

HARNESSING THE STANDARDS OF REVIEW

Presented & Prepared By

HON. JAMES A. BAKER

Hughes & Luce, L.L.P.
1717 Main Street, Suite 2800
Dallas, Texas 75201
Telephone: 214-939-5403
Facsimile: 214-939-5849
bakerj1@hughesluce.com

State Bar Of Texas
**18TH ANNUAL ADVANCED CIVIL
APPELLATE PRACTICE COURSE**
September 9-10, 2004
Austin

CHAPTER 10

Justice James A. Baker
Hughes & Luce, L.L.P.
1717 Main Street, Suite 2800
Dallas, TX 75201

214.939.5403 – TELEPHONE bakerj1@hughesluce.com – **E-mail** 214.939.6100 - **FAX**

Date and place of birth: March 30, 1931, Evansville, Indiana

Admitted to: Texas Bar - April 24, 1958

Federal Court, Northern District of Texas - August 4, 1958

5th Circuit Court of Appeals - November 24, 1961

11th Circuit Court of Appeals - October 1, 1981

United States Supreme Court - November 17, 1980

Judicial Service: Fifth District Court of Appeals, Dallas, TX. December 19, 1986 to October 3, 1995; Supreme Court of Texas, Austin, Texas. October 3, 1995 to August 31, 2002

Undergraduate education: Southern Methodist University (BBA 1953)

Law school and graduate education: Southern Methodist University School of Law (LLB 1958)

Employment history: Goldberg, Alexander and Baker (1958-1972)

Weber, Baker and Allums (1972-1979)

Law office of James A. Baker (1979-1986)

Professional activities: Member, State Bar of Texas; Member, Dallas Bar Association; Member, Travis County Bar Association; Member, American Bar Association; Fellow, Texas Bar Foundation; Fellow Dallas Bar Foundation; Fellow, Travis County Bar Foundation; Member, College of the State Bar of Texas; Former Chair, Bankruptcy & Commercial Law Section, Dallas Bar Association (1974); Member, Texas Real Estate Broker/Lawyer Committee (1974-1995); Member, ABA Task Force on Appellate Delay Reduction (1991-92); Member, William Mac Taylor, Jr. Inn of Court (1993 –1995, 2003 –); Board of Directors, Dallas Bar Association (1995); Robert W. Calvert American Inn of Court (1998 – 2002); President, Robert W. Calvert American Inn of Court (2000-2001); American Law Institute (1998-); Supreme Court Liaison to Home Equity Loan Foreclosure Rules Task Force (1997); Supreme Court Liaison to Reverse Mortgage Loan Foreclosure Rules Task Force (1999); Supreme Court Liaison to Chapter 33-Parental Notification Rules Task Force (1999); Supreme Court Liaison to Texas Association for Court Administration (1996-2002); Adjunct Professor, University of Texas School of Law (1999-2002); Member, Supreme Court Gender Bias Reform Implementation Committee (2002-); Member, Board of Trustees, Texas Supreme Court Historical Society (2003 –); President-Elect, Texas Supreme Court Historical Society; Member, The Honorary Serjeant's Inn of the Dallas – Ft. Worth Inns of Court; Member, Board of Trustees, The Texas Center For Legal Ethics And Professionalism.

Publications : Contributing author, Texas Collection Manual; State Bar of Texas Pub., (1980)

Presentations : Lecturer, State Bar of Texas Professional Development Program; Guest Lecturer, SMU School of Law; Guest Lecturer, Dallas Bar Association; Presenter, University of Texas Law School, State and Federal Appeals Course.

Honors : American Board of Trial Advocates, Dallas Chapter - Outstanding Civil Jurist (1993); Board of Advocates, S.M.U. School of Law - Award of Honorary Membership (1994). Highland Park High School, Distinguished Alumni Award (1998); S.M.U. Dedman School of Law, Distinguished Alumni Award for Judicial Service, 2000-2001; American Board of Trial Advocates, Texas Chapter - Judge of the Year (2001).

TABLE OF CONTENTS

I. SCOPE OF THE ARTICLE 1

II. LEGAL INSUFFICIENCY OF THE EVIDENCE..... 1

 A. Definition..... 1

 B. No Evidence..... 1

 C. As a Matter of Law..... 1

III. FACTUAL INSUFFICIENCY..... 1

 A. Definition..... 1

 B. Insufficient Evidence 1

 C. Great Weight and Preponderance..... 2

 D. Applying The Factual Insufficiency Standard 2

IV. ABUSE OF DISCRETION..... 2

 A. Definition..... 2

 B. Factual Determinations 2

 C. Applying The Law..... 3

 D. When Discretion Is Not Abused..... 3

V. *DE NOVO*..... 3

 A. Definition..... 3

 B. When *De Novo* Review Applies..... 3

VI. SPECIAL CIRCUMSTANCES 4

 A. Summary Judgment 4

 B. Admitting Or Excluding Evidence 4

 C. Multiple Categories Of Damages 4

 D. Pleas To The Jurisdiction 5

LIST OF AUTHORITIES

CASES

Akin v. Dahl, 661 S.W.2d 917, 921 (Tex. 1983) 2

Ames v. Ames, 776 S.W.2d 154, 158 (Tex. 1989) 2

Austin & N.W.R.R. v. Cluck, 97 Tex. 172, 77 S.W. 403, 405 (1903) 5

Barshop v. Medina County Underground Water Conservation Dist., 925 S.W.2d 618, 629 (Tex. 1996) 3

Bishop v. Bishop, 74 S.W.3d 877, 880 (Tex.App.—San Antonio 2002, no pet.) 4

Bland Indep. Sch. Dist. v. Blue, 34 S.W. 3d 547, 555 (Tex. 2000) 5

Bradford v. Vento, 48 S.W.3d 749, 754 (Tex. 2001) 1

Carr v. Norstok Bldg. Sys., Inc., 767 S.W.2d 936, 943 (Tex.App.—Beaumont 1989, no writ) 2

City of Brownsville v. Alvarado, 897 S.W.2d 750, 754 (Tex. 1995) 4

Davis v. Huey, 571 S.W.2d 859, 862 (Tex. 1978) 3

Dikeman v. Snell, 490 S.W.2d 183, 187 (Tex. 1973) 3

Dow Chem. Co. v. Francis, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam) 1, 2

Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex. 1985) 2, 3

Eanes Indep. Sch. Dist. v. Logue, 712 S.W.2d 741, 742 (Tex. 1986) (orig. proceeding) 3

Ellis County State Bank v. Keever, 888 S.W.2d 790, 794 (Tex. 1994) 2

Flores v. Fourth Court of Appeals, 777 S.W.2d 38, 41-42 (Tex. 1989) 2

Gates v. Pitts, 291 S.W. 948, 949 (Tex.Civ.App.—Amarillo 1927, no writ) 5

Gentry v. Bowser, 21 S.W. 569, 570 (Tex.Civ.App.—1893, no writ) 5

Golden Eagle Archery, Inc. v. Jackson, 116 S.W.3d 757 (Tex. 2003) 4, 5

Herbert v. Herbert, 754 S.W.2d 141, 144 (Tex. 1988) 2

Hooks v. Fourth Court of Appeals, 808 S.W.2d 56, 60 (Tex. 1991) 3

Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 906 (Tex. 2000) 4

In re R.J.H., 79 S.W.3d 1, 6 (Tex. 2002) 3, 4

Joachim v. Chambers, 815 S.W.2d 234, 240 (Tex. 1991) 3

Johnson v. Fourth Court of Appeals, 700 S.W.2d 916 (Tex. 1985) 2

Jones v. Strayhorn, 159 Tex. 421, 321 S.W.2d 290, 295 (1959) 3

Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983) 1

Lenz v. Lenz, 79 S.W.3d 10, 19 (Tex. 2002) 1

Marathon Corp. v. Pitzner, 106 S.W.3d 724, 727 (Tex. 2003) (per curiam) 1

Maritime Overseas Corp. v. Ellis, 971 S.W.2d 402, 409 (Tex. 1998) 1, 2

Marsh v. Frost Nat’l Bank, 129 S.W.3d 174, 177 (Tex.App.—Corpus Christi 2004, pet. filed) 3

Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 928 (Tex. 1998) 3

Mayhew, 964 S.W.2d at 928 3

Montanaro v. Montanaro, 946 S.W.2d 428, 431 (Tex.App.—Corpus Christi 1997, no pet.) 4

Morrow v. H.E.B., Inc., 714 S.W.2d 297 (Tex. 1986) 3

National Med. Enters. v. Godbey, 924 S.W.2d 123, 135 (Tex. 1996) (Baker J. dissenting) 3

NCNB Texas Nat’l. Bank v. Coker, 765 S.W.2d 398, 400 (Tex. 1989) (orig. proceeding) 3

Nixon vs. Mr. Property Mgmt. Co., 690 S.W.2d 546 548-49 (Tex. 1985) 4

Ortiz v. Jones, 917 S.W.2d 770, 772 (Tex. 1996)..... 2

Owens Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 43 (Tex. 1998) 4

Pegasus Energy Group v. Cheyenne Petroleum Co., 3 S.W.3d 112, 121 (Tex.App.—Corpus Christi 1999, pet. denied) 3

Plas-Tex, Inc. v. U.S. Steel Corp., 772 S.W.2d 442, 445 (Tex. 1989) 2

Poole v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986)2, 5

Rawhide Oil & Gas, Inc. v. Maxus Exploration Co., 766 S.W.2d 264, 265 (Tex.App.—Amarillo 1988, writ denied) . 1

Shenandoah Assocs. v. J & K Props., Inc., 741 S.W.2d 470, 494 (Tex.App.—Dallas 1987, writ denied) 4

Smith v. Reliance Standard Life Ins. Co., No. Civ. A. 01F17179MJW, 2004 WL 1401187, at *8 (D. Colo. June 16, 2004) 3

Southwestern Bell Tel. Co. v. Johnson, 389 S.W.2d 645, 648 (Tex. 1965) 3

State v. Heal, 917 S.W.2d 6, 9 (Tex. 1996) 3

Tenet Health Ltd. v. Zamora, 13 S.W.3d 464, 468 (Tex.App.—Corpus Christi 2000, pet. dismiss’d w.o.j.) 3

Texas Ass’n of Bus. v. Texas Air Control Bd., 852 S.W. 2d 440, 444-45 (Tex. 1993)3, 5

Texas Dep’t of Parks & Wildlife v. Miranda, 133 S.W.3d 217 (Tex. 2004)..... 6

Texas Nat’l Bank v. Karnes, 717 S.W.2d 901, 903 (Tex. 1986) 2

Texas Natural Res. Conservation Comm’n v. IT-Davy, 74 S.W.3d 849, 855 (Tex. 2002) 5

Torres v. Caterpillar, Inc., 928 S.W.2d 233, 239 (Tex.App.—San Antonio 1996, writ denied) 4

Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992).....2, 3

Wal-Mart Stores, Inc. v. Canchola, 121 S.W.3d 735, 739 (Tex. 2003) 1

Williams Distrib. Co. v. Franklin, 898 S.W.2d 816, 817 (Tex. 1995) (per curiam) 4

Wolfson v. BIC Corp., 95 S.W.3d 527, 530 (Tex.App.—Houston [1st Dist.] 2002, pet denied) 4

STATUTES

TEX. CONST. art. V § 6..... 2

TEX. GOVT. CODE § 22.225 (a);..... 2

OTHER AUTHORITIES

BLACK’S LAW DICTIONARY, 8TH ED. (Bryan A. Garner, Editor-in-chief) (2004) 3

When is the Evidence Really Sufficient in the Supreme Court of Texas?, W. Wendell Hall 1

RULES

TEX. R. APP. P. 44.1..... 4

TEX. R. CIV. P. 166(a)(c)..... 4

HARNESSING THE STANDARDS OF REVIEW

I. SCOPE OF THE ARTICLE

This article defines each of the major Civil Appellate Standards of Review. The article also will attempt to explain how these standards apply.

II. LEGAL INSUFFICIENCY OF THE EVIDENCE

A. Definition.

In reviewing a “no evidence” point of error, the reviewing court must review the evidence in a light that tends to support the finding of the disputed fact and disregard all evidence and inferences to the contrary. *Bradford v. Vento*, 48 S.W.3d 749, 754 (Tex. 2001); *See also Lenz v. Lenz*, 79 S.W.3d 10, 19 (Tex. 2002). This standard is frequently referred to as the “traditional statement of the standard of review”. *See When is the Evidence Really Sufficient in the Supreme Court of Texas?*, by W. Wendell Hall, presented by Mr. Hall and Charles R. “Skip” Watson, Jr. at the State Bar of Texas 17th Annual Advanced Civil Appellate Practice Course, September 11-12, 2003¹. Simply put, legal sufficiency points of error assert a complete lack of evidence on an issue. Such claims are designated as “no evidence” points or “matter of law” points, depending on whether the party asserting the claim had the burden of proof. *See Rawhide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 265 (Tex.App.—Amarillo 1988, writ denied).

The reviewing court must sustain a challenge to the legal insufficiency of the evidence if one of four elements is present in the case: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla of evidence; or (4) the evidence established conclusively the opposite of a vital fact. *See Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003) (per curiam); *Maritime Overseas Corp v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998).

B. No Evidence.

If the party asserting legal insufficiency of an adverse finding did not have the burden of proof, that party must show there is no evidence to support the adverse finding. *Rawhide Oil & Gas, Inc.*, 766 S.W.2d at 276. But if more than a scintilla of evidence supports the challenged finding, the no evidence challenge must fail. *Wal-Mart Stores, Inc. v. Canchola*, 121 S.W.3d 735, 739 (Tex. 2003). What is

a scintilla of the evidence? The definition is couched in what a “scintilla” is not. Evidence is no more than a scintilla when that evidence, when offered to prove a vital fact is so weak, that it does no more than create a mere surmise or suspicion of its existence. *See Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). Stated another way, if reasonable minds cannot differ from the conclusion that the evidence offered to prove a vital fact lacks probative force, then that evidence is the legal equivalent of no evidence. *See Kindred*, 650 S.W.2d at 63.

C. As a Matter of Law.

If a party is attacking the legal sufficiency of an adverse finding of which that party had the burden of proof, he must demonstrate on appeal that the evidence conclusively established all vital facts in support of that issue. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam).

When the claim is that there is no evidence to support the adverse fact-finding as a matter of law, the reviewing court must follow a two-part test. First the court must review the record for evidence that supports the fact-finding and ignore all evidence to the contrary. *See Dow Chem. Co.*, 46 S.W.3d at 241. If the reviewing court concludes there is no evidence to support the finding, that court then must again examine the entire record to decide if the contrary proposition is established as a matter of law. *Dow Chem. Co.*, 46 S.W.2d at 241. If the reviewing court can conclude that the evidence conclusively establishes the contrary proposition, that court must sustain the point of error. *Dow Chem. Co.*, 46 S.W.3d at 241.

III. FACTUAL INSUFFICIENCY.

A. Definition.

A claim that the evidence is factually insufficient to support a fact-finding concedes there is conflicting evidence on an issue. *See Rawhide Oil & Gas, Inc.*, 766 S.W.2d at 275. But the claim maintains that the evidence against the jury’s finding was so great, that it is an erroneous finding. Factual insufficiency points may be raised in two ways, depending on whether the complaining party had the burden of proof on the issue or not. *Rawhide Oil & Gas, Inc.*, 766 S.W.2d at 275.

The factual insufficiency point may be designated as a “insufficient evidence” point or a “great weight and preponderance of evidence” point.

B. Insufficient Evidence.

If a party attacks the factual sufficiency of an adverse finding on an issue that the other party has the burden of proof on, the complainant must demonstrate that there is insufficient evidence to support the adverse finding. *Rawhide Oil & Gas, Inc.*, 766 S.W.2d at 275–76. First, the court of appeals must consider, weigh, and examine all of the evidence in the record

¹ I have shamelessly and without contrition borrowed heavily from this paper.

which both supports and which is contrary to the jury's determination. *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989). Following such a review, the reviewing court can set aside the verdict only if it is so contrary to the overwhelming weight of the evidence that the verdict is clearly wrong and unjust. *Maritime Overseas Corp.*, 971 S.W.2d at 407; *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996).

C. Great Weight and Preponderance.

If the party attacks a finding on an issue which the party had the burden of proof, that party must demonstrate that the adverse finding is against the great weight and preponderance of the evidence. *Dow Chem. Co.*, 46 S.W.3d at 241. In such a case, the reviewing court must first examine the evidence to determine if there is some evidence to support the finding; if such is the case, the court of appeals must then determine, based on the entire record, whether that finding is so contrary to the overwhelming weight and preponderance of the evidence that it is clearly wrong and manifestly unjust, or whether the great preponderance of the evidence supports its non-existence. *Dow Chem. Co.*, 46 S.W.2d at 241; *Poole v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986).

D. Applying The Factual Insufficiency Standard.

First, the court of appeals is not a fact-finder. In conducting a factual sufficiency review, that court may not pass upon the witnesses' credibility or substitute its judgment for the jury's, even if the evidence would support a different result. *Poole*, 715 S.W.2d at 634. Second, if the court of appeals determines that the evidence supports the jury verdict, it is not required to detail all the evidence supporting the judgment when it affirms the trial court judgment. *Maritime Overseas Corp.*, 971 S.W.2d at 407; *see also Ellis County State Bank v. Keever*, 888 S.W.2d 790, 794 (Tex. 1994). But the Court should at least mention some evidence that it believes is sufficient to support the jury's verdict. The court should not be permitted to conclude its discussion by stating it has reviewed the evidence and found it sufficient to support the jury's finding. *See Poole*, 715 S.W.2d at 635.

On the other hand, when reversing a trial court's judgment for factual insufficiency, the court of appeals must detail all the evidence relevant to the issue and clearly state why the jury's finding is factually insufficient or so against the great weight and preponderance of the evidence that it is manifestly unjust. *Maritime Overseas Corp.*, 971 S.W.2d at 407; *Ellis County State Bank*, 888 S.W.2d at 794; *Poole*, 715 S.W.2d at 635. The court of appeals must explain how the contrary evidence greatly outweighs the evidence supporting the verdict. *Maritime Overseas Corp.*, 971 S.W.2d at 407; *Ellis County State Bank*,

888 S.W.2d at 794 (Tex. 1994); *Poole*, 715 S.W.2d at 635.

Remember that only the courts of appeal may review factual sufficiency challenges. *See* TEX. CONST. art. V § 6; TEX. GOVT. CODE § 22.225 (a); *Maritime Overseas Corp.*, 971 S.W.2d at 407; *Akin v. Dahl*, 661 S.W.2d 917, 921 (Tex. 1983). If the court of appeals concludes that the great weight challenge is appropriate, and whether that challenge is to a finding or a non-finding, the court of appeals may only reverse and remand the case for a new trial. *See Ames v. Ames*, 776 S.W.2d 154, 158 (Tex. 1989). Additionally, if the court of appeals concludes that a jury's failure to find a fact is against the great weight and preponderance of the evidence, the court of appeals may not reverse simply because it concludes that the evidence preponderates toward an affirmative answer. *See Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988). The court of appeals may reverse only where the great weight of the evidence supports an affirmative answer. *Herbert*, 754 S.W.2d at 144.

Thus, while the court of appeals may "unfind" certain facts, it cannot affirmatively find facts that would become the basis of a rendition of the judgment for the complaining party. *See Texas Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1986). The court of appeals may only reverse and remand for a new trial under such circumstances. *See Carr v. Norstok Bldg. Sys., Inc.*, 767 S.W.2d 936, 943 (Tex.App.—Beaumont 1989, no writ).

IV. ABUSE OF DISCRETION.

A. Definition.

A trial court's abuse of discretion is defined as an action the court takes without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). Stated another way, a trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). Additionally, a trial court can abuse its discretion when it misapplies the law to the established facts of the case. *Walker*, 827 S.W.2d at 840; *Downer*, 701 S.W.2d at 242.

B. Factual Determinations.

With respect to resolving factual issues or matters committed to the trial court's discretion, the reviewing court may not substitute its judgment for that of the trial court. *Walker*, 827 S.W.2d at 839; *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 41-42 (Tex. 1989). The complaining party must establish that the trial court could reasonably have reached only one decision. *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916 (Tex. 1985). Even if the reviewing court would have decided the issue differently, it cannot

disturb the trial court’s decision unless it is shown to be arbitrary and unreasonable. *Walker*, 827 S.W.2d at 840; *Johnson*, 700 S.W.2d at 918.

C. Applying The Law.

On the other hand, reviewing a trial court’s determination of the legal principles controlling its ruling is much less deferential. A trial court has no “discretion” in determining what the law is or applying the law to the facts. *Walker*, 827 S.W.2d at 840. The trial court’s clear failure to analyze or apply the law correctly will constitute an abuse of discretion. *Walker*, 827 S.W.2d at 840; *Joachim v. Chambers*, 815 S.W.2d 234, 240 (Tex. 1991); *NCNB Texas Nat’l. Bank v. Coker*, 765 S.W.2d 398, 400 (Tex. 1989) (orig. proceeding); *Eanes Indep. Sch. Dist. v. Logue*, 712 S.W.2d 741, 742 (Tex. 1986) (orig. proceeding).

D. When Discretion Is Not Abused

First, the test for abuse of discretion is not whether, in the reviewing court’s opinion, the facts present an appropriate case for the trial court’s action. *See Downer*, 701 S.W.2d at 241. The mere fact that the trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Downer*, 701 S.W.2d at 242; *Southwestern Bell Tel. Co. v. Johnson*, 389 S.W.2d 645, 648 (Tex. 1965); *Jones v. Strayhorn*, 159 Tex. 421, 321 S.W.2d 290, 295 (1959).

First, to determine whether there is an abuse of discretion, the reviewing court must review the entire record. *Morrow v. H.E.B., Inc.*, 714 S.W.2d 297 (Tex. 1986). The party challenging the trial court’s decision must establish that the facts and law permit the trial court to make but one decision. *National Med. Enters. v. Godbey*, 924 S.W.2d 123, 135 (Tex. 1996) (Baker J. dissenting). How the trial court resolves factual issues is entitled to deference. *Walker*, 827 S.W.2d at 839-40.

An abuse of discretion does not exist if the trial court heard conflicting evidence and some evidence reasonably supports the trial court’s decision. *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978).

An abuse of discretion does not exist if some evidence in the record shows the trial court followed guiding rules and principles. *See Morrow*, 714 S.W.2d at 298.

An appellate court may not deal with disputed factual matters in a mandamus proceeding. *Hooks v. Fourth Court of Appeals*, 808 S.W.2d 56, 60 (Tex. 1991); *Dikeman v. Snell*, 490 S.W.2d 183, 187 (Tex. 1973).

V. DE NOVO

A. Definition.

The Latin phrase *de novo* is an adjective that means anew. BLACK’S LAW DICTIONARY, 8TH ED. (Bryan A. Garner, Editor-in-chief) (2004). In the context of a judicial review, *de novo* review means a court’s non-deferential review of a trial court’s decision. *See* BLACK’S LAW DICTIONARY, 8TH ED. (Bryan A. Garner, Editor-in-chief) (2004). Stated another way, one court suggested that *de novo* review means that the reviewing court must take a fresh look at the record and determine for itself the correct application. *See Smith v. Reliance Standard Life Ins. Co.*, No. Civ. A. 01F17179MJW, 2004 WL 1401187, at *8 (D. Colo. June 16, 2004); however, appellate review of the trial court’s findings of historical fact is deferential, not *de novo*, because the trial court is in a better position to weigh credibility and to make such determinations. *In re R.J.H.*, 79 S.W.3d 1, 6 (Tex. 2002). On the other hand, review of how the trial court applied the law to the facts is *de novo* because the trial court is in no better position to decide legal issues than the appellate court. *In re R.J.H.*, 79 S.W. 3d at 6.

B. When De Novo Review Applies.

When an issue turns on a pure question of law, the reviewing court applies a *de novo* standard of review. *State v. Heal*, 917 S.W.2d 6, 9 (Tex. 1996); *Tenet Health Ltd. v. Zamora*, 13 S.W.3d 464, 468 (Tex.App.—Corpus Christi 2000, pet. dismiss’d w.o.j.). Under these circumstances the appellate court is not obliged to give any particular deference to the trial court’s legal conclusions. *Tenet Health Ltd.*, 13 S.W.3d 468-69.

Examples of when the *de novo* standard of review applies are:

- Pure questions of law. *Marsh v. Frost Nat’l Bank*, 129 S.W.3d 174, 177 (Tex.App.—Corpus Christi 2004, pet. filed);
- Constitutionality of a Statute. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996);
- Issues of a trial court’s jurisdiction. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex. 1998);
- Whether a claim is ripe. *Texas Ass’n of Bus. v. Texas Air Control Bd.*, 852 S.W. 2d 440, 444-45 (Tex. 1993);
- Standing, *see Mayhew*, 964 S.W.2d at 928;
- The trial court’s legal conclusions. *Pegasus Energy Group v. Cheyenne Petroleum Co.*, 3 S.W.3d 112, 121 (Tex.App.—Corpus Christi 1999, pet. denied);

- Interpreting a contract to determine whether it is enforceable or binding. *Montanaro v. Montanaro*, 946 S.W.2d 428, 431 (Tex.App.—Corpus Christi 1997, no pet.);
- Generally, the trial court’s application of the law to the underlying facts. *In re RJH*, 79 S.W.3d at 6;
- Agreed judgments, and whether such a judgment is ambiguous is a question of law. *Bishop v. Bishop*, 74 S.W.3d 877, 880 (Tex.App.—San Antonio 2002, no pet.).

VI. SPECIAL CIRCUMSTANCES

A. Summary Judgment.

The purpose of a summary judgment is to eliminate patently unmeritorious claims or untenable defenses; it is not intended to deprive litigants of their right to a full hearing on the merits of any real issue of fact. TEX. R. CIV. P. 166(a)(c); *Wolfson v. BIC Corp.*, 95 S.W.3d 527, 530 (Tex.App.—Houston [1st Dist.] 2002, pet denied). Its purpose is not to provide trial by affidavit or by deposition, and the trial court should not resolve such a motion by weighing the relative strength of conflicting facts and inferences. *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex.App.—San Antonio 1996, writ denied).

The standard of review of the motion for summary judgment has been clearly established. It is:

- (1) The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law;
- (2) in deciding whether there is a disputed material fact issue precluding summary judgment, the trial court as well as the reviewing court must take evidence favorable to the non-movant as true; and
- (3) the reviewing court must indulge every reasonable inference in the non-movant’s favor and resolve any doubts in the non-movant’s favor. *See Nixon vs. Mr. Property Mgmt. Co.*, 690 S.W.2d 546 548-49 (Tex. 1985); *Torres*, 928 S.W.2d at 239.

B. Admitting Or Excluding Evidence.

Rule 103 of the Texas Rule of Evidence provides that error may not be predicated upon a trial court ruling which either admits or excludes evidence unless a parties’ substantial right is effected and (1) an objection is made and (2) if the evidence was excluded, an offer of proof is made. *See Texas Rules of Evidence*, Rule 103(a)(1), (2). The reviewing court applies the abuse of discretion standard to a trial court’s evidentiary rulings. *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 906 (Tex. 2000); *Owens*

Corning Fiberglas Corp. v. Malone, 972 S.W.2d 35, 43 (Tex. 1998). The reviewing court should not reverse the trial court for an erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment. *Auld*, 34 S.W.3d at 906; *Malone.*, 972 S.W.2d at 43; *see also* TEX. R. APP. P. 44.1. Stated another way, to successfully challenge an evidentiary ruling usually requires the complaining party to show that the judgment turns on the particular evidence excluded or admitted. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 754 (Tex. 1995); *Shenandoah Assocs. v. J & K Props., Inc.*, 741 S.W.2d 470, 494 (Tex.App.—Dallas 1987, writ denied).

Before harm can be established, the reviewing court must examine the entire record to determine whether the evidence was both controlling on a material issue and not a cumulative. *Williams Distrib. Co. v. Franklin*, 898 S.W.2d 816, 817 (Tex. 1995) (per curiam); *see also City of Brownsville*, 897 S.W.2d at 754.

C. Multiple Categories Of Damages.

In 2003, the Supreme Court of Texas decided a case of first impression on the standard of review that applies when more than one category of damages is submitted in a single damage question. This case was *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757 (Tex. 2003).

Without reviewing all the facts, the issue arose because the trial court submitted a single damage question in which the jury was permitted to award damages in six separate categories. The jury awarded damages to the plaintiff for medical care, for physical pain and mental anguish, for “physical impairment of loss of vision”, \$0 damages for “physical impairment other than the loss of vision”, damages for disfigurement, and damages for loss of earnings in the past.

The trial court rendered judgment on the verdict for the plaintiff and the plaintiff appealed. The original appeal was ultimately reversed and remanded by the Supreme Court for the court of appeals to consider other unresolved issues. Following that remand, the court of appeals considered the plaintiff’s contention that he was entitled to a new trial because the jury failed to award any damages for “physical impairment other than loss of vision”. And whether that finding was against the great weight and preponderance of the evidence. The plaintiff also contended that the amounts of the awards for the other damages were inadequate and he was entitled to a new trial. The court of appeals agreed with the plaintiff about the \$0 damages award and remanded the case for a new trial and did not reach the plaintiff’s other issues on appeal. The Supreme Court of Texas granted the petition for review to consider the proper standard to apply in

conducting a factual sufficiency review of a jury's failure to award any damages for physical impairment.

The Court recognized it did not have jurisdiction to conduct a factual sufficiency review, but acknowledged it did have jurisdiction to decide whether the court of appeals applied the correct standard when it conducted a factual sufficiency review. *See Poole v. Ford Motor Co.*, 715 S.W.2d 629, 634-35 (Tex. 1986) The Court then reviewed its *Poole* requirement that a court of appeals is required to detail the evidence relevant to the issue and clearly state why a jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust or why it shocks the conscience or is clearly biased. *Golden Eagle*, 116 S.W.3d at 761. The Court then reviewed the charge and instructions to the jury in this case. *See Golden Eagle*, 116 S.W.3d at 762.

As previously stated, the Supreme Court decided as a matter of first impression on a new factual standard of review under the particular circumstances that the *Golden Eagle* case describes. In the interest of time and space, the Majority's conclusion paraphrased as follows:

- (1) when only one category of damages is challenged on the basis that the award in that category was \$0 or was too low, a court should consider only whether the evidence unique to that category is so against the great weight and preponderance of the evidence as to be manifestly unjust, shock the conscience, or clearly demonstrate bias, even if the evidence also relates to another category of damages;
- (2) when a jury's failure to find greater damages in more than one overlapping category is challenged, the court of appeals should first determine if the evidence unique to each category is factually sufficient; if it is not, the court of appeals should then consider all the overlapping evidence, together with the evidence unique to each category, to determine if the total amount awarded in the overlapping categories is factually sufficient;
- (3) a court of appeals should confine its review to the evidence, if any, that is unique to the challenged category of damages;
- (4) a reviewing court should not conclude that a jury's failure to award any damages for physical impairment is against the great weight and preponderance of the evidence simply because there is objective evidence of an injury;
- (5) as required by *Poole*, the court of appeals was required to detail the evidence that supported the jury's failure to award the

plaintiff any damages in a products liability case for physical impairment other than loss of vision or state in what regard the contrary evidence greatly outweighed the evidence in support of the verdict.

D. Pleas To The Jurisdiction.

A trial court must determine at its earliest opportunity whether it has the constitutional or statutory authority to decide the case before allowing the case to proceed. *Austin & N.W.R.R. v. Cluck*, 97 Tex. 172, 77 S.W. 403, 405 (1903). Whether a trial court has subject matter jurisdiction is a question of law. *Texas Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002).

Whether a pleader has alleged facts that affirmatively demonstrate a trial court's subject matter jurisdiction is a question of law reviewed *de novo*. Likewise, whether undisputed evidence of jurisdictional facts establishes a trial court's jurisdiction is also a question of law. But in some cases, disputed evidence of jurisdictional facts that also implicate the merits of the case may require the fact-finder to resolve those facts. *See Gates v. Pitts*, 291 S.W. 948, 949 (Tex.Civ.App.—Amarillo 1927, no writ); *Gentry v. Bowser*, 21 S.W. 569, 570 (Tex.Civ.App.—1893, no writ).

When a plea to the jurisdiction challenges the pleadings, the reviewing court determines if the pleader has alleged facts that affirmatively demonstrate the court's jurisdiction to hear the cause. *See Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d, 440-46 (Tex. 1993). But if a plea to the jurisdiction challenges the existence of jurisdictional facts, the reviewing court should consider relevant evidence the parties submit when necessary to resolve the jurisdictional issues raised as the trial court is required to do. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W. 3d 547, 555 (Tex. 2000). When the subject matter jurisdiction issue requires the trial court to examine evidence, the trial court exercises its discretion in deciding whether the jurisdictional determination should be made at a preliminary hearing or await a fuller development of the case, mindful that this determination must be made as soon as practicable. *Bland*, 34 S.W.3d at 554. Then, in a case in which the jurisdictional challenge implicates the merits of the plaintiffs' cause of action and the plea to the jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exist.

Of course the rub in this procedure is that if the evidence involved in the jurisdictional issue is inextricably bound to the evidence involving the merits of the case, the trial court could find facts in an attempt to determine jurisdiction that in effect, prematurely determine the merits of a parties' claims. To solve this problem, the Supreme Court applied the summary

judgment standard of review to this situation. See *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217 (Tex. 2004).

Accordingly, in *Miranda*, when the jurisdictional issue involved in the plead to the jurisdiction requires either or both parties to introduce evidence which is relevant both to the jurisdictional issue and the merits of a claim, the Supreme Court concluded that:

- (1) if the evidence creates a fact issue about the jurisdictional issue, then the Court cannot grant the plea to the jurisdiction, and the fact-finder will resolve the fact issue;
- (2) but if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the pleaded to the jurisdiction as a matter of law.

The Court went on to assert that it adheres to the fundamental precept that a court must not proceed on the merits of a case until legitimate challenges to its jurisdiction have been decided. Thus by reserving for the fact-finder the opportunity to resolve disputed jurisdictional facts that implicate the merits of a claim or defense, the parties' right to present the merits of their case at trial is preserved. The Majority concluded that by requiring a party to meet the summary judgment standard of proof in jurisdictional cases like this case, the Court protects the plaintiffs from having to put on their case to simply establish jurisdiction.