CHAPTER 1.
PRESERVATION OF ERROR AND THE HARMFUL ERROR RULE

1. *Introduction*

Before launching into a detailed presentation of the procedural intricacies of Texas Civil Procedure, one of its more fundamental aspects needs to be addressed. In the following pages of this book the student will be reading real decisions by real courts in Texas concerning Texas Civil Procedure. The majority of decisions in this book are from appellate courts in Texas. By in large the cases contained in this book discuss various alleged errors which occurred during the pretrial and trial process of the particular case. As a general rule a lawyer needs to bring the alleged error to the attention of the trial court for its consideration and decision in order for an appellate court to have the ability to consider the alleged error on appeal. The concept of preservation of error refers to those procedures which must be taken by a lawyer in a lower court to ensure that any alleged errors made by a lower court are available for review by an appellate court. *See* Rule 33 of the Texas Rules of Appellate Procedure.

Another fundamental aspect of Texas Civil Procedure that will be presented in this chapter concerns the manner in which an appellate court determines whether the error preserved and presented to it on appeal is of such a nature as to lead to a reversal of the case. As a general rule, even if error of law is determined to have occurred in the trial court level, appellate courts will not reverse the trial court unless the error which was committed "probably caused the rendition of a improper judgment or probably prevented the appellant from properly presenting the case" to the appellate court. This concept of reversible error has been given the popular name of the "harmful error rule". *See* Rules 44.1 and 61.1 of the Texas Rules of Appellate Procedure.

In the following pages the concepts of preservation of error and the "harmful error rule" will be briefly introduced. Throughout the remainder of the book the student needs to be very mindful of these basic concepts and of the various exceptions which can arise depending on the nature of the error or the type of proceeding which is presented to the court.

2. *Why Require That Error Be Preserved*

Most procedural rules are written to guide the parties and the courts in the conduct of litigation. When the rule is violated, an error occurs. The party aggrieved by that error has the alternative of insisting that the error be corrected, or of waiving the error. Parties regularly waive rules, and allow the rules to be ignored. When the party wishes to insist upon the observation of the rule, that party must preserve error at any time the other party or the court violate the rule. By complaining of the violation (preserving error),

a) the opposing party is given an opportunity to cure any error that may occur;
b) the trial court is given an opportunity to cure any error that may occur;
c) trial by ambush is prevented; and
d) appeal by ambush is prevented.

Following the trial of a case, a party seeking to alter a trial court's appealable order must perfect his appeal by filing a notice of appeal with the information required and in the manner dictated by Rule 25 of the Texas Rules of Appellate Procedure and within the time specified in Rule 26 of the Texas Rules of Appellate Procedure. Once the appeal has been perfected, and the record brought forward to the appellate court, the party seeking to alter the trial court's appealable order may through his brief request the court of appeals to review the alleged errors that had been properly preserved.

In addition, certain procedural errors committed by the trial court may be reviewed by an appellate court in an original mandamus proceeding pursuant to Rule 52 of the Texas Rules of Appellate Procedure. As will be shown in the following case, the basic requirements for an appellate court to exercise its original mandamus jurisdiction are an abuse of discretion by the trial court and no adequate remedy by appeal.

In re The PRUDENTIAL INSURANCE CO. OF AMERICA
148 S.W.3d 124
(Tex. 2004)

Gino John Rossini, John A. Mackintosh Jr., G. Luke Ashley and Camille Knight, Thompson & Knight, L.L.P., Dallas, for Relators.

Luke Madole, Russell F. Nelms, Dena Jean Denooyer, Carrington Coleman Sloman & Blumenthal, Dallas, for Respondents.

JUSTICE HECTH delivered the opinion of the Court, in which JUSTICE OWEN, JUSTICE SMITH, JUSTICE WAINWRIGHT, and JUSTICE BRISTER joined.

The parties to a commercial lease agreed to waive trial by jury in any future lawsuit involving the lease, but when the tenant and its guarantors later sued for rescission and damages, they nevertheless demanded a jury trial. The trial court denied the landlord's motion to quash the demand. In this original proceeding, the landlord petitions for mandamus relief directing the trial court to enforce the parties' contractual jury waiver. We conditionally grant relief.

I

Francesco Secchi, a native of Italy, and his wife Jane, a native of England, moved to Dallas in 1981, where they have lived ever since and have become naturalized citizens. The Secchis have been in the restaurant business since 1983, and they (or entities controlled by them) own and operate two Dallas restaurants, Ferrari's and Il Grano. In October 2000, a limited partnership the Secchis controlled, Italian Cowboy Partners, Ltd., leased space in a Dallas shopping center for another restaurant. The lease agreement was the product of six months' active negotiations with the landlord, The Prudential Insurance Co. of America, and its agent, Four Partners L.L.C. doing business as Prizm Partners (collectively, "Prudential"). The Secchis had negotiated at least two other leases over the years, and they and their lawyer successfully insisted on a number of changes in Prudential's proposals. Offers went back and forth, and the agreement went through seven drafts. Francesco, whose formal education extended only to about the eighth grade, did not read the lease but left that to Jane, whose educational background was similar but whose English was better. Jane went over the agreement with their attorney but focused on the economic terms. When the Secchis and Prudential finally reached an understanding, Francesco signed the lease as manager of the partnership's general partner, Secchi, L.L.C. Prudential insisted that the Secchis personally guarantee the lease, and that agreement was also negotiated and changed by the Secchis before they signed it.

The lease contains the following paragraph:

> Counterclaim and Jury Trial. In the event that the Landlord commences any summary proceeding or action for nonpayment of rent or other charges provided for in this Lease, Tenant shall not interpose any counterclaim of any nature or description in any such proceeding or action. Tenant and Landlord both waive a trial by jury of any or all issues arising in any action or proceeding between the parties hereto or their successors, under or connected with this Lease, or any of its provisions.

Prudential did not specifically point out this provision to the Secchis, and Jane testified that she never noticed it. She also testified that notwithstanding the clear meaning of the second sentence, she never intended to waive a jury trial in any future litigation. The guaranty agreement does not contain a similar waiver but does state that the Secchis agree to guarantee the tenant's "full and timely performance and observance of all the covenants, terms, conditions, provisions, and agreements" in the lease, and in the event of the tenant's default, to "faithfully perform and fulfill all of such terms, covenants, conditions, provisions, and agreements".

Some nine months after the lease was executed, the Secchis and their limited partnership (collectively, "ICP") sued Prudential in statutory county court, claiming in part that it was impossible to do business on the premises because of a persistent odor of sewage. Prudential counterclaimed for amounts allegedly due under the lease and guaranty. When the trial court notified the parties that a date for non-jury trial had been set, ICP filed a jury demand and paid the jury fee, as required by Rule 216 of the Texas Rules of Civil Procedure. The court then notified the parties that a date for jury trial had been set. Prudential moved to quash the jury demand, based on the waiver in the lease. ICP responded that contractual jury waivers in general, and the waiver in the lease in particular, are unenforceable. * * *

After a hearing, the court denied the motion in a brief order without explanation.

Prudential petitioned the court of appeals for mandamus relief, which that court denied with a short memorandum opinion, 2002 WL 1608233, explaining only that "the relators have not shown themselves entitled to the relief requested." Prudential then petitioned for relief from this Court, and we agreed to hear argument. * * *

* * *

Having concluded that the parties' contractual jury waiver is enforceable, we turn to whether Prudential is entitled to relief by mandamus. Prudential must meet two requirements. One is to show that the trial court clearly abused its discretion. We have concluded as a matter of law that Prudential was entitled to enforcement of the jury waiver. Since "[a] trial court has no 'discretion' in determining what the law is or applying the law to the facts", even when the law is unsettled, the trial court's refusal to enforce the jury waiver was a clear abuse of discretion. Thus, Prudential has met the first requirement.

The other requirement Prudential must meet is to show that it has no adequate remedy by appeal. The operative word, "adequate", has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. These considerations implicate both public and private interests. Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation. Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is "adequate" when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.

This determination is not an abstract or formulaic one; it is practical and prudential. It resists categorization, as our own decisions demonstrate. Although this Court has tried to give more concrete direction for determining the availability of mandamus review, rigid rules are necessarily inconsistent with the flexibility that is the remedy's principal virtue. Thus, we wrote in *Walker v. Packer* that "an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ." While this is certainly true, the word "merely" carries heavy freight. In *In re E.I. duPont de Nemours & Co*., we concluded that defending the claims of more than 8,000 plaintiffs in litigation that would last for years was not mere expense and delay, and that mandamus review of the denial of duPont's special appearance was justified, even though duPont could eventually appeal and did not appear to be in any danger of succumbing to the burden of the litigation. In *Travelers Indemnity Co. v. Mayfield*, we granted mandamus review of an order requiring a carrier to pay the plaintiff's attorney fees as incurred in a compensation case, even though the carrier could have appealed from the final judgment and won recovery for the amounts paid, because the order not only cost the carrier money but "radically skew[ed] the procedural dynamics of the case" by requiring the defendant to fund the plaintiff's prosecution of her claims. In *In re Masonite Corp*., the trial court on its own motion and without any authority whatever, split two cases into sixteen and transferred venue of fourteen of them to other counties. We held that the defendants were not required to wait until appeal to complain:

> Walker does not require us to turn a blind eye to blatant injustice nor does it mandate that we be an accomplice to sixteen trials that will amount to little more than a fiction. Appeal may be adequate for a particular party, but it is no remedy at all for the irreversible waste of judicial and public resources that would be required here if mandamus does not issue.

These cases, among a great many others that could be cited, serve to illustrate that whether an appellate remedy is "adequate" so as to preclude mandamus review depends heavily on the circumstances presented and is better guided by general principles than by simple rules.

Nor is the consideration whether to grant mandamus review confined to private concerns. No one suggested in *Masonite* that any individual party would suffer more by waiting to complain on appeal of the venue order than would any other party complaining of any other venue order in any other case. Two factors drove our decision in *Masonite*: the complete lack of authority for the trial court's order, and the impact on the legal system. We simply could not justify putting the civil justice system itself to the trouble of grinding through proceedings that were certain to be "little more than a fiction." The trial court's ruling in Travelers was novel but might easi-

ly have become a repeated error. Either way, the error was clear enough, and correction simple enough, that mandamus review was appropriate.

Prudent mandamus relief is also preferable to legislative enlargement of interlocutory appeals. The unavailability of mandamus relief increases the pressure for expanded interlocutory appeals. For example, when this Court refused to review venue decisions by mandamus, the Legislature responded by authorizing mandamus review of all decisions involving mandatory venue provisions. When we held that the denial of a special appearance would ordinarily not warrant mandamus review, the Legislature responded by creating an interlocutory appeal from the denial of a special appearance. When questions arose concerning the availability of mandamus to review the sufficiency of expert reports required in medical malpractice cases, the Legislature responded by creating an interlocutory appeal from the denial of dismissals of such cases for insufficient expert reports. Interlocutory appeals lie as of right and must be decided on the merits, increasing the burden on the appellate system. "Mandamus," on the other hand, "is an extraordinary remedy, not issued as a matter of right, but at the discretion of the court. Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles." As a selective procedure, mandamus can correct clear errors in exceptional cases and afford appropriate guidance to the law without the disruption and burden of interlocutory appeal. Appellate courts must be mindful, however, that the benefits of mandamus review are easily lost by overuse.

The issue before us in the present case—whether a pre-suit waiver of trial by jury is enforceable—fits well within the types of issues for which mandamus review is not only appropriate but necessary. It is an issue of law, one of first impression for us, but likely to recur (it has already arisen in another case in the court of appeals, also on petition for mandamus. It eludes answer by appeal. In no real sense can the trial court's denial of Prudential's contractual right to have the Secchis waive a jury ever be rectified on appeal. If Prudential were to obtain judgment on a favorable jury verdict, it could not appeal, and its contractual right would be lost forever. If Prudential suffered judgment on an unfavorable verdict, Prudential could not obtain reversal for the incorrect denial of its contractual right "unless the court of appeals concludes that the error complained of . . . probably caused the rendition of an improper judgment". Even if Prudential could somehow obtain reversal based on the denial of its contractual right, it would already have lost a part of it by having been subject to the procedure it agreed to waive.

* * *

Only if a contractual waiver of trial by jury is enforced in the trial court can its propriety effectively be reviewed on appeal. The denial of trial by jury is harmless error only if there are no material fact issues to submit to a jury. But the denial of trial by jury is also reviewable by mandamus. A sentence in our opinion in *General Motors Corp. v. Gayle* suggests that this is not true, but we granted mandamus in that case to correct the trial court's denial of a jury trial, and we cited without disapproval three courts of appeals that we said "ha[d] reviewed jury trial orders by mandamus." To afford relief for the denial of a jury trial both by mandamus and by appeal, and to deny relief by either means for the refusal to enforce a jury waiver, unacceptably contorts review of the issue. Mandamus relief in a situation like this, in Professor Charles Alan Wright's words, "provides a valuable ad hoc relief valve for the pressures that are imperfectly contained by the statutes permitting appeals from final judgments and interlocutory orders."

* * *

The dissent suggests that mandamus relief should not be used to enforce contractual rights, but we used it for precisely that purpose only recently in *In re Allstate County Mutual Insurance Co*. to enforce the parties' agreement to submit to an appraisal process for determining the value of a vehicle claimed to be a total loss. The dissent states that we took "the United States Supreme Court's pronouncement that appellate delays defeated the 'core purpose' of contracts to arbitrate" as a "mandate . . . to provide an extraordinary remedy." Perhaps so, but the Supreme Court's "pronouncement" was also a statement of fact: lawsuits followed by appeals defeat the core purpose of arbitration agreements. For exactly the same reason, trial to a jury followed by appeal, if one were even allowed, defeats the reasons for agreeing to waive a jury in the first place.

The dissent argues that "authorizing mandamus relief to enforce a contractual jury waiver while relegating a party to its appellate remedy when denied its constitutional right to a jury trial" creates a procedural anomaly. If the premise were true, an anomaly would exist; but the premise is not true. We have never held that the denial of a jury trial, which can certainly be reviewed by appeal, cannot also be reviewed by mandamus. As we have already noted, we have faced the issue only once, in *General Motors Corp. v. Gayle*, and while one sentence of

that opinion states that mandamus is "generally not available" to review the denial of a jury trial, we nevertheless directed the trial court to abort or mistry the nonjury trial it had commenced and to set the case on its jury docket. We also cited three court of appeals cases that had "reviewed jury trials by mandamus." *General Motors* does not preclude review of the denial of a jury trial by mandamus.

Finally, the dissent argues that "[e]ven if parties may freely waive their right to trial by jury, there is no public policy reason for encouraging them to do so." Of course, enforcing an agreement is not the same as encouraging parties to make it. By enforcing contractual jury waivers, we no more encourage them than we encourage arbitration by enforcing arbitration agreements. Parties are free to agree to such remedies as they choose, and as we have noted, they may have good reasons for agreeing to waive a jury trial. What the dissent ignores is that there is a compelling public policy reason to enforce legal agreements freely made. The dissent does not find the jury trial waiver in this case illegal or contrary to public policy, yet it would deny all viable means of enforcement.

* * *

For these reasons, we direct respondent, the Honorable Sally Montgomery, to vacate her order of June 6, 2003, and the prior order of June 19, 2002, to grant Prudential's motion to quash the jury demand and payment of jury fee, and to return the case to the nonjury docket. We are confident she will promptly comply. Our writ will issue only if she does not.

CHIEF JUSTICE PHILLIPS, joined by JUSTICE O'NEILL, JUSTICE JEFFERSON, and JUSTICE SCHNEIDER, dissenting [omitted].

3. *Fundamental Error*

Fundamental or unassigned error is an exception to the general rule that error must be preserved during the lower court proceeding in order for an appellate court to consider any complaints about the specific error. The definition of fundamental error was fairly broad for a period of time. The current view of fundamental error, however was set in 1941, and is extremely restrictive.

Note

McCauley v. Consolidated Underwriters, 157 Tex. 475, 304 S.W.2 265 (1957):

Facts: This is an appeal from the order of a district court setting aside a default judgment rendered at a previous term (after the trial court lost jurisdiction). The court of appeals affirmed.

Issues: Is this fundamental error? Yes. Fundamental error is an error which directly and adversely affects the interest of the public generally, as that interest is declared by the statutes or Constitution of Texas. A court's lack of jurisdiction is fundamental error.

Issues: Is there a difference between fundamental error in the Supreme Court and Court of Appeals? No. There used to be, but there is no longer any difference.

PIRTLE
v.
GREGORY
629 S.W.2d 919
(Tex. 1982)

Sudderth, Woodley & Dudley, Keith Woodley, Comanche, for petitioner.
Thompson & Cook, John R. Cook, Breckenridge, for respondents.

PER CURIAM.

Stanley Pirtle brought suit for specific performance and for removal of cloud on 512 acres of land. Pirtle sued Layne Gregory, Grady Gregory, and Kathy Coker because they had contracted in writing but failed to exe-

cute an oil and gas lease to Pirtle, as lessee. Layne and Grady Gregory later executed an oil and gas lease on the property to James P. Flanagan. Plaintiff Pirtle originally sued Flanagan as one of the defendants, but took a non-suit as to him. The trial court rendered judgment for Pirtle commanding the Gregorys and Coker to execute the oil and gas lease, but the court of appeals reversed that judgment, believing that the absence of Flanagan from the suit constituted fundamental error. 623 S.W.2d 955 (Tex. App.).

"Fundamental error" in civil actions arose in Texas under old statutes that stated that cases on appeal could be reviewed "on an error in law either assigned or apparent on the face of the record." 2 GAMMEL, LAWS OF TEXAS 1562 (1898); 3 GAMMEL, LAWS OF TEXAS 393 (1898). The practice of appellate courts in considering unassigned errors was the source of much mischief, and when the Texas Supreme Court promulgated its Rules of Civil Procedure in 1941, old article 1837 was repealed. Since that time, there has been no rule or statute that authorizes appellate consideration of errors for which there was no trial predicate that complained of the error. *McCauley v. Consolidated Underwriters*, 157 Tex. 475, 304 S.W.2d 265, 266 (1957); *Ramsey v. Dunlop*, 146 Tex. 196, 205 S.W.2d 979, 984 (1947) (ALEXANDER, J., concurring). Fundamental error survives today in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas. STATE BAR OF TEXAS, APPELLATE PROCEDURE IN TEXAS § 11.5 (2d ed. 1979).

The reason for the requirement that a litigant preserve a trial predicate for complaint on appeal is that one should not be permitted to waive, consent to, or neglect to complain about an error at trial and then surprise his opponent on appeal by stating his complaint for the first time.

Flanagan is said to be an indispensable party to this cause, because the defendants gave him an oil and gas lease and the validity of that lease has not been adjudicated. The defendants should not be heard to complain for the first time on appeal, however, because they did not complain at the trial level by exception, plea in abatement, motion to join other parties or otherwise.

We reaffirm the views we expressed in *Cooper v. Texas Gulf Industries, Inc*., 513 S.W.2d 200 (Tex. 1974). We there stated: Under the provisions of our present Rule 39 it would be rare indeed if there were a person whose presence was so indispensable in the sense that his absence deprives the court of jurisdiction to adjudicate between the parties already joined. *Id.* at 204.

In a case such as this, parties who participate in the trial without complaint will not be heard to complain at the appellate stage when "there is reason not to throw away a judgment just because it did not theoretically settle the whole controversy." *Continental Insurance Co. of New York v. Cotten*, 427 F.2d 48, 51 (9th Cir. 1970) (*citing Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 88 S.Ct. 733, 19 L.Ed.2d 936 (1967).

Pursuant to Texas Rules of Civil Procedure, Rule 483, we grant the writ of error and, without hearing oral argument, reverse the judgment of the court of appeals and remand this cause to that court for disposition of the other points not reached.

Notes

1. In *Ramsey v. Dunlop*,[1] CHIEF JUSTICE ALEXANDER, in his concurring opinion stated: "[I]n so far as the rights of the litigants are concerned they are not entitled to have the court consider any error not assigned by them. It is my opinion that the Court of Civil Appeals is authorized to reverse a judgment of the trial court upon an unassigned error only when it involves a matter of public interest and when the record affirmatively and conclusively shows that the appellee was not entitled to recover, where the record affirmatively shows that the court rendering the judgment was without jurisdiction over the subject matter."

2. Examples of fundamental error, that do not relate to jurisdictional defects, are difficult to find. *Bradley v. State of Texas ex rel White*,[2] however, is a recent case that reflects non-jurisdictional fundamental error. Under TEX. R. EVID. 605 "[T]he judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve this point." In *Bradley*, city council members sitting as a court to remove the mayor of the city were held to be sitting as judges. The council members were, thus, bound by Rule 605, and

[1] 146 Tex. 196, 205 S.W.2d 979 (1947).

[2] 990 S.W.2d 245 (Tex. 1999).

violated the rule by testifying as witnesses in the removal proceeding. Under that section, a harm analysis is not necessary.

3. In *Waco Independent School District v. Gibson*, 22 S.W.3d 849 (Tex. 2000) the Court held that because subject matter jurisdiction is essential to the authority of a court to decide a case, it cannot be waived and may be raised for the first time on appeal. Thus, ripeness and standing, which are components of subject matter jurisdiction, cannot be waived.

ALLSTATE INDEMNITY COMPANY
v.
FORTH
204 S.W.3d 795
(Tex. 2006)

Roger Higgins, Thompson Coe Cousins and Irons, L.L.P., Dallas, Jeffrey P. Lennard, Sonnenschein Nath & Rosenthal LLP, Chicago, IL, for Petitioner.

G. Laird Morgan, Stephen Gardner, Law Office of Stephen Gardner, PC, John M. Phalen Jr., Daniel Sheehan & Associates, L.L.P., Dallas, for Respondent.

PER CURIAM.

In this breach of contract suit, we consider whether an insured has standing to sue her insurance company for settling her medical bills in what the insured considered to be an arbitrary and unreasonable manner. In reversing the trial court and remanding the case for trial, the court of appeals concluded that the insured had standing even though the insured had no out-of-pocket expenses, and her health care providers had not, and now could not, collect any additional sum from her. 151 S.W.3d 732, 738. Because there are no allegations that the insured suffered damages or that the manner in which the insurance company settled the insured's medical expenses caused her any injury, we conclude that the trial court was correct to dismiss her suit, and accordingly we reverse the court of appeals' judgment.

Pat Forth's daughter required medical treatment in 1997 as the result of an auto accident. The personal-injury-protection (PIP) of Forth's Allstate auto insurance policy, covered "reasonable medical expenses incurred for necessary medical services." Allstate settled Forth's medical bills for less than the actual amount billed. Forth sued Allstate for injunctive and declaratory relief, alleging that it arbitrarily reduced her bills without using an independent and fair evaluation to determine what amount of her medical expenses were reasonable. According to Forth, Allstate routinely discounts medical expenses by comparing those charges to a third-party contractor's computerized database. Allstate then offers about eighty-five percent of the medical expenses reflected in that database for the same treatment or procedure. Forth did not claim that Allstate's conduct had caused her any damage.

In the trial court, Allstate filed a motion to dismiss, arguing that Forth lacked standing because she had no claim for damages, and Allstate had not caused her any actual injury. The trial court granted Allstate's motion, and the court of appeals affirmed in part and reversed in part, holding that Forth lacked standing to seek prospective relief because Allstate no longer insured her, but that she could seek retrospective relief for any injury suffered while she was a policy holder. The court concluded that if a fair and independent evaluation of the medical bills revealed that Allstate paid less than the full amount of Forth's "reasonable expenses," then Forth could claim injury because the terms of the insurance contract required that reasonable expenses be paid.

The court of appeals relied on *Black v. American Bankers Insurance Co*., 478 S.W.2d 434 (Tex. 1972) and *American Indemnity Co. v. Olesijuk*, 353 S.W.2d 71, 72 (Tex. Civ. App.—San Antonio 1961, writ dism'd w.o.j.) to support its view that the insured had standing to sue her insurance company despite its settlement of her medical claims to the apparent satisfaction of the medical providers. Both *Black* and *Olesijuk* held that the insurance companies' obligation to pay under the respective policies was triggered by the insured's incurrence of medical expenses and was not affected by the fact that the insured had not, in fact, had to pay those expenses. In both cases, a third party paid the medical expenses, but the respective courts concluded that such fact did not alter the obligation of the insurance company to pay under its policy. Unlike the insurance companies in Olesijuk and

Black, Allstate did not question whether Forth had incurred medical expenses and did not refuse to pay the medical providers. Instead, Allstate paid the medical bills according to its own evaluation.

Under Texas law, to have standing a party must have suffered a threatened or actual injury. Forth does not claim that she has any unreimbursed, out-of-pocket medical expenses. She does not assert that these providers withheld medical treatment as a result of Allstate reducing their bills, or threatened to sue her for any deficiency, or harassed her in any other manner. Moreover, Forth has no exposure in the future because limitations has now run on the medical claims. From all appearances, her medical providers have accepted the amount Allstate paid them without complaint, thereby satisfying Allstate's obligation under the policy.

Because Forth does not claim that the manner in which Allstate settled her claim caused her any injury, we conclude that she does not have standing in this case. Accordingly, we reverse the court of appeals' judgment and, without hearing oral argument, render judgment dismissing Forth's claims against Allstate.

Note

In *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006), the Court held that there is no legal bar preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners for pure economic loss, because such claims are necessarily limited to recovery for property damage. In that case the joint, independent executors of an estate sued several attorneys and their law firm, for legal malpractice. The Court noted that even though an estate may suffer significant damages after a client's death, this does not preclude survival of an estate-planning malpractice claim.

MAPCO, INC.
v.
CARTER
817 S.W.2d 686
(Tex. 1991)

Roger Townsend, Lee A. Hunnell, Houston, Royse M. Parr, Tulsa, Okl., for Mapco.
Thomas Lee Bartlett, Tom F. Coleman, Houston, for Carter.

PER CURIAM.

We consider whether a judgment may be entered against a party not before the trial court. We conclude that it may not.

Clarence, James Ross, and Mrs. Clyde Carter (Carters), Mapco Underground Storage of Texas, Inc. (MUST) and Texasgulf, Inc. (Texasgulf) owned, in undivided interests, a 126.378-acre mineral estate (5/8's by the Carters, 2/8's by Texasgulf, and 1/8 by MUST). MUST owned the surface estate in its entirety. MUST created an underground cavern on a portion of the tract from a salt dome formation to store natural gas and other hydrocarbons. The Carters sued MUST for waste and sought a partition of the mineral estate. The waste claim was severed and is not a part of this appeal.

After a bench trial, the trial court found that the mineral estate was susceptible to a partition in kind. In accord with a request by MUST, the trial court awarded a 15.797-acre tract surrounding the cavern to Gordon Speer (Speer) (successor to MUST), a 31.582-acre tract to Landmark Trust (successor to Texasgulf), and a 78.999-acre tract to be divided equally among the Carters. In addition, the trial court entered a $450,000 owelty award against Mapco, Inc. (Mapco, Inc.) and imposed a lien against the property set aside to Speer, to be foreclosed in the event the owelty award was not paid. The court of appeals affirmed, holding, among other things, that a judgment against Mapco, Inc. was permissible. 808 S.W.2d 262. The parties do not contest the partition and we consider only the portion of the judgment pertaining to Mapco, Inc.

Mapco, Inc. argues that the owelty award entered against it was erroneous because it was not a party in the trial court. We agree.

In no case shall judgment be rendered against any defendant unless upon service, or acceptance or waiver of process, or upon an appearance. TEX. R. CIV. P. 124. *See, e.g., Patrick v. Patrick*, 728 S.W.2d 864, 868 (Tex.

App.—Fort Worth 1987, writ ref'd n.r.e.). The Carters' pleadings identified only MUST as a party and indicated only that service could be made upon MUST's designated agent. Furthermore, each answer filed was only on behalf of MUST and there is no indication in the record that Mapco, Inc. waived service of process. *See* TEX. R. CIV. P. 120. The fact that MUST was generically referred to by the parties and the trial court as "Mapco, Inc." is not sufficient to place Mapco, Inc. before the court. *See also Fuqua v. Taylor*, 683 S.W.2d 735, 738 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) ("Judgment may not be granted in favor of a party not named in the suit as a plaintiff or a defendant.").

The Carters argue that Mapco, Inc. and MUST waived this point because they did not raise it until their motion for rehearing in the court of appeals. Generally, a point not assigned as error in the court of appeals and raised for the first time in a motion for rehearing cannot be considered by this court. *See Watson v. Glens Falls Ins. Co*., 505 S.W.2d 793, 797 (Tex. 1974). However, lack of jurisdiction is fundamental error and may be raised for the first time before this court. *Grounds v. Tolar Indep. School Dist*., 707 S.W.2d 889, 893 (Tex. 1986). *See also Texas Alcoholic Beverage Comm'n v. Sfair*, 786 S.W.2d 26, 27 (Tex. App.—San Antonio 1990, writ denied).

* * *

Pursuant to Rule 170 of the Texas Rules of Appellate Procedure, a majority of the court grants the application for writ of error of Mapco, Inc. and MUST and, without hearing oral argument, reverses that portion of the judgment of the court of appeals concerning entry of judgment against Mapco, Inc., renders judgment that the Carters take nothing against Mapco, Inc. and remands this cause to the trial court solely to determine against whom the owelty award may properly be entered.

TEXAS ASSOCIATION OF BUSINESS
v.
TEXAS AIR CONTROL BOARD, et al
852 S.W.2d 440
(Tex. 1993)

R. Kinnan Golemon, James W. Checkley, Jr., Albert R. Axe, Jr., Scott R. Kidd and Douglas W. Alexander, Austin, for appellant.

Douglas G. Caroom, Mary E. Kelly, Dan Morales, Nancy N. Lynch, William D. Dugat, III and Amy R. Johnson, Austin, for appellees.

CORNYN, JUSTICE.

The Texas Association of Business (TAB), on behalf of its members, brought this declaratory judgment action seeking a ruling that statutes empowering two state administrative agencies to levy civil penalties for violations of their regulations conflict with the open courts and jury trial provisions of the Texas Constitution. The administrative agencies denied TAB's claims, and along with two Intervenors, filed counterclaims seeking a declaration that the same statutes and regulations comport with those constitutional provisions.

* * *

TAB alleges that it is a Texas not-for-profit corporation, that its members do business throughout Texas, and that it is authorized to represent its members on any matter that may have an impact on their businesses.

TAB filed this suit under the Uniform Declaratory Judgments Act, TEX.CIV.PRAC. & REM.CODE §§ 37.001-37.011, alleging that some of its members had been subjected to civil penalties assessed by either the Air Control Board or the Water Commission. TAB further alleged that all of its other members that operate their businesses pursuant to the pertinent provisions of the Texas Clean Air Act, the Texas Water Code, or the Texas Solid Waste Disposal Act or any rules or orders issued pursuant to those provisions were put at "substantial risk (if not certainty)" of being assessed civil penalties by the Air Control Board or the Water Commission. Thus this suit does not challenge specific instances of the Air Control Board's or the Water Commission's exercise, or threatened exercise, of the civil penalty power. Instead, TAB's suit is a facial challenge to the constitutionality of this administrative enforcement scheme under the Texas Constitution.

* * *

Before we reach the merits of this case, we first consider the matter of the trial court's jurisdiction, as well as our own; specifically we determine whether TAB has standing to challenge the statutes and regulations in question. Because TAB's standing to bring this action is not readily apparent, and because our jurisdiction as well as that of the trial court depends on this issue, we requested supplemental briefing on standing at the oral argument of this case. In response, the parties insist that any question of standing has been waived in the trial court and cannot be raised by the court for the first time on appeal. We disagree.

Subject matter jurisdiction is essential to the authority of a court to decide a case. Standing is implicit in the concept of subject matter jurisdiction. The standing requirement stems from two limitations on subject matter jurisdiction: the separation of powers doctrine and, in Texas, the open courts provision. Subject matter jurisdiction is never presumed and cannot be waived.

One limit on courts' jurisdiction under both the state and federal constitutions is the separation of powers doctrine. *See* TEX.CONST. art. II, § 1; * * * Under this doctrine, governmental authority vested in one department of government cannot be exercised by another department unless expressly permitted by the constitution. Thus we have construed our separation of powers article to prohibit courts from issuing advisory opinions because such is the function of the executive rather than the judicial department. *Firemen's Ins. Co. v. Burch,* 442 S.W.2d 331, 333 (Tex. 1969); *Morrow v. Corbin,* 122 Tex. 553, 62 S.W.2d 641, 644 (Tex.1933). Accordingly, we have interpreted the Uniform Declaratory Judgments Act, TEX.CIV.PRAC. & REM.CODE §§ 37.001-.011, to be merely a procedural device for deciding cases already within a court's jurisdiction rather than a legislative enlargement of a court's power, permitting the rendition of advisory opinions. *Firemen's Ins. Co.,* 442 S.W.2d at 333; *United Serv. Life Ins. Co. v. Delaney,* 396 S.W.2d 855, 863 (Tex. 1965); *California Prods., Inc. v. Puretex Lemon Juice, Inc.,* 160 Tex. 586, 334 S.W.2d 780 (1960).

The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties. *Alabama State Fed'n of Labor v. McAdory,* 325 U.S. 450, 461, 65 S.Ct. 1384, 1389, 89 L.Ed. 1725 (1945); *Firemen's Ins. Co.,* 442 S.W.2d at 333; *Puretex Lemon Juice, Inc.,* 160 Tex. at 591, 334 S.W.2d at 783. An opinion issued in a case brought by a party without standing is advisory because rather than remedying an actual or imminent harm, the judgment addresses only a hypothetical injury. *See Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). Texas courts, like federal courts, have no jurisdiction to render such opinions.

The separation of powers doctrine is not the only constitutional basis for standing. Under federal law, standing is also an aspect of the Article III limitation of the judicial power to "cases" and "controversies." *Sierra Club v. Morton,* 405 U.S. 727, 731, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972). To comport with Article III, a federal court may hear a case only when the litigant has been threatened with or has sustained an injury. *Valley Forge Christian College,* 454 U.S. at 471, 102 S.Ct. at 758. Under the Texas Constitution, standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury. Specifically, the open courts provision provides:

> All courts shall be open, and every person for an **injury** done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

TEX. CONST. art. I, § 13 (emphasis added). Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield.

Under federal law, a lack of standing deprives a court of subject matter jurisdiction because standing is an element of such jurisdiction. * * * Other states have followed this analysis in construing their own constitutions. * * *

Subject matter jurisdiction is an issue that may be raised for the first time on appeal; it may not be waived by the parties. *Texas Employment Comm'n v. International Union of Elec., Radio and Mach. Workers, Local Union No. 782,* 163 Tex. 135, 352 S.W.2d 252, 253 (1961); RESTATEMENT (SECOND) OF JUDGMENTS § 11, comment c (1982). This court recently reiterated that axiom in *Gorman v. Life Insurance Co.,* 811 S.W.2d 542, 547 (Tex.), *cert. denied,* 502 U.S. 824, 112 S.Ct. 88, 116 L.Ed.2d 60 (1991). Because we conclude that standing is a component of subject matter jurisdiction, it cannot be waived and may be raised for the first time on appeal.

If we were to conclude that standing is unreviewable on appeal at least three undesirable consequences could result. First and foremost, appellate courts would be impotent to prevent lower courts from exceeding their constitutional and statutory limits of authority. Second, appellate courts could not arrest collusive suits.

Third, by operation of the doctrines of res judicata and collateral estoppel, judgments rendered in suits addressing only hypothetical injuries could bar relitigation of issues by a litigant who eventually suffers an actual injury. We therefore hold that standing, as a component of subject matter jurisdiction, cannot be waived in this or any other case and may be raised for the first time on appeal by the parties or by the court.

* * *

Because standing is a component of subject matter jurisdiction, we consider TAB's standing under the same standard by which we review subject matter jurisdiction generally. That standard requires the pleader to allege facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *Richardson v. First Nat'l Life Ins. Co.,* 419 S.W.2d 836, 839 (Tex. 1967). When reviewing a trial court order dismissing a cause for want of jurisdiction, Texas appellate courts "construe the pleadings in favor of the plaintiff and look to the pleader's intent." *Huston v. Federal Deposit Ins. Corp.,* 663 S.W.2d 126, 129 (Tex. App.—Eastland 1983, writ ref'd n.r.e. 1984); *see also* W. Wendell Hall, *Standards of Appellate Review in Civil Appeals,* 21 ST. MARY'S L.J. 865, 870 (1990).

Here, however, we are not reviewing a trial court order of dismissal for want of jurisdiction, we are considering standing for the first time on appeal. A review of only the pleadings to determine subject matter jurisdiction is sufficient in the trial court because a litigant has a right to amend to attempt to cure pleading defects if jurisdictional facts are not alleged. *See* TEX.R.CIV.P. 80. Failing that, the suit is dismissed. When an appellate court questions jurisdiction on appeal for the first time, however, there is no opportunity to cure the defect. Therefore, when a Texas appellate court reviews the standing of a party sua sponte, it must construe the petition in favor of the party, and if necessary, review the entire record to determine if any evidence supports standing.

TAB asserts standing on behalf of its members. The general test for standing in Texas requires that there "(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought." *Board of Water Engineers v. City of San Antonio,* 155 Tex. 111, 114, 283 S.W.2d 722, 724 (1955). Texas, however, has no particular test for determining the standing of an organization, such as TAB. * * * While we agree with the statement of the general test for standing set out in *Board of Water Engineers,* we foresee difficulties in relying on it alone to determine the standing of an organization like TAB. For instance, when members of an organization have individual standing, but the organization was not established for the purpose of protecting the particular interest at issue, it is not necessarily in the members' best interest to allow such a disinterested organization to sue on their behalf. Furthermore, an organization should not be allowed to sue on behalf of its members when the claim asserted requires the participation of the members individually rather than as an association, such as when the members seek to recover money damages and the amount of damages varies with each member.

The United States Supreme Court has articulated a standard for associational standing that lends itself to our use. We adopt that test today. In *Hunt v. Washington State Apple Advertising Commission,* the Court held that an association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977); *see also New York State Club Ass'n v. City of New York,* 487 U.S. 1, 9, 108 S.Ct. 2225, 2231, 101 L.Ed.2d 1 (1988); *International Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Brock,* 477 U.S. 274, 282, 106 S.Ct. 2523, 2528, 91 L.Ed.2d 228 (1986). This standard incorporates the standing analysis we adopted in *Board of Water Engineers,* yet addresses the additional concerns we have noted.

We now apply the *Hunt* standard to the case before us. Reviewing the record in its entirety for evidence supporting subject matter jurisdiction, and resolving any doubt in TAB's favor, we conclude that TAB has standing to pursue the relief it seeks in this case.

The first prong of the *Hunt* test requires that TAB's pleadings and the rest of the record demonstrate that TAB's members have standing to sue in their own behalf. This requirement should not be interpreted to impose unreasonable obstacles to associational representation. In this regard the United States Supreme Court stated that "the purpose of the first part of the *Hunt* test is simply to weed out plaintiffs who try to bring cases, which could not otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *New York State Club Ass'n,* 487 U.S. at 9, 108 S.Ct. at 2232. We are satisfied that TAB has not manufactured this lawsuit. A comparison of the association's membership roster with the list of businesses subjected to state penalties indicates individual TAB members have been assessed administrative penalties pursuant to the challenged

enactments. Additionally, TAB has alleged that other of its members remain at substantial risk of penalty. A substantial risk of injury is sufficient under *Hunt. See e.g., Pennell v. City of San Jose,* 485 U.S. 1, 7 n. 3, 108 S.Ct. 849, 855 n. 3, 99 L.Ed.2d 1 (1988) (concluding that association of landlords had standing based on pleadings that individual members would likely be harmed by rent ordinance). Thus TAB satisfies the first prong of the *Hunt* test.

The second prong of *Hunt* requires that TAB's pleadings and the rest of the record demonstrate that the interests TAB seeks to protect are germane to the organization's purpose. TAB was chartered to "represent the interests of its members on issues which may impact upon its members' businesses." Considering a very similar question in *New York State Club Association,* the United States Supreme Court held that: "[T]he associational interests that the consortium seeks to protect are germane to its purpose: appellant's certificate of incorporation states that its purpose is 'to promote the common business interests of its [member clubs].' " 487 U.S. at 10 n. 4, 108 S.Ct. at 2232, n. 4 (bracketed language in original). Likewise, the interests TAB desires to protect are germane to the organization's purpose, and thus the second prong is met.

Under the third and final prong of the *Hunt* test, TAB's pleadings and the record must demonstrate that neither the claim asserted nor the relief requested require the participation of individual members in the lawsuit. The Supreme Court has interpreted this prong as follows:

> [W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.

Hunt, 432 U.S. at 343, 97 S.Ct. at 2441 (quoting *Warth,* 422 U.S. at 515, 95 S.Ct. at 2213).

By seeking damages on behalf of its members, necessitating that each individual prove lost profits particular to its operations, the organization in *Warth* lacked standing to sue; rather, each individual member had to be a party to the suit. These facts are distinguishable from *Brock,* in which the union challenged an administrative interpretation of statutory provisions relating to unemployment compensation. 477 U.S. 274, 106 S.Ct. 2523. Recognizing that the suit raised "a pure question of law," and that "the individual circumstances" of any aggrieved member were not in issue, the Court held that the UAW had standing to challenge the government's actions. *Id.* at 287-88, 290, 106 S.Ct. at 2531-32, 2533; *see also Pennell,* 485 U.S. at 7 n. 3, 108 S.Ct. at 855 n. 3 (facial challenge to rent ordinance does not require participation of individual landlords). Here, TAB seeks only prospective relief, raises only issues of law, and need not prove the individual circumstances of its members to obtain that relief, thus meeting the third prong of *Hunt.*

Having found that TAB meets all three prongs of the *Hunt* test, we conclude that TAB has standing to pursue the relief it seeks in this case.

* * *

Concurring and dissenting opinions by DOGGETT, GAMMAGE and SPECTOR, JJ(omitted). HIGHTOWER, J., not sitting.

4. *Methods of Preservation of Error*

Error occurring during a lower court proceeding that is not fundamental requires some sort of affirmative action on the part of a complaining attorney to preserve error. As will be shown throughout this book the types of affirmative action necessary to preserve error for appellate review will vary depending on the nature of the alleged error as well as the time in the lower court proceeding in which the alleged error occurred.

One of the more frequent errors complained of on appeal relates to the admission or exclusion of evidence. Therefore, in the remaining portion of this Chapter the focus will be on steps which must be taken when alleged *improper evidence* is admitted during a trial or when purported proper evidence is excluded. An "objection" made to the introduction of evidence claimed to be inadmissible is the most frequent affirmative action which is taken to preserve the alleged error of admitting inadmissible evidence. An "offer of proof" [prior to September 1, 1997, this was also referred to an "informal bill of exception"; *see* Rule 52(b) of the former Texas Rules of Appellate Procedure] is the typical method to preserve error in the event that the trial court refuses to admit evi-

dence. In the following pages a brief introduction to these two methods of preservation of error will be made. The proper procedures necessary to preserve other types of errors will be presented throughout the remainder of this book.

Texas Rules of Evidence 103. Rulings on Evidence.

(a) Effect of Erroneous Ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context. When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence be admitted, such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of repeating those objections.

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer, or was apparent from the context within which questions were asked.

(b) Record of Offer and Ruling. The offering party shall, as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, its offer of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may, or at the request of a party shall, direct the making of an offer in question and answer form.

(c) Hearing of Jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Fundamental Error in Criminal Cases. In a criminal case, nothing in these rules precludes taking notice of fundamental errors affecting substantial rights although they were not brought to the attention of the court.

Texas Rules of Appellate Procedure 33.1. Preservation; How Shown.

(a) In General. As a prerequisite to presenting a complaint for appellate review, the record must show that:

(1) the complaint was made to the trial court by a timely request, objection, or motion that:

(A) stated the grounds for the ruling that the complaining party sought from the trial court with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds were apparent from the context; and

(B) complied with the requirements of the Texas Rules of Civil or Criminal Evidence or the Texas Rules of Civil or Appellate Procedure; and

(2) the trial court:

(A) ruled on the request, objection, or motion, either expressly or implicitly; or

(B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

(b) Ruling by Operation of Law. In a civil case, the overruling by operation of law of a motion for new trial or a motion to modify the judgment preserves for appellate review a complaint properly made in the motion, unless taking evidence was necessary to properly present the complaint in the trial court.

(c) Formal Exception and Separate Order Not Required. Neither a formal exception to a trial court ruling or order nor a signed, separate order is required to preserve a complaint for appeal.

Note

In the Interest of ZLT, 124 S.W.3d 163 (Tex. 2003): Under Rule 33.1(a)(2) of the Rules of Appellate Procedure, in order to present a complaint for appellate review, the record must reflect that the trial court (A) ruled on the request, objection, or motion, either expressly or implicitly; or (B) refused to rule and the complaining party objected to the refusal. In this case, the trial court proceeded to trial without ruling expressly on Thompson's

request for a bench warrant. Consistent with Rule 33.1(a)(2)' s language, an implicit ruling may be sufficient to present an issue for appellate review. By proceeding to trial, without issuing the bench warrant, it is clear that the trial court implicitly denied Thompson's request.

BAY AREA HEALTHCARE GROUP, LTD.
v.
MCSHANE
239 S.W.3d 231
(Tex. 2007)

R. Brent Cooper, Diana L. Faust, Stephen J. Rodolf, Leslie C. Weeks, Russell H. McMains, Rick Rogers, A. Scott Johnson, for Petitioners.

Mark R. Mueller, Max E. Freeman II, Vincent L. Marable III, Kathleen P. McCartan, for Respondents.

PER CURIAM.

In this medical malpractice case, Deborah Sue McShane and James Patrick McShane, individually and as next friends of their daughter, Maggie Yvonne McShane, sued Bay Area Healthcare Group, Ltd., Columbia Hospital Corporation of Bay Area, and South Texas Surgicare, Inc. (collectively, "Bay Area") to recover for injuries that Maggie allegedly sustained during her birth at a Bay Area Healthcare Group hospital. After a jury found in the hospital's favor, the trial court signed a take-nothing judgment. The court of appeals reversed, holding that the trial court abused its discretion in admitting evidence that two doctors involved in the incident were originally sued by the plaintiffs, but were nonsuited before trial. 174 S.W.3d 908, 912. Bay Area presents several issues on appeal: (1) whether the court of appeals misapplied the Texas Rules of Evidence regarding the admissibility of information in superseded pleadings; (2) whether the court of appeals incorrectly concluded that the error was harmful; and (3) whether the court of appeals misapplied Texas Rule of Appellate Procedure 44.1 We hold that the trial court did not abuse its discretion in admitting information from the superseded pleadings. Because that issue is dispositive, we do not reach Bay Area's remaining complaints.

* * *

In 1999, Deborah Sue McShane gave birth to Maggie Yvonne McShane. Maggie allegedly sustained injuries during the delivery that left her with brain damage and other physical complications. Deborah and James McShane sued Bay Area and two doctors, Dr. Rothschild and Dr. Eubank, but nonsuited the doctors before trial. The McShanes filed a motion in limine to prevent Bay Area from introducing into evidence the superseded pleadings that listed Rothschild and Eubank as defendants. The trial court denied that motion. At trial, neither party attempted to introduce the superseded pleadings into evidence, but attorneys for both sides discussed Rothschild and Eubank's status during voir dire, and witnesses testified over objection that the McShanes had previously sued Rothschild and Eubank.

After a three-week trial, the jury returned a 10-2 verdict in Bay Area's favor, and the trial court signed a take-nothing judgment. A divided court of appeals reversed and remanded, concluding that the trial court abused its discretion by admitting evidence that the McShanes had, at one point, sued the two physicians. 174 S.W.3d at 912. The dissent would have held that the complained-of evidence was merely cumulative and the McShanes had not shown reversible error. *Id.* at 924 (CASTILLO, J., dissenting).

The first issue is whether statements from the superseded pleadings were admissible at trial. Evidentiary rulings are committed to the trial court's sound discretion. *Interstate Northborough P'ship v. State,* 66 S.W.3d 213, 220 (Tex. 2001); *City of Brownsville v. Alvarado,* 897 S.W.2d 750, 753 (Tex. 1995). Even if a trial court errs by improperly admitting evidence, reversal is warranted only if the error probably caused the rendition of an improper judgment. TEX. R. APP. P. 61.1(A); *Nissan Motor Co. Ltd. v. Armstrong,* 145 S.W.3d 131, 144 (Tex. 2004); *Owens-Corning Fiberglas Corp. v. Malone,* 972 S.W.2d 35, 43 (Tex. 1998). We review the entire record and require the complaining party to demonstrate that the judgment turns on the particular evidence admitted. *Nissan Motor,* 145 S.W.3d at 144.

Statements from pleadings, depending on their content, could potentially be excluded as irrelevant or unfairly prejudicial. *See* TEX.R. EVID. 402, 403. The McShanes, however, cannot make this complaint here because their attorney was the first to allude to the doctors' party status by telling the jury panel that a doctor's conduct

"could have been brought before this Court in this trial" but "both sides have not done that at this trial." *See McInnes v. Yamaha Motor Corp., U.S.A.,* 673 S.W.2d 185, 188 (Tex. 1984) (plaintiff's counsel opened door to plaintiff's alcohol consumption by discussing it during opening statements, thus preventing plaintiffs from complaining on appeal of similar evidence later introduced by the defendant); *see also* W. JEREMY COUNSELLER & CHARLES D. BROWN, HANDBOOK OF TEXAS EVIDENCE § 401.03 (2005) ("A party can make otherwise irrelevant evidence relevant by injecting collateral issues into a lawsuit. This is called 'opening the door.' Once a party opens the door . . . the opposing party may offer rebuttal evidence on the collateral issue." (citations omitted)). Moreover, testimony is not inadmissible on the sole ground that it is "prejudicial" because in our adversarial system, much of a proponent's evidence is legitimately intended to wound the opponent. Here, however, we conclude that the information's probative value is not substantially outweighed by the danger of *unfair* prejudice.

The Rules of Evidence govern admissibility of evidence in court proceedings. TEX. R. EVID. 101(B). Bay Area introduced statements from superseded pleadings indicating that Bay Area sued Rothschild and Eubank. Normally, out-of-court statements are excluded as hearsay. *Id.* 801(d) (hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). But because the McShanes made the statements, they are considered admissions by a party-opponent and are not hearsay. *Id.* 801(e)(2) ("A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's own statement . . . ."). Rule 801(e)(2) is straightforward: subject to other Rules of Evidence that may limit admissibility, *any* statement by a party-opponent is admissible against that party. *Id.*

Thus, the court of appeals erred in concluding that statements from the pleadings would only be admissible if they contained "some statement relevant to a material issue in the case" that is "inconsistent with the position taken by the party against whom it is introduced." 174 S.W.3d at 920. Before the Rules of Evidence were promulgated, our cases required an inconsistency between the superseded pleading and the party's position at trial. *See Hartford Accident and Indem. Co. v. McCardell,* 369 S.W.2d 331, 337-39 (Tex. 1963); *Kirk. v. Head,* 137 Tex. 44, 152 S.W.2d 726, 729 (Tex. 1941). But the Rules of Evidence no longer require inconsistency when it comes to admissibility of superseded pleadings. *See* TEX.R. EVID. 801(E)(2) (statements made by a party and offered against that party are admissible). Cases that hold otherwise are distinguishable because they were decided before the Rules of Evidence became effective in 1983, or they rely on pre-1983 case law without discussing the Rules' effect. *See, e.g., Drake Ins. Co. v. King,* 606 S.W.2d 812, 817 (Tex. 1980); *McCardell,* 369 S.W.2d at 337-39; *Kirk,* 152 S.W.2d at 729; *Loy v. Harter,* 128 S.W.3d 397, 407 (Tex. App.—Texarkana 2004, pet. denied) (relying on *Kirk,* 152 S.W.2d at 729); *Huff v. Harrell,* 941 S.W.2d 230, 239 (Tex. App.—Corpus Christi 1996, writ denied) (same). We hold that there is no requirement that the statement be inconsistent with the party's position at trial, and the court of appeals erred in finding the superseded pleadings inadmissible on that basis.

* * *

For the reasons stated in this opinion, we grant the petition for review and without hearing argument, TEX. R. APP. P. 59. 1, we reverse the court of appeals' judgment and render judgment that the McShanes take nothing. *Id.* 60.2(c).

BUSHELL
v.
DEAN
803 S.W.2d 711
(Tex. 1991)

PER CURIAM.

Syndex's motion for rehearing is granted in part and overruled in part. This court's opinion and judgment of November 21, 1990, are withdrawn, and the following is substituted in their place.

Mary Dean brought this action against Bill Bushell and the Syndex Corporation, her former manager and employer, claiming assault, intentional infliction of emotional distress, and sexual harassment pursuant to TEX. REV. CIV. STAT. ANN. art. 5221k, § 5.01 (1985). Dean obtained a favorable jury determination on each cause and the trial court rendered judgment awarding Dean $195,600 in actual and punitive damages and $123,000 in attorney's fees. The court of appeals reversed that part of the judgment awarding damages and attorney's fees

for the sexual harassment claim and remanded that part of the cause for new trial. 781 S.W.2d 652. Because the court of appeals based this part of its judgment on unpreserved error, we reverse the judgment of the court of appeals and remand the cause to that court for further proceedings.

By three points of error to the court of appeals, Syndex attacked the trial court's admission of testimony by one of Dean's experts, Dr. Lucia Gilbert. Syndex asserted that the testimony was irrelevant, TEX. R. CIV. EVID. 402; that the probative value of the testimony was substantially outweighed by unfair prejudice, TEX. R. CIV. EVID. 403; and that the testimony was inadmissible character evidence. TEX. R. CIV. EVID. 404. The court of appeals sustained all three points of error.

Syndex did not preserve its objection to Dr. Gilbert's testimony at trial. On direct examination, Dr. Gilbert indicated that he was going to give a "working definition" of sexual harassment, including "general things that are true about a person who harasses." Syndex's counsel objected, stating, I am objecting to the testimony of this expert witness as a whole to the extent that it goes to questions of profile of someone who harasses . . . . I think it is likely to create a great deal of prejudice and to confuse the jury and issues that they actually have to decide in this case, and that involves a mixture of law and fact. The trial judge responded, I [have] expressed a concern that at some point I did not think that the questions to the witness had crossed the point yet, but at some point it might cross the line into character evidence prohibitions, at which time if you believe that it does you will need to reurge your—any objection. Some time later, Dr. Gilbert testified about the "profile" of a sexual harasser, but Syndex did not make any further objection.

In order to preserve a complaint for appellate review, a party must present to the trial court a timely request, objection or motion, state the specific grounds therefor, and obtain a ruling. TEX. R. APP. P. 52(a). Therefore, Syndex's points of error relating to this testimony were not before the appellate court for review, and the court of appeals erred in holding that the testimony was inadmissible. *See Lemons v. EMW Mfg. Co*., 747 S.W.2d 372 (Tex. 1988).

The court of appeals did not consider several of Syndex's points of error. These points include arguments which, if sustained, would require a modification of the trial court's judgment or a remand for new trial. Therefore, we remand the cause to the court of appeals for consideration of these points of error. *See McKelvy v. Barber*, 381 S.W.2d 59, 64 (Tex. 1964).

The applications for writ of error brought by Bill Bushell and Syndex Corporation are denied.

Pursuant to TEX. R. APP. P. 170, a majority of the court, without hearing oral argument, reverses the judgment of the court of appeals and remands the cause to that court for further consideration in accordance with this opinion.

Notes

1. In *Campbell v. State of Texas*, 85 S.W.3d 176 (Tex. 2002) the court noted that an objection is sufficient to preserve error for appeal, if it allows the trial judge to make an informed ruling and the other party to remedy the defect, if he can. Campbell's statement, that an unidentified statute prohibited the trial court from compelling Campbell to engage in certain unidentified "things," was inadequate to inform the trial court of the precise objection. Thus, the objection was insufficient to preserve error for appellate review.

2. *Maritime Overseas Corporation v. Ellis.*[1] To preserve a complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial, or when the evidence is offered.

Maritime did not object before trial, or when the evidence was offered, that the scientific evidence offered by Ellis's experts was scientifically unreliable. On appeal, Maritime argues that the federal standard articulated in *Daubert*[2] and the state standard articulated in *Robinson*[3] and *Havner*[4] are the proper standards for reviewing the sufficiency of Ellis's damages evidence. Maritime does not complain about the trial court's admissions of

[1] 971 S.W.2d 402 (Tex. 1998).

[2] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

[3] E.I. duPont de Nemours v. Robinson, 923 S.W.2d 549 (Tex. 1995).

[4] Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997).

any of the scientific evidence from any of Ellis's five experts. Rather, Maritime's position is that, if the court of appeals applied a proper scientific methodology test to Ellis's experts' testimony, the testimony would be legally insufficient to show that the long-term conditions, which Ellis claims he suffers, were caused by delayed neurotoxicity. Thus, Maritime concludes, by way of its complaints about the court of appeals" factual sufficiency review, that there is *no evidence* of *some* of Ellis's actual damages.

Held: Affirmed. Maritime's argument is flawed. *To preserve a complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial or when the evidence is offered*. In *Daubert,* the U. S. Supreme Court considered "the standard for admitting expert scientific testimony in a federal *trial*." *Daubert's* focus is on the trial court's discretion, when faced with an objection to scientific evidence, to admit or exclude such evidence before or during the trial. When the trial court concludes that the disputed scientific evidence is insufficient to go to the jury, the trial court may grant a summary judgment or a directed verdict. However, *Daubert* does not support the proposition that a reviewing court can in effect exclude expert testimony that was not objected to, based on its scientific reliability before trial, or when it was offered at trial, and then render judgment against the offering party.

Similarly, in *Robinson*, the special nature of scientific expert testimony was recognized. There, it was recognized that the trial court's role is as a "gatekeeper," and that "[t]he trial court is responsible for making the preliminary determination of whether the proffered testimony meets the standards for scientific reliability." Like *Daubert*, *Robinson's* focus is on a trial court's discretion in admitting or excluding scientific evidence after a party lodges an objection to the reliability of its opponent's scientific expert testimony before trial, or when the evidence is offered.

Under *Havner*, a party may complain on appeal that scientific evidence is unreliable, and thus, no evidence to support a judgment. *Havner* recognizes that a no evidence complaint may be sustained when the record shows one of the following: (a) a complete absence of a vital fact; (b) the reviewing court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (c) the evidence offered to prove a vital fact is no more that a mere scintilla; or (d) the evidence establishes conclusively the opposite of the vital fact.

Without requiring a timely objection to the reliability of the scientific evidence, the offering party is not given an opportunity to cure any defect that may exist, and will be subject to trial and appeal by ambush. Reviewing courts may not exclude expert scientific evidence after trial to render a judgment against the offering party, because that party relied on the fact that the evidence was admitted. To hold otherwise is unfair. To prevent trial or appeal by ambush, the complaining party must object to the reliability of scientific evidence before trial, or when the evidence is offered. When the reliability of scientific evidence is contested, attempts at persuasion before the jury and reiterated on appeal cannot amount to preservation of error for appeal. To allow otherwise would impermissibly permit a party to strip away the trial court's role as gate keeper in the first instance, when a party wishes to contest the reliability of scientific evidence. It is impossible for a trial court to exercise its gatekeeper function after the evidence has been admitted and the jury discharged. [Emphasis added.]

3. *In the Interest of ZLT*, 124 S.W.3d 163 (Tex. 2003). Under Rule 33.1(a)(2) of the Rules of Appellate Procedure, in order to present a complaint for appellate review, the record must reflect that the trial court (a) ruled on the request, objection, or motion, either expressly or implicitly; or (b) refused to rule and the complaining party objected to the refusal. In this case, the trial court proceeded to trial without ruling expressly on Thompson's request for a bench warrant. Consistent with Rule 33.1(a)(2)' s language, an implicit ruling may be sufficient to present an issue for appellate review. By proceeding to trial without issuing the bench warrant, it is clear that the trial court implicitly denied Thompson's request.

4. In *Low v. Henry*, 221 S.W.3d 609 (Tex. 2007) the court held that a trial court does not abuse its discretion in denying a party's request for a running objection, if the party fails to plainly identify the source of the objectionable testimony, the subject matter of the witness's testimony, and the ways the testimony will be brought before the court.

BRIDGES
v.
RICHARDSON
163 Tex. 292, 354 S.W.2d 366
(1962)

Woodgate, Richards & McElhaney, Dallas, for petitioners.
Strasburger, Price, Kelton, Miller & Martin, Dallas, for respondents.

PER CURIAM.

The opinion of the Court of Civil Appeals is reported in 349 S.W.2d 644.

We approve the judgment entered by the Court of Civil Appeals, but we are not satisfied that the opinion of the court "in all respects has correctly declared the law." Normally that conclusion would call for no other action on our part than the stamping of the application for writ of error, "Refused. No Reversible Error." *See* Rule 483, Texas Rules of Civil Procedure. But some of the general holdings of the Court of Civil Appeals, express and implied, which we regard as erroneous are so far-reaching that we deem it wise to disapprove them specifically lest they be regarded by lawyers, trial judges and judges of the Courts of Civil Appeals as having our tacit approval.

The holdings to which we refer and our views with respect thereto are:

1. That in order to complain successfully on appeal of the erroneous admission of evidence, a party must have filed a proper motion in limine to suppress the evidence or to instruct counsel not to offer it.

The purpose in filing a motion in limine to suppress evidence or to instruct opposing counsel not to offer it is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury with respect to matters which have no proper bearing on the issues in the case or on the rights of the parties to the suit. It is the prejudicial effect of the questions asked or statements made in connection with the offer of the evidence, not the prejudicial effect of the evidence itself, which a motion in limine is intended to reach. A proper objection made at the time evidence is offered is sufficient to preserve right of review of error committed in admitting it, and a motion in limine is not a necessary predicate for complaint on appeal that the admission of the evidence was error and that the error was prejudicial.

2. That in order to complain successfully on appeal of the erroneous admission of evidence, a party must have requested that the jury be retired until the judge had heard and ruled upon the admissibility of the evidence.

A request to retire the jury while evidence is being offered cannot be a necessary predicate to the right to complain on appeal of a trial court's error in admitting evidence over proper objection. The purpose in retiring a jury is to prevent prejudice through development of questionable evidence in the presence of the jury if the evidence is later excluded, or to permit the perfecting of a bill of exceptions after the evidence has been excluded.

3. That an objection that proffered evidence is "immaterial and irrelevant" is not sufficient to preserve right of review of error committed in admitting it.

The rule stated is a correct general rule but there is a limitation on or an exception to the rule: When the evidence is not relevant to any issue in the case and can have no material bearing thereon, a general objection that it is immaterial and irrelevant is sufficient to preserve right of review of error committed in admitting it. 1 MCCORMICK & RAY, TEXAS LAW OF EVIDENCE, 2d ed., § 25, p. 24; 1 WIGMORE, EVIDENCE, 3d ed. § 18, p. 336.

4. That a conclusion that the erroneous admission of evidence was not reasonably calculated to cause and probably did not cause an improper judgment leads to the further conclusion that "no error resulted in (from) the admission of the evidence."

If evidence is erroneously admitted, error exists; if its admission was not reasonably calculated to cause and probably did not cause an improper judgment, it is still error but is not reversible error. The question of whether a particular error is reversible error depends upon whether it was reasonably calculated to cause and probably did cause an improper judgment and presupposes the existence of error. *Aultman v. Dallas Ry. & Term. Co*., 152 Tex. 509, 260 S.W.2d 596.

In pointing out the foregoing errors in the opinion of the Court of Civil Appeals we are not to be understood as approving all other holdings and statements in the opinion.

The application for Writ of Error is "Refused. No Reversible Error." Rule 483, Texas Rules of Civil Procedure.

Notes

1. *Hartford Accident and Indemnity Co. v. McCardell,* 369 S.W.2d 331, 335 (Tex. 1963): "The Court of Civil Appeals held that the trial court erred in not sustaining a portion of respondent's motion in limine which sought to suppress evidence of claims, settlements or payments arising out of three other injuries. We sustain petitioner's point of error complaining of this holding.

We held in *Bridges v. City of Richardson*, Tex., 354 S.W.2d 366 (1962), that a party need not file a motion in limine in order to preserve the right to appellate complaint about erroneous admission of evidence. Proper objection made at the time of the offer of the evidence is sufficient. We stated that the purpose of a motion in limine is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury. It seems that the converse of our holding in the Bridges case is that although the overruling of a motion in limine may be error, it is never reversible error.

If a motion in limine is overruled, a judgment will not be reversed unless the questions or evidence were in fact asked or offered. If they were in fact asked or offered, an objection made at that time is necessary to preserve the right to complain on appeal that such questions asked or such evidence tendered were so prejudicial that the mere asking or tendering should require a reversal. In neither case-(1) questions not asked or evidence not offered, or (2) questions asked or evidence offered-should the error of the trial court in overruling the motion in limine be regarded as harmful or reversible error."

2. *In re Toyoto Motor Sales, U.S.A., Inc.,* 407 S.W. 3d 746, 760 (Tex. 2013): The trial court initially granted the Kings' motion in limine to preclude Officer Coon's deposition testimony regarding King's seat belt usage at the time of the crash. But a protective limine order alone does not preserve error. *See Pool v. Ford Motor Co.,* 715 S.W.2d 629, 637 (Tex. 1986) (noting that "to preserve error as to an improper question asked in contravention of a sustained motion in limine, a timely objection is necessary"). Furthermore, where, as here, the party that requested the limine order *itself* introduces the evidence into the record, and then fails to immediately object, ask for a curative or limiting instruction or, alternatively, move for mistrial, the party waives any subsequent alleged error on the point. *See, e.g., Bay Area Healthcare Grp., Ltd. v. McShane,* 239 S.W.3d 231, 235 (Tex. 2007) ("Error is waived if the complaining party allows the evidence to be introduced without objection."); *State Bar of Tex. v. Evans,* 774 S.W.2d 656, 659 n. 6 (Tex. 1989) ("Failure to request the court to instruct the jury to disregard the inadmissible testimony results in waiver of the alleged error where the instruction would have cured the error."); *see also* TEX.R.APP. P. 33.1(a) (detailing requirements for preservation of appellate complaints); TEX.R. EVID. 103(a) (describing effects of erroneous admission or exclusion of evidentiary rulings); John Henry Wigmore, WIGMORE'S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW § 140 (3d ed. 1942) ("The objector waives an objection when he himself *subsequently introduces* evidence which is directed to prove or disprove the same matter and is liable to the same objection.")".

3. *In the Interest of R.V. Jr. and C.V.*, 977 S.W.2d 777, 780 (Tex. App.—Ft. Worth, 1998, no pet.): "A motion in limine merely precludes reference to certain issues without first obtaining a ruling on the admissibility of those issues outside the presence of the jury. *See Sims v. State*, 816 S.W.2d 502, 504 (Tex. App.—Houston [1st Dist.] 1991, writ denied). A trial court's ruling on a motion in limine does not preserve error. *See Chavis v. Director, State Worker's Compensation Div.*, 924 S.W.2d 439, 446 (Tex. App.—Beaumont 1996, no writ). Thus, on appeal, a party may not predicate his complaint on a motion in limine. *See id; Methodist Hospitals v. Corporate Communicators, Inc.*, 806 S.W.2d 879, 883 (Tex. App.—Dallas 1991, writ denied). In addition, the complaint on appeal must be the same as that presented in the trial court."

4. *Greenberg Traurig of N.Y., P.C. v. Moody*, 161 S.W.3d 56, 91 (Tex. App.—Houston [14th Dist.] 2004, no pet.): "A motion in limine is a procedural device that permits a party to identify, prior to trial, certain evidentiary rulings the trial court may be asked to make. *Weidner v. Sanchez*, 14 S.W.3d 353, 363 (Tex. App.—Houston [14th Dist.] 2000, no pet.). The purpose of the motion in limine is to prevent the other party from asking prejudicial questions or introducing prejudicial evidence in front of the jury without first asking the trial

court's permission. *Hartford Acc. & Indem. Co. v. McCardell*, 369 S.W.2d 331, 335 (Tex. 1963); *Weidner*, 14 S.W.3d at 363. Because a trial court's ruling on a motion in limine preserves nothing for review, a party must object at trial when the testimony is offered to preserve error for appellate review. *Hartford Acc. & Indem. Co*., 369 S.W.2d at 335. However, not all pretrial motions are motions in limine. *See Huckaby v. A.G. Perry & Son, Inc*., 20 S.W.3d 194, 203 (Tex. App.—Texarkana 2000, pet. denied). There is a distinction between a motion in limine and a pretrial ruling on admissibility. *Id*.; *see also Norfolk S. Ry. Co. v. Bailey*, 92 S.W.3d 577, 583 (Tex. App.—Austin 2002, no pet.) (stating that "[a] ruling on a pretrial motion to exclude evidence . . . can be a ruling on the admission of evidence"). The trial court has the authority to make a pretrial ruling on the admissibility of evidence. *Huckaby*, 20 S.W.3d at 203; *Owens-Corning Fiberglas Corp. v. Malone*, 916 S.W.2d 551, 557 (Tex. App.—Houston [1st Dist.] 1996), aff'd, 972 S.W.2d 35 (1998)."

5. The *Bridges* case introduces another important concept of Texas Civil Procedure—the precedential value of orders by the Supreme Court. The refusal of a petition for review by the Texas Supreme Court indicates that the opinion of the court of appeals has the same precedential value as an opinion of the Supreme Court. Since June 24, 1927, such a notation [either writ refused or petition refused] has indicated that the opinion and judgment of the court of appeals are correction. [Prior to 1997, the method of appealing from a court of appeals to the Supreme Court of Texas was by application for writ of error, and hence a writ refused was the designation used to indicate that the opinion and judgment of a court of appeals was correct.] The denial of a petition for review carries no precedential value, and does not indicate approval of the opinion or judgment of the court of appeals. It only means that 4 justices did not agree that the appeal is important to the jurisprudence of the state. TEX. R. APP. P. 56.1.

From February 1, 1946, until December 31, 1987, the Supreme Court's most common notation when refusing to review a case was "writ refused, n.r.e." This designation indicated that the Supreme Court approved of the result (reverse and remand, reverse and render, affirm) of the court of appeals, but did not necessarily approve of the court's reasoning or language. *See* Frank Wilson, "*Hints on Precedent Evaluation*," 24 TEX. BAR J. 1037 (1961).

[Note that the Texas Courts of Civil Appeals became Courts of Appeal on September 1, 1981, and were, at that time, given jurisdiction to review criminal, as well as civil appeals.]

From September 1, 1941 to February 1, 1946, the notation "writ ref'd w.o.m.," was used to indicate approval of the Court of Civil Appeals judgment, but not the opinion.

From March 1, 1939 to September 1, 1941, the designation "Writ Dismissed, Judgment Correct," was used to indicate approval of the Court of Civil Appeals judgment, but not the opinion.

Prior to June 24, 1927, the designation "writ refused" meant only that the decision of a Court of Civil Appeals was correct in the result, even though the Supreme Court might not agree with the reasoning used to reach that result.

From February 1, 1946 until December 31, 1987, the designation "writ dismissed, w.o.j. (want of jurisdiction)" meant that the Supreme Court lacked jurisdiction to review the case or that the application on writ of error failed to properly present the error. The designation, petition dismissed for want of jurisdiction, currently in use, means the same thing.

Prior to February 1, 1946, the designation dismissed, w.o.j. could have one of several meanings. *See Bain Peanut Co. v. Pinson and Guyger*, 119 Tex. 572, 34 S.W.2d 1090, 1091 (1931).

6. In *Hartford Accident & Indem. Co. v. McCardell*,[1] the Court noted that "[i]f a motion in limine is overruled, a judgment will not be reversed unless the questions or evidence were in fact asked or offered. If they were in fact asked or offered, an objection made at that time is necessary to preserve the right to complain on appeal that such questions asked or such evidence tendered were so prejudicial that the mere asking or tendering should require a reversal. In either case—(1) questions not asked or evidence not offered, or (2) questions asked or evidence offered—should the error of the trial court in overruling the motion in limine be regarded as harmful or reversible error."

7. *In the Interest of M. N*., 262 S.W.3d 799 (Tex. 2008): "This Court is obligated to promulgate rules of practice and procedure in civil cases. *See* TEX. CONST. art. V, § 31(b) ("The Supreme Court shall promulgate

[1] 369 S.W.2d 331 (Tex. 1963).

rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts."); TEX. GOV'T CODE § 22.003(d) ("The supreme court from time to time shall promulgate suitable rules, forms, and regulations . . . ."); *id.* § 22.004(a) ("The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant."); *see generally Stillman v. Hirsch,* 128 Tex. 359, 99 S.W.2d 270, 273-74 (1936). Rules promulgated by this Court repeal conflicting laws and parts of laws governing practice and procedure so long as the laws are non-substantive. *See* TEX. CONST. art. V, § 31(c); TEX. GOV'T CODE § 22.004(c) ("So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed."). The rules of civil procedure are intended to promote just, fair, and equitable resolution of issues."

4M LINEN & UNIFORM SUPPLY CO.
v.
W.P. BALLARD & CO.
793 S.W.2d 320
(Tex. App.—Houston [1st Dist.] 1990, writ denied)

Andrew J. Mytelka, John A. Buckley, Jr., Galveston, for appellant.
Robert E. Lapin, Galveston, for appellee.

O'CONNOR, JUSTICE.

This is an appeal from a suit on a sworn account. We grant appellant's motion for rehearing, withdraw our original opinion issued November 16, 1989, and substitute the following opinion.

W.P. Ballard & Co., Inc. (Ballard & Co.) filed suit on a sworn account against 4M Linen & Uniform Supply Co., Inc. (4M Linen). In response, 4M Linen filed a counterclaim alleging breach of implied warranty, breach of contract, and violation of the Deceptive Trade Practices Act (DTPA). Before trial, on stipulated facts, the court entered an instructed verdict for Ballard & Co. for $51,996.11 on its sworn account claim and on 4M Linen's counterclaim. After the evidence, the trial court submitted Ballard & Co.'s issue on attorney's fees, and 4M Linen's defensive issues on misrepresentations and breach of warranties. The jury answered all the issues in favor of Ballard & Co. The trial court disregarded the finding on attorney's fees, and signed a judgment awarding Ballard & Co. $51,996.11, plus interest. Both parties appealed. We modify and affirm the judgment.

This suit arises out of a contract between Ballard & Co. and 4M Linen, under which Ballard & Co. supplied laundry products, produced and recommended by Diamond Shamrock, to 4M Linen. A sales representative for Ballard & Co. visited the 4M Linen plant each week to inventory 4M Linen's supplies. Based on that inventory, Ballard & Co. delivered chemicals. 4M Linen paid Ballard & Co. for the chemicals until July 1985. Beginning in June, 4M Linen started having problems with mildew. 4M Linen refused to pay Ballard & Co. for the supplies that it delivered from July 1985 through October 1985. The main issue at trial was whether Ballard & Co. had a duty to tell 4M Linen that Tex-Stat, one of the chemicals recommended by Diamond Shamrock and supplied by Ballard & Co., was not a mildewcide.

* * *

In its second point of error, 4M Linen contends the trial court erred in excluding part of the testimony of its expert witness, Chad Keith, which it preserved in an informal bill of exceptions. In our earlier opinion, we overruled the point because 4M Linen did not make an informal bill before the court submitted the charge to the jury. On rehearing, 4M Linen contends the trial court erred when it refused to permit it to make an informal bill of exceptions before the jury retired to consider the charge. We agree and reconsider our holding on appellant's second point of error.

When 4M Linen tried to question Keith about a statement in a letter Diamond Shamrock sent to 4M Linen, Ballard & Co. objected. After the court sustained the objection, 4M Linen deferred further questions of that witness on that subject until a later bill of exceptions. 4M Linen did not outline what it planned to prove through Keith's testimony.

At the charge conference, 4M Linen reminded the court that it wanted to make its bill of exceptions before the court submitted the charge to the jury. The court refused, but said it would permit 4M Linen to make a bill during the jury's deliberations. The court noted that if it decided it was error to exclude the evidence, it could grant 4M Linen a new trial.

After the jury retired to consider the charge, 4M Linen made its bill of exceptions by eliciting testimony from Keith before the court and opposing counsel, for the court reporter to include in the statement of facts. To begin the bill, 4M Linen asked that the two questions 4M Linen asked Keith during the trial be read to him from the court reporter's notes. In response to those questions, Keith testified that a product identified as a mildewcide should kill and prevent mildew, and that the letter did not supply a lot of information about the product. In response to questions that were not asked during the trial, Keith testified that a linen supply dealer in the Gulf Coast area would have reason to know that a linen company required a mildewcide, and that a linen supply company in this area would have run across the mildew problem many times.

There are two kinds of bills of exception: the informal bill and the formal bill. Compare TEX. R. APP. P. 52(b) to 52(c). An informal bill of exception preserves error if: (1) an offer of proof is made before the court, the court reporter, and the opposing counsel, outside the presence of the jury; (2) it is preserved as part of the statement of facts; (3) and it is made before the charge is read to the jury. TEX. R. APP. P. 52(b).

Rule 52(b) permits a party to make an informal bill of exception before the court reads the charge to the jury. *McKinney v. National Union Fire Ins. Co*., 747 S.W.2d 907, 910 (Tex. App.—Fort Worth 1988), aff'd, 772 S.W.2d 72 (Tex. 1989). 4M Linen made its informal bill of exception after the charge was read to the jury.

Rule 52(b) states: When the court excludes evidence, the party offering same shall as soon as practicable, but before the court's charge is read to the jury, be allowed to make, in the absence of the jury, an offer of proof in the form of a concise statement. (Emphasis added.)

The rule is mandatory. The trial court must permit a party to make an informal bill before the jury is charged. *Dorn v. Cartwright*, 392 S.W.2d 181, 185-86 (Tex. Civ. App.—Dallas 1965, writ ref'd). Here, 4M Linen specifically reminded the court that it wanted to make an informal bill before the court read the charge to the jury. The court refused, and granted 4M Linen permission to make the bill after the charge was read.

Under rule 52, it was error to refuse 4M Linen permission to make an informal bill. Our task now is to determine whether the error was reasonably calculated to cause and probably did cause harm. TEX. R. APP. P. 81(b)(1); *see also Houston Lighting & Power Co. v. Russo Properties, Inc*., 710 S.W.2d 711, 717 (Tex. App.—Houston [1st Dist.] 1986, no writ).

To appeal the trial court's exclusion of evidence, the complaining party must present the evidence that was excluded to the appellate court in a bill of exception. *Huckaby v. Henderson*, 635 S.W.2d 129, 131 (Tex. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.). Because the appellate courts cannot evaluate excluded evidence unless it is preserved in a bill, it is reversible error for the trial court to refuse to permit a party to make a bill of exceptions. Here, however, although the trial court incorrectly prevented 4M Linen from making an informal bill before the charge was read to the jury, 4M Linen made a late informal bill, preserving that testimony.

On the late informal bill, Keith testified that a linen supply dealer in the Gulf Coast area would have reason to know that a linen company required a mildewcide, and that a linen supply company in this area would have run across the mildew problem many times. We hold this testimony was not relevant. There was no evidence in this case that Ballard & Co. had a duty to 4M Linen to do anything but supply the chemicals 4M Linen ordered. The laundry products were recommended to 4M Linen by Diamond Shamrock, not by Ballard & Co.

We overrule 4M Linen's second point of error.

* * *

We modify the judgment to reinstate the jury's award of attorney's fees for Ballard & Co., and, as modified, affirm the judgment.

ON SECOND MOTION FOR REHEARING

On appellant's first motion for rehearing, we held the trial court erred in refusing to allow 4M Linen to make an informal bill of exception, but we found the error was harmless. On second motion for rehearing, appellant claims the error was harmful. 4M Linen refers us to *In re Marriage of Goodwin*, 562 S.W.2d 532 (Tex. Civ. App.—Texarkana 1978, no writ); *Ledisco Fin. Serv., Inc. v. Viracola*, 533 S.W.2d 951 (Tex. Civ. App.—

Texarkana 1976, no writ); and *Dorn v. Cartwright*, 392 S.W.2d 181 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

In all three cases cited by 4M Linen, the party who attempted to make a bill to preserve excluded testimony was prevented from preserving a record of the excluded testimony. *Dorn* directly supports our holding. In *Dorn*, the Dallas Court of Appeals held it was not reversible error to refuse a bill of exception when the information appellant attempted to offer was immaterial to the outcome of the suit. 392 S.W.2d at 186. We said the same thing in this case: the evidence offered in the late bill was not relevant to the issue of defendant's liability.

We do not think Ledisco assists 4M Linen's cause either. In *Ledisco*, the trial court refused to permit appellant to make a bill of exception to preserve cross-examination testimony of a witness. 533 S.W.2d at 958. On appeal, the court held the objections, the questions, and the statements of counsel were sufficient to apprise both courts of the nature of the evidence appellant expected to produce. 533 S.W.2d at 959. Here, as in *Ledisco*, we can look at the record and find the testimony the trial court excluded.

Neither should Goodwin offer 4M Linen any comfort. In *Goodwin*, the trial court announced it would render judgment without taking any evidence. 562 S.W.2d at 533. Before the judgment was signed, appellant filed a motion to make a bill of exception to preserve evidence. *Id.* Without ruling on the bill, the court rendered a judgment reciting that it heard evidence and the parties waived a record. *Id.* On appeal, the Texarkana Court of Appeals reversed because appellant did not have the opportunity to present evidence. That is not the case here. The record before us contains the testimony 4M Linen attempted to offer at trial.

4M Linen complains about the timing of the bill: it was not permitted to make a bill before the trial court charged the jury, as required in TEX. R. APP. P. 52(b). 4M Linen, however, was permitted to present the excluded evidence to the trial court after the charge was read to the jury. That evidence was brought forward for our consideration in the statement of facts.

After finding the trial court erred, we reviewed the evidence in the late bill and held the evidence was not relevant. 4M Linen now insists it has a right to a reversal and retrial because the trial court did not permit it to make a timely bill of exception.

If the purpose of the procedure for a bill of exception is to afford a party the opportunity to preserve excluded testimony for appellate review, the late informal bill did so. We find the late informal bill was the equivalent of a formal bill of exception, which can be filed as late as 60 days after the judgment is signed or, if a motion for new trial was filed, as here, 90 days after the judgment was signed.

We overrule 4M Linen's second motion for rehearing.

Notes

1. Rule 52(b) of the former Texas Rules of Appellate Procedure provided the procedural requirements for preservation of error by an informal bill of exception. The new Rules of Appellate Procedure eliminated mention of the informal bill of exception on grounds that it was unnecessary, as it was already provided for in Rule 103(a)(2) ["Offer of Proof"] of the Texas Rules of Civil Evidence. It is clear, therefore, that all of the procedures for the preservation of error by means of an informal bill of exception as outlined in the former case law have survived the enactment of the new appellate rules.

2. In *Raw Hide Oil & Gas v. Maxus Exploration*,[1] the Court stated succinctly: "To preserve error concerning the exclusion of evidence by offer of proof, the appellate record must show that (1) the substance of the evidence sought to be admitted was made known to the court, and (2) the court either ruled adversely to its admission or, after timely request, affirmatively refused to rule.[2] An objection to the trial court's refusal to rule is suf-

[1] 766 S.W.2d 264, 274 (Tex. App—Amarillo 1988, writ denied).

[2] *See* Disposal Supply Co. v. Perryman Bros. Trash Service, Inc., 664 S.W.2d 756, 762 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.); O'Shea v. Coronado Transmission Co., 656 S.W.2d 557, 564 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.); TEX. R. CIV. EVID. 103(a)(2) & (b); TEX. R. APP. P. 52(a).

ficient to preserve error for appellate complaint.[3] An offer of proof or objection to the refusal to rule on the offer must be made prior to the court's charge being read to the jury."[4]

3. a. *Presenting a formal bill of exception*. TEX. R. APP. P. 33.2 requires:

"The objection to the court's ruling or action, and the ruling complained of, must be stated with sufficient specificity to make the trial court aware of the complaint." TEX. R. APP. P. 33.2(a).

"If the evidence needed to explain the bill is in the record, the complainant may refer to it and attach a transcription of the record certified by the court reporter." TEX. R. APP. P. 33.2(b).

b. *The procedure for preserving error by use of a bill of exception.* The requirements are:

The bill be presented first to the trial court. TEX. R. APP. P. 33.2(c)(1).

If the parties agree to the bill, the judge must sign it. TEX. R. APP. P. 33.2(2).

If the parties do not agree to the bill, the judge must:

Sign the bill if the judge finds it to be correct. TEX. R. APP. P. 33.2(a).

Suggest correction to the complaining party if the judge believes they are necessary to make it accurately reflect the proceedings in the trial court. If the party agrees to the correction, then the judge signs and files the bill. TEX. R. APP. P. 33.2(b).

If the party will not make corrections suggested by the judge, then the judge returns the bill with the judge's refusal noted on it. The judge then prepares and files a bill that accurately reflects the proceedings in the court. TEX. R. APP. P. 33.2(c).

If the party is dissatisfied with the judge's bill, the party may file the bill rejected by the judge, supported by the affidavits of three people who observed the matter to which the bill of exceptions is addressed, who attest to the correctness of the bill. The opposing party may contest this 'by-standers' bill, and the appellate court will determine the truth of the exception. TEX. R. APP. P. 33.2(c)(3).

c. *Conflict with the record.* "If a formal bill *of* exceptions conflicts with the reporter's record, the bill controls." TEX. R. APP. P. 33.2(d).

d. *Time.* A formal bill of exceptions must be filed no later than 30 days after the filing party's notice of appeal is filed. TEX. R. APP. P. 33.2(e). Unlike the prior practice, the deadline does not vary depending on timely filing of a post verdict motion. The time for filing the formal bill may be extended if, "within 15 days after the deadline for filing the bill, the party files in the appellate court a motion complying with Rule 10.5(b)." TEX. R. APP. P. 33.2(e)(3).

e. *Inclusion in the record:* "When filed, a formal bill of exceptions should be included in the appellate record."

4. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006): The purpose of a bill of exceptions is to allow a party to make a record for appellate review of matters that do not otherwise appear in the record, such as evidence that was excluded.

5. When it is impossible to preserve error by informal bill, and the trial court will not approve a formal bill of exception, the parties only recourse is to what has been called the "bystanders bill of exceptions." While, under the 1997 appellate rule changes, these may no longer be technically "bystanders bills," since the term "bystander" was eliminated from Rule 33.2, it is expected that the "old" terminology will continue to be used to describe this procedure.

6. A bill of exceptions that is not approved by either the trial judge or opposing counsel, and that is not a bystanders' bill, presents nothing for appellate review. *See Goodpasture v. Coastal Industrial Water Authority*.[5]

7. Under *old* TEX. R. APP. P. Rule 52(c), a bystanders bill of exceptions required the affidavits of "three respectable bystanders." The *new* TEX. R. APP. P. Rule 33.2 dispenses with the language "three respectable by-

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[3] TEX. R. APP. P. 52(a).

[4] TEX. R. APP. P. 52(a) & (b).

[5] 90 S.W.2d 883 (Tex. App.—Houston [1st Dist] 1973, no writ).

standers" and merely states "three people." Does this reflect a change in actual practice? Will the affidavits of attorneys still not suffice? Must the affiant still be one who has no concern in the outcome of the case?

8. In *Smith v. United Gas Pipe Line Co*.,[6] the Court held that bystander's bills are defective if supported only by affidavits of the attorneys participating in the case. The court in *Harris County Flood Control Dist. v. Cohen*,[7] held that the term "bystander" "relates to one who has no concern in the outcome of the case on trial."[8] Both *Smith v. United Gas Pipe Line Co*. and *Harris County Flood Control Dist. v. Cohen* dealt with TEX. R. APP. P. 52(c)(8)'s predecessor, TEX. R. CIV. P. 372(j). However, since the language of the two rules is virtually identical on the bystanders bill there is no reason to believe that these two cases are not still the law.

9. Before the 1997 amendments, formal bills of exception had to be filed 60 days after the judgment was signed if there was not post-judgment motion, and 90 days after the judgment was signed, if there was a post-verdict motion. Former TEX. R. APP. P. 52(c)(11). Under the current TEX. R. APP. P. 33.2(1), the formal bill of exception is to be filed 30 days after the filing party perfects appeal. TEX. R. APP. P. 33.2(e)(3) provides for extending that deadline, upon proper motion, filed within 15 days after the deadline. *See* Richard Orsinger, *The New Texas Rules of Appellate Procedure*, STATE BAR OF TEXAS INSTITUTE ON PRACTICING UNDER THE NEW TEXAS RULES OF APPELLATE PROCEDURE, 1997, at page B-9.

5. *Failure to Properly Preserve Error Results in a Waiver*

In order to preserve the right to complain on appeal about the admission of testimony one must have objected at the time the testimony was offered; the objection must have been specific enough to enable the trial court to understand the precise nature of the objection; and the party needed to have obtained a ruling on the objection. Thus, any complaint is waived if the objection is made after the admission of the testimony. Furthermore, the preceding section established that in order to preserve the right to complain on appeal about the exclusion of evidence one must have properly made an offer of proof. The failure to properly preserve error results in a waiver. Absent fundamental error, an appellate court is not authorized to reverse a trial court judgment in the absence of properly assigned error. *See Gulf Consolidated International Inc. v. Murphy*.[9]

6. *The Preserved Error must be Harmful*

Texas Rules of Appellate Procedure 44.1. Reversible Error in Civil Cases.

(a) Standard for Reversible Error. No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of:

(1) probably caused the rendition of an improper judgment; or

(2) probably prevented the appellant from properly presenting the case to the court of appeals.

(b) Error Affecting Only Part of Case. If the error affects part of, but not all, the matter in controversy and that part is separable without unfairness to the parties, the judgment must be reversed and a new trial ordered only as to the part affected by the error. The court may not order a separate trial solely on unliquidated damages if liability is contested.

Texas Rules of Appellate Procedure 61.1. Standard for Reversible Error.

No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the Supreme Court concludes that the error complained of:

(a) probably caused the rendition of an improper judgment; or

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6 149 Tex. 69, 228 S.W.2d 139 (1950).

7 282 S.W.2d 917 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.).

8 *Id*. at 919.

9 568 S.W.2d 565 (Tex. 1983).

(b) probably prevented the petitioner from properly presenting the case to the appellate courts.

The reversible error rules under the former Texas Rules of Appellate procedure included language that error must be one that "was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case" in order to result in the reversal of the case. *See* Rules 81(b)(1) and 184(b) of the former Texas Rules of Appellate Procedure. The Supreme Court did not make any substantive changes in the new Rules of Appellate Procedure by dropping the phrase "reasonable calculated to cause" and leaving only "probably caused the rendition of an improper judgment."

RELIANCE STEEL & ALUMINUM CO.
v.
SEVCIK
267 S.W.3d 867
(Tex. 2008)

Chad Michael Forbes, Thomas C. Wright, Wright Brown & Close, LLP, Houston TX, Russell H. McMains, Law Offices of Russell H. McMains, Corpus Christi, TX, for Reliance Steel & Aluminum Co. and Samuel Alvarado.

David W. Holman, The Holman Law Firm, P.C., Houston TX, Macklin Keith Johnson, Hallettsville, TX, for Michael Sevcik and Cathy Loth.

JUSTICE BRISTER delivered the opinion of the Court.

Neither a plaintiff's poverty nor a defendant's wealth can help a jury decide whose negligence caused an accident. Even though punitive damages were not at issue in this collision case, the plaintiffs tendered evidence that the defendant's annual revenues were $1.9 billion. Because this evidence was inadmissible, and the record reflects that it probably caused an improper verdict, we reverse and remand for a new trial.

I. Background

Michael Sevcik and Cathy Loth were injured in a highway accident west of Houston when they were hit from behind by a tractor trailer owned by Reliance Steel & Aluminum Co. and driven by Sam Alvarado. Sevcik and Loth filed suit in Waller County, and at trial they offered the following testimony from the deposition of Reliance's corporate representative:

Q: How big a company is Reliance?

A: I believe last year's annual sales approximated $1.9 billion.

Q: About how many employees do they have? Do you know?

A: Just guessing, I think we're close to 3,000 I think, nationwide.

Q: And are the headquarters for Reliance in California? Is that what I-

A: Yes, sir. They're in Los Angeles, California.

Outside the presence of the jury, counsel for the defendants objected to the offer:

> Defense counsel: Judge, on this and the next couple pages, [plaintiffs' counsel] is talking to the witness-this is the corporate rep for Reliance Steel & Aluminum. He is talking to him about how big a company it is, how many people do you employ, you're all over the country. And I think that is irrelevant and it is also inflammatory to the jury because that plants a seed in their mind that this is a huge company with huge dollars and they can afford a huge verdict.
>
> The Court: [to plaintiff's counsel] You are not seeking punitives?
>
> Plaintiffs' counsel: No, sir.
>
> The Court: Therefore it becomes less relevant.
>
> Plaintiffs' counsel: Right. The thing is, we are definitely entitled to show they are not a mom and pop operation, and we are going to talk-It says they are a California corporation. Then he says they are a division. I'm entitled to bring all of that in.

> Defense counsel: I don't think it is relevant at all. We have the truck driver here, the man who drove the truck who was involved in the accident. Why do we need all this information about the company? That only plants the seed in their mind-
>
> Plaintiffs' counsel: He is asking Mike Sevcik if he bought a new truck. I think everything
>
> Defense counsel: This, I think, only tends to make the jurors start thinking about how much money is behind Mr. Alvarado, which isn't something they need to reach their verdict
>
> Plaintiffs' counsel: Your Honor, some of what we get into in his deposition and then in the testimony of the driver is-part of it is how much-how many hours they have these people riding on the road, 15- and 16-hour days.
>
> The Court: I'm going to overrule the objection

At the end of the four-day trial, the jury awarded the plaintiffs more than $3 million. The defendants appealed, challenging several of the damage awards and the admission of evidence of its $1.9 billion in revenues. After transfer for docket equalization, the court of appeals reduced one damage item by $6,000, affirmed the rest, and held admission of the gross sales evidence was harmless. The defendants then petitioned this Court for review.

II. Evidence of Wealth

Even when a party's wealth has no logical relevance to a case, the prejudicial effect of such evidence often creates strong temptations to use it. As we have stated before, "highlighting the relative wealth of a defendant has a very real potential for prejudicing the jury's determination of other disputed issues in a tort case." To avoid such situations, Texas courts "historically have been extremely cautious in admitting evidence of a party's wealth." Even when wealth can be used on the issue of punitive damages, we take the unusual step of bifurcating a trial so that it cannot be used for any other purpose.

* * * We hold the trial court abused its discretion in allowing admission of Reliance's gross annual sales.

III. Harmless Error?

Erroneous admission of evidence is harmless unless the error probably (though not necessarily) caused rendition of an improper judgment. We have recognized "the impossibility of prescribing a specific test" for harmless-error review, as the standard "is more a matter of judgment than precise measurement." A reviewing court must evaluate the whole case from voir dire to closing argument, considering the "state of the evidence, the strength and weakness of the case, and the verdict."

A. The Effect

The starting point for harmless-error review is the judgment. Obviously, a party that wins a favorable judgment has usually not suffered harm from any errors during trial. In this case, several parts of the verdict on which the judgment was based show that something beyond the relevant evidence was guiding the jury's deliberations.

During trial, plaintiffs' counsel introduced a chart showing that Loth's past medical expenses totaled $33,985.23, and he asked for precisely that amount in closing argument. Nevertheless the jury awarded $40,000. As the court of appeals held, there was no evidence for this amount as "the record is devoid of any testimony or affidavits" supporting it.

The same is true of the jury's verdict that Loth's future medical expenses were $250,000. Reliance concedes there was some evidence that she would incur $37,000 for future medications, and there was also some evidence she could incur as much as $90,000 for a six-month rehabilitation program in Houston. But there was no evidence she would incur anything more. To the contrary, her expert testified that "when we see a patient like Cathy, who is several years past their brain injury, all of the healing and recovery that is going to take place has taken place." While there was evidence that Loth would suffer permanent brain damage (for which the jury awarded $1.75 million in future impairment and mental anguish), there was no evidence that further medical treatment could do anything about it. The jury's finding on future medical expenses was simply twice as much as the evidence would support.

The jury's finding of $750,000 for future earning capacity was also surprisingly large given the evidence. Loth's tax returns leading up to the accident showed a total income of $7,562 for all five years combined; at that rate, the future award represented almost 500 years. Similarly, the jury's award for her earning capacity lost in

the three years before trial was $15,000; at that rate the future award represented 150 years. It is of course true that Loth was entitled to damages for future earning capacity, not just future earnings. But the jury's findings still must be based on "such facts as are available" and "on something more than mere conjecture." We need not decide whether this particular award was erroneous; we conclude only that in combination with the other awards it shows that the jury's findings probably were the result of something other than the admissible evidence in the case.

The plaintiffs argue that the verdict was not inflated because the jury awarded them only half of what they requested in closing argument. But whether a jury awarded less than the plaintiffs requested is not the same question as whether they awarded the plaintiffs more than the evidence supported. The primary damage requests rejected by the jury related to future pain and mental anguish and future physical impairment, matters as to which the lack of specific proof available makes it very hard to say whether the jury's award was either "too low" or "too high." But in those parts of the verdict where such evidence was available, the jurors' findings generally exceeded it by a substantial amount.

B. The Evidence

In reviewing whether erroneous admission of evidence was harmful, we have also looked to the role the evidence played in the context of the trial. Thus, if erroneously admitted or excluded evidence was crucial to a key issue, the error was likely harmful. By contrast, admission or exclusion is likely harmless if the evidence was cumulative, or if the rest of the evidence was so one-sided that the error likely made no difference.

As already noted, a defendant's wealth has "a very real potential" for prejudice. The Legislature has deemed it so potentially prejudicial that it must be separated from the jury's deliberations regarding liability and actual damages. That concern is especially relevant here because the more impressive the wealth, the more likely it is to make an impression. Had Reliance's gross sales been $190,000 or perhaps even $1.9 million, the plaintiffs might be right that it would have been unlikely to turn jurors' heads. But sales of $1.9 billion are surely enough to catch any juror's attention. If evidence of gross sales is ever likely to be harmful, the evidence offered here surely must qualify.

Further, that evidence must be considered in the context of this case. Liability here was largely uncontested; as plaintiffs' counsel told the jury in his opening statement, "You're going to hear the driver tell you that it was his fault." Instead, he correctly noted that the key issue was damages: "The biggest issue, the biggest issue, in my opinion, that you're going to have at the end of the week or later in the week when you deliberate is going to involve how much should be paid." In that respect, most of the damages here were difficult to gauge, stemming as they did from soft-tissue injuries and impairments whose effects were hard to measure objectively. Given that the trial focused primarily on setting damage amounts as to which jurors have few clear guideposts, it is probable that proof of Reliance's huge revenues played a crucial role on the key issue at trial.

C. The Emphasis

In harmless-error review, we have also looked to efforts by counsel to emphasize the erroneous evidence. In this case, the court of appeals held that evidence of Reliance's wealth was harmless because it was mentioned only once. If that were the only rule, there would be little use for the rules of evidence as everyone could ignore them once with impunity.

Moreover, this argument conflicts with the plaintiffs' additional argument that evidence of Reliance's wealth was "buried in the larger context of testimony that concerned the size of the Reliance Steel operation, the number of employees, the number of divisions, and so forth." While plaintiffs' counsel mentioned the gross revenues figures only once, he mentioned Reliance's large size from voir dire to closing argument. * * *

D. The Effort

In harmless-error review, we have also considered whether admission of improper evidence was calculated or inadvertent. As this Court has stated before, a party's insistence on introducing inadmissible testimony "indicates how important he thought it was to his case." In the related area of improper evidence of insurance, Texas courts often look to whether the injection of insurance was inadvertent or not. When attorneys insist that prejudicial evidence be admitted, that can be some evidence that at least they thought it would have some likely effect.

Here, of course, admission was no accident. Proof of Reliance's income was not offered in the heat of the moment, but as a deposition excerpt prepared in advance and offered outside the presence of the jury, giving the plaintiffs time to overcome the defendants' objection and the trial court's reservations.

Intentionally leading the trial court into error does not always make the error harmful. But when issues like race, religion, gender, and wealth are injected into a case unnecessarily, there is the potential for damage not just to a litigant but to the civil justice system. Courts must provide equal justice to all, regardless of their circumstances, and efforts to suggest that jurors should do otherwise cannot be lightly disregarded.

* * *

We recognize that evidence of a party's wealth is sometimes admissible, and sometimes unavoidable; a large company may be so well known that jurors need no evidence about its ability to pay a judgment. But we also recognize "the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." We reiterate today that gratuitous evidence about either party's financial circumstances is not what trials should be about.

Accordingly, we reverse the judgment of the court of appeals, and remand the case for a new trial.

Notes

1. *Texas Department of Transportation v. Able*, 35 S.W.3d 608 (Tex. 2000): The inclusion and exclusion of evidence is committed to the trial court's sound discretion. Even if the excluded evidence was admissible, and that the trial court erred in not admitting it, the complainant still must show that the error was harmful. To put it another way, a successful challenge to evidentiary rulings usually requires the complaining party to show that the judgment turns on the particular evidence excluded or admitted. In determining if the excluded evidence probably resulted in the rendition of an improper judgment, a court must review the entire record. Courts ordinarily will not reverse a judgment for erroneous rulings on admissibility of evidence when the evidence in question is cumulative and not controlling on a material issue dispositive to the case.

2. *Nissan Motor Company Ltd. v. Armstrong*, 145 S.W.3d 131(Tex. 2004): The erroneously admitted evidence probably made the judgment improper. The evidence of other incidents was far more than cumulative: it was emphasized at every opportunity; it was used to prove a defect when the actual evidence had been destroyed; and it was calculated to show Nissan was malicious rather than mistaken in suggesting the accident was Armstrong's fault. It also violated the long-standing rule in Texas that proof of unintended acceleration is not proof of a defect. Under that rule, proof of many instances of unintended acceleration cannot prove a defect either; a lot of no evidence is still no evidence. For all these reasons, the evidence improperly admitted in this case probably resulted in an improper judgment.

3. In *Service Corp. International v. Guerra*, 348 S.W.3d 221 (Tex. 2011) the court stated: "An error in admitting evidence requires reversal if it probably caused the rendition of an improper judgment. TEX.R.APP. P. 61.1; *Nissan Motor Co. v. Armstrong,* 145 S.W.3d 131, 144 (Tex. 2004). In determining whether the error was harmful we evaluate the entire case from voir dire to closing argument, considering the evidence, strengths and weaknesses of the case, and the verdict. *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867,871 (Tex. 2008). We also consider whether counsel emphasized the erroneous evidence and whether the admission of the evidence was calculated or inadvertent. *Id*. at 874; *Nissan Motor Co.,* 145 S.W.3d at 144 ("[W]hether erroneous admission is harmful is more a matter of judgment than precise measurement.")."

McCRAW
v.
MARIS
828 S.W.2d 756
(Tex. 1992)

Joe D. Gregory, Grapevine, Gary W. Sibley, Dallas, for petitioner.
David S. Stubblefield, Dallas, for respondent.

HIGHTOWER, JUSTICE.

The issue before this court is whether certain evidence was admissible in an action to determine whether the surviving spouse or the surviving children of Donna Ann Maris are entitled to the proceeds of her life insurance policy. After excluding certain evidence, the trial court determined that the surviving spouse was entitled to the life insurance proceeds. The court of appeals affirmed. ___ S.W.2d ___. We reverse the judgment of the court of appeals and remand the cause to the trial court for further proceedings on all issues.

Donna Ann Maris was an employee of the United States Department of Labor and had obtained life insurance under a Federal Employee's Group Life Insurance policy. Under federal statute, the life insurance proceeds are paid to the surviving spouse of the deceased employee unless the employee signed a written beneficiary designation form and filed it with the employing office. At her death in 1987, Donna Ann Maris was survived by her estranged husband, Jimmie L. Maris ("Maris"), and two children from a prior marriage, Tracy L. McCraw and Kristina N. McCraw ("McCraws"). The McCraws, the surviving children, filed suit for declaratory judgment asserting that they were entitled to the life insurance proceeds because Donna Ann Maris signed and filed the appropriate form with the employing office designating them as beneficiaries and the beneficiary designation form was subsequently lost. Maris, the surviving spouse, counterclaimed asserting that he was entitled to the life insurance proceeds. During trial, the court admitted testimony that two co-employees witnessed Donna Ann Maris' signature on some forms and that it was Donna Ann Maris' habit to complete handwritten duplicate forms prior to typing and filing the original form. However, the court excluded, among other things, a "duplicate beneficiary designation form" in the handwriting of Donna Ann Maris. The trial court determined that the surviving spouse was entitled to the life insurance proceeds. The court of appeals held that the trial court did not err in excluding the "duplicate beneficiary designation form."

* * *

Since we have determined that exclusion of the "duplicate beneficiary designation form" was erroneous, we must determine whether the exclusion constituted reversible error. For the exclusion of evidence to constitute reversible error, the complaining party must show (1) that the trial court committed error and (2) that the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. *Gee v. Liberty Mut. Ins. Co*., 765 S.W.2d 394, 396 (Tex. 1989); TEX. R. APP. P. 81(b)(1). Since we have determined that the trial court committed error when it excluded the "duplicate beneficiary designation form," we must determine whether the error was reasonably calculated to cause and probably did cause rendition of an improper judgment. This court has recognized "the impossibility of prescribing a specific test for determining whether any error . . . [including] the improper admission or exclusion of evidence . . . 'was reasonably calculated to cause and probably did cause the rendition of an improper judgment.' " *Lorusso v. Members Mut. Ins. Co*., 603 S.W.2d 818, 821 (Tex. 1980). "Such a determination necessarily is a judgment call entrusted to the sound discretion and good senses of the reviewing court." *Id.* However, it is not necessary for the complaining party to prove that "but for" the exclusion of evidence, a different judgment would necessarily have resulted. The complaining party is only required to show that the exclusion of evidence probably resulted in the rendition of an improper judgment. *Howard v. Faberge, Inc*., 679 S.W.2d 644, 648 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). *See King v. Skelly*, 452 S.W.2d 691, 696 (Tex. 1970). In making this determination, the court must review the entire record. *Gee v. Liberty Mut. Ins. Co*., 765 S.W.2d at 396; *Lorusso v. Members Mut. Ins. Co*., 603 S.W.2d at 821.

Under the McCraws' theory of the case, it is necessary that they prove (either directly or by circumstantial evidence) that Donna Ann Maris signed and filed the appropriate form with the employing office designating them as beneficiaries. Evidence of the duplicate beneficiary designation form in the handwriting of Donna Ann Maris combined with admitted evidence that it was Donna Ann Maris' habit to complete handwritten duplicate forms prior to typing and filing the original constitutes crucial circumstantial evidence concerning proof that

Donna Ann Maris signed and filed the appropriate beneficiary designation form. Under these circumstances, the McCraws have demonstrated that exclusion of the "duplicate beneficiary designation form" was reasonably calculated to cause and probably did cause rendition of an improper judgment.

We reverse the judgment of the court of appeals and remand the cause to the trial court for further proceedings on all issues.

GONZALEZ, JUSTICE, dissenting [opinion omitted].

CORNYN, JUSTICE, dissenting.

* * *

Even if the majority is impelled to the conclusion that exclusion of this evidence was error, Petitioners have not met their burden to show any error was reasonably calculated to cause and probably did cause rendition of an improper judgment. TEX. R. APP. P. 81(b)(1). The excluded evidence of the duplicate beneficiary designation form is cumulative of other evidence admitted on this point and, thus, even erroneous exclusion is harmless error. *Rose v. O'Keefe*, 39 S.W.2d 877, 879 (Tex. Comm'n App. 1931, opinion adopted); *Thrailkill v. Montgomery Ward & Co*., 670 S.W.2d 382, 387 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Certainly, the inferences which petitioners seek to have drawn from the excluded evidence are cumulative of the inferences that they sought to have drawn from the evidence admitted and considered by the trial court. Moreover, how the majority can hold that in this non-jury trial—where the trier of fact actually heard all the evidence, both admitted and excluded, albeit on a bill of exception—that admission would have probably resulted in a different judgment is beyond me. I would affirm the judgment of the court of appeals.

Notes

1. As shown above a successful challenge to properly preserved evidentiary rulings usually requires the complaining party to show that the judgment turns on the particular evidence excluded or admitted. That determination is made by the appellate court by reviewing the entire record. *See City of Brownsville v. Alvarado*.[1]

2. Please note as you read the remainder of this book that often times the courts do not address the harmless error rule. Many times that failure is an oversight on the part of the court. However, in a few special instances, it is because a different standard—other than the harmless error rule—is being used to determine whether the error will lead to a reversal of the case being appealed. Please be alert to this possibility.

MENTIS
v.
BARNARD
870 S.W.2d 14
(1994)

Gary W. Sibley and Robert T. Baskett, Dallas, for petitioner.

Charles M. Bradshaw, Dallas, for respondent.

JUSTICE DOGGETT delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE GONZALEZ, JUSTICE HIGHTOWER, JUSTICE HECHT, JUSTICE GAMMAGE, and JUSTICE ENOCH join.

We consider trial court exclusion of the testimony of an expert witness on the grounds that he had not been designated "as soon as practical" under Rule 166b(6)(b) of the Texas Rules of Civil Procedure.

While crossing a street, Thelma Mentis was struck and killed by an automobile driven by John Barnard. Although suit was filed shortly after her death, the attorney who tried the case was not retained until about three months before trial. In response to discovery, that attorney designated an accident reconstruction expert as a testifying witness thirty-two days before trial. After jury selection and opening statements had been completed,

[1] 897 S.W.2d 750 (Tex. 1995).

Barnard's attorney was successful in having barred any testimony from this expert because he had not been identified "as soon as practical." Based upon the remaining evidence it was permitted to consider, the jury found that the negligence of both Mentis and Barnard constituted a proximate cause of the accident, with 85 percent of the negligence attributable to the former, and 15 percent to the latter. The trial court entered a take-nothing judgment. The court of appeals affirmed. 853 S.W.2d 119. We reverse.

* * *

A trial court's exclusion of an expert who has not been properly designated can be overturned only upon a finding of abuse of discretion. *Morrow*, 714 S.W.2d at 298. Barnard's only objection was that "the designation of the [Mentis's] expert one month before trial, after a lawsuit ha [d] been filed almost two years, is not as soon as practical." Though later arguing that he lacked the expert's deposition, Barnard's counsel admitted that he had never sought it. A litigant who seeks to deny an opponent the right to use a witness has the burden of producing evidence to show that the designation was not "as soon as practical." *See Williams*, 734 S.W.2d at 193. Simply advising the court as to how long the case had been pending did not by itself establish that designation at an earlier date would have been practical. The trial court abused its discretion in granting Barnard's motion.

Our analysis is not complete, however, without determining whether the error constituted reversible error. TEX. R. APP. P. 81(b). An error in the exclusion of evidence requires reversal if it is both controlling on a material issue and not cumulative. *See Gee v. Liberty Mut. Fire Ins. Co*., 765 S.W.2d 394, 396 (Tex. 1989). Here the excluded witness was an accident reconstruction expert who planned to address a central issue of the comparative negligence of the pedestrian and driver. The expert's noncumulative calculations and opinions, based on examination and measurement of the scene, that Barnard was driving between 6 and 20 miles above the 40 mile per hour speed limit on a dark, rainy morning were controlling, though not conclusive, as to whether excessive speed caused the death.

Given the harmful effect of the trial court's abuse of discretion in excluding expert testimony, we reverse the court of appeals and remand for a new trial.

CORNYN, JUSTICE, joined by SPECTOR, J., in Part I of this opinion, dissenting.

* * *

The court further errs when it concludes that exclusion of Murray's testimony was harmful error. After the trial court excluded Murray's testimony, Murray testified on bill of exception that Barnard's car was travelling between forty-five and sixty miles per hour at the time of the accident.

Three eyewitnesses testified to the speed of Barnard's vehicle before the accident, the main subject of contention at trial. Barnard testified that he was travelling about thirty-five miles per hour at the time of the collision; one disinterested witness, Carolyn Hubacek, testified that Barnard was travelling at a speed of twenty to twenty-five miles per hour. A second disinterested eyewitness, Joy Soby, testified that Barnard was travelling "approximately forty miles-an-hour" at the time his car hit Mentis.

Given this eyewitness testimony, Murray's testimony was probably cumulative. And the court offers no reason to assume that the testimony of what Learned Hand once referred to as a "hired champion" will carry the day with the jury. *See* Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 53 (1901). Even if exclusion of Murray's testimony was error, however, the court's opinion does not show that such error probably caused the jury to reach an improper verdict when the jury assigned eighty-five percent of the fault for the accident to Mentis, and fifteen percent of the fault to Barnard. I would conclude that the trial court did not err by rendering judgment on the verdict. *See* TEX. R. APP. P. 81(b)(1).

For the foregoing reasons, I respectfully dissent.

Note

GTE Southwest v. Bruce.[1] In this action for intentional infliction of emotional distress, three GTE employees, Bruce, Davis, and Poelstra, sued GTE for intentional infliction of emotional distress premised on the constant humiliating and abusive behavior of their supervisor, Shields. The employees obtained opinion evidence from three different expert witnesses that Shields's conduct was extreme and outrageous. GTE objected to this testimony at trial, and complained of the trial court's admission of the testimony of two of the witnesses on appeal. The court of appeals held that the trial court's admission of expert testimony on the issue of whether Shields's conduct was extreme and outrageous was error. The Supreme Court affirmed, holding that the error was harmless.

> Last, GTE complains about the trial court's admission of expert testimony that Shields's conduct was extreme and outrageous. The employees obtained opinion evidence from three different expert witnesses that Shields's conduct was extreme and outrageous. GTE objected to this testimony at trial, and complained of the trial court's admission of the testimony of two of the witnesses on appeal.
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> The court of appeals held that the trial court's admission of expert testimony on the issue of whether Shields's conduct was extreme and outrageous was error. 956 S.W.2d at 641. We agree. "[A]n expert may state an opinion on a mixed question of law and fact as long as the opinion is confined to the relevant issues and is based on proper legal concepts." *Birchfield v. Texarkana Mem'l Hosp*., 747 S.W.2d 361, 365 (Tex. 1987). But to be admissible, expert testimony must generally involve "scientific, technical, or other specialized knowledge" as to which a witness could be qualified as an expert by "knowledge, skill, experience, training, or education," and it must assist the trier of fact. TEX. R. EVID. 702; *Warner v. Hurt*, 834 S.W.2d 404, 406 (Tex. App.—Houston [14th Dist.] 1992, no writ) ("Admissibility of the expert's opinion hinges on whether or not the expert has special knowledge concerning [the] matter on which his opinion is sought."). Except in highly unusual circumstances, expert testimony concerning extreme and outrageous conduct would not meet this standard. Where, as here, the issue involves only general knowledge and experience rather than expertise, it is within the province of the jury to decide, and admission of expert testimony on the issue is error.
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> Nevertheless, the court of appeals correctly concluded that the error was harmless. The court applied our reasoning in *Louder v. De Leon*, 754 S.W.2d 148, 149 (Tex. 1988), that "[j]urors realize that they are the final triers to decide the issues. They may accept or reject an expert's view. Thus there is little danger in an expert's answer to an all-embracing question on a mixed question of law and fact."
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> Texas Rule of Appellate Procedure 44.1(a)(1) mandates that no judgment may be reversed on appeal on the ground that the trial court made an error of law unless the error complained of probably caused the rendition of an improper judgment. TEX. R. APP. P. 44.1(a)(1). GTE argues that "it is inconceivable that expert opinion on the ultimate issue could be harmless." To demonstrate that it was harmed by the expert's testimony, GTE relies solely on the jury's answers to the charge, pointing out that the jury did not find malice, upon which there was no expert opinion, but did find intentional infliction of emotional distress, upon which there was expert testimony. This questionable logic is insufficient to demonstrate that admitting the testimony harmed GTE. *See Templeton v. Dreiss*, 961 S.W.2d 645, 672 (Tex. App.—San Antonio 1998, pet. denied). Absent the expert testimony, there was an abundance of evidence from the employees and other witnesses establishing the continuing assaults and humiliation by Shields. At most, the expert testimony GTE finds objectionable was merely cumulative of evidence demonstrating that Shields's conduct amounts to intentional infliction of emotion distress. *See Southwestern Elec. Power Co. v. Burlington N. R.R*., 966 S.W.2d 467, 474 (Tex. 1998). This non-expert testimony is sufficient to support the jury's verdict.
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> [JUSTICE OWEN concurred on grounds unrelated to this point.]

[1] 998 S.W.2d 605 (Tex. 1999).