POST-TRIAL MOTIONS[1]

APPELLATE LAW IN THE NEW MILLENIUM:

BRIDGING THEORETICAL FOUNDATION WITH PRACTICAL APPLICATION

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I. INTRODUCTION

Post-trial motions serve two important functions: (1) they provide the litigant a final opportunity for persuading the trial court that they are entitled to relief; and (2) they lay the groundwork for appealing an unfavorable outcome. Accordingly, following trial, every attorney should carefully review the jury's findings to determine what judgment can properly be rendered as a result of the verdict. The attorney should also carefully review the proceedings leading up to the verdict and determine whether the trial court took or failed to take any actions about which the party will want to complain. In particular, the attorney should determine whether the proper objection was raised to the trial court's action and whether the necessary ruling was obtained. Upon doing so, the attorney can then use post-trial motions to either obtain the proper judgment or, as is more often the case, to preserve error for appeal.

Coinciding with their two primary functions, post-trial motions can be divided into two general categories: (1) post-verdict motions; and (2) post-judgment motions. Post-verdict motions can be filed by either party and are used to put the most favorable spin on the jury's findings. Post-judgment motions, on the other hand, provide the platform for the party to argue one last time that it is entitled to a particular outcome and/or that the jury made a mistake. More importantly, post-judgment motions are critical to the appellate process, as they are often a pre-requisite for raising certain appellate complaints; most notably, factual insufficiency points and complaints regarding the amount of damages.

The discussion below identifies the various post-trial motions that are available in Texas state courts and provides the basic "what," "why," and "when" of each motion as well as identifying potential landmines.

II. POST-VERDICT MOTIONS

The Texas Rules of Civil Procedure recognize various motions that may be filed after the jury returns a verdict, but before the trial court signs a judgment. These motions include: (1) motion for judgment on the verdict; (2) motion for judgment notwithstanding the verdict (judgment n.o.v.), and (3) motion to disregard jury findings.

A. Motion For Judgment

1. The Basics

Motions for judgment are governed by Rules 300-306.[2] A motion for judgment can be filed at any time following the verdict and simply requests that the court enter the judgment proposed by the motion. Any party may move the trial court to enter judgment on the verdict and submit a draft judgment for the court's signature. See Tex. R. Civ. P. 305. The motion preserves error for appeal should the court enter a judgment that differs from the proposed judgment. See Emerson v. Tunnell, 793 S.W.2d 947, 948 (Tex. 1990) (motion for judgment preserved error where trial court entered judgment for less damages than requested in motion). Thus, despite the fact that a written motion for judgment is not required and the trial court can enter judgment on its own motion, filing a motion that includes a draft of your proposed judgment is good practice.

Another good practice is to include a "Mother Hubbard" clause or its equivalent[3] in your draft judgment. Such a clause is essential in summary and default judgments, since those judgments are not accompanied by any presumption that all issues were disposed by those judgments. See Mafrige v. Ross, 866 S.W.2d 590, 592 (Tex. 1993) (summary judgment); Quebodeaux v. Lundy, 977 S.W.2d 465, 467 (Tex. App. – Tyler 1998, no pet.) (default judgment). A judgment following a trial on the merits, on the other hand, is presumed to dispose of all issues before the court. Nonetheless, a simple statement that "all relief not herein granted is hereby denied" will dispel any question as to the judgment's finality. See Allen v. Allen, 717 S.W.2d 311, 312 (Tex. 1986) (presumption of finality); Arnold v. West Bend Co., 1999 WL 897 (Tex. App. – Houston [1st Dist.] December 30, 1998, no pet. hist.) (order of dismissal not final appealable judgment where order did not expressly dispose of all claims against all parties or contain a "Mother Hubbard" clause).

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[2] Unless otherwise noted, all references to "Rule" are to the Texas Rules of Civil Procedure.

[3] The Texas Supreme Court considers its equivalent to be a statement that judgment is granted as to all claims asserted by the plaintiff, or a statement that plaintiff take nothing against defendant. See Mafrige v. Ross, 866 S.W.2d 590, n.1 (Tex. 1993); see also Inglish v. Union State Bank, 945 S.W.2d 810, 811 (Tex. 1997).

2. The Trap: Moving For Entry Of A Judgment You Do Not Completely Agree With

In moving for judgment, a problem can arise when some, but not all, of the findings are favorable to a party. Because a motion for judgment on the verdict effectively constitutes approval of the court or jury's verdict, the motion may preclude the party from subsequently challenging any aspect of that judgment. See Litton Indus. Prod., Inc. v. Gammage, 668 S.W.2d 319, 322 (Tex. 1984). In Litton, the Texas Supreme Court expressly disapproved of a method in which the plaintiff moved for entry of judgment without reserving its right to appeal, yet in a brief accompanying that motion, expressly reserved the right to challenge any adverse judgment based upon the verdict. See Litton, 668 S.W.2d at 322. The court refused to approve of a practice "by which a party, by motion, induces the trial court on the one hand to render a judgment, but reserves in a brief the right for the movant to attack the judgment if the court grants the motion." See id. As a result, the court found that Litton had waived his right to complain on appeal of the judgment he moved the court to enter.

Five years later, the Texas Supreme Court further defined the parameters regarding the proper method by which a party may move for entry of a judgment and still reserve its right to challenge certain aspect of that judgment. See First National Bank of Beeville v. Fojtik, 775 S.W.2d 632, 633 (Tex. 1989). In Fojtik, the court recognized that "[t]here must be a method by which a party may move the trial court to render judgment without being bound by its terms." Id. at 633. The party in Fojtik did so by expressly reserving the right to raise a factual sufficiency complaint in its motion. The motion stated:

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

Id. The supreme court approved this express reservation of the right to complain about the judgment as "an appropriate exercise of such a right" and "distinguishable from the attempted reservation in Litton".

Litton and Fojtik thus set the parameters for preserving error when moving to enter judgment. Read together, an express reservation made in the motion itself is sufficient while a reservation of right to appeal in a written brief that accompanies a motion to enter judgment is not. Given these parameters, it is difficult to imagine another method (i.e., oral statements made during the hearing on the motion to enter judgment or during any other part of the trial substituting for the specific requirements approved by the Texas Supreme Court. Accordingly, an attorney moving to enter judgment on a verdict he or she is not totally pleased with will be well-served to reserve his or her right to complain in the fashion dictated by Fojtik. The consequences for failing to do so can, potentially, be quite fatal.

a. Waiver of factual sufficiency complaints

This position is represented almost exclusively by the El Paso Court of Appeals opinion in Harry v. University of Texas System, 878 S.W.2d 342 (Tex. App. – El Paso 1994, no writ). Harry involved an attempt to challenge a jury submission following an adverse verdict in a workers' compensation lawsuit. In attempting to appeal this issue, the plaintiff moved for judgment on the verdict requesting that a take-nothing judgment be entered against him.

On appeal, the appellee argued that the plaintiff had waived his right to appeal by moving for judgment on the verdict without expressly reserving his right to appeal that judgment. However, citing Litton and Steward & Stevenson Services, Inc. v. Enserve, 719 S.W.2d 337 (Tex. App. – Houston [14th Dist.] 1986, writ ref'd n.r.e.), the El Paso court held that by moving for judgment, a party only waives his right to complain about the lack, or insufficiency, of evidence to support the verdict.

b. Waiver of all complaints

Less than a year after Harry, Houston's First District Court of Appeals issued an opinion that directly criticized Harry and holds, instead, that the failure to expressly reserve the right to appeal portions of the judgment forfeits the right to raise any appellate points, not just factual sufficiency complaints. See Casu v. Marathon Refining Co., 896 S.W.2d 388, 390-91 (Tex. App. – Houston [1st Dist] 1995, writ denied). Casu involved a personal injury lawsuit arising out of injuries sustained in a chemical accident. Following trial on the merits, the jury awarded the injured party $50,000, but awarded nothing to his children. Mr. Casu moved the trial court to enter judgment on that jury's verdict, and that judgment was granted. Mr. Casu then attempted to attack that judgment.

On appeal, the Houston Court of Appeals found that the Casus had waived their right to complain about the judgment by failing, in their motion to enter

judgment, to expressly state that they agreed only with the form of the judgment and noting their disagreement with the content and result of the judgment. Because the Casus had not expressed any disagreement with the judgment they had unreservedly invited the trial court to enter, the Casus were not permitted to attack that judgment on appeal. See id. at 390.

In reaching this conclusion, the Court expressly recognized its direct conflict with Harry and expressly noted its disagreement with that opinion. As justification, the Court examined the authority Harry relied on in reaching its holding and expressly disapproved of those cases. See id. at 391. The Court first looked to Litton and found that the Texas Supreme Court's decision made absolutely no pronouncement limiting waiver under these circumstances to sufficiency of the evidence points. See id. at 391. The court then turned to Harry's reliance on Steward & Stevenson Services, Inc. In Steward & Stevenson Services, Inc., the Fourteenth Court overruled all sufficiency of the evidence points upon finding that the appellant had moved to enter judgment without reserving its right to appeal. Nonetheless, the Fourteenth Court went on to address those points of error which did not focus on the sufficiency of the evidence. See id. Steward & Stevenson, however, offers no analysis or authority supporting its decision to address those points. See id.; see also Byrd v. Central Freight Lines, Inc., 976 S.W.2d 257, 259 (Tex. App. – Amarillo 1998, pet. filed) (after finding that appellant had waived error by not reserving complaint in motion to enter, court goes on to address merits of jury submission complaint without offering any justification for doing so); Cruz v. Furniture Technicians of Houston, Inc., 949 S.W.2d 34, 35 (Tex. App. – San Antonio 1997, writ denied) (after finding that appellants waived any right to challenge take nothing judgment by moving to have it entered, court goes on to address substance of other complaints regarding trial court's exclusion of expert witnesses without offering any analysis or authority for doing so). For this reason, the court expressly disapproved of Harry's conclusion.

Casu, on the other hand, cites a number of other cases in which points other than those addressing the sufficiency of the evidence were held to be waived. See id. (citing Transmission Exchange Inc. v. Long, 821 S.W.2d 265, 275 (Tex. App. – Houston [1st. Dist.] 1991, writ denied); D/FW Commercial Roofing, Co. v. Mehra, 854 S.W.2d 182, 190 (Tex. App. – Dallas 1993, no writ); Trevino v. Espinosa, 718 S.W.2d 848, 853 (Tex. App. – Corpus Christi 1986, no writ); Travenol Lab., Inc. v. Bandy Lab., Inc., 608 S.W.2d 308, 314 (Tex. Civ. App. – Waco 1980, writ ref'd n.r.e.)). These cases, therefore, support quite the opposite proposition -- a litigant who moves the trial court to enter judgment without reserving its right to appeal that judgment in the motion itself waives all points of error arising out of that judgment, not just those addressing the sufficiency of the evidence.

Bottom line: be careful about moving for judgment if you plan on appealing. Expressly reserve your right to challenge the judgment on appeal in your motion to enter, regardless of the expected complaint.

B. Motion for Judgment Notwithstanding The Verdict

1. The Basics

Motions for judgment *non obstante veredicto* [n.o.v.] are governed by Rule 301 and are proper if a directed verdict would have been proper. See Fort Bend County Drainage Dist. v. Sbrusch, 818 S.W. 2d 392, 394 (Tex. 1991). In other words, judgment n.o.v. motions are appropriate where there is no evidence to support one or more of the jury's findings on issues necessary to liability, Brown v. Bank of Galveston, National Assoc., 963 S.W.2d 511, 573 (Tex. 1998), or where conclusive evidence or a legal principle bars a particular claim as a matter of law, McDaniel v. Continental Apts., 887 S.W.2d 167, 170 (Tex. App. – Dallas 1994, writ denied). Accordingly, a motion for judgment n.o.v. will preserve legal sufficiency ("no evidence") and "as a matter of law" complaints and entitles the movant to rendition of a favorable judgment, unlike a motion for new trial as will be addressed.

Interestingly, although a legal sufficiency (or "no evidence") challenge can also be preserved through a motion for new trial, it is preferable to make this challenge through a motion for judgment n.o.v. or motion to disregard. If a party preserves the legal sufficiency challenge and prevails, that party may be entitled to rendition of the judgment. However, if the same challenge is made solely by way of a motion for new trial, the most the party can hope to obtain is a remand for a new trial. See Horrocks v. Texas Dept. of Transp., 852 S.W.2d 498, 499 (Tex. 1993); Cecil v. Smith, 804 S.W.2d 509, 512 (Tex. 1991). Accordingly, if you foresee even a slight chance for success on a "no evidence" argument, it would be wise to pursue that argument via a motion for judgment n.o.v. to take advantage of a possible rendition.

Finally, the motion for judgment n.o.v. must be in writing, with reasonable notice given to your opponent, and request that the court ignore the jury's verdict in its entirety and render judgment in your favor. See St. Paul Fire & Marine Ins. v. Bjornson, 831 S.W.2d 366, 369 (Tex. App. – Tyler 1992, no writ). The motion must be directed toward the specific objectionable issues and must point out the reasons why such issue should be disregarded. See Thornhill v. Ronnie's I-45 Truck Stop, 944 S.W.2d 780, 791 (Tex. App. – Beaumont 1997, writ dism'd by agr.). The trial court cannot enter a judgment

n.o.v. *sua sponte*. McDade v. Texas Commerce Bank, 822 S.W.2d 713, 717 (Tex. App. – Houston[1st Dist.] 1992, writ denied).

2. The Traps: Deadlines for Filing and Obtaining Order

Neither Rule 301 nor Rule 329b contains a time limit for filing a motion for judgment n.o.v. There is ample case law holding that the motion can be filed any time prior to the judgment becoming final. See, e.g., Spiller v. Lyons, 737 S.W.2d 29 (Tex. App. – Houston [14th Dist.] 1987, no writ) (motion for j.n.o.v. may be filed at any time after court has announced judgment and may be acted upon at any time before motion for new trial has been overruled either by action of court or by operation of law); Eddings v. Black, 602 S.W.2d 353, 357 (Tex. App. – El Paso 1980, writ ref'd n.r.e.). However, you might not want to wait until the last moment to file your motion. The Dallas Court of Appeals has held that a motion for judgment n.o.v. must be filed within thirty days after the judgment is signed. See Commonwealth Lloyds Ins. Co. v. Thomas, 825 S.W.2d 135 (Tex. App. – Dallas), judgment vacated pursuant to settlement, 843 S.W.2d 486 (Tex. 1992). While the order vacating and dismissing the case erases the opinion's precedential value, the supreme court expressly refused comment on the merits and the lower court's argument that the motion should be governed by the same deadlines as a motion for new trial (30 days after the judgment is signed) is compelling.

The San Antonio Court of Appeals has recently criticized this opinion, stating that the Dallas court's "reasoning appears inconsistent with what is effectively the Supreme Court of Texas' holding in Walker and this court's decision in Hahn." See Kirschberg v. Lowe, 974 S.W.2d 844, 848 n. 5 (Tex. App. – San Antonio 1998, no pet.) (citing Walker v. S & T Truck Lines, Inc., 409 S.W.2d 942, 943 (Tex. Civ. App. – Corpus Christi 1966, writ ref'd); Hahn v. Life & Cas. Ins. Co. of Tenn., 312 S.W.2d 261, 263 (Tex. Civ. App. – San Antonio 1958, no writ)). Accordingly, in a case in which the San Antonio court recognizes that a motion for judgment n.o.v. extends the appellate deadlines, it expressly declines to adopt a 30-day deadline for the filing of such motions. See id. Nonetheless, given the absence of any strategic reasons for delaying the filing of the motion, the better practice is to file it within 30 days of the judgment being signed.

As with the time for filing the motion, the Texas Rules of Civil Procedure do not provide a deadline for the court to rule on the motion for judgment n.o.v. Some courts have held that the motion for judgment n.o.v. will not preserve error unless it is overruled within the same time limits for ruling on a motion for new trial. See Spiller v. Lyons, 737 S.W.2d at 29 (Tex. App. – Houston [14th Dist] 1987, no writ). Other courts, however, hold that the motion may be ruled upon at any time prior to the judgment becoming final. See Eddings v. Black, 602 S.W.2d 353, 357 (Tex. App. – El Paso, 1980), writ ref'd n.r.e., 615 S.W.2d 168 (Tex. 1981). Given the disagreement between the courts, make sure you get a ruling on your motion as soon as possible.

Despite the existence of Texas Rule of Appellate Procedure 33.1(c)[4], which no longer requires a separate, signed order to preserve error, it remains advisable to get a written order on your motion for j.n.o.v. in order to ensure that it preserves error. As one commentator points out, Rule 301, which governs motions for judgment n.o.v., specifically requires a written motion and "reasonable notice", quite unlike a motion for directed verdict, and, more importantly, motions for judgment n.o.v. are not overruled by operation of law, but must be presented and heard by the court. See John Hill Cayce, Jr., Anne Gardner, and Felicia Harris Kyle, Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure, 49 Baylor L. Rev. 867, 875 & n.14 (1997) (citing Noble Hurley & Co. v. Blackjack Clay Co., 617 S.W.2d 741, 744 (Tex. Civ. App. – Tyler 1981, no writ)). Finally, this commentator points out that these motions are often taken under advisement, such that there is no oral ruling from the bench. See id. Accordingly, these motions should still require a written order.

3. No Longer A Trap: Motion For Judgment N.O.V. Now Extends the Appellate Timetables

Historically, there has been some significant confusion as to whether a judgment n.o.v. would extend the appellate timetables. This confusion initially arose out of Texas Rule of Civil Procedure 329b which provided for an extended appellate timetable if a motion for a new trial or "motion to vacate, modify, correct, or reform" a judgment was filed within thirty days of the date the judgment was signed. See Tex. R. Civ. P. 329b(a), (e), (g). Unfortunately, by its express terms, Rule 329b made no provision for a motion for judgment n.o.v. or a motion to disregard jury findings. For that reason, it appeared that motions for judgment n.o.v. would continue to be authorized and governed solely by Rule 301. See Kirschberg v. Lowe, 974 S.W.2d 844, 847 (Tex. App. – San Antonio, 1998, no pet.). This confusion was made worse by the Fourteenth Court of Appeals decision in First Freeport National Bank v. Brazoswood National Bank, 712 S.W.2d 168, 170 (Tex. App. – Houston [14th Dist.] 1986, no writ). In that case, First Freeport filed a "Motion to Disregard Special Issue Findings and a Motion to Modify and Enter Judgment"

[4] Specifically, Texas Rule of Appellate Procedure 33.1(c) provides that "[n]either a formal exception to a trial court ruling or order nor a signed, separate order is required to preserve a complaint for appeal."

within thirty days after the date the judgment was signed. Believing this motion to be sufficient to extend the appellate timetables, First Freeport then perfected its appeal in accordance with the extended timetable. The Fourteenth Court, however, disagreed with First Freeport's construction and dismissed their appeal as untimely. The Fourteenth Court held that because First Freeport's motion was, in essence, a motion for judgment n.o.v., and not a true motion to modify, the motion did not extend the appellate timetable. See id. at 170. However, since that time, First Freeport's reasoning has been soundly rejected by every other court of appeals. Ultimately, in 1995, the Texas Supreme Court cleared up any confusion, holding that the filing of any post-judgment motion or other instrument that (1) is filed within the time for filing a motion for new trial, and (2) that assails the trial court's judgment extends the appellate timetable. Gomez v. Texas Department of Criminal Justice, 896 S.W.2d 176, 177 (Tex. 1995) (per curiam); Kirschberg, 974 S.W.2d at 847-48. Accordingly, a motion for j.n.o.v. filed within thirty days of the date the judgment was signed and which "assails the trial court's judgment" will extend the appellate timetable. See Kirschberg, 974 S.W.2d at 848.

C. Motion To Disregard Jury Findings

A motion to disregard jury findings is governed by Rule 301 which provides: "the court may upon [motion and reasonable notice] disregard any jury finding on a question that has no support in the evidence." Like the motion for judgment n.o.v., a motion to disregard jury findings challenges the legal sufficiency of the evidence and will preserve legal insufficiency challenges for appellate review. The distinction between the two is that a motion for judgment n.o.v. challenges the entire verdict, whereas a motion to disregard a jury finding only challenges certain jury findings. Consequently, a motion to disregard, like the motion for judgment n.o.v., can be used to challenge the legal sufficiency of the evidence supporting a particular finding or the materiality of a given finding.

The grounds asserted in the motion to disregard jury findings determine whether a written motion is required. If the motion raises a legal sufficiency or "no evidence" argument, then a specific motion must be filed and reasonable notice given prior to granting the motion. Tex. R. Civ. P. 301; St. Paul Fire & Marine Co. v. Bjornson, 831 S.W.2d 366, 368 (Tex. App. – Tyler 1992, no writ). The motion must be directed to the objectionable issue and must point out the reasons why that particular issue should be disregarded. See Thornhill v. Ronnie's I-45 Truck Stop, Inc., 944 S.W.2d 780, 791 (Tex. App. – Texarkana 1997, writ dism'd by agr). However, where the complaint involves an immaterial[5] jury finding, the court may disregard such a finding on its own motion. See Second Injury Fund of Texas v. Garcia, 970 S.W.2d 706, 710 (Tex. App. – Amarillo 1998, pet. denied); Arch Constr. Co. v. Tyburec, 730 S.W.2d 47, 49 (Tex. App. – Houston [14th Dist] 1987, writ ref'd n.r.e.); see also Kuehenhofer v. Welch, 893 S.W.2d 689, 692 (Tex. App. – Texarkana 1995, writ denied) (trial court properly disregarded immaterial findings of liability and rendered judgment based on jury's finding of no damages).

As with motions for judgment n.o.v., the rules of civil procedure do not provide deadlines for filing or for obtaining a ruling on a motion to disregard a jury finding. For all practical purposes, motions to disregard jury findings are treated the same, procedurally, as motions for Judgment n.o.v. Thus, a party should file a motion to disregard as soon as possible after the judgment is signed. That same party should also make every effort to get a written ruling on that motion. One recent case has recognized that, although no case law exists regarding whether a ruling on a motion to disregard need be in writing, or whether oral denial in open court is sufficient to preserve error, some ruling, oral or written, must appear in the record on a motion to disregard to preserve the points raised by that motion. See City of Alamo v. Casas, 960 S.W.2d 240, 248 (Tex. App. – Corpus Christi 1997, pet. denied) (absent some kind of ruling, either oral or written, on the record, motion to disregard will present nothing for review). However, despite the implication that an oral ruling may be sufficient, caution continues to dictate that a signed, written order be obtained. See Civil Appeals in Texas, 49 Baylor L. Rev. at 875 & n. 14; see also p. 4, supra.

III. POST-JUDGMENT MOTIONS

A. Introduction

Post-judgment motions are used to correct any errors that the trial court may have made in rendering its judgment. They provide a final opportunity, prior to the appellate stage, for a party to convince the trial court that it is entitled to relief. Of primary importance to post-judgment motions is the trial court's power to grant the relief sought. The trial court can only act to set aside or modify its judgment during the period in which it retains plenary jurisdiction over the judgment.

[5] A jury finding is immaterial only if the question should not have been submitted or if the question, although properly submitted, was rendered immaterial by other findings. See Salinas v. Rafati, 948 S.W.2d 286, 288 (Tex. 1997).

B. Plenary Jurisdiction Of The Trial Court

The date the judgment is signed determines the beginning of the trial court's plenary power. Tex. R. Civ. P. 306a. The trial court has plenary power "to grant a new trial or to vacate, modify, correct or reform the judgment within thirty days after the judgment is signed," and if a timely motion for new trial or motion to correct, modify or reform a judgment is filed by any party, the trial court has plenary power "until 30 days after all such timely filed motions are overruled, either by a written and signed order, or by operation of law, whichever comes first." Tex. R. Civ. P. 329b(d), (e), (g). These periods apply "regardless of whether an appeal has been perfected." Tex. R. Civ. P. 329b(d). Note that the jurisdiction of the trial court and the appellate court may overlap for a certain period of time. Thus, once the judgment is signed, the trial court retains plenary power over its judgment for 30 days. If a motion for new trial or to otherwise modify the judgment is filed, the court retains its plenary power until 30 days after the motion is overruled. Once the trial court's plenary power expires, it has no power to change the judgment except: (1) to correct a clerical error and render judgment nunc pro tunc; (2) to sign an order declaring void a previous judgment or order signed after the expiration of the trial court's plenary power; or (3) to set aside the judgment by bill of review. Tex. R. Civ. P. 329b(f).

The above discussion is subject to one important condition – actual notice of the judgment. If a party does not receive actual notice of the judgment within 20 days after the judgment is signed, the timetables governing the trial court's plenary power and the filing a motion for new trial are extended for a maximum period of 90 days from the date the order was signed. Tex. R. Civ. P. 306a(4). However, the Rule 306a Motion should be filed within thirty days after the party or his attorney received notice or acquired actual knowledge of the signing of the judgment. See In re Simpson, 932 S.W.2d 674, 678 (Tex. App. – Amarillo 1996, orig. proceeding); Womack-Humphreys Architects v. Barrasso, 886 S.W.2d 808, 813 (Tex. App. – Dallas 1994, writ denied); Montalvo v. Rio National Bank, 885 S.W.2d 235, 236 (Tex. App. – Corpus Christi 1994, no writ); but see Grondona v. Sutton, 1998 WL 855505, *2 (Tex. App. – Austin 1998, no pet.) (per curiam) (motion can be filed more than thirty days after notice, so long as court still has plenary power counted from date of notice); Vineyard Bay v. Vineyard on Lake Travis, 864 S.W.2d 170, 172 (Tex. App. – Austin 1993, writ denied). The provisions of Rule 306a(4) do not apply if notice is received more than ninety days after the date the judgment is signed. See Levit v. Adams, 850 S.W.2d 469 (Tex. 1993); In re Jones, 974 S.W.2d 766, 768 (Tex. App. – San Antonio 1998, orig. proceeding); Graham v. Fashing, 928 S.W.2d 567, 569 (Tex. App. – El Paso 1996, orig. proceeding) (trial court does not have jurisdiction to consider a motion for new trial filed 111 days after entry of judgment, even where the defendant did not receive notice of the judgment until 103 days after the judgment was signed). Under 306a, the trial court's plenary power begins to run upon the party receiving actual notice of the judgment and lasts for 20 days unless a motion for new trial or to otherwise modify the judgment is filed. In order to obtain relief under Rule 306b, a party must "prove in the trial court, on sworn motion and notice, the date on which the party or his attorney first either received notice of the judgment or acquired actual knowledge of the signing and that this date was more than twenty days after the judgment was signed." Tex. R. Civ. P. 306a(5). In other words, the moving party must establish the date of notice by competent proof and ensure that the proof is included in a written order signed by the trial judge. See In re Jones, 974 S.W.2d at 768. Absent establishment of the applicability of Rule 306a(4) in this fashion, the trial court's plenary power will not be restarted and the trial court will be without jurisdiction to grant the motion. See id. (citing Memorial Hosp. v. Gillis, 741 S.W.2d 364, 365-66 (Tex. 1987)); see also In re Simpson, 932 S.W.2d 674, 679 (Tex. App. – Amarillo 1996, orig. proceeding) (motion for new trial failed to present a prima facie case of lack of notice and, thus, failed to invoke the plenary power of the trial court to hear the motion).

Another important event that affects the above deadlines is the filing of a modified judgment. If the court changes its judgment, all time periods start anew and are calculated based on the signing of the modified judgment. See Tex. R. Civ. P. 329b(h); Tex. R. App. P. 4.3(a), 27.3; Mackie v. McKenzie, 890 S.W.2d 807, 808 (Tex. 1994); Old Republic Ins. Co. v. Scott, 846 S.W.2d 832, 833 (Tex. 1993); Check v. Mitchell, 765 S.W.2d 755, 756 (Tex. 1988) (per curiam). Since the deadlines start all over again, another motion is necessary to extend these deadlines. See Board of Trustees of Bastrop Ind. Sch. Dist. v. Toungate, 958 S.W.2d 365, 367 (Tex. 1997). Accordingly, once a judgment is modified, do not rely on any previously filed motion to extend your deadlines. A second motion is necessary.

C. Motion For New Trial

1. The Basics

Motions for new trial are governed by Rules 320-324. Rule 320 provides that "new trials may be granted and judgment set aside for good cause, on motion or on the court's own motion on such terms as the court shall direct. New trials may be granted when the damages are manifestly too small or too large...." A motion for new trial is used to convince the trial court that certain errors or injustices occurred that require a new trial be granted. In addition to being a platform for further advocacy, a motion for new trial can be used simply to extend the appellate timetables. See Old

Republic Ins. Co. v. Scott, 846 S.W.2d 832 (Tex. 1993) ("The filing of a motion for new trial in order to extend the appellate timetable is a matter of right, whether or not there is any sound or reasonable basis for the conclusion that a further motion is necessary."); Producers Assistance v. Employers Ins., 934 S.W.2d 796, 798-99 (Tex. App. – Houston [1st Dist.] 1996, no writ). Moreover, a motion for new trial can be critical to preserving complaints for appeal regarding certain types of error. Specifically, a motion for new trial is required to preserve error regarding the following: (1) the factual sufficiency of the evidence to support the judgment rendered by the trial court; (2) excessive or inadequate damages; (3) jury misconduct; (4) newly discovered evidence; (5) lack of consent to an agreed judgment; (6) the failure to set aside a default judgment; and (7) incurable jury argument if the trial court has not previously ruled on it. Tex. R. Civ. P. 324(b). Generally a motion for new trial is appropriate in any situation in which the complaint involves presenting new evidence to the trial court.

A motion for new trial must be filed within thirty days of the judgment or other order complained of being signed. Tex. R. Civ. P. 329b. The date that a motion for new trial is tendered to the clerk is the controlling date for appellate purposes, even if the requisite statutory filing fee is not paid at that time. Jamar v. Patterson, 868 S.W.2d 318 (Tex. 1993) (per curiam). The motion is "conditionally filed" on the date it is tendered and the filing is completed when the fee is paid. Id. However, if you forget to pay your fee at the time the motion is filed, be sure to get it to the clerk before the court loses its plenary jurisdiction. See Tate v. E. I. Dupont de Nemours & Co., 934 S.W.2d 83, 84 (Tex. 1996) (fee paid after motion overruled by operation of law but before trial court lost plenary jurisdiction extended the appellate timetable). Although three courts of appeals, including San Antonio, have held that a timely motion for new trial will still extend the appellate deadlines even where the fee is paid well after the court loses plenary power, dicta in a least one older case out of Houston's 14th District suggests otherwise. See Polley v. Odom, 937 S.W.2d 623, 625-36 (Tex. App. – Waco 1997, no pet.) (fee paid 6 months late); Ramirez v. Get 'N' Go, 888 S.W.2d 29, 31 (Tex. App. – Corpus Christi 1994, writ denied) (fee paid 9 months late); Spellman v. Hoang, 887 S.W.2d 480, 481 (Tex. App. – San Antonio 1994, no writ) (fee paid 7 months late); but see Arndt v. Arndt, 709 S.W.2d 281, 282 (Tex. App. – Houston [14th Dist.] 1986, no writ) ("motion will not act to extend the appellate timetables if the required . . . fee is not paid before the motion is heard or before it is overruled."). The supreme court in Tate failed to reach this issue. See Tate, 934 S.W.2d at 84 n. 1 ("we express no opinion about whether a motion for new trial extends the appellate timetable if the filing fee is not paid within the period of the trial court's plenary jurisdiction."). However, the court did note that failure to pay before the motion is overruled by operation of law may forfeit the movant's right to have the trial court consider the motion. See id. at 84. Accordingly, the fee should be paid as soon as possible.

Prematurely filed motions for new trial are permissible. Tex. R. Civ. P. 329b(a) ("shall be filed prior to or within thirty days after the judgment or other order complained of is signed.") A premature motion is simply deemed to be filed on the date of, but subsequent to, the signing of the judgment the motion for new trial assails. Tex. R. Civ. P. 306c; Padilla v. La France, 907 S.W.2d 454, 458 (Tex. 1995); Wirtz v. Massachusetts Mut. Life Ins. Co., 898 S.W.2d 414, 419 (Tex. App. – Amarillo 1995, no writ); Harris Cty. Hosp. Dist. v. Estrada, 831 S.W.2d 876, 878 (Tex. App. – Houston [1st Dist.] 1992, no writ). An amended motion for new trial may be filed without leave of court within thirty days after the judgment or other order complained of is signed so long as any preceding motion for new trial filed by the movant has not been overruled. Tex. R. Civ. P. 329b(2); see also Wirtz, 898 S.W.2d at 419 n.2 (second motion for new trial filed after judgment expressly denying all motions, including prematurely-filed motion for new trial, was signed was a nullity due to overruling of first motion for new trial at time judgment was entered). However, amended motions for new trial have no impact on the court's plenary power. See In re Dickason, 42 Tex. Sup. Ct. J. 41 (October 15, 1998).

If the motion is not ruled on within 75 days of the judgment being signed, it is overruled by operation of law. Tex. R. Civ. P. 329b(c). Even if overruled by operation of law, the motion may still be granted within 30 days of its being overruled. Tex. R. Civ. P. 329b(e); see also Hunter v. O'Neill, 854 S.W.2d 704, 705 (Tex. App. – Dallas 1993, orig. proceeding). Thus, the trial court can grant a new trial up to 105 days after the judgment was signed. See L.M. Healthcare v. Childs, 929 S.W.2d 442, 444 (Tex. 1996) (per curiam). The trial court also has the authority during the 75-day period to vacate previously granted motions for new trial. Fruehauf Corp. Porter v. Vick, 888 S.W.2d 789, 790 (Tex. 1994) (order vacating order granting new trial signed outside period of court's plenary power over original judgment is void). Be careful letting a motion for new trial be overruled by operation of law. While motions for new trial asserting sufficiency of the evidence points need not be brought to the court's attention in order to preserve those points for appeal, when the motion requires the exercise of discretion, the Court must be given the opportunity to exercise that discretion before that discretion can be abused. See Faulconer, Inc. v. HFI Ltd. Partnership, 970 S.W.2d 36, 38-39 (Tex. App. – Tyler 1998, no pet.).

After a judgment has been modified or reformed, a party can file a second motion for new trial. Old Republic Ins. Co. v. Scott, 846 S.W.2d 832 (Tex.

1993). Following the rationale underlying Harris Cty. Hosp. Dist., a motion for new trial addressed to the first judgment of the trial court is sufficient to preserve error in a subsequent judgment provided that the motion addresses the error alleged to exist in the modified judgment. See Fredonia State Bank v. General Am. Life Ins. Co., 881 S.W.2d 279, 282 (Tex. 1994). Arguably, the appellate deadlines also start anew with the signing of the reformed judgment. See Harris Cty. Hosp. Dist., 831 S.W.2d at 878-79; but see A.G. Solar and Co., Inc. v. Nordyke, 744 S.W.2d 646 (Tex. App. – Dallas 1988, no writ). Notwithstanding the supreme court's holding in Fredonia, unless you are absolutely confident that the complaint raised in the earlier motion squarely addresses the second judgment, the safest practice is to file a new motion for new trial or motion to modify the new judgment.

Motions for new trial must be in writing. Tex. R. Civ. P. 320. Complaints raised in a motion for new trial must be specifically presented in individual points of error. Tex. R. Civ. P. 321, 322; see also Ramey v. Collagen Corp., 821 S.W.2d 208, 211 (Tex. App. – Houston [14th Dist.] 1991, writ denied) (motion for new trial argument consisting solely of "when the record is viewed as a whole, the jury's verdict is against the great weight and preponderance of the evidence" was insufficient to preserve plaintiff's "great weight" point). Each point relied upon in a motion for new trial must briefly refer to that part of the ruling of the court, charge given to the jury, or charge refused, admission or rejection of evidence, or other proceedings which are designated to be complained of, in such a way that the objection can be clearly identified and understood by the court. Meyer v. Great Am. Indemnity Co., 279 S.W.2d 575, 578-79 (Tex. 1955); see also D/FW Commercial Roofing Co., Inc. v. Mehra, 854 S.W.2d 182, 189 (Tex. App. – Dallas 1993, no writ).

2. The Traps: Rule 324(b)'s Pre-requisites For Appeal

A point in a motion for new trial is a prerequisite to the following complaints on appeal:

- A complaint on which evidence must be heard such as: (1) jury misconduct, see e.g., Mitchell v. Southern Pacific Transp. Co., 955 S.W.2d 300, 319-23 (Tex. App. – San Antonio 1997, no pet.); (2) newly discovered evidence, see e.g., Jackson v. Van Winkle, 660 S.W.2d 807 (Tex. 1983); Connell Chevrolet Co., Inc. v. Leak, 967 S.W.2d 888, 894 (Tex. App. – Austin 1998, no pet.); or (3) failure to set aside a judgment by default, see e.g., Old Republic Ins. Co. v. Scott, 873 S.W.2d 381, 382 (Tex. 1994);

- A complaint of factual insufficiency of the evidence to support a jury finding, see, e.g. Fredonia State Bank v. General American Life Ins. Co., 881 S.W.2d 279, 281 (Tex. 1994); Hart v. Moore, 952 S.W.2d 90, 94-95 (Tex. App. – Amarillo 1997, pet. denied); Hill v. Clayton, 827 S.W.2d 570, 574 (Tex. App. – Corpus Christi 1992, no writ);

- 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, see, e.g. Hawthorne v. Guenther, 917 S.W.2d 924, 937 (Tex. App. – Beaumont 1996, writ denied); Pipgras v. Hart, 832 S.W.2d 360 (Tex. App. – Fort Worth 1992, writ denied).

- Incurable jury argument if not otherwise ruled on by the trial court.

D. Motion To Correct, Modify Or Reform

A motion to correct, modify or reform is used to change the trial court's judgment. Such motions are authorized by Rule 329b(g), although the trial court's plenary jurisdiction inherently encompasses the power to change the judgment so long as it is not final. See Coastal Refining & Marketing v. Latimez, 838 S.W.2d 570, 571 (Tex. App. – Corpus Christi, 1992, no writ) (trial court has no power to modify judgment if plenary period has expired). The motion must be in writing, specifically state the grounds relied upon, and be signed. Tex. R. Civ. P. 329b(g). The motion can be used to correct either clerical or judicial errors.

A motion to modify, correct or reform the judgment must be filed within 30 days after the judgment is signed. Tex. R. Civ. P. 329b. Once filed, the motion extends the appellate timetables in the same manner as a motion for new trial. Tex. R. Civ. P. 329b(g); Tex. R. App. P. 26.1(a)(2); Cannon v. ICO Tublar Servs., Inc., 905 S.W.2d 380, 389-90 (Tex. App. – Houston [1st Dist.] 1995, no writ); see also Home Owners Funding Corp. v. Scheppler, 815 S.W.2d 884, 887 (Tex. App. – Corpus Christi 1991, no writ) (any "post-judgment motion that would result in a change in the judgment, if granted, is one which is contemplated by Rule 329b" and therefore extends the time for perfecting appeal).

E. Motion For Remittitur

1. The Basics

Remittitur, the relinquishment of part or all of a damage award, is appropriate where the evidence is insufficient to support the jury's damage findings. See Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 406 (Tex. 1998); Pope v. Moore, 711 S.W.2d 622, 624 (Tex. 1986). Rule 316 allows a "party in whose favor a judgment has been rendered" to file a voluntary remittitur. Additionally, under Rule 320, the trial court has the power to grant a new trial "when the damages are

manifestly too small or too large." The trial court may also order a remittitur on its own motion in conjunction with a motion for new trial. See Union Carbide v. Burton, 618 S.W.2d 410, 416 (Tex. Civ. App. – Houston [14th Dist.] 1981, writ ref'd n.r.e.). The request for remittitur can be filed as a separate motion or combined with a motion for new trial. See, e.g., Landmark Am. Ins. Co. v. Pulse Ambulance Serv., Inc., 813 S.W.2d 497, 499 (Tex. 1991) (party filed motion for new trial with alternate request for remittitur). Failure to ask for remittitur in some post-judgment motion, however, will result in its waiver. See Hawthorne v. Guenther, 917 S.W.2d 924, 937 (Tex. App. – Beaumont 1996, writ denied).

The request for remittitur should be filed by the same deadline applicable to motions for new trial -- within thirty days following the signing of the judgment. The trial court can order remittitur on its own motion as long as the court has plenary power. See Union Carbide Corp. v. Burton, 618 S.W.2d 410, 416 (Tex. App. – Houston [14th Dist.] 1981, writ ref'd n.r.e.) (trial court's exercise of power to order remittitur is not dependent upon specific request for remittitur when timely motion for new trial is filed and trial court still has plenary power). An order of remittitur is comparable to a "correction" of the remitted judgment under Tex. R. Civ. P. 329b(h), and the appellate timetable runs from the date the trial court signs the order of remittitur. Landmark Am. Ins. Co. v. Pulse Ambulance Serv., Inc., 813 S.W.2d 497, 499 (Tex. 1991).

2. The Trap: Remittitur Must Be Conditioned On New Trial

The trial court cannot order a remittitur without offering the party the alternative of a new trial. See Snoke v. Republic Underwriters Ins. Co., 770 S.W.2d 777 (Tex. 1989) ("The trial court had no power to order a remittitur in the amount of attorneys fees found by the jury without conditioning that remittitur on a new trial."); Long John Silvers, Inc. v. Martinez, 850 S.W.2d 773, 777 (Tex. App. – San Antonio 1993, writ dism'd w.o.j.).

F. Motion For Judgment Nunc Pro Tunc

A motion for judgment nunc pro tunc is used to correct a clerical error in the judgment after the trial court's plenary power has already expired. See Ferguson v. Naylor, 860 S.W.2d 123, 126 (Tex. App. – Amarillo 1993, writ denied); Tex. R. Civ. P. 316. The trial court cannot use a motion for judgment nunc pro tunc to correct a judicial error following the expiration of the court's plenary power. See Dikeman v. Snell, 490 S.W.2d 183, 186 (Tex. 1973). In short, a judgment nunc pro tunc merely corrects the judgment to accurately reflect that which was rendered by the court. Whether an error is clerical or judicial is a question of law. Escobar v. Escobar, 711 S.W.2d 230, 231-32 (Tex. 1986); Dickens v. Willis, 957 S.W.2d 657, 659 (Tex. App. – Austin 1997, no pet.).

The only ground for a motion for judgment nunc pro tunc is to correct clerical errors made in entering the judgment. See id. at 231. A "judicial error" is one that occurs in rendering a judgment. Id., 711 S.W.2d at 231. A " clerical error", on the other hand, is a mistake or omission that prevents the judgment as entered from accurately reflecting the judgment that was rendered, i.e., a mistake in entering or recording the judgment. Universal Underwriters Ins. Co. v. Ferguson, 471 S.W.2d 28, 29-30 (Tex. 1971); H. E. Butt v. Pais, 955 S.W.2d 384, 388 (Tex. App. – San Antonio 1997, no pet.). A "clerical error" is not the result of judicial reasoning, evidence or determination. Matagorda County v. Conquest Explor., 788 S.W.2d 687, 693 (Tex. App. – Corpus Christi 1990, no writ). "To establish that the error was, in fact, clerical, it must be clearly shown that the written judgment signed by the trial judge and entered of record did not correctly reflect the judgment actually rendered by the court. Id. (citation omitted).

An opinion by the Fourth Court of Appeals provides a good discussion of the difference between judicial and clerical mistakes. See America's Favorite Chicken Co. v. Galvan, 897 S.W.2d 874, 876-77 (Tex. App. – San Antonio 1995, writ denied). In Galvan, the trial court entered an order of nonsuit with prejudice pursuant to the plaintiff's motion. The plaintiff then filed a motion for judgment nunc pro tunc arguing that she had erred in requesting that the nonsuit be entered with prejudice. The trial court reformed the judgment. The Fourth Court of Appeals vacated the judgment nunc pro tunc and reinstated the original judgment, holding that the original judgment, even if erroneous, was the judgment that the court intended to enter. Id. at 877. Thus the trial court had no power under Rule 316 to reform the judgment. See also National Unity Ins. Co. v. Johnson, 926 S.W.2d 818, 820 (Tex. App. – San Antonio 1996, orig. proceeding) (where second judgment corrects judicial rather than clerical error, second judgment is void).

Notice must be given to all interested parties pursuant to Rule 21a prior to the trial court ruling on a motion for judgment nunc pro tunc. Tex. R. Civ. P. 316; see also West Texas State Bank v. General Resources Mgmt. Corp., 723 S.W.2d 304, 307 (Tex. App. – Austin 1987, writ ref'd n.r.e.). Failure to give such notice nullifies the judgment. See West Texas State Bank, 723 S.W.2d at 307.

There is no deadline for filing a motion for judgment nunc pro tunc and the trial court can correct a clerical error even after its plenary power has expired. A judgment nunc pro tunc does not extend the appellate deadlines for any complaints regarding the original judgment entered by the court. See Cavalier Corp. v.

Store Enterprises, Inc., 742 S.W.2d 785, 787 (Tex. App. – Dallas 1987, writ denied); Gonzalez v. Doctors Hosp. - East Loop, 814 S.W.2d 536, 537 (Tex. App. – Houston [1st Dist.] 1991, no writ). However, any change to the judgment resulting from a motion for judgment nunc pro tunc that gives rise to a complaint that could not have been raised as to the original judgment extends the appellate deadlines. See, e.g., Escobar v. Escobar, 711 S.W.230, 232 (Tex. 1986) (the trial court's entry of a nunc pro tunc judgment correcting the acreage disposed of in a judgment extended the appellate deadlines); Amato v. Hernandez, 981 S.W.2d 947 (Tex. App. – Houston [1st Dist.] 1998, pet. filed) (judgment nunc pro tunc that, for the first time, named defendant as defaulting party extended appellate deadline to complain about default).

During the hearing on the motion, evidence may be presented. Evidence may be in the form of oral testimony of witnesses, written documents, the court's docket, and the judge's personal recollection. Riner v. Briargrove Park Property Owners, 976 S.W.2d 680, 683 (Tex. App. – Houston [1st Dist.] 1997, no pet.); Pruet v. Coastal States Trading, Inc., 715 S.W.2d 702, 705 (Tex. App. – Houston [1st Dist.] 1986, no writ). Docket entries are "some evidence" of a rendered judgment and its contents. Escobar, 711 S.W.2d at 232 (citing Port Huron Engine & Thrasher Co. v. McGregor, 131 S.W.398 (Tex. 1910)). Attorneys with knowledge of the judgment rendered can testify at the hearing on the motion for judgment nunc pro tunc. See Escobar, 711 S.W.2d 232 (attorney who tried the case testified as to judgment actually rendered by trial court).

G. Non-jury Trials - Findings of Fact and Conclusions of Law

1. The Basics

In non-jury trials, either party is entitled to request findings of fact and conclusions of law made by the trial court regarding a judgment. Findings and conclusions may also be requested following the entry of certain orders where the parties' ability to appeal would be undermined by the absence of such findings or conclusions. Requests for findings of fact and conclusions of law are governed by Rules 296-299a. The purpose behind such requests is to provide a litigant a right to findings of fact and conclusions of law finally adjudicated after a conventional trial on the merits before the court. See IKB Industries v. Pro-Line Corp., 938 S.W.2d 440, 442 (Tex. 1998). In other cases, findings and conclusion may not be required, but are nonetheless not without purpose – i.e., they could be considered by the appellate court. See id. at 443; In re Perritt, 973 S.W.2d 776, 778 (Tex. App. – Texarkana 1998, orig. proceeding). Thus, in addition to a conventional trial on the merits before the court, findings and conclusions are also appropriate following a default judgment on a claim for unliquidated damages, judgment rendered as sanctions, and any judgment based in any part on any evidentiary hearing. See IKB, 938 S.W.2d at 443.

In requesting findings of fact and conclusions of law, the following time deadlines must be strictly followed. See, e.g., Thompson v. Thompson, 827 S.W.2d 563, 567 (Tex. App. – Corpus Christi 1992, writ denied) (trial court did not err in refusing to file findings of fact and conclusions of law when notice of past due findings was filed one day late). A request for findings of fact and conclusions of law must be made in writing and filed with the district clerk within 20 days of the signing of the judgment. Tex. R. Civ. P. 296. The request should properly be styled "Request For Findings Of Fact and Conclusions Of Law." A party may file the request for findings and conclusions prior to the signing of the judgment, in which case the request is deemed filed on the day that the judgment is signed. Tex. R. Civ. P. 306c.

The trial court must prepare and file the findings and conclusions within 20 days of the request being filed. Tex. R. Civ. P. 297. The findings cannot be included in the judgment; rather, they must be filed as a separate documents. Tex. R. Civ. P. 299a. Findings that are included in the judgment have no effect and later filed findings have precedent over any findings included in the judgment. See Southerland v. Cobern, 843 S.W.2d 127, 131 n. 7 (Tex. App. – Texarkana, writ denied). Moreover, oral comments made by the trial court cannot act as a substitute for written findings and conclusions. See Spiers v. Maples, 970 S.W.2d 166, 170 (Tex. App. – Fort Worth 1998, no pet.).

If the trial court fails to prepare findings and conclusions within 20 days, the party must file a "Notice Of Past Due Findings Of Fact And Conclusions Of Law" within 30 days of the filing of the original request for findings and conclusions. Tex. R. Civ. P. 297; Salinas v. Beaudrie, 960 S.W.2d 314, 317 (Tex. App. – Corpus Christi 1997, no pet.) (because appellants failed to file reminder, they waived their right to complain on appeal of any error related to the trial court's failure to make a finding or conclusion). Following the additional notice, the trial court then has 40 days from the filing of the original request to complete and file the findings and conclusions. The trial court's duty to file findings and conclusions is mandatory and the court's failure to respond when all requests have been properly made is presumed harmful, unless the record before the appellate court shows that the complaining party has suffered no injury. See Cherne Indus., Inc. v. Magallanes, 763 S.W.2d 768, 772 (Tex. 1989); see also Tenery v. Tenery, 932 S.W.2d 29, 30 (Tex. 1996) (error is harmful if it prevents an appellant from properly presenting his case to the appellate court.).

Note: the due date for filing the findings and conclusions runs from the filing of the original request, not the notice of past due findings and conclusions.

Once the findings and conclusions are filed, any party may request additional or amended findings and conclusions within 10 days. Tex. R. Civ. P. 298. The party requesting additional findings must tender specific findings for the trial court to either adopt or reject. See Alvarez v. Espinoza, 840 S.W.2d 238, 241-42 (Tex. App. – San Antonio 1992, writ dism'd w.o.j.). A general request for additional findings is not sufficient.

A request for findings and conclusions extends the appellate timetable in a non-jury case, provided the findings are required by the Rules of Civil Procedure or, if not required, could properly be considered by the appellate court. Tex. R. App. P. 26.1(a)(4). A request for findings and conclusions is not appropriate and, thus, will not extend the appellate timetable in the following cases: summary judgment, judgment following a directed verdict, judgment *non obstante verdicto*, default judgment awarding liquidated damages, dismissal for want of prosecution without an evidentiary hearing, dismissal for want of jurisdiction without an evidentiary hearing, and dismissal based on the pleadings or special exceptions, or any judgment rendered without an evidentiary hearing. See IKB, 938 S.W.2d at 443.

2. The Trap: Failure To Request Findings

Where a party fails to request findings of fact, the appellate court presumes that the trial court made all findings necessary to support the judgment rendered and will affirm the judgment if it can be upheld on any legal theory that has support in the evidence. See Worford v. Stamper, 801 S.W.2d 108, 109 (Tex. 1990); AIG Risk Mgmt., Inc. v. Motel 6 Operating L.P., 960 S.W.2d 301, 307 (Tex. App. – Corpus Christi 1997, no pet.). Moreover, if the findings of fact that are filed include some, but not all, elements of a claim or defense, the court of appeals infers that the trial court found the omitted elements in support of the judgment. Tex. R. Civ. P. 299; Black v. Dallas Cty. Child Welfare Unit, 835 S.W.2d 626, 630 n.10 (Tex. 1992). However, if the omitted element was requested by a party and the trial court refused to find the element, then the court of appeals may not presume that the element was found to support the judgment. Tex. R. Civ. P. 299; Boy Scouts of Am. v. Responsive Terminal Sys., 790 S.W.2d 738, 742-43 (Tex. App. – Dallas 1990, writ denied). Accordingly, if the trial court's findings of fact omit an element of a claim or defense and you intend to challenge the claim or defense on appeal, request findings as to each element.

If the findings of fact filed by the trial court omit a claim or defense altogether, the party intending to rely on the claim or defense on appeal must request additional findings pursuant to Rule 298 or the claim or defense is waived. Tex. R. Civ. P. 299; El Paso Natural Gas Co. v. Minco Oil & Gas Co., 964 S.W.2d 54, 72 (Tex. App. – Amarillo 1997, pet. granted). The moral to all of this: request findings and conclusions regarding all elements of a claim or defense about which you intend to complain or upon which you intend to rely on appeal.