

## PROTECTING YOUR CLIENT'S CASE FOR APPEAL (AND YOURSELF FROM MALPRACTICE)

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This paper was created at the request of several trial lawyers that consult with me on appellate issues. They want to know what are the big mistakes that trial lawyers make which have an effect on the appeal. With that in mind, I have created my own David Letterman style top ten list of ways to protect your client's case for appeal (and you from malpractice).

One of the steps in advising a client of his or her options prior to trial is to explore the remedies available both at trial and after the trial is over. Considerations such as the likelihood of success at trial, what issues are available for appeal, and what are the chances of success on appeal all factor in the risk analysis of evaluating pretrial settlement offers and possible trial outcomes.

The client's best chance of getting close to what he or she wants is in settlement prior to trial. If settlement is not an option, then trial is the best option. Once the decision is rendered from the trial, whether by jury or judge, the chances of success decrease dramatically.

Consider these statistics compiled from the 12-month period ending August 31, 2002:

- ¬ The statewide reversal rate in civil cases is approximately one in three.
- ¬ In appeals from judgments entered on jury verdicts, the reversal rate was 25%.
- ¬ In appeals following bench trials, the

reversal rate was 22%.

- ¬ In appeals from summary judgments, the reversal rate was 33%.
- ¬ When the courts of appeals reversed judgments on jury verdicts, they most often did so on the basis that the evidence was legally insufficient to support the verdict or because one party was entitled to judgment as a matter of law. These reasons accounted for 60% of the reversals.
- ¬ Charge error accounted for 14% of the reversals from jury verdicts.
- ¬ Factual insufficiency points accounted for just 4% of the reversals from jury verdicts.
- ¬ Rulings concerning the erroneous admission or exclusion of evidence accounted for less than 1% of reversals from jury verdicts.
- ¬ Appeals from no-answer default judgments had one of the highest rates of reversal at 79%.
- ¬ The reversal rate was 48% for post-answer default judgments.
- ¬ The most common reason for reversal following a bench trial was that the evidence was legally insufficient to support the judgment or one party was entitled to judgment as a matter of law. These grounds accounted for 72% of the reversals.

- 14% of the reversals following bench trials were based on determinations that the trial court's findings were supported by factually insufficient evidence or were against the great weight and preponderance of the evidence.
- Family law cases formed the largest group of appeals following bench trials.
- In family cases, the reversal rate was 32%.
- In divorce cases, including actions to enforce or modify existing decrees, the reversal rate was 24%.
- In suits affecting the parent-child relationship, the reversal rate was 34%.
- In child support cases, including actions to collect or modify support, the reversal rate was 42%

Lynn Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. Tex. L. Rev. 431 (2003).

A plaintiff's petition must give fair notice of the plaintiff's claims by setting out the elements of the cause of action and the relief sought. *Stoner v. Thompson*, 578 S.W.2d 679 (Tex. 1999); *Roarke v. Allen*, 633 S.W.2d 804 (Tex. 1982). Error regarding a pleading that seeks unliquidated damages is waived if no special exceptions are filed. *See Peek v. Equipment Serv. Co.*, 779 S.W.2d 802 (Tex. 1989).

Failure of a defendant to specifically

plead the affirmative defenses and failure to verify defensive pleadings results in waiver of the subject matter of the defense at trial and on appeal. *Beacon Nat'l Ins. Co. v. Reynolds*, 799 S.W.2d 390 (Tex. App. – Fort Worth 1990, writ denied). However, plaintiff must object to defendant's failure to verify a defense or the defense will have been tried by consent and error is waived. *Roarke v. Allen*, 633 S.W.2d 804 (Tex. 1982).

Failure to specially except waives pleading deficiencies that can be cured by repleading, and the issues raised by the defective pleadings will be tried by consent. *Roarke v. Allen*, 633 S.W.2d 804 (Tex. 1982). If the trial court sustains the special exception, the offending party may replead or he may elect to stand on his pleadings, suffer dismissal of the case, and test the trial court's order on appeal. However, the pleader who repleads waives any error by the trial court in sustaining the special exception. *Long v. Tascosa Nat'l Bank*, 678 S.W.2d 699, 703 (Tex. App. – Amarillo 1984, no writ).

Leave of court must be obtained if pleadings are to be amended within seven days of trial. To preserve error when a pleading is untimely filed, a party must move to strike the offending pleading. *See Forscan Corp. Dresser Indus.*, 789 S.W.2d 389 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1990, writ denied). Where the record fails to show leave of court to amend late-filed pleadings, it will be presumed that leave to file was granted. *Goswami v. Metropolitan Sav. & Loan Ass'n*, 751 S.W.2d 487 (Tex. 1988).

When a party objects to evidence at trial on the grounds that it is not raised by the pleadings, the trial court may permit a trial amendment if amendment would assist presentation of the merits and does not

unfairly surprise or prejudice the objecting party. To preserve the right to complain about such trial amendment, the objecting party must move for a continuance alleging surprise and seek attorney's fees. *State Bar of Texas v. Kilpatrick*, 874 S.W.2d 656 (Tex. 1994), cert. denied, 512 U.S. 1236 (1994).

When the trial court grants leave to file a trial amendment, the amended pleading must be tendered before the charge is given to the jury. *Tex. Gen. Indem. Co. v. Ellis*, 888 S.W.2d 830 (Tex. App. – Tyler 1994, no writ).

A post-verdict amendment to conform pleadings to an award of exemplary damages has been held proper where it raises no new matters of substance and where defendant failed to object. Where the record failed to show leave to file, the amended pleading was harmless error. *Tex. Health Enter. v. Krell*, 828 S.W.2d 192 (Tex. App. – Corpus Christi), *writ granted, remand for settlement*, 830 S.W.2d 922 (1992).

There are few more important aspects of preserving a complaint for appeal than ensuring that there is an adequate record to present to the appellate court.

The party complaining on appeal must see that a sufficient record is presented to the appellate court to show error requiring reversal. Tex. R. App. P. 33.1(a); *Petitt v. Laware*, 715 S.W.2d 688 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1986, *writ ref'd n.r.e.*). Absent a record, the evidence will be presumed to support the trial court's order. *Pyles v. United Services Auto Ass'n*, 804 S.W.2d 163 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1991, *writ denied*).

Texas Rules of Appellate Procedure 13.1

places an obligation on the part of the court reporter to attend and make a full record of all court proceedings. Tex. R. App. P. 13.1. "Proceedings" include those events or happenings which occur during the course of a trial or other hearing. *Tanguma v. State*, 47 S.W.3d 663, 670 (Tex. App. – Corpus Christi 2001, *pet. ref'd*).

Although it is technically error when a court reporter fails to make a full record of the court proceedings, this error is waived if the party seeking the transcription fails to object to the lack of recording. *Brossette v. State*, 99 S.W.3d 277, 284-85 (Tex. App. – Texarkana 2003, *pet. dism'd*). It is also judged according to the harmless error analysis. See *Aviation Composite Technologies, Inc. v. CLB Corp.*, \_\_ S.W.3d \_\_, 2004 WL 64951 (Tex. App. – Fort Worth 2004, *no pet.*).

This issue is particularly important in default judgment review. The making of a record cannot be waived by an absent party, so a default judgment must be taken on the record in order to provide a transcript of the proceedings to support review. See *In re Vega*, 10 S.W.3d 720, 722 (Tex. App. – Amarillo 1999, *no pet.*).

The request for a record is subject to a due diligence test. Where a party exercises due diligence and, through no fault of its own, is unable to obtain a proper record of the proceedings, a new trial may be required where the right to have the case reviewed on appeal can be preserved in o other way. *Carstar Collision, Inc. V. Mercury Finance Co.*, 23 S.W.3d 368, 370 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1999, *pet. denied*). In such a circumstance, error is not waived.

1. Comply with all prerequisites to filing suit.

A global allegation that a plaintiff has complied with all prerequisites to filing the suit, or that all conditions precedent have been performed or have occurred, is sufficient to support a judgment in the absence of special exceptions. Tex. R. Civ. P. 54. A defendant should file special exceptions to object to plaintiff's failure to allege that the required notice has been given or the complaint is waived. Further, a defendant should file a motion to abate to object to plaintiff's failure to give the required notice.

## 2. Pretrial motions and hearings

The best practice is to request relief via a written motion. Although many rules require the filing of a written motion to support relief, this practice should be done even in the absence of a specific rule. In order to preserve a request or objection for appeal, file a written motion. In order to oppose relief requested, file a written response.

Where a motion relies on facts outside the record, verify the motion or attach an affidavit, even if not required to do so under the rules.

The general rule is to present or oppose a motion at a hearing and obtain a record. *See Moore v. Wood*, 809 S.W.2d 621 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1991, orig. proceeding). However, if there is no evidence presented, error is not waived by the failure to obtain a hearing on the motion. *See Martin v. Cohen*, 804 S.W.2d 201, 203 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1991, no writ). If the motion requires presentation of evidence, and no hearing is held, any error is waived.

A party should obtain a signed order reflecting the court's ruling on a pretrial

motion.

## 3. Motion for Continuance

A motion for continuance must be in writing and must strictly comply with the rules. The failure to verify a motion for continuance is fatal. *City of Houston v. Blackbird*, 658 S.W.2d 269 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1983, writ dism'd).

Any opposition to a motion for continuance should be affirmatively reflected in the record by filing a written response, appearing at the hearing, and arguing against the continuance on the record.

## 4. Request for Jury Trial

To preserve the right to a jury trial, a timely written request must be filed and the jury fee paid within a reasonable time before the case is set on non-jury docket, and in any event, no later than 30 days prior to the trial setting. *Halsell v. Dehoyos*, 810 S.W.2d 371 (Tex. 1991). A request made 30 or more days in advance of the trial setting raises a rebuttable presumption that the demand was made within a reasonable time. *Id.*

Although the right to a jury trial is constitutional, the right can be waived when the requesting party fails to object to conducting the trial without a jury. In order to preserve error when the trial court undertakes to try a case before the bench, despite a proper request for jury, the party must object on the record to the trial court's action or indicate affirmatively in the record that it intends to stand on its perfected right to jury trial.

### 1. Voir dire

a. Challenges to the Makeup of the Jury.

The jurors originally summoned for jury service can be challenged either by challenging the array or by requesting a jury shuffle. The “array” is the group drawn from the jury wheel and summoned for jury service; the “panel” means the individuals assigned to a particular case before voir dire; “jury” refers to the 12 or 6 individuals selected through the voir dire process.

To preserve a complaint about the array – a defect in the juror selection and summons procedure or violation of the statute pertaining to jury summons – a party must make the challenge in writing, setting forth distinctly the grounds of the challenge supported by affidavit. Tex. R. Civ. P. 221. The motion should be addressed to the particular judge in charge of the local jury system. *Martinez v. City of Austin*, 852 S.W.2d 71, 73 (Tex. App. – Austin 1993, writ denied).

Challenges to the array must be made before voir dire begins. For counties that operate under a system where one judge is designated to organize and impanel all jurors for the week, the challenge must be made before or at the time the designated judge empanels the prospective jurors. *State ex rel. Hightower v. Smith*, 671 S.W.2d 32, 36 (Tex. 1984). Challenges made for the first time to the judge assigned to try the case or in a motion for new trial come too late. *Benevides v. Soto*, 893 S.W.2d 69, 70-71 (Tex. App. – Corpus Christi 1994, no writ). If the movant is successful, the entire array is dismissed and a new array summoned.

When the panel selected for voir dire does not fairly represent a cross-section of the community, a party may demand a

shuffle. Tex. R. Civ. P. 223. The result is that the panel is randomly rearranged. The demand for a shuffle must be made before voir dire and is limited to one shuffle per case. Tex. R. Civ. P. 223.

b. Challenges for cause.

A prospective juror who admits bias or prejudice should be struck for cause. If the trial court denies a challenge for cause after bias or prejudice has been established, the movant must preserve error *before* exercising peremptory challenges by advising the trial court that (1) its denial of the challenge for cause will allow the party to exhaust peremptory challenges, and (2) specific objectionable jurors (identified by name/number) will remain on the panel after peremptory challenges are exercised. *Shepherd v. Ledford*, 962 S.W.2d 28, 34 (Tex. 1998). Additional peremptories should be requested to make up for the ones used on target panel members.

Making a record is crucial in preserving error in challenges for cause.

c. Peremptory challenges

In multi-party cases, the trial court must, if timely requested, equalize the number of peremptory strikes to avoid giving one side or one party an unfair advantage. First, the trial court must align the parties by grouping the litigants who share essentially common interests. *Patterson Dental Co. v. Dunn*, 592 S.W.2d 914 (Tex. 1979). The determination is made after voir dire and prior to the exercise of strikes.

Second, the court must equalize the strikes, not necessarily numerically, according to what the ends of justice require to prevent an unequal advantage. *Id.* at 918.

The proper time to object to the trial

court's allocation of peremptory strikes is after voir dire and prior to the exercise of the challenges allocated by the court. *Van Allen v. Blackledge*, 35 S.W.3d 61, 65 (Tex. App. – Houston [14<sup>th</sup> dist.] 2000, pet denied).

## 2. Evidentiary Objections

The admission or exclusion of evidence is only error where a substantial right of the party is affected.

Where the complaint is about the improper admission of evidence, a timely objection or motion to strike must appear in the record.

If the complaint is one excluding evidence, the substance of the evidence must be made known to the court by offer of proof or be apparent from the context of the record. The offering party must be allowed to make its offer of proof as soon as practicable, but before the charge is read to the jury.

To be timely, an objection must be made before the admission of evidence. An objection to evidence previously admitted without objection is too late. An objection should be lodged each time the evidence is offered.

A general objection will not suffice to preserve error. A specific objection is one which enables the trial court to understand the precise question and to make an intelligent ruling, affording the offering party the opportunity to remedy the defect if possible. *De Los Angeles Garay v. TEIA*, 700 S.W.2d 657 (Tex. App. – Corpus Christi 1985, no writ).

An objection must be overruled to preserve error for appeal. *Duperier v. Texas State Bank*, 28 S.W.3d 740 (Tex. App. –

Corpus Christi 2000, pet. Dism'd by agr.).

Where evidence may be partly admissible and partly inadmissible, the objecting party must point out and distinguish the admissible from the inadmissible and direct objections specifically to that point which is inadmissible.

When evidence is admissible for one purpose, but inadmissible for another purpose, it may be admitted for the purpose for which it is competent, but the court must, upon motion of a party, limit the evidence to its proper purpose. In the absence of such a motion, the right to complain of the improper purpose is waived. The objecting party has the obligation to request the court to limit the purpose for which the evidence might be considered. Absent such a limiting instruction, the evidence is received for all purposes. *Cigna Ins. Co. V. Evans*, 847 S.W.2d 417, 421 (Tex. App. – Texarkana 1993, no writ).

## 3. Opening/Closing Argument

To complain about improper jury argument on appeal, it is necessary to show an error, not invited or provoked, that was preserved by proper trial predicate (objection, request for instruction, motion for mistrial) that was not curable by instruction, withdrawal of the statement or reprimand by the judge, and that the argument by its nature constituted reversibly harmful error. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979). Failure to timely follow these procedures results in waiver. *Miller v. Bock Laundry Mach. Co.*, 568 S.W.2d 648, 653 (Tex. 1977).

## 4. Charge

A trial court must submit broad form questions to the jury unless extraordinary circumstances exist. Tex. R. Civ. P. 277. The pleadings and evidence determine which questions are properly presented to the jury. Tex. R. Civ. P. 278. As long as matters are timely raised and properly requested as a part of the trial court's charge, a judgment must be reversed when a party is denied proper submission of a valid theory of recovery or a vital defensive issue raised by the pleadings and evidence. *Exxon Corp. v. Perez*, 842 S.W.2d 629, 631 (Tex. 1992).

The submission of controlling issues in the case is a question of law and reviewable by the appellate courts under the de novo standard. *Continental Cas. Co. v. Street*, 379 S.W.2d 648, 651 (Tex. 1964). Whether a trial court should submit a theory by questions or instructions is reviewable by abuse of discretion. Tex. R. Civ. P. 277; *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990).

The trial court should generally explain to the jury any legal or technical terms contained in instructions and definitions. Tex. R. Civ. P. 277. Whether to submit a particular instruction or definition is review under abuse of discretion. *State Farm Lloyds v. Nicolau*, 951 S.W.2d 444, 451 (Tex. 1997).

When instructions or definitions are actually given, the question on review is whether the instruction or definition is "proper". Tex. R. Civ. P. 277; *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 791 (Tex. 1995).

When a party complains about the court's refusal to submit a requested instruction or definition, the question on review is whether the request was

"reasonably necessary to enable the jury to render a proper verdict." *Vinson & Elkins v. Moran*, 946 S.W.2d 381, 405 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1997, writ dism'd by agr.).

The harmless error rule applies when evaluating whether an alleged error in the submission of instructions or definitions is reversible. *St. James Transp. Co. v. Porter*, 840 S.W.2d 658, 664 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1995, writ dism'd).

Preservation of error after verdict and judgment focuses on the distinctions among the various post-trial motions.

#### 1. Motion for Judgment

A motion for judgment asks the trial court to render judgment on the jury's verdict. Tex. R. Civ. P. 300. Such a motion adopts all findings of the jury. A party who obtained judgment in its favor should be wary of moving for judgment based on a verdict if there are any contrary or ambiguous findings in order to avoid waiver of objection to those findings on appeal. In such instance, the motion for judgment should clearly reserve any points to be challenged and disclaim adoption of any part of the verdict or findings that are unfavorable or objectionable.

#### 2. Motion for Judgment Notwithstanding the Verdict (JNOV)

A motion for JNOV raises legal sufficiency, no evidence or matter of law arguments and preserves the right to request the trial and appellate courts to render judgment. Tex. R. Civ. P. 301.

A motion for JNOV may be filed before judgment or no later than 30 days after the

signing of the judgment.

### 3. Motion to Disregard Jury Findings

A motion to disregard jury findings challenges specific findings, not the entire verdict, and preserves the right to request the trial and appellate courts to render judgment. Tex. R. Civ. P. 301. Specifically, it raises the points that there is no evidence or legally insufficient evidence to support the finding; the finding is immaterial; or the opposite finding is established as a matter of law.

A motion to disregard may be filed before the judgment or no later than 30 days after the signing of the judgment.

### 4. Motion for New Trial

A motion for new trial raises factual insufficiency and against the great weight of the evidence arguments, and preserves the right to request the trial and appellate courts to order a new trial. Tex. R. Civ. P. 324, 329b. A motion for new trial raises complaints on jury misconduct, newly discovered evidence, failure to set aside default judgment. It also raises a complaint of factual insufficiency of the evidence to support a jury finding, or a complaint that a jury finding is against the overwhelming weight of the evidence. A complaint regarding inadequacy or excessiveness of damages found by a jury can be raised via motion for new trial.

Failure to assert these grounds in a motion for new trial waives them. Other grounds not proper in another type of post-trial motion can be included in a motion for new trial to preserve error.

A motion for new trial must be filed within 30 days after the signing of the judgment. A new motion may be filed within 30 days after the signing of a

corrected or modified judgment.

### 5. Motion to Modify, Correct or Reform Judgment

a motion to modify, correct or reform judgment challenges errors in the judgment but does not seek to vacate the verdict or findings. Tex. R. Civ. P. 329b.

A motion to modify, correct or reform must be filed within 30 days after the signing of the judgment. A new motion may be filed within 30 days after the signing of a corrected or modified judgment.

### 6. Findings of fact in a nonjury trial.

A party can request that the trial court make findings of fact in support of the judgment after a nonjury trial. Tex. R. Civ. P. 296. The request must be made within 20 days of the judgment and the failure to request findings by the deadline waives complaint as to the failure to file findings.

If findings are timely requested but not filed by the court within 20 days after the request, the requesting party must file a reminder of the duty to file findings. Tex. R. Civ. P. 297. Otherwise, the right to complain on appeal about the lack of findings is waived.

If findings are given, but they do not address all issues important to the requesting party, the requesting party can, within 10 days of the filing of the findings, file a request for amended or additional findings. Failure to request additional findings waives the right to complain about the failure to find a certain matter.

If findings of fact and conclusions of law are neither filed nor requested, all necessary findings in support of the judgment will be

implied. *Osteen v. Osteen*, 38 S.W.3d 809 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2001, no pet.) The implied findings may be challenged for legal and factual sufficiency only if a reporter’s record is included in the record on appeal. *Casino Magic Corp. v. King*, 43 S.W.3d 14 (Tex. App. – Dallas 2001, pet. denied).

Understanding the methods of review by the appellate courts is essential in determining how to present evidence at trial.

### 1. Legal Insufficiency

Legal insufficiency complaints on appeal are either designated as “no evidence” points or “matter of law” points, depending on whether the appellant had the burden of proof at trial. *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275 (Tex. App. – Amarillo 1988, writ denied).

#### a. No evidence

Where the appellant is challenging an adverse finding on a matter where he did not have the burden of proof, he or she must demonstrate that there is no evidence to support the adverse finding. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983). No evidence issues will be sustained only when the record discloses (1) a complete absence of evidence on a vital fact; (2) the court is barred by a rule 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 mere scintilla; or, (4) the evidence established conclusively the opposite of the vital fact. *Juliette Fowler Homes, Inc. v. Welch Assoc., Inc.*, 793 S.W.2d 660, 666 n. 9 (Tex. 1990); *Cridern v. Naaman*, 83 S.W.3d 241, 244 (Tex. App. – Corpus Christi 2001, pet. pending).

The scope of review for a no evidence issue requires the appellate court to consider only the evidence and inferences that tend to support the finding, ignoring all evidence and inferences to the contrary. *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996).

#### b. Matter of law

When attacking the legal sufficiency of an adverse finding of an issue upon which the appellant had the burden of proof at trial, the appellant must demonstrate that the evidence conclusively established his issue as a matter of law. *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989).

The scope of review in a matter of law issue first examines the record to determine that there is no evidence to support the trial court’s adverse finding; then, the entire record is examined regarding evidence to support the contrary position. *In Re Doe 2*, 19 S.W.3d at 288 (J. Owen concurring); *Curtis v. Curtis*, 11 S.W.3d 466, 472 (Tex. App. – Tyler 2000, no pet.).

### 2. Factual sufficiency

Factual sufficiency concedes that there is conflicting evidence on an issue. The appellate court should only sustain a factual sufficiency complaint when it is necessary to prevent a manifestly unjust result.

The courts of appeals are the final arbiter of factual sufficiency; the Supreme Court has no jurisdiction to consider the questions of fact, and it may not consider any issue challenging the factual sufficiency. *Dyson v. Olin*, 692 S.W.2d 456 (Tex. 1985). However, the Supreme Court does have jurisdiction to determine whether the court of appeals used the correct standard of review in reaching its conclusion on an

insufficient evidence point. *Hannon v. Sohio Pipeline Co.*, 623 S.W.2d 314, 315 (Tex. 1987).

a. Insufficient evidence

Where the party without the burden of proof is complaining of the trial court's findings, the issue is insufficient evidence. *Raw Hide*, 766 S.W.2d at 275-76. Under this review, the appellant will succeed only if the evidence supporting the finding is so slight, or the evidence against it is so strong, that the finding is clearly wrong and manifestly unjust. *Id.*; *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

b. Great weight and preponderance of the evidence

When the party having the burden of proof complains of an unfavorable finding, the issue should allege that the finding is against the great weight and preponderance of the evidence. *Croucher*, 660 S.W.2d at 58. The finding should be sustained if there is some probative evidence to support it and provided it is not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *Lindsey v. Lindsey*, 965 S.W.2d 589, 592 (Tex. App. – El Paso 1998, no pet.).

In reviewing a great weight and preponderance challenge, the scope of review requires the court of appeals to examine all of the evidence, both that which tends to prove the existence of a vital fact and evidence which tends to disprove its existence. *Id.*

The biggest threat to an appeal is the waiver doctrine. When error is not preserved, it is waived. Waiver is the main challenge to almost any appeal. A trial

lawyer must be diligent in his efforts at preservation of error to avoid waiver.

The following are the general steps to preservation of error:

1. State the specific grounds for the complaint.

Specific grounds for the objection must be stated or must be apparent from the context of the objection. *Ford Motor Co. v. Miles*, 967 S.W.2d 377 (Tex. 1998). The complaint raised on appeal must be the same as that presented to the trial court. *Pfeffer v. Southern Texas Laborers' Pension Trust Fund*, 679 S.W.2d 691 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Global objections, profuse objections, or overly general objections preserve no error for review.

2. Assert the objection timely.

Timing is everything. An objection too early is premature and does not preserve error. An objection too late does not preserve error. *House v. State*, 909 S.W.2d 214 (Tex. App. – Houston [14<sup>th</sup> Dist.]), aff'd 947 S.W.2d 251 (Tex. 1995).

However, with legal arguments, never assume it is too late. Legal arguments raised post-verdict are timely because they do not involve jury issues. *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278 (Tex. 1999).

3. Secure a Ruling.

An objection must be overruled in order to preserve error for review. *Perez v. Baker Packers*, 694 S.W.2d 138, 141 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1985, writ ref'd n.r.e.). However, the trial court's ruling may be express or implicit. Tex. R. App. P. 33.1(a)(2). If the trial court refuses to rule,

the objection is still preserved so long as the complaining party objects to the refusal. *Id.*

#### 4. Make a record.

The party complaining on appeal must see that a sufficient record is presented to the appellate court to show error requiring reversal. Tex. R. App. P. 33.1(a). Without a written motion, response, or order, or a statement of facts containing oral argument or objection, the appellate court must presume that the trial court's judgment or ruling was correct and that it was supported by the omitted portions of the record. *Christiansen v. Prezelski*, 782 S.W.2d 842 (Tex. 1990).

#### 5. General comments on waiver.

Preservation of complaints and waiver must be carefully distinguished from harm. Simply because a party has failed to preserve a complaint, or has waived it, does not lessen the harm caused by an error. Nonetheless, the unpreserved complaint cannot be reviewed on appeal, regardless of any error which may be present.

Trial lawyers should be mindful of the waiver doctrine in preparing and delivering opening and closing arguments. Further, error in admission of evidence is waived if the complaining party introduces the same evidence. Where a party challenges the admissibility of evidence outside the presence of the jury, then states "no objection" when it is offered to the jury, the party waives the complaint. *Sands v. State*, 64 S.W.3d 488 (Tex. App. – Texarkana 2001, no pet.). Objection to a pleading defect is waived if no special exceptions are lodged. *Vera v. Perez*, 884 S.W.2d 182 (Tex. App. – Corpus Christi 1994, no writ).

Before a judgment can be reversed and a

new trial ordered on the ground that an error of law has been committed by the trial court, the reviewing court must find that the error complained of amounted to such a denial of the appellant's rights as was reasonably calculated to cause and probably did cause the rendition of an improper judgment, or that the error probably prevented the appellant from properly presenting the case on appeal. Tex. R. App. P. 44.1. If the error more likely than not caused an improper judgment, then it is reversible. If not, then the error is harmless.

The harmless error rule applies to all errors.

Evaluation of the appellate standard of review should not begin with the appellate lawyer, but should begin with the trial lawyer.

A trial attorney should be aware of the abuse of discretion standard of review, as it is typically applied to most procedural or other trial management decisions. *In re Jane Doe*, 19 S.W.3d 249, 253 (Tex. 2000). The trial attorney is usually the first to give advice to a party regarding appealing a judge's decision.

The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241 (Tex. 1985). Rather, a trial court abuses its discretion if its decision is "arbitrary, unreasonable, and without reference to guiding principles." The El Paso Court of Appeals applies a two-pronged inquiry to the abuse of discretion standard: (1) Did the trial court have sufficient information upon which to exercise its discretion; and (2) Did the trial

court err in its application of that discretion? *Lindsay v. Lindsay*, 965 S.W.2d 589, 592 (Tex. App. – El Paso 1998, no pet.). The reviewing court may not substitute its own judgment for the trial judge’s judgment. *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 41 (Tex. 1989)(orig. proceeding).

There are at least two instances in which a perceived error does not constitute an abuse of discretion. First, a mere error of judgment is not an abuse of discretion. *Loftin v. Martin*, 776 S.W.2d 145, 146 (Tex. 1989)(orig. proceeding). Second, a trial court does not abuse its discretion if it reaches the right result for the wrong reason. *Bruce Terminix Co. v. Carroll*, 953 S.W.2d 537, 540 (Tex. App. – Waco 1997, no writ). In other words, the standard of review permits a trial judge the limited right to be wrong without being reversed.

The author acknowledges and references generally the following articles which were helpful in preparation of this paper:

Alene Ross Levy & Lori Massey Cliffe, *Trying Case with Appeal – Preserving Error*, 28<sup>th</sup> Annual Advanced Family Law Course, Ch. 70 (2002).

W. Wendell Hall & Marcy Hogan Greer, *Standards of Review and Demonstrating Harmful Error*, Appellate Boot Camp 2002, Ch. 2 (2002).

Lynn Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S.Tex. L. Rev. 431 (2003).

