POST-VERDICT ISSUES

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I. INTRODUCTION

This paper seeks to address issues that will arise post-trial but before the trial court loses its jurisdiction. Accordingly, the paper is primarily devoted to post-verdict and post-judgment motion practice as well as the trial court's entry of judgment. The paper does not discuss pre-trial motions, motions that are generally filed during trial, or motions directed to the appellate process.

II. POST-VERDICT MOTIONS

A. Motion for Judgment on the Jury Verdict.

The Texas Rules of Civil Procedure do not directly address motions for judgment on the verdict; the procedure is governed entirely by case law. Consequently, no special form is required for a motion for judgment on the verdict.

Rule 305 of the Texas Rules of Civil Procedure provides that any party may prepare a judgment and submit it to the court. Pursuant to Rule 301, the judgment must conform to the pleadings, the nature of the case proved, and the verdict. Rule 305 does not require, however, that a judgment be accompanied by a motion for judgment. Additionally, because it is the duty of the trial court to reconcile apparent conflicts in the jury findings, *see Traywick v. Goodrich*, 364 S.W.2d 190, 191 (Tex. 1963), a motion for judgment on the verdict is not mandatory. The trial judge has a ministerial duty to enter a judgment on the verdict if there is no irreconcilable conflict in the jury's findings. *See* TEX. R. CIV. P. 300. Similarly, there is no deadline for filing a motion for judgment because it does not extend the appellate timetable. *See Brazos Elec. Power Co-op, Inc. v. Callejo*, 734 S.W.2d 126, 128 (Tex. App.—Dallas 1987, no writ).

Although a motion for judgment is not required to preserve error, a motion for judgment on the verdict may preserve some issues for appeal while waiving others. For example, a motion for judgment on the verdict preserves a party's right to seek judgment on the verdict if the trial court disregards the verdict and enters judgment notwithstanding the verdict. *See Emerson v. Tunnell*, 793 S.W.2d 947, 948 (Tex. 1990). However, a motion for judgment on the verdict is an affirmation that the jury's verdict is supported by the evidence. *See Litton Indus. Prod., Inc. v. Gammage,* 668 S.W.2d 319, 322 (Tex. 1984); *Russell v. Dunn Equipment, Inc.,* 712 S.W.2d 542, 545 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). Thus, a party that seeks judgment on the verdict may waive the right to challenge the judgment it requested on appeal. *See, e.g.*, *Cruz v. Furniture Technicians of Hous., Inc.*, 949 S.W.2d 34, 35 (Tex. App.—San Antonio 1997, pet. denied); *Casu v. Marathon Ref. Co.*, 896 S.W.2d 388, 389-90 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Stewart & Stevenson Servs., Inc. v. Enserve, Inc.*, 719 S.W.2d 337, 341 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). A problem arises when only some of the jury findings are favorable to a litigant seeking judgment on the verdict.

The Texas Supreme Court recognized this problem in *First Nat'l Bank of Beeville v. Fojtik,* 775 S.W.2d 632 (Tex. 1989): "There 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." *Id.* at 635. Finding a solution to the problem, the court held that an express

reservation in the motion for judgment on the verdict would preserve a partially successful party's right to challenge the adverse jury findings on appeal. The court deemed the following reservation sufficient:

> 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.

Since *Fojtik*, Texas appellate courts have approved other methods whereby a litigant may move for judgment on the verdict without waiving the right to challenge particular adverse findings. *See, e.g.*, *Morse v. Delgado*, 975 S.W.2d 378, 381 (Tex. App.—Waco 1998, no pet.); *Transmission Exch., Inc. v. Long*, 821 S.W.2d 265, 275 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *Melissinos v. Phamanivong*, 823 S.W.2d 339 (Tex. App.—Texarkana 1991, writ denied).

Recently, the Fourteenth Court of Appeals found no waiver where the defendants, in response to the plaintiffs' motion for judgment, expressly asked the trial court to enter the attached proposed judgment but stated that they contend that the plaintiffs are "not entitled to any award, as outlined in Defendants' post-trial motion[.]" *Soon Phat, L.P. v. Alvarado*, 392 S.W.2d 78, 95 (Tex. App.—Houston [14 Dist.] 2013, pet. filed). The attached proposed judgment stated that it was "Approved As To Form Only." *Id.*

The courts of appeals are divided about the extent to which appellate complaints are waived by moving for judgment without reservation. For example, in *Harry v. University of Texas System*, 878 S.W.2d 342, 344 (Tex. App.—El Paso 1994, no writ), the court held that only sufficiency of the evidence points are waived. The court held that attacks on the form of jury submission are not waived. *Id.* In *Casu v. Marathon Refining Co.*, 896 S.W.2d 388, 391 (Tex. App.—Houston [1st Dist.] 1995, writ denied), however, the court held that "where the litigant moves the trial court to enter a judgment, and the trial court enters the judgment, the litigant cannot later complain of the judgment, period." *Also see Austin-Bray v. Tejas Toyota, Inc.*, 363 S.W.3d 777, 787 (Tex. App.—Austin 2012, no pet.) (following *Casu*); *Robinson & Harrison Poultry v. Galvan*, 323 S.W.3d 236, 239 (Tex. App.—Corpus Christi 2010), *judgment vacated w.r.m. by agreement* (following *Casu*).

B. Motion to Disregard Jury Findings

Rule 301 of the Texas Rules of Civil Procedure provides one basis for disregarding findings by the jury:

> [T]he court may, upon . . . motion and notice, disregard any jury finding on a question that has no support in the evidence."

TEX. R. CIV. P. 301. A motion to disregard jury findings is a motion requesting that the trial court ignore one or more jury findings and render judgment based upon the remaining findings. *See Dewberry v. McBride*, 634 S.W.2d 53, 55 (Tex. App.—Beaumont 1982, no writ).

Unlike a motion for judgment notwithstanding the verdict, a motion to disregard jury findings relies on the jury's verdict, at least in part, for entry of judgment. *See Kish v. Van Note*, 692 S.W.2d 463, 466-67 (Tex. 1985).

There is no particular form for a motion to disregard jury findings. However, the motion to disregard must: (1) designate particular finding or findings to be disregarded; (2) specify why the finding(s) should be disregarded; and (3) request that judgment be entered upon the remaining findings. *Dupree v. Piggly Wiggly Shop Rite Foods, Inc.*, 542 S.W.2d 882, 892 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.); *Dewberry*, 634 S.W.2d at 55. The motion should state with specificity each of the findings to be disregarded and the particular reasons why each finding should be disregarded. *See Dewberry*, 634 S.W.2d at 55; *Colom v. Vititow*, 435 S.W.2d 187, 191 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.).

1. The legal standard

The standard for determining whether to grant a motion to disregard a jury finding is legal sufficiency. The trial court may consider only that evidence which, together with reasonable inferences which may be drawn from such evidence, supports the jury's verdict. *Overstreet v. Gibson Prod. Co. of Del Rio*, 558 S.W.2d 58, 60 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.). The evidence must be viewed in the light most favorable to the jury's verdict. *See id.* A jury finding can only be disregarded in two circumstances: if (1) there is no evidence in the record to support the finding; or (2) the finding is immaterial. *See Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994); *Fleet v. Fleet,* 711 S.W.2d 1, 2 (Tex. 1986); *C & R Transp., Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966).

If there is no evidence of probative force to support the jury finding, a trial court may disregard 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.). However, a trial court cannot disregard a finding on grounds that the finding is supported by factually insufficient evidence or is against the great weight of the evidence. *Sassen v. Tanglegrove Townhouse Condominium Ass'n.*, 877 S.W.2d 489, 492 (Tex. App.—Texarkana 1994, writ denied); *Alm v. Aluminium Co. of Am.*, 717 S.W.2d 588, 594 (Tex. 1986).

A finding is immaterial either when the question should not have been presented to the jury because there was no evidence to support an affirmative answer, or when the jury question, though properly submitted, has been rendered immaterial by other findings. *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994); *C & R Transp., Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966). For example, a question that calls for a jury finding beyond the purview of the jury, such as a pure question of law, is immaterial. *See, e.g.*, *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994). Also, some questions concerning evidentiary issues may elicit immaterial findings. *See, e.g.*, *Clark v. McFerrin*, 760 S.W.2d 822, 826 (Tex. App.—Corpus Christi 1988, writ denied); *Sell v. C.B. Smith Volkswagen, Inc.*, 611 S.W.2d 897, 903 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.). Similarly, when the jury makes a finding regarding damages when the liability questions were answered negatively, the damages findings are immaterial. *See, e.g.*, *Sinko v. City of San Antonio,* 702 S.W.2d

201, 208 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

Because a jury's finding on an immaterial question cannot affect the judgment, the finding should be disregarded by the trial court. *See City of San Augustine v. Roy W. Green Co.*, 548 S.W.2d 467, 470-71 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). In fact, the trial court may disregard immaterial jury findings *sua sponte*. *Spencer v. Eagle Star Ins. Co.*, 876 S.W.2d 154, 157 (Tex. 1994); *C & R Transp., Inc. v. Campbell*, 406 S.W.2d 191, 194 (Tex. 1966); *McDaniel v. Continental Apartments Joint Venture*, 887 S.W.2d 167, 170 (Tex. App.—Dallas 1994, writ denied); *Brown v. Armstrong*, 713 S.W.2d 725, 728-29 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

2. Necessity for motion

A trial court has no authority to disregard a material jury finding on its own initiative; a court can only disregard a jury finding upon written motion and reasonable notice by a party, unless the finding is immaterial. *See* TEX. R. CIV. P. 301; *Southwest Galvanizing, Inc. v. Eagle Fabricators, Inc*., 383 S.W.3d 677, 680 (Tex. App.—Houston [14th Dist.] 2012, no pet.); *St. Paul Fire & Marine Ins. Co. v. Bjornson*, 831 S.W.2d 366, 369 (Tex. App.—Tyler 1992, no writ); *Scholl v. Home Owners Warranty Corp.*, 810 S.W.2d 464, 467 (Tex. App.—San Antonio 1991, no writ). The record must reflect that notice of the motion was given to all the parties, and that the motion was presented and ruled upon by the court. *Moore v. Cotter & Co.*, 726 S.W.2d 237, 240 (Tex. App.—Waco 1987, no writ); *Douglas v. Winkle*, 623 S.W.2d 764, 768 (Tex. App.—Texarkana 1981, no writ). The trial court cannot grant a motion to disregard jury findings absent such notice. *See Hines v. Parks*, 128 Tex. 289, 96 S.W.2d 970, 973 (1936). A similar showing is necessary to preserve a complaint about the denial of the motion. *Hous. Cnty. v. Leo L. Landauer & Assoc., Inc.*, 424 S.W.2d 458, 465-466 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

3. Time for filing

Rule 301 of the Texas Rules of Civil Procedure does not establish a deadline for filing a motion to disregard jury findings. *See* TEX. R. CIV. P. 301. Typically, the motion is filed before judgment; however, a motion to disregard jury findings may be filed after judgment, but it must be acted upon by the trial court before the judgment becomes final. *See Eddings v. Black*, 602 S.W.2d 353, 356-57 (Tex. Civ. App.—El Paso 1980), writ ref'd n.r.e. *per curiam* 615 S.W.2d 168 (Tex. 1981).

4. Effect of disregarding the jury's finding(s)

When a trial court disregards particular jury findings there must be enough of a verdict remaining to support a judgment after the disregarded issues have been stricken. When matters are disputed, the trial court cannot substitute its own finding for the findings of the jury. *Highlands Ins. Co. v. Baugh*, 605 S.W.2d 314, 319 (Tex. Civ. App.—Eastland 1980, no writ). However, when facts are undisputed, the trial court may disregard the jury findings and render judgment based on the undisputed facts. *City of San Antonio v. Theis*, 554 S.W.2d 278, 284 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e), *cert. denied*, 439 U.S. 807 (1978); *see also Long v. Tascosa Nat'l Bank*, 678 S.W.2d 699 (Tex. App.—Amarillo 1984, no writ). Thus, the trial court may only disregard a jury's negative finding and substitute its own affirmative finding when the evidence conclusively establishes the opposite

affirmative finding. *Brown v. Bank of Galveston*, 930 S.W.2d 140, 145 (Tex. App.—Houston [14th Dist.] 1996, writ granted); *Tex. Paper Stock Co. v. Corpus Christi Food City, Inc.*, 609 S.W.2d 259, 261-62 (Tex. Civ. App.—Corpus Christi 1980, no writ). An issue is "conclusively established" only when the evidence is such that ordinary minds could not differ about the conclusion to be drawn from it. *Campbell v. C.D. Payne & Geldermann Securities, Inc.*, 894 S.W.2d 411, 419 (Tex. Civ. App.—Amarillo 1995, writ denied).

C. Motion for Judgment Non Obstante Veredicto (N.O.V.)

Rule 301 of the Texas Rules of Civil Procedure provides, "upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper[.]" TEX. R. CIV. P. 301. Unlike a motion to disregard jury findings, a motion for judgment n.o.v. complains of the entire jury verdict, and seeks a judgment that is contrary to that verdict. Judgment n.o.v. is only appropriate when a directed verdict could have been granted. *Fort Bend City Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 394 (Tex. 1991); *Wuertz v. Wilson*, 922 S.W.2d 268, 271 (Tex. App.—Austin 1996, no writ). A judgment n.o.v. may only be granted in limited circumstances. *Wood v. Texas Farmers Ins. Co.*, *593* S.W.2d 777, 780 (Tex. Civ. App.—Corpus Christi 1979, no writ). Those circumstances include: (1) a defect in the non-movant's pleading that makes the pleading insufficient to support a judgment; (2) the evidence is insufficient to support a fact which must be established for the non-movant to be entitled to judgment; or (3) a fact that negates the non-movant's right to judgment is conclusively established. *Rowland v. City of Corpus Christi*, 620 S.W.2d 930, 933 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.).

1. The Legal Standard

Similar to a motion to disregard jury findings, the motion for judgment n.o.v. is evaluated on the basis of legal sufficiency, *i.e.*, a "no evidence" standard. *Siderius, Inc. v. Wallace Co.*, 583 S.W.2d 852, 861 (Tex. Civ. App.—Tyler 1979, no writ); *Frost v. Sun Oil Co.,* 560 S.W.2d 467, 474 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). If there is some evidence that amounts to more than a scintilla supporting the jury verdict, the court must enter judgment consistent with the verdict, even if the verdict is against the great weight and preponderance of the 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.). The court may enter a judgment n.o.v. only when there was no evidence to warrant the submission of the question to the jury, and when there is no evidence supporting the jury's answer to that question. *San Antonio Indep. School Dist. v. National Bank of Commerce*, 626 S.W.2d 794, 795 (Tex. App.—San Antonio 1981, no writ). This rule does not require that there be "no evidence at all" to sustain a motion for judgment n.o.v., but comprehends those situations in which the evidence is deemed legally insufficient to establish an asserted fact. *Marquez v. Sears, Roebuck & Co.*, 625 S.W.2d 52, 54 (Tex. App.—San Antonio 1981), *rev'd on other grounds,* 628 S.W.2d 772 (Tex. 1982); *Basin Operating Co.*, 620 S.W.2d at 776.

The trial court, when considering a movant's motion for judgment n.o.v., must consider only the evidence and those inferences supporting the jury verdict, disregarding all contrary evidence and inferences. *Dowling v. NADW Mktg., Inc.*, 631 S.W.2d 726, 728 (Tex. 1982); *James v.*

Vigilant Ins. Co., 674 S.W.2d 925, 926 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.). Moreover, the appellate court, when reviewing the trial court's grant or denial of a motion for judgment n.o.v., must apply the same legal standard applicable to the trial court's review. *McDade v. Texas Commerce Bank, Nat'l Ass'n*, 822 S.W.2d 713, 717 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *Best v. Ryan Auto Group, Inc.*, 786 S.W.2d 670, 671 (Tex. 1990).

2. Necessity for motion

Trial judges cannot sua sponte enter judgment n.o.v., but can do so only upon written motion and reasonable notice. *Dewberry v. McBride*, 634 S.W.2d 53, 55 (Tex. Civ. App.—Beaumont 1982, no writ). In fact, the requirement of a motion is jurisdictional, and if a trial court grants judgment n.o.v. without a proper motion seeking such relief, the trial court errs. *Olin Corp. v. Cargo Carriers, Inc.*, 673 S.W.2d 211, 213-14 (Tex. App.—Houston [14th Dist.] 1984, no writ). However, in determining whether a motion for judgment n.o.v. has been filed, the appellate court will look to the substance of the pleading, as gleaned from the body and the prayer of the instrument, rather than limiting its inquiry to the caption of the instrument. *Dittberner v. Bell*, 558 S.W.2d 527, 531 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.).

3. Time for filing

The Texas Supreme Court recently held that a motion for judgment n.o.v. will extend the appellate timetables as long as so long as the motion seeks to modify the trial court's judgment. *See Enterprise, Inc. v. Weatherspoon*, 355 S.W.3d 664, 666 (Tex. 2011). As with the motion to disregard jury findings, there are no time limits contained in the rules for filing a motion for judgment n.o.v. However, the motion for judgment n.o.v. should be filed before the trial court rules on a motion for new trial and 30 days after the judgment or order complained of is signed, especially where the motion is relied upon in order to extend the deadlines for appeal. *See Spiller v. Lyons*, 737 S.W.2d 29 (Tex. App.—Houston [14th Dist.] 1987, no pet.) (motion for judgment n.o.v. may be acted upon at any time before a motion for new trial has been overruled either by written action or operation of law). Although better practice would suggest that it be filed soon after the jury verdict so that the first judgment signed is the judgment n.o.v., a motion for judgment n.o.v. may be filed and acted upon after a contrary judgment is entered, as long as the judgment is not yet final. *Cleaver v. Dresser Indus.*, 570 S.W.2d 479, 483-84 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.); *Needville Indep. Sch. Dist. v. S.PJ.S.T. Rest Home*, 566 S.W.2d 40, 42 (Tex. Civ. App.—Beaumont 1978, no writ). *But see Commonwealth Lloyd's Ins. Co. v. Thomas*, 825 S.W.2d 135, 141 (Tex. App.—Dallas 1992), writ granted, vacated by agreement, 843 S.W.2d 486 (Tex. 1993) (holding judgment n.o.v. must be filed within 30 days of signing of judgment).

D. Request for Findings of Fact and Conclusions of Law

Findings of fact and conclusions of law may be necessary for an appellate court's review. Rule 296 provides that a litigant may request that the judge state in writing his findings of fact and conclusions of law and that the request must be made within twenty days of the signing of the final judgment. TEX. R. CIV. P. 296. The strict deadlines in the rule can potentially cause a litigant to waive error if findings and conclusions are not timely requested.

Rule 297 states that when findings of fact and conclusions of law are requested, the court shall prepare and file them within twenty days after the request is filed. TEX. R. APP. P. 297. If the judge fails to file the findings of fact and conclusions of law within twenty days, the party making the request must file with the clerk a "Notice of Past Due Findings of Fact and Conclusions of Law" within thirty days of the original request. Upon receipt of this written complaint, the judge's deadline for filing the findings is extended to forty days from the original request. *Id.* at R. 297.

Rule 298 provides that after the judge files findings of fact and conclusions of law, either party may request that the judge make additional or amended findings or conclusions. This request must be made within ten days of the filing of the original findings and conclusions, and upon receipt of the request for additional findings, the judge shall prepare and file additional findings, if appropriate, within ten days of the request. TEX. R. CIV. P. 298.

Findings of fact made by a trial judge after a bench trial have the same force and effect as jury findings. *Operation Rescue-Nat'l v. Planned Parenthood*, 937 S.W.2d 60, 72 (Tex. App.—Houston [14th Dist.] 1996) *aff'd as modified* 975 S.W.2d 546 (Tex. 1998). On appeal, the judge's findings of fact carry the same weight as would a jury verdict. *Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 245 n.4 (Tex. 1993).

Findings of fact must be filed with the clerk of the court as a separate document. TEX. R. CIV. P. 299a. Where findings of fact are inserted into the judgment, the findings will not be considered on appeal. *Sutherland v. Cobern*, 843 S.W.2d 127, 131 n.7 (Tex. App.—Texarkana 1992, writ denied); *Boland v. Natural Gas Pipeline Co.*, 816 S.W.2d 843, 844 (Tex. App.—Fort Worth 1991, no writ). Similarly, oral pronouncements of the court about the basis for the judgment cannot be treated as findings of fact or conclusions of law, and cannot be considered on appeal. *Southwestern Newspapers Corp. v. Curtis*, 584 S.W.2d 362, 366 (Tex. Civ. App.—Amarillo 1979, no writ); s*ee also In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984). However, findings of fact and conclusions of law contained in a letter filed with the clerk have been considered to be valid findings, despite the fact that they were not filed as formal pleadings. *Schlobohm v. Schapiro*, 759 S.W.2d 470, 474 (Tex. App.—Dallas 1988), *rev'd on other grounds,* 784 S.W.2d 355 (Tex. 1990); *Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120, 124 (Tex. App.—Corpus Christi 1986, no writ).

1. Evidentiary Standards

In arriving at the findings of fact and conclusions of law, the trial judge may consider all facts and circumstances in evidence and may indulge all reasonable inferences that can be drawn from the evidence. *Chitsey v. Pat Winston Interior Design Inc.*, 558 S.W.2d 579, 581 (Tex. Civ. App.—Austin 1977, no writ).

When findings of facts and conclusions of law are challenged on appeal, they are treated the same as a jury verdict. If they are challenged on legal sufficiency grounds, they must be sustained on appeal if there is any probative evidence to support them. *Herbert v. Greater Gulf Coast Enter., Inc.*, 915 S.W.2d 866, 871-72 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Walnut Equip. Leasing Co. v. J-V Dirt & Loam*, 907 S.W.2d 912, 915 (Tex. App.—Austin 1995, writ denied). In order to reverse a case based on the legal insufficiency of the

findings of fact, there must be no evidence to support the finding, or the evidence against the findings must be conclusive. *Hellman v. Kincy*, 632 S.W.2d 216, 219 (Tex. App.—Fort Worth 1982, no writ). If the trial court's findings of fact are challenged on factual sufficiency grounds, they can be set aside only if they are so contrary to the overwhelming weight and preponderance of the evidence that they are manifestly unjust. *Rodriguez v. Montgomery*, 630 S.W.2d 826, 828 (Tex. App.—Waco 1982, writ ref'd n.r.e.); *Lambert v. Gearhart-Owen Indus., Inc.,* 626 S.W.2d 845 (Tex. App.—Corpus Christi 1981, no writ).

The trial judge is the sole judge of the credibility of witnesses in a bench trial. Thus, the trial judge's judgment about the credibility of the witnesses will not be reversed unless it appears from the record as a whole that the judge abused his discretion in evaluating the credibility of witnesses. *In re H.D.O.*, 580 S.W.2d 421, 424 (Tex. Civ. App.—Eastland 1979, no writ); *Church of Life v. Elder*, 564 S.W.2d 111, 113 (Tex. Civ. App.—Beaumont 1978, no writ).

If an appellate court determines that a conclusion of law was erroneous, but the proper judgment was rendered, the erroneous conclusion of law does not require reversal. *Scholz v. Heath*, 642 S.W.2d 554, 559 (Tex. App.—Waco 1982, no writ).

2. Necessity to Complain of Court's Failure to File

Rule 297 provides that if a party timely requests findings of fact and conclusions of law, and the court fails to file findings within twenty days, the requesting party must file a "Notice of Past Due Findings of Fact and Conclusions of Law." TEX. R. CIV. P. 297. This notice is filed with the clerk and should be immediately called to the attention of the court by the clerk. *Id.* Once this notice has been filed, the court's deadline to file findings of fact and conclusions of law is extended to 40 days from the date the original request was filed. *Id.* The failure to file this reminder constitutes a waiver of the right to complain on appeal about the judge's failure to file findings. *Las Vegas Pecan & Cattle Co. v. Zavala County*, 682 S.W.2d 254, 255-56 (Tex. 1984); *Pierson v. GFH Fitt. Serv. Corp.*, 829 S.W.2d 311, 314 (Tex. App.—Austin 1992, no writ).

When no conclusions of law are filed, the judgment of the trial court must be affirmed if the appellate court can find any legal theory (supported by the pleadings and the evidence) to provide a basis for the judgment. *Pepe Intern. Dev. Co. v. Pub Brewing Co.*, 915 S.W.2d 925, 929 (Tex. App.—Houston [1st Dist.] 1996, no writ); *Jones v. Jones*, 900 S.W.2d 786, 787 (Tex. App.—San Antonio 1995, writ denied); *see also Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). If no findings of fact are filed, the appellate court must presume that the trial judge found all necessary facts to support the judgment. *Worford,* 901 S.W.2d at 109; *Valley Mechanical Contractors, Inc. v. Gonzales*, 894 S.W.2d 832, 834 (Tex. App.—Corpus Christi 1995, no writ); *Capellen v. Capellen*, 888 S.W.2d 539, 542 (Tex. App.—El Paso 1994, writ denied). The appellate court not only presumes fact findings in favor of the judgment, but, in reviewing the record, can consider only the evidence that is favorable to the court's implied findings, and must disregard all evidence or inferences to the contrary. *Worford*, 801 S.W.2d at 109; *Pierson v. GFH Fin. Serv. Corp.*, 829 S.W.2d 311, 314 (Tex. App.—Austin 1992, no writ).

Because of these strong presumptions in favor of the judgment in the absence of findings of fact and conclusions

of law, a non-prevailing party severely hampers success on appeal by failing to file a request for findings.

Nonetheless, the implied findings are not conclusive and may be challenged for legal and factual sufficiency when the appellate record includes both the reporter's and clerk's records. *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002). But when the reporter's record is not included in the appellate record, and the proceeding's nature, the trial court's order, the party's briefs, or other indications show that an evidentiary hearing took place in open court, then the complaining party cannot establish harmful, reversible error. *See Michiana Easy Livin' Country, Inc. v. Holten*, 48 S.W.3d 777, 783 (Tex. 2005).

3. Consequences of Trial Court's Failure to File

If a litigant makes a timely request for findings of fact and conclusions of law, followed by a timely notice of past due findings of fact and conclusions of law, and the court still fails to make findings of fact and conclusions of law, the failure by the trial court constitutes reversible error, and harm is presumed. *Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996). However, the presumption of harm may be overcome, and reversal avoided, if the record affirmatively shows that the complaining party suffered no injury. *Id.* Error is harmful if it prevents an appellant from properly presenting a case to the appellate court. *Id.*

The proper remedy for a trial court's refusal to file findings of fact and conclusions of law is abatement of an appeal, thereby giving the trial court an opportunity to cure its harmful error. *See id.*; *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772-73 (Tex. 1989); *see also Sheikh v. Sheikh*, 248 S.W.3d 381, 386 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Elliott v. Kraft Foods N. Am., Inc.*, 118 S.W.3d 50, 56 (Tex. App—Houston [14th Dist.] 2003, no pet.); *Brooks v. Housing Auth. of City of El Paso*, 926 S.W.2d 316, 321 (Tex. App.—El Paso 1996, no writ).

4. Time for Filing

The times for filing and refiling requests for findings of fact and conclusions of law are set out in Rule 297, and are summarized at the beginning of this section. These deadlines are strictly enforced, and the failure to comply with any of them will waive any argument arising from the absence of findings of fact and conclusions of law on appeal. *See Las Vegas Pecan & Cattle Co. v. Zavala Cnty.*, 682 S.W.2d 254, 255 (Tex. 1984).

Further, requests for findings of fact and conclusions of law that are filed prematurely (*i.e.*, before the final judgment is signed), used to be considered a nullity. *Ratcliff v. State Bar*, 673 S.W.2d 339, 341-42 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Williams v. Royal Am. Chinchilla, Inc.*, 560 S.W.2d 479, 480 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.). However, Rule 306c was amended to provide that prematurely filed requests for findings of fact and conclusions of law shall be deemed to have been filed on the date of, but subsequent to, the date the judgment is signed. TEX. R. CIV. P. 306c; *Echols v. Echols*, 900 S.W.2d 160, 161 (Tex. App.—Beaumont 1995, writ denied). Nonetheless, courts have recognized that a notice of past due findings that is prematurely filed is ineffective. *See Echols*, 900 S.W.2d at 161.

III. THE JUDGMENT

A. Judgment finality

When issuing a judgment, a trial judge must be cognizant of the technical and procedural nuances that can impact the judgment's finality. It is important that a judge regard these issues because a party cannot appeal a judgment until it is final; thus, the finality of a judgment has a crucial impact on the timing of appeals. *See N. E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966). Two particular issues frequently cause confusion for appellate courts in determining the finality of a judgment. First, an appellate court may struggle to determine whether the judgment is final if its language does not expressly indicate its finality. Second, an appellate court may struggle to determine the validity of a judgment if a trial judge signs two judgments and fails to vacate the first.

B. The importance of language indicating a judgment's finality

The necessity of specifying a judgment's finality depends on the nature of the judgment. When a judgment follows from a conventional trial on the merits, Texas courts presume the judgment's finality. *Vaughn v. Drennon*, 324 S.W.3d 560, 562 (Tex. 2010); *Moritz v. Preiss,* 121 S.W.3d 715, 718-19 (Tex. 2003); *Aldridge*, 400 S.W.2d at 897-98. This rule was first established in *Aldridge* when the Texas Supreme Court reasoned that if a judgment is not "intrinsically interlocutory in character. . . it will be presumed for appeal purposes that the Court intended to, and did, dispose of all parties legally before it and of all issues made by the pleadings between such parties." *Aldridge*, 400 S.W.2d at 897-98. The *Aldridge* court established this policy to address its concern that "the right to appeal was [too often] abridged by judgments that were drafted poorly or were unclear." *Vaughn*, 324 S.W.3d at 563 (citing *Aldridge*, 400 S.W.2d at 897-98). Thus, unless a trial court orders a separate trial to resolve a specific issue, there is a presumption that the trial court's judgment disposes of all claims and issues in the case when it follows a trial on the merits. *Id.*

However, this presumption does not apply to judgments that are "interlocutory in character" or that did not otherwise result from a conventional trial on the merits. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001). This is because judgments rendered prior to a full-blown trial are often intended only to dispose of one part of the case; thus, they are not intended to be final.[1] *Id.* Thus, appellate courts must determine from the language of the judgment whether the trial court intended that it be final.

In *Lehmann*, the Texas Supreme Court expressly held that inclusion of a Mother Hubbard clause, *i.e.* the statement "all relief not granted is denied," is not sufficient to indicate the finality of a judgment. *Lehmann*, 39 S.W.3d at 203-04. Instead, the court held that "when there has not been a conventional trial on the merits, an order of judgment is not final for purposes of appeal unless it. . . unequivocally states that it finally disposes of all claims and parties." *Id.* at 205. Further, the Court clarified that, even if an order is entitled "final," it is not a final judgment if it only partially disposes of the

[1] Nonetheless, if a court has dismissed all the claims in a lawsuit but one, an order determining the last claim is a final judgment, regardless of its language or whether it resulted from a trial on the merits. *Lehmann*, 39 S.W.3d at 200 (citing *Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995) (per curiam); *H.B. Zachry Co. v. Thibodeaux*, 364 S.W.2d 192, 193 (Tex.1963) (per curiam); *McEwen v. Harrison*, 162 Tex. 125, 345 S.W.2d 706, 707 (1961)).

plaintiff's claims, fails to dispose of a counterclaim, a cross-claim, or a third-party claim, or otherwise leaves claims unclearly or ambiguously resolved. *Id.* The *Lehmann* court did not set forth clear guidelines regarding what language a trial court must use in its judgment to indicate its finality; however, it reasoned that "the language of an order can make it final, even though it should have been interlocutory, if that language expressly disposes of all claims and parties[.]" *Id.* at 200. As an example, the *Lehmann* court explained that a statement like, "This judgment finally disposes of all parties and all claims and is appealable" would be sufficiently final. *Id.* at 206.

Since the issuance of the *Lehmann* rule, appellate courts have attempted to define its boundaries. In *In re Daredia*, American Express sued Daredia and Map Wireless, Inc. to recover money due on three credit card accounts. 317 S.W.3d 247, 248 (Tex. 2010). Daredia answered, but Map Wireless did not, and American Express moved for a default judgment against Map Wireless. *Id*. The trial court granted the default judgment, which contained the language:

> *All relief not expressly granted herein is denied. This judgment disposes of all parties and all claims in this cause of action and is therefore FINAL.*

Id. Fifteen months later, American Express moved to proceed on its claims against Daredia. *Id.* The Supreme Court granted Daredia's writ of mandamus and held that the default judgment finally disposed of all of American Express's claims, despite the fact that it did not expressly mention its claims against Daredia. *Id.* at 249-50.

C. Problems associated with multiple judgments

A related issue regarding the finality of judgments arises when a judge signs two orders without expressly indicating whether the second order vacates the first. In general, any change in a judgment made during the period of the trial court's plenary power is treated as a modified judgment and it implicitly vacates and supersedes the prior judgment, unless the record indicates a contrary intent. *SLT Dealer Grp., Ltd. v. AmeriCredit Fin. Servs., Inc.*, 336 S.W.3d 822, 832 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (citing *Price Constr., Inc. v. Castillo*, 147 S.W.3d 431, 441 (Tex. App.—San Antonio 2004, pet. denied)); *see also Quanaim v. Frasco Rest. & Catering*, 17 S.W.3d 30, 39 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (inferring from entry of modified judgment during trial court's plenary power that court intended prior judgment be vacated)).

Nonetheless, once a trial court issues a final judgment, "entry of a second judgment in the same case does not ***automatically*** vacate the first judgment, and if there is nothing in the record to show that the first judgment was vacated, the second judgment is a nullity." *Exxon Corp. v. Garza*, 981 S.W.2d 415, 419 (Tex. App.—San Antonio 1998, pet. denied) (emphasis added); *see also Mullins v. Thomas*, 136 Tex. 215, 150 S.W.2d 83, 84 (Tex. 1941). Although this language may seem incongruous with the general rule stated above, its severity should not be over-stated for two reasons. First, it only applies when the trial court has issued a ***final*** judgment. *Id.* Thus, a trial court may issue subsequent interlocutory orders without demonstrating an intent to vacate previous ones. Second, if a trial court issues two ***final*** orders, an appellate court will likely find some evidence in the record that indicates the trial

court's intent to vacate the first judgment – if such intent existed. *See, e.g.*, *SLT Dealer Grp.*, 336 S.W.3d at 832 (reasoning that "nothing on the record indicate[d] the trial court did not intend that its second judgment supersede the first. And the language of the trial court's [] order granting the motion to modify . . . together with the inclusion of the work 'Amended' in the title of the second judgment, indicate[d] the trial court's intent that the second judgment replace the first.").

D. Prejudgment Interest Calculations

The Texas Supreme Court also recently considered the question of whether post-judgment interest runs from the date of the original judgment or from the date of judgment following remand. *Phillips v. Bramlett*, No. 12-0257, --- S.W.3d ---, 56 Tex. Sup. Ct. J. 635, 2013 WL 2664056, at *12 (Tex. June 7, 2013) (op. not released for pub.). In deciding the question, the court limited its holding to situations where the case was remanded to the trial court to enter judgment in accordance with the appellate court's opinion and the trial court was not required to admit or consider any additional evidence before entering the judgment. *Id.* The Texas Supreme Court held, in that limited factual scenario, post-judgment interest runs from the date of the original judgment. *Id.* The court expressly left undecided, however, the question of whether post-judgment interest runs from the date of the original judgment in cases where the trial court is required to conduct a new trial or other evidentiary proceeding on remand before entering judgment. *Id.*

IV. THE TRIAL COURT'S PLENARY JURISDICTION

A. Length of the Trial Court's Plenary Jurisdiction

The trial court's plenary jurisdiction begins the date the judgment is signed. TEX. R. CIV. P. 306a; *see In re Bennett*, 960 S.W.2d 35, 38 (Tex. 1997). During the trial court's plenary jurisdiction, the trial court has the power to grant a new trial or to vacate, modify, correct, or reform the judgment within thirty days after the judgment is signed. TEX. R. CIV. P. 329b(d). The trial court also has the power to decide sanctions. *See Scott & White Mem. Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996). Absent a timely filed motion for new trial or motion to modify, correct, or reform a judgment, a trial court's plenary jurisdiction expires 30 days after the court has signed the judgment. *See id.*

If a party files a timely motion for new trial or motion to correct, modify, or reform a judgment, the trial court's plenary jurisdiction extends until 30 days after all such timely filed motions are overruled, either by a written and signed order, or by operation of law. TEX. R. CIV. P. 329b(e). Only timely filed motions may extend the trial court's plenary jurisdiction. *L.M. Healthcare, Inc. v. Childs*, 929 S.W.2d 442, 444 (Tex. 1996). The periods of the trial court's plenary jurisdiction apply regardless of whether an appeal has been perfected. TEX. R. CIV. P. 329b(d). Thus, the jurisdiction of the trial court and the appellate court may overlap for a certain period.

The trial court's plenary jurisdiction cannot extend beyond 105 days after the trial court signs the judgment. *L.M. Healthcare*, 929 S.W.2d at 444.

After the trial court's plenary jurisdiction expires, the trial court has no jurisdiction to change the judgment, except: (1) to set aside the judgment by bill of review for sufficient cause, filed within the time allowed by law; (2) to correct a clerical error and render judgment nunc pro tunc under TEX. R. CIV. P. 316; or (3) to sign an order declaring void a previous judgment or order signed after the expiration of the trial court's plenary power. TEX. R. CIV. P. 329b(f).

B. Effect of a Litigant's Failure to Receive Notice of Judgment

If a party proves that it did not receive notice from the clerk or otherwise acquire actual knowledge within 20 days after the judgment is signed, the timetables governing the trial court's plenary power and for filing a motion for new trial begin to run from the date the party or its attorney received notice or acquired actual knowledge of the judgment. *See* TEX. R. CIV. P. 306a(4). However, if notice was received or actual knowledge acquired more than 90 days after the judgment was signed, the extension permitted under Rule 306a(4) does not apply. *Levit v. Adams*, 850 S.W.2d 469, 470 (Tex. 1993).

V. POST-JUDGMENT MOTIONS

A. Motion for New Trial

Motions for new trial are discussed in Rules 320-329b of the Texas Rules of Civil Procedure (excluding Rules 323, 325, and 328, which have been repealed). Those rules may be summarized as follows:

- Rule 320 says that new trials may be granted for good cause, either upon a written motion by the parties, or the court's own motion. The rule also provides for partial new trials of severable issues. TEX. R. CIV. P. 320.

- Rule 321 states that a motion for new trial must identify specifically the action upon which the movant complains so that the objection can be clearly identified and understood by the court. TEX. R. CIV. P. 321.

- Rule 322 says that objections couched in general terms shall not be considered by the court. TEX. R. CIV. P. 322.

- Rule 324 states the general rule that a complaint need not be raised in a motion for new trial in order to be preserved for purposes of appeal. The rule, however, outlines five exceptions to that general principle. For those exceptions, raising the issue in a motion for new trial is required to preserve the point for appeal. TEX. R. CIV. P. 324.

- Rule 326 provides that no more than two new trials can be granted to the same party in the same case based on factual insufficiency or great weight of the evidence. TEX. R. CIV. P. 326.

- Rule 327 discusses the standard for granting a new trial based on jury misconduct. TEX. R. CIV. P. 327.

- Rule 329b describes the time for filing a motion for new trial, and the effect that the filing of a motion for new trial has on the court's plenary power. TEX. R. CIV. P. 329b.

The purpose of a motion for new trial is to give the trial court a chance to examine assigned errors in the trial, and to have the opportunity to cure those errors by granting a new trial. *Mushinski v.*

Mushinski, 621 S.W.2d 669, 670-71 (Tex. Civ. App.—Waco 1981, no writ); *Townsend v. Collard*, 575 S.W.2d 422, 423-24 (Tex. Civ. App.—Fort Worth 1978, no writ). In the motion, the movant seeks the trial court equivalent of an appellate court reversal and remand.

1. Requirement of specifics

Rules 321 and 322 of the Texas Rules of Civil Procedure require that a motion for new trial specifically identify complaints, and not plead error generally. No point of error on appeal may be predicated upon an improper, general assignment of error in the motion for new trial. *Powell v. Powell*, 554 S.W.2d 850, 855 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). Assignments of error couched in general terms will not be considered by the appellate courts. *Mitchell v. Chaparral Chrysler-Plymouth Sales, Inc.*, 572 S.W.2d 359, 360 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.). For example, a general objection in a motion for new trial that the trial court erred in overruling all of the movant's objections to the charge is insufficient to preserve the point of error on appeal. *See Sw. Title Ins. Co. v. Plemons*, 554 S.W.2d 734, 735-36 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.). An assignment of error in a motion for new trial that directs the trial court to scan the movant's objections at trial, without setting forth particular objections, is likewise inadequate. *Lee v. Andrews*, 545 S.W.2d 238, 247 (Tex. Civ. App.—Amarillo 1976, writ dism'd).

The mere inclusion of the error point in a properly and timely filed motion for new trial is sufficient to preserve error. The movant need not "present" the complaint to the court at an oral hearing prior to the motion being overruled by operation of law. *See Cecil v. Smith*, 804 S.W.2d 509, 511-12 (Tex. 1991).

2. Grounds for New Trial

Listed below are some of the common grounds for new trial.

(a) Jury misconduct

Rule 327(a) provides that a motion for new trial may complain of misconduct of the jury, improper communication made to the jury, or an incorrect answer given on voir dire examination. When confronted with such a motion, the court must hear evidence concerning the jury misconduct in open court, and may grant a new trial if the misconduct is proved, if it is material, and if it reasonably appears that harm resulted to the movant. TEX. R. CIV. P. 327(a). Rule 327(b), however, limits the proof of jury misconduct. A juror is not permitted to testify about any matters discussed during the jury's deliberations, except for situations where "any outside influence was improperly brought to bear upon any juror." TEX. R. CIV. P. 329(b); *see Weaver v. Westchester Fire Ins. Co.*, 739 S.W.2d 23, 24 (Tex. 1987); *see also* TEX. R. CIV. EVID. 606(b). Outside influences include conversations between the judge and a juror and a threat to a juror by a non-jury member. *Clancy v. Zale Corp.*, 705 S.W.2d 820, 829 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

(b) Inadequate record

A new trial should also be granted in order to preserve the right to appeal, when a party exercises due diligence, but is unable, through no fault of its own, to obtain a proper record of the evidence introduced at trial. *Hawkins v. Hawkins*, 626 S.W.2d 332, 333 (Tex. App. —Tyler 1981, no writ); *Garcia v. Smith*, 612 S.W.2d 255, 256 (Tex. Civ. App.—Beaumont 1981, no writ);

O'Neal v. Cnty. of San Saba, 594 S.W.2d 185, 186 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.). A new trial should only be granted if no other action will be adequate to protect the right of the aggrieved party to a review by the appellate court. *Wolters v. Wright*, 623 S.W.2d 301, 305-06 (Tex. 1981).

(c) Newly discovered evidence

A trial court may also in its discretion grant a motion for new trial based on newly discovered evidence. *Jackson v. Van Winkle*, 660 S.W.2d 807, 809 (Tex. 1983), *overruled on other grounds by Mortiz v. Preiss*, 121 S.W.3d 715 (Tex. 2003); *Kirkpatrick v. Memorial Hosp.*, 862 S.W.2d 762, 775-76 (Tex. App.—Dallas 1993, writ denied). Motions for new trial on grounds of newly discovered evidence are not favored and reviewed with careful scrutiny. *Posey v. Posey*, 561 S.W.2d 602, 605 (Tex. Civ. App.—Waco 1978, writ dism'd). In order to prevail on a motion for new trial based on newly discovered evidence, the movant must: (1) introduce the newly discovered evidence in admissible form at the hearing on motion for new trial; (2) show no notice of the existence of the evidence before trial; (3) demonstrate that due diligence was used to obtain the evidence before trial; (4) demonstrate that the evidence is not merely cumulative, nor does it tend only to impeach; and (5) show that the evidence would produce a different result if a new trial were granted. *Fettig v. Fettig*, 619 S.W.2d 262, 267 (Tex. Civ. App.—Tyler 1981, no writ); *Wilkins v. Royal Indem. Co.*, 592 S.W.2d 64, 68-69 (Tex. Civ. App.—Tyler 1979, no writ); *Estate of Arrington v. Fields*, 578 S.W.2d 173, 179-81 (Tex. Civ. App. Tyler 1979, writ ref'd n.r.e.). If the same effort used to produce the evidence after trial could have produced the evidence prior to trial if performed prior to trial, the due diligence requirement cannot be met. *Wilkins*, 592 S.W.2d at 69; *Tarrant Cnty. Waste Disposal, Inc. v. Doss*, 737 S.W.2d 607, 610 (Tex. App.—Fort Worth 1987, writ denied).

(d) Factual sufficiency

A motion for a new trial may be granted based on factual sufficiency. If jury findings are contrary to the great weight and preponderance of the evidence, even if supported by some evidence, the court can grant a new trial. *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.); *de Anda v. Blake*, 562 S.W.2d 497, 499-500 (Tex. Civ. App.—San Antonio 1978, no writ).

(e) Legal sufficiency

"No evidence" points of error need not be included in a motion for new trial, but may be preserved by inclusion in the motion. *Cecil v. Smith*, 804 S.W.2d at 510-511. Although raising a no-evidence point in a motion for new trial preserves the point for appeal, the appellate court can only remand—not render judgment—if the point is only raised in the motion for new trial. *See Werner v. Colwell*, 909 S.W.2d 866, 870 n.1 (Tex. 1995); *Horrocks v. Tex. Dep't of Transp.*, 852 S.W.2d 498, 499 (Tex. 1993) (per curiam).

3. Necessity of motion

Rule 320 explicitly provides that a trial judge may grant a new trial upon motion by one of the litigants, "or on the court's own motion[.]" TEX. R. CIV. P. 320.

Generally, raising a ground of error in a motion for new trial is not a prerequisite to preserve the error for appeal. However, the following complaints must, however, be

included in a motion for new trial or they are waived:

- a complaint upon which evidence must be heard, such as jury misconduct, newly discovered evidence, or failure to set aside a default judgment;
- a complaint of factually insufficient evidence to support a jury finding;
- a complaint that a jury finding is against the great weight and preponderance of the evidence;
- a complaint of inadequate or excessive damages found by the jury; and
- incurable jury argument, if it has not been previously ruled upon by the court.

TEX. R. CIV. P. 324(b)(1)-(5). No other grounds of error need to be raised in a motion for new trial to preserve the arguments for appeal. *See, e.g.*, *Wilson v. Dunn*, 800 S.W.2d 833, 837 (Tex. 1990) (complaint of defective service need not be raised in motion for new trial because it's not part of list in Rule 324).

If a trial court files a second judgment, and a motion for new trial has been filed challenging the first judgment, it is not necessary for the litigants to file a new motion to reassert the same points asserted in the first motion for new trial in order to preserve error. *Freedonia State Bank v. General Am. Life Ins. Co.*, 881 S.W.2d 279, 281 (Tex. 1994). However, any new problems created by second judgment must be challenged in a new motion for new trial, or they are waived.

4. Time for filing

A motion for new trial must be filed within thirty days after the judgment is signed. TEX. R. CIV. P. 329b(a); *Padilla v. LaFrance*, 907 S.W.2d 454, 458 (Tex. 1995). A motion for new trial filed more than 30 days after the judgment cannot be considered by the appellate court in terms of preserving error. *Equinox Enters., Inc. v. Associated Media Inc.*, 730 S.W.2d 872, 875 (Tex. App.—Dallas 1987, no writ). The trial court has discretion, however, to grant a new trial on the grounds stated in the late-filed motion as long as the court retains plenary power. *See Moritz v. Preiss*, 121 S.W.3d 715, 720-21 (Tex. 2003); *Kalteyer v. Sneed*, 837 S.W.2d 848, 851 (Tex. App.—Austin 1992, no writ). But, an untimely motion for new trial will not preserve the issue for appellate review, even if the trial court considers the untimely motion on its merits within the plenary power period. *Moritz*, 121 S.W.3d at 721.

A motion for new trial filed before the judgment is signed is premature, but is deemed to be filed on the date of, but immediately after, the judgment is signed. TEX. R. CIV. P. 306c; *Padilla,* 907 S.W.2d 458.

If a party proves that it did not receive notice from the clerk or otherwise acquire actual knowledge within 20 days after the judgment is signed, the timetables governing the trial court's plenary power and for filing a motion for new trial begin to run from the date the party or its attorney received notice or required actual knowledge of the judgment. *See* TEX. R. CIV. P. 306a(4). However, if notice was received or actual knowledge acquired more than 90 days after the judgment was signed, the extension permitted under Rule 306a(4) does not apply. *Levit v. Adams*, 850 S.W.2d 469, 470 (Tex. 1993).

5. Timeline for deciding a new trial motion

If the motion for new trial has not been ruled upon within seventy-five days after the judgment is signed, it is automatically overruled by operation by law. TEX. R. CIV. P. 329b(c). If a motion for new trial is filed on time, the court retains plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after the motion for new trial is overruled, whether by signed order or by operation of law. *Id.* at 329b(e); *Rogers v. Clinton*, 794 S.W.2d 9, 11 (Tex. 1990). A trial court can vacate an order granting a motion for new trial during its plenary power period. *See In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 227, 231-32 (Tex. 2008) (orig. proceeding).

If the trial court intends to grant a motion for new trial, it is important that the judge promptly sign the order. A trial judge's oral pronouncement granting a motion for new trial or a docket entry indicating that the motion was granted cannot substitute for a written order required by Rule 329b. *Clark & Co. v. Giles*, 639 S.W.2d 449, 450 (Tex. 1982).

6. Effect of the trial court's grant or denial of the motion for new trial

The trial court's denial of a motion for new trial can form the basis for a point of error on appeal. *See Jackson*, 660 S.W.2d at 808-09. However, the trial court's decision to grant a motion for new trial is generally not appealable. *Napier v. Napier*, 555 S.W.2d 186, 188-89 (Tex. Civ. App.—El Paso 1977, no writ). If the trial court's order is wholly void of its rational, or if the reason stated for granting the motion for new trial is a conflict in the jury findings, and the complaint on appeal is that the jury findings are not in conflict as a matter of law, the decision to grant a new trial is appealable. *Johnson v. Court of Civil Appeals*, 162 Tex. 613, 350 S.W.2d 330, 331 (Tex. 1961); *St. Paul Mercury Ins. Co. v. Tri-State Cattle Feeders, Inc.*, 628 S.W.2d 844, 847-48 (Tex. App.—Amarillo 1982, writ ref'd n.r.e.).

The Texas Supreme Court has held that a trial court's failure to state reasons for granting a new trial is reviewable by mandamus. *See In re Columbia Med. Ctr. of Las Colinas*, 290 S.W.3d 204, 207, 209 (Tex. 2009) (orig. proceeding); *see also In re Cook*, 356 S.W.3d 493, 494 (Tex. 2011) (orig. proceeding) (per curiam) (successor judge's failure to provide reasons for reaffirming prior judge's grant of new trial was reviewable by mandamus); *In re Baylor Med. Ctr. at Garland*, 289 S.W.3d 859, 861 (Tex. 2009) (orig. proceeding); *In re Du Pont de Nemours & Co.*, 289 S.W.3d 861, 862 (Tex. 2009) (orig. proceeding). More recently, in *In re United Scaffolding, Inc.*, 377 S.W.3d 685 (Tex. 2012) (orig. proceeding), the Supreme Court held that an order granting a new trial must: (1) state a "legally appropriate" reason for granting a new trial; and (2) be "specific enough to indicate that the trial court did not simply parrot a pro forma template, but rather derived the articulated reasons from the particular facts and circumstances of the case at hand." 377 S.W.3d at 688-89. The Supreme Court is now reviewing a similar issue in *In re Toyota Motor Sales, U.S.A., Inc.*, No. 10-0933 (Tex. Aug. 31, 2012) (requesting review of merits of order granting a new trial).

If the denial of a motion for new trial is appealed, the standard of review on appeal is abuse of discretion. *Jackson,* 660 S.W.2d at 809.

B. Motion for Remittitur

Rule 315 of Texas Rules of Civil Procedure provides that any party in whose favor a judgment is granted may remit any part of that judgment, either by statement in open court, or by the filing of a written remittitur. TEX. R. CIV. P. 315. Rules 306a and 329b indicate that the trial court may then modify, correct or reform a judgment. *See* TEX. R. CIV. P. 306a(1), 329b(d).

A litigant who files a remittitur voluntarily reduces the amount of the judgment that has been entered in their favor. Ordinarily, the reason for filing a motion for remittitur is that the prevailing party realizes that they may not be entitled to the full amount of the judgment that has been entered and would prefer to voluntarily reduce the amount of the judgment in order to avoid the time and expense of an appeal, as well as the possibility of reversal.

In addition to the completely voluntary remittitur contemplated by Rule 315, the concept of remittitur also arises when the trial court or the appellate court concludes that damages are excessive, and offers the litigant the opportunity to remit a portion of the damages in lieu of reversal. Even when the litigant is strongly persuaded by a court, remittitur is voluntarily undertaken by the litigant, and not something ordered by a court. Although the trial court has the power to involuntarily reduce the amount of damages in a judgment, that act constitutes a modification, correction or reformation of the judgment under the court's plenary power, and not a remittitur according to the language of Rule 315.

1. Evidentiary standard

Although a remittitur may be presented in the form of a motion, the motion is not something that may be granted or overruled by the trial court, but is a matter of right on the part of the prevailing party. *See* TEX. R. CIV. P. 315.

However, if the litigant fails to file a motion for remittitur in the trial court, the opposing party may challenge the excessiveness of the damages awarded by the judgment. The appellate court, reviewing for factual sufficiency, has the authority to reverse and remand for new trial, or to direct a remittitur. TEX. R. APP. P. 85(c); *Tejas Gas Corp. v. Magers*, 619 S.W.2d 285 (Tex. Civ. App.—Texarkana 1981, writ ref'd n.r.e.). The factual sufficiency standard is to be employed by both the trial court and the appellate court. *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986). Any other standard would allow a court to substitute its determinations of damages for those of the jury. *Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1987).

If the appellate court determines that no evidence supports the damages verdict, a take nothing judgment should be rendered. If any part of damages verdict lacks sufficient evidentiary support, the court should suggest a remittitur. The prevailing party at trial should be given the option to accept the remittitur or have the case remanded. *Snoke v. Republic Underwriters Ins. Co.*, 770 S.W.2d 777 (Tex. 1989).

The prevailing party may remit voluntarily with or without a motion. A trial court has the power to require a remittitur on its own motion as part of its power to order a new trial, as long as the trial court has plenary jurisdiction. *Union Carbide Corp. v. Burton*, 618 S.W.2d 410, 416 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

2. Time for filing

Rule 315 does not address when a voluntary remittitur may be filed, though presumably the remittitur would fall within the description of a motion to modify, correct or reform judgments described in Rule 329b. Those motions must be filed within thirty days of the signing of the judgment, unless a motion for new trial is timely filed, in which case a motion to modify or reform a judgment must be filed within thirty days of the overruling of the motion for new trial either by operation of law or otherwise. TEX. R. CIV. P. 329b.

Once the trial court has lost plenary jurisdiction and a case is on appeal, a party to an appeal has a right to remit a part of the judgment in order to save excessive expenses from prolonged litigation, and to prevent a reversal. *Tex. Elec. Serv. Co. v. Nix*, 575 S.W.2d 304, 307 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.).

C. Motion for Judgment Nunc Pro Tunc

Rule 316 provides that clerical mistakes in the record of any judgment may be corrected by the judge, in open court, after notice to all interested parties. TEX. R. CIV. P. 316. Prior to the time that a judgment becomes final and the court loses plenary jurisdiction, the court has the power to grant a motion to correct the judgment. *See* TEX. R. CIV. P. 329b. However, even after the judgment has become final, any clerical errors in the entry of the judgment may be corrected by judgment nunc pro tunc. TEX. R. CIV. P. 329b(f). Judicial errors in the rendition of the judgment may not be corrected. *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986); *America's Favorite Chicken Co. v. Galvan*, 897 S.W.2d 874, 876 (Tex. App.—San Antonio 1995, writ denied). An error in the judgment is "clerical" if the judgment entered incorrectly records the judgment that was rendered. *Nat'l Unity Ins. Co. v. Johnson*, 926 S.W.2d 818, 820 (Tex. App.—San Antonio 1996, no writ); *Newsom v. Petrilli*, 919 S.W.2d 481, 483 (Tex. App.—Austin 1996, no writ). A clerical error results when the official records of the court do not accurately reflect the judgment rendered by the trial judge in open court. *Coffin County Appraisal Dist. v. Northeast Dall. Assoc.*, 855 S.W.2d 843, 847 (Tex. App.—Dallas 1993, no writ). However, if the error is one that resulted from judicial reasoning or determination, then the error is not clerical and a judgment nunc pro tunc is inappropriate. *Escobar*, 711 S.W.2d at 231.

Errors in judgments are not clerical merely because they are based on, or grow out of, clerical mistakes. Even though a misstatement in the judgment arises from a clerical mistake, the error may be judicial rather than clerical if the correction of the error deprives a party of a right that it would have possessed if the judgment had been entered correctly before the trial court's plenary power expired. *W. Tex. State Bank v. Gen. Res. Mgmt. Corp.*, 723 S.W.2d 304, 306 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

The following errors are clerical, and therefore correctable by judgment nunc pro tunc:

- Incorrect spelling of a party's name. *Cockrell v. Estevez,* 737 S.W.2d 138, 140 (Tex. App.—San Antonio 1987, no writ).

- Oral rendition of judgment in divorce case awarded house to husband "as his separate property" but the written judgment awarded the house to the husband without reciting the words "as his separate

property." *Mizell v. Mizell*, 624 S.W.2d 782, 784-85 (Tex. App.—Fort Worth 1981, no writ).

- Failure to award attorney's fees in judgment, where the judge had announced his judgment, including attorney's fees, by letter, and requested that counsel prepare an appropriate judgment, and the judgment prepared by counsel omitted attorney's fees. *Hutcherson v. Lawrence*, 673 S.W.2d 947, 948-49 (Tex. App.—Tyler 1984, no writ).

- Judgment for defendant on a promissory note secured by a ring, which inadvertently awarded possession of the ring to plaintiff, when the balance of the judgment clearly indicated that the court intended to award possession of the ring to the defendant. *Mathes v. Kelton*, 565 S.W.2d 78, 81 (Tex. Civ. App.—Amarillo 1977), *aff'd*, 569 S.W.2d 876 (1978).

The following errors are judicial rather than clerical, thus rendering judgment nunc pro tunc inappropriate:

- Modification of divorce decree to set out conservatorship and visitation rights on behalf of the mother allegedly arising from a mistake on the part of the mother's attorney. *Stock v. Stock*, 702 S.W.2d 713, 716 (Tex. App.—San Antonio 1985, no writ).

- Amendment of judgment which changed name of party affected by the judgment to reflect the judgment intended to be rendered by the court. *W. Tex. State Bank*, 723 S.W.2d at 306.

- Amended judgment deleting stepchild from an order of the termination of heirship in connection with her stepmother's estate. *Humphries v. Chandler*, 597 S.W.2d 2, 3 (Tex. Civ. App.—Beaumont 1980, no writ).

Regardless of whether an error is clerical or judicial, the failure to give all interested parties notice of the motion for judgment nunc pro tunc after the trial court has lost plenary jurisdiction renders any correction of the original judgment a nullity. TEX. R. CIV. P. 316; *W. Tex. State Bank*, 723 S.W.2d at 307.

1. Evidentiary standard

Whether an error corrected by nunc pro tunc judgment is clerical or judicial is a question of law. *Humphries v. Chandler*, 597 S.W.2d 2, 3 (Tex. Civ. App.—Beaumont 1980, no writ). Judgment nunc pro tunc should only be granted if the evidence of clerical error is clear, satisfactory, and convincing. *Thompson v. Tex. Dept. of Human Res.*, 859 S.W.2d 482, 486 (Tex. App.—San Antonio 1993, no writ); *Smith v. Stansbury*, 754 S.W.2d 509, 511 (Tex. App.—Houston [14th Dist.] 1988, no writ).

When a clerical error in a judgment is discovered, the trial court has the inherent power to correct the judgment so that it accurately reflects the judgment rendered. In doing so, the court may consult the records of the case to determine if there is any instrument that might be of assistance in correcting the error. *Petroleum Equip. Fin. Corp. v. First Nat'l Bank*, 622 S.W.2d 152, 154 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.). Evidence on a motion for judgment nunc pro tunc may include oral testimony, written documents, the court's docket sheet, and the judge's personal

recollection. *Thompson*, 859 S.W.2d at 485; *Gray v. Turner,* 807 S.W.2d 818, 821 (Tex. App.—Amarillo 1991, no writ). The trial judge may rely solely on personal recollection of the judgment rendered, and if the judgment nunc pro tunc is granted to correct the written decree, a presumption arises that the judge's personal recollection supports the finding of clerical error. *Gray*, 807 S.W.2d at 822; *Davis v. Davis*, 647 S.W.2d 781, 783 (Tex. App.—Austin 1983, no writ).

The trial court's failure to grant a motion for judgment nunc pro tunc is not an appealable order. *Shadowbrook Apartments v. Alm-Ahmad*, 783 S.W.2d 210 (Tex. 1990) (per curiam).

2. Necessity of motion

The trial court is not prohibited from correcting its own judgment if it does not make new findings of fact or usurp the authority of the jury. *First Nat'l Bank v. Walker*, 544 S.W.2d 778, 782 (Tex. Civ. App.—Dallas 1976, no writ). If the court corrects the judgment before the judgment has become final, it is exercising its inherent power to correct or modify the judgment while it retains plenary power, and may act on its own motion and without notice to any party. *Go Leasing, Inc. v. Groos Nat'l Bank*, *628* S.W.2d 143, 144 (Tex. App.—San Antonio 1982, no writ). However, if the judgment has become final, notice must be given. *Id.*

3. Time for filing

A trial court has the power to correct clerical errors in its judgment by entering a judgment nunc pro tunc at any time. *Conmark Equip., Inc. v. Harris*, *595* S.W.2d 145, 147 (Tex. Civ. App.—Tyler 1980, no writ). Even during the pendency of an appeal, if an incorrect judgment has been appealed, the trial court may correct a clerical error by judgment nunc pro tunc. *Wiegand v. Riojas*, 547 S.W.2d 287, 291 (Tex. Civ. App.—Austin 1977, no writ).

D. Motions to Vacate, Modify, Correct, or Reform the Judgment

Motions to vacate, modify, correct, or reform the judgment are not discussed in much detail in the rules of appellate procedure, and there is not an extensive body of case law pertaining to these motions. However, the court's plenary power to vacate, modify, correct, or reform a judgment is referred to in Rule 306a with reference to the time period for the court's plenary power beginning to run with the date of judgment, TEX. R. CIV. P. 306a(1), and also is referred to throughout Rule 329b, which pertains to the time for filing motions. *See* TEX. R. CIV. P. 329b(d-h). Most of the comments about these motions in the rules pertain to the time for filing them, and those deadlines follow the same deadlines as a motion for new trial. TEX. R. CIV. P. 329b(g). These motions must be filed during a time in which the court has plenary power, which originally is thirty days after the judgment is signed. TEX. R. CIV. P. 329b(d). However, the filing of a motion for new trial or a motion to vacate, modify, correct, or reform the judgment extends the plenary power of the court "until thirty days after all such timely-filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first." TEX. R. CIV. P. 329b(e).

The only guidance that the rules give about motions to vacate, modify, correct, or reform the judgment is that they must be in writing, signed by the party or their attorney, and must "specify the respects in which the judgment should be modified, corrected, or reformed." TEX. R. CIV. P. 329b(g). These motions are appropriate when there are

mistakes in the judgment that are judicial, rather than clerical, so that judgment nunc pro tunc is not appropriate, but errors that do not require further litigation in a new trial.

If a judgment is modified, corrected, or reformed, the previous judgment should be vacated in its entirety, and an entirely new judgment should be submitted to the court for signature, rather than an order specifying the changes in the previous judgment, or an attempt to strike out erroneous information in the previous judgment. *See Garza v. Serrato*, 671 S.W.2d 713, 714 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.); *P.V. Intern. Corp. v. Turner, Mason, and Solomon*, *700* S.W.2d 21, 22-23 (Tex. App.—Dallas 1985, no writ); *Stephens v. Henry S. Miller Co.*, *667* S.W.2d 250, 252 (Tex. App.—Dallas 1984, writ dism'd by agr.).

VI. SUPERSEDING THE JUDGMENT

Under Rule 24.1 of the Texas Rules of Appellate Procedure, a judgment debtor may supersede a judgment by filing a bond with the trial court clerk. *See* TEX. R. APP. P. 24.2(a)(1). The amount of the bond must equal the sum of compensatory damages awarded in the judgment, interest for the estimated duration of the appeal, and costs awarded in the judgment. TEX. R. APP. P. 24.2(A)(1); TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(a). However, the amount must not exceed the lesser of 50 percent of the judgment debtor's current net worth or 25 million dollars. TEX. R. APP. P. 24.2(a)(1); TEX. CIV. PRAC. & REM. CODE ANN. § 52.006(b). Thus, the judgment debtor's net worth can have a critical impact on the amount it must post in its supersedeas bond.

A. Attorney's Fees

The Texas Supreme Court recently resolved a split among the Texas appellate courts as to whether an award of attorney's fees are "compensatory damages" or "costs" under Chapter 52 of the Civil Practice and Remedies Code such the amount of the attorney's fee award must be included in calculating the supersedeas amount for the appeal bond. *In re Nalle Plastics Family Ltd. P'ship*, No. 11-0903, --- S.W.3d ---, 56 Tex. Sup. Ct. J. 580, 2013 WL 2150717, at *2, 7 (Tex. May 17, 2013) (op. not released for pub.). The court held that *generally* attorney's fees awarded in a judgment are neither compensatory damages nor costs under the statute. *Id.* at *6-8. Thus, an award of attorney's fees need not be considered in calculating the bond amount. *Id.* at *8. The Texas Supreme Court rejected the idea, however, that attorney's fees can *never* be considered compensatory damages. *Id.* at *6. The court gave the following example: "While attorney's fees incurred in prosecuting this claim are not compensatory damages, the fees comprising the breach-of-contract damages are." *Id.* The court held that if the underlying suit concerns a claim for attorney's fees as an element of damages, then those fees may properly be considered compensatory damages. *Id.* Consequently, only when attorney's fees are an element of damages, and are thus compensatory damages, should they be included in calculating the amount of the appellate bond.

B. Net Worth Affidavits

A judgment debtor who provides a supersedeas bond in an amount based on its net worth must file an affidavit that states the debtor's net worth and provides complete, detailed information concerning the debtor's assets and liabilities from which net worth can be ascertained. *Montelongo v.*

Exit Stage Left, Inc., 293 S.W.3d 294, 296 (Tex. App.—El Paso 2009, no pet.) (citing TEX. R. APP. P. 24.2(c)(1)). The affidavit is *prima facie* evidence of the debtor's net worth. *Id.*

Texas courts have frequently addressed the appropriate technique for calculating a judgment debtor's net worth in an affidavit supporting a supersedeas bond. The widely accepted method involves subtracting a company's current liabilities from its current assets at the time the bond is set. *See Enviropower, LLC v. Bear, Stearns, & Co.*, 265 S.W.3d 1, 5-6 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *LMC Complete Automotive, Inc. v. Burke*, 229 S.W.3d 469, 482 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (quoting *G.M. Houser, Inc. v. Rodgers*, 204 S.W.3d 836, 840 (Tex. App.—Dallas 2006, no pet.)); *Ramco Oil & Gas, Ltd. v. Anglo Dutch (TENGE)*, 171 S.W.3d 905, 915 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Texas courts have rejected less formulaic methods, such as a determination of the debtor's "market value," which considers projected revenues and other undetermined values. *See Enviropower*, 265 S.W.3d at 5-6.

Enviropower explained that a market value calculation is inappropriate because "the thrust of the inquiry under section 52.006(c) is whether the judgment debtor has the ability to meet the supersedeas requirement as determined in 52.006(a) or (b) and whether doing so is likely to result in substantial economic harm." *Id.* at 6 (referring to TEX. CIV. P. & REM. CODE § 52.006). It further explained that the trial court has the flexibility to take into account a number of factors that could affect the judgment debtor's ability to post bond; however, it should not focus on the company's value as a whole, but on its ***actual*** ability to post the security required. *Id.* (citing *Ramco Oil & Gas,* 171 S.W.3d at 917).

Although the appropriate method of calculating net worth seems well settled, the judgment debtor and creditor may still dispute ***which*** liabilities and assets should be included in the net worth calculation. In particular, several cases have addressed whether the value of the judgment itself should be included as a liability. *See Bus. Staffing, Inc. v. Jackson Hot Oil Serv.*, 392 S.W.3d 183, 187-188 (Tex. App.—El Paso 2012, pet. denied)); *Montelongo*, 293 S.W.3d at 296; *McCullough v. Scarbrough, Medlin & Assocs., Inc*., 362 S.W.3d 847, 848-49 (Tex. App.—Dallas 2012, no pet.); *Anderton v. Cawley*, 326 S.W.3d 725, 726 (Tex. App.—Dallas 2010, no pet.). In each of these cases the court reasoned that, because the judgment is a contingent liability, it should not be included as a liability in the net worth calculation. *Id.* In fact, the *McCullough* court reasoned that "the plain language of [Rule 24(a)(1)(A)] does not include a contingent money judgment in calculating net worth." 362 S.W.3d at 849 (citing *Anderton*, 326 S.W.3d at 726).