

POST-JUDGMENT MOTIONS

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I. Introduction

So your trial is over. You've won, or you've lost. What now?

There are a variety of postjudgment motions available in both state and federal courts. Some of those motions must be filed in order to preserve any error for appeal. Other times, motions are filed in an attempt to persuade the trial court to change its mind, either in whole or in part. Finally, some motions may be filed simply to extend either the trial court's plenary power or the appellate deadlines.

Which motions accomplish these varied goals, and under what circumstances, is not always a simple matter. Even the courts sometimes disagree. The purpose of this paper is to give an overview of the various types of postjudgment motions available and to discuss their mechanics, when they are appropriate, the grounds for them, and their effect.

II. Postjudgment motions in Texas state court

A. Motion for judgment

Although not strictly a postjudgment motion, one of the common motions after a jury's verdict – if you are lucky enough to be on the winning side – is a motion for judgment. After the jury returns its verdict, any party may move the trial court to render judgment on the verdict. TEX. R. CIV. P. 300. It is a good practice to attach a proposed judgment to the motion, and indeed some courts require a proposed judgment.

1. A motion for judgment will preserve error if the trial court rejects or modifies the proposed judgment

The motion for judgment is important because it will preserve error if the trial court modifies or rejects the proposed judgment. *See Emerson v. Tunnell*, 793 S.W.2d 947, 947-48 (Tex. 1990) (holding that because trial court entered an adverse ruling by granting judgment less than requested, error was preserved). The appellant does not need to obtain a written order

overruling the motion to enter judgment. The motion is implicitly overruled by the trial court's entry of a judgment different from the one proposed by the motion. *See, e.g., Salinas v. Rafati*, 948 S.W.2d 286, 288 (Tex. 1997) (holding that the granting of a motion to disregard the jury's findings resulted in the automatic denial of the opposing party's motion for judgment); *see also* TEX. R. APP. P. 33.1(a)(2)(A) (providing that the trial court's implicit ruling on a request, objection, or motion preserves the complaint for appeal).

2. Be careful if not all jury findings are favorable

However, a motion for judgment can present problems when some but not all of the jury findings are favorable to a party. Because courts treat a motion for judgment on the verdict as an affirmation that the jury findings are supported by the evidence, a motion for judgment on the verdict may waive the right to present certain challenges on appeal. *See Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 322 (Tex. 1984); *Russell v. Dunn Equip., Inc.*, 712 S.W.2d 542, 545 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

Of course, there “must be a method by which a party who desires to initiate the appellate process may move the trial court to render judgment without being bound by its terms.” *First Nat'l Bank v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989). Accordingly, the Texas Supreme Court has noted that a party's right to review of the sufficiency of the evidence was properly preserved with the following language in a motion to enter judgment:

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

Id.; accord *Transmission Exch. Inc. v. Long*, 821 S.W.2d 265, 275 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (“To preserve a complaint about the judgment entered, the party moving for entry of judgment should move for entry only as to form while noting its disagreement with the content and result of the judgment or some portion thereof.”).

A losing party should consider carefully the risk involved in asking the court to render judgment and take care to reserve any objections to the verdict in the motion. See *Casu v. Marathon Ref. Co.*, 896 S.W.2d 388, 389 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (holding that a losing party that asks for judgment without reserving the right to appeal waives error).

B. Motion for JNOV and motion to disregard jury findings

Pursuant to Texas Rule of Civil Procedure 301, “upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper.” TEX. R. CIV. P. 301. A judgment non obstante veredicto is often referred to as a judgment notwithstanding the verdict or, more commonly, a JNOV.

Rule 301 also provides for a related motion called a motion to disregard certain jury findings. See TEX. R. CIV. P. 301 (“Provided, that upon motion and reasonable notice the court may . . . disregard any jury finding on a question that has no support in the evidence.”). The only substantive distinction between it and a motion for JNOV is that a motion for JNOV asks the trial court to disregard all of the jury’s findings and render a judgment contrary to the verdict, while the motion to disregard asks the trial court to disregard only some of the jury’s answers and render judgment on the remaining ones.

1. Grounds for rendering JNOV or disregarding jury findings

Under the express language of Rule 301, a court may render a JNOV “if a directed verdict would have been proper.” TEX. R. CIV. P. 301; accord

Fort Bend County Drainage Dist. v. Sbrusch, 818 S.W.2d 392, 394 (Tex. 1991) (“A court may render judgment n.o.v. if a directed verdict would have been proper.”). “A trial court may grant a judgment notwithstanding the verdict if there is no evidence to support one or more of the jury findings on issues necessary to liability.” *Brown v. Bank of Galveston*, 963 S.W.2d 511, 513 (Tex. 1998). In addition, “[a] motion to disregard jury findings and for JNOV should be granted: (1) when the evidence is conclusive, and one party is entitled to recover as a matter of law, or (2) when a legal principle precludes recovery.” *John Masek Corp. v. Davis*, 848 S.W.2d 170, 173 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (citation omitted).

Moreover, “a trial court may disregard a jury finding . . . if the issue is immaterial.” *Spencer v. Eagle Star Ins. Co. of Am.*, 876 S.W.2d 154, 157 (Tex. 1994). “A question is immaterial when it should not have been submitted, or when it was properly submitted but has been rendered immaterial by other findings. A question which calls for a finding beyond the province of the jury, such as a question of law, may be deemed immaterial.” *Id.* (citation omitted); see, e.g., *City of Austin v. Travis County Landfill Co., L.L.C.*, 73 S.W.3d 234, 241 (Tex. 2002) (holding that because “determining whether a taking has occurred is a question of law for the court, . . . the jury’s conclusion that the overflights resulted in a taking of TCLC’s property is immaterial”) (citation omitted). Some courts have held that a judgment disregarding an immaterial issue is not technically a JNOV. See, e.g., *Anderson, Greenwood & Co. v. Martin*, 44 S.W.3d 200, 216 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (“The trial court may disregard a jury’s finding on an immaterial issue and render judgment based upon the remaining findings; such a judgment is not considered as one rendered non obstante veredicto.”).

2. Time for filing the motion and for ruling on the motion

The rules do not specify any time limit for filing a motion for judgment notwithstanding the

verdict. Some courts have interpreted this omission as meaning that there is no time limit for filing a motion for JNOV, so long as it is filed within the period of the trial court's plenary power. See, e.g., *Kirschberg v. Lowe*, 974 S.W.2d 844, 846 (Tex. App.—San Antonio 1998, no pet.) (“Rule 301 provides for a motion for judgment non obstante veredicto but neither that rule nor any other ‘provide[s] a time limit [for its] filing.’”) (alterations in original) (quoting *Walker v. S & T Truck Lines, Inc.*, 409 S.W.2d 942, 943 (Tex. Civ. App.—Corpus Christi 1966, writ ref’d)); *Needville Indep. Sch. Dist. v. S.P.J.S.T. Rest Home*, 566 S.W.2d 40, 42 (Tex. Civ. App.—Beaumont 1978, no writ) (“A motion for judgment non obstante veredicto may be filed after a judgment has been entered but before it becomes final.”). Other courts of appeals, however, have held that a motion for JNOV must be filed within the time limit for a motion for new trial, i.e., within 30 days of the signing of the judgment. See, e.g., *Commonwealth Lloyd’s Ins. Co. v. Thomas*, 825 S.W.2d 135, 141 (Tex. App.—Dallas 1992), writ granted w.r.m., 843 S.W.2d 486 (Tex. 1993).

Similar confusion surrounds the deadline for the court's ruling on the motion for JNOV. Rule 301 does not specify a deadline. Some courts hold that “[t]he motion for judgment non obstante veredicto must be acted on by the trial court prior to the time the motion (or amended motion) for new trial has been overruled, either by order of the court or by operation of law.” *Commercial Standard Ins. Co. v. Southern Farm Bureau Cas. Ins. Co.*, 509 S.W.2d 387, 392 (Tex. Civ. App.—Corpus Christi 1974, writ ref’d n.r.e.); *accord Spiller v. Lyons*, 737 S.W.2d 29, 29 (Tex. App.—Houston [14th Dist.] 1987, no writ) (“It is well settled that such a motion [for JNOV] may be filed at any time after the court has announced judgment and may be acted upon at any time before a motion for new trial has been overruled either by action of the court or by operation of law.”) (citing *Commercial Standard Ins.*). Others have held that a court may rule on a motion for JNOV at any time before it loses plenary power. See, e.g., *City of Garland v. Vasquez*, 734 S.W.2d 92, 98 (Tex. App.—Dallas 1987, writ ref’d n.r.e.) (“[A] motion for judgment notwithstanding the verdict

may be filed and acted upon by the trial court after judgment is entered and before the judgment becomes final.”); *Eddings v. Black*, 602 S.W.2d 353, 357 (Tex. Civ. App.—El Paso 1980) (holding that a motion for JNOV must “be acted on by the trial court before its original judgment becomes final”), writ ref’d n.r.e., 615 S.W.2d 168 (Tex. 1981).

Until these issues are resolved, you should file your motion within 30 days after the signing of the judgment. Likewise, you should request a ruling within the time a motion for new trial would be overruled by operation of law (75 days from the signing of the judgment).

3. A ruling should be obtained, although an implied ruling may suffice

Note that unlike a motion for new trial, a motion for JNOV or to disregard jury findings is not overruled by operation of law; a ruling is necessary to preserve error. See *City of Alamo v. Casas*, 960 S.W.2d 240, 248 (Tex. App.—Corpus Christi 1997, pet. denied) (“With regard to a motion to disregard jury findings, any error in denying such motion is not preserved unless the record reflects that such motion was presented and ruled on by the trial court.”) (citing Texas Rule of Appellate Procedure 33.1); *Quintero v. Citizens & Southern Factors, Inc.*, 596 S.W.2d 277, 279 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ) (“The record before this court does not reflect that Quintero’s motion for judgment non obstante veredicto was presented to and ruled upon by the court, and under this state of the record, there is no action of the trial court before this court for review.”).

Although a motion for JNOV filed before the judgment is signed may be treated as implicitly overruled by the subsequent signing of the judgment, see TEX. R. APP. P. 33.1(a)(2)(A), the same would not be true of a motion for JNOV filed after the judgment is signed. The safest course, then, is to request a written ruling on the motion, and to object if the trial court refuses to rule. See TEX. R. APP. P. 33.1(a)(2)(B).

4. Effect on appellate deadlines is unclear

The supreme court has held, “Any post-judgment motion, which, if granted, would result in a substantive change in the judgment as entered, extends the time for perfecting the appeal.” *Gomez v. Tex. Dep’t of Crim. Justice*, 896 S.W.2d 176, 177 (Tex. 1995) (per curiam) (quoting *Miller Brewing Co. v. Villareal*, 822 S.W.2d 177, 179 (Tex. App.—San Antonio 1991), *rev’d on other grounds*, 829 S.W.2d 770 (Tex. 1992)); *see also Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*, 10 S.W.3d 308, 314 (Tex. 2000) (“We accordingly hold that a timely filed postjudgment motion that seeks a substantive change in an existing judgment qualifies as a motion to modify under Rule 329b(g), thus extending the trial court’s plenary jurisdiction and the appellate timetable.”) (citing *Gomez*).

Some appellate courts have construed *Gomez* to mean that motions to disregard jury findings and motions for JNOV extend the appellate timetables if filed within 30 days of the signing of the judgment, because both types of motions clearly seek substantive changes in the judgment. *See, e.g., Kirschberg*, 974 S.W.2d at 847-48 (“In the aftermath of *Gomez*, the filing of any postjudgment motion or other instrument that (1) is filed within the time for filing a motion for a new trial and (2) ‘assail[s] the trial court’s judgment’ extends the appellate timetable. We therefore hold that *Kirschberg*’s motion for judgment non obstante veredicto, which was filed within thirty days of the date the judgment was signed and which assails the trial court’s judgment in favor of Rey, extended the appellate timetable.”) (quoting *Gomez*, 896 S.W.2d at 176) (footnote omitted); *see also Pursley v. Ussery*, 982 S.W.2d 596, 600 n.2 (Tex. App.—San Antonio 1998, *pet. denied*) (“We recognize motions other than those specified in Rule 329b extend the appellate timetable if they are filed within the time for filing a motion for new trial and ‘assail[] the trial court’s judgment.’”) (quoting *Gomez*, 896 S.W.2d at 176) (alteration in original).

However, neither a motion for JNOV nor a motion to disregard jury findings is one of the motions listed in the Texas Rules of Appellate Procedure as extending the time for filing a notice of appeal. *See* TEX. R. APP. P. 26.1. Therefore, a party wishing to appeal should not rely on a motion for JNOV or to disregard jury findings to extend the appellate timetables unless and until the Texas Supreme Court settles the issue.

C. Motion for New Trial

1. A motion for new trial is required to preserve error in certain circumstances in jury trials

A motion for new trial is a prerequisite to make the following complaints on appeal: “(1) A complaint on which evidence must be heard such as one of jury misconduct or newly discovered evidence or failure to set aside a judgment by default; (2) A complaint of factual insufficiency of the evidence to support a jury finding; (3) A complaint that a jury finding is against the overwhelming weight of the evidence; (4) A complaint of inadequacy or excessiveness of the damages found by the jury; or (5) Incurable jury argument if not otherwise ruled on by the trial court.” TEX. R. CIV. P. 324(b).

a. You must file a motion for new trial to preserve a factual sufficiency challenge

Perhaps the most common use of a motion for new trial is to complain of the factual sufficiency of the evidence to support the jury's verdict. “A point in a motion for new trial is a prerequisite to complain on appeal that the evidence is factually insufficient to support a jury finding and that a jury finding is against the overwhelming weight of the evidence.” *Cecil v. Smith*, 804 S.W.2d 509, 510 (Tex. 1991); *see* TEX. R. CIV. P. 324(b)(2) (factually insufficient challenges); *id.* 324(b)(3) (against the overwhelming weight of the evidence challenges).

Both of these types of complaints relate to factual sufficiency; the choice between terminology depends on whether the complaining party has the burden of proof on the particular issue submitted to the jury. A party without the burden of proof on an issue complains that the evidence is factually insufficient to support the jury's affirmative finding. See *Licata v. Licata*, 11 S.W.3d 269, 273 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (“A factual insufficiency point of error is appropriate if the party without the burden of proof challenges a finding of fact.”) (citing *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983)). A party with the burden of proof on an issue complains that the jury's failure to find is against the great weight and preponderance of the evidence. See *Bracewell v. Bracewell*, 20 S.W.3d 14, 23 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (“A party challenging a jury finding on an issue upon which he had the burden of proof must demonstrate that the adverse finding is ‘against the great weight and preponderance of the evidence.’”) (quoting W. Wendell Hall, *Standards of Review*, 29 ST. MARY'S L.J. 351, 485 (1998)). Although many practitioners confuse this terminology, use of the wrong terminology will not preclude appellate review.

b. No evidence challenges may be raised by motion for new trial, but relief is limited

“[N]o evidence complaints *may* be raised in a motion for new trial” despite the fact that “Rule 324 does not *require* no evidence points of error to be raised in a motion for new trial to preserve the complaint for appeal.” *Cecil*, 804 S.W.2d at 512 (emphases added). A motion for new trial should be used only a last resort, however, because it limits the relief obtainable from both the trial court and the appellate court. In *Horrocks v. Texas Department of Transportation*, the supreme court held that an appellate court may only remand for a new trial if it sustains a no evidence point that was preserved only through a motion for new trial. 852 S.W.2d 498, 499 (Tex. 1993) (per curiam); accord *Werner v. Colwell*, 909 S.W.2d 866, 870 n.1 (Tex. 1995) (“Despite the fact that there is

no evidence to support the verdict, we can only remand for new trial because Eastex did not request rendition of judgment in the trial court.”).

2. A new trial can always be granted in the interest of justice

Under the case law, a trial court has broad discretion to order a new trial “in the interest of justice.” *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 918 (Tex. 1985); see *Champion Int'l Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988) (holding that “a trial court enjoys broad discretion in granting a new trial, before or after judgment” and that “[u]nder the 1985 *Johnson* case, a trial court may, in its discretion, grant a new trial ‘in the interest of justice’”); see also *Stolhandske v. Stern*, 14 S.W.3d 810, 816 (Tex. App.—Houston [1st Dist.] 2000, pet. denied & original proceeding) (“A motion for new trial granted ‘in the interest of justice’ is not reviewable by mandamus.”) (quoting *Johnson*, 700 S.W.2d at 918). Therefore, your motion for new trial should always include a request to grant a new trial in the interest of justice, in addition to any specific grounds.

3. In some circumstances, the trial court may grant a partial new trial

A party may move for, and a trial court may grant, a partial new trial in certain circumstances. “When it appears to the court that a new trial should be granted on a point or points that affect only a part of the matters in controversy and that such part is clearly separable without unfairness to the parties, the court may grant a new trial as to that part only, provided that a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.” TEX. R. CIV. P. 320.

4. Time for filing a motion for new trial

A motion for new trial must be filed within 30 days after the judgment is signed, not entered or filed. TEX. R. CIV. P. 329b(a). An amended motion for new trial may be filed without leave of court within this same 30-day period if the

initial motion for new trial has not yet been overruled by the court. *Id.* 329b(b). If the original motion has been overruled, leave of court is required. *Id.*

A motion for new trial is one of the few filings for which the trial court has no power to extend the deadline. Rule 5 provides that the trial “court may not enlarge the period for taking any action under the rules relating to new trials except as stated in these rules,” and no other rule permits an extension of time to file a motion for new trial. TEX. R. CIV. P. 5.

A prematurely filed motion (filed before the judgment is signed) is valid and treated as having been filed “on the date of but subsequent to the time of signing of the judgment the motion assails.” TEX. R. CIV. P. 306c; *see also* TEX. R. APP. P. 27.2.

There is no longer any requirement that the movant “present” the motion for new trial to the court or otherwise call the court’s attention to the errors asserted in a timely filed motion. *See Cecil*, 804 S.W.2d at 511 (“When Rule 324(b) requires a motion for new trial to preserve error, the complaining party is required only to comply with the filing requirements in Rule 329b to preserve the points of error.”).

5. Time for ruling on a motion for new trial

The trial court has 75 days from the signing of judgment to rule on the motion for new trial; if it does not expressly rule on the motion by the 75th day, the motion is overruled by operation of law. TEX. R. CIV. P. 329b(c). The overruling by operation of law preserves error as effectively as an express overruling. TEX. R. APP. P. 33.1(b). A trial court may grant a new trial on its own motion within thirty days after the judgment is signed, regardless of whether any party has moved for new trial. TEX. R. CIV. P. 329b(d).

6. A motion for new trial extends the trial court's plenary power

A timely filed motion for new trial extends the trial court’s plenary power. “If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until thirty days after all such timely filed motions are overruled, either by a written and signed order or by operation of law, whichever occurs first.” TEX. R. CIV. P. 329b(e). Thus, a timely filed motion for new trial has the potential to extend the trial court’s plenary power to 105 days after judgment (if the motion is overruled by operation of law 75 days after the judgment was signed). *See id.* 329b(c). Note, however, that if a party withdraws its motion for new trial, the court’s plenary power reverts to thirty days from the signing of the judgment. *See Rogers v. Clinton*, 794 S.W.2d 9, 11-12 (Tex. 1990) (“Rule 329b, as presently written, does not authorize a trial court to order a new trial when the movant has deliberately withdrawn his motion and more than 30 days have passed since the judgment was signed.”). As a result, never rely on another party’s motion for new trial to extend the appellate timetable for you.

a. Ability to grant a new trial after overruling the motion

Because a timely filed motion extends the trial court’s plenary power to 30 days after the overruling of the motion, *see* TEX. R. CIV. P. 329b(e), a trial court which overrules a motion for new trial has 30 days to change its mind and grant the motion. *Hunter v. O’Neill*, 854 S.W.2d 704, 705-06 (Tex. App.—Dallas 1993, orig. proceeding).

b. Ability to vacate a new trial after motion is granted

The same is not true of a court’s ability to vacate a previously granted motion for new trial. The court may do so only during the 75-day period after the signing of the judgment. *See Fruehauf Corp. v. Carrillo*, 848 S.W.2d 83, 84 (Tex.

1993) (“The court of appeals erred in holding that a trial court does not have the authority to vacate an order for a new trial during the 75-day period.”). It does not have authority to “ungrant” the motion for an additional thirty days. *See Hunter*, 854 S.W.2d at 705-06 (“Read literally, section (e) of rule 329b gives the trial court an additional thirty days of plenary power but limits that power to ruling on motions for new trial that have been overruled, not granted.”); *In re Luster*, 77 S.W.3d 331, 334-35 (Tex. App.—Houston [14th Dist.] 2002, original proceeding) (“The majority of the courts, when confronted with the issue of a trial court’s power to ‘ungrant’ an order granting a motion for new trial, have held the trial court’s plenary power only continues in effect for seventy-five days after the date the original judgment is signed. Accordingly, a trial court only retains plenary power to vacate or ‘ungrant’ an order granting a new trial for seventy-five days after the original judgment is signed.”) (collecting cases) (citations and footnotes omitted).

7. A motion for new trial extends the appellate timetable

A timely motion for new trial extends the time for perfecting an appeal from 30 days after the signing of the judgment to 90 days after signing of the judgment. TEX. R. APP. P. 26.1(a)(1). Because of this benefit, a party may wish to file a motion for new trial even if there is no need to do so to preserve error. *See Old Republic Ins. Co. v. Scott*, 846 S.W.2d 832, 833 (Tex. 1993) (“The filing of a motion for new trial in order to extend the appellate timetable is a matter of right, whether or not there is any sound or reasonable basis for the conclusion that a further motion is necessary.”).

If a trial court grants a new trial but then vacates it within 75 days after the judgment was signed, the appellate timetable runs from the date of the order vacating the new trial. *See Wang v. Hsu*, 899 S.W.2d 409, 412 n.3 (Tex. App.—Houston [14th Dist.] 1995, writ denied) (“Even if the trial court had reinstated the first judgment with an express and specific written order, the appellate timetables would have run from the date of the

second order, and would not have reverted to the date of the original judgment.”).

8. Effect of failure to pay the filing fee on appellate deadlines and preservation of error

The date that a motion for new trial is tendered to the clerk is the controlling date for appellate purposes, even if the statutory filing fee is not paid at that time. *See Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993) (holding that a motion for new trial is “conditionally” filed on the date it is tendered and that the filing is completed when the fee is paid). However, the court may ordinarily not consider the motion until the fee has been paid. *See id.* at 319 n.3 (“The filing is not completed until the fee is paid, and absent emergency or other rare circumstances, the court should not consider it before then.”).

As long as the fee is paid before the trial court loses plenary power, the motion is effective to extend the appellate timetables, even if the fee is not paid until after the motion is overruled. *See Tate v. E.I. DuPont de Nemours & Co.*, 934 S.W.2d 83, 84 (Tex. 1996) (“[T]he failure to pay the fee before the motion is overruled by operation of law may forfeit altogether the movant’s opportunity to have the trial court consider the motion; it does not, however, retroactively invalidate the conditional filing for purposes of the appellate timetable.”).

The supreme court has not decided whether the same rule applies for preservation purposes, *i.e.*, whether a motion for new trial preserves error if the fee is not paid until after the motion is overruled. *See Tate*, 934 S.W.2d at 84 n.1 (“We also express no opinion about whether a motion for new trial, even though extending the appellate timetable, properly preserves error for appeal if, as in this case, the filing fee is not paid until after the motion is overruled by operation of law.”).

The supreme court has also declined to decide whether a motion extends the appellate timetables if the fee is not paid until after the trial court loses plenary power over the

judgment. *See Tate*, 934 S.W.2d at 84 n.1 (“However, we express no opinion about whether a motion for new trial extends the appellate timetable if the filing fee is not paid within the period of the trial court’s plenary jurisdiction.”). Among the courts of appeals to have addressed this issue, the consensus appears to be that payment after the loss of jurisdiction is sufficient to extend the appellate timetable. *See Ramirez v. Get N Go No. 103*, 888 S.W.2d 29, 31 (Tex. App.—Corpus Christi 1994, writ denied) (rejecting contention that appellant’s failure to pay the filing fee for the motion for new trial before the trial court lost jurisdiction “should retroactively invalidate the filing of that motion for purposes of the appellate deadlines and appellate court jurisdiction”); *Spellman v. Hoang*, 887 S.W.2d 480, 482 (Tex. App.—San Antonio 1994, no writ) (“Under *Jamar*, failure to pay the filing fee before the expiration of the trial court’s plenary jurisdiction may preclude that court from considering and ruling on the motion for new trial. Even late payment of the filing fee, however, will retroactively complete the filing as of the date of tender in order to extend the appellate timetable.”) (citation omitted); *Polley v. Odom*, 937 S.W.2d 623, 625-26 (Tex. App.—Waco 1997, no writ) (“We agree with the *Spellman* and *Ramirez* courts: a timely tendered motion for new trial extends the appellate timetable regardless when the filing fee is paid.”); *Finley v. J.C. Pace Ltd.*, 4 S.W.3d 319, 321 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (“We therefore hold that a timely tendered motion for new trial extends the appellate timetable regardless of when the filing fee is paid.”).

There is considerably less authority on the issue of whether a motion for new trial preserves error if the fee is not paid until after the trial court loses jurisdiction. One court of appeals has held that payment after the trial court loses jurisdiction does not preserve error for appeal. *See Marathon Corp. v. Pitzner*, 55 S.W.3d 114, 125 (Tex. App.—Corpus Christi 2001, pet. filed) (holding that “where the appellant failed to pay the filing fee for its motion for new trial until long after the motion was overruled by operation of law and the trial court lost plenary jurisdiction. . . . appellant has failed to preserve

error as to those issues which must be preserved for appellate review by a point raised in a motion for new trial”).

9. Effect of a second judgment on appellate deadlines and preservation of error

If in response to motion for new trial, the trial court enters a second judgment and the motion is sufficient to challenge or “assail” the second judgment, it is sufficient to preserve error, even if the motion was overruled before the second judgment was signed. *See Fredonia State Bank v. Gen. Am. Life Ins. Co.*, 881 S.W.2d 279, 282 (Tex. 1994) (“We hold that a motion for new trial overruled by operation of law, which complains of error brought forward in a subsequent judgment, preserves the complaints to the extent applicable to the subsequent judgment, under Rule 58 of the Texas Rules of Appellate Procedure.”); *see* TEX. R. APP. P. 27.2 (former Rule 58) (“The appellate court may treat actions taken before an appealable order is signed as relating to an appeal of that order and give them effect as if they had been taken after the order was signed.”); *see also* TEX. R. CIV. P. 306c (“No motion for new trial or request for findings of fact and conclusions of law shall be held ineffective because prematurely filed; but every such motion shall be deemed to have been filed on the date of but subsequent to the time of signing of the judgment the motion assails . . .”).

Similarly, if in response to a motion for new trial, the trial court enters a second judgment and the motion “assails” the second judgment, the time to appeal runs from the second judgment and the motion for new trial is effective to extend the appellate timetable from that second judgment. *See Harris County Hosp. Dist. v. Estrada*, 831 S.W.2d 876, 880 (Tex. App.—Houston [1st Dist.] 1992, order on motion); *Gunnels v. City of Brownfield*, __ S.W.3d __, No. 07-02-0121-CV, 2002 WL 825567, at *3 (Tex. App.—Amarillo May 1, 2002, no pet.). There is a split of authority, however, as to whether this rule applies if the motion was overruled prior to the signing of the second judgment. *Compare A.G. Solar & Co. v.*

Nordyke, 744 S.W.2d 646, 647-48 (Tex. App.—Dallas 1988, no writ) (“We hold that, when a premature motion for new trial has already been disposed of, it can no longer ‘assail’ a subsequent judgment under rule 306c of the Texas Rules of Civil Procedure, and can no longer ‘be properly applied’ to that judgment under rule 58 of the Texas Rules of Appellate Procedure.”) *with Estrada*, 831 S.W.2d at 880 (rejecting the “live pleadings” requirement as applied to motions for new trial). The supreme court has declined to resolve this conflict. *See Fredonia State Bank*, 881 S.W.2d at 281 n.2 (“We do not purport to resolve the conflict between *Solar* and *Estrada* on the question of whether a motion for new trial overruled by operation of law is effective to extend the appellate deadline from a subsequent judgment.”).

If the second judgment raises issues that were not addressed in the previous motion for new trial, a party should file a second motion for new trial from the second judgment.

10. A grant of new trial is generally not reviewable

Although the likelihood of a trial court granting a new trial is small, the benefits of obtaining one are great. The cost and delay of an appeal are avoided, and the order granting a new trial is not subject to mandamus except in two very narrow circumstances: “There are two instances in which a trial court’s order granting a new trial has been overturned on mandamus. These are: (1) when the trial court’s order was wholly void . . . ; and (2) where the trial court has granted a new trial specifying in the written order the sole ground that the jury’s answers to special issues were conflicting.” *Stolhandske*, 14 S.W.3d at 816 (citations omitted).

A new trial granted by the trial court is also not subject to interlocutory appeal unless the parties and the trial court agree to an appeal under Section 51.014(d) of the Civil Practice and Remedies Code, which is unlikely. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d) (Vernon Supp. 2002).

11. A motion for new trial is not required in a nonjury trial

As Rule 324 makes clear, all of the grounds for which a motion for new trial is a prerequisite to appeal relate only to jury trials. Thus, unlike in jury trials, in nonjury trials a motion for new trial is not required to preserve complaints about the factual sufficiency of the evidence. TEX. R. CIV. P. 324; *see Strickland v. Coleman*, 824 S.W.2d 188, 191 (Tex. App.—Houston [1st Dist.] 1991, no writ) (“A motion for new trial is not necessary to raise either legal or factual sufficiency complaints in a non-jury trial.”); *see also Howell v. Coca-Cola Bottling Co.*, 599 S.W.2d 801, 802 (Tex. 1980) (per curiam) (disapproving of court of appeals’ holding that in order to present a complaint on appeal that the trial court had never ruled on, it was necessary to file a motion for new trial in a non-jury case). Indeed, “[n]o predicate is required to preserve the argument that findings rendered in a non-jury trial are legally or factually insufficient.” *Letson v. Barnes*, 979 S.W.2d 414, 419 n.2 (Tex. App.—Amarillo 1998, pet. denied); *accord Regan v. Lee*, 879 S.W.2d 133, 136 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Sammons v. Elder*, 940 S.W.2d 276, 279 (Tex. App.—Waco 1997, writ denied).

D. Motion to modify, correct, or reform the judgment

1. Timing for filing and for ruling on motion

A party may file a motion to modify, correct, or reform the judgment within 30 days of the signing of the judgment. TEX. R. CIV. P. 329b(g). Like a motion for new trial, a motion to modify is deemed overruled by operation of law if it has not been ruled on 75 days after the judgment was signed. TEX. R. CIV. P. 329b(c) & (g).

2. A timely filed motion will extend both plenary power and the appellate timetables, but only if the motion seeks a substantive change in the judgment

Rule 329b(g) provides that a timely filed motion to modify extends both (1) the trial court's plenary power to 30 days after the motion is overruled by operation of law or by written order, whichever occurs first, and (2) the time to perfect an appeal to 90 days after the date the judgment is signed. TEX. R. CIV. P. 329b(g) ("A motion to modify, correct, or reform a judgment (as distinguished from motion to correct the record of a judgment under Rule 316), if filed, shall be filed and determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial."); see TEX. R. APP. P. 26.1(a)(2) (providing that "the notice of appeal must be filed within 90 days after the judgment is signed if any party timely files . . . a motion to modify the judgment").

Although parties have historically filed motions to modify to correct both substantive and clerical errors in a judgment, the supreme court recently interpreted Rule 329b(g)'s distinguishing reference to Rule 316 motions to correct clerical errors as indicating that a "motion to modify, correct or reform a judgment was always intended to embody something other than a motion for judgment nunc pro tunc." *Lane Bank Equip. Co. v. Smith Southern Equip., Inc.*, 10 S.W.3d 308, 313 (Tex. 2000). The supreme court therefore held that only "a timely filed postjudgment motion that seeks a substantive change in an existing judgment qualifies as a motion to modify under Rule 329b(g), thus extending the trial court's plenary jurisdiction and the appellate timetable." *Id.* at 314 (emphasis added). "In contrast, a timely filed postjudgment motion that merely seeks to correct clerical errors, such as punctuation, grammar or misspellings, will not qualify under Rule 329b(g)." *Id.* at 313-14.

3. In contrast, a judgment modified in any respect generally will restart the appellate timetable

This requirement that in order to extend plenary power and the appellate timetable, a motion seek a substantive change contrasts with the rule applicable to modifications of a judgment. If the trial court modifies, corrects, or reforms the judgment "*in any respect*," the appellate timetables begin anew and run from the date of signing of the modified, corrected, or reformed judgment. TEX. R. CIV. P. 329b(h) (emphasis added); TEX. R. APP. P. 4.3(a). Under Rule 329b(h), "any change, *whether or not material or substantial*, made in a judgment while the trial court retains plenary power, operates to delay the commencement of the appellate timetable until the date the modified, corrected or reformed judgment is signed." *Mackie v. McKensey*, 890 S.W.2d 807, 808 (Tex. 1994) (emphasis added) (quoting *Check v. Mitchell*, 758 S.W.2d 755, 756 (Tex. 1988)). "Thus, any change to a judgment made by the trial court while it retains plenary jurisdiction will restart the appellate timetable under Rule 329b(h), but only a motion seeking a substantive change will extend the appellate deadlines and the court's plenary power under Rule 329b(g)." *Lane Bank Equip.*, 10 S.W.3d at 313 (citing *Check*, 758 S.W.2d at 756).

The one rare exception is where the record indicates that a new judgment was signed "for the sole purpose of extending the appellate timetable"; in that case, the modified judgment will not restart the appellate timetable. *Mackie*, 890 S.W.2d at 808 (modifying rule announced in *Anderson v. Casebolt*, 493 S.W.2d 509, 510 (Tex. 1973)).

A trial court's modification of the judgment (other than for the sole purpose of restarting the appellate timetable) gives a party the opportunity to file a second motion for new trial and extend this new appellate timetable. *Old Republic Ins. Co.*, 846 S.W.2d at 833.

E. Motion for judgment nunc pro tunc

Even after it loses jurisdiction over a judgment, the trial court can correct clerical errors in the judgment—but only clerical errors—by issuing a “judgment nunc pro tunc.” TEX. R. CIV. P. 316.

1. Clerical v. judicial errors

Because a judgment nunc pro tunc can only correct clerical errors, the careful practitioner will keep in mind the important difference between “clerical” and “judicial” errors. *See Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986) (“After the trial court loses its jurisdiction over a judgment, it can correct only clerical errors in the judgment by judgment nunc pro tunc. In this regard, the trial court has plenary power to correct a clerical error made in entering final judgment. However, the trial court cannot correct a judicial error made in rendering a final judgment.”) (citation omitted). “A clerical error is a mistake or omission that prevents the judgment as entered from accurately reflecting the judgment that was rendered, *i.e.*, a mistake in entering or recording the judgment.” *Alford v. Whaley*, 794 S.W.2d 920, 922 (Tex. App.—Houston [1st Dist.] 1990, no writ) (citation omitted). “A judicial error is one that occurs in rendering a judgment.” *Id.* at 921; *see Comet Aluminum Co. v. Dibrell*, 450 S.W.2d 56, 58-59 (Tex. 1970) (holding that “a judgment’s ‘rendition is the judicial act by which the court settles and declares the decision of the law upon The matters at issue’”) (quoting *Coleman v. Zapp*, 151 S.W. 1040, 1041 (Tex. 1912)).

A judgment that attempts to correct a judicial error and that is entered after the period of plenary power is void. *See In re Rollins Leasing Inc.*, 987 S.W.2d 633, 638 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding) (holding that “because his plenary jurisdiction had expired, the presiding judge had no jurisdiction to correct the visiting judge’s judicial error by judgment nunc pro tunc and that judgment is void”).

The trial court’s determination as to whether an error in a judgment is a judicial or clerical error is a question of law, and therefore the appellate court is not bound by it. *See Finlay v. Jones*,

435 S.W.2d 136, 138 (Tex. 1968) (“Whether the errors in the original judgment are judicial or clerical is obviously a question of law, and the trial court’s finding or conclusion as to the nature of the errors is not binding on this court.”). Rather, “in deciding whether an attempted correction is a correction of a judicial error or clerical error, [the appellate court is] required to look to the judgment or order that was actually rendered and not to the judgment or order that should or might have been rendered.” *Crocker v. Synpol, Inc.*, 732 S.W.2d 429, 436 (Tex. App.—Beaumont 1987, no writ).

2. Standard for granting judgment nunc pro tunc

“A judgment nunc pro tunc should be granted if the evidence is clear and convincing that a clerical error was made. Evidence may be in the form of oral testimony of witnesses, written documents, the court’s docket, and the judge’s personal recollection. . . . [A] trial judge may rely upon his personal recollection of the facts at the time the original judgment was rendered, and if he corrects the judgment nunc pro tunc, a presumption arises that his personal recollection supports the finding of clerical error.” *Pruet v. Coastal States Trading, Inc.*, 715 S.W.2d 702, 705 (Tex. App.—Houston [1st Dist.] 1986, no writ) (citations omitted).

3. No deadline for filing

There is no deadline for filing a motion for judgment nunc pro tunc. TEX. R. CIV. P. 316.

4. Motion does not extend plenary power or appellate timetables, but judgment nunc pro tunc extends appellate timetables in some circumstances

A motion for judgment nunc pro tunc does not extend the trial court’s plenary power or the appellate timetable, regardless of when it is filed. *See Lane Bank Equip.*, 10 S.W.3d at 313 (holding that “any change to a judgment made by the trial court while it retains plenary jurisdiction will restart the appellate timetable under Rule 329b(h), but only a motion seeking a

substantive change will extend the appellate deadlines and the court's plenary power under Rule 329b(g)”) (citation omitted), *overruling Cannon v. ICO Tubular Servs., Inc.*, 905 S.W.2d 380, 389-90 (Tex. App.—Houston [1st Dist.] 1995, no writ).

This is true despite the fact that any change in a judgment, clerical or judicial, made during the trial court's plenary power will restart the appellate timetable. Compare TEX. R. APP. P. 4.3(a) (“During Plenary-Power Period. If a judgment is modified *in any respect* while the trial court retains plenary power, a period that, under these rules, runs from the date when the judgment is signed will run from the date when the modified judgment is signed.”) (emphasis added), and TEX. R. CIV. P. 329b(h) (“If a judgment is modified, corrected or reformed *in any respect*, the time for appeal shall run from the time the modified, corrected, or reformed judgment is signed”) (emphasis added), with TEX. R. CIV. P. 329b(g) (“A motion to modify, correct, or reform a judgment (*as distinguished from motion to correct the record of a judgment under Rule 316*), if filed, shall be filed and determined within the time prescribed by this rule for a motion for new trial and shall extend the trial court's plenary power and the time for perfecting an appeal in the same manner as a motion for new trial.”) (emphasis added). Thus, a judgment nunc pro tunc signed during the trial court's plenary power will extend the appellate timetable, but a motion for such relief, even if filed during the period of plenary power, has no similar effect.

If a judgment nunc pro tunc is signed after the court has lost plenary power, it will only extend the appellate timetable as to any complaint about a matter that was not in the original judgment. See TEX. R. CIV. P. 306a(6) (“Nunc pro tunc order. When a corrected judgment has been signed after expiration of the court's plenary power pursuant to Rule 316, the periods mentioned in paragraph (1) of this rule shall run from the date of signing the corrected judgment with respect to any complaint that would not be applicable to the original document.”); *id.* 329b(h) (“If a judgment is modified, corrected or reformed in any respect, the time for appeal

shall run from the time the modified, corrected, or reformed judgment is signed, but if a correction is made pursuant to Rule 316 after expiration of the period of plenary power provided by this rule, no complaint shall be heard on appeal that could have been presented in an appeal from the original judgment.”); TEX. R. APP. P. 4.3(b) (“After Plenary Power Expires. If the trial court corrects or reforms the judgment under Texas Rule of Civil Procedure 316 after expiration of the trial court's plenary power, all periods provided in these rules that run from the date the judgment is signed run from the date the corrected judgment is signed for complaints that would not apply to the original judgment.”).

5. Denial of motion is not appealable but may be subject to mandamus

An order denying a motion for judgment nunc pro tunc is not an appealable, final judgment. See *Shadowbrook Apts. v. Abu-Ahmad*, 783 S.W.2d 210, 211 (Tex. 1990) (per curiam). In *Shadowbrook Apartments*, the trial court dismissed the plaintiffs' claims against all four defendants, on the basis of a motion to nonsuit that was directed at only one of the defendants. *Id.* The plaintiffs moved for judgment nunc pro tunc dismissing only the one defendant, which was denied, and the plaintiffs appealed from the denial. *Id.* The supreme court held, “If the [plaintiffs] Abu-Ahmads are appealing the dismissal order of August 11, their appeal is not timely. . . . Conversely, if the Abu-Ahmads are in fact complaining of the denial of their Motion for Judgment Nunc Pro Tunc, they are not appealing a final judgment.” *Id.*

However, at least one court has relied on *Shadowbrook Apartments* as the basis for granting mandamus relief to a party complaining of the denial of a motion for judgment nunc pro tunc. See *In re Bridges*, 28 S.W.3d 191, 195 (Tex. App.—Fort Worth 2000, orig. proceeding) (holding that relator had no adequate remedy at law from trial court's refusal to correct clerical error in dismissing defendant whom relator had never nonsuited, because relator “cannot appeal Judge Nelson's denial of her motion for an order

nunc pro tunc correcting the dismissal order”) (citing *Shadowbrook Apts.*, 783 S.W.2d at 211).

F. Motion for remittitur

A motion for remittitur asks the court to reduce an excessive damages award. See *City Nat’l Bank v. Jacksboro Nat’l Bank*, 602 S.W.2d 511, 512 (Tex. 1980) (per curiam) (“A remittitur may be ordered when the trial court concludes that the verdict is excessive in light of the whole record.”). “Factual sufficiency is the sole remittitur standard for actual damages.” *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986); see *Larson v. Cactus Util. Co.*, 730 S.W.2d 640, 641 (Tex. 1987) (“In *Pope*, we held that a court of appeals, in ordering a remittitur, should do so on an insufficiency of the evidence, and not an abuse of discretion, standard. Today we reaffirm that principle as it applies to trial courts. Trial courts and courts of appeals should be subject to the same standard for a simple reason: no court is free to substitute its judgment for that of the jury.”).

1. Requisites and deadline for filing motion

A party may ask for a remittitur in a motion for new trial, or it may file a separate motion. See, e.g., *Landmark Am. Ins. Co. v. Pulse Ambulance Serv., Inc.*, 813 S.W.2d 497, 498 (Tex. 1991) (per curiam) (involving motion for new trial or in the alternative remittitur). Although the rules do not state a deadline for filing the motion for remittitur, it is wise to file one within the time for filing a motion for new trial. See O’CONNOR’S TEXAS RULES CIVIL TRIALS 615 (2002) (“Whether the request for remittitur is filed as part of the motion for new trial or separately, it must be filed within the time limits for a motion for new trial.”); see also *Makeig v. State*, 802 S.W.2d 59, 62 (Tex. App.—Amarillo 1990) (suggesting that a motion for remittitur was timely filed because it was filed within 30 days of the signing of the judgment), *aff’d*, 830 S.W.2d 956 (Tex. Crim. App. 1992).

2. Remittitur should be conditioned on grant of new trial

While the trial court cannot order remittitur on its own motion, it can do so as a part of its power to grant a new trial. See *Union Carbide Corp. v. Burton*, 618 S.W.2d 410, 416 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref’d n.r.e.) (“[T]he trial judge has the power to require a remittitur on its own motion as a part of its power to order a new trial. . . . The exercise of such power is not, therefore, dependent upon a specific request for a remittitur where a Motion for New Trial has been filed and the trial court continues to have jurisdiction.”). The trial court may do so by conditioning the grant of a new trial on the prevailing party’s non-compliance with a suggestion of remittitur. As the Texas Supreme Court has recognized, “[i]t is a well-established practice in Texas courts to condition the granting of a new trial upon compliance with an order of remittitur.” *City Nat’l Bank*, 602 S.W.2d at 511-12. A later decision made this conditional practice a mandatory requirement. See *Snoke v. Republic Underwriters Ins. Co.*, 770 S.W.2d 777, 777 (Tex. 1989) (per curiam) (“The trial court had no power to order a remittitur in the amount of attorneys’ fees found by the jury without conditioning that remittitur on a new trial.”); accord *Long John Silver’s Inc. v. Martinez*, 850 S.W.2d 773, 777 (Tex. App.—San Antonio 1993, writ dismissed w.o.j.) (“When a trial court orders a remittitur, as it did in the instant case, it must condition the remittitur on a new trial.”).

The imposition of this condition is critical, because if the trial court reduces damages but does not do so as a condition to the overruling of a motion for new trial, the trial court’s action is not considered a remittitur. See *Benavidez v. Isles Constr. Co.*, 716 S.W.2d 588, 589 (Tex. App.—Corpus Christi 1986) (“[T]he trial court ordered a reduction of the damages in its judgment and did not condition the reduction on the overruling of a motion for new trial. Its action had the effect of overturning the jury’s verdict but cannot be considered a remittitur.”), *rev’d on other grounds*, 726 S.W.2d 23 (Tex. 1987). Rather, on appeal the trial court’s ruling

will be considered a JNOV or an order disregarding jury findings, and the court will review the evidence under standards applicable to those motions. *Id.*; accord *Galveston County Fair & Rodeo, Inc. v. Glover*, 880 S.W.2d 112, 122 (Tex. App.—Texarkana 1994) (“The trial court’s ruling [ordering a reduction of damages not conditioned on the overruling of a motion for new trial] is tantamount to granting a judgment notwithstanding the verdict or to disregarding jury answers to special issues and, as such, should be upheld on appeal only if there was no evidence to support the jury’s finding.”), *writ denied per curiam*, 940 S.W.2d 585 (Tex. 1996).

Thus, “a trial court may not order a remittitur; a remittitur may only be suggested, not compelled.” *Galveston County Fair & Rodeo*, 880 S.W.2d at 122. A prevailing party may either accept the remittitur and have the judgment reformed accordingly, or refuse the remittitur, in which case a new trial will be ordered. If the party accepts, the judgment corrected to include the remittitur restarts the appellate timetable. *Landmark Am. Ins. Co.*, 813 S.W.2d at 498-99 (citing TEX. R. CIV. P. 329b(h)). If the case is appealed by the other side before a party can accept the trial court’s suggestion of remittitur, the party may file the remittitur in the court of appeals. TEX. R. APP. P. 46.1. The court of appeals will then render the judgment that the trial court should have rendered. *Id.*

3. Appeal of remittitur

Unlike in federal court, discussed *infra*, “[i]f a party makes the remittitur at the trial judge’s suggestion and the party benefiting from the remittitur appeals, the remitting party is not barred from contending in the court of appeals that all or part of the remittitur should not have been required, but the remitting party must perfect an appeal to raise that point. If the court of appeals sustains the remitting party’s contention that remittitur should not have been required, the court must render the judgment that the trial court should have rendered.” TEX. R. APP. P. 46.2. If the party benefiting from the remittitur does not appeal, however, the party

accepting the remittitur may not appeal the remittitur. *See City Nat’l Bank*, 602 S.W.2d at 512 (“Here, City National Bank, the party benefited by the remittitur, did not appeal from the trial court’s judgment. Under the provisions of Rule 328 [now Rule 46.2], Jacksboro National Bank could not appeal the validity of the order of remittitur in the absence of an appeal by City National Bank.”).

4. Remittitur by court of appeals

The court of appeals may suggest a remittitur. TEX. R. APP. P. 46.3; *see Comstock Silversmiths, Inc. v. Carey*, 894 S.W.2d 56, 58 (Tex. App.—San Antonio 1995, no writ) (“This court is vested with the power to suggest a remittitur on its own motion when the appellant complains that there is insufficient evidence to support an award and the court of appeals agrees, but finds that there is sufficient evidence to support a lesser award.”). However, if a party does not ask for a remittitur in one of these post-judgment motions, it runs the risk that the court of appeals will find the complaint waived. *See, e.g., Hawthorne v. Guenther*, 917 S.W.2d 924, 937 (Tex. App.—Beaumont 1996, writ denied) (“Point of error nine, which complains of the excessiveness of the exemplary damages award and which calls for a remittitur, was not preserved in a motion for new trial or motion for remittitur and is waived on appeal.”). The same is true if a party asks for remittitur in the appellate court in a different amount or on different grounds than it did in the trial court. *See, e.g., Borden, Inc. v. Guerra*, 860 S.W.2d 515, 526 (Tex. App.—Corpus Christi 1993, writ dismissed by agrmt.) (“The amount of the remittitur requested from the trial court does not conform with the amount of the remittitur requested from this Court. In their Motion to Modify, Correct or Reform Judgment, Motion for New Trial, and Motion for Judgment Notwithstanding the Verdict, appellants asked the trial court for a \$260,000 remittitur. However, they ask this Court for only a \$50,000 remittitur. . . . Because of this discrepancy, appellants have presented nothing for appellate review.”); *Marathon Oil Co. v. Sterner*, 777 S.W.2d 128, 132 (Tex. App.—Houston [14th Dist.] 1989, no writ) (“Arguably, appellant has not preserved error on

this point because in its motion for new trial, appellant requested a remittitur to \$5,000 in exemplary damages while in this point appellant argues the damages should have been reduced to \$10,000.”).

G. Request for findings of fact and conclusions of law

1. A request is required in bench trials

If a case is tried to the bench, the losing party must request findings of fact and conclusions of law. *See* TEX. R. CIV. P. 296. If part of a case is tried to a jury and part to the bench, the appealing party should request findings and conclusions regarding the part tried to the bench. *Operation Rescue-Nat'l v. Planned Parenthood of Houston & Southeast Tex., Inc.*, 937 S.W.2d 60, 82 (Tex. App.—Houston [14th Dist.] 1996), *aff'd as modified*, 975 S.W.2d 546 (Tex. 1998); *Shenandoah Assocs. v. J & K Props., Inc.*, 741 S.W.2d 470, 484 (Tex. App.—Dallas 1987, writ denied).

2. Formal requirements for findings and conclusions

A trial court's oral comments are not a substitute for written findings of fact and conclusions of law. *See In re Jane Doe 10*, 78 S.W.3d 338, 340 n.2 (Tex. 2002) (“Oral comments from the bench are not written findings of fact.”). Nor may findings and conclusions be recited in a judgment. *See* TEX. R. CIV. P. 299a (“Findings of fact shall not be recited in a judgment. . . . Findings of fact shall be filed with the clerk of the court as a document or documents separate and apart from the judgment.”). “If there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 and 298, the latter findings will control for appellate purposes.” *Id.*

Nevertheless, some courts have held, contrary to the rule, that findings contained in a judgment have probative value as long as such findings do not conflict with those in the separate document of findings of fact and conclusions of law. *See, e.g., Hill v. Hill*, 971 S.W.2d 153, 157 (Tex.

App.—Amarillo 1998, no pet.). Others, however, have held that findings of fact improperly contained within the body of a judgment are not reviewable. *See, e.g., Frommer v. Frommer*, 981 S.W.2d 811, 814 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd); *Salinas v. Beaudrie*, 960 S.W.2d 314, 317 (Tex. App.—Corpus Christi 1997, no pet.); *R.S. v. B.J.J.*, 883 S.W.2d 711, 715 n.5 (Tex. App.—Dallas 1994, no writ).

3. Timing and requisites for request for findings and conclusions

Findings must be requested within 20 days after the judgment is signed. TEX. R. CIV. P. 296. It is not necessary that the request be “presented” to the judge within that time period; filing is all that is required. *See Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 770 (Tex. 1989). If findings are properly requested, the trial court has a mandatory duty to file findings within 20 days of the request. *Zieba v. Martin*, 928 S.W.2d 782, 786 (Tex. App.—Houston [14th Dist.] 1996, no writ); *see* TEX. R. CIV. P. 297. If the request is untimely, the trial court has no duty to file findings. *See DeMello v. NBC Bank-Perrin Beitel*, 762 S.W.2d 379, 381 (Tex. App.—San Antonio 1988, no writ).

A bare request for findings, without proposed findings, may be held to be insufficient. *See Alvarez v. Espinoza*, 844 S.W.2d 238, 241-42 (Tex. App.—San Antonio 1992, writ dism'd w.o.j.). At the least, a request for additional findings under Rule 298 should specify the additional or amended findings requested. *See Stuckey Diamonds, Inc. v. Harris County Appraisal Dist.*, ___ S.W.3d ___, No. 14-00-00766-CV, 2002 WL 1608615, at *1 (Tex. App.—Houston [14th Dist.] July 18, 2002, no pet. h.) (holding that a “request for additional findings must be specific”); *Wagner v. Riske*, 178 S.W.2d 117, 119-20 (Tex. 1944); *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 838 (Tex. App.—Texarkana 1996, writ denied).

4. Requirement of filing notice of past due findings

If the trial court fails to file findings when timely requested to do so, the party requesting the findings must file a “Notice of Past Due Findings of Fact and Conclusions of Law.” TEX. R. CIV. P. 297. This notice must be filed within 30 days after filing the original request and must state the date the original request was filed and the date the findings were due. *Id.* The due date for the findings and conclusions is then extended until 40 days from the date the original request was filed. *Id.* The failure to file the notice waives the right to complain on appeal of the failure to make findings—even if findings were originally timely requested. *Salinas*, 960 S.W.2d at 317.

5. The failure to request findings and conclusions results in unfavorable standard of review

The failure to request findings (or to file a notice of past due findings) results in the appellate court implying all findings of fact necessary to support the trial court’s judgment. *See Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990) (per curiam) (“In this case, no findings of fact or conclusions of law were requested or filed. It is therefore implied that the trial court made all the findings necessary to support its judgment.”); *accord Wadsworth Props. v. ITT Employment & Training Sys.*, 816 S.W.2d 819, 822 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (“In the absence of findings of fact or conclusions of law, an appellate court should presume the trial court made all necessary findings to support its judgment.”). Findings will be implied so long as “[1] the proposition is one raised by the pleadings and supported by the evidence; and [2] the trial judge’s decision can be sustained on any reasonable theory that is consistent with the evidence and the applicable law, considering only the evidence favorable to the decision.” *Austin Area Teachers Fed. Credit Union v. First City Bank-Northwest Hills, N.A.*, 825 S.W.2d 795, 801 (Tex. App.—Austin 1992, writ denied) (quoting *Franklin v. Donoho*, 774 S.W.2d 308, 311 (Tex. App.—Austin 1989, no writ)).

Thus, the absence of a request affects the standard of review. Absent findings and conclusions, “[t]he judgment must be affirmed if it can be upheld on any legal theory that finds support in the evidence.” *Worford*, 801 S.W.2d at 109. However, the failure to request findings does not affect a party’s ability to challenge the legal and factual sufficiency of the evidence to support the implied findings, so long as a reporter’s record is filed. *Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989); *see also Giangrosso v. Crosley*, 840 S.W.2d 765, 769 (Tex. App.—Houston [1st Dist.] 1992, no writ) (holding that implied findings of fact, like express findings, may be challenged by legal and factual sufficiency points of error).

6. The trial court’s failure to file findings in response to a proper request can result in presumed harm

When (1) a party properly requests the trial court to file findings of fact and conclusions of law pursuant to Rules 296 and 297, (2) the trial court fails to do so, and (3) the reporter’s record is presented to the appellate court for review, harm is presumed and the appellate court must reverse the judgment, unless the record affirmatively shows that no injury resulted from the trial court’s failure to comply with Rule 296. *See Tenery v. Tenery*, 932 S.W.2d 29, 30 (Tex. 1996); *Cherne Indus., Inc.*, 763 S.W.2d at 772.

The test of whether harm exists depends upon whether the circumstances of the particular case would require an appellant to guess the reasons that the trial judge ruled against the appellant or whether the reasons are obvious. *See Elizondo v. Gomez*, 957 S.W.2d 862, 865 (Tex. App.—San Antonio 1997, pet. denied); *In re O.L.*, 834 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1992, no writ). If the appellant is prevented from making a proper presentation of the case to the appellate court, error will be harmful; if the appellant has adequate notice of the reasons for the judgment and can adequately contest it, error will not be harmful. *See Elizondo*, 957 S.W.2d at 865; *In re O.L.*, 834 S.W.2d at 418-19; *Eye Site, Inc. v. Blackburn*, 750 S.W.2d 274, 277 (Tex. App.—Houston [14th Dist.] 1988), *rev’d on other grounds*, 796 S.W.2d 160 (Tex. 1990);

Anzaldua v. Anzaldua, 742 S.W.2d 782, 783 (Tex. App.—Corpus Christi 1987, writ denied). Without a reporter’s record, however, it will be presumed that facts necessary to support the judgment were proven at trial. See *Alexander v. Barlow*, 671 S.W.2d 531, 535 (Tex. App.—Houston [1st Dist.] 1983, writ ref’d n.r.e.); *In re Swift’s Estate*, 560 S.W.2d 517, 518 (Tex. Civ. App.—Amarillo 1977, no writ). Note, however, that “the rule of implied findings of fact in support of the judgment cannot be invoked when the evidence establishes as a matter of law the issue to be determined.” *Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662, 666 (Tex. 1987).

Even when the lack of requested findings is found to be harmful, many appellate courts will not reverse the judgment but instead will abate the appeal and remand to the trial court for the entry of the required findings.

7. Findings and conclusions filed late by the trial court generally will still be considered

Although the trial court is supposed to file its findings within the time limit set out above, as a practical matter courts of appeals will generally consider findings filed late—even if they are filed after the trial court lost plenary power over the judgment. See, e.g., *Robles v. Robles*, 965 S.W.2d 605, 611 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); *Morrison v. Morrison*, 713 S.W.2d 377, 380-81 (Tex. App.—Dallas 1986, writ dismissed). Unless a party can show harm, it has no remedy for an untimely filing of findings. See *Morrison*, 713 S.W.2d at 381 (“We conclude that when a court files belated findings the only issue that arises is the injury to the appellate, not the trial court’s jurisdiction to make the findings.”).

8. A request for additional or amended findings may be required

If findings are filed, but are deficient, a request for additional findings under Rule 298 is required to preserve error. TEX. R. CIV. P. 298. For example, if the trial court’s original findings do not include any findings on a ground of

recovery or defense, a party must request additional findings or that ground is waived on appeal. TEX. R. CIV. P. 299; *Levine v. Maverick County Water Control & Improvement Dist. No. 1*, 884 S.W.2d 790, 795 (Tex. App.—San Antonio 1994, writ denied); *Dallas Morning News Co. v. Bd. of Trs.*, 861 S.W.2d 532, 538 (Tex. App.—Dallas 1993, writ denied); *Sears, Roebuck & Co. v. Nichols*, 819 S.W.2d 900, 907 (Tex. App.—Houston [14th Dist.] 1991, writ denied); *Augusta Dev. Co. v. Fish Oil Well Servicing Co.*, 761 S.W.2d 538, 542 (Tex. App.—Corpus Christi 1988, no writ).

But when one or more elements of a ground of recovery or defense have been found by the trial court, omitted unrequested elements that find support in the evidence will be deemed in support of the judgment. TEX. R. CIV. P. 299; *Boy Scouts of Am. v. Responsive Terminal Sys., Inc.*, 790 S.W.2d 738, 742 (Tex. App.—Dallas 1990, writ denied); *Bolli v. Prewitt*, 561 S.W.2d 917, 920 (Tex. Civ. App.—San Antonio 1978, no writ). Findings or conclusions will not be presumed, however, when the findings were properly requested. *Boy Scouts of Am.*, 790 S.W.2d at 742-43.

9. Timing for requesting and filing additional or amended findings

Any party may request specified additional or amended findings within 10 days of the filing of the original findings. TEX. R. CIV. P. 298. Any additional or amended findings must be filed within 10 days of the request. *Id.*

10. A request for findings extends appellate timetables only when findings are required or appropriate

Whether a request for findings of fact extends appellate timetables under Texas Rule of Appellate Procedure 26.1(a)(4) depends on whether findings are appropriate:

A timely filed request for findings of fact and conclusions of law extends the time for perfecting appeal when findings and conclusions are either (1) required by Rule 296, or (2) not required by Rule 296 but are not without purpose—that is, they could properly be considered by the appellate court.

IKB Indus. (Nig.) Ltd. v. Pro-Line Corp., 938 S.W.2d 440, 443 (Tex. 1997). It is therefore important to recognize when findings are required or appropriate.

a. When findings are required

Findings are required when the ruling or judgment follows an evidentiary hearing or a bench trial on the merits. *See Zimmerman v. Robinson*, 862 S.W.2d 162, 164 (Tex. App.—Amarillo 1993, no writ) (“[A] trial judge has the authority and duty to file requested findings of fact and conclusions of law where there has been an evidentiary hearing to the court or a bench trial on the merits.”). Findings are required in bench trials regardless of whether the trial court rules on a motion for judgment at the close of the plaintiff’s case or decides the case at the close of all the evidence. *See Qantel Business Sys., Inc. v. Custom Controls Co.*, 761 S.W.2d 302, 304 (Tex. 1988) (establishing rule allowing “the trial judge, sitting as trier of fact and law, to rule on both the factual and legal issues at the close of the plaintiff’s case and to make factual findings at that time if requested by a party”); *accord Martin-Simon v. Womack*, 68 S.W.3d 793, 796 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (“In entering judgment at the close of Martin-Simon’s case, the trial court, acting as fact finder, is presumed to have ruled not only on the legal sufficiency of the evidence, but also on the weight of the evidence and the credibility of the witnesses. Thus, after granting a motion for judgment, the trial judge may properly make findings of fact as well as conclusions of law.”) (citations omitted).

b. When findings are appropriate

Findings are not required, but may nevertheless be appropriate, in various situations. Some

examples are a trial court’s review of punitive damages award, *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 33 (Tex. 1994), discovery sanctions, *IKB Indus.*, 938 S.W.2d at 442; *TransAmerican Natural Gas Corp. v. Powell*, 811 S.W.2d 913, 919 n.9 (Tex. 1991), and a dismissal for want of prosecution issued after an evidentiary hearing. *Phillips v. Beavers*, 938 S.W.2d 446, 446-47 (Tex. 1997) (per curiam).

Similarly, although a trial court is not required to enter findings of fact and conclusions of law in connection with the signing of an interlocutory order, it “may” do so within 30 days after it signed the order. *See* TEX. R. APP. P. 28.1 (“The trial court need not, but may—within 30 days after the order is signed—file findings of fact and conclusions of law.”). Indeed, appellate courts have encouraged findings in the interlocutory appeal context, some strongly. *See, e.g., Fish v. Tandy Corp.*, 948 S.W.2d 886, 891-92 (Tex. App.—Fort Worth 1997, pet. denied) (“When a trial court overrules a special appearance, the defendant should request it to make findings of fact according to Texas Rule of Civil Procedure 296.”); *Vinson v. Tex. Commerce Bank-Houston, N.A.*, 880 S.W.2d 820, 828 (Tex. App.—Dallas 1994, no writ) (noting that “findings and conclusions can be helpful in assisting an appellate court in determining whether the trial court made its determination [of a motion to certify a class] in a reasonable and principled fashion”); *Tex. Dep’t of Mental Health & Mental Retardation v. Petty*, 778 S.W.2d 156, 160 (Tex. App.—Austin 1989, writ dism’d w.o.j.) (“The filing of findings of fact and conclusions of law, in connection with appealable interlocutory orders, is of course the better practice.”).

Nevertheless, it is questionable whether a request for findings will extend the appellate timetable in an interlocutory appeal, even if the findings are helpful. *See* TEX. R. APP. P. 28.1 (“Filing a motion for new trial will not extend the time to perfect the appeal.”). However, a party may still be wise to request findings in the context of an appealable interlocutory order because findings may be implied by the appellate court. *See, e.g., BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795

(Tex. 2002) (“When a trial court does not issue findings of fact and conclusions of law with its special appearance ruling, all facts necessary to support the judgment and supported by the evidence are implied.”). However, the appellant may still challenge the legal and factual sufficiency of the evidence to support the implied findings (as it would if express findings had been issued) if an appellate record is filed. *See id.* (“When the appellate record includes the reporter’s and clerk’s records, these implied findings are not conclusive and may be challenged for legal and factual sufficiency in the appropriate appellate court.”). A request for findings may also be advisable because at least one court has imposed a more onerous standard of review where findings were neither requested nor filed in an interlocutory appeal. *See Landry’s Seafood Inn & Oyster Bar-Kemah, Inc. v. Wiggins*, 919 S.W.2d 924, 927 (Tex. App.—Houston [14th Dist.] 1996, no writ) (holding that because appellant did not request findings or conclusions in connection with denial of application for temporary injunction, “we are to uphold the trial court’s judgment on any legal theory supported by the record”).

c. When findings are not appropriate

Because findings are appropriate only on “ultimate or controlling issues,” findings on issues “that relate merely to evidentiary matters” are inappropriate. *Rafferty v. Finstad*, 903 S.W.2d 374, 376 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *accord Loomis Int’l, Inc. v. Rathburn*, 698 S.W.2d 465, 467 (Tex. App.—Corpus Christi 1985, no writ). A controlling issue is one that “requires a factual determination to render judgment in the case.” *Collins*, 840 S.W.2d at 790. Nor is the trial court required to set out in detail every reason or theory by which it arrived at its final conclusion. *Associated Tel. Directory Publishers, Inc. v. Five D’s Pub. Co.*, 849 S.W.2d 894, 901 (Tex. App.—Austin 1993, no writ). The trial court also is not required to make findings of fact that are undisputed. *Jackman v. Jackman*, 533 S.W.2d 361, 362 (Tex. Civ. App.—San Antonio 1975, no writ).

A request for findings is also inappropriate in the context of any judgment rendered as a matter of law. *See IKB Indus.*, 938 S.W.2d at 443 (“A request for findings of fact and conclusions of law does not extend the time for perfecting appeal of a judgment rendered as a matter of law, where findings and conclusions can have no purpose and should not be requested, made, or considered on appeal.”). This includes a summary judgment, *id.*; *Linwood v. NCNB Tex.*, 885 S.W.2d 102, 103 (Tex. 1996) (per curiam), a judgment notwithstanding the verdict, *IKB Indus.*, 938 S.W.2d at 443; *Fancher v. Cadwell*, 314 S.W.2d 820, 822 (Tex. 1958), or a directed verdict. *IKB Indus.*, 938 S.W.2d at 443; *Ditto v. Ditto Inv. Co.*, 309 S.W.2d 219, 220 (Tex. 1958).

In addition, findings are inappropriate in the context of a default judgment awarding liquidated damages, *IKB Indus.*, 938 S.W.2d at 443; *Nixon v. Nixon*, 348 S.W.2d 434, 437 (Tex. Civ. App.—Houston [1st Dist.] 1961, writ ref’d n.r.e.), a dismissal for want of subject matter jurisdiction issued without an evidentiary hearing, *IKB Indus.*, 938 S.W.2d at 443; *Zimmerman*, 862 S.W.2d at 164; *Lusk v. Serv. Lloyds Ins. Co.*, 922 S.W.2d 647, 647 (Tex. App.—Austin 1996, writ denied), a dismissal for want of prosecution issued without an evidentiary hearing, *IKB Indus.*, 938 S.W.2d at 443, a dismissal based on the pleadings or special exceptions, *IKB Indus.*, 938 S.W.2d at 443, an appeal to a district court from an administrative body, *Valentino v. City of Houston*, 674 S.W.2d 813, 820 (Tex. App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.), and a postjudgment hearing. *Johnson v. J.W. Constr. Co.*, 717 S.W.2d 464, 468 (Tex. App.—Fort Worth 1986, no writ); *Zimmerman*, 862 S.W.2d at 164.

11. The effect of a request for findings on the trial court’s plenary power is unclear

“It is unclear whether the trial court’s plenary power to change its judgment is extended by filing a request for findings of fact and conclusions of law.” *Sammons v. Elder*, 940 S.W.2d 276, 280 n.1 (Tex. App.—Waco 1997,

writ denied). Some courts have held that a request for findings does not extend plenary power because it is not listed in Texas Rule of Civil Procedure 329b. *See, e.g., Pursley v. Ussery*, 982 S.W.2d 596, 599 (Tex. App.—San Antonio 1998, pet. denied) (“By its terms, Rule 329b extends a trial court’s plenary power only upon the timely filing of a motion for new trial and a motion to modify, correct, or reform the judgment. TEX. R. CIV. P. 329b(e), (g). As a result, several prominent commentators have concluded a trial court’s plenary power is not extended by requests for findings of fact and conclusions of law. We reach the same conclusion and so hold.”) (citations omitted); *see also* Elaine A. Carlson & Karlene S. Dunn, *Navigating Procedural Minefields: Nuances in Determining Finality of Judgments, Plenary Power, and Appealability*, 41 S. TEX. L. REV. 953, 1034 n. 258 (2000) (citing *Pursley* and stating that “the filing of a request for findings of fact does not correspondingly extend the trial court’s plenary power, even though it might extend the deadline for perfecting an appeal”).

Others, perhaps without much analysis, hold that a request does extend the trial court’s plenary power. *See, e.g., Elec. Power Design, Inc. v. R.A. Hanson Co., Inc.*, 821 S.W.2d 170, 171 (Tex. App.—Houston [14th Dist.] 1991, no writ) (“We see no reason why, under the current rules, the extension of the trial court’s plenary power over its judgment should not also be triggered by the filing of a request for findings of fact and conclusions of law.”); *see also Sammons*, 940 S.W.2d at 280 n.1 (noting that because a trial court can issue findings outside its plenary power, a rule that a request for findings did not extend the trial court’s plenary power over its judgment “could lead to a situation where the trial court amends or alters its conclusions of law so that they no longer support the judgment, yet the court is powerless to change its judgment”).

Obviously, until this issue is resolved, you should err on the side of caution and assume that a request for findings does NOT extend the trial court’s plenary power.

12. There is no need to challenge findings in order to preserve error for appeal

There is generally no action that need be taken in the trial court to challenge findings of fact on appeal. “[C]hallenges to a finding of fact’s legal and factual sufficiency can be made *for the first time on appeal* from nonjury trials.” *Regan*, 879 S.W.2d at 136 (emphasis added); *accord Letson*, 979 S.W.2d at 419 n.2. This is true of implied findings of fact as well. *See Roberson*, 768 S.W.2d at 281 (“When a statement of facts is brought forward, these implied findings may be challenged by factual sufficiency and legal sufficiency points the same as jury findings or a trial court’s findings of fact.”).

13. A challenge to conclusions may be required to preserve error for appeal

There is a split of authority, however, on the necessity of preserving challenges to conclusions of law. The Fourteenth Court of Appeals has held that complaints about specific conclusions of law issued by the trial court are subject to the requirement in former Rule of Appellate Procedure 52(d) (now Rule 33.1) that they have been presented to the trial court in the first instance. *See Regan*, 879 S.W.2d at 136 (reasoning that former Rule 52(d) (now Rule of Civil Procedure 324) only excepted complaints about factual sufficiency and the inadequacy or excessiveness of damages in a bench trial from the general requirement in Rule 52(a) (now Rule 33.1) that complaints on appeal have been presented to the trial court in the first instance); *accord Winters v. Arm Ref. Co.*, 830 S.W.2d 737, 738-39 (Tex. App.—Corpus Christi 1992, writ denied) (holding that appellant waived complaints about erroneous conclusions of law where he did not file any requests or objections or otherwise call the court’s attention to the error). Other courts of appeals have disagreed. *See, e.g., Sammons*, 940 S.W.2d at 279 (disagreeing with *Regan* and *Winters* and holding that “conclusions of law in a nonjury trial are reviewable by this Court without preservation under Rule 52(a),” now Rule 33.1); *Spiller v. Spiller*, 901 S.W.2d 553, 556 (Tex. App.—San Antonio 1995, writ denied) (“A trial court’s conclusions of law are always

reviewable.”); *Westech Eng’g, Inc. v. Clearwater Constructors, Inc.*, 835 S.W.2d 190, 196-97 (Tex. App.—Austin 1992, no writ) (same).

III. Postjudgment motions in federal court

A. Motion for judgment

A motion to enter judgment is not necessary in federal court because “Rule 58 puts the onus of preparing a judgment squarely on the shoulders of the clerk of the district court.” *Otis v. City of Chicago*, 29 F.3d 1159, 1163 (7th Cir. 1994); see FED. R. CIV. P. 58 (“Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it.”).

Indeed, until very recently, Rule 58 warned, “Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.” But effective December 1, 2002, the instruction against filing a proposed form of judgment was removed from Rule 58. Amended Rule 58(d) provides, “Request for Entry. A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1).” FED. R. CIV. P. 58(d) (eff. Dec. 1, 2002).

The amended rule still places the duty to prepare the judgment on the clerk and the court. See *id.* 58(a)(2) (“Subject to Rule 54(b): (A) unless the court orders otherwise, the clerk must, without awaiting the court’s direction, promptly prepare, sign, and enter the judgment when: (i) the jury returns a general verdict, (ii) the court awards only costs or a sum certain, or (iii) the court

denies all relief; (B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when: (i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or (ii) the court grants other relief not described in Rule 58(a)(2).”). The rationale for the change on motions for entry of judgment and proposed judgments is that “[t]he new provision allowing any party to move for entry of judgment on a separate document will protect all needs for prompt commencement of the periods for motions, appeals, and execution or other enforcement.” FED. R. CIV. P. 58(d) 2002 advisory committee note.

B. Rule 50(b) renewed motion for judgment as a matter of law

A “renewed motion for judgment as a matter of law” in federal court was formerly called a motion for JNOV. FED. R. CIV. P. 50 1987 advisory committee note. As its new name suggests, the motion is intended to be a reurging of a motion for judgment as a matter of law (“JMOL”) filed under Rule 50(a) at the close of all the evidence (formerly called a motion for directed verdict).

1. Timing for Rule 50(b) renewed motion for JMOL

Rule of Civil Procedure 50(b) allows a party to renew a motion for JMOL, which was not granted at the close of all the evidence, within 10 days after entry of judgment. See FED. R. CIV. P. 50(b) (“If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59.”).

Unlike in state court, in federal court the time to file this and other motions runs from “entry” of judgment. Rule 58 provides, “Every judgment

shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a).” Thus, judgment is not considered “entered” until both of these requirements are met: the judgment is set forth on a separate document and the judgment is entered in the civil docket.

Effective December 1, 2002, Rule 58 was amended to provide that if the separate document requirement is not met within 150 days of the entry of judgment on the civil docket under Rule 79(a), the judgment will nevertheless be treated as “entered” on that date. *See* FED. R. CIV. P. 58(b)(2) (eff. Dec. 1, 2002) (“Judgment is entered for purposes of these rules: . . . if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs: (A) when it is set forth on a separate document, or (B) when 150 days have run from entry in the civil docket under Rule 79(a).”). A parallel change is made to Rule of Appellate Procedure 4(a)(7). *See* FED. R. APP. P. 4(a)(7) (eff. Dec. 1, 2002).

This change was made because the common failure to comply with the separate document requirement led to serious confusion about when to file post-judgment motions and, more critically, when to appeal. FED. R. CIV. P. 58 2002 advisory committee note. Thus, “in the cases in which court and clerk fail to comply with this simple requirement, the motion time periods set by Rules 50, 52, 54, 59, and 60 begin to run after expiration of 150 days from entry of the judgment in the civil docket as required by Rule 79(a).” *Id.* The 150-day “cap will ensure that parties will not be given forever to appeal (or to bring a postjudgment motion) when a court fails to set forth a judgment or order on a separate document in violation of fed. R. Civ. P. 58(a)(1).” FED. R. APP. P. 4(a)(7) 2002 advisory committee note.

The Fifth Circuit has held that a renewed motion for JMOL filed after the verdict but before the judgment is entered preserves error because the deadline stated in the rule—10 days after entry of judgment—is only an outside time limit.

Gaia Techs. Inc. v. Recycled Prods. Corp., 175 F.3d 365, 373-74 (5th Cir. 1999).

The renewed motion for JMOL must not only be filed but also served on the opposing party within the ten-day time limit. *See United States Leather, Inc. v. H&W P’ship*, 60 F.3d 222, 225 (5th Cir. 1995) (holding that the “failure to serve the motion within the ten day limit deprives the district court of jurisdiction to alter or reconsider its earlier judgment”) (citing *Flores v. Procuiner*, 745 F.2d 338, 339 (5th Cir. 1984)). The district court has no power to enlarge the time for filing a renewed motion for JMOL. FED. R. CIV. P. 6(b); *see United States Leather, Inc.*, 60 F.3d at 225 (“The requirement that post-trial motions be filed within the relevant ten day period after entry of judgment is jurisdictional, and may not be extended by a waiver of the parties or by a rule of the district court.”) (citing *Vincent v. Consol. Operating Co.*, 17 F.3d 782, 785 (5th Cir. 1994)).

2. A Rule 50(a) motion for JMOL is a prerequisite to a Rule 50(b) renewed motion for JMOL

Filing a motion for JMOL at the close of all the evidence is generally a prerequisite to filing a renewed motion for JMOL. “If a party does not make such a motion [under Rule 50(a)], it can not ordinarily raise the issue of sufficiency of the evidence in its post-verdict motion under Fed. R. Civ. P. 50(b) or on appeal.” *Serna v. City of San Antonio*, 244 F.3d 479, 481 (5th Cir. 2001). “A post-judgment Rule 50 motion ‘may not enlarge or assert new matters not presented in the [pre-verdict] motion for directed verdict.’” *Taylor Pub. Co. v. Jostens, Inc.*, 216 F.3d 465, 473 (5th Cir. 2000) (quoting *Dimmitt Agri Indus., Inc. v. CPC Int’l Inc.*, 679 F.2d 516, 521 (5th Cir. 1982)). But the arguments in the Rule 50(b) motion need not be identical to those in the Rule 50(a) motion. Rather, all that is required is that “the evidence and law supporting the pre-submission challenge are the same as the evidence and law supporting the post-judgment challenge.” *Id.*

a. Failure to file Rule 50(a) motion results in waiver and "plain error" standard of review

If the appellant moved only under Rule 50(b) and not under Rule 50(a), the appellate court “will consider the issue as waived by the defendant and will treat the issue as being raised for the first time on appeal.” *Polanco v. City of Austin*, 78 F.3d 968, 974 (5th Cir. 1996). Under this standard of review, the court will only “review the issue of sufficient evidence for mere ‘plain error.’” *Id.* That is, the court will “review only whether there was *any* evidence to support the jury’s verdict, regardless of its sufficiency.” *Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.*, 81 F.3d 606, 610 n.9 (5th Cir. 1996). This is different from—and far more onerous than—a “no evidence” review under Texas procedure. The “[c]ourt will reverse only if the judgment complained of results in a ‘manifest miscarriage of justice.’” *United States v. Flintco Inc.*, 143 F.3d 955, 963-64 (5th Cir. 1998) (quoting *McCann v. Tex. City Ref., Inc.*, 984 F.2d 667, 673 (5th Cir. 1993)).

b. But failure to file Rule 50(a) motion will sometimes be excused

The Fifth Circuit will excuse the failure to file a Rule 50(a) motion in some circumstances, however. “Technical noncompliance with Rule 50(b) may be excused in situations in which the purposes of the rule are satisfied.” *Scottish Heritable Trust*, 81 F.3d at 610. The Fifth Circuit has described the test as requiring that (1) the defendant filed a motion for JMOL at the close of the plaintiff’s case, (2) the district court either refused to rule on the motion or took it under advisement, and (3) the motion sufficiently alerted the court and the plaintiff to the sufficiency issue. *Polanco*, 78 F.3d at 975; *see also Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 781 (5th Cir. 1999) (“Circumstances which have led us to deem a technical violation of Rule 50(b) ‘de minimis’ include, *inter alia*, (1) the trial court’s having reserved a ruling on an earlier motion for a JML made at the close of plaintiff’s evidence; (2) the defendant’s calling no more than two witnesses before closing; (3) the elapse of only a small

amount of time between the motion for a JML and the conclusion of all evidence; and (4) the plaintiff’s introducing no rebuttal evidence.”).

Nevertheless, “this circuit has never completely disregarded the requirement that the defendant must move for judgment as a matter of law at the close of all of the evidence.” *Polanco*, 78 F.3d at 974; *see Flintco, Inc.*, 143 F.3d at 963 (“While it is true that this Circuit has not been strict about motions for directed verdicts, we cannot depart completely from Rule 50(b).”). Thus, the court will find waiver where the rule’s purposes have not been satisfied. *See, e.g., Flintco, Inc.*, 143 F.3d at 961-62 (finding waiver where defendant did not file motion for JMOL at close of plaintiff’s case or close of all the evidence and did not object to the charge on sufficiency grounds, and rejecting argument that noncompliance was excused by either district court’s reluctance to hear motion or its later stated concerns about the sufficiency of the evidence).

Moreover, the failure to file a Rule 50(a) motion is not a jurisdictional defect. That is, the non-movant must raise in the district court the argument that the movant waived consideration of a Rule 50(b) motion by failing to make a prior Rule 50(a) motion. Otherwise the non-movant cannot raise the waiver argument on appeal. *Thompson & Wallace of Memphis, Inc. v. Falconwood Corp.*, 100 F.3d 429, 435 (5th Cir. 1996).

3. A renewed motion for JMOL is not required to complain about the sufficiency of the evidence, but if it is not filed remedy is limited to a new trial

The Fifth Circuit recently clarified that unlike a Rule 50(a) motion for JMOL, a Rule 50(b) renewed motion for JMOL is not a prerequisite to a complaint on appeal about the sufficiency of the evidence. *See Gaia Techs. Inc.*, 175 F.3d at 374 n.9 (“We have never required a party to file a Rule 50(b) motion in order to preserve its right to claim insufficiency of the evidence on appeal, so long as it has filed a Rule 50(a) motion at the close of all the evidence.”). Other circuits have

held to the contrary. *See, e.g., Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 638 (2d Cir. 1995). Indeed, before *Gaia*, loose language in prior Fifth Circuit opinions suggested that a Rule 50(b) motion was a prerequisite to appeal on sufficiency grounds. *See, e.g., Thompson & Wallace of Memphis, Inc.*, 100 F.3d at 435 (in dicta) (“Generally, a party must make *both* a pre-verdict rule 50(a) motion and a post-verdict rule 50(b) motion to preserve the right to appellate review.”) (emphasis added).

The failure to renew a motion for JMOL after the verdict does, however, limit the relief obtainable on appeal: “An appellant who fails to renew its pre-verdict motion for judgment ‘in the district court is not entitled to rendition of judgment in his favor on appeal, but is at most entitled to a new trial.’” *Whitehead v. Food Max of Miss., Inc.*, 163 F.3d 265, 271 (5th Cir. 1998) (quoting *Satcher v. Honda Motor Co.*, 52 F.3d 1311, 1315 (5th Cir. 1995)); *accord Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 217-18 (1947) (holding that defendant’s failure to file motion for judgment notwithstanding the verdict—now called a renewed motion for JMOL—precluded the court of appeals from rendering judgment for the defendant and constrained the court to remand for a new trial, despite the district court’s erroneous denial of the defendant’s motion for directed verdict).

4. A renewed motion for JMOL extends appellate deadlines

Preservation concerns aside, a party may wish to file a renewed motion for JMOL because it extends the time for taking an appeal. A timely filed motion extends the time for perfecting an appeal from 30 days after entry of judgment to 30 days after entry of the order disposing of the motion. FED. R. APP. P. 4(a)(4)(A)(i).

Note that effective December 1, 2002, Federal Rule of Civil Procedure 58 and Federal Rule of Appellate Procedure 4 were amended to make clear that “a separate document is not required for an order disposing of a motion for judgment under 50(B).” FED. R. CIV. P. 58(a)(1)(A) (eff. Dec. 1, 2002). Thus, entry of a ruling on a renewed motion for JMOL in the civil docket

constitutes entry of the order for purposes of Rules 58 and 4. *Id.* 58(b)(1); FED. R. APP. P. 4(a)(7)(A)(i) (eff. Dec. 1, 2002). This clarification was made because some courts had held that an order disposing of such a motion was not “entered” until it was entered in the docket *and* set forth on a separate document, thus delaying the time to appeal, sometimes indefinitely. *See* FED. R. APP. P. 4(a)(7) 2002 advisory committee note.

5. A motion for JMOL is inappropriate in a nonjury trial

A motion for judgment as a matter of law has no place in a case tried to the bench. *See Schlitt v. State of Fla.*, 749 F.2d 1482, 1482-83 (11th Cir. 1985) (“Fed. R. Civ. P. 50, governing directed verdicts, applies only in cases tried to a jury with power to return a binding verdict.”); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2523 (1995) (stating that Rule 50 “does not apply to cases tried without a jury or to those tried to the court with an advisory jury”).

Therefore, a party need not comply with Rule 50 in order to preserve the complaint that the evidence is insufficient to support the district court’s findings or that the findings are insufficient to support the judgment. *Colonial Penn Ins. v. Mkt. Planner Ins. Agency Inc.*, 157 F.3d 1032, 1037 (5th Cir. 1998) (citing *Ogletree v. Chester*, 682 F.2d 1366, 1368 n.1 (11th Cir. 1982)).

C. Motion for new trial

1. A motion for new trial is generally not a prerequisite for appeal, unless the complaint has never been brought to the trial court's attention

Unlike a motion for judgment as a matter of law, “[f]iling a Rule 59 motion [for new trial] is not a prerequisite to taking an appeal.” *Richardson v. Oldham*, 12 F.3d 1373, 1377 (5th Cir. 1994); *accord* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2818 (“Parties are not required to make a

motion for a new trial challenging the supposed errors as a prerequisite to appeal.”).

Despite its broad pronouncement in *Richardson*, however, the Fifth Circuit may require a motion for new trial if the alleged error has not previously been brought to the district court’s attention. For example, the Fifth Circuit has repeatedly held that the failure to file a motion for new trial waives complaints about the excessiveness or inadequacy of the damages that were not otherwise brought to the lower court’s attention. *See, e.g., Bueno v. City of Donna*, 714 F.2d 484, 493-94 (5th Cir. 1983) (“It is well-established [sic] that there can be no appellate review of allegedly excessive or inadequate damages if the trial court was not given the opportunity to exercise its discretion on a motion for a new trial.”); *Carlton v. H.C. Price Co.*, 640 F.2d 573, 577 (5th Cir. 1981) (holding that the issue of the excessiveness of the damages was reviewable despite failure to move for new trial on this ground, where the issue was presented to the district court during post-verdict hearing). A preeminent commentator advises, “Grounds for new trial that arise solely in the context of post trial proceedings must be presented to the trial court for consideration by a motion for new trial, and the failure to do so deprives the appellate court from any record that is reviewable for error.” 12 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 59.55 (3d ed. 2001).

2. A motion for new trial may be filed in the alternative along with a renewed motion for JMOL

In addition, a party making a renewed motion for judgment as a matter of law may wish to file an alternative motion for new trial. *See* FED. R. CIV. P. 50(b) (allowing for alternative motion for new trial). The movant must obtain a ruling on the alternative motion for new trial, however, or it loses the right to a new trial on appeal in the event that the appellate court reverses the JMOL. *Arenson v. S. Univ. Law Ctr.*, 43 F.3d 194, 198 (5th Cir. 1995).

Similarly, a motion for new trial may provide the only hope of preserving a sufficiency

argument if the party failed to move for judgment as a matter of law at the close of all the evidence.

3. Grounds for a motion for new trial

Even where a motion for new trial is not required, the losing party in a jury trial may file such a motion “for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.” FED. R. CIV. P. 59(a)(1). The rule does not enumerate the potential grounds for new trial, but “[i]t has been said that the general grounds for a new trial are that the verdict is against the weight of the evidence, that the damages are excessive, or that for other reasons the trial was not fair, and that the motion may also raise questions of law arising out of substantial errors in the admission or rejection of evidence or the giving or refusal of instructions.” 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2805 (1995).

4. Time for filing motion for new trial

A motion for new trial must be filed no later than 10 days after entry of judgment. FED. R. CIV. P. 59(b). As in Texas state court, the time for filing cannot be enlarged by the court. FED. R. CIV. P. 6(b).

5. A motion for new trial extends appellate deadlines

Preservation concerns aside, a party may wish to move for new trial because a timely filed motion extends the time for perfecting an appeal—from 30 days after entry of judgment to 30 days after entry of the order disposing of the motion. *See* FED. R. APP. P. 4(a)(4)(A)(v).

Effective December 1, 2002, Federal Rule of Civil Procedure 58 and Federal Rule of Appellate Procedure 4 were amended to make clear that “a separate document is not required for an order disposing of a motion for a new trial, or to alter or amend the judgment, under 59.” FED. R. CIV. P. 58(a)(1)(D) (eff. Dec. 1, 2002). Thus, entry of a ruling on a motion for

new trial in the civil docket constitutes entry of the order for purposes of Rules 58 and 4. *Id.* 58(b)(1); FED. R. APP. P. 4(a)(7)(A)(i) (eff. Dec. 1, 2002).

6. A motion for new trial is permissible, but not required, in a nonjury trial

As in a jury trial, “[f]iling a Rule 59 motion is not a prerequisite to taking an appeal” from a judgment rendered after a bench trial. *Richardson*, 12 F.3d at 1377.

Although not required, a motion for new trial is permissible in the context of a bench trial. Rule 59(a)(2) provides, “A new trial may be granted to all or any of the parties and on all or part of the issues in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States.” FED. R. CIV. P. 59(a)(2). Unlike in a jury trial, a motion for new trial in a bench trial allows the court to reopen the judgment, take additional testimony, amend findings of fact and conclusions of law, or make new findings of fact and conclusions of law. FED. R. CIV. P. 59(a).

D. Motion to alter or amend the judgment

1. Grounds for the motion

The grounds for altering or amending a judgment are “(1) an intervening change in the controlling law; (2) new evidence previously unavailable; and (3) the need to correct clear error or prevent manifest injustice.” *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). “Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party’s position, or the controlling law.” *Id.*

Regarding the new evidence ground, the Fifth Circuit is among those circuits holding that a movant is not required to show “that with greater diligence the affidavits could not have been obtained earlier” and “need not first show that her default was the result of mistake, inadvertence, surprise, or excusable neglect or

that the evidence is such as to show that the judgment was manifestly wrong.” *Ford v. Elsbury*, 32 F.3d 931, 937 (5th Cir. 1994) (quoting *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990)). *But cf.*, e.g., *Retired Chicago Police Ass’n v. City of Chicago*, 76 F.3d 856, 867 (7th Cir. 1996) (“A Rule 59(e) motion cannot be used to present evidence that could and should have been presented prior to entry of final judgment.”). “In deciding whether to consider late-filed evidence, the district court must strike a proper balance between two competing interests: ‘the need to bring litigation to an end and the need to render just decisions on the basis of all the facts.’” *Ford*, 32 F.3d at 937 (quoting *Lavespere*, 910 F.2d at 174). “*Lavespere* instructs that in striking the proper balance in these circumstances, the court should consider, among other things, (1) the reasons for the plaintiffs’ default, (2) the importance of the evidence to the plaintiffs’ case, (3) whether the evidence was available to plaintiffs before they responded to the summary judgment motion, and (4) the likelihood that the defendants will suffer unfair prejudice if the case is reopened.” *Id.* at 938.

2. Time for filing motion

Under Rule 59(e), a party may file a motion to alter or amend the judgment within 10 days of the entry of judgment. FED. R. CIV. P. 59(e). The 10-day deadline is jurisdictional and cannot be extended. *Id.* 6(b) (referring to Rule 59(e)). Even if misnomered, “[a] post-judgment motion for reconsideration or rehearing is generally considered a Rule 59(e) motion to alter or amend if it challenges the correctness of the judgment.” *In re Stangel*, 68 F.3d 857, 859 n.1 (5th Cir. 1995); *see also Ford v. Elsbury*, 32 F.3d 931, 937 (5th Cir. 1994) (“Rule 59(e) has been interpreted as covering motions to vacate judgments, not just motions to modify or amend.” (quoting *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 353, 355 (5th Cir. 1993))).

If the motion is filed after the ten-day period has elapsed, it will be treated as a Rule 60(b) motion, which requires a higher showing of

entitlement to relief and which does not extend the appellate timetable:

The Federal Rules of Civil Procedure recognize no “motion for reconsideration.” Instead, this court construes such a filing in one of two ways. If the motion is filed within ten days of the district court’s entry of judgment, the motion is treated as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). Alternatively, if the motion is filed more than ten days after the entry of judgment, it is considered a motion seeking relief from the judgment under Fed. R. Civ. P. 60(b). This distinction can be significant in determining the timeliness of a notice of appeal, for a Rule 59(e) motion tolls the 30-day period, while a Rule 60(b) motion does not.

United States v. Emmons, 107 F.3d 762, 764 (10th Cir. 1997) (quoting *Hatfield v. Bd. of County Comm’rs for Converse County*, 52 F.3d 858, 861 (10th Cir. 1995)); accord *In re Stangel*, 68 F.3d at 859 (“Although motions for reconsideration or rehearing are typically treated as Fed. R. Civ. P. 59(e) motions, motions for reconsideration or rehearing served more than 10 days after the judgment are generally decided under Fed. R. Civ. P. 60(b).”).

3. A motion to alter or amend the judgment extends appellate deadlines

A timely filed motion to alter or amend the judgment extends the time to appeal from 30 days after entry of judgment to 30 days after entry of an order disposing of the motion. FED. R. APP. P. 4(a)(4)(A)(iv); see *Richardson v. Oldham*, 12 F.3d 1373, 1377 (5th Cir. 1994). Note that although courts agree that a premature Rule 59 motion, *i.e.*, one filed before the entry of judgment, is effective, some courts rule that such a motion is implicitly overruled by the entry of judgment and that therefore the 30 days to appeal begins to run with the judgment. See, *e.g.*, *Dunn v. Truck World, Inc.*, 929 F.2d 311, 313 (7th Cir. 1991) (in case involving premature motion for new trial, reasoning that “[f]inal

judgment necessarily denies pending motions, and so starts the time for appeal”). Others hold that “the district court must explicitly dispose of all outstanding Rule 4(a)(4) motions [which includes Rule 59(e) motions] and, consequently, the time for filing an appeal does not begin to run until the motion is decided.” *Havird Oil Co. v. Marathon Oil Co.*, 149 F.3d 283, 288 (4th Cir. 1998).

Just like with a motion for new trial, effective December 1, 2002 no separate document is required for an order disposing of a motion to alter or amend the judgment under Rule 59. See FED. R. CIV. P. 58(a)(1)(D) (eff. Dec. 1, 2002). Thus, entry of a ruling on a motion to alter or amend in the civil docket constitutes entry of the order for purposes of Rules 58 and 4. *Id.* 58(b)(1); FED. R. APP. P. 4(a)(7)(A)(i) (eff. Dec. 1, 2002).

E. Motion to correct clerical errors under Rule 60(a)

1. Grounds for a Rule 60(a) motion

“Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.” FED. R. CIV. P. 60(a). Although Rule 60(a) does not appear to require the court to give the parties notice of its intent to correct a judgment *sua sponte*, the Fifth Circuit has imposed such a requirement. See *In re West Tex. Mktg. Corp.*, 12 F.3d 497, 503 n.4 (5th Cir. 1994).

“The scope of Rule 60(a) is . . . very limited.” *In re West Tex. Mktg.*, 12 F.3d at 503 (quoting *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 668-69 (5th Cir. 1986) (en banc)). “Rule 60(a) finds application where the record makes apparent that the court intended one thing but by merely clerical mistake or oversight did another. Such a mistake must not be one of judgment or even of misidentification, but merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature.” *Dura-Wood Treating Co. v. Century*

Forest Indus., Inc., 694 F.2d 112, 114 (5th Cir. 1982). “Correction of an error of ‘substantive judgment,’ therefore, is outside the reach of Rule 60(a).” *Harcon Barge*, 784 F.2d at 669.

2. Time for filing motion under Rule 60(a)

There is no time limit on a motion to correct a clerical error in a judgment. *Id.* at 503. However, if an appeal from the original judgment is pending, a party must secure the court of appeals’ permission first. *See* FED. R. CIV. P. 60(a) (“During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.”).

3. A Rule 60(a) motion has no effect on appellate deadlines

Neither a motion nor a corrected judgment under Rule 60(a) restarts the time to appeal the underlying judgment. *See In re Cobb*, 750 F.2d 477, 479 (5th Cir. 1985) (“Corrections under Rule 60(a) do not affect the underlying judgment, and, consistent therewith, do not affect the time for filing a notice of appeal. . . . ‘The time for appeal from the underlying judgment correspondingly dates from the original rendition of judgment in the Rule 60(a) context’”) (quoting *Int’l Controls Corp. v. Vesco*, 556 F.2d 665, 670 (2d Cir. 1977)); *Am. Fed’n of Grain Millers, Local 24 v. Cargill Inc.*, 15 F.3d 726, 728 (7th Cir. 1994) (“Such a motion does not restart or toll the allowable time period for a timely appeal.”).

F. Motion for remittitur

1. Standard for remittitur

A motion for remittitur is proper to challenge the excessiveness of an award of damages; it is not appropriate to argue that the damages award is the result of passion or prejudice. *See Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1241 (5th Cir. 1985) (holding that “the better approach is to require a new trial on any

issue infected by passion and prejudice and employ remittitur for those verdicts which are excessive, that is, so large as to be contrary to right reason”). A motion for remittitur is often couched as an alternative to a motion for new trial.

The Fifth Circuit recently detailed the standard for ruling on a motion for remittitur:

This court’s power to grant a remittitur of excessive damages is the same as the district court’s. “[W]e apply the loosely defined ‘maximum recovery rule’ when deciding whether a remittitur is in order. This judge-made rule essentially provides that we will decline to reduce damages where the amount awarded is not disproportionate to at least one factually similar case from the relevant jurisdiction.” The rule applies regardless of whether the award was made by a jury. The rule “does not necessarily limit an award to the highest amount previously recognized in the state;” indeed, the rule “does not become operative unless the award exceeds 133% of the highest previous recovery in the [relevant jurisdiction]” for a factually similar case. Because the facts of each case are different, prior damages awards are not always controlling; a departure from prior awards is merited “if unique facts are present that are not reflected within the controlling caselaw.”

Lebron v. United States, 279 F.3d 321, 326 (5th Cir. 2002) (quoting *Douglass v. Delta Air Lines, Inc.*, 897 F.2d 1336, 1337, 1339 & n.3, 1344 & n.14 (5th Cir. 1990)); *see also Hughes v. Ford Motor Co.*, 204 F. Supp. 2d 958, 965 (N.D. Miss. 2002).

As in state court, the prevailing party may accept or refuse a suggestion of remittitur. *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2815 (1995) (“A remittitur gives the plaintiff a choice.”); *see, e.g., Hansen v. Johns-Manville Prods. Corp.*, 734 F.2d 1036, 1047 (5th Cir. 1984) (“On remand, Hansen shall be given the option of

accepting or rejecting the remittitur thus determined.”).

2. Time for filing motion for remittitur

Although there does not appear to be a deadline for filing a motion for remittitur, it is wise to file one within the time for filing a motion for new trial—10 days after the entry of judgment. *See* FED. R. CIV. P. 59(b).

3. Accepted remittitur is not appealable; refusal is appealable after new trial

If the party accepts the remittitur, he or she cannot appeal it. *See Tullos v. Resource Drilling, Inc.*, 750 F.2d 380, 386 (5th Cir. 1985) (“The law of this Circuit is clear that even if a remittitur is accepted *under protest*, the plaintiff cannot appeal from it given that it was accepted.”). “Where the plaintiff elects the remittitur, the defendant’s time for filing the notice of appeal runs from the date of entry of the amended judgment reduced as a result of the remittitur.” *Ortiz-Del Valle v. N.B.A.*, 190 F.3d 598, 600 (2d Cir. 1999).

If the party refuses the remittitur, the court will typically order a new trial on the issue of damages only. *See Stewart v. Atlantic Pipe Line Co.*, 479 F.2d 311, 312 (5th Cir. 1973) (per curiam) (“The law of this circuit requires that in the event the trial court concludes that a jury verdict for damages so far departs from the evidence as to warrant his granting a new trial with respect to the amount of damages, it should simply grant a new trial on the damage issue or it should give the winning party an option of having a new trial or agreeing to a remittitur of a part of the amount found in the jury verdict.”); *Maxey v. Freightliner Corp.*, 727 F.2d 350, 352 (5th Cir. 1984) (in the context of plaintiff’s refusal to accept a remittitur, holding that “[w]here, as here, the jury’s findings on questions relating to liability were based on sufficient evidence and made in accordance with law, it [is] proper to order a new trial only as to damages”) (quoting *Hadra v. Herman Blum Consulting Eng’rs*, 632 F.2d 1242, 1246 (5th Cir. 1980)); *see also* FED. R. CIV. P. 59(a).

The party refusing to remit can appeal the propriety of the new trial on appeal from a final judgment after the second trial. *See Ortiz-Del Valle*, 190 F.3d at 600 (“Where the plaintiff elects a new trial, however, no final order is entered; rather, the defendant can appeal the issues of liability and damages after the conclusion of the case.”); 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2815 (1995) (“The plaintiff can refuse to accept the reduced amount of damages and instead proceed to a new trial. On appeal from a judgment following the second trial he may claim that the court erred in setting aside the original verdict as excessive.”).

G. Requests for findings of fact and conclusions of law

1. Generally, no request for findings is required in federal court

“Requests for findings are not necessary for purposes of review.” FED. R. CIV. P. 52(a). Thus, unlike the Texas rules, Federal Rule of Civil Procedure 52 places the onus for findings of fact and conclusions of law squarely on the district court. *See id.* (providing that the district court “shall” enter findings and conclusions in all actions tried without a jury or with an advisory jury). Rule 52 has been described as “completely self-executing.” 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2578 (1995); *see also Gilbert v. Sterrett*, 509 F.2d 1389, 1393 (5th Cir. 1975) (holding that “in cases tried without a jury there should be no formal barriers to appellate review of the court’s findings”). “It is an error for the trial court to fail to make findings of fact, even though no requests for such findings were made.” *Squirtco v. Seven-Up Co.*, 628 F.2d 1086, 1092 (8th Cir. 1980); *accord Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 606 (2d Cir. 1986) (citing *Squirtco*).

“When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not in the district court the party raising the question objected to the findings,

moved to amend them, or moved for partial findings.” FED. R. CIV. P. 52(b). A motion for additional findings is similarly not necessary to preserve error about the sufficiency of the findings. *See Gilbert*, 509 F.2d at 1393 (“[W]e attach no significance to the failure of the plaintiffs-appellants, to file a motion in the district court for additional findings.”). Thus, an appellant may raise for the first time on appeal arguments that the district court’s findings were clearly erroneous or insufficient to support the judgment. *Colonial Penn Ins. v. Mkt. Planners Ins. Agency Inc.*, 157 F.3d 1032, 1036 (5th Cir. 1998).

However, the failure to propose specific findings has been held to prevent a party from complaining about the lack of specificity in findings. *See Evans v. Suntreat Growers & Shippers, Inc.*, 531 F.2d 568, 570 (Temp. Emerg. Ct. App. 1976); *see also Reliance Fin. Corp. v. Miller*, 557 F.2d 674, 681-82 (9th Cir. 1977) (““It would seem that if a party is not willing to give a trial judge the benefit of suggested findings and conclusions, he is not in the best of positions to complain that the findings made and conclusions stated are incomplete.”” (quoting *Evans*, 531 F.2d at 570 (quoting *Sonken-Galamba v. Atchison, T. & S.F. Ry.*, 34 F. Supp. 15, 16 (W.D. Mo. 1940), *aff’d*, 124 F.2d 952 (8th Cir. 1942))))).

Moreover, the general preservation-of-error rule still requires that a party make its objections known to the trial court. Thus, courts have tended to restrict Rule 52’s exceptions from the general preservation requirements stated in Rule 46 to those expressly enunciated in Rule 52. *See* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2581 (1995) (noting that several “courts have held that the general principle of Rule 46 is still controlling and that, except as specifically otherwise provided in Rule 52, it is necessary that a party make known to the trial court his objection to the action taken by it and the grounds of the objection”); *see, e.g., Rocket Indus., Inc. v. S. Tire & Supply, Inc.*, 706 F.2d 561, 564 (5th Cir. 1983) (stating that “Fed. R. Civ. P. 46 & 52(a) require party to make known

to district court objections to its findings and judgment in order to preserve point for review”).

2. When the trial court is required to make findings

Findings and conclusions are required when the district court renders a partial judgment as a matter of law during a nonjury trial. *See* FED. R. CIV. P. 52(c) (“If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.”). However, findings are not required on other “matter of law” rulings, such as rulings on Rule 12(b)(6) or Rule 56 (summary judgment) motions. *See* FED. R. CIV. P. 52(a) (“Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in subdivision (c) of this rule.”).

3. Formal requirements for findings

Unlike state court, written findings and conclusions are not necessary; the court may recite its findings and conclusions either in a written opinion or memorandum or orally in open court. FED. R. CIV. P. 52(b). Findings must be stated separately from conclusions. FED. R. CIV. P. 52(a). Findings may not be included in the judgment, *see* FED. R. CIV. P. 58 (“Every judgment shall be set forth on a separate document.”), and they should be made before the entry of judgment. *In re Tex. Extrusion Corp.*, 836 F.2d 217, 220 (5th Cir. 1988) (“Certainly the intent of Rule 52 is that the court should make and file its findings of fact and conclusions of law prior to the entry of judgment.”).

4. Requesting amended or additional findings

a. Deadline for requesting

After findings have been issued, a party may request amended or additional findings within 10 days after entry of judgment. *In re Tex. Extrusion Corp.*, 836 F.2d at 220. “This 10 day period of Rule 52(b) is jurisdictional and cannot be extended in the discretion of the court.” *Id.*

b. Not required to preserve error

As discussed above, a motion for additional findings is not necessary to preserve error about the sufficiency of the findings. *Gilbert*, 509 F.2d at 1393.

c. Extends appellate deadlines

A timely request for amended or additional findings extends the appellate timetable from 30 days after entry of judgment to 30 days after the request is ruled upon. FED. R. APP. P. 4(a)(4)(A)(ii).

Effective December 1, 2002, Federal Rule of Civil Procedure 58 and Federal Rule of Appellate Procedure 4 were amended to make clear that “a separate document is not required for an order disposing of a motion to amend or make additional findings of fact under 52(b).” FED. R. CIV. P. 58(a)(1)(B) (eff. Dec. 1, 2002). Thus, entry of a ruling on a motion for amended or additional findings in the civil docket constitutes entry of the order for purposes of Rules 58 and 4. *Id.* 58(b)(1); FED. R. APP. P. 4(a)(7)(A)(i) (eff. Dec. 1, 2002).

5. Effect of trial court's failure to make findings and conclusions

Normally when the trial court fails to make findings and an appeal is taken, the appellate court will vacate the judgment and remand the action for appropriate findings to be made on the material issues. Findings, however, are not a jurisdictional requirement of appeal. Furthermore, cursory findings and

conclusions or even the complete lack of findings and conclusions does not necessarily require a reversal of the judgment if a full understanding of the issues on appeal can nevertheless be determined by the appellate court.

In re Tex. Extrusion Corp., 836 F.2d at 221 (citations omitted); *see Chandler v. City of Dallas*, 958 F.2d 85, 90 (5th Cir. 1992) (“The touchstone of our Rule 52(a) analysis has remained the same over the years: Whether we, as an appellate court, can obtain a ‘full understanding of the issues on appeal.’”) (quoting *In re Tex. Extrusion Corp.*, 836 F.2d at 221).

IV. Conclusion

It can sometimes be difficult after the completion of a long trial to do the research necessary to accomplish the postjudgment phase of the lawsuit correctly. Moreover, the rules are not always simple, or clear. But as can be seen from the above discussion, the timely filing of the appropriate postjudgment motion is critical to preserving error, extending deadlines, and getting the relief you desire after trial.