

# Turning Bad Rulings Into Good Appeals



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*Shareholder, Haley & Olson, P.C.*

Richard “Rick” R. Bradley joined Haley & Olson, P.C. in January 2024. He is a shareholder and is certified by the Texas Board of Legal Specialization in Civil Appellate Law.

Rick is a former Staff Attorney on the 10th Court of Appeals and the 13th Court of Appeals, a member of the Texas Bar College, and a Fellow of the Texas Bar Foundation.

Rick’s civil appellate practice before state and federal appellate courts consists of pursuing traditional and accelerated appeals, original proceedings, and extraordinary writs. He has successfully briefed and orally argued in state appellate courts, the Fifth Circuit Court of Appeals, and recently won in the United States Supreme Court. As a Staff Attorney, Rick assisted in the drafting of more than 1,500 appeals.

Rick’s civil and commercial litigation practice includes working closely with trial teams to provide strategic counsel regarding pre- and post-trial motion practice, expert designation disputes, jury charge preparation, and dispositive motion practice, as well as reviewing, interpreting, and drafting transactional contracts for business clients and appearing in bankruptcy court for creditors.

Rick has published several law review articles on varied topics, served as the Chief Recent Developments Editor for the Environmental & Energy Law & Policy Journal, and clerked for the Honorable Judge Vanessa Gilmore of the Southern District of Texas and the Antitrust Division of the United States Department of Justice. He has also served as a Research Assistant for two law professors at the University of Houston Law Center. Prior to becoming an attorney, Rick was a power scheduler for a major energy company.

## **Tyler Talbert**

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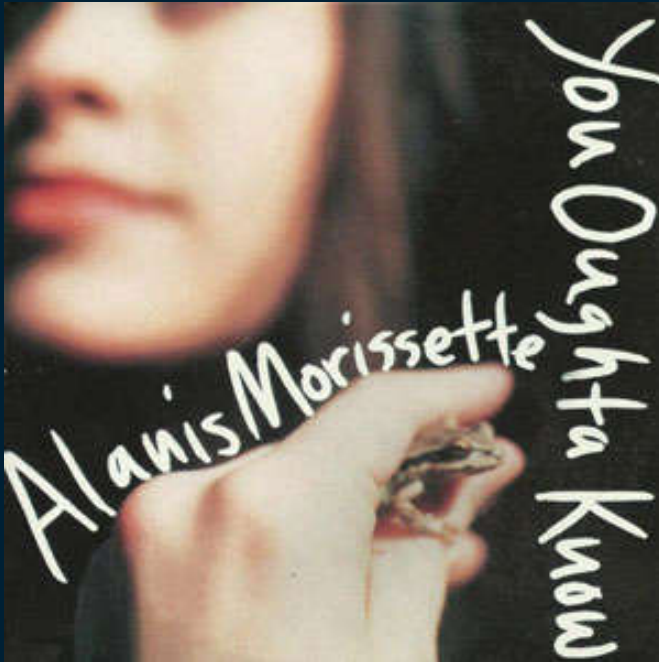
Tyler Talbert is a board certified civil appellate attorney with Scanes Yelverton Talbert, LLP in Waco.

Tyler briefs and argues civil appeals across Texas appellate courts, the Fifth Circuit, and the Supreme Court of Texas. He has handled appeals in a variety of cases including employment law, personal injury, sovereign immunity, statutory construction, election litigation, and certified questions. Tyler also provides trial support to attorneys, including dispositive motions and trial preparation.

Tyler is a frequent planner of and speaker for Continuing Legal Education courses. He chairs the Appellate Section's Local Bar CLE committee, which connects CLE speakers to local bar organizations. He is also a trustee of the Supreme Court of Texas Historical Society.

Tyler also teaches appellate advocacy, legal writing, and moot court at Baylor Law School. He has volunteered with the Court Appointed Special Advocates (CASA) of McLennan County and the Waco Education Foundation.

Tyler is married to Camille, a professor of curriculum and teaching. The two have twin seven-year-old boys: Theodore and Thatcher.



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# Due Order of Pleadings

# Things You, You, You Oughta Know

## Common Traps

## Key Cases and Rules

- Waiver of Transfer of Venue
    - Filing a general denial or other pleading before a venue challenge
  - Waiver of Special Appearance
  - Removal to Federal Court
    - Filing of notice of removal does not waive state court venue transfer
- Texas Rule of Civil Procedure 86
    - *Wilson v. Tex. Dep't of Parks & Wildlife*, 886 S.W.2d 259 (Tex. 1994)
  - Texas Rule of Civil Procedure 120a
    - Due order of pleading rule applies to special appearance; special appearance must be filed before any other “plea, pleading or motion”
    - *Exito Elecs. Co, Ltd. v. Trejo*, 142 S.W.3d 302 (Tex. 2004)

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# Summary Judgment



# And another one gone...

## Common Traps

- New rules
- Asking for more time
- Attach and point out evidence
- If you're late, ask for help
- Check your pleadings
- Objecting to evidence
- Challenging all error (Malooly)

## Key Cases

- *State v. \$3,774.28* (2025)
  - Attach and “point out”
- *Verhalen v. Ahktar* (2024)
  - Late response
- *B.C. v. Steak N Shake* (2020)
  - Order
- *Field Turf v. Pleasant Grove* (2022)
  - Oral rulings
- *Malooly Bros. v. Napier* (1970)
  - Challenging all issues

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Expert  
Witnesses



Mr. Know It All

vevo

# Things You Must Know About Experts

## Common Traps

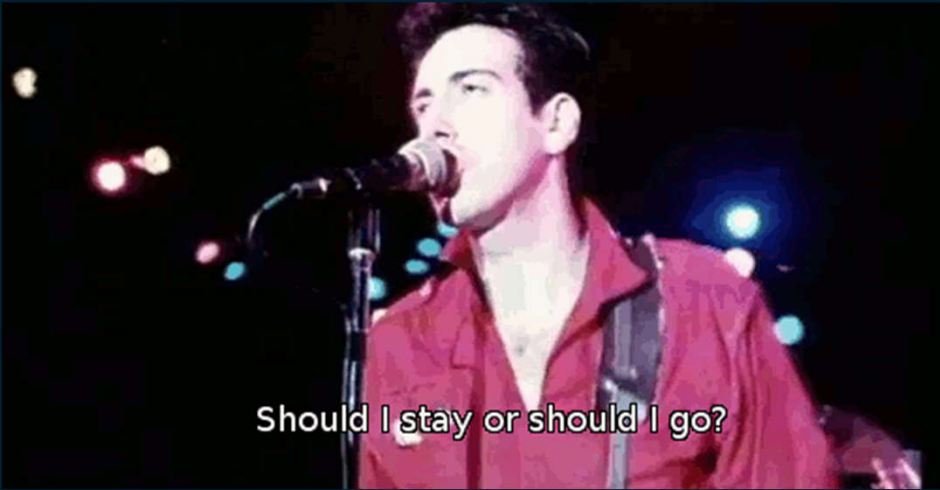
- Objection that expert testimony is conclusory
  - Equivalent to a no-evidence challenge
  - Can be raised for the first time on appeal
- Objection to reliability or methodology
  - Must be asserted and ruled on before trial or when testimony is offered
  - Failure to do so = waived

## Key Cases

- *City of San Antonio v. Pollock*, 284 S.W.3d 809 (Tex. 2009) (an objection to an expert's testimony as conclusory (i.e., ipse dixit) can be raised for the first time on appeal)
- *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402 (Tex. 1998) (objections to reliability and methodology of experts are waived if not raised before trial or when the testimony is offered)

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# Jury Charge



Should I stay or should I go?

# Come on and let me know

## Preserving Complaints

- Object, request, both?
- Sometimes neither?
- Informal v. Formal Charge Conference
- I must insist (on a ruling)
- Co-Mingling
  - Liability
  - Apportionment
  - Damages

Question		
Burden	Defective	Omitted
Yours	Request/Object	Request
Opponent's	Object	Object

Instruction		
Burden	Defective	Omitted
Yours	Request/Object	Request
Opponent's	Object	Request

- Incorrect Question
  - *JNM Express* (2024)
    - Timely, specific, ruled on
  - *Casteel* (2000), *Horton* (2024)
    - Comingling



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Get a  
Record

# No Record = Appellate Kryptonite

## Common Traps

- Failing to request that a record is made of your hearing
  - Always request that a record be made of your hearing
  - Avoid off-the-record conferences
  - No record = Unsuccessful appeal
- Failure to request and pay or make arrangements to pay for the Clerk's Record and the Reporter's Record
- Forgetting to Request for Findings of Fact and Conclusions of Law

## Key Cases, Rules, and Tips

- *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789 (Tex. 2002) (all facts necessary to support judgment and supported by the evidence are implied)
- *Worford v. Stamper*, 801 S.W.2d 108 (Tex. 1990) (court will affirm the judgment if it can be upheld on any legal theory supported by evidence)
- TRAP 26.1
- TRAP 34.5
- TRAP 34.6

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# Post-Trial Motions



# Some will win and some will lose

## Preservation Pointers

- Certain issues require post-trial motions
- Motion for New Trial
- Tendering orders to facilitate judgment
- Motion to Extend Post-Judgment Deadlines
- Findings of Fact and Conclusions of Law

(b) Motion for the following

Action	Deadline
request for findings and conclusions	20 days from date judgment signed
Findings and conclusions due	20 days from date of request
notice of past due findings and conclusions	30 days from date of request
late findings and conclusions due	40 days from date of original request
request for additional findings and conclusions	10 days from date findings and conclusions filed
additional findings and conclusions due	10 days from date of request

prerequisite to

misconduct or fault;

ry finding;

of the evidence;

by the jury; or

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# Objections



AND NOTHING ELSE MATTERS

©NOTHINGWETRUST

# *Without These Basics, Nothing Else Matters*

## Common Traps

- No objection
- Premature or late objection
- Non-specific objection
- Failure to get a ruling (“Move along, counsel”)
- Objection at trial does not comport with appellate issue
- Each party must assert their own objections
- Motion in limine preserves nothing for appellate review

## Key Cases and Rules

- TRAP 33.1
- *McDaniel v. Yarbrough*, 898 S.W.2d 251 (Tex. 1995) (objection must state specific grounds or grounds must be apparent from context)
- *Banda v. Garcia*, 955 S.W.2d 270 (Tex. 1997) (complaint raised on appeal must be the same as objection made in trial court)
- *Wilson v. Rice*, 807 S.W.2d 836 (Tex. App.—Waco 1991, writ denied) (untimely objection preserves nothing for review)



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# Final Judgments

# Finding (and creating) Finality

## “Deceiving in its apparent simplicity and vexing in its application.”

- Request all relief
- Surprise! Your case is over
- Reverse: Your case is not over
- Create finality with specific language
  - (Not) Magic Language: “This judgment finally disposes of all parties and all claims and is appealable”
  - Mother Hubbard?
- If you don’t know, go.
- Cases with more than one final judgment.

## Key Cases

Important consequences flow from the distinction between final

1. Was the judgment rendered after a conventional trial on the merits?
2. Does the order dispose of all parties and claims? |
3. Does the order express finality with unmistakable clarity?
4. Does a review of the record confirm that the trial court intended it to be final?<sup>15</sup>

volume of our post-*Lehmann* finality decisions, however, reflects that new scenarios continue to emerge. Since *Lehmann*, for example, we have not addressed the situation presented by this case: whether a purportedly “Final Default Judgment” is final for purposes of appeal despite expressly describing itself as “not appealable.”

- In re Lakeside Resort (Margaritaville) (2024)
  - “Final Default Judgment: This Judgment finally disposes of all claims and all parties and is not appealable.”

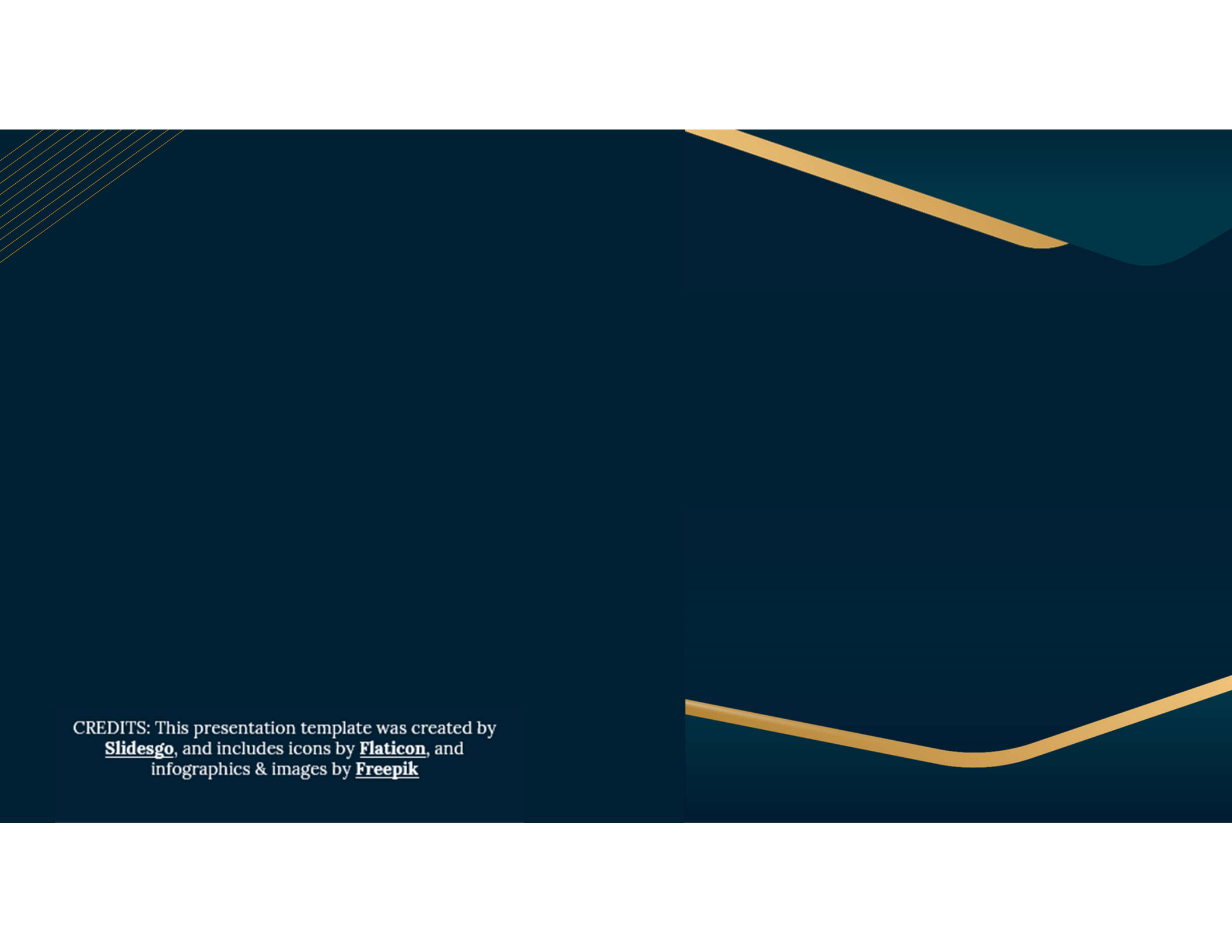
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SCAN ME





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