.3d at 788.

3. Impact on appellate deadlines and plenary power.

A timely filed and verified motion to reinstate extends the trial court's plenary power and also extends the appellate deadlines. TEX. R. CIV. P. 165a(3); *South Main Bank v. Wittig*, 909 S.W.2d 243, 244 (Tex. App.—Houston [14th Dist.] 1995, no writ); TEX. R. APP. P. 26.1(a)(3); *Guest v. Dixon*, 195 S.W.3d 687, 687-88 (Tex. 2006).

An unverified motion to reinstate does not have same effect. An unverified motion to reinstate does not extend plenary power. *McConnell v. May*, 800 S.W.2d at 194. An unverified motion does not extend the appellate deadlines. *Guest v. Dixon*, 195 S.W.3d 687, 688-689 (Tex. 2006) (citing *Butts v. Capitol City Nursing Home, Inc.*, 705 S.W.2d 696, 697 (Tex. 1986)). An unverified motion to reinstate is a nullity. *Douglas v. American Title Co.*, No. 14-08-00676-CV, 2009 WL 3851674 (Tex. App.—Houston [14th Dist.] Nov. 19, 2009, no pet.) (mem. op.); *contra In re Dobbins*, 247 S.W.3d 394, 396-97 (Tex. App.—Dallas 2008, orig. proceeding) (unverified motion to reinstate held valid to extend plenary power).

4. Role in preservation of error.

A motion to reinstate is not a prerequisite to appeal a dismissal order. *Woodberry v. J.C. Penny*, No. 05-05-01552-CV, 2006 WL 2062945 at *3, n.2 (Tex. App.—Dallas 2006, pet. denied). A motion to reinstate, however, is an important opportunity for an appellant. A primary function of the motion to reinstate is to create an appellate record with evidence and a hearing to develop those facts and explain the failure to appear or prosecute a case. *Id.* Without a motion to reinstate and its evidence, there is no evidence in the record to explain the failure to appear.

5. Respondent's options.

The respondent should challenge movant's evidence and allegations. The respondent could counter the diligence allegations and highlight the inactivity in the case. Note also that mandamus review is available if a case is reinstated after plenary power has expired. *In re Bokeloh*, 21 S.W.3d at 793 (mandamus will issue when trial court reinstates case after plenary power expires).

6. Trial court's duties.

The trial court must give notice of its intent to dismiss a case. TEX. R. CIV. P. 165a(1). Sufficient notice may consist of receipt of the dismissal order in time to file a motion to reinstate. *Keough*, 204 S.W.3d at 5-6.

The trial court must hold a hearing and shall dismiss if there is no good cause to retain case on the docket. TEX. R. CIV. P. 165a(3). If the case is retained, the trial court must set the case for trial and enter a pretrial scheduling order. *Id.* Rule 165a(1).

The trial court must act by written order on the motion to reinstate. TEX. R. CIV. P. 165a(3). The motion is overruled by operation of law 75 days after the order of dismissal if no written order has been signed by the trial court. *Id.* The trial court also retains plenary power 30 days after the motion to reinstate is overruled by written order or by operation of law. *Id.*

C. Practice points and strategy considerations

A party may not receive timely notice of the order dismissal. In that case, the party will need to use the procedure for establishing late notice of judgment under Rule 306a(4), (5) as discussed above.

Consider requesting findings of fact and conclusions of law after a hearing on a motion to reinstate if the court dismisses the case. A dismissal for want of prosecution is reviewed under an abuse of discretion standard. *Texas Mut. Ins.*, 323 S.W.3d at 272. Without findings of fact and conclusions of law and the dismissal order fails to state the reason for the dismissal, the court of appeal must affirm on any legal theory supported by the record. *Bilnoski*, 858 S.W.2d at 58.

III. MOTION TO MODIFY, CORRECT OR REFORM A JUDGMENT

A. Purpose of the motion to modify, correct or reform a judgment.

A motion to modify, correct or reform a judgment is used to correct errors in the rendition of judgment when a party does not seek to vacate the findings and when a party does not want a new trial. This motion can be used to raise the failure to award all of the relief to which a party is entitled or when an opponent has been awarded more than they are entitled to. For example, a motion to modify could raise errors in the award of court costs or attorneys fees. A motion to modify, correct or reform a judgment can be filed following a jury trial or a bench trial.

B. Mechanics of the motion to modify and procedure to follow.

1. Form of the motion.

The motion to modify, correct or reform a judgment is governed by Rule 329b(g). TEX. R. CIV. P. 329b(g). The motion shall be in writing, signed by counsel or the party and shall specify the respects in which the judgment should be modified, reformed or corrected. TEX. R. CIV. P. 329b(g). The motion to modify does not need to be verified. TEX. R. CIV. P. 329b(g).

2. Deadline for filing.

The motion shall be filed within 30 days of the judgment being signed. TEX. R. CIV. P. 329b(a), (g). An amended motion to modify, correct or reform a judgment can be filed without leave of court if filed before any preceding motion is overruled and if filed within 30 days of the judgment or order complained of is signed. TEX. R. CIV. P. 329b(b).

3. Impact on appellate deadlines and plenary power.

The impact of a motion to modify, correct or reform a judgment depends on whether the motion raises a substantive change in the judgment. A motion to modify if raising a substantive change in the judgment extends the trial court's plenary power and extends the time for perfecting an appeal. TEX. R. CIV. P. 329b(g), (h); TEX. R. APP. P. 26.1(a)(2); *Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*, 10 S.W.3d 308, 310 (Tex. 2000). If a motion seeks only a clerical change in a judgment it is not a Rule 329b(g) motion to modify and will not extend plenary power or the appellate deadlines. *Lane Bank*, 10 S.W.3d at 313.

Like a motion for new trial, a timely filed motion to modify under Rule 329b(g) that seeks a substantive change in the judgment extends the trial court's plenary power of the judgment up to 75 days after the signing of the judgment. *Lane Bank*, 10 S.W.3d at 310; TEX. R. CIV. P. 329b(e).

If the trial court modifies, corrects or reforms the judgment in any respect, the deadline to file a notice of appeal runs from the modified, corrected or reformed judgment. TEX. R. CIV. P. 329b(h); TEX. R. APP. P. 4.3(a); *Arkoma Basin Exploration Co. v. FMF Associates 1990-A, Ltd.*, 249 S.W.3d 380, 390-91 (Tex. 2008) (order suggesting remittitur modifies a judgment and restarts appellate deadlines); *Lank Bank*, 10 S.W.3d at 313.

4. Respondent's options.

A respondent should raise any jurisdictional or plenary power issues to defeat the motion.

5. Trial court's duties.

Like a motion for new trial, the motion to modify, correct or reform a judgment must be ruled on by the trial court within 75 days after the judgment is signed or it is overruled by operation of law. TEX. R. CIV. P. 329b(c), (g). The trial court retains plenary power for 30 days after the motion to modify is overruled either by written order or by operation of law. *Id.* 329b(e).

The trial court's determination of a motion to modify must be by written order. TEX. R. CIV. P. 329g(c).

C. Practice points and strategy considerations

The overruling of a motion to modify does not preclude the filing of a motion for new trial. TEX. R. CIV. P. 329b(g). Similarly, the overruling of a motion for new trial court does not preclude the filing of a motion to modify. *Id.* These motions would have to be filed within 30 days of the judgment. *In re Brookshire Grocery Co.*, 250 S.W.3d 66, 69-71 (Tex. 2008).

Remember that a motion seeking only a clerical change does not serve as a Rule 329b(g) motion to modify to extend the appellate deadlines and plenary power. File a motion for new trial to extend plenary power and the appellate deadlines.

IV. MOTION FOR NEW TRIAL

A. Purpose of a motion for new trial.

The purpose of a motion for new trial is to allow a trial court an opportunity to cure errors in the trial and avoid an appeal. *In re C.O.S.*, 988 S.W.2d 760, 765 (Tex. 1999). A motion for new trial can be filed after a jury trial or bench trial.

By rule, a motion for new trial is required for certain errors to be preserved. TEX. R. CIV. P. 324. A motion for new trial also serves the purpose of extending the trial court's plenary power and extending the deadlines for filing an appeal. *Lane Bank*, 10 S.W.3d at 310, 313; TEX. R. CIV. P. 329b(g); TEX. R. APP. P. 26.1(a)(1).

Section B. is a discussion of matters relating to motions for new trial in general. Sections C. and D. address particular types of motions for new trial and the specific procedures relevant to each.

B. Mechanics of the motion for new trial and procedure to follow.

1. Form of the motion.

Rules 320-329 govern the specifics of motions for new trial. The rules are specific on several matters with which a motion for new trial must comply. A motion for new trial must be in writing and signed by the party or her attorney. TEX. R. CIV. P. 320. The motion shall set out the points upon which it relies to show the error of which the party complains. TEX. R. CIV. P. 321. A motion for new trial cannot rely on general objections, such as "the court erred in its charge," "the verdict of the jury is contrary to law." TEX. R. CIV. P. 322. For example, a motion for new trial that stated the trial court erred in failing to grant defendant's motion for instructed verdict failed to preserve error. *Tennell v. Esteve Cotton Co.*, 546 S.W.2d 346, 352 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.). The motion must "clearly specify each ground of error" or risk waiver on appeal. *Id.*

The motion may need to be verified or supported by affidavits when raising newly discovered evidence or other matters that require evidence. *See* TEX. R. CIV. P. 324(b)(1). For example, a motion for new trial on jury misconduct requires supporting evidence. *See id.*

Motions for new trial have a statutory filing fee of $15. TEX. GOV. CODE §51.317(b)(2). Always check with the particular county where filing a motion for new trial. Some counties add an addition fee.

What is the effect of not paying the fee or paying it late? A motion for new trial is considered "conditionally filed" if submitted without the filing fee. *Garza v. Garcia*, 137 S.W.3d 36, 37 (Tex. 2004); *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993). The appellate deadlines, however, are still extended by the motion. *Id.* Note that a trial court is not obligated to consider a motion for new trial filed without the fee. *Garza*, 137 S.W.3d at 38. Such motion also does not preserve error. *Id.* Paying the filing fee after the court loses plenary power does not preserve error. *Id.* Paying before the court loses plenary power may preserve error.

2. Deadline for filing

The deadline to file a motion for new trial is 30 days after the judgment or order is signed about which the complaint is made. TEX. R. CIV. P. 329b(a). Motions for new trial can be filed earlier. A motion for new trial is one of the motions listed in Rule 306c as being timely filed even if the motion is filed prematurely. TEX. R. CIV. P. 306c. If filed earlier, the motion is deemed filed the day of but after the judgment is signed. *Id.*

While a motion for new trial can be filed early; the deadline for filing cannot be moved. The deadline for filing a motion for new trial cannot be extended. TEX. R. CIV. P. 5; *Rabb Int'l, Inc. v. SHL Thai Food Serv., LLC*, __ S.W.3d __, 2011 WL 2898975 at *2 (Tex. App.—Houston [14th Dist.] July 21, 2011, no pet. h.); *see Moritz v. Preiss*, 121 S.W.3d 715, 720 (Tex. 2003).

The movant filing a motion for new trial should request a hearing on the motion. When motion for new trial requires a hearing, the movant must ask the court for a setting and not allow the motion to be overruled by operation of law before the motion is heard. *See Shamrock Roofing Supply, Inc. v. Mercantile Nat'l*

Bank, 703 S.W.2d 356, 357-58 (Tex. App.—Dallas 1985, no writ).

Limit - two. There is a limit on the number of motions for new trial that can be filed. No more than two new trials can be granted for either party because of the insufficiency or weight of the evidence. TEX. R. CIV. P. 326.

A motion for new trial can be amended within the appropriate time. Rule 329b(b) provides that an amended motion for new trial may be filed without leave of court when a preceding motion has not been overruled and if the amended motion is filed within 30 days of the judgment. TEX. R. CIV. P. 329b(b).

What about filing a second motion for new trial after the trial court has overruled a first new trial motion? A second motion for new trial filed within 30 days but after a first motion is overruled is not timely to extend plenary power even if the trial court has granted leave for the filing. *In re Brookshire Grocery Co.*, 250 S.W.3d at 69-71. The losing party is not without options to extend plenary power. After a first motion for new trial is overruled, a party may file a motion to modify, correct or reform the judgment so long as the motion to modify is filed within 30 days after the judgment is signed. Also, while a second motion for new trial does not operate to extend plenary power, the trial court still retains plenary power to change the judgment as long as done within 30 days of the first motion for new trial being overruled. *Brookshire*, 250 S.W.3d at 72.

What is the effect of a late-filed motion for new trial? Although a late-filed motion for new trial does not extend the appellate deadlines or the trial court's plenary power, it may nonetheless be persuasive. If it is filed while the trial court has plenary power, the trial court could grant a new trial using the grounds in the motion to grant a new trial while acting under its inherent power. *Moritz*, 121 S.W.3d at 720 (trial court may look to a late-filed motion for new trial for guidance in exercising its inherent authority).

3. Impact on appellate deadlines and plenary power

A timely filed motion for new trial extends the trial court's plenary power to act on the judgment or order for up to 75 days after the judgment or order is signed. TEX. R. CIV. P. 329b(c). The trial court retains plenary power for 30 days after a motion for new trial is overruled by written order or if overruled by operation of law. TEX. R. CIV. P. 329b(c), (e). If a new trial is granted, the trial court has plenary power to set aside a new trial order any time before a subsequent judgment is signed. *In re Baylor Med. Ctr.*, 280 S.W.3d 227, 230-31 (Tex. 2008).

A timely filed motion for new trial extends the deadline to file a notice of appeal to 90 days after the judgment or order is signed. TEX. R. APP. P. 26.1(a)(1).

Remember that a motion for new trial can be filed solely to extend the appellate deadlines. A motion for new trial can be used solely to extend the trial court's plenary power. *Pearson v. Stewart*, 314 S.W.3d 242, 245 (Tex. App.—Fort Worth 2010, no pet.). A motion for new trial can also be filed solely to extend the appellate deadlines. *Old Republic Ins. v. Scott*, 846 S.W.2d 832, 833 (Tex. 1993). As the supreme court has noted, that a motion for new trial can be filed solely to extend appellate deadlines is "a matter of right." *Id.*

A defective motion for new trial still extends the appellate deadlines and plenary power although a trial court does not err in refusing to grant it. *Rabb International, Inc.*, __ S.W.3d __, 2011 WL 2898975 at *2. In *Rabb*, a non-attorney timely filed a motion for new trial on behalf of a corporation. Corporations cannot appear in court without being represented by a licensed attorney. *Id.* at *1. The Houston Court Fourteenth concluded the motion for new trial was defective but concluded that the motion still served to extend both the appellate deadlines and the trial court's plenary power. *Id.* at *2.

4. Trial court's duties

Rule 329b(c) requires a written order ruling on a motion for new trial. TEX. R. CIV. P. 329b(c); *In re Lovito-Nelson*, 278 S.W.3d 773, 775 (Tex. 2009). A trial court's oral pronouncement granting a new trial and a docket entry showing a new trial was granted do not substitute for the requirement in Rule 329b(c) for a written order. *Olmos v. Olmos*, __ S.W.3d __, 2011 WL 3240533 at *2 (Tex. App.—El Paso July 29, 2011, no pet. h.) (citing *Faulkner v. Culver*, 851 S.W.2d 187, 188 (Tex. 1993)).

C. Rule 324(b) motions for new trial

A motion for new trial is not required to preserve error in a non-jury or jury trial except as provided in Rule 324(b). TEX. R. CIV. P. 324(a). As discussed in detail below, Rule 324(b) sets out the scenarios when a motion for new trial must be filed to preserve error and avoid waiver on appeal.

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 the failure to set aside a judgment by default;
> 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.

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

1. Complaints on which evidence must be heard

Rule 324(b) instructs that trial court error on which evidence must be heard must be raised in a motion for new trial to preserve error. TEX. R. CIV. P. 324(b)(1). Rule 329(b)(1) identifies three complaints on which evidence must be heard: jury misconduct, newly discovered evidence, and the failure to set aside a default judgment. *Id.*

A general point about motions for new trial where evidence must be heard. When raising a ground in a new trial on which evidence must be heard, request findings of fact and conclusions of law after the hearing. *Osborn v. Osborn*, 961 S.W.2d 408, 411, n.3 (Tex. App.—Houston [1st Dist.] 1997, pet. denied). Without findings of fact, the court of appeals assumes the trial court made all the findings in support of its decision to deny a motion for new trial. *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 372 (Tex. 2000).

Findings of fact in this instance are not considered Rule 296 findings because a motion for new trial is not a "case tried" within the meaning of the rule. Thus, the court of appeals will not give them same deference as Rule 296 findings. *Osborn*, 961 S.W.2d at 411, n.3; *see also Pharo v. Chambers County, Texas*, 922 S.W.2d 945, 950 (Tex. 1996) (without findings of fact following hearing on motion for new trial court assumes trial court made all findings in support of judgment).

Findings of fact filed in non-Rule 296 cases are reviewed differently than Rule 296 findings. For findings made in cases where the trial court standard is abuse of discretion, the findings are helpful and aid in the court's review on appeal, but not "binding" in the same manner as findings under Rule 296. *IKB Indus. v. Pro-Line Corp.*, 938 S.W.2d 440, 442 (Tex. 1997); *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 852-53 (Tex. 1992). Unlike review of Rule 296 findings where findings are tested for legal and factual sufficiency, in an abuse of discretion review, an appellate court can reverse even if findings and evidence support a trial court's order. *IKB*, 938 S.W.2d at 442; *Chrysler Corp.*, 841 S.W.2d at 852-53; *see also Doran v. ClubCorp USA, Inc.*, 174 S.W.3d 883, 887 (Tex. App.—Dallas 2005, no pet.) (in an interlocutory appeal, findings do not carry the same weight as findings under Rule 296; court makes an independent review of the evidence); *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 884 (Tex. App.—Dallas 2003, no pet.) (in an interlocutory appeal, findings are "helpful," but "they do not carry the same weight on appeal as findings made under rule 296, and are not binding when we are reviewing a trial court's exercise of discretion.")

Note also that one court of appeals has concluded that findings of fact are not appropriate and a trial court has no duty to file them in a post-judgment hearing. *Murray v. Murray*, 276 S.W.3d 138, 143 (Tex. App.—Fort Worth 2008, pet. dism'd). The court reasoned that a post-judgment hearing is not "tried" to the court within the meaning of Rule 296. *Id.*

Findings of fact when evidence has been heard in a motion for new trial are nonetheless helpful on appeal and should be requested.

a. Juror misconduct

Another point in a motion for new trial that requires evidence to be heard is juror or bailiff misconduct. Rule 327 sets out the requirements for a motion for new trial asserting jury or bailiff misconduct. According to the rule, a movant seeking a new trial based on juror misconduct must establish: (1) that misconduct occurred by improper communications to the jury or that a juror gave an erroneous answer in voir dire; (2) that the misconduct was material; and (3) that it reasonably caused injury considering the record as a whole. TEX. R. CIV. P. 327(a); *Golden Eagle Archery*, 24 S.W.3d at 372.

The occurrence of juror misconduct and whether it caused injury are questions of fact. *Id.* Juror misconduct must be supported by affidavits or other evidence from jurors and non-jurors. *Id.* at 369; TEX. R. CIV. P. 327(a). The trial court must hold a hearing to determine juror misconduct. TEX. R. CIV. P. 327(a).

Whether juror misconduct is "material" will depend on the facts in a particular case. "Material" has been defined in other contexts as whether "a reasonable person would attach importance to and would be induced to act on the information in determining his choice of actions in the transaction in question." *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America*, 341 S.W.3d 323, 337 (Tex. 2011) (quoting *Smith v. KNC Optical, Inc.*, 296 S.W.3d 807, 812 (Tex. App.—Dallas 2009, no pet.)).

To show probable injury, a movant must show that the alleged misconduct most likely caused a juror to vote differently than she otherwise would have done on issues vital to the judgment. *Pharo v. Chambers County*, 922 S.W.2d at 950. Whether there is a probable injury is a question of law. *Id.*

The amount of information obtained from jurors to support a motion for new trial based on juror misconduct is limited. *See* TEX. R. CIV. P. 327(b). Jurors may not offer testimony at the motion for new trial on the jury's deliberations or to anything that influenced how they voted on the verdict. *Id.*; TEX. R. EVID. 606(b). A juror may testify, however, may testify about outside influences that were improperly

brought to bear on any juror. TEX. R. CIV. P. 327(b); TEX. R. EVID. 606(b).

Rule 327(b) and Rule of Evidence 606(b) prohibit jurors from later testifying about matters occurring during deliberations. TEX. R. CIV. P. 327(b); TEX. R. EVID. 606(b); *Golden Eagle Archery*, 234 S.W.3d at 370. The rule does not, however, bar a juror from testifying about improper contacts with individuals outside the jury or about matters that occur outside the deliberative process. *Id.* In *Golden Eagle*, the supreme court gave examples of matters that could be elicited from jurors when there is an allegation of misconduct. According to the Court, a juror could testify about another juror visiting the scene of an accident that gave rise to the lawsuit. *Id*. A juror could also be asked to testify about reasons that would disqualify another juror from service if the information was obtained outside of deliberations. *Id.*

The Texas Supreme Court has not defined an "outside influence." *Golden Eagle Archery*, 24 S.W.3d at 370. "Outside influence" contemplates an influence other than the jurors themselves. *Id.* Matters that are *not* "outside influences" include jurors trading answers, jurors speculating about whether a plaintiff received a settlement, or whether alcohol was involved in an accident. *Id.*[3]

Can jurors be subjected to discovery to uncover juror misconduct? The supreme court addressed this issue in *Ford Motor Company v. Castillo*, 279 S.W.3d 656 (Tex. 2009). In *Castillo*, the presiding juror sent a note to the judge asking how much could be awarded to plaintiffs. The parties quickly settled the case. Ford later learned that the presiding juror was alone in her assessment of the facts of the case. Ford sought to set aside the settlement and to conduct discovery on the jurors in response to the plaintiffs' motion to enforce the settlement agreement.

The supreme court reiterated that discovery on jurors is generally limited. *Id.* at 666. The Court noted several reasons for protecting jurors from discovery. For example, jury deliberations need to be candid, jurors need to be protected from harassment after serving on a jury, and an unhappy juror should not be permitted to overturn a verdict. *Id.* Protecting jurors from discovery also protects the finality of judgments. *Id.* Under the facts in *Castillo*, the Court concluded that the trial court abused its discretion in denying Ford all discovery from jurors and noted that discovery could be conducted if limited to determining outside influences or juror qualifications to serve. *Id.*

b. Newly-discovered evidence

The second type of motion for new trial on which evidence must be heard is a complaint about newly-discovered evidence.

A motion for new trial based on newly-discovered evidence must demonstrate that: (1) the evidence has come to the party's knowledge since the trial, (2) the failure to discover the evidence sooner was not due to lack of diligence, (3) the evidence is not cumulative and is solely to impeach and adversary's testimony, and (4) the evidence is so material it would probably produce a different result if a new trial were granted. *Waffle House, Inc. v. Williams*, 313 S.W.3d. 796, 813 (Tex. 2010); *Connell Chevrolet Co. v. Leak*, 967 S.W.2d 888, 894 (Tex. App.—Austin 1998, no pet.).

A motion for new trial alleging newly-discovered evidence must be supported by an affidavit of the missing evidence or witness. *Steelman v. Rosenfeld*, 408 S.W.2d 330, 335 (Tex. Civ. App.—Dallas 1966, no writ). That the motion is verified does not change the requirement of supporting the motion with an affidavit. *Id.* If the newly-discovered evidence is a witness, the witness must be called to testify at the hearing on the motion for new trial. *Id.*

What constitutes due diligence? The due diligence requirement "has not been met if the same diligence used to obtain the evidence after trial would have had the same result if exercised before trial." *Neyland v. Raymond*, 324 S.W.3d 646, 652 (Tex. App.—Fort Worth 2010, no pet.). The court of appeals noted that the movant relying on an allegation of newly-discovered evidence must explain why the evidence could have not been produced before trial. *Id.* In *Neyland*, husband sought to present "new evidence" in a motion for new trial about the value of a home located in Africa that was awarded to him in a divorce to show it had no value. *Id.* 651-62. The court of appeals noted that husband failed to provide any explanation of why the "new evidence" was not available before trial or how he exercised due diligence in attempting to obtain the evidence sooner. *Id*. at 652.

Note that a movant seeking a new trial based on newly-discovered evidence is not necessarily entitled to a hearing on the motion. The Fort Worth Court concluded in *Neyland* that a movant was not entitled a hearing when the motion for new trial "contained no showing of due diligence and therefore raised no question of fact regarding his entitlement to a new trial." *Neyland*, 324 S.W.3d at 652-53.

c. Failure to set aside a default judgment

To **c**hallenge the failure to set aside default judgment must be raised in a motion for new trial and have evidence heard to preserve error for appeal. TEX. R. CIV. P. 324(b)(1).

A defendant must establish three elements to obtain a reversal of a default judgment whether a no-

[3] An extensive list of what does and does not constitute outside influences on a jury is complied in an excellent article by Jeffrey L. Oldham & JoAnn Storey, *Preservation of Error Post-Trial*, NUTS AND BOLTS OF APPELLATE PRACTICE, ch. 3, pp. 9-10 (State Bar of Texas, Sept. 9, 2009).

answer default or a post-answer default. The defendant must: 1) show that the failure to appear for trial was not intentional or the result of conscious indifference; 2) set up a meritorious defense to the lawsuit's allegations; and 3) demonstrate that granting the motion will occasion no delay or otherwise injure the plaintiff. *Dolgencorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 925 (Tex. 2009); *Craddock v. Sunshine Bus Lines, Inc.*, 134 Tex. 388, 133 S.W.2d 124, 126 (1939). If a movant establishes these three elements, it is an abuse of discretion not to grant a new trial. *Dolgencorp.*, 288 S.W.3d at 926.

The first element, "not intentional or the result of conscious indifference" means more than deliberate conduct, it must also be without adequate justification. *Dolgencorp*, 288 S.W.3d at 926 (quoting *Smith v. Babcock & Wilcox Constr. Co.*, 913 S.W.2d 467, 468 (Tex. 1995)). Proof of an accident, mistake or other reasonable explanation negates intent or conscious indifference. *Id.* In *Dolgencorp.*, the supreme court concluded defendant established its failure to appear was not intentional upon proof that the defendant's attorney was in trial in another county and had contacted the court regarding his conflict and provided a credible explanation for why he believed the trial court would delay the trial. *Id.* at 926-27.[4]

The second element requires a movant to "set up a meritorious defense." This means the motion must allege facts that in law would constitute a defense to the plaintiff's allegations. *Id.* at 927-28. The movant must show prima facie proof of its meritorious defense by affidavits or other evidence. *Id.* at 928. Note that if a default is taken without valid service or notice to defendant, the defendant does not have to show a meritorious defense to support its motion for new trial. *Dolgencorp.*, 288 S.W.3d at 928, n.1 (citing *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988) & *Mathis v. Lockwood*, 166 S.W.3d 743, 744 (Tex. 2005)).

For example in *Dolgencorp.*, the motion for new trial set up a meritorious defense to the plaintiff's allegations of negligence. Dolgencorp.'s motion for new trial presented expert testimony of the cause of the fire. *Id.* at 928-29.

The final issue requires a defendant to show that granting a new trial does not injure plaintiff. Dolgencorp. alleged that it was ready for trial and offered to pay the reasonable expenses of plaintiff in obtaining the default judgment. *Id.* at 929. When a defendant alleges that a new trial does not harm plaintiff, the burden shifts to plaintiff to prove injury or harm. *Id.* As the court explained in *Dolgencorp.*, a plaintiff must show more than general harm of having a default overturned. *Id.* A plaintiff must show a specific injury. For example, a motion for new trial overturning a default and setting a new trial might harm a plaintiff if she could not secure a particular witness for a later trial setting. *Id.*

A motion for new trial to set aside a default judgment must be supported by evidence. *Puri v. Mansukhani*, 973 S.W.2d 701, 715 (Tex. App.—Houston [14th Dist.] 1998, no pet.). An affidavit supporting a motion for new after a default cannot be based on conclusory allegations. *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 83 (Tex. 1992) (affidavit stating failure to answer was an accident constitutes no support for the first element of *Craddock*.) Similarly, "unbelievable and internally inconsistent excuses" will not show a lack of conscious indifference. *Boatman v. Bradley M. Griffin, Inc.*, No. 02-10-00417-CV, 2011 WL 2989925 at *5 (Tex. App.—Fort Worth July 21, 2011, no pet. h.) (mem. op.) (rejecting affidavit testimony that defendant could not physically sit due to health problems, yet defendant had moved out of state on the eve of trial). The absence of evidence or affidavit attached to a motion for new trial to set aside a default judgment is a fatal defect. *Henderson v. Henderson*, No. 03-10-00531-CV, 2011 WL 2768549 at *4 (Tex. App.—Austin July 13, 2011, no pet. h.) (mem. op.); *Wiseman v. Levinthal*, 821 S.W.2d 439, 442 (Tex. App.—Houston [1st Dist.] 1991, no writ).

If a motion for new trial is properly filed with supporting evidence, a plaintiff should file a response and controvert the defendant's facts. Courts accept as true uncontroverted allegations in a defendant's affidavit that negate intentional conduct. *Gilbert v. Brownell Electro*, 832 S.W.2d 143, 144-45 (Tex. App.—Tyler 1992, no writ). By controverting the facts, the trial court must conduct a hearing and determine if a defendant negated conscious indifference or intentional conduct. *Id.*

2. Complaints about the factual sufficiency of evidence in support of a jury finding

Rule 324(b) provides that challenges to the factual sufficiency of the evidence to support a jury finding or about a finding being against the overwhelming weight of the evidence must be preserved in a motion for new trial. TEX. R. CIV. P. 324(b)(2) & (3).

In this type of motion for new trial, a movant challenges the evidence supporting a jury finding as "factually insufficient" if she did not have the burden of proof. *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275-76 (Tex. App.—Amarillo 1988, writ denied). If she had the

[4] An extensive list of what is and is not intentional conduct satisfying the first element of *Craddock* is complied in an excellent article by Jeffrey L. Oldham & JoAnn Storey, *Preservation of Error Post-Trial*, NUTS AND BOLTS OF APPELLATE PRACTICE, ch. 3, pp. 11-12 (State Bar of Texas, Sept. 9, 2009).

burden of proof, then the factual sufficiency challenge is couched as the jury's finding is "against the great weight of the evidence." *Id.*

When drafting a motion for new trial complaining of factual insufficiency, keep the standard of review on appeal in mind. In making a factual sufficiency review, the court of appeals considers all the evidence both supporting and contradictory to the finding. *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). A finding is set aside only if the supporting evidence is so weak as to be clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986). Thus, a motion for new trial raising factual insufficiency should recount the evidence on both sides to demonstrate why the finding should be set aside.

Note that a motion for new trial can raise a legal insufficiency challenge if not otherwise raised by a motion for instructed verdict, motion for jnov, object to the charge, or motion to disregard a jury's finding. *Steves Sash & Door Co. v. Ceco Corp*., 751 S.W.2d 473, 477 (Tex. 1988). Raising a legal sufficiency point in a motion for new trial, however, is not optimal. A complaint of the legal sufficiency raised in a motion for new trial will only result in a remand for new trial and not a rendition of judgment. *El-Khoury v. Kheir*, 241 S.W.3d 82, 90 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

3. Complaints about the inadequacy or excessiveness of damages

Rule 324(b) requires a motion for new trial to preserve error about the inadequacy or excessiveness of the jury's damage award. TEX. R. CIV. P. 324(b)(4). A trial court and an appellate court cannot order remittitur. *Arkoma Basin*, 249 S.W.3d at 390. The trial court and court of appeals can suggest a remittitur conditioned that if the plaintiff refuses, a new trial will be granted. *Id.*

A court can suggest remittitur if the damages are not supported by factually sufficient evidence. *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986). If part of a damage verdict is lacks sufficient evidentiary support, remittitur of a portion of the damages is proper. *Comstock Silversmiths, Inc. v. Carey*, 894 S.W.2d 56, 58 (Tex. App.—San Antonio 1995, no writ).

If the trial court signs an order suggesting remittitur, it is a modification of the earlier judgment that restarts the appellate deadlines. *Id.* at 390-91. If a party files a voluntary remittitur without any trial court order or suggestion, the original judgment remains in place and the deadlines remained tied to the original judgment. *Id.* at 390.

4. Complaints about incurable jury argument

The final error that must be preserved in a motion for new trial is an allegation of incurable jury argument that was not otherwise ruled on by the trial court. TEX. R. CIV. P. 324(b)(5). A complaint about incurable jury argument can be raised through a motion for new trial when no objection was raised during trial. *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009).

Improper jury arguments are either curable or incurable. *Otis Elevator Co v. Wood*, 436 S.W.2d 324, 333 (Tex. 1968). Curable jury arguments are those where an objection during trial and instruction to disregard cures any harm. *Id.* An incurable jury argument is one that is so inflammatory that its damage cannot be remedied through an instruction to disregard. *Id.* Incurable jury arguments are those that "strike at the courts' impartiality, equality, and fairness inflict damage beyond the parties and the individual case under consideration if not corrected." *Living Ctrs. of Tex., Inc. v. Penalver*, 256 S.W.3d 678, 681 (Tex. 2008) (jury argument compared defendant's attorneys to perpetrators of the atrocities in Germany during World War II).

Incurable jury argument is rare. *Living Ctrs. of Tex., Inc. v. Penalver*, 256 S.W.3d at 680; *Catalanotto v. Meador Oldsmobile LLC*, No. 02-10-00044-CV, 2011 WL 754413 at *12-13 (Tex. App.—Fort Worth March 3, 2011, no pet.) (mem. op.). To prevail on a claim of incurable jury argument, the party must establish that in light of the record as a whole, the challenged argument was so extreme to cause an ordinary juror to agree to a verdict that, without the argument, she would not have agreed to. *Phillips*, 288 S.W.3d at 883.

D. Other grounds for motions for new trial

In addition to the motion for new trial grounds in Rule 324, there are two other bases for new trials. A new trial can be granted "in the interest of justice" or for "good cause." Both grounds are to include in any motion for new trial.

A trial court can grant a new trial "in the interest of justice." *In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 213 (Tex. 2009) (citing *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985)). As the supreme court recently held, a trial court that grants a new trial "in the interest of justice" must give its reasons. The trial court's reasons in granting a new trial should be "clearly identified and reasonably specific." *Id.* "In the interest of justice" is not sufficiently specific. *Id.* The trial court's broad discretion "should not, and does not, permit a trial judge to substitute his or her own views for that of the jury without a valid basis." *Id.* at 212.

What happens if a trial court grants a motion for new trial "in the interest of justice?" A trial court's failure to given reasons for a new trial granted in the

interest of justice is reviewable by mandamus. *In re E.I. Du Pont de Nemours & Co.*, 289 S.W.3d 861, 862 (Tex. 2009); *In re United Scaffolding, Inc.*, 301 S.W.3d 661, 663 (Tex. 2010). The extent of the mandamus review when a trial court refuses to specify the reasons for granting a new trial is limited. The court of appeals can mandamus a trial court to comply with *Columbia* and state the reasons for granting a new trial. The court of appeals, however, cannot review the merits of the trial court's stated grounds for granting a new trial. *In re Smith*, 332 S.W.3d 704, 708-09 (Tex. App.—Texarkana 2011, orig. proceeding); *In re Toyota Motor Sales, U.S.A., Inc.*, 327 S.W.3d 302, 305-06 (Tex. App.—El Paso 2010, orig. proceeding).

A trial court can also grant a new trial or for "good cause" on the court's own motion or on the motion of a party. TEX. R. CIV. P. 320; *In re Columbia Med. Ctr.*, 290 S.W.3d at 210, n.3. As the supreme court noted in *Columbia Medical Center*, "good cause" in granting a new trial is not defined in the rules of procedure. *Id.* According to the supreme court, "good cause" means more than just "any cause." *Id.* Given the importance of the right to trial by jury, trial courts should not set aside jury verdicts without "specific, significant, and proper reasons." *Id.*

E. Other general preservation issues with motions for new trial.

What is the effect of a granted motion for new trial? When a new trial is granted, the case is back on the trial court's docket as though it had never been tried. *In re Baylor Med. Ctr.*, 280 S.W.3d at 230-31. At that point, the trial court has the authority to review any pre-trial order if so requested as long as the case is still pending, including review of its decision to grant a new trial. *Id.* at 231-32.

What is the effect of a motion for new trial complaining of a first judgment that is granted, on a second judgment? A granted motion for new trial cannot assail a subsequent judgment. *Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 562 (Tex. 2005). When a motion for new trial is granted, it is moot and can have no effect on a later judgment. *Id.* at 563. In *Wilkins*, the Court concluded that at an original motion for new trial that was granted following a summary judgment could not operate to extend the appellate deadline on a subsequently granted summary judgment. *Id.* at 563-64.

A motion for new trial, however, preserves error in a subsequent judgment if the errors remain in the subsequent judgment. *Wilkins*, 160 S.W.3d at 562; *Fredonia State Bank v. General American Life Ins. Co.*, 881 S.W.2d 279, 281 (Tex. 1994).

Note that a trial court may grant a partial new trial. Under Rule 320, a new trial can be granted in part if clearly separable without unfairness. *State Dept. of Highways & Pub. Transp. v. Cotner*, 845 S.W2.d 818, 819 (Tex. 1993). There can be no separate trial on unliquidated damages alone, however, if liability is contested. TEX. R. CIV. P. 320.

V. REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

Unlike having a jury verdict to illuminate the facts underlying the result, the underlying reasons for a judgment in a bench trial are not apparent. The rules of procedure allow a litigant to obtain factual findings that replace a jury's verdict and to obtain the trial court's legal bases for its rulings. The findings of fact and conclusions of law form the basis for the appeal.[5]

As highlighted at the end of this section, the Supreme Court Advisory Committee is considering significant changes to the rules on findings of fact and conclusions of law. If passed, the revised rules will impact much of the discussion that follows. For a further discussion on the possible impacts on the proposed revisions on findings of fact practice and procedure see Laurie Ratliff, *Appealing Bench Trials*, CIVIL APPELLATE PRACTICE 101, ch. 6 (State Bar of Texas, Sept. 1, 2010).

A. Purpose of findings of fact and conclusions of law

Findings of fact take the place of a jury's verdict and provide the factual framework for the court's judgment. Findings of fact in a bench trial have the "same force and dignity" as a jury's answers to jury questions. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991); *Keisling v. Landrum*, 218 S.W.3d 737, 740 (Tex. App.—Fort Worth 2007, pet. denied). Conclusions of law identify the legal basis for the judgment based on the facts found. Findings of fact and conclusions of law narrow the issues for appeal and provide a basis for attacking the judgment. *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 252, 255 (Tex. App.—Houston [14th Dist.], pet. denied).

B. Mechanics of the request for findings of fact and procedure.

1. <u>When findings of fact and conclusions of law are appropriate.</u>

Findings of fact and conclusions of law are critical for appeals in bench trials. However, not every bench trial or hearing is a candidate for findings of fact and conclusions of law.

[5]This discussion is excerpted from an article on findings of fact and conclusions of law. *See* Laurie Ratliff, *Appealing Bench Trials*, CIVIL APPELLATE PRACTICE 101, ch. 6 (State Bar of Texas, Sept. 1, 2010). *Appealing Bench Trials* contains a detailed analysis of the procedures surrounding findings of fact and the strategies associated with findings of fact and conclusions of law.

Under Rule 296, "in any case tried in the district or county court 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. Rule 296 gives a party a right to findings of fact and conclusions of law following a final adjudication after a conventional trial on the merits before the court. *IKB Indus. v. Pro-Line Corp.*, 938 S.W.2d at 442; *Haddix v. American Zurich Ins. Co.*, 253 S.W.3d 339, 345(Tex. App.—Eastland 2008, no pet.). A case is "tried" when a court holds an evidentiary hearing. *Haddix*, 253 S.W.3d at 345. In such cases, findings of fact and conclusions of law are mandatory under Rule 296 and 297.

In addition to Rule 296 findings, the supreme court has identified proceedings where findings of fact, although not required under Rule 296, could be considered on appeal: a default judgment on a claim for unliquidated damages, judgment rendered as sanctions, and any judgment based in any part on an evidentiary hearing. *IKB*, 938 S.W.2d at 443.

Accelerated appeals where findings of fact may be requested include appeals from interlocutory orders when by statute an appeal is allowed, quo warranto proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected less than 30 days after the order or judgment. TEX. R. APP. P. 28.1(a). Accordingly, the appealable orders listed in Tex. Civ. Prac. & Remedies Code §51.014(a) are matters where findings of fact could be filed. TEX. CIV. PRAC. & REM. CODE §51.014(a).

Not all proceedings result in a party being able to obtain findings of fact and conclusions of law. In cases where there are no facts to find and a trial court rules as a matter of law, findings of fact and conclusions of law serve no purpose and should not be requested. *IKB*, 938 S.W.2d at 442. Findings of fact are not appropriate in the following kinds of cases: summary judgments, directed verdicts, jnov's, default judgment awarding liquidated damages, dismissal for want of prosecution without an evidentiary hearing, dismissal based on the pleadings or special exceptions, and any judgment rendered without an evidentiary hearing. *Id.*

For example, in a plea to the jurisdiction challenge if there are no disputed facts and the trial court rules as a matter of law, findings of fact have no purpose and are not considered on appeal. *U. Lawrence Boze' & Assocs., P.C. v. Harris County Appraisal Dist.*, __ S.W.3d __, 2011 WL 3524209 at * 14 (Tex. App.—Houston [1st Dist.] Aug. 11, 2011, no pet. h.); *F-Star Socorro, L.P. v. El Paso Cent. Appraisal Dist.*, 324 S.W.3d 172, 175 (Tex. App.—El Paso 2010, no pet.).

2. Requesting findings of fact and conclusions of law

Requesting findings of fact and conclusions of law is a three-step process. All three steps are critical in preserving error and in presenting a case on appeal.

The first step in the procedure for obtaining findings of fact and conclusions of law is to file a written "Request for Findings of Fact and Conclusions of Law." TEX. R. CIV. P. 296. The request must be filed with the clerk within twenty days after the judgment is signed and must be served on all parties according to Rule 21a. TEX. R. CIV. P. 296. There is no procedure for extending this 20-day deadline. *Id.* A request for findings of fact can be filed early. A prematurely filed request for findings of fact is effective and deemed filed on the date of but after the signing of the judgment. TEX. R. CIV. P. 306c. The clerk must immediately notify the trial court of the request. TEX. R. CIV. P. 296.

Rule 297 imposes a mandatory duty on the trial court to file properly requested findings of fact. TEX. R. CIV. P. 297. A court "shall file findings of fact and conclusions of law within twenty days after a timely request is filed." *Id.* The court must also send a copy of the findings and conclusions to each party in the suit. TEX. R. CIV. P. 297.

A trial court is only required to enter findings (and additional findings) on ultimate or controlling issues. *Flanary v. Mills*, 150 S.W.3d 785, 792 (Tex. App.—Austin 2004, pet. denied). An ultimate issue is one that is essential to the cause of action and that would have a direct effect on the judgment or one that supports a judgment for one party or another. *Id.*

While findings of fact typically contain numerous evidentiary findings, the trial court is not required to enter findings of fact on evidentiary issues. An evidentiary issue is one that a trial court considers in making its decision on a controlling issue, but that itself, is not a controlling issue. *Flanary*, 150 S.W.3d at 792-93.

The second step in the procedure for obtaining findings of fact and conclusions of law is to file a notice past due findings and conclusions if the trial court fails to timely file findings of fact and conclusions of law. If the court fails to timely file findings of fact and conclusions of law within 20 days after the request is filed, the party who requested findings of fact must file a "Notice of Past Due Findings of Fact and Conclusions of Law." The notice of past due must be filed within thirty days after the original request was filed. TEX. R. CIV. P. 297. The notice of past due findings must state the date the original request was filed and the date the findings and conclusions were due. TEX. R. CIV. P. 297. The clerk is required to immediately inform the court of the late notice. *Id.*

The filing of the late notice extends the time for the trial court to file findings of fact and conclusions of law. TEX. R. CIV. P. 297. With the filing of past due notice, the trial court's deadline to file findings and conclusions is extended to forty days from the date the original request was filed. *Id.*

Rule 297's requirement of filing a past due notice of findings is frequently missed but it is a critical step in preserving error on the court's failure to file findings and conclusions. The failure to file a notice of past due findings waives the right to complain about the failure to file findings. *Gnerer v. Johnson*, 227 S.W.3d 385, 389 (Tex. App.—Texarkana 2007, no pet.).

When filing a notice of past due findings, do not file the notice early. Some courts of appeals have concluded that a notice of past due findings request filed early is *not* timely and an appellant waived complaint regarding the trial court's failure to file findings of fact. *Estate of Gorski v. Welch*, 993 S.W.2d 298, 301 (Tex. App.—San Antonio 1999, pet. denied). The courts reasoned that Rule 306c lists only the request for findings of fact, not the notice of past due findings of fact, as a document that can be filed early and still be effective. TEX. R. CIV. P. 306c.

The final step in the procedure for obtaining findings of fact and conclusions of law is the filing of a request for additional findings and conclusions. TEX. R. CIV. P. 298. A request for additional findings of fact and conclusions of law must be made within ten days after the original findings and conclusions are filed by the court. TEX. R. CIV. P. 298. The court then has ten days to file additional findings and conclusions. *Id.* ("court shall file any additional or amended findings and conclusions that are appropriate within ten days after the request is filed.") The rule also provides that no findings or conclusions "shall be deemed or presumed by any failure of the court to make additional findings or conclusions." *Id.*

While the request for additional findings applies to both parties, for the appellant, the request for additional findings of fact is critical and the primary avenue to preserve error. A request for additional findings is similar to an objection. *Vickery*, 5 S.W.3d at 255-56. Thus, the request for additional findings, like an objection, needs to be specific. *Id.* A request for additional findings of fact has significance unrelated to the trial court actually filing additional findings of fact. To raise an issue on appeal, a party must have requested a finding of fact on the issue or the issue must be in the court's findings.

Requesting additional findings of fact depends on the omission, whether an omitted element or an entirely omitted cause of action. The guiding principle is this: if you want to raise an issue on appeal, it needs to be in the findings of fact or in a request for additional findings of fact. *Century Indem. Co. v. First Nat'l Bank of Longview*, 272 S.W.2d 150, 156 (Tex. Civ. App.—Texarkana 1954, no writ); *Townson v. Liming*, No. 06-10-00027-CV, 2010 WL 2767984, at *2, n.2 (Tex. App.—Texarkana July 14, 2010, no pet.).

A related matter to additional findings of fact is omitted findings. As Rule 299 points out, findings of fact form the basis of the judgment upon "all grounds of recovery and of defense embraced therein." TEX. R. CIV. P. 299. The judgment cannot be supported on appeal by a presumed finding on a ground of recovery or defense if no element has been included in the findings. *Id.* However, if one of more elements of a ground or defense is included in the findings, "omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment." *Id.* Finally, the court's refusal to file a requested finding is reviewable on appeal. *Id.*

Note that Rule 298 starts the deadline to file a request for additional findings from a different date than most rules. Rule 298 ties the deadline for requesting additional or amended findings to the date the trial court *files* it findings of fact, not the day the court signs the findings. TEX. R. CIV. P. 298. Failing to timely request additional findings of fact and conclusions of law waives the right to complain of the trial court's failure to enter the additional findings. *Heritage Res., Inc. v. Hill*, 104 S.W.3d 612, 620 (Tex. App.—El Paso 2003, no pet.) (appellant waived complaint regarding trial court's failure to segregate attorney's fees when appellant failed to request an additional finding on the issue).

3. Form for findings of fact and conclusions of law

Rule 296 and 299a prescribe the form for the trial court's findings of fact and conclusions of law. The rules require that findings of fact and conclusions of law be in writing and in a separate document from the judgment. TEX. R. CIV. P. 296, 299a. The trial court's finding of fact "shall not be recited in a judgment." TEX. R. CIV. P. 299a. Findings of fact shall be filed with the district clerk separate and apart from the judgment. *Id.*

Several issues arise in the form of the findings of fact. First, findings of fact and conclusions of law must be in writing and cannot be made orally on the record. *In re Doe 10*, 78 S.W.3d 338, 340, n.2 (Tex. 2002). The court of appeals must ignore oral pronouncements as they do not constitute findings of fact and conclusions of law. *In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984); *Celestine v. Department of Family & Protective Servs.*, 321S.W.3d 222, 232 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

While oral pronouncements may not amount to findings of fact and conclusions of law, such statements are not without significance. For example, the Austin Court considered oral pronouncements when ruling on an appellant's complaint about lack of findings of fact. In *Burnet Central Appraisal District*

v. Millmeyer, 287 S.W.3d 753, 759-60 (Tex. App.—Austin 2009, no pet.), appellant complained about the trial court's failure to enter findings of fact and conclusions of law. In deciding whether appellant suffered harm by the lack of findings, the Austin Court referred to the trial court's statements on the record at end of trial that explained the reasons for its ruling. According to the Austin Court, the trial court's oral pronouncements negated any harm in the failure to file findings of fact. *Id.*; *see also Pope v. Pope*, No. 03-06-00550-CV, 2007 WL 2010766 (Tex. App.—Austin July 12, 2007, no pet.) (mem. op.) (court looked to trial judge's comments from the bench to determine if appellant was harmed by the trial court's failure to file findings of fact).

Second, another problem occurs when a trial court sends a letter ruling that contains findings of fact and conclusions of law. The supreme court rejected an attempt to alter formal findings of fact with a pre-judgment letter ruling. *Cherokee Water Co. v. Gregg County Appraisal Dist.*, 801 S.W.2d 872, 878 (Tex. 1990). The Court's reasoning appeared to be based on the fact that the letter was prepared before the judgment and thus did not constitute post-judgment Rule 296-99a findings of fact. *Id.*

Several courts of appeals have applied *Cherokee Water* and concluded that pre-judgment letter rulings do not constitute findings of fact. *Alan Reuber Chevrolet, Inc. v. Grady Chevrolet, Ltd.*, 287 S.W.3d 877, 883 (Tex. App.—Dallas 2009, no pet.); *Mondragon v. Austin*, 954 S.W.2d 191, 193 (Tex. App.—Austin 1997, pet. denied); *but see Barry v. Jackson*, 309 S.W.3d 135, 138-39, n.4 (Tex. App.—Austin 2010, no pet.) (court agreed letter ruling was not a finding of fact but "we believe it is nonetheless instructive background regarding the court's reasoning"); *Castillo v. August*, 248 S.W.3d 874, 880 (Tex. App.—El Paso 2008, no pet.).

Other courts of appeals vary on this interpretation. The Eastland Court distinguished *Cherokee Water* and construed a pre-order letter ruling as findings of fact. The Eastland Court noted that unlike *Cherokee Water*, the trial court did not file formal finding of fact and expressly indicated in the letter ruling that it intended the letter to constitute findings of fact. *Kendrick v. Garcia*, 171 S.W.3d 698, 701-02 (Tex. App.—Eastland 2005, pet denied). Other courts have construed letter rulings as findings of fact, noting that the rules do not require any particular form. *Rose v. Woodworth*, No. 04-08-00382-CV, 2009 WL 97256, at *1 (Tex. App.—San Antonio Jan. 14, 2009, no pet.) (mem. op.); *Senora Res., Inc. v. Kouatli*, No. 01-00-00264-CV, 2000 WL 1833771, at *2-3 (Tex. App.—Houston [1st Dist.] Dec. 14, 2000, no pet.) (mem. op); *Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120, 124 (Tex. App.—Corpus Christi 1986, no pet); *Duddlesten v. Klemm*, No. 06-08-00106-CV, 2009 WL 635153, at *2 (Tex. App.—Texarkana March 13, 2009, no pet.) (mem. op.) (trial court's letter expressed findings and conclusions and court of appeals treated as official findings), *but see Moore v. Jet Stream Investments, Ltd.*, 315 S.W.3d 195 (Tex. App.—Texarkana 2010, pet. denied) (letter ruling stated "below are my findings" but court of appeals refused to treat as findings when subsequent judgment conflicted with letter). The Houston Fourteenth Court questioned the applicability of *Cherokee Water* when a letter ruling matches the judgment. *Chenault v. Banks*, 296 S.W.3d 186, 190 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

Finally, the rule also contemplates that findings will often end up in a judgment: "if there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 and 298 the latter findings will control for appellate purposes." TEX. R. CIV. P. 299a; *Redman v. Bennett*, 401 S.W.2d 891, 894 (Tex. Civ. App.—Tyler 1066, no writ).

Courts of appeals split on how to consider findings of fact contained in a judgment. The Amarillo Court has concluded that findings in a judgment have probative value as long as they do not conflict with separately filed findings of fact. *South Plains Lamesa R.R., Ltd.*, 280 S.W.3d 357, 365 (Tex. App.—Amarillo 2008, no pet.); *Hill v. Hill*, 971 S.W.2d 153, 157 (Tex. App.—Amarillo 1998, no pet.). The court reasoned that findings recited in the judgment reveal the basis for the trial court's decision and should be considered. *South Plains Lamesa R.R.*, 280 S.W.3d at 365; *Hill*, 971 S.W.2d at 157; *see also Martinez v. Molinar*, 953 S.W.2d 399, 401 (Tex. App.—El Paso 1997, no writ) (findings in a judgment serves the underlying purpose of Rule 296 of allowing the parties to know the court's findings); *In re U.P.*, 105 S.W.3d 222, 229, n.3 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (findings in a judgment have probative value if not in conflict with separately filed findings); *In re Sigmar*, 270 S.W.3d 289, 295, n.2 (Tex. App.—Waco 2008, orig. proceeding) (findings of fact in an order given probative value so long as not in conflict with separately filed findings).

Other courts of appeals have concluded that findings in a judgment cannot be considered on appeal. *Guridi v. Waller*, 98 S.W.3d 315, 317 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Salinas v. Beaudrie*, 960 S.W.2d 314, 317 (Tex. App.—Corpus Christi 1997, no pet.); *Sutherland v. Cobern*, 843 S.W.2d 127, 131, n.7 (Tex. App.—Texarkana 1992, writ denied.). If findings of fact in the judgment are not considered, then the court of appeals reviews as though no findings were made. *Sutherland*, 843 S.W.2d at 131, n.7.

The best procedure is to encourage the trial court to sign findings of fact and conclusions of law that are in a separate document from the judgment.

4. Impact on appellate deadlines and plenary power

A request for findings of fact and conclusions of law made in an appropriate case (required under Rule 296 or when can be considered on appeal) will extend the deadlines for perfecting an appeal. TEX. R. APP. P. 26.1(a)(4); *see IKB*, 938 S.W.2d at 442-43. If unsure if findings of fact will extend the appellate deadlines, file a motion for new trial. *See, e.g., Ford v. City of Lubbock*, 76 S.W.3d 795, 798 (Tex. App.—Amarillo 2002, no pet.).

While a request for findings of fact in an appropriate case extends the appellate deadlines, a request for findings of fact does not extend plenary power. *See* TEX. R. CIV. P. 329b. File a motion for new trial or a motion to modify the judgment if seeking to extend the court's plenary power. *Id.* 329b(e), (g).

If findings of fact are not appropriate and could not considered in a particular case, filing a request for findings does not extend the appellate deadlines. *IKB*, 938 S.W.2d at 443; *International Union v. General Motors Corp*., 104 S.W.3d 126, 128-29 (Tex. App.—Fort Worth 2003, no pet.)

5. Role in preservation of error

Having findings of fact and conclusions of law provides the most favorable appellate review. If no findings of fact and conclusions of law are filed or requested, all questions of fact will be presumed and found in support of the judgment. *Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662, 666 (Tex. 1987); *Treuil v. Treuil*, 311 S.W.3d 114, 130 (Tex. App.—Beaumont 2010, no pet.) If there are no findings of fact requested and none filed, the appellate court must affirm the judgment if any legal theory that is supported by the evidence. *Schoeffler v. Denton*, 813 S.W.2d 742, 744 (Tex. App.—Houston [14th Dist.] 1991, no writ).

Findings of fact are reviewed for factual and legal sufficiency of the evidence; conclusions of law are reviewed *de novo*. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996); *Perry Homes v. Cull*, 258 S.W.3d 580, 598 (Tex. 2008); *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994).

To raise a complaint about the lack of findings of fact and conclusions of law, an appellant must have filed a timely request for findings of fact and conclusions of law and a timely notice of past due findings of fact and conclusions of law. TEX. R. CIV. P. 296, 297. If properly requested and in an appropriate case, it is mandatory for the trial court file findings of fact and conclusions of law. *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 786, 772 (Tex. 1989). When a trial court fails to file findings, it is presumed harmful, unless the record affirmatively shows no harm. *Id.* An appellant is harmed if there are two or more possible grounds on which the trial court could have ruled and an appellant has to guess at the court's basis for its ruling. *Zieba v. Martin*, 928 S.W.2d 782, 786 (Tex. App.—Houston [14th Dist.] 1996, no writ); *see also In re Marriage of Grossnickle*, 115 S.W.3d 238, 253 (Tex. App.—Texarkana 2003, no pet.).

The failure to make findings of fact, however, does not compel reversal if the record affirmatively demonstrates that the complaining party suffered no harm. *Las Vegas Pecan & Cattle Co. v. Zavala County*, 682 S.W.2d 254, 256 (Tex. 1984); *Martinez v. Molinar*, 953 S.W.2d at 401. Where there is only one theory of recovery or defense, there is no injury. *Martinez*, 953 S.W.2d at 401; *see also General Elec. Capital Corp. v. ICO, Inc.*, 230 S.W.3d 702, 711 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (only one argument raised thus appellant knew the basis for trial court's ruling). The test for whether the complaining party has suffered harm is whether the appellant is forced to guess at the reason or reasons the trial court ruled against it. *Martinez*, 953 S.W.2d at 401; *Burnet Cent. Appraisal Dist. v. Millmeyer*, 287 S.W.3d at 760 (trial court's statements on the record at end of trial sufficiently explained reasons for its ruling and negated any harm in the failure to file findings of fact); *see also Midwest Med. Supply Co. v. Wingert*, 317 S.W.3d 530, 535-36 (Tex. App.— 2010, no pet.) (no harm in having no findings of fact when only issue is a legal one).

Other cases support an appellant's argument of harm when no findings of fact are filed. When there are multiple possible bases on which the trial court could have relied in making its decision, an appellant is harmed by the lack of findings of fact. *Liberty Mut. Fire Ins. v. Laca*, 243 S.W.3d 791, 795 (Tex. App.—El Paso 2007, no pet.). The El Paso Court reasoned that without findings, appellant was forced to appeal under a more onerous standard of review even though the party properly requested findings of fact. Without findings of fact, appellant was forced to expend resources to brief all issues, rather than those forming the basis of the trial court's decision. *Id.*; *see also Vargas v. Texas Dep't of Protective & Regulatory Servs.*, 973 S.W.2d 423, 426-27 (Tex. App.—Austin 1998, pet. granted, judgm't vacated w.r.m.) (forcing appellant to challenge sufficiency of each ground for termination put appellant at disadvantage without findings of fact; court remanded based on changed circumstances).

Mandamus is not an available remedy to compel a trial court to file findings of fact and conclusions of law. *In re Martin*, No. 06-09-00099-CV, 2009 WL 4281276, at *1-2 (Tex. App.—Texarkana Dec. 2, 2009, orig. proceeding) (mem. op.) (recognizing there is an appellate remedy for failure to file findings of fact – abate the appeal and order the trial court to file findings of fact and conclusions of law); *In re Sheshtawy*, 161 S.W.3d 1, 2 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (same). The

remedy for a trial court's failure to file findings of fact when required is to ask the court of appeals to abate the appeal and direct the trial court to correct the error. *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 773 (Tex. 1989). TEX. R. APP. P. 44.4(a). If the original judge is no longer serving, the case may be remanded for a new trial. *Liberty Mut.*, 243 S.W.3d at 795.

C. Proposed Revisions to Rules 296-99a.

As mentioned above, the Supreme Court Advisory Committee has been considering several amendments to simplify Rules 296-99a. Highlights of the significant proposed revisions from the current draft include:

Rule 296 – allow a judge to orally state findings of fact on the record.

Rule 297(a) – change the deadline to request written findings of fact to 30 days after the judgment is signed.

Rule 297(b) – instructs that findings can be only on ultimate issues and must be in broad form without unnecessary evidentiary findings.

Rule 297(c) –change the trial court's deadline to enter findings to 50 days after the judgment is signed.

Rule 297 – eliminates the requirement of filing a "notice of past due findings."

Rule 298 – change the deadline to request additional findings to no later than 20 days after the original findings are filed and no earlier than 30 days after the judgment is signed.

Rule 299a – instructs that Rules 296-299a does not apply to any recitals of findings of fact in a judgment.

SUPREME COURT ADVISORY COMMITTEE PROPOSED DRAFT TO RULES 296-299a (dated Nov. 26, 2010).

VI. MOTION FOR JUDGMENT NUNC PRO TUNC

A. Purpose of a nunc pro tunc judgment

The purpose of a nunc pro tunc judgment is to correct clerical errors that occur in the entry of the judgment. TEX. R. CIV. P. 316.

B. Mechanics of the motion for judgment nunc pro tunc and procedure

1. Form of the motion.

There is no particular form for a motion for judgment nunc pro tunc. The critical point in nunc pro tunc motions is that only clerical errors can be corrected. Substantive or judicial errors cannot be corrected through this motion. *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986).

A judicial error is one that occurs in the rendition of judgment as opposed to the entry of a judgment. *Id.* A judicial error arises from a mistake of fact or law that requires judicial reasoning to correct. *Barton v. Gillespie*, 178 S.W.3d 121, 126 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Judgments that correct judicial errors after plenary power has expired are void. *Hernandez v. Lopez*, 288 S.W.3d 180, 185 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

A clerical error is one that occurs in the entering of a judgment or order. *Escobar*, 711 S.W.2d at 231. A clerical error is one that is not the result of judicial reasoning or determination. *Andrews v. Koch*, 702 S.W.2d 584, 585 (Tex. 1986).

The movant under Rule 316 for a judgment nunc pro tunc must establish the facts that existed when the original judgment was rendered. *Pruet v. Coastal States Trading, Inc.*, 715 S.W.2d 702, 705 (Tex. App.—Houston [1st Dist.] 1986, no writ). Evidence in support of a motion for judgment nunc pro tunc can consist of oral testimony, documents, the court's docket entries, as well as the judge's recollection of the rendition of the original judgment. *Id.*

Determining whether an error is judicial or clerical is a question of law. *Escobar*, 711 S.W.2d at 232. In making its determination, courts must review the judgment actually rendered, not the judgment that should have been rendered. *Id.* at 231.

A judgment nunc pro tunc cannot be signed solely to extend appellate deadlines. *Anderson v. Casebolt*, 493 S.W.2d 509, 510 (Tex. 1973).

2. Deadline for filing.

There is no deadline for filing a motion for judgment nunc pro tunc. TEX. R. CIV. P. 329b(f) (clerical errors can be corrected at any time). It is used to correct clerical errors after the trial court has lost plenary power over the judgment.

3. Impact on appellate deadlines.

If the trial court grants a motion for judgment nunc pro tunc while it retains plenary power over the judgment, the deadlines for filing a notice of appeal run from the date of the nunc pro tunc judgment. *Lane Bank*, 10 S.W.3d at 313.

As set out in Rule 306a(6), if the trial court signs a corrected judgment after its plenary power has expired, the deadline to appeal the corrected judgment begins from the date the nunc pro tunc was signed for complaints that were not applicable to the original judgment. TEX. R. CIV. P. 306a(6); TEX. R. APP. P. 4.3(b). A judgment nunc pro tunc does not extend the appellate deadlines for matters in the original

judgment. *Id.*; *Gonzales v. Rickman*, 762 S.W.2d 277, 278 (Tex. App.—Austin 1988, no writ).

VII. BILL OF REVIEW

A. Purpose of a bill of review proceeding

A bill of review is the last option to attack a judgment. A bill of review proceeding is an equitable action seeking to set aside a judgment that is no longer appealable or subject to a motion for new trial. Tex. R. Civ. P. 329b(f); *Caldwell v. Barnes*, 154 S.W.3d 93, 96 (Tex. 2004).

After a trial court's plenary power has expired, a judgment cannot be set aside except by bill of review for sufficient cause. TEX. R. CIV. P. 329b(d).

B. Mechanics of a bill of review proceeding and procedure

1. Form of the motion.

A bill of review is a new proceeding. The petitioner files a new lawsuit with a new cause number when seeking to set aside a judgment by bill of review.

The petitioner in a bill of review proceeding must plead and prove: 1) a meritorious defense; 2) that she was prevented from making through "fraud, accident or [a] wrongful act of the opposing party or official mistake;" and 3) that she was free from fault or negligence. *Caldwell*, 154 S.W.3d at 96. In addition to the three elements listed above, a petitioner in a bill of review proceeding must also have exercised due diligence in pursuing all other legal remedies against the former judgment. *Wembley Inv. v. Herrera*, 11 S.W.3d 924, 926-27 (Tex. 1999).

The requirements for a bill of review are different if the petitioner was not properly served. If the petitioner (defendant below) was not properly served, the petitioner is not required to prove the first two elements above and is only required to plead and prove that she is without fault or negligence. *Caldwell*, 154 S.W.3d 96-97. This element is conclusively proven if the party proves it was not served. *Id.* at 97. This is true even if a party becomes aware of a lawsuit and fails to participate. *In re A.M.*, __ S.W.3d __, 2011 WL 2471766 at * 1(Tex. App.—El Paso June 22, 2011, no pet. h.). A party has no duty to participate in a lawsuit about which she is aware if she was not properly served. *Caldwell*, 154 S.W.3d at 97, n.1.

Extrinsic fraud means fraudulent conduct that denies a party an opportunity to litigate its rights or defenses that could have been asserted in the trial. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 752 (Tex. 2003). Extrinsic fraud means conduct that occurred outside the trial that prevents a trial on the merits on the issues in dispute. *Montgomery v. Kennedy*, 669 S.W.2d 309, 312-13 (Tex. 1984). Intentionally failing to serve a party in order to obtain a judgment is an example of extrinsic fraud. *Layton v. Nationsbanc Mortg. Corp.*, 141 S.W.3d 760, 763 (Tex. App.—Corpus Christi 2004, no pet.).

Intrinsic fraud on the other hand is fraud that is determined in a trial. *Id.* at 313.

The following is a brief description of the process for determining a bill of review. The petition must allege with particularity that the prior judgment was rendered as a result of fraud, accident or wrongful act by the opposing party or by an official mistake, with no negligence by petitioner. *Baker v. Goldsmith*, 582 S.W.2d 404, 408 (Tex. 1979). The petitioner must present by sworn facts and establish its meritorious defense by prima facie proof. *Id.* at 408-09. A prima facie meritorious defense is established when the petitioner's defense is not barred as a matter of law and that the petitioner will be entitled to judgment on retrial if no contrary evidence is offered. *Id.* at 409.

The bill of review defendant (plaintiff originally) can raise defenses to the bill of review petition by attacking the validity of the defense and by raising grounds such as laches or the failure to pursue other avenues for attacking the judgment. *Caldwell v. Barnes*, 975 S.W.2d 535, 538 (Tex. 1998).

If the petitioner shows a prima facie meritorious defense, the trial court will conduct a trial. *Baker*, 582 S.W.2d at 409. The trial proceeds on two bases. First, the bill of review plaintiff must establish the elements for a bill of review listed above. Second, the bill of review defendant must prove her original cause of action in obtaining the original judgment. *Id.* The bill of review should be granted if the bill of review plaintiff meets her burden of showing a "wrongfully-obtained judgment that is unsupported by the weight of the evidence." *Id.*

2. Deadline for filing.

A bill of review proceeding must be filed after plenary power expires and within four-years after the judgment is signed. *Ross v. National Ctr. for the Employment of the Disabled*, 197 S.W.3d 795, 798 (Tex. 2006).