

**WHEN IS THE EVIDENCE  
*REALLY* SUFFICIENT  
IN THE SUPREME COURT OF TEXAS?**

Paper by

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**17<sup>TH</sup> ANNUAL ADVANCED CIVIL APPELLATE  
PRACTICE COURSE**  
September 11-12, 2003  
Austin, Texas

**CHAPTER 14**



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## CHALLENGES TO THE SUFFICIENCY OF THE EVIDENCE IN JURY TRIALS

### A. Legal Insufficiency

In a jury trial, challenges to the legal insufficiency of the evidence<sup>1</sup> are preserved by: “(1) a motion for instructed verdict; (2) a motion for judgment notwithstanding the verdict; (3) an objection to the submission of the issue to the jury; (4) a motion to disregard the jury’s answer to a vital fact issue or, (5) a motion for new trial specifically raising the complaint.”<sup>2</sup> “Legal sufficiency points of error assert a complete lack of evidence on an issue,”<sup>3</sup> and are designated as “no evidence” points, or “matter of law” points, depending upon whether the complaining party had the burden proof.<sup>4</sup> Challenges to the legal insufficiency of the evidence points of error “must be sustained when the record discloses one of the following:”

- (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla of evidence; or (4) the evidence established conclusively the opposite of a vital fact.<sup>5</sup>

<sup>1</sup> The courts of appeals and the supreme court have jurisdiction to review challenges to the legal sufficiency of the evidence. *Choate v. San Antonio & A.P. Ry.*, 91 Tex. 406, 44 S.W.2d 69, 69-70 (1898).

<sup>2</sup> *Cecil v. Smith*, 804 S.W.2d 509, 510-11 (Tex. 1991); *Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 822 (Tex. 1985); *Hart v. Moore*, 952 S.W.2d 90, 94 (Tex. App.—Amarillo 1997, writ denied); *Pipgras v. Hart*, 832 S.W.2d 360, 367 (Tex. App.—Fort Worth 1992, writ denied); see TEX. R. CIV. P. 301; *Salinas v. Fort Worth Cab & Baggage Co.*, 725 S.W.2d 701, 704 (Tex. 1987); *Tribble & Stephens Co. v. Consolidated Servs., Inc.*, 744 S.W.2d 945, 947 (Tex. App.—San Antonio 1987, writ denied); *Robert W. Calvert, “No Evidence” and “Insufficient Evidence” Points of Error*, 38 TEX. L. REV. 361, 362 (1960).

<sup>3</sup> *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied).

<sup>4</sup> *Id.*

<sup>5</sup> *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 727 (Tex. 2003) (per curiam); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998); *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998); *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) (citing *Robert W. Calvert, “No Evidence” and “Insufficient Evidence” Points of Error*, 38 TEX. L. REV. 361, 362-63 (1960)); *Cecil*, 804 S.W.2d at 511 n.2; *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 666 n. 9 (Tex. 1990) (citing *Calvert*, 38 TEX. L. REV. at 362-63).

In reviewing legal sufficiency, the supreme court has held that it is “required to determine whether the proffered evidence as a whole rises to the level that would enable reasonable and fair-minded people to differ in their conclusions.”<sup>6</sup> As the court observed, it is not “simply directed to determine whether evidence exists that has some remote relation to the verdict.”<sup>7</sup> “The evidence presented, viewed in the light most favorable to the prevailing party, must be such as to permit the logical inference [that the jury must reach].”<sup>8</sup> Whether logical or inferential, there must be a logical connection “between the evidence offered and the fact to be proved.”<sup>9</sup> The court admonished reviewing courts to “bear in mind the difference between materiality of the evidence and the issue of evidentiary sufficiency.”<sup>10</sup> Furthermore, simply because some evidence is material in the sense that it makes a fact that is of consequence to the determination of the action more or less probably does not render the evidence legally sufficient.<sup>11</sup> Quoting Professor McCormick, the supreme court observed, “brick is not a wall.”<sup>12</sup>

#### 1. No Evidence

If an appellate is attacking the legal sufficiency of an adverse finding of an issue on which he did not have the burden of proof, the appellant must demonstrate on appeal that there is no evidence to support the adverse finding.<sup>13</sup>

“The traditional statement of the standard of review”<sup>14</sup> for reviewing no evidence points of error is that the reviewing court considers only the evidence and inferences that tend to support the finding and

<sup>6</sup> *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex. 1994).

<sup>7</sup> *Id.* at 24.

<sup>8</sup> *Id.* (quoting *Lyons v. Millers Casualty Ins. Co.*, 866 S.W.2d 597, 600 (Tex. 1993)).

<sup>9</sup> *Id.* (citing *Lyons*, 866 S.W.2d at 600).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 24-25.

<sup>12</sup> *Id.* at 25 (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 152 (West ed. 1954)).

<sup>13</sup> TEX. R. APP. P. 38.1(e); *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983); *Hickey v. Couchman*, 797 S.W.2d 103, 109 (Tex. App.—Corpus Christi 1990, writ denied); *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 276 (Tex. App.—Amarillo 1988, writ denied). See generally *Robert W. Calvert, “No Evidence” and “Insufficient Evidence” Points of Error*, 38 TEX. L. REV. 361, 364-68 (1960) (discussing the requirements necessary to prove legal insufficiency).

<sup>14</sup> *Lyons v. Miller Cas. Ins. Co.*, 866 S.W.2d 597, 600 (Tex. 1993) (citing *W. Wendell Hall, Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY’S L.J. 1045, 1133 (1993)).

disregards all evidence and inferences to the contrary.<sup>15</sup> The scope of review is clear: only the evidence and inferences supporting the finding are considered. The supreme court *seemed to reaffirm* this statement of the scope of review when it recently stated in a unanimous opinion, *Lenz v. Lenz*,<sup>16</sup> that “[w]e emphasize ... that under a legal-sufficiency review, we must disregard all evidence and inferences contrary to the jury’s finding.”<sup>17</sup>

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<sup>15</sup> *Wal-Mart Stores, Inc. v. Canchola*, 46 Tex. Sup. Ct. J. \_\_\_ (Sept. 4, 2003) (per curiam); *Tiller v. McLure*, 46 Tex. Sup. Ct. J. 632 (May 8, 2003) (per curiam); *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 717 (Tex. 2003) (Schneider, J., concurring); *Wal-Mart Stores, Inc. v. Miller*, 102 S.W.3d 706, 708 (Tex. 2003) (per curiam); *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 782 (Tex. 2001); *Bradford v. Vento*, 48 S.W.3d 749, 754 (Tex. 2001); *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam); *State Farm Fire & Cas. Co. v. Simmons*, 41 Tex. Sup. Ct. J. 371, 372, 1998 WL 59210, at \*3 (Feb. 13, 1998); *Minnesota Mining & Mfg. Co. v. Nishika, Ltd.*, 953 S.W.2d 733, 738 (Tex. 1997); *ACS Investors, Inc. v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997); *Continental Coffee Prods. Co. v. Casarez*, 937 S.W.2d 444, 450 (Tex. 1996); *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996); *Ellis County State Bank v. Keever*, 888 S.W.2d 790, 794 (Tex. 1994); *Lyons*, 866 S.W.2d at 600; *Weirich v. Weirich*, 833 S.W.2d 942, 945 (Tex. 1992); *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 458 (Tex. 1992); *Orozco v. Sander*, 824 S.W.2d 555, 556 (Tex. 1992); *State v. \$11,014.00*, 820 S.W.2d 783, 784 (Tex. 1991) (per curiam); *Mancorp, Inc. v. Culpepper*, 802 S.W.2d 226, 227 (Tex. 1990); *Lewelling v. Lewelling*, 796 S.W.2d 164, 166 (Tex. 1990); *Best v. Ryan Auto Group, Inc.*, 786 S.W.2d 670, 671 (Tex. 1990); *Responsive Terminal Sys., Inc. v. Boy Scouts of America*, 774 S.W.2d 666, 668 (Tex. 1989); *Southern States Transp., Inc. v. State*, 774 S.W.2d 639, 640 (Tex. 1989); *Sherman v. First Nat’l Bank*, 760 S.W.2d 240, 242 (Tex. 1988); *Davis v. City of San Antonio*, 752 S.W.2d 518, 522 (Tex. 1988); *Jacobs v. Danny Darby Real Estate*, 750 S.W.2d 174, 175 (Tex. 1988); *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 765 (Tex. 1987); *Stafford v. Stafford*, 726 S.W.2d 14, 16 (Tex. 1987); *Alm v. Aluminum Co. of America*, 717 S.W.2d 588, 593 (Tex. 1986); *Larson v. Cook Consultants, Inc.*, 690 S.W.2d 567, 568 (Tex. 1985); *King v. Bauer*, 688 S.W.2d 845, 846 (Tex. 1985); *Tomlinson v. Jones*, 677 S.W.2d 490, 492 (Tex. 1984); *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982); *Glover v. Texas Gen. Indem. Co.*, 619 S.W.2d 400, 401 (Tex. 1981); *McClure v. Allied Stores*, 608 S.W.2d 901, 904 (Tex. 1980); *Ray v. Farmers’ State Bank*, 576 S.W.2d 607, 609 (Tex. 1978); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965); *Benoit v. Wilson*, 150 Tex. 273, 239 S.W.2d 792, 796 (1951); *Cartwright v. Canode*, 106 Tex. 502, 171 S.W.2d 696, 698 (1914).

<sup>16</sup> *Lenz v. Lenz*, 45 Tex. Sup. Ct. J. 781, 783 (June 6, 2002).

<sup>17</sup> *Minyard Food Stores, Inc. v. Goodman*, 45 Tex. Sup. Ct. J. 828, 831 (June 13, 2002) (citing *Bradford*, 48 S.W.3d at 754); see *State v. Gonzalez*, 45 Tex. Sup. Ct. J. 925, 927

However, in 1997, the supreme court reformulated the traditional standard and scope of review. The supreme court stated that, in reviewing no evidence points of error, the reviewing court must consider *all of the record evidence* in a light most favorable to the party in whose favor the verdict has been rendered, and every reasonable inference deducible from the evidence is to be indulged in that party’s favor.<sup>18</sup> Under this restated statement of the standard of review, the scope of review has been expanded: all of the evidence is considered.<sup>19</sup> The expanded scope of review may significantly effect one’s analysis of the viability of a legal insufficiency challenge. While the supreme court seems to have returned to the traditional statement of the standard, it did so without discussing the two lines of supreme court authority.

Since the supreme court’s apparent clarification of the scope of review in legal sufficiency challenges in *Lenz v. Lenz*, the only thing that is clear is that the scope of review remains unclear.

In *Bentley v. Bunton*,<sup>20</sup> a host of a local, publicly-accessed television call-in talk show in a small town repeatedly accused a local district judge, Judge Bentley, of being corrupt. The jury awarded Judge Bentley \$7 million in mental anguish damages. As to

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(June 27, 2002) (citing *Bradford*, 48 S.W.3d at 754); *Lenz v. Lenz*, 45 Tex. Sup. Ct. J. 781, 783 (June 6, 2002) (citing *Bradford*, 48 S.W.3d at 754); *Rocor Int’l, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 77 S.W.3d 253, 262 (Tex. 2000) (citing *Bradford*, 48 S.W.3d at 754). *Bradford* now seems to be the seminal no evidence scope of review case.

<sup>18</sup> *Associated Indem. Corp. v. Cat Contracting, Inc.*, 964 S.W.2d 276, 285-86 (Tex. 1998) (citing *Harbin v. Seale*, 461 S.W.2d 591, 592 (Tex. 1970)); *Formosa Plastics Corp. USA v. Presidio Eng’rs*, 41 Tex. Sup. Ct. J. 289, 293-94, 1998 WL 18981, at \*7 (Jan. 18, 1998) (citing *Harbin*, 461 S.W.2d 592); *Putman v. Missouri Valley, Inc.*, 616 S.W.2d 930, 931 (Tex. 1981) (quoting *Harbin*, 461 S.W.2d at 592); *Burk Royalty Co. v. Walls*, 616 S.W.2d 930, 931 (Tex. 1981) (quoting *Harbin*, 461 S.W.2d at 592); *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981) (same); *Harbin*, 461 S.W.2d at 592 (citing *Burt v. Lochausen*, 151 Tex. 289, 249 S.W.2d 194, 199 (1952)).

<sup>19</sup> The *Formosa Plastics* and *Merrell Dow* decisions both cite to *Harbin v. Seale*, 461 S.W.2d 591 (Tex. 1970), which was written by Chief Justice Calvert. Interestingly, ten years earlier, then Associate Justice Calvert stated, in his often cited law review article, the standard of review as follows: “the courts follow the further rule of viewing the evidence in its most favorable light in support of the finding of the vital fact, considering only the evidence which support the finding and rejecting the evidence and the inferences which are contrary to the finding.” ROBERT W. CALVERT, “*No Evidence*” and “*Insufficient Evidence*” *Points of Error*, 38 TEX. L. REV. 361, 364 (1960) (citing *Cartwright v. Canode*, 106 Tex. 502, 171 S.W. 696, 696-97 (1914)).

<sup>20</sup> 94 S.W.3d 561 (Tex. 2002).

this issue, the supreme court reversed the damages award and in an unusual judgment of the court it remanded the issue to the court of appeals to reconsider the excessiveness of the jury's award of mental anguish damages, although the court stated that this issue may have to be retried although the court of appeals is free to suggest a remittitur.<sup>21</sup>

In reversing this award of damages, the plurality noted that non-economic damages cannot be determined by mathematical precision and that by their very nature they can be determined only by the exercise of sound judgment.<sup>22</sup>

Then came the "but."

The supreme court added, "[b]ut the necessity that a jury have some latitude in awarding such damages does not, of course, give it carte blanche to do whatever it will, and this is especially true in defamation actions brought by public officials."<sup>23</sup> The court held that "[d]amage awards left largely to a jury's discretion threaten too great an inhibition of speech protected by the First Amendment."<sup>24</sup> The court said that the jury's broad discretion "unrestrained by meaningful appellate review poses a real threat to all members of the media."<sup>25</sup>

The plurality concluded that while the record supports some amount of mental anguish damages, it does not support the amount of those damages [\$7 million] found by the jury.<sup>26</sup>

Citing *Saenz v. Fidelilty & Guaranty Ins. Underwriters*,<sup>27</sup> the court noted that not only must there be evidence of the existence of compensable mental anguish, there must be some evidence to justify the amount awarded.<sup>28</sup> Again citing *Saenz*, the court held that "[t]here must be evidence that the amount found is fair and reasonable compensation, just as there must be evidence to support any other jury finding."<sup>29</sup>

The court recanted the evidence supporting Judge Bentley's mental anguish award: the defamation had cost him time, deprived him of sleep, caused him embarrassment in the community in which he has spent almost all of his life, disrupted his family, distressed his children at school, it was the worst experience of

his life, he was depressed, his honor and integrity had been impugned, his family had suffered as well, and he would never be the same.<sup>30</sup> However, the plurality concluded that this evidence constituted no evidence that Bentley suffered \$7 million in mental anguish damages.<sup>31</sup> The court concluded that "[t]he amount is not merely excessive and unreasonable; it is far beyond any figure the evidence can support."<sup>32</sup>

Justice Baker dissented and argued that the plurality was improperly conducting a factual sufficiency review of the mental anguish award.<sup>33</sup> Justice Baker pointed out that after the plurality listed the evidence that supported the jury's award it then remarkably concluded that there was no evidence to support the jury's award.<sup>34</sup> Justice Baker opined that the plurality assumed to role of fact-finder because it found that the award of damages was excessive – a determination that is final in the court of appeals.<sup>35</sup> Finally, Justice Baker observed that the court was evaluating the "reasonableness" of the mental anguish award as "a proxy for factual sufficiency review." "Simply put," Justice Baker wrote, "the Court oversteps its constitutional appellate review boundaries to conduct what effectively results in a factual sufficiency review of the mental anguish damages award and issues a wholly advisory opinion to the court of appeals about those damages."<sup>36</sup> Citing the traditional legal sufficiency review standard in *Bradford v. Vento*,<sup>37</sup> Justice Baker would have held that there was some evidence to support the jury's damages award and affirmed the judgment.<sup>38</sup>

Next, the Court issued its opinion in *St. Joseph Hospital v. Wolff*<sup>39</sup> which involved the issue whether a teaching hospital that sponsors a medical residency program is vicariously liable for a resident's negligent treatment of a patient, occurring while the resident, as part of the residency training program, was receiving training at another hospital under the immediate supervision of another medical institution's agent.<sup>40</sup> In *Wolff*, the majority properly stated the scope of review in no evidence cases (*i.e.*, disregarding all evidence to the finding in question), but added that it need not disregard undisputed evidence that allows of only one

<sup>21</sup> *Id.* at 607-08 (Hecht, J. joined by Owen, Jefferson & Rodriguez, JJ.).

<sup>22</sup> *Id.* at 605. Interestingly, three members of the court (Phillips, C.J., joined by Enoch & Hankinson, JJ.) who voted for *no* liability against Bunton, joined in the judgment (which was contrary to their opinion) remanding the case to the court of appeals.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> 925 S.W.2d 607 (Tex. 1996).

<sup>28</sup> 94 S.W.3d at 606.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 606-07.

<sup>31</sup> *Id.* at 607.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 623 (Baker, J., dissenting).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 624.

<sup>36</sup> *Id.*

<sup>37</sup> 48 S.W.3d 749, 754 (Tex. 2001).

<sup>38</sup> 94 S.W.3d at 624.

<sup>39</sup> 94 S.W.3d 513 (Tex. 2002).

<sup>40</sup> *Id.* at 517.

logical inference.<sup>41</sup> In *Wolff*, the majority held that there was no evidence to support the jury's finding of joint enterprise, joint venture, mission or non-employee respondeat superior or ratification, and that the evidence established as a matter of law that when the resident treated the patient he was acting as the borrowed employee of the medical institution supervising him; therefore, the court reversed the judgment and rendered judgment that the plaintiffs take nothing by way of their claims against the teaching hospital.<sup>42</sup>

The dissenters, Justice Enoch, joined by Justice Hankinson, argued that the majority reached its conclusion by applying the incorrect scope of review.<sup>43</sup> The dissent opined that the majority had improperly reviewed evidence that was not favorable to the jury's verdict and reached the wrong conclusion as a result.<sup>44</sup> The dissent not only contended that the jury's conclusion was supported by legally sufficient evidence, but that the evidence established as a matter of law that the physician was acting in the course and scope of his employment with the hospital when he treated the plaintiff.<sup>45</sup>

In *Wal-Mart Stores, Inc. v. Miller*,<sup>46</sup> a premises liability case, the issue was whether there was legally sufficient evidence to support the jury's finding that the licensee, Bryan Miller, lacked actual knowledge about the dangerous condition at Wal-Mart.<sup>47</sup> Citing the traditional standard in *Bradford v. Vento*,<sup>48</sup> (*i.e.*, viewing all the evidence in a light favorable to the jury's verdict), the supreme court held in a per curiam opinion that there was no evidence to support the jury's finding that Miller was not aware of the dangerous condition.<sup>49</sup>

In another per curiam opinion, in *Tiller v. McLure*,<sup>50</sup> the issue was whether there was legally sufficient evidence to support the jury's finding of intentional infliction of emotional distress.<sup>51</sup> Again citing the traditional standard in *Bradford v. Vento*,<sup>52</sup> (*i.e.*, viewing all the evidence in a light favorable to the jury's verdict), the supreme court held that there was no evidence to support the jury's finding that the

conduct was extreme and outrageous and rendered judgment for the defendant.

In *Marathon Corporation v. Pitzner*,<sup>53</sup> the supreme court reversed a judgment for the plaintiff as a result of injuries he sustained when he fell off the roof of the building occupied by Marathon as a tenant.<sup>54</sup> Stating the traditional scope of review, the court concluded that there was no evidence that the condition of Marathon's premises proximately caused the plaintiff's injuries.<sup>55</sup> Because there was only slight circumstantial evidence and no other evidence to corroborate the probability of the fact's existence or non-existence, the court rendered judgment for Marathon.<sup>56</sup>

In *Wal-Mart Stores, Inc. v. Canchola*,<sup>57</sup> the issue was whether there was legally sufficient evidence to support the jury's finding that Wal-Mart discriminated against the plaintiff based upon his disability and whether it was liable for intentional infliction of emotional distress. Again citing the traditional standard in *Bradford v. Vento*,<sup>58</sup> (*i.e.*, viewing all the evidence in a light favorable to the jury's verdict), the supreme court held that there was no evidence to support the jury's finding of disability discrimination and that there was no evidence of extreme and outrageous conduct in Wal-Mart's handling of the sex harassment charges against the plaintiff or his subsequent termination.

Under either statement of the standard, it remains settled that if there is any evidence of probative force to support the finding, the no evidence issue must be overruled and the finding upheld.<sup>59</sup> Stated another way, if there is more than a scintilla of evidence to support the finding, the no evidence challenge fails.<sup>60</sup>

What is a "scintilla" of evidence?<sup>61</sup> "When the evidence offered to prove a vital fact is so weak as to

<sup>41</sup> *Id.* at 519-20 (quoting *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 51 n. 1 (Tex. 1997)).

<sup>42</sup> *Id.* at 517.

<sup>43</sup> *Id.* at 547 (Enoch, J., dissenting, joined by Hankinson, J.)

<sup>44</sup> *Id.* at 547-50.

<sup>45</sup> *Id.* at 548.

<sup>46</sup> 102 S.W.3d 706 (Tex. 2003) (per curiam).

<sup>47</sup> *Id.* at 707.

<sup>48</sup> 48 S.W.3d 749, 754 (Tex. 2001).

<sup>49</sup> 102 S.W.3d at 709.

<sup>50</sup> 47 Tex. Sup. Ct. J. 632 (May 8, 2003).

<sup>51</sup> *Id.*

<sup>52</sup> 48 S.W.3d 749, 754 (Tex. 2001).

<sup>53</sup> 106 S.W.3d 724 (Tex. 2003) (per curiam).

<sup>54</sup> *Id.* at 725.

<sup>55</sup> *Id.* at 728.

<sup>56</sup> *Id.* (citing *Lozano v. Lozano*, 52 S.W.3d 141, 148 (FTex. 2001)).

<sup>57</sup> 46 Tex. Sup. Ct. J. \_\_\_\_ (Sept. 4, 2003).

<sup>58</sup> 48 S.W.3d 749, 754 (Tex. 2001).

<sup>59</sup> See *ACS Investors, Inc.*, 943 S.W.2d at 430; *Leitch*, 935 S.W.2d at 118; *Southern States*, 774 S.W.2d at 640; *In re King's Estate*, 150 Tex. 662, 244 S.W.2d 660, 661 (1951). In one case, the supreme court even considered-posttrial-overruling a legal insufficiency challenge. See *Weirich*, 833 S.W.2d at 946 (Tex. 1990) (considering telephone records discovered after the trial).

<sup>60</sup> *Formosa Plastics Corp.*, 41 Tex. Sup. Ct. J. at 294, (citing *Continental Coffee*), 937 S.W.2d at 450 and *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1993)); *Leitch*, 935 S.W.2d at 118; *Stafford*, 726 S.W.2d at 16.

<sup>61</sup> Scintilla is defined as "a barely perceptible manifestation" and "the slightest particle or trace." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2033 (1986). It is also defined

do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence.”<sup>62</sup> “More than a scintilla exists when the evidence supporting the finding, as a whole, ‘rises to the level that would enable reasonable and fair-minded people to differ in their conclusions.’”<sup>63</sup> The application of this rule provides that “if reasonable minds cannot differ from the conclusion that the evidence offered to support the existence of a vital fact lacks probative force,” then it is the legal equivalent of no evidence.<sup>64</sup> In any other situation, the appellate court may not second guess the fact finder unless only one inference may be drawn from the evidence.<sup>65</sup> “Whether other possible inferences may be drawn from the evidence is not a relevant inquiry.”<sup>66</sup> However, when the evidence furnishes a reasonable basis for reasonable minds to reach differing conclusions as to the existence of the crucial fact, it amounts to more than a scintilla of evidence and the no evidence challenge should be overruled.<sup>67</sup>

“Any ultimate fact may be proved by circumstantial evidence.”<sup>68</sup> However, the legal

equivalent of no evidence exists when “[meager] circumstantial evidence give[s] rise to inferences equally consistent with two different propositions.”<sup>69</sup> Furthermore, where circumstances are equally consistent with either of two facts and “nothing shows that one is more probable than the other, neither fact can be inferred” and the no evidence challenge must be sustained.<sup>70</sup> Circumstantial evidence still must consist of more than a scintilla to withstand a no evidence challenge.<sup>71</sup>

“Inferences may also support a judgment so long as they are reasonable in light of all the facts and circumstances.”<sup>72</sup> The supreme court recently observed that the reviewing court is not required to “disregard undisputed evidence that allows of only one logical inference.”<sup>73</sup> Under the no evidence standard of review, inference stacking is not permissible. As the court has noted, “a vital fact may not be established by piling inference upon inference.”<sup>74</sup> Similarly, some suspicion linked to other suspicion produces only more

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as “[a] spark; a remaining particle; a trifle; the least particle.” BLACK’S LAW DICTIONARY 1207 (5<sup>th</sup> ed. 1979).

<sup>62</sup> *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983) (citing *Seideneck v. Cal Bayreuther Assoc.*, 451 S.W.2d 752, 755 (Tex. 1970) and *Joske v. Irvine*, 91 Tex. 574, 44 S.W. 1059, 1062 (1898)).

<sup>63</sup> *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 717-18 (Tex. 2003) (Schneider, J., concurring); *Rocor Int’l, Inc v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 77 S.W.3d 253, 262 (Tex. 2000); *Merrell Down Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) (citing *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995) (quoting *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex. 1994)).

<sup>64</sup> *Kindred*, 650 S.W.2d at 63; *Woods v. Townsend*, 144 Tex. 594, 192 S.W.2d 884, 886 (1946); *Joske v. Irvine*, 91 Tex. 574, 44 S.W. 1059, 1063 (1898); *Choate v. San Antonio A.P. Ry.*, 90 Tex. 82, 37 S.W. 319, 319 (1896); *Lee v. International & G.N.R.*, 89 Tex. 583, 36 S.W. 63, 65 (1896).

<sup>65</sup> *State v. \$11,014.00*, 820 S.W.2d 783, 785 (Tex. 1991) (citing *Ross v. Green*, 135 Tex. 103, 139 S.W.2d 565, 572 (1940)).

<sup>66</sup> *Havner v. EZ Mart Stores, Inc.*, 825 S.W.2d 456, 459 (Tex. 1992).

<sup>67</sup> *Id.*

<sup>68</sup> *Transportation Ins. Co. v. Faircloth*, 898 S.W.2d 269, 285 (Tex. 1995); *\$11,014.00*, 820 S.W.2d at 785; see *Farley v. M.M. Cattle Co.*, 529 S.W.2d 751, 755 (Tex. 1975); *Prudential Ins. Co. of America v. Krayner*, 366 S.W.2d 779, 780 (Tex. 1963); *Dallas County Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271, 279 (Tex. App.? Dallas 1991, writ denied). “A fact is established by circumstantial evidence when the fact may be fairly and reasonably drawn from other facts proved in the case.” *Cross*, 815 S.W.2d at 279.

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<sup>69</sup> \$56,700 in *U.S. Currency v. State*, 730 S.W.2d 659, 660 (Tex. 1987).

<sup>70</sup> *Continental Coffee Prods. Co. v. Casarez*, 937 S.W.2d 444, 450 (Tex. 1996); *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam); *\$56,700 in U.S. Currency*, 730 S.W.2d at 662; *Litton Indus. Prod., Inc., v. Gammage*, 668 S.W.2d 319, 324 (Tex. 1984). An inference may not be drawn when “the facts prove to give rise to opposing inferences which are equally reasonable and plausible.” ROBERT W. CALVERT, “No Evidence” and “Insufficient Evidence” *Points of Error*, 38 TEX. L. REV. 361, 365 (1960).

<sup>71</sup> *Blount v. Bordens, Inc.*, 910 S.W.2d 931, 933 (Tex. 1995) (per curiam); *Litton*, 668 S.W.2d at 324.

<sup>72</sup> *Ortiz*, 917 S.W.2d at 772; *Briones v. Levine’s Dep’t Store, Inc.*, 446 S.W.2d 7, 10 (Tex. 1969); *Simmons v. Simmons Constr. Co. v. Rea*, 155 Tex. 353, 286 S.W.2d 415, 419 (1955). Even under a “no evidence” standard of review, the court must consider not only facts and circumstances that give rise to an inference but also “facts and circumstances in derogation of that inference.” *Woodward v. Ortiz*, 150 Tex. 75, 237 S.W.2d 286, 290 (1951); *Texas & N.O. RR v. Burden*, 146 Tex. 109, 203 S.W.2d 522, 530 (1947).

<sup>73</sup> *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 51 n.1 (Tex. 1997) (plurality opinion) (citing *Wininger v. Fort Worth & D.C. Ry.*, 143 S.W.2d 1150, 1152 (Tex. 1912) and *Texas & N.O. R.R. v. Rookes*, 293 S.W. 554, 556-57 (Tex. Comm’n App. 1927)); *id.* at 74 (Hecht, J., concurring, joined by Phillips, C.J., & Gonzalez & Owen, JJ.).

<sup>74</sup> *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 858 (Tex. 1968); *Texas Sling Co. v. Emanuel*, 431 S.W.2d 538, 541 (Tex. 1968); see Robert W. Calvert, “No Evidence” and “Insufficient Evidence” *Points of Error*, 38 TEX. L. REV. 361, 365 (1960) (concluding that a vital fact may not be established “by piling inference upon inference” (citing *Rounsaville v. Bullard*, 154 Tex. 260, 276 S.W.2d 791, 784 (1955)); *Lobley v. Gilbert*, 149 Tex. 493, 236 S.W.2d 121, 123 (1951)).

suspicion which does not constitute a scintilla of evidence.<sup>75</sup> Mere suspicion or surmise will not constitute some evidence.<sup>76</sup>

## 2. As a Matter of Law

If an appellant is “attacking the legal sufficiency of an adverse finding to an issue on which [he] had the burden of proof, [he] must demonstrate on appeal that the evidence conclusively established all vital facts in support of the issue.”<sup>77</sup> In reviewing a “matter of law” challenge, the reviewing court employs a two prong test.<sup>78</sup> The court will first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary.<sup>79</sup> If there is no evidence to support the finding, the reviewing court will then examine the entire record to determine if the contrary proposition is established as a matter of law.<sup>80</sup> If the

contrary proposition is established conclusively by the evidence, the point of error will be sustained.<sup>81</sup>

Texas courts have repeatedly held that although a jury is the finder of fact, the jury may not disregard uncontroverted evidence.<sup>82</sup> Similarly, the appellate court must consider undisputed or uncontradicted evidence and has no “right to disregard the undisputed evidence and decide such issue[s] in accordance with [its] wishes.”<sup>83</sup>

Nevertheless, contradictory cases also hold that a jury’s failure to find the existence of a particular fact need not be supported by any evidence because the jury is free to disbelieve the witnesses of the party bearing the burden of proof.<sup>84</sup> These two lines of cases are impossible to reconcile. Given the scope of review, which requires the court to disregard all evidence contrary to the verdict, the latter line of cases is clearly correct when the appellant raises an “as a matter of law” challenge.

## 3. The Equal Inference Rule

Inferences may be drawn from direct or circumstantial evidence. “Any ultimate fact may be proved by circumstantial evidence.”<sup>85</sup> Common sense

<sup>75</sup> *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 728 (Tex. 2003 (per curiam)); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 210 (Tex. 2002); *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 & n.3 (Tex. 1993).

<sup>76</sup> *Mission Petroleum Carriers, Inc. v. Solomon*, 106 S.W.3d 705, 718 (Tex. 2003) (Schneider, J., concurring).

<sup>77</sup> *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam) (citing *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *W. Wendell Hall, Standards of Review in Texas*, 29 ST. MARY’S L.J. 351, 481-82 (1998)); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 340 (Tex. 1998); *Smith v. Central Freight Lines, Inc.* 774 S.W.2d 411, 412 (Tex. App.? Houston [14th Dist.] 1989, writ denied); *see Victoria Bank & Trust Co., v. Brady*, 811 S.W.2d 931, 940 (Tex. 1991); *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982); *Pacific Employers Ins. Co. v. Dayton*, 958 S.W.2d 452, 455 (Tex. App.? Fort Worth 1997, no pet. h.); *Murphy v. Fannin County Elec. Coop., Inc.*, 957 S.W.2d 900, 903 (Tex. App.? Texarkana 1997, no pet. h.); *Hickey v. Couchman*, 797 S.W.2d 103, 109 (Tex. App.? Corpus Christi 1990, writ denied); *Ritchey v. Crawford*, 734 S.W.2d 85, 86 (Tex. App.? Houston [1st Dist.] 1987, no writ).

<sup>78</sup> *Dayton*, 958 S.W.2d at 455 (citing *Brady*, 811 S.W.2d at 940).

<sup>79</sup> *Dow Chem Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam) (citing *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *W. Wendell Hall, Standards of Review in Texas*, 29 ST. MARY’S L.J. 351, 482 (1998)); *Holley*, 629 S.W.2d at 696.

<sup>80</sup> *Dow Chem Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam) (citing *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989); *W. Wendell Hall, Standards of Review in Texas*, 29 ST. MARY’S L.J. 351, 482 (1998)); *Holley*, 629 S.W.2d at 696-97; *N.O.R.R. v. Burden*, 146 Tex. 109, 203 S.W.2d 522, 530 (1947); *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 276 (Tex. App.? Amarillo 1988, writ denied).

<sup>81</sup> *Dow Chem Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam) (citing *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983); *W. Wendell Hall, Standards of Review in Texas*, 29 St. Mary’s L.J. 351, 481-82 (1998)); *see Meyerland Community Improvement Ass’n v. Temple*, 700 S.W.2d 263, 267 (Tex. App.? Houston [1st Dist.] 1985, writ ref’d n.r.e.).

<sup>82</sup> *E.g.*, *Kennedy v. Missouri Pac. R.R.*, 778 S.W.2d 552, 557 (Tex. App.? Beaumont 1989, writ denied); *Ralston Purina Co. v. Barkley Feed & Seed Co.*, 722 S.W.2d 431, 434 (Tex. App.? Houston [1st Dist.] 1986), *rev’d on other grounds sub nom.* *International Proteins Corp. v. Ralston Purina Co.*, 744 S.W.2d 932 (Tex. 1988); *Berry v. Griffin*, 531 S.W.2d 394, 396 (Tex. Civ. App.? Houston [14th Dist.] 1980, writ ref’d n.r.e.).

<sup>83</sup> *Burden*, 203 S.W.2d at 530; *Nichols v. Nichols*, 727 S.W.2d 303, 305 (Tex. App.? Beaumont 1987, writ ref’d n.r.e.); *Watts v. St. Mary’s Hall, Inc.*, 662 S.W.2d 55, 59 (Tex. App.? San Antonio 1983, writ ref’d n.r.e.); *see also Cochran v. Wool Growers Cent. Storage Co.*, 140 Tex. 191, 166 S.W.2d 904, 908 (1942) (observing that “where the testimony of an interested witness is not contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon, it is taken as true, as a matter of law”).

<sup>84</sup> *Yap v. ANR Freight Sys.*, 789 S.W.2d 424, 425 (Tex. App.—Houston [1st Dist.] 1990, no writ).

<sup>85</sup> *Transportation Ins. Co. v. Faircloth*, 898 S.W.2d 269, 285 (Tex. 1995); *State v. 11,014.00*, 820 S.W.2d 783, 785 (Tex. 1991) (per curiam); *see Farley v. M.M. Cattle Co.*, 529 S.W.2d 751, 755 (Tex. 1975); *Prudential Ins. Co. of America v. Krayer*, 366 S.W.2d 779, 780 (Tex. 1963);

dictates that any conclusion drawn from circumstantial evidence is nothing more than an inference.<sup>86</sup> “By its very nature, circumstantial evidence often involves linking what may be apparently insignificant and unrelated events to establish a pattern.”<sup>87</sup> The supreme court has observed that circumstantial evidence establishes a fact when the fact may be “inferred from other facts in the case.”<sup>88</sup> Circumstantial evidence and any inferences drawn from the evidence still must consist of more than a scintilla to withstand a no evidence challenge.<sup>89</sup> This analysis is known as the equal inference rule.

In *Lozano v. Lozano*,<sup>90</sup> a majority concurrence of the Texas Supreme Court appears to muddle the equal inference rule, yet it did not overrule prior supreme court decisions which had clearly articulated that rule for many years. Therefore, it can be argued that *Lozano*, in which only seven members of the court participated,<sup>91</sup> is an aberration and should be limited to the facts of that case.

Properly stated, and as all participating members of the court agreed in *Lozano*, the equal inference rule provides that a jury may not reasonably infer an ultimate fact from meager circumstantial evidence that could give rise to any number of inferences, none more

probable than another.<sup>92</sup> Stated another way, “[w]hen circumstances are consistent with either of the two facts and nothing shows that one is more probable than the other, neither fact can be inferred.”<sup>93</sup> Both statements accurately reflect the principle of the equal inference rule.

Over the years, the supreme court has provided the following nonexclusive principles or standards for application of the equal inference rule:

- Circumstantial evidence may be used to establish any material fact, but it must transcend mere suspicion, conjecture or a guess.<sup>94</sup>
- Circumstantial evidence may establish a fact if the fact may be fairly and reasonably drawn from other facts proved in the case.<sup>95</sup>
- There must be a logical bridge between the proffered evidence and the fact sought to be established by inference.<sup>96</sup>
- Circumstantial evidence must not be viewed in isolation, but in light of all the known circumstances.<sup>97</sup>

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Dallas County Flood Control Dist. No. 1 v. Cross, 815 S.W.2d 271, 279 (Tex. App.? Dallas 1991, writ denied).

<sup>86</sup> BLACK’S LAW DICTIONARY defines “inference” as “[a] process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, already proved or admitted.” Black’s Law Dictionary at 456 (5<sup>th</sup> ed. 1979).

<sup>87</sup> *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1993)

<sup>88</sup> *Wal-Mart Stores, Inc. v. Reece*, 45 Tex. Sup. Ct. J. 863, 866 (June 20, 2002) (quoting *Russell v. Russell*, 865 S.W.2d 929, 933 (Tex. 1993) (quoting *Dallas County Flood Control v. Cross*, 815 S.W.2d 271, 279-80 (Tex. App.—Dallas 1991, writ denied))).

<sup>89</sup> *Blount v. Bordens, Inc.*, 910 S.W.2d 931, 933 (Tex. 1995) (per curiam); *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 324. (Tex. 1984).

<sup>90</sup> 52 S.W.3d 141 (Tex. 2001) (per curiam).

<sup>91</sup> The majority concurrence, relevant to the equal inference rule discussion, included Chief Justice Phillips and Justices Enoch, Hankinson, Baker and Abbott. Justice O’Neill was recused because she was a member of the panel that decided *Lozano* while she was on the court of appeals, and Justice Gonzalez participated in the original opinion of the supreme court, but resigned his office on December 25, 2000, and did not participate in the opinion on motion for rehearing. Since *Lozano*, Justices Abbott has resigned from the court, Justice Baker resigned from the Court September 1, 2002, and Justice Hankinson did not seek re-election and will leave the court in January 2003. Accordingly, only two of the five person majority concurrence will remain on the court after January 2003.

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<sup>92</sup> *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex. 1997); \$56,700 in *U.S. Currency v. State*, 730 S.W.2d 659, 660 (Tex. 1987); compare *Lozano v. Lozano*, 52 S.W.3d 141, 148 (Tex. 2001) (per curiam) (Phillips, C.J., concurring in part and dissenting in part, joined by Enoch, Hankinson, Baker & Abbott), *with id.* at 157 (Hecht, J., concurring in part and dissenting in part, joined by Owen, J.). Interestingly, the entire court agrees with this definition of the equal inference rule.

<sup>93</sup> *Continental Coffee Prods. Co. v. Casarez*, 937 S.W.2d 444, 450 (Tex. 1996); *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996) (per curiam); \$56,700 in *U.S. Currency*, 730 S.W.2d at 662; *Litton Indus. Prod., Inc., v. Gammage*, 668 S.W.2d 319, 324 (Tex. 1984). An inference may not be drawn when “the facts prove to give rise to opposing inferences which are equally reasonable and plausible.” ROBERT W. CALVERT, “No Evidence” and “Insufficient Evidence” *Points of Error*, 38 TEX. L. REV. 361, 365 (1960)

<sup>94</sup> *Lozano*, 52 S.W.2d at 148, 152; *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1993). “Inferences may also support a judgment so long as they are reasonable in light of all the facts and circumstances.” *Ortiz*, 917 S.W.2d at 772; *Briones v. Levine’s Dep’t Store, Inc.*, 446 S.W.2d 7, 10 (Tex. 1969); *Simmons Constr. Co. v. Rea*, 155 Tex. 353, 286 S.W.2d 415, 419 (1955).

<sup>95</sup> *Dallas County Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271, 279 (Tex. App.? Dallas 1991, writ denied).

<sup>96</sup> *Lozano*, 52 S.W.3d at 152 (citing *Joske v. Irvine*, 91 Tex. 574, 44 S.W. 1059, 1064 (1898)).

<sup>97</sup> *Lozano*, 52 S.W.3d at 149

- The material fact must be reasonably inferred from the known circumstances.<sup>98</sup>
- Under the “no evidence” standard of review, the reviewing court must consider not only facts and circumstances that give rise to an inference, but also “facts and circumstances in derogation of that inference.”<sup>99</sup>
- The reviewing court is not required to “disregard undisputed evidence that allows of only one logical inference.”<sup>100</sup>

Despite many years of well-settled law, the majority concurrence in *Lozano* holds that “[i]f circumstantial evidence will support more than one reasonable inference, it is for the jury to decide which is more reasonable, subject only to review by the trial court and the court of appeals to assure that such evidence is factually sufficient.”<sup>101</sup> As Justice Hecht correctly noted, this is not an accurate statement of the equal inference rule. Justice Hecht observed:

[I]f circumstantial evidence supports two reasonable inferences, neither of which is any more likely than the other, can a jury pick one? The ‘equal inference’ rule says no. It is not enough that one inference is as reasonable as another; to be given weight, an inference must be more probable than others. ‘Reasonable’ is not the same as ‘probable.’ The ‘equal inference’ rule stated in *Hammerly Oaks* and *Litton* . . . expressly requires that an accepted inference not only be reasonable but that it be probable.<sup>102</sup>

Prior supreme court decisions expressly require that an accepted inference not only be reasonable but also that it be probable.<sup>103</sup> As Justice Hecht noted, the majority’s first statement of the equal inference rule is

in direct conflict with the majority’s second statement of the rule. More troubling than the conflicting statements of the equal inference rule, the majority would permit juries to resolve two equal inferences, one no more probable than the other, thereby eliminating any legal insufficiency challenge. The majority would only permit factual sufficiency challenges under these circumstances. It is highly improbable that any appellant could ever successfully challenge by a factual sufficiency challenge circumstantial evidence that gives rise to equal and “reasonable” inferences.

As a final related matter, under the no evidence standard of review, inference stacking is not permissible. “[A] vital fact may not be established by piling inference upon inference.”<sup>104</sup>

### B. Factual Insufficiency

Only the courts of appeals may review factual sufficiency challenges; the supreme court may only review legal sufficiency challenges.<sup>105</sup> In a jury trial, a complaint that the evidence is factually insufficient to support a jury finding must be raised in a motion for new trial.<sup>106</sup> A motion for new trial, however, is not required in a non-jury case to challenge either the legal *or* factual sufficiency of the evidence.<sup>107</sup> When reviewing a challenge to the factual sufficiency of the evidence, the court of appeals must consider all of the evidence.<sup>108</sup> “Factual sufficiency points of error concede conflicting evidence on an issue, yet maintain that the evidence against the jury’s finding is so great as to make the finding erroneous.”<sup>109</sup> “Factual sufficiency points of error are designated as ‘insufficient evidence’ points or ‘great weight and preponderance of evidence’ points. . . depending upon whether the complaining party had the burden of

<sup>98</sup> See *Joske v. Irvine*, 91 Tex. 574, 44 S.W. 1059, 1064 (1898) (inference is merely a deduction from proven facts).

<sup>99</sup> *Woodward v. Ortiz*, 150 Tex. 75, 237 S.W.2d 286, 290 (1951); *Texas & N.O. RR v. Burden*, 146 Tex. 109, 203 S.W.2d 522, 530 (1947).

<sup>100</sup> *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 51 n.1 (Tex. 1997) (plurality opinion) (citing *Winger v. Fort Worth & D.C. Ry.*, 143 S.W.2d 1150, 1152 (Tex. 1912) and *Texas & N.O. R.R. v. Rookes*, 293 S.W. 554, 556-57 (Tex. Comm’n App. 1927)); see *id.* at 74 (Hecht, J., concurring, joined by Phillips, C.J., & Gonzalez & Owen, JJ.).

<sup>101</sup> *Lozano*, 52 S.W.3d at 148.

<sup>102</sup> *Id.* at 158 (Hecht, J., joined by Owen, J.).

<sup>103</sup> *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 392 (Tex. 1997); *Litton Indus. Prod., Inc., v. Gammage*, 668 S.W.2d 319, 324 (Tex. 1984).

<sup>104</sup> *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 858 (Tex. 1968); *Texas Sling Co. v. Emanuel*, 431 S.W.2d 538, 541 (Tex. 1968); see Robert W. Calvert, “No Evidence” and “Insufficient Evidence” Points of Error, 38 TEX. L. REV. 361, 365 (1960) (concluding that a vital fact may not be established “by piling inference upon inference” (citing *Rounsaville v. Bullard*, 154 Tex. 260, 276 S.W.2d 791, 784 (1955)); *Lobley v. Gilbert*, 149 Tex. 493, 236 S.W.2d 121, 123 (1951)).

<sup>105</sup> *In re Jane Doe*, 19 S.W.3d 249, 253 (Tex. 2000).

<sup>106</sup> TEX. R. CIV. P. 324(b)(2), (3).

<sup>107</sup> TEX. R. CIV. P. 324(b); *Farmer’s Mut. Protective Ass’n v. Wright*, 702 S.W.2d 295, 296-97 (Tex. App.—Eastland 1985, no writ).

<sup>108</sup> *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989); *Lofton v. Texas Brine Corp.*, 720 S.W.2d 804, 805 (Tex. 1986).

<sup>109</sup> *Raw Hide Oil & Gas Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275 (Tex. App.—Amarillo 1988, writ denied).

proof.”<sup>110</sup> Although both points are generally classified as “insufficient evidence” points, they are distinct.<sup>111</sup>

According to the *Pool* case, when an appellate court reverses a case on grounds of factual insufficiency, it must “detail the evidence relevant to the issue in consideration, and clearly state why the jury’s finding is factually insufficient or is so against the great weight and preponderance of the evidence,” and “state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict.”<sup>112</sup> Similarly, when a court of appeals reviews a factual insufficiency challenge to a punitive damage award, the court must detail the relevant evidence in its opinion, explaining why that evidence either supports or does not support the punitive damages award in light of the factors enumerated in Section 41.011 of the Texas Civil Practice and Remedies Code.<sup>113</sup>

<sup>110</sup> *Id.*; *Hurlbut v. Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 770 n.2 (Tex. 1987) (Robertson, J., dissenting, joined by Ray & Mauzy, JJ.).

<sup>111</sup> *Ritchey v. Crawford*, 734 S.W.2d 85, 86–87 n.1 (Tex. App.—Houston [1st Dist.] 1987, no writ) (citing Robert W. Calvert, “No Evidence” and “Insufficient Evidence” Points of Error, 38 TEX. L. REV. 361, 366 (1960)). An “insufficient evidence” point simply asserts that the “evidence adduced to support the vital fact, even if it is the only evidence adduced on an issue, is factually too weak to support it.” *Id.* A “great weight” point simply asserts that the evidence in support of a finding of the existence of a vital fact in response to a jury’s affirmative finding is insufficient because the great preponderance of the evidence supports its nonexistence. *See id.* The Calvert article does not fully discuss the problem of challenging a negative finding on an issue. *But see* *Blonstein v. Blonstein*, 831 S.W.2d 468, 743 (Tex. App.—Houston [14th Dist.] 1992, writ denied) (emphasizing that the standard of review is the same for factual insufficiency challenges regardless of the burden of proof and regardless of whether the court is reviewing affirmative or negative findings).

<sup>112</sup> *Dow Chem Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam) (citing *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986); *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 47 (Tex. 1998); *Lofton v. Texas Brine Corp.*, 777 S.W.2d 384, 385 (Tex. 1989)).

<sup>113</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 41.013 (Vernon supp. 1995); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 31 (Tex. 1994). In assessing whether an award of punitive damages are appropriate, the court is to consider the following (commonly referred to as the *Kraus* factors):

- (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; (5) the extent to which the conduct offends a public sense of justice and propriety and (6) the net worth of the defendant.

The *Pool* requirement does not extend to *affirmances* by the court of appeals when there has been a factual sufficiency or great weight challenge, except as to challenges to punitive damage awards outlined above.<sup>114</sup> However, the *Pool* requirement or some variation of *Pool* should be extended to liability findings and actual damage awards as well. Due process suggests that a court of appeals at least mention some evidence that it believes is sufficient to support the jury’s verdict. The court should not be permitted to simply conclude that it has reviewed the evidence and found it sufficient to support the jury’s finding.<sup>115</sup>

#### 1. Insufficient Evidence

If a party is attacking the factual sufficiency of an adverse finding on an issue to which the other party had the burden of proof, the attacking party must demonstrate that there is insufficient evidence to support the adverse finding.<sup>116</sup> In reviewing an insufficiency of the evidence challenge, the court of appeals<sup>117</sup> must first consider, weigh, and examine all of the evidence which supports and which is contrary to the jury’s determination.<sup>118</sup> Having done so, the court should set aside the verdict only if the evidence which supports the jury finding is so weak as to be clearly wrong and manifestly unjust.<sup>119</sup>

TEX. CIV. PRAC. & REM. CODE ANN. § 41.011 (Vernon Supp. 1995).

<sup>114</sup> *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 4–7 (Tex. 1998); *Ellis County State Bank v. Keever*, 915 S.W.2d 478, 479 (Tex. 1996) (explaining that *Pool* is appropriate in challenges regarding punitive damages); *Moriel*, 879 S.W.2d at 31 (stating that *Pool* review is required when a court of appeals affirms a punitive damage award).

<sup>115</sup> *See generally* Tex. R. App. P. 47.1 (requiring courts of appeals to write opinions for their decisions).

<sup>116</sup> *Hickey v. Couchman*, 797 S.W.2d 103, 109 (Tex. App.—Corpus Christi 1990, writ denied); *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 275–76 (Tex. App.—Amarillo 1988, writ denied).

<sup>117</sup> The court of appeals has conclusive jurisdiction over questions of fact. *See* TEX. CONST. art. V, § 6; *Coulson v. Lake LBJ Util. Dist.*, 781 S.W.2d 594, 597 (Tex. 1989); *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 648–49 (Tex. 1988); *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988).

<sup>118</sup> *Plas–Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989); *Sosa v. City of Balch Springs*, 772 S.W.2d 71, 72 (Tex. 1989); *Lofton v. Texas Brine Corp.*, 720 S.W.2d 804, 805 (Tex. 1986); *Harco Nat’l Ins. Co. v. Villanueva*, 765 S.W.2d 809, 810 (Tex. App.—Dallas 1988, writ denied).

<sup>119</sup> *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam); *Dyson v. Olin Corp.*, 692 S.W.2d 456, 457 (Tex. 1985); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965); *In re King’s Estate*, 150 Tex. 662, 244 S.W.2d 660, 661 (1951) (per curiam); *Raw Hide Oil & Gas, Inc. v. Maxus Exploration Co.*, 766 S.W.2d 264, 276 (Tex. App.—Corpus

## 2. Great Weight and Preponderance

If a party is attacking a jury finding concerning an issue upon which he had the burden of proof, he must demonstrate that the adverse finding is against the great weight and preponderance of the evidence.<sup>120</sup> In reviewing a challenge that the jury finding is against the great weight and preponderance of the evidence, the court of appeals must first examine the record to determine if there is some evidence to support the finding; if such is the case, then the court of appeals must determine, in light of the entire record, whether the finding is so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, or whether the great preponderance of the evidence supports its nonexistence.<sup>121</sup> Whether the great weight challenge is to a finding or a nonfinding, a court of appeals may reverse and remand a case for a new trial only when it concludes that the finding or nonfinding is against the great weight and preponderance of the evidence.<sup>122</sup>

In reviewing great weight points, which complain of a jury's failure to find a fact, the supreme court has admonished the courts of appeals to be mindful of the fact that the jury was not convinced by a preponderance of the evidence.<sup>123</sup> In such cases, a court of appeals may not reverse simply "because [it] concludes that the evidence preponderates toward an

affirmative answer."<sup>124</sup> The courts of appeals may only reverse where "the great weight of the evidence supports an affirmative answer."<sup>125</sup> While a court of appeals may "unfind" certain facts, it cannot affirmatively find facts that would be the basis of a rendition.<sup>126</sup> The court of appeals may only reverse and remand for a new trial.<sup>127</sup> The following diagram is a brief summary of Justice Michol O'Connor's extensive and thorough diagrams analyzing the legal and factual insufficiency standards of review.<sup>128</sup>

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Christi 1988, writ denied); *Wilson v. Goodyear Tire & Rubber Co.*, 753 S.W.2d 442, 448 (Tex. App.—Texarkana 1988, writ denied); *Otis Elevator Co. v. Joseph*, 749 S.W.2d 920, 923 (Tex. App.—Houston [1st Dist.] 1988, no writ).

<sup>120</sup> *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam) (citing *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983); W. Wendell Hall, *Standards of Review in Texas*, 29 St. Mary's L.J. 351, 485 (1998)); *Murphy v. Fannin County Elec. Coop., Inc.*, 957 S.W.2d 900, 903 (Tex. App.—Texarkana 1997, no pet.); *Correa v. General Motors Corp.*, 948 S.W.2d 515, 519 (Tex. App.—Corpus Christi 1997, no writ); *Hickey*, 797 S.W.2d at 109; *Raw Hide Oil & Gas*, 766 S.W.2d at 275–76.

<sup>121</sup> *Dow Chem Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam) (citing *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986); W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 484 (1998)); *Cain*, 709 S.W.2d at 176; *Dyson*, 692 S.W.2d at 457; *Traylor v. Goulding*, 497 S.W.2d 944, 945 (Tex. 1973); *In re King's Estate*, 244 S.W.2d at 661; *Hopson v. Gulf Oil Corp.*, 150 Tex. 1, 237 S.W.2d 352, 358 (1951); *Raw Hide Oil & Gas*, 766 S.W.2d at 276; *Wilson*, 753 S.W.2d at 448.

<sup>122</sup> *Ames v. Ames*, 776 S.W.2d 154, 158 (Tex. 1989), cert. denied, 494 U.S. 1080 (1990); *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 651 (Tex. 1988).

<sup>123</sup> *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988); *Peterson v. Reyna*, 908 S.W.2d 472, 476 (Tex. App.—San Antonio 1995), *judgm't modified per curiam*, 920 S.W.2d 288 (Tex. 1996).

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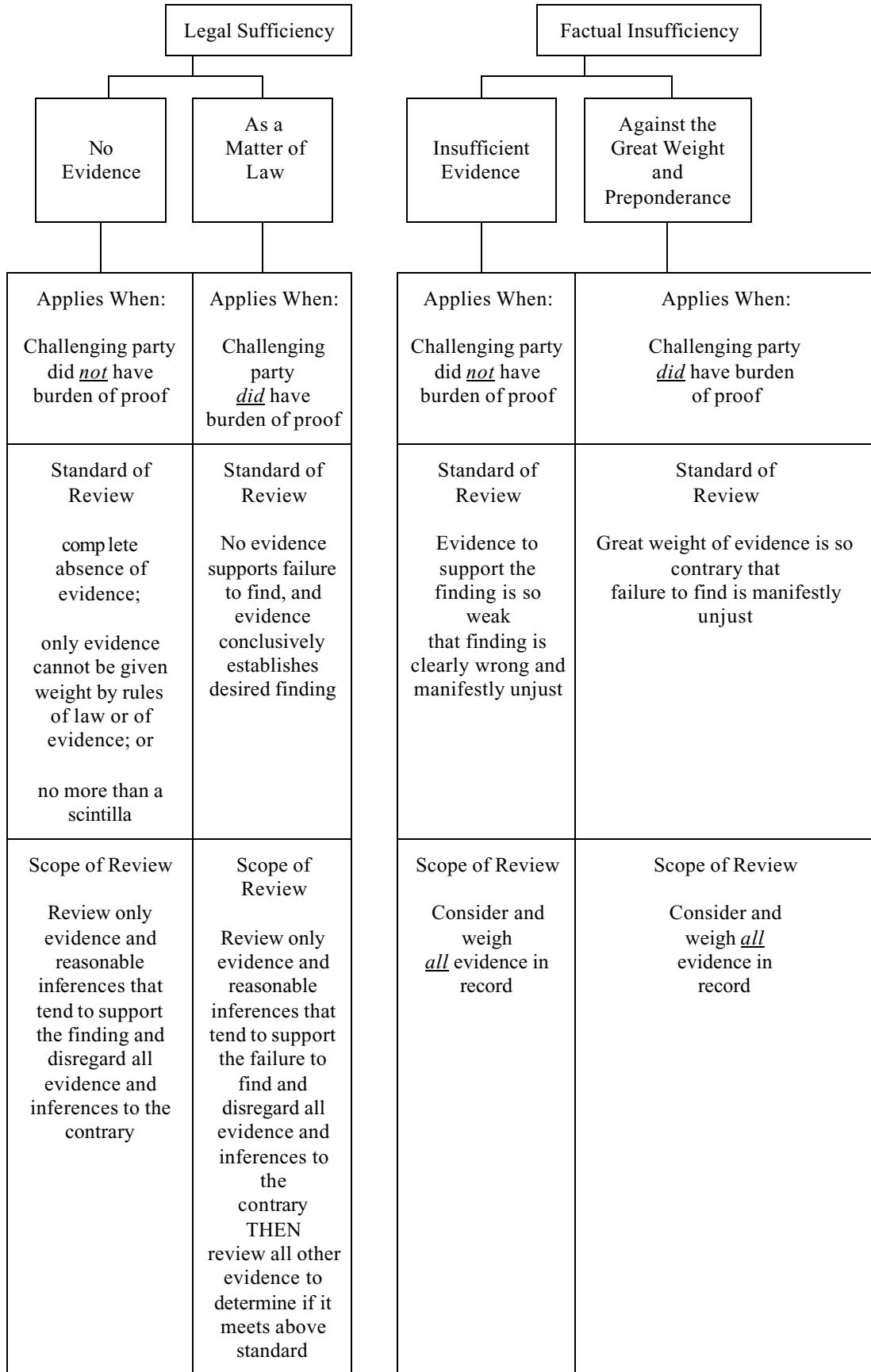
<sup>124</sup> *Herbert*, 754 S.W.2d at 144; see *Peterson*, 908 S.W.2d at 476.

<sup>125</sup> *Herbert*, 754 S.W.2d at 144; *Peterson*, 908 S.W.2d at 476.

<sup>126</sup> *Texas Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1986); *Carr v. Norstok Bldg. Sys., Inc.* 767 S.W.2d 936, 943 (Tex. App.—Beaumont 1989, no writ).

<sup>127</sup> *Carr*, 767 S.W.2d at 943.

<sup>128</sup> See Michol O'Connor, *Appealing Jury Findings*, 12 HOUS. L. REV. 65, 66–67, 79, 83 (1974) (analysis of legal and factual sufficiency of evidence).



### C. Pool and the Constitutional Conflict Between the Right to Trial by Jury and the Court of Appeals' Conclusive Jurisdiction Over Issues of Fact

In 1891, the Texas Constitution was amended to provide that “the decision of [the courts of appeals] shall be conclusive on all questions of fact brought before them on appeal or error.”<sup>129</sup> This constitutional provision limits the supreme court’s authority, restricting its jurisdiction to questions of law.<sup>130</sup> The courts of appeals conclusive jurisdiction over issues of “fact,” however, is complicated by the Texas Bill of Rights, which provides that every person has a “right of trial by jury”<sup>131</sup> and that this right “shall remain inviolate.”<sup>132</sup> The supreme court recently reaffirmed that the right to a jury trial is one of Texas’s “most precious rights, holding ‘a sacred place in English and American history.’”<sup>133</sup> Recognizing that the Texas Constitution confers an exceptionally broad jury trial right upon litigants, the supreme court has cautioned that “the courts must not lightly deprive our people of this jury right by taking an issue away from a jury.”<sup>134</sup>

These two constitutional provisions can come into conflict in cases where a jury decides on a fact issue at trial, and the court of appeals later throws out the jury’s finding because it concludes that the finding is not supported by sufficient evidence. In 1898, only seven years after the Texas Constitution was amended, the supreme court recognized the potential constitutional conflict and observed that Article V, Section 6, which gives courts of appeals conclusive jurisdiction over questions of fact, “was not to enlarge their power over questions of fact but to restrict, in express terms, the jurisdiction of the supreme court and to confine it to

questions of law.”<sup>135</sup> Thus, the absence of any significant evidence and the conclusiveness of the evidence are legal questions which the supreme court may address, but the weight and preponderance of the evidence is a factual question within the exclusive jurisdiction of the court of appeals.<sup>136</sup> The supreme court also recognized that the courts of appeals’ jurisdiction does not give them the authority to pass upon the credibility of witnesses<sup>137</sup> or substitute their finding for a jury’s finding<sup>138</sup> when the record contains evidence of, and gives equal support to, inconsistent inferences in support of the jury’s finding.<sup>139</sup>

<sup>135</sup> *Choate v. San Antonio & A.P. Ry.*, 91 Tex. 406, 44 S.W.2d 69, 69 (1898).

<sup>136</sup> *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 73 (Tex. 1997) (Hecht, J., concurring, joined by Phillips, C.J., & Gonzalez & Owens, JJ.) (citing *In re King’s Estate*, 244 S.W.2d 660 (Tex. 1951)); see *Continental Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996) (holding that the supreme court cannot determine whether the remaining probative evidence is factually sufficient); *Leitch v. Hornsby*, 935 S.W.2d 114, 120 (Tex. 1996) (Abbott, J., concurring) (reaffirming that the supreme court has no jurisdiction to conduct a factual sufficiency review).

<sup>137</sup> A reviewing court may not review a factfinder’s credibility determinations because the jury is the exclusive judge of the facts and the credibility of the witnesses. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 134 (Tex. 2000) (Baker, J., concurring in part and dissenting in part, joined by Enoch & Hankinson, JJ.) (citing *Benoit v. Wilson*, 150 Tex. 273, 239 S.W.2d 792, 796 (1951)); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

<sup>138</sup> *Turner v. KTRK Television, Inc.*, 38 S.W.3d at 134 (Baker, J., concurring in part and dissenting in part, joined by Enoch & Hankinson, JJ.) (citing *Benoit v. Wilson*, 239 S.W.2d at 796).

<sup>139</sup> *Choate*, 44 S.W.2d at 69. The court’s admonition was often repeated prior to the issue squarely confronting the supreme court in *Cropper*. See *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 647 (Tex. 1988) (observing that courts of appeals may only “unfind” facts and reverse but cannot usurp jury’s fact finding function); *In re Rodriguez*, 940 S.W.2d 265, 271 (Tex. App.—San Antonio 1997, writ denied) (stating that “[w]e are not permitted to act, and will not act, as a second jury. . . .”); *Clancy v. Zale Corp.* 705 S.W.2d 820, 826 (Tex. App.—Dallas 1986, writ ref’d n.r.e.) (re-affirming that the court is not to be a factfinder); see also *Pool v. Ford Motor Co.* 715 S.W.2d 629, 633–35 (Tex. 1986) (ruling that the court of appeals may only evaluate the sufficiency of the evidence to support a lower court’s judgment, but may not decide factual issues as a basis for judgment); *In re King’s Estate*, 244 S.W.2d at 662 (forbidding the court of appeals from overturning a jury verdict simply because different inferences or conclusions could have been derived by the jury); *Benoit v. Wilson*, 150 Tex. 273, 239 S.W.2d 792, 796 (1951) (referring to the jury as “the exclusive judge of the facts proved”).

<sup>129</sup> TEX. CONST. art. V, § 6 (amended 1891); *Leitch v. Hornsby*, 935 S.W.2d 114, 120 (Tex. 1996) (Abbott, J., concurring); *E-Z Mart Stores, Inc. v. Havner*, 832 S.W.2d 368, 369 (Tex. App.—Texarkana 1992, writ denied).

<sup>130</sup> *Universe Life Ins. Co. v. Giles*, 950 S.W.2d 48, 73 (Tex. 1997) (Hecht, J., concurring, joined by Phillips, C.J., & Gonzalez & Owen, JJ.); *Leitch*, 935 S.W.2d 2d at 120 (Abbott, J., concurring); *Choate v. San Antonio & A.P. Ry.*, 91 Tex. 406, 44 S.W. 69, 69 (1898); *E-Z Mart Stores*, 832 S.W.2d at 369.

<sup>131</sup> TEX. CONST. art V, § 10; see Tex. R. Civ. P. 226(a) (requiring the trial judge to admonish the jury that they “are the sole judges of the credibility of the witnesses and the weight to be given their testimony . . .”).

<sup>132</sup> TEX. CONST. art I, § 15.

<sup>133</sup> *General Motors Corp. v. Gayle*, 951 S.W.2d 469, 476 (Tex. 1997) (quoting *White v. White*, 108 Tex. 570, 196 S.W. 508, 512 (1917)).

<sup>134</sup> *Giles*, 950 S.W.2d at 56 (quoting *Young v. Blain*, 245 S.W. 65, 67 (Tex. Comm’n App. 1922, judgment adopted, holding approved)).

Almost seventy-five years later, in *In re King's Estate*,<sup>140</sup> the supreme court established that it might accept jurisdiction, notwithstanding Texas Constitution Article V., Section 6, to determine if a correct legal standard had been applied by the courts of appeals.<sup>141</sup> Since *In re King's Estate*, the supreme court continues to accept jurisdiction to determine whether the court of appeals utilized an incorrect legal principle in reviewing factual insufficiency points.<sup>142</sup> In *Dyson v. Olin Corp.*,<sup>143</sup> the supreme court again concluded that while it does not have jurisdiction over questions of fact, it does "have jurisdiction to determine whether the courts of appeals used the correct rules of law in reaching their conclusions."<sup>144</sup> As the court correctly recognized, the use of the wrong rule of law, a purely legal question, is within the supreme court's jurisdiction.<sup>145</sup> More importantly, in his concurring opinion, Justice Robertson expressly raised the issue of whether the supreme court would continue to adhere to prior case law interpreting Article V, Section 6.<sup>146</sup> Justice Robertson expressed his view that Article V, Section 6 improperly allows the courts of appeals to usurp the jury's fact-finding function.<sup>147</sup>

Justice Robertson's challenge to the continued viability of Article V, Section 6 was subsequently raised in *Pool v. Ford Motor Co.*<sup>148</sup> While the supreme chose "to adhere to previous interpretations that harmonize[d] the two constitutional provisions" and reaffirmed the courts of appeals' jurisdiction to review

cases for factual insufficiency of the evidence,<sup>149</sup> it also held that it had the authority to review the court of appeals' opinions to determine if the appellate court had applied the correct standard of review to the facts.<sup>150</sup> In order to determine whether the courts of appeals applied the correct legal principles to the facts, the supreme court held that:

[The] courts of appeals, when reversing on insufficiency grounds, should, in their opinions, detail the evidence relevant to the issue in consideration and clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust; why it shocks the conscience; or clearly demonstrates bias. Further, those courts, in their opinions, should state in what regard the contrary evidence greatly outweighs the evidence in support of the verdict.<sup>151</sup>

*Pool* clearly takes the supreme court's earlier decision in *Dyson* one step further by allowing it to review a court of appeals' application of the correct legal standard to the facts, instead of only determining whether the correct legal standard was utilized.<sup>152</sup> Therefore, the courts of appeals must do more than simply recite the *Pool* standard of review, they must prove that they actually followed the standard.<sup>153</sup>

The inherent constitutional conflict of the courts of appeals' jurisdiction over questions of act and the right to trial by jury was again raised and addressed in *Cropper v. Caterpillar Tractor Co.*<sup>154</sup> In that case, the supreme court rejected a challenge to the courts of appeals' constitutional obligation to review fact questions and pointed out that the right to jury trial and the appellate court's right to review fact questions have "peacefully co-existed for almost one hundred fifty years" and are "thoroughly rooted in our constitution and judicial system."<sup>155</sup> While the court recognized the "inescapable fact" that it could not amend the constitution to remove the conflict, it concluded that even if the court was empowered to, it was "not prepared to sacrifice either [constitutional provision] for the benefit of the other."<sup>156</sup>

<sup>140</sup> 150 Tex. 662, 244 S.W.2d 660 (1951). *In re King's Estate* is a per curiam opinion that dealt only with the scope of review; it simply held that a court of appeals must pass on all dispositive points raised by an appellant. See *In re King's Estate*, 244 S.W.2d at 661-62.

<sup>141</sup> *Id.* at 661.

<sup>142</sup> See *Harmon v. Sohio Pipeline Co.*, 621 S.W.2d 314, 315-15 (Tex 1981) (noting that the supreme court has jurisdiction to review an appellate court's application of the rules of law); *Garza v. Alviar*, 395 S.W.2d 821, 823-24 (Tex. 1965) (recognizing that the supreme court has the power to determine if the appellate court had jurisdiction over an issue); *Puryear v. Porter*, 153 Tex 82, 92, 264 S.W.2d 689, 690 (1954) (taking note of the fact that the supreme court may remand to the appellate court for reconsideration of the applicable rules of law).

<sup>143</sup> 692 S.W.2d 456 (Tex. 1985).

<sup>144</sup> *Dyson*, 692 S.W.2d at 457.

<sup>145</sup> See *id.* (emphasizing that supreme court can, as matter of law, review appellate court's application of rules of law).

<sup>146</sup> *Id.* (Robertson, J., concurring).

<sup>147</sup> *Id.* at 458 (Robertson, J., concurring).

<sup>148</sup> 715 S.W.2d 629 (Tex. 1986). The Pools argued that the court of appeals "exercised its fact jurisdiction in a manner that undermined the jury verdict in contravention of the constitutional right to trial by jury." *Pool*, 715 S.W.2d at 633.

<sup>149</sup> *Id.* at 634.

<sup>150</sup> *Id.* at 634-35.

<sup>151</sup> *Id.* at 635.

<sup>152</sup> *Id.*

<sup>153</sup> *Stewart v. Allied Bancshares, Inc.*, 770 S.W.2d 837, 838 (Tex. App.—Tyler 1989, writ denied).

<sup>154</sup> 754 S.W.2d 646, 648 (Tex. 1988).

<sup>155</sup> *Cropper*, 754 S.W.2d at 652.

<sup>156</sup> *Id.*; see *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988) (reiterating the courts of appeals' conclusive jurisdiction over questions of fact); *Hurlburt v. Gulf Atl.*

While the supreme court has continued to recognize the courts of appeals' conclusive jurisdiction over questions of fact,<sup>157</sup> it has in the past circumvented its own constitutional limitation in two interesting and sharply divided cases. In *Lofton v. Texas Brine Corp.*,<sup>158</sup> the supreme court, in a 5-4 decision, reversed the court of appeals' decision for a second time,<sup>159</sup> holding that the jury's finding was supported by evidence that was factually sufficient.<sup>160</sup> The court presumably reversed the court of appeals' second opinion pursuant to *Pool* for a third review of the case. The fundamental problem with the decision is that the court, as Justice Gonzalez predicted in *Pool*<sup>161</sup>, was using *Pool* to second guess the courts of appeals' constitutional prerogative to judge the factual sufficiency of the evidence in a case.<sup>162</sup> While the supreme court again recognized its lack of jurisdiction to determine the factual sufficiency of the evidence,<sup>163</sup> it is nevertheless explained in great detail why all of the evidence was sufficient to support the jury's finding.<sup>164</sup> It is clear from the court's "extensive, and unauthorized, analysis"<sup>165</sup> that while the court was unwilling to explicitly overrule *Herbert* and *Cropper*, it was now going to review the court of appeals' factual sufficiency analysis.<sup>166</sup> In his dissent, Justice Hecht observed that the majority in *Lofton* "stymied . . . the constitution" by allowing the supreme court to "keep reversing the judgment of the court of appeals

until it reached a result [of which] the [c]ourt approve[d]."<sup>167</sup> Subsequently, reiterating Justice Hecht's concern in *Lofton*, Justice Gonzalez noted that the supreme court should try to avoid the "yo-yo effect" that occurs "when a majority of the court keeps reversing the judgment of the court of appeals until it reaches a result that the majority approves."<sup>168</sup>

In *Aluminum Co. of America v. Alm*,<sup>169</sup> the supreme court once again circumvented the court of appeals' constitutionally binding conclusion that the jury's finding of gross negligence was supported by factually insufficient evidence.<sup>170</sup> In another 5-4 decision, a deeply divided court reversed the court of appeals' conclusion and held that Alcoa was grossly negligent as a matter of law.<sup>171</sup> Ignoring the evidence of care introduced by Alcoa,<sup>172</sup> the supreme court refused to accept the court of appeals' analysis of the factual sufficiency of the evidence and concluded that Alcoa was grossly negligent as a matter of law, a legal issue over which the supreme court has jurisdiction.<sup>173</sup> The dissenters accurately summarized the real meaning of the court's decision: whenever a majority of the court is dissatisfied with a court of appeals' conclusion on a factual sufficiency point, it may impose any result it chooses "merely by holding that a party proved the necessary facts conclusively, *i.e.*, as a matter of law."<sup>174</sup>

While most practitioners and courts assume that the inherent conflict between the court of appeals' constitutional and conclusive prerogative to review factual insufficiency challenges and a person's constitutional right of trial by jury have been resolved, it is clear that the supreme court, at least as it was constituted at the time of *Lofton* and *Alm*, was deeply

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Life Ins. Co., 749 S.W.2d 762, 770-71 (Tex. 1987) (Robertson, J., dissenting) (suggesting that the courts of appeals' authority to review sufficiency of jury's fact-finding should be eliminated).

<sup>157</sup> See *Coulson v. Lake LBJ Mun. Util. Dist.*, 781 S.W.2d 594, 597 (Tex. 1989) (stating that "the task of weighing all the evidence and determining its sufficiency is a power confined exclusively to the court[s] of appeals").

<sup>158</sup> 777 S.W.2d 384 (Tex. 1989).

<sup>159</sup> *Lofton*, 777 S.W.2d at 387. The case was reversed for the first time in *Lofton v. Texas Brine Corp.*, 720 S.W.2d 804, 805 (Tex. 1986) (per curiam). The *Lofton* opinion on the first remand is reported at *Texas Brine Corp. v. Lofton*, 751 S.W.2d 197 (Tex. App.—Houston [14th Dist.] 1988, writ granted), *rev'd*, 777 S.W.2d 384 (Tex. 1989).

<sup>160</sup> *Lofton*, 777 S.W.2d at 387.

<sup>161</sup> *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 633 (Tex. 1986). In his concurring opinion Justice Gonzalez expressed fear that the supreme court would use *Pool* "to second guess the courts of appeals," thereby interfering with their conclusive jurisdiction over questions of fact. *Id.* At 638 (Gonzalez, J., concurring).

<sup>162</sup> See *Lofton*, 777 S.W.2d at 387-88 (Gonzalez, J. dissenting); *id.* At 388-89 (Hecht, J., dissenting, joined by Phillips, C.J., & Cook, J.).

<sup>163</sup> *Id.* at 387.

<sup>164</sup> *Id.* at 386-87.

<sup>165</sup> *Id.* at 389 (Hecht, J. dissenting).

<sup>166</sup> *Id.* at 388.

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.* *Havner v. EZ Mart Stores, Inc.*, 846 S.W. 2d 286, 287 (Tex. 1993) (citing *Lofton v. Texas Brine Corp.*, 720 S.W.2d 804 (Tex. 1996)) (per curiam) (remanding for second factual sufficiency review); see *Lofton*, 777 S.W.2d at 387 (remanding for third factual sufficiency review); see William Powers, Jr. 7 Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 533 (1991) (discussing concerns of Justices Hecht and Gonzalez that the supreme court cannot reverse an appeals court until that court reaches a result the supreme court approves).

<sup>169</sup> 785 S.W.2d 137 (Tex. 1990).

<sup>170</sup> *Alm*, 785 S.W.2d at 141 (Gonzalez, J., dissenting, joined by Phillips, C.J., Cook, & Hecht, JJ.) (interpreting the majority's opinion to mean "that a jury could not disbelieve a plaintiff's case as to gross negligence when the issue is disputed, and that a court should determine this issue as a matter of law").

<sup>171</sup> *Id.* at 140, 142.

<sup>172</sup> *Id.* at 431 (Gonzalez, J., dissenting).

<sup>173</sup> *Id.* at 141.

<sup>174</sup> *Aluminum Co. of America v. Alm*, 785 S.W.2d 143 (Tex. 1990).

divided on the issue. The concurring and dissenting opinions on denial of application for writ of error in *Havner v. E-Z Mart Stores, Inc.*<sup>175</sup> indicate that the questions surrounding the courts of appeals' constitutional conclusive jurisdiction over questions of fact may not yet be truly resolved.<sup>176</sup> In any event, appellate practitioners must be aware of the potential conflict on the supreme court and understand that the inherent constitutional conflict remains. Because of this vexing problem, appellate practitioners should brief the facts and the appropriate legal standard in detail and with complete accuracy when raising factual sufficiency points to a court of appeals. If a court of appeals reverses a jury finding or non finding for factual insufficiency, and uses any language that may be construed as an "inappropriate standard of review" or as a "legal conclusion," an able opponent will surely seek review in the supreme court. Given the supreme court's decisions in *Lofton*, *Alm*, and *E-Z Mart*, appellate practitioners should be wary of assuming that the supreme court will not review the court of appeals' disposition of the factual challenge in some manner.<sup>177</sup>

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<sup>175</sup> 846 S.W.2d 286, 286–87 (Tex. 1993) (Gonzalez, J., concurring & Doggett, J., dissenting, joined by Gammage & Spector, JJ.); see *Formosa Plastics Corp. USA v. Presidio Eng'rs*, 960 S.W.2d 41, 52 (Tex. 1998); (Baker, J., dissenting, joined by Spector, J.) (accusing the majority of review undertaking a factual sufficiency review); *May v. United Servs. Ass'n of America*, 844 S.W.2d 666, 675 (Tex. 1992) (Doggett, J., dissenting) (accusing the majority of review undertaking a factual sufficiency).

<sup>176</sup> See William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 557 (1991) (noting that "[a]fter *Cropper*, the power of courts of appeals to order new trials on factual sufficiency grounds seems to be settled, at least for the time being.") (emphasis added); see also William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1699 n.3 (1997) (finding that "[f]ew issues of Texas procedural law have drawn more attention than the respective roles of judge and jury on questions of fact.")

<sup>177</sup> See *Griffin Indus., Inc. v. Thirteenth Court of Appeals*, 934 S.W.2d 349, 355 (Tex. 1996) (orig. proceeding) (Baker, J., dissenting, joined by Enoch, J.) (criticizing the majority because it reached its conclusion by reweighing the evidence and reevaluating the witnesses' credibility).