

POST-VERDICT MOTIONS

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I. INTRODUCTION

Purpose. There are two primary purposes for filing post-verdict motions: (1) to obtain post-verdict relief from the trial court, and (2) to preserve error on appeal. This paper focuses on crafting arguments that are designed to meet both purposes. It discusses how to craft arguments with a focus on persuading the trial court. The paper also discusses the various types of post-verdict motions, the different purposes they serve, and how they may be used to preserve error

This paper does not address some procedural aspects of post-verdict motions, such as the deadlines for filing post-verdict motions and the effect of motions on the appellate timetable. Those issues are addressed extensively in various legal publications. *See, e.g.*, MICHOL O'CONNOR, O'CONNOR'S TEXAS CIVIL APPEALS (2002 - 2003) at 34 - 49 (appellate timetables).

Section II discusses the different types of post-verdict motions and how they can be used to obtain trial court relief or preserve error. Section III suggests an approach to crafting arguments in post-verdict motions that are designed to persuade a trial court to grant relief.

II. THE SUBSTANCE OF POST-VERDICT MOTIONS

This section will consider different types of post-verdict motions, how they can be used to obtain post-verdict relief, and how they can be used to preserve error.

A. Motion for Judgment on the Verdict

Purposes. Motions for judgment are not required, or even mentioned, in the Texas Rules of Civil Procedure. Although motions for judgment are not mentioned, proposed judgments are provided for by Rule 305, which states that “[a]ny party may prepare and submit a proposed judgment to the court for signature.” TEX. R. CIV. P. 305. Rule 305, and the absence of any mention of motions for judgment in the rules, suggests that motions for judgment are necessary.

A motion for judgment nevertheless serves important purposes beyond the mere submission of a proposed judgment. First, filing a motion for judgment can speed the entry of judgment. In some trial courts, it is easier to obtain court action when there is an actual motion pending, rather than just a proposed judgment. Filing the motion for entry, and obtaining a hearing, can speed the court's entry of judgment, reduce the time for the other side to prepare arguments challenging the verdict, and speed the appellate timetable.

Second, by moving for judgment, a party preserves error if the trial court later modifies or rejects the judgment. For instance, the supreme court has held that a motion for judgment on the verdict preserves error when the trial court renders judgment for the movant but for less than the verdict. *Emerson v. Tunnell*, 793 S.W.2d 947, 948 (Tex. 1990). It is not clear whether the error in *Emerson* would have been preserved if the plaintiff had filed only a proposed judgment without a motion for judgment. Accordingly, if a party desires a judgment based on the jury verdict, the best practice is to file the motion for judgment on the verdict.

Contents of motion. The motion can be as simple as a one-sentence request that the trial court enter the proposed judgment. The motion also can be used to present arguments for the trial court to include certain relief in the judgment — relief that may not be evident from the face of the verdict. For instance, the motion can be used to explain damage cap calculations or calculations of pre-judgment interest. Additionally, a party may wish to make pre-emptive arguments against JNOV points that the other side is likely to assert.

Moving for judgment can waive error. Filing a motion for judgment presents a problem for a party that wishes to appeal any part of the jury verdict or judgment. By filing the motion for judgment, the party can waive any complaint about the verdict or judgment. “A motion for judgment on the verdict is an affirmation by the movant that the findings of the jury are supported by competent evidence.” *Braswell v. Braswell*, 476 S.W.2d 444, 446 (Tex. Civ. App.—Waco 1972, writ dism’d). Thus, by filing a motion that the trial court render judgment on the verdict, a party is not then permitted to take a position inconsistent with the judgment on appeal. *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 321-22 (Tex. 1984). This rule is a species of the invited error doctrine which prohibits a party from complaining on appeal about an error which it invited. See *Texas Indus., Inc. v. Vaughan*, 919 S.W.2d 798, 804 (Tex. App.—Houston [14th Dist.] 1996, writ denied). This rule thus creates a potential procedural trap for a party who requests the trial court to enter a judgment even though that party plans to appeal the judgment.

Despite the risks, there are a number of reasons why a party planning to appeal may want to move for judgment. First, the party that lost at trial may desire to speed the entry of the judgment so that the appellate process can begin. Second, a plaintiff who prevailed at trial, but did not obtain all of the desired recovery, may want to appeal and seek a partial new trial on (1) those portions of the verdict that the plaintiff challenges as legally or factually insufficient, or (2) additional theories of recovery that the trial court did not submit to the jury. Third, when a party has prevailed on its affirmative claims for relief, but has lost opposing claims for relief by the other side, the party may desire to have the judgment entered to speed its recovery on the affirmative claim and appeal the verdict on the opposing claims.

Moving for judgment while reserving right to appeal Fortunately, the Texas Supreme Court has recognized that “[t]here must be a method by which a party who desires to initiate the appellate process may move the trial court to render judgment without being bound by its terms.” In the *Fojtik* case, the court approved a means of moving for judgment while reserving the right to appeal. *First Nat’l Bank v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989). The court held that a plaintiff had preserved its right to appeal when it filed a motion for judgment that included the following statement:

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 that 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.

Currently the only approved means by which a party can move for judgment while preserving the right to appeal is the method approved in *Fojtik*. Other efforts to preserve a complaint while moving for judgment have been rejected. For instance, one court has held that a party waived its right to appeal by filing a motion for judgment, even though the motion stated that it was made “without waiver of appeal or the right to file a motion for new trial or other subsequent pleadings.” *Russell v. Dunn Equipment, Inc.*, 712 S.W.2d 542, 545 (Tex. App.—Houston [14th Dist.] 1986, writ ref’d n.r.e.). Similarly, it has been held that an error is not preserved by complaining about the verdict and reserving the right to appeal in a separate brief in support of a motion for judgment. *See Litton*, 668 S.W.2d at 322. Thus, the safest approach is to use the procedure and the exact wording of the disclaimer that were approved in *Fojtik*.

Fojtik suggests an odd result for the timing of the motion for new trial. To stay strictly within the holding *Fojtik*, the party moving for entry of judgment should follow the procedure approved by that case and request a new trial before or at the same time as the motion for entry of judgment. Neither *Fojtik*, nor any other Texas court, has yet held whether a party preserves error by filing a motion for judgment with a *Fojtik* disclaimer that refers to a motion for new trial to be filed in the future. This places the movant in the unusual position of filing a motion for new trial before the entry of judgment. Nonetheless, until this issue is decided, the safest procedure is to file the motion for new trial before or at the same time as the motion for entry of judgment.

Moving for judgment in disregard of a jury answer. In some cases, a judgment may only be entered on certain jury findings if other jury findings are disregarded. In this circumstance, a party's motion for judgment should include a request to disregard certain jury findings. If the prevailing party does not move to disregard the relevant jury findings, a judgment that disregards those findings may be reversed. *See Wilson v. Burlison*, 358 S.W.2d 751, 753 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.). The following section of this paper considers arguments in support of motions to disregard and for JNOV.

B. Motions for JNOV or to Disregard Jury Findings.

Purposes. A litigant may obtain two types of relief from a jury verdict under Rule 301. The rule provides that, “upon motion and reasonable notice,” the trial court (1) “may render judgment non obstante veredicto if a directed verdict would have been proper” or (2) “disregard any jury finding on a question that has no support in the evidence.” TEX. R. CIV. P. 301. A motion for JNOV seeks a judgment that is contrary to all jury findings. A motion to disregard jury findings seeks a judgment that is based on some jury answers, but which disregards other answers.

Preserving Error. One means by which a party may preserve “no evidence” and “as a matter of law” appellate points is to make those points in a motion for JNOV or a motion to disregard. *See T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 220 (Tex. 1992). “No evidence” points also may be preserved through any of the following: (1) a motion for instructed verdict; (2) an objection to the submission of the issue to the jury; or (3) a motion for new trial. *Id.* To obtain a rendered judgment on appeal, however, a party should seek to preserve a “no evidence” point in a motion for JNOV or in a motion to disregard. Although a “no evidence” complaint may be preserved through a motion for new trial, the appellate court may only reverse and remand; it cannot reverse and render. *See Werner v. Colwell*, 909 S.W.2d 866, 870 n.1 (Tex. 1995).

Contents of Motion. The motion for JNOV or to disregard should be in writing. Unless a jury finding is immaterial, the trial court cannot disregard it without a written motion to disregard. *See Lamb v. Franklin*, 976 S.W.2d 339, 343-44 (Tex. App.—Amarillo 1998, no pet.) (complaint in motion for new trial not sufficient); *Wilson*, 358 S.W.2d at 753 (motion to disregard is required). Similarly, the trial court cannot grant a JNOV on no evidence grounds absent a written motion. *Olin Corp. v. Cargo Carriers, Inc.*, 673 S.W.2d 211, 213-14 (Tex. App.—Houston [14th Dist.] 1984, no writ); *Dewberry v. McBride*, 634 S.W.2d 53, 55 (Tex. App.—Beaumont 1982, no writ). In contrast, if the ground for disregarding the finding is that it is immaterial, the trial court may disregard the jury finding on the court's own motion. *Clear Lake City Water Auth. v. Winograd*, 695 S.W.2d 632, 638-39 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

Additionally, there are three necessary elements of a motion to disregard findings. It must “1) designate the finding and/or findings which the court is called upon to disregard; 2) specify the reason why the finding or findings should be disregarded; 3) contain a request that judgment be entered upon the remaining findings after specific findings have been set aside or 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.); *see also Dewberry*, 634 S.W.2d at 55 (stating that a “motion to disregard must be directed to the objectionable issue or issues and point out the reasons why such issue should be disregarded”).

Grounds for Disregarding a Finding or for JNOV. A motion for JNOV or to disregard a finding is proper only “if a directed verdict would have been proper.” TEX. R. CIV. P. 301; *Dodd v. Texas Farm Prods. Co.*, 576 S.W.2d 812, 815 (Tex. 1979). A directed verdict is proper only when “the evidence conclusively demonstrates that no other verdict could be rendered.” *Bywaters v. Gannon*, 686 S.W.2d 593, 595 (Tex. 1985).

There are four grounds to disregard a jury’s answer to a question or to grant a JNOV. First, a jury finding should be disregarded if there is no evidence to support the finding. A trial court should grant a JNOV or disregard a finding if there is no evidence to support one or more of the jury findings on issues necessary to liability. *See Brown v. Bank of Galveston*, 963 S.W.2d 511, 513 (Tex. 1998). To sustain a no evidence challenge to a finding, there must be no evidence of probative force to support the finding. *Overstreet v. Gibson Product Co., Inc.*, 558 S.W.2d 58, 59-60 (Tex. Civ. App.—San Antonio 1977, writ ref’d n.r.e.). The trial court may not “disregard a jury’s answer that has some support in the evidence, even though the great weight and preponderance of the evidence may have been to the contrary.” *Harris County v. McFerren*, 788 S.W.2d 76, 78 (Tex. App.—Houston [1st Dist.] 1990, writ denied). Evidence that amounts to no more than a mere surmise or suspicion constitutes “no evidence.” *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1993). To rise above a scintilla, the evidence offered to prove a vital fact must do more than create a mere surmise or suspicion of its existence. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex.1983). In determining legal sufficiency, a court should consider whether the evidence “rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.” *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex.1994); *see also Kindred*, 650 S.W.2d at 63. If more than a scintilla of evidence exists, it is legally sufficient. *Lozano v. Lozano*, 44 Tex. Sup. Ct. J. 499, 2001 WL 33216152 (March 8, 2001).

Second, a jury finding should be disregarded if the evidence conclusively establishes an issue as a matter of law, and the jury is not free to make a contrary finding. *John Masek Corp. v. Davis*, 848 S.W.2d 170, 173 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *see also Gallas v. Car Biz, Inc.*, 914 S.W.2d 592, 593 (Tex. App.—Dallas 1995, writ 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.”). However, “[a] trial court may not properly disregard

a jury's negative finding and substitute its own affirmative finding unless the evidence conclusively establishes such an affirmative finding." *McFerren*, 788 S.W.2d at 78.

Third, a jury finding should be disregarded if it is barred by a legal principle. *See, e.g., Stevenson v. Koutzarov*, 795 S.W.2d 313, 318-20 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (holding that JNOV should have been granted because claims were barred by statute of limitations); *Atlantic Richfield Co. v. Misty Prods., Inc.*, 820 S.W.2d 414, 420-21 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (holding that a jury finding of conspiracy should have been disregarded because, as a matter of law, a corporation cannot conspire with its wholly owned subsidiary).

Fourth, a jury finding should be disregarded if it is immaterial. *See Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994). A question is immaterial when it should not have been submitted, it calls for a finding beyond the province of the jury, such as questions of law, or when it was properly submitted but has been rendered immaterial by other findings. *Southeastern Pipe Line Co., Inc. v. Tichacek*, 997 S.W.2d 166, 172 (Tex. 1999). A question is also immaterial when its answer can be found elsewhere in the verdict or when its answer cannot affect the verdict. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 752 (Tex. 1995). A trial court, however, has no authority because of another conflicting jury finding to disregard a jury finding of legal significance that has support in the evidence. *C. & R. Transport, Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1996).

C. Request for Findings of Fact and Conclusions of Law

Rule. Requests for findings of fact and conclusions of law are authorized by Rule 296, which provides as follows:

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. Such requests shall be entitled "Request for Findings of Fact and Conclusions of Law" and shall be filed within twenty days after judgment is signed with the clerk of the court, who shall immediately call such request to the attention of the judge who tried the case.

TEX. R. CIV. P. 296.

Purpose. Findings and conclusions identify the factual and legal bases for a trial court's judgment after a non-jury trial. If a case involves multiple legal theories or more than one set of factual determinations, obtaining findings of fact and conclusions of law is critical to narrow the issues on appeal. In the absence of findings and conclusions, the judgment of the trial court must be affirmed if it can be upheld on any available legal theory that is

supported by the evidence. *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277, 279 (Tex. 1987). If no findings of fact are filed, the appellate court presumes that the trial court made the necessary findings and conclusions to support the judgment. *Lemons v. EMW Mfg. Co.*, 747 S.W.2d 372, 373 (Tex. 1988). In reviewing the record of a bench trial where findings were not made, the appellate court can only consider the evidence that favors the court's implied findings, and must disregard all evidence or inferences to the contrary. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990).

Because of these strong presumptions, failing to request findings and conclusions can drastically reduce a party's chance of success on appeal of a bench trial. It is much easier to challenge a specific theory and specific evidentiary findings on appeal than to eliminate all possible implied findings.

Another purpose for filing a request for findings and conclusions is that a "timely filed request for findings of fact and conclusions of law extends the time for perfecting appeal when findings and conclusions are required by Rule 296, or when they are not required by Rule 296 but are not without purpose — that is, they could properly be considered by the appellate court." *IKB Industries (Nigeria) Ltd. v. Pro-Line Corp.* 938 S.W.2d 440, 443 (Tex. 1997). When findings are not properly requested, however, they do not extend the appellate timetable. *See id.*

When the trial court must file findings and conclusions. Rule 296 only entitles a party to findings and conclusions in cases tried in district or county court without a jury. "Not every case finally adjudicated without a jury trial is 'a case tried without a jury' within the meaning of Rule 41(a)(1)." *IKB*, 938 S.W.2d at 441. For instance, a party is not entitled to findings in a summary judgment case because a summary judgment is proper only if there is no genuine issue as to any material fact. *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994). A court tries a case within the meaning of rule 41(a)(1) when there is an evidentiary hearing upon conflicting evidence. *Id.*

The most obvious instance in which a party is entitled to findings and conclusions is a non-jury trial of fact issues. Courts also have found that a request for findings and conclusions is appropriate in the following instances:

- when part of a case is tried to a jury and part is decided by the trial court, *see Heafner & Associates v. Koecher*, 851 S.W.2d 309, 313 (Tex. App.—Houston [1st Dist.] 1992, no writ);
- after an original mandamus proceeding in the trial court, *see Anderson v. City of Seven Points*, 806 S.W.2d 791, 792 n.1 (Tex. 1991); and

- after the court holds a hearing on unliquidated damages in a default judgment case, *IKB*, 938 S.W.2d 440.

In contrast, courts have found that a party is not entitled to findings and conclusions in the following instances:

- after a directed verdict is granted, *Ditto v. Ditto Investment Co.*, 158 Tex. 104, 309 S.W.2d 219, 220 (1958);
- after a JNOV is entered, *Fancher v. Caldwell*, 159 Tex. 8, 314 S.W.2d 820, 822 (1958);
- after the grant of a default judgment, *Wilemon v. Wilemon*, 930 S.W.2d 290, 296 (Tex. App.—Waco 1996, no writ); and
- after dismissal for lack of subject matter jurisdiction without an evidentiary hearing, *Zimmerman v. Robison*, 862 S.W.2d 162 (Tex. App.—Amarillo 1993, no writ).

Findings of fact are required only when they relate to ultimate or controlling issues. *Dura-Stilts Co. v. Zachry*, 697 S.W.2d 658, 661 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.). In this sense, a finding resembles a jury question and its answer.

Trial court's failure to file findings. If the trial court fails to file findings and conclusions within twenty days after a proper request, a party should file a "Notice of Past Due Findings of Fact and Conclusions of Law" within thirty days after the original request. TEX. R. CIV. P. 297. Failing to file this notice of past due findings waives any right to complain on appeal about the court's failure to file findings. *Curtis v. Commission for Lawyer Discipline*, 20 S.W.3d 227, 232 (Tex. App.—Houston [14th Dist.] 2000, no pet).

There are several possible consequences of a trial court's failure to file findings after a proper request and notice of past due findings. First, in most cases, the proper remedy is for the appellate court to abate the appeal until the trial court prepares and files its findings and conclusions with the court of appeals. See, e.g., *Cherne Indus., Inc. v. Megallanes*, 763 S.W.2d 768, 772-73 (Tex. 1989); *Electronic Power Design, Inc. v. R. A. Hanson Co.*, 821 S.W.2d 170, 171-72 (Tex. App.—Houston [14th Dist.] 1992, no writ); *Wallen v. State*, 667 S.W.2d 621, 624 (Tex. App.—Austin 1984, no writ). Second, if the trial judge is no longer available to respond to the order to enter findings and conclusions, the appropriate remedy is to reverse and remand. *FDIC v. Morris*, 782 S.W.2d 521, 524 (Tex. App.—Dallas 1989, no writ). Third, in cases where the record affirmatively shows that the complaining party suffered no harm, the court of appeals will not remedy the failure to file findings and

conclusions. *Las Vegas Pecan & Cattle Co, Inc. v. Zavala County.*, 682 S.W.2d 254, 256 (Tex. 1984). The general rule is that harm in failing to obtain findings and conclusions is presumed. *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996). There may be no harm on the face of the record in cases where the complaining party would not “have to guess the reason or reasons that the judge has ruled against it.” *Sheldon Pollack Corp. v. Pioneer Concrete of Texas, Inc.*, 765 S.W.2d 843, 845 (Tex. App.—Dallas 1989, writ denied). For instance, findings are not required when there is only one theory of recovery or defense pled or raised by the evidence. *Guzman v. Guzman*, 827 S.W.2d 445 (Tex. App.—Corpus Christi 1992, writ denied).

D. Motion for New Trial

Purpose. Motions for new trial are discussed in Rules 320-329b of the Texas Rules of Procedure. Rule 320 permits the trial court to set aside a judgment and grant a new trial on a motion by a party or the court’s own motion. TEX. R. CIV. P. 320. The rule also permits a trial court to grant a partial new trial on a portion of the matter in controversy that is clearly separable. TEX. R. CIV. P. 320.

From the perspective of the judicial system, the purpose of a motion for new trial is to give the trial court an opportunity to examine arguments regarding trial errors and to correct any errors by new trial. *See Mushinski v. Mushinski*, 621 S.W.2d 669, 670-71 (Tex. Civ. App.—Waco 1981, no writ). The motion for new trial is designed so that a trial court may review each asserted error “with more deliberate consideration than is practicable during trial” and so that the court “will then have the first full and fair opportunity to correct the errors or grant a new trial if need be.” *Smith v. Brock*, 514 S.W.2d 140, 142 (Tex. Civ. App.—Texarkana 1974, no writ).

From the perspective of the litigant, a motion for new trial has three purposes. First, a motion for new trial provides one more opportunity to convince the court to correct trial error, such as an error in the court’s rulings or the jury’s findings. Second, it is necessary to preserve certain specified kinds of error for appeal. *See* TEX. R. CIV. P. 324 (outlining errors that must be preserved through a motion for new trial). Third, it extends the appellate timetable. *See* TEX. R. APP. P. 26.1.

Contents of the motion. The Rules of Civil Procedure require that a party present its grounds for new trial with specificity. Rule 321 requires that the grounds for a new trial specify the act of which the party complains “in such a way that the objection can be clearly identified and understood by the court.” TEX. R. CIV. P. 321. Rule 322 provides that the trial court should not consider objections “couched in general terms — as that the court erred in its charge, in sustaining or overruling exceptions to the pleadings, and in excluding or admitting evidence, the verdict of the jury is contrary to the law, and the like” TEX. R.

Civ. P. 322.

In construing these rules, courts of appeals have held that an improper, general objection does not preserve error on appeal. *Ramey v. Collagen Corp.*, 821 S.W.2d 208, 210-11 (Tex. Civ. App.—Houston [14th Dist.] 1991, writ denied) (holding that error was not preserved by a complaint that “when viewed as a whole, the jury’s verdict is against the great weight and preponderance of the evidence”); *Southwest Title Ins. Co. v. Plemons*, 554 S.W.2d 734, 735-36 (Tex. Civ. App.—Dallas 1977, writ ref’d n.r.e.) (holding that error was not preserved by a statement in motion for new trial that “the court erred in overruling each and all of the objections to the charge of the court made by defendants”). The “allegations in a motion for new trial must be sufficiently specific to enable the trial court to clearly understand what is being alleged as error.” *D/FW Commercial Roofing Co. v. Mehra*, 854 S.W.2d 182, 189 (Tex. App.—Dallas 1993, no writ).

To prevent a new trial from being subject to mandamus, the motion should request, and any proposed order should recite, that a new trial “in the interest of justice and fairness.” A trial court has broad discretion in granting a new trial and can grant it without stating any reason other than that it is “in the interest of justice.” See *Champion Int’l Corp. v. 12th Ct. of Appeals*, 762 S.W.2d 898, 899 (Tex. 1998) (orig. proceeding). When a new trial is timely granted based on a finding that it would be “in the interest of justice and fairness,” the order will not be disturbed by mandamus. See *Johnson v. Fourth Ct. of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985) (orig. proceeding).

Preservation of error. Rule 324(b) provides that certain errors must be preserved by asserting them in a motion for new trial or they are waived. These errors are as follows:

- 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 of inadequacy or excessiveness of the damages found by the jury;
- a complaint of incurable jury argument if not otherwise ruled on by the court; and
- a complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence.

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

There is some question whether any other errors must be preserved by a motion for

new trial. On one hand, Rule 324(a) provides that a motion for new trial is not necessary to preserve any type of complaint other than the listed complaint. TEX. R. CIV. P. 324(a); *see also Wilson v. Dunn*, 800 S.W.2d 833, 837 (Tex. 1990) (holding that a complaint of defective service need not be raised in motion for new trial because it is not one the complaints listed in Rule 324).

On the other hand, Rule 33.1 provides that, as a prerequisite to presenting a complaint for appellate review, the record must show that a complaint was made to the trial court by a timely request, objection, or motion. TEX. R. APP. P. 33.1. Thus, it may be necessary to preserve some types of complaints in a motion for new trial if they have not been preserved by any other means previously. If, for instance, a “no evidence” complaint has not been preserved previously by any other means, it must be preserved in a motion for new trial or waived. *See T.O. Stanley Boot Co.*, 847 S.W.2d at 220 (listing methods of preserving a “no evidence” complaint).

Grounds for new trial. Rule 324(a)’s list of points that must be preserved through a motion for new trial identifies some grounds that may be included in a new trial motion. These are not the only grounds for new trial. Any complaint that would be ground for an appellate court to reverse the judgment and remand for a new trial is a reason for the trial court to grant a new trial. The most common grounds for new trial are the following:

1. Factual sufficiency. The most common ground for a new trial is a complaint about the factual sufficiency of a jury finding. Unlike Rule 301 motions to disregard and for JNOV, which are based on a legal sufficiency or “no evidence” standard, a factual sufficiency challenge is based on a factual sufficiency or “against the great weight and preponderance of the evidence standard.” When the party who does not have the burden of proof challenges the factual sufficiency of the evidence supporting a jury’s finding, the proper standard is the “insufficient evidence” standard. *Sanchez v. Guerro*, 885 S.W.2d 487, 491 (Tex. App.—El Paso 1994, no writ).

When the party with the burden of proof challenges the factual sufficiency of a finding in the trial court, that party must show that the jury finding was against the great weight and preponderance of the evidence. *Murphy v. Fannin County Elec. Co-op, Inc.*, 957 S.W.2d 900, 903 (Tex. App.—Texarkana 1997, no pet.). “If a finding is against the great weight and preponderance of the evidence, the inquiry is whether the finding is so contrary to the overwhelming weight of all relevant evidence as to be clearly wrong and unjust.” *Id.* A new trial is the proper remedy when the jury findings are contrary to the great weight and preponderance of the evidence, but supported by some evidence. *Basin Operating Co. v. Valley Steel Prods. Co.*, 620 S.W.2d 773, 776 (Tex. Civ. App.—Dallas 1981, writ ref’d n.r.e.).

Whenever a lawyer has preserved a no evidence complaint, it makes sense to attempt to preserve the corresponding factual sufficiency complaint. If the court of appeals does not sustain the “no evidence” challenge, it nonetheless may hold that the jury finding was factually insufficient and remand for new trial.

2. Newly discovered evidence. In order to prevail on a motion for new trial based on newly discovered evidence, the movant must demonstrate each of the following elements: (1) the evidence came to the movant’s knowledge since the trial; (2) it was not because of a lack of due diligence that the movant did not learn of the evidence sooner; (3) the evidence is not cumulative; and (4) the evidence is so material that it probably would produce a different result if a new trial were granted. *Jackson v. Van Winkle*, 660 S.W.2d 807, 809-10 (Tex. 1983). Each of these elements should be established by affidavit. *See Brown v. Hopkins*, 921 S.W.2d 306, 310-11 (Tex. App.—Corpus Christi 1996, no writ).

3. Jury misconduct. Rule 327(a) permits a party to seek a new trial based on a complaint of misconduct of the jury, improper communication made to the jury, or an incorrect answer given on voir dire examination. TEX. R. CIV. P. 327(a). It is very difficult to prove such a complaint because Rule 327(b) prohibits jurors from testifying about any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon the juror’s mind or emotions during the deliberation, except for any situations where “any outside influence was improperly brought to bear on any juror.” TEX. R. CIV. P. 327(b); *see also* TEX. R. EVID. 606(b). Evidence of jury misconduct may consist of testimony about “outside influences” such as the following: improper contacts with persons outside the jury, including witnesses; a conversation with another juror during a trial break; information that another juror improperly viewed the scene of the events giving rise to the litigation; and information showing another juror is disqualified as a juror if that information was acquired independently of deliberations. *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 369-71 (Tex. 2000). To obtain a new trial based on juror or bailiff misconduct, the movant must show (1) that the misconduct occurred, (2) that it was material, and (3) that, based on the record as a whole, the misconduct probably resulted in an harm to them. *Redinger v. Living, Inc.*, 689 S.W.2d 415, 419 (Tex. 1985). The movant has the burden to prove all three elements before a new trial can be granted. *See id.*

4. Complaint of inadequacy or excessiveness of damages. Complaints about the inadequacy or excessiveness of damages may only be preserved through a motion for new trial. *See* TEX. R. CIV. P. 324(b)(4); *Pipgras v. Hart*, 832 S.W.2d 360, 367 (Tex. App.—Fort Worth 1992, writ denied) (holding that objection in motion for JNOV regarding excessiveness of future damages was insufficient to preserve error; complaint had to have been made in motion for new trial). Whenever there is some evidence of some damages, but insufficient evidence to support the entire jury award of damages, the best approach is to preserve the error in a motion for new trial.

5. Other grounds. In a motion for new trial a party may raise grounds other than those required to preserve error on appeal. For instance, although an objection to a jury question is properly preserved only by an objection at the formal charge conference, a defective jury question is grounds for a new trial. *See Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994). Similarly, the improper admission or exclusion of evidence can be a ground for a new trial. *See Lyondell Petrochemical Co. v. Fluor Daniel, Inc.*, 888 S.W.2d 547, 556 (Tex. App.—Houston [1st Dist.] 1994, writ denied). It makes sense to reiterate errors such as these in the motion for new trial so that the trial court may reconsider the error after trial.

E. Motion for Remittitur

Purpose. A motion for remittitur is a request that the court suggest a remittitur to the prevailing party and condition a new trial on the denial of the remittitur. *See Snoke v. Republic Underwriters Ins. Co.*, 770 S.W.2d 777, 777 (Tex. 1989). In other words, the trial court gives a prevailing party an option to reduce the amount of damages awarded by the jury. If the party rejects the suggestion of remittitur, the trial court will grant a new trial. *See id.* This new trial order is only reversible by mandamus in a few limited circumstances, such as when it is signed after the trial court's jurisdiction lapsed. *See Kolfeldt v. Thoma*, 822 S.W.2d 366, 368-69 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding). If a party makes the remittitur at the trial judge's suggestion and the other party appeals, the remitting party is not barred from contending in the court of appeals that all or part of the remittitur should not have been required. *See* TEX. R. APP. P. 46.2

Contents. The request for remittitur may be included as part of the motion for new trial or filed separately. The standard for remittitur of an actual damages finding is factual sufficiency. *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986). The court must examine all of the evidence to determine whether there is sufficient evidence to support the damage award and suggest a remittitur only if some portion is so factually insufficient or against the great weight and preponderance of the evidence as to be manifestly unjust. *Id.*

F. Motion to Modify the Judgment

Purpose. A motion to modify the judgment is the proper means to challenge mistakes in the judgment that do not require a new trial. The Rules of Civil Procedure give little guidance as to the appropriate grounds for a motion to modify. The most common reasons for filing a motion to modify are when the judgment fails to (1) properly reflect the jury verdict, (2) award the appropriate amount of prejudgment interest, or (3) award the appropriate amount of attorney's fees or costs. A motion to modify may only be granted by the trial court when it still has plenary power over the judgment. *See* TEX. R. CIV. P. 329b(d)-(e). If a trial court's plenary power has expired, a judgment may only be corrected

by a motion for judgment nunc pro tunc. *See* TEX. R. CIV. P. 316.

Preservation of error. A motion to modify may be necessary to preserve errors in the judgment. For instance, the right to recover prejudgment interest is waived if not asserted in the trial court. *Bulgerin v. Bulgerin*, 724 S.W.2d 943, 946 (Tex. App.—San Antonio 1987, no writ), *overruled on other grounds, Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819 (Tex. 1997). Failure to file a motion to modify a judgment with an incorrect amount of interest waives any error on appeal. *See Larrumbide v. Doctors Health Facilities*, 734 S.W.2d 685, 693 (Tex. App.—Dallas 1987, writ denied).

III. OVERCOMING BARRIERS TO PERSUASION

Obtaining post-verdict relief is often an uphill battle for the party that lost the verdict or judgment. The judicial system is designed to make a reversal of a jury or a judgment a rare exception rather than a common occurrence. The system is designed to promote the values of deference to the jury, preservation of judicial resources, and finality. These values result in a judicial resistance to such post-verdict relief as a judgment notwithstanding the jury verdict, a new trial, or a modification of a judgment. Because of this resistance to post-verdict relief, post-verdict arguments must be persuasive and compelling for a party to have any chance of obtaining relief.

Two significant barriers to persuasion arise in most post-verdict situations. First, there is a conflict between lawyers' impulse to preserve numerous potential errors post-verdict and the lawyers' ability to persuade the trial court about the best arguments for relief. Second, in most instances, the trial court has already heard the party's best arguments during trial. Trial courts are naturally resistant to hearing a repeat of the same argument, particularly when the court has already made up its mind.

The conflict between preservation and persuasion. After trial, appellate lawyers typically assert numerous post-verdict complaints. This tendency is understandable. Often it is not clear to the appellate lawyer at the post-verdict stage which potential errors will be the best arguments to develop on appeal. Most appellate lawyers are very sensitive to error preservation and do not want to be second-guessed because they failed to preserve an error for appeal. As a result, appellate lawyers tend to preserve every colorable complaint — regardless of whether the complaint appears to have any significant chance of success with the trial court.

This tendency to make multiple post-verdict complaints creates a barrier to persuading the trial court to grant post-verdict relief for several reasons. First, most trial judges understandably lack the time and attention to wade through a large volume of post-verdict complaints. Second, a long list of merely colorable complaints in a post-verdict motion

dilutes the force of the complaints that may actually persuade the trial court to grant relief. Third, most trial courts will see a long list of post-verdict complaints for what it really is — an attempt to preserve every possible error without regard to identifying the complaints that actually could result in a reversal.

Solution: separating preservation and persuasion. It is possible to preserve a wide range of post-verdict complaints while still focusing the trial court's attention on two or three key arguments for post-verdict relief that have a significant chance of persuading the trial court. This is best done by emphasizing the best arguments for post-verdict relief while signaling that other points are raised primarily to preserve an error for appeal. There are several ways to do this:

- Oral argument in the trial court* . At the hearing on the post-judgment motions, it may be possible to focus the trial court's attention on the specific post-verdict arguments that the court is more likely to accept. For instance, a lawyer could explain in argument that, although she has raised ten arguments for a new trial, there are two particular arguments that will likely be the focus of an appeal. The majority of the lawyer's oral argument would then focus on those two points. The difficulty with using only this approach is that it only works during the oral argument. When the trial court reviews the post-verdict motions before the hearing, it does not have the benefit of the counsel's oral argument guidance as to which arguments are most significant.

- Filing briefs in support of potential winning arguments.* A second approach is to file both (1) a post-verdict motion that lists all of the complaints sufficiently to preserve error, and (2) a separate brief that significantly elaborates on the best arguments for post-verdict relief. The brief on particular arguments signals to the court that those are the arguments it should consider most seriously. This approach increases the chance that the trial court will actively consider those arguments, rather than dismissing them along with the other less persuasive arguments that are raised primarily for preservation. The difficulty with this approach is that the post-verdict motion itself must sufficiently explain the error or the error may be waived. *See* TEX. R. CIV. P. 321 - 322 (providing specificity requirements for new trial arguments). If, however, the post-verdict motion is sufficiently specific in listing all objections, there should not be any preservation problem with elaborating on the best arguments in a separate brief.

- Providing signals in the motion about the potential winning arguments* . A third approach is to provide signals in the post-verdict motions about which arguments are the potential winners and which arguments are colorable, but

are raised primarily for preservation. For instance, a motion for new trial with ten grounds for a new trial could be divided into three sections of argument: one section apiece for each of the two best grounds for new trial and a third section that summarily lists the other new trial grounds sufficiently to preserve them. This is a subtle signal that would suggest to most trial judges that the first two arguments are the most likely grounds for appeal and are the primary grounds the court should consider.

These approaches help to focus the trial court's attention on the arguments that have the best chance of granting post-verdict relief.

The problem with repeating arguments made during trial. Arguments raised in post-verdict motions are often the same as, or slight variations on, arguments made during trial. For instance, an argument that there is no evidence to support a jury answer to a question may have been made as part of a motion for directed verdict and repeated during the charge conference. Thus, in most instances, post-verdict motions seek relief based on arguments that the court already has heard and rejected.

Because post-verdict motions often repeat earlier arguments, they can be very difficult to win. Most trial courts understandably lack both the patience to hear the same arguments again and the desire to reverse themselves. Most judges also prefer not to reverse their earlier decisions.

Solution: bringing new arguments and a new perspective. Judges, like anyone else, are less likely to change their mind unless they are given a new reason to do so. Consequently, in post-verdict motions and oral argument of those motions, a party should have a better chance of persuading the court that its earlier ruling was erroneous if that party can present some new twist on the argument, such as new authority or new reasoning. In this respect, it makes sense to highlight the new argument for the judge so that he or she knows it is a new argument. By raising and highlighting a new argument, the movant increases the chance the court will give it more attention because (1) unlike a repeated argument, a new argument is less likely to be a waste of the court's time to consider, (2) the reasons the court rejected the old argument may not apply to the new argument, and (3) the presence of a new argument can give the court a justification for changing its previous ruling, even if the court simply changes its mind.

Similarly, it helps to bring a new perspective in post-verdict motions. This can be accomplished in two ways. First, it often helps to have a different lawyer argue the post-verdict motions before the trial court. The argument may appear less redundant when it is presented by a different lawyer. The different lawyer also may have the advantage of a different slant on the argument that may persuade the court to change its mind. Second, it

often helps to bring an appellate perspective to post-verdict motions. During trial, the trial court judge is the primary decision maker, and arguments are therefore directed to the judge's beliefs and values about the law, as well as all of the judge's knowledge about the case. In contrast, the arguments raised in post-verdict motions are likely to be determined later by an appellate court. It is often helpful to persuade the trial court to consider post-verdict issues from the perspective of the appellate court whose decision will be based solely on the law and the trial court record. Of course, nothing helps explain the perspective of the appellate court better than identifying the reasoning of the appellate court in reported decisions. Providing such a narrow focus on the record and the law sometimes can persuade a trial court to grant post-verdict relief based on an argument that it has rejected in the past.