

**BIG DEAL APPEALS  
AND WHY WE LOVE THEM**

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State Bar Advanced Civil Appellate Practice Course, September 20-21, 2001 (received  
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Federal Civil Litigation Seminars, 1994-2001

Author/Speaker, "Handling Default Judgments in State Court," Techniques for Handling  
Appeals in State and Federal Court, June 8-9, 1995

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# **BIG DEAL APPEALS AND WHY WE LOVE THEM**

## **I. INTRODUCTION**

When Jackie Robinson first asked me to speak on the topic of “Big Deal Appeals and Why We Love Them,” my initial thought was, “That’s easy -- because as defense lawyers who survived the Ray-Kilgarlin Supreme Court and a new tort or an expansion of an existing tort almost every Thursday when opinions came out, we’re now winning in the Supreme Court.” But, like most first thoughts, that too broadly summarized the appellate process for most defense lawyers. The majority of us are not so fortunate as to practice in a court of appeals district that shares the Supreme Court of Texas’s conservative view toward expanding torts or other causes of actions or its precision in legal analysis. Thus, we need to be able to get into the Supreme Court in order to get justice for our clients. Thus, this paper focuses on how to get that “big deal appeal” to the Supreme Court.

Of course, to every client, his or her appeal is a “big deal” no matter how small the judgment. That presents a greater challenge to getting into the Supreme Court, but not an insurmountable one if you preserve error during trial -- because that’s where it all starts -- and you find what appellate practitioners often call a “hook” to get the Court’s attention.

## **II. SUPREME COURT OF TEXAS STATISTICS**

I’ll start with the bad news: currently only one in eleven (9%) of the petitions for review and/or for writ of mandamus filed are granted by the Court, as demonstrated by the following 2005 statistics from the Office of Court Administration:<sup>1</sup>

Of the 1,176 petitions for review filed, 106 were granted and 105 disposed of.  
Of the 347 petitions for writ of mandamus that were filed, 33 were granted  
and 28 disposed of.

The statistics in previous years have been higher -- 11.6% in 2002, 11.9% in 2003, and 11.4% in 2004; but 2001 was lower at 8.6%.<sup>2</sup>

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<sup>1</sup> The current Office of Court Administration statistics are attached to this paper as Appendix A. They may be accessed at [http://www.courts.state.tx.us/oca/PublicInfo/AR2005/sc/2\\_SC\\_Activity\\_2005.pdf](http://www.courts.state.tx.us/oca/PublicInfo/AR2005/sc/2_SC_Activity_2005.pdf).

<sup>2</sup> Texas Judicial Council Annual Reports.

However, if you manage to get your petition granted, your chances of success increase dramatically. Of the 105 petitions for review granted in 2005, only 10 were affirmed; 31 were reversed and rendered and 28 were reversed and remanded. With mandamus petitions, 22 were conditionally granted, 1 denied, and 5 dismissed. Thus, in 2005, there was a 72.3% success rate if your petition for review was granted; and a 78.5% success rate on granted mandamus petitions.

It's also interesting to see from whence these 105 granted petitions for review came. The Corpus Christi Court of Appeals leads the pack with 22 granted petitions. The Houston First Court of Appeals had 16 grants; the Dallas Court of Appeals had 15; the Fort Worth and Austin Courts each had 10; and the Houston Fourteenth had 9.

### **III. SUBJECT MATTER OF GRANTED PETITIONS FOR REVIEW**

Since the subject matter of mandamus petitions is a narrow one limited to those matters for which you do not have an adequate appeal, the following focus will be on subject matter of petitions for review that were granted.

In a survey of the granted petitions in 2003 by Molly and Mike Hatchell,<sup>3</sup> the leading topics listed in ranking order were:

- Procedure, particularly those involving expert witnesses
- Statutory construction
- Contract construction, including insurance

In 2004, the following areas led in the number of petition grants:<sup>4</sup>

- Negligence (16 grants)
- Procedure (15 grants)
- Jurisdiction (13 grants)

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<sup>3</sup> See The Hatchell Report at [www.hatchellreport.com](http://www.hatchellreport.com), which classifies petition for review grants by using the unofficial Supreme Court staff case summaries issued whenever a petition for review is granted.

<sup>4</sup> Mike and Molly Hatchell, *What Issues Are Being Granted by the Supreme Court* in State Bar of Texas, PRACTICE BEFORE THE TEXAS SUPREME COURT, Chpt. 4 (April 16, 2004).

According to the Hatchell Report, in those petitions for review granted or pending in 2005, the predominant issues were:

- Contract, including insurance (11 grants on insurance law, the most in any subject area; plus 7 grants on contract)
- Procedure, including appellate, jury charge, jury argument, and summary judgment (total of 16)
- Damages, including punitive (total of 8)

#### IV. HOW TO DETERMINE WHETHER YOUR APPEAL HAS A “HOOK” THAT WILL ATTRACT THE COURT’S ATTENTION

##### A. TRAP 56.1(a) Factors Court Considers in Deciding Whether to Grant Petitions for Review

Texas Rule of Appellate Procedure 56.1(a) lists the following factors to be considered by the Court in deciding whether to grant a petition for review:

- (1) court of appeals’ dissent on an important point of law
- (2) conflict between courts of appeals on an important point of law
- (3) construction or validity of a statute
- (4) constitutional issues
- (5) whether the court of appeals appears to have committed an error of law of such importance to the state’s jurisprudence that it should be corrected
- (6) whether the court of appeals has decided an important question of state law that should be, but has not been resolved by the Supreme Court

Most petitions for review end up within the “importance to the jurisprudence of the state” category because the others are rarer. Whatever your basis for review, decide what it is and emphasize that in your petition. I will often briefly in a couple of sentences summarize the importance of a certain factor in the required Statement of Jurisdiction. For example, the following is the Statement of Jurisdiction from the petition for review filed in *City of San Antonio v. Pollock*, 155 S.W.3d 322 (Tex. App.--San Antonio 2004, pet. filed in No. 04-1118):

This Court has jurisdiction under Tex. Gov’t Code § 22.001(a)(2) and (6).

***Takings Clause.*** This case presents an important constitutional issue: whether *personal injury* damages are recoverable under the Takings Clause,

Tex. Const. art. I, § 17, which provides compensation only for *property* that is taken, damaged, or destroyed for public use. The court of appeals' unprecedented decision -- that the City pay in excess of \$7 million in personal injury damages under the Takings Clause -- conflicts with *Tex. Highway Dept. v. Weber*, 147 Tex. 628, 219 S.W.2d 70 (1949), and *City of Beaumont v. Bouillion*, 896 S.W.2d 143 (Tex. 1995), in which this Court construed the Constitution as providing compensation solely for private property taken for public use. By creating an unlimited exception to the Legislature's cap on personal injury damages recoverable against a governmental unit for tort claims, the court of appeals' opinion imposes unanticipated and significant financial burdens on the more than 3,000 governmental units in this State.

**Causation.** The court of appeals is the first in this State to hold that exposure to benzene causes ALL; its decision conflicts with the opposite holding in *Exxon Corp. v. Makofski*, 116 S.W.3d 176 (Tex.App.--Houston [14th Dist.] 2003, pet. denied). Also, in holding that the City waived its objection to conclusory or speculative expert opinion, the court of appeals' opinion conflicts with *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227 (Tex. 2004), which held that no pre-verdict objection is necessary to preserve a legal sufficiency challenge to incompetent expert opinion evidence.

Convincing the Court to exercise its discretionary jurisdiction is the hardest hurdle you have in getting relief from the Supreme Court.

## **B. Practical Ways to Formulate a “Hook”**

### **1. Watch for Petitions Being Filed on Issues Raised by Your Case**

As a practical matter, if an issue is raised in multiple petitions being filed with the Court and they're pending at the same time, that enhances your chances of obtaining Supreme Court review. Thus, it is advantageous to check to see if any petitions are currently pending before the Court on your particular issues. If so, call that to the Court's attention in your petition for review.

### **2. Watch for Petitions Being Granted on Issues Raised by Your Case**

It is a good idea to watch the TEXAS SUPREME COURT JOURNAL to see the issues upon which the Court is granting review. If your petition raises the same issue, again, call that to the Court's attention in the petition because it will increase your chances of getting the petition either granted or held and carried along until the first granted petition

is decided -- at which time your petition will be governed by the controlling law announced in the issued opinion.

**3. Watch How the Courts of Appeals Are Applying Newly Announced Principles of Law**

While it is a good idea to see historically and currently what legal issues the Court is interested in granting, the reality is that the “Court does not author the same opinion twice.” Charles R. “Skip” Watson, Jr., *Petitions for Review Grant Trends 2005* in State Bar of Texas, 19TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE, Chpt. 9 at 11 (Sept. 8-9, 2005). Another reality is that upon the issuance of a new legal principle by the Supreme Court, the courts of appeals will spend a number of years determining the parameters of this new principle. They often will be narrow in their application and the Supreme Court will end up writing on the same principle over a period of years to show how that concept extends to other factual or procedural scenarios or to clarify the principle itself.

**a. The Casteel Objection**

For example, in *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000), the Court held that when jury charge instructions included invalid causes of action along with valid ones, such resulted in harmful error because the appellate court could not determine whether the jury had based its affirmative answer on a valid or an invalid cause of action; and, thus, the harm was depriving the objecting party of a meaningful appeal. That principle was extended to damages awards in *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002), where there was evidence to support some of the instructed upon measures of damages, but not others and there was only one answer blank for damages. And in 2005, the Court once again utilized the *Casteel* principle in *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005). In *Romero*, the failure of one theory of liability for lack of evidentiary support required reversal when a single apportionment question allowed the jury to consider both a valid (negligence) and invalid (malicious credentialing) theory in apportioning responsibility.

**b. Preservation of a Daubert/Robinson Objection**

The same is true with regard to *Daubert/Robinson*, which although announced by the Texas Supreme Court in 1995, continues to present issues of application the Court must still resolve. This is particularly true in the area of preservation of a *Daubert/Robinson* objection. Beginning with *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556-57 (Tex. 1995), it was assumed that the threshold inquiry as to an expert’s qualifications and the reliability of his testimony was to be addressed pre-trial. However, three years later in *Maritime Overseas Corp. v. Ellis*, the Court announced that a party can either object “before trial *or* when the evidence is offered.”

971 S.W.2d 402, 409 (Tex. 1998)(emphasis added). In 2004 and 2005, the Court recognized that there are times when the basis of a *Robinson* objection does not become apparent until the expert's testimony or on cross-examination. In such an instance, when there is no indication that an expert's reliability is subject to a *Robinson* objection prior to his testimony, then the motion to strike can be raised immediately after the basis for the objection becomes apparent. *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 252 (Tex. 2004); *see also General Motors Corp. v. Iracheta*, 161 S.W.3d 462, 471 (Tex. 2005).

But that last statement warrants a big **caution**. I've heard a number of seminar speakers say broadly that *Helton* and *Iracheta*, which was my case, open up the question of when you're required to make a *Daubert* objection and under those cases you could wait until the midst of the expert's testimony to object. That is absolutely wrong. The rule remains that which was announced in *Maritime Overseas*: object before trial or when the expert's testimony is offered.

*Helton* and *Iracheta* were very unique circumstances. In *Helton*, it was only upon cross examination that the expert admitted that production data from existing wells could not tell him what production for the hypothetical well would be -- upon which the damages were based. He also admitted that he had no factual basis for projecting such production -- contrary to what his opinion had been. 133 S.W.3d at 250. Thus, the basis for the *Daubert* objection was not apparent until then. *Id.* at 252. There was a similar situation in *Iracheta*. There, the fire expert changed his opinion at trial and offered an opinion that the fuel line had siphoned in the rear where the fire was -- *i.e.*, offered an opinion on the defect, which he was not qualified to do. In cross-exam, he led General Motor's counsel to believe that expert on siphoning had also changed his opinion that the line had siphoned in the front of the car. 161 S.W.3d at 466-67. However, it became clear that the siphoning expert had not changed his opinion that the fuel line siphoned at the front of the vehicle. *Id.* at 469. General Motors objected at the end of cross-examination. The Court held that the "utterly conflicting nature" of the fire expert's testimony was not fully apparent until cross-examination; therefore, it rejected *Iracheta's* argument that the *Daubert* objection was waived, stating that a party is not required to anticipate a deficiency before it is apparent. *Id.* at 471. Both these cases involved experts who changed their testimony at trial such that you could not have anticipated their lack of reliability. In that circumstance, and in that rare circumstance alone, may you wait until the midst of an expert's testimony to lodge a *Daubert* objection.

In addition, the Court has had to clarify that the lack of a *Daubert/Robinson* objection does not waive a "no evidence" or legal sufficiency attack on the expert's testimony. *See Coastal Transport Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232-33 (Tex. 2004); *see also Iracheta*, 161 S.W.3d at 471. This principle was announced in *Merrell Dow Pharmaceuticals, Inc. v. Havner*, when the Court stated: "If for some reason such testimony were admitted in a trial without objection, would a reviewing court be obliged to accept it as some evidence? The answer is no." 953 S.W.2d 706, 712 (Tex.

1997). In *Coastal Transport*, the Court clarified that there are two types of challenges to expert testimony, also noting the difference in preservation: (1) an attack on the scientific methodology, technique, or foundational data underlying the expert's opinion, which requires an objection to scientific reliability of the testimony; and (2) an attack on the legal sufficiency of the expert's opinion as speculative or conclusory on the face of the record, for which no pre-verdict objection is required. *Id.* at 232-33. Thus, if there is no *Daubert* objection, a party cannot complain on appeal of the expert's methodology or the science of his underlying studies, but it can predicate error on "no evidence" or legal insufficiency because the expert's opinion is mere *ipse dixit* and thus no evidence at all.

#### **4. How to Spot Future Subjects of Interest to the Court<sup>5</sup>**

##### **a. Look at the Court's Dicta**

Often the Court in dicta will signal where it wants to take the law, but it reserves the question for another day. Very often the citations will be only federal cases or out-of-jurisdiction cases because Texas law in the area has not yet developed.

An example is *Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438 (Tex. 2004), which held that an employee could not bring a separate intentional infliction of emotional distress claim in order to circumvent the statutory cap on non-pecuniary damages for sexual harassment. Six years earlier the Court had made a reference to the tort of intentional infliction of emotional distress as a "gap filler" created to afford a remedy not afforded by statute, relying on out-of-state cases. *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 68 (Tex. 1998).

##### **b. Look at the Concurring and Dissenting Opinions**

Because of the turnover on the Court in the last several years, it is important to note as you research the issues applicable to your case whether a current justice has written a concurring or dissenting opinion where he or she took issue with an announced principle or saw another legal concept that was not addressed in the majority opinion. That view may well now carry the day, especially if it is not completely contrary to the precedent announced but rather extends or distinguishes that precedent.

For example, the dissenting opinion in *H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22 (Tex. 1998), may well provide an opportunity to revisit *Bilotto's* holding that the damages conditioning instruction in the State Bar of Texas, TEXAS PATTERN JURY CHARGES--MALPRACTICE, PREMISES, PRODUCTS PJC 80.1 (1997 ed.) does not constitute

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<sup>5</sup> I'm indebted to Skip Watson for these suggestions on how to spot future trends in the Supreme Court. See Charles R. "Skip" Watson, Jr., *Petitions for Review Grant Trends 2005* in State Bar of Texas, 19TH ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE, Chpt. 9 at 11-14 (Sept. 8-9, 2005).

a comment on the weight of the evidence. The instruction, which remains in the current PJC Negligence and Malpractice volumes, tells the jury to answer the damages question if it answered “Yes” to the liability question and if it found 50 percent or less as to *Paul Plaintiff* in the percentage causation question. Note Justice Hecht’s comment in his *Bilotto* dissent: “To tell the jury the legal policy determined by the Legislature and allow the jury to make findings to avoid that policy and achieve a desired result gives the jury a role it should not have and usurps the province of the Legislature.” *Id.* at 32 (Hecht, J., dissenting). In looking at the historical role of jurors in Texas, Justice Hecht also noted that the Supreme Court had “consistently held to the view that a trial court commits error if its conditional submission informs the jury of some legal consequence that it would not know but for the conditional submission.” *Id.* at 34. Thus, he concludes: “The rule established by these cases prevents jurors from engaging in outcome-oriented decisionmaking.” *Id.* I, therefore, continue to object to that instruction and will take it up the first chance I get. And I would urge you to do the same. However, many trial judges agree with its “nudging” effect and will not give it.

**c. Look at Dissenting Opinions on Denial of Review**<sup>6</sup>

Dissenting opinions on denial of review are rare, but it is worth determining whether there have been any in the subject areas involved in your petition to get ideas on how you might frame your argument or issues to persuade the Court to grant review. *See, e.g., Dolcefino v. Stephens*, 181 S.W.3d 741 (Tex. 2005) (Hecht, J., dissenting from denial of petition for review, joined by Justice Wainwright) (applicability of discovery rule to limitations); *In re R.D.Y.*, 92 S.W.3d 433 (Tex. 2002) (Hecht, J., dissenting from the denial of a motion for rehearing on denial of a petition for review, joined by Justices Owen and Jefferson) (should grant because this is an important, recurring issue over which the courts of appeals are in disagreement); *Wagner & Brown, Ltd. v. Horwood*, 53 S.W.3d 347, 349-51 (Tex. 2001) (Hecht, J., dissenting from denial of motion for rehearing on denial of petition for review) (conflicts jurisdiction); *Gaylord Broadcasting Co. v. Francis*, 35 S.W.3d 599 (Tex. 2000) (Hecht, J., dissenting from denial of petition for review) (public official-media defendant defamation case on interlocutory appeal); *Texas Workers’ Compensation Ins. Fund v. Serrano*, 22 S.W.3d 341 (Tex. 1999) (Hecht, J., dissenting from denial of petition for review)(in a subrogation claim made by the workers’ compensation fund, the allocation of settlement proceeds between an injured worker and his family). Once again, with the turnover in the Court, it is a good idea to see what justice(s) feel this issue deserves review, whether the opponents of review are still on the Court, and whether the dissenting justice(s) is still on the Court and/or often in the majority in the current Court’s opinions.

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<sup>6</sup> *See* Richard R. Orsinger, *Trends in the Supreme Court* in State Bar of Texas, PRACTICE BEFORE THE TEXAS SUPREME COURT, Chpt. 11 at 3 (April 1, 2005)

**5. Remember That the Court's Conflict Jurisdiction Has Been Broadened**

Applicable to cases filed on or after September 1, 2003, the Supreme Court's conflicts jurisdiction has been broadened. *See* TEX. GOV'T CODE ANN. § 22.001(a)(2) & (e) (Vernon 2004). Prior to the 2003 amendments when there was no statutory definition, the Supreme Court had narrowly interpreted the "holds differently" term in the jurisdictional statute to mean there was a conflict in the courts of appeals when two decisions could not stand together, were fundamentally at odds, or announced antagonistic conclusions -- *i.e.*, when "two cases are so similar that the decision in one case is necessarily conclusive of the decision in the other." *Texas Dept. of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 223 (Tex. 2004); *see also State Farm Mut. Auto. Ins. Co. v. Lopez*, 156 S.W.3d 550, 554 (Tex. 2004); *Compaq Computer Corp. v. Lapray*, 135 S.W.3d 657, 663 (Tex. 2004); *Christy v. Williams*, 156 Tex. 555, 298 S.W.2d 565, 568-69 (1957). The test was whether one decision would operate to overrule the other had it been issued by the same court. *Miranda*, 133 S.W.3d at 223; *Christy*, 298 S.W.2d at 568-69. If the factual differences between the cases legally and legitimately distinguished the holdings, there was no conflicts jurisdiction. *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 689 (Tex. 2002); *see also Hill v. Miller*, 714 S.W.2d 313, 315 (Tex. 1986) (must concern essentially the same facts to establish conflicts jurisdiction).

In the House Bill 4 amendment, the Legislature defined "holds differently": "one court holds differently from another when there is inconsistency in their respective decisions that should be clarified to remove unnecessary uncertainty in the law and unfairness to litigants." TEX. GOV'T CODE ANN. § 22.001(e). Interestingly, Justice Hecht's dissents foreshadowed this very construction of "holds differently." *See Collins v. Ison-Newsome*, 73 S.W.3d 178, 186, 193 (Tex. 2001) (Hecht, J., dissenting); *Coastal Corp. v. Garza*, 979 S.W.2d 318, 323-26 (Tex. 1998) (Hecht, J., dissenting). Thus, now conflicts jurisdiction is within the Court's discretion and determination as to whether an inconsistency should be clarified by the Court. While the new statutory definition does not explicitly eliminate the required close parallel between the facts in the conflicting courts of appeals' opinions, it certainly does relax that requirement. Therefore, jurisdictional statements in petitions for review need to focus now on "inconsistencies" in courts of appeals' decisions that require the Court to declare what the correct rule of law is.

## V.

### THE BEST POINTS OF ERROR TO PRESERVE IN A BIG DEAL APPEAL

#### A. No Evidence or Legal Insufficiency

For purposes of formulating the “big deal” appeal, the case you really need to know and understand is *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005), authored by Justice Brister. The reason is that one of the best points of error you can have in any appeal is a complaint that there is “no evidence” to support a jury finding necessary to support the judgment in plaintiff’s favor. It will support a rendition of a take-nothing judgment by the appellate court if you ask for it; and you’re not required to undertake the expense or risk of retrying the case and potentially receiving a worse verdict -- as you are when your relief is limited to a remand. A “no evidence” point of error can be preserved by objection to the jury charge, by a directed verdict motion, or by post-verdict motions, such as a J.N.O.V. or a motion to modify the judgment. *T.O. Stanley Boot Co., Inc. v. Bank of El Paso*, 847 S.W.2d 218, 220 (Tex. 1992).

Perhaps in reaction to some commentators’ recent criticism that the Court was changing long established “no evidence” review, *City of Keller v. Wilson* examined the history of legal sufficiency review in Texas to demonstrate that its opinions over the past five or so years had not altered such review. In *City of Keller*, the Supreme Court noted that a standard of review requiring the court of appeals “to consider only the evidence and inferences that tend to support the finding and disregard all evidence and inferences to the contrary” -- what it called “the exclusive standard” -- had never applied to every “no evidence” challenge. *See id.* at 808-11. While noting that a no-evidence review requires the Court to view any evidence in the light most favorable to the verdict, Justice Brister explained that such a review should ultimately focus on “whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review.” *Id.* at 822, 827. To achieve that end, the Court concluded that “legal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.” *Id.* at 827. To properly determine if the evidence is legally sufficient to support a finding, the reviewing court must consider all of the evidence and is permitted to disregard evidence that reasonable jurors could disregard. *See id.* at 811.

In terms of arguing a “no evidence” point, the concept of being able to disregard evidence that reasonable jurors could is what is most helpful in an appeal. Prior to *City of Keller*, invariably, plaintiffs responded to “no evidence” points with the retort that the appellate court could only consider the evidence that supports the jury’s verdict and had to disregard any evidence that did not. For most courts of appeals, there endeth your “no evidence” point unless there was positively no evidence on that particular issue -- which, of course, is rare.

While it had long been the law that inferences must be reasonable in order to constitute evidence,<sup>7</sup> *City of Keller* made that point clear in “no evidence” review. It is an argument that you can use to your advantage in any case where the jury’s finding under attack is supported by circumstantial evidence. As the Court explained, this type review also applies to the fact finder’s reconciliation of conflicts in the evidence; that reconciliation also must be reasonable. *Id.* at 820-21. It is also useful in making a “no evidence” attack on an expert where his opinion is based on certain assumptions about the facts. If those assumptions are unfounded, *City of Keller* noted that the reviewing court cannot disregard evidence which shows those assumptions were unfounded. *Id.* at 813 & n.34 (citing *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499-500 (Tex. 1995); *Roark v. Allen*, 633 S.W.2d 804, 809 (Tex. 1982)).

## **B. Causation in Tort**<sup>8</sup>

Another good rendition point is an attack on causation in a tort case, which will generally be a “no evidence” point that you need to preserve in your jury charge objections, directed verdict, or post-judgment motions.

As the Supreme Court of the 90’s and the new millennium has tried to correct the excesses of the 80’s Court, causation has become an issue the Court has repeatedly examined. What the Court has done in the last decade is a precise analysis of what the components of proximate cause, “cause in fact” and “foreseeability,” mean legally in a given factual pattern. See *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). The first in-depth examination of the history of causation is found in then Justice Cornyn’s concurrence in *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 777-84 (Tex. 1995) (Cornyn, J., concurring). In developing current causation analysis, the Court has: (1) heightened the proof requirements regarding inferences to be drawn from circumstantial evidence and from expert testimony; and (2) eliminated remote and attenuated causes. See, e.g., *General Motors Corp. v. Iracheta*, 161 S.W.3d 462, 471-72 (Tex. 2005) (no evidence that siphoning defect caused fire where both defect and fire expert’s opinions were internally inconsistent and conflicted with each other and were therefore unreliable); *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 906 (Tex. 2004) (expert’s opinion on wheel remaining pocketed in wheel well when car veered off road was not corroborated, but rather was his subjective view of facts; therefore, opinion is unreliable and no evidence of causation); *IHS Cedars Treatment Center of DeSoto*,

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<sup>7</sup> See then Chief Justice Phillips’ concurrence and dissent in *Lozano v. Lozano*, 52 S.W.3d 141 (Tex. 2001)(per curiam), for an overview of circumstantial evidence review. See generally Sharon E. Callaway, *Yet Another Look at the “No Evidence” Standard of Review* in State Bar of Texas, ADVANCED CIVIL APPELLATE PRACTICE COURSE, Chpt. 9 (Sept. 9-10, 2004).

<sup>8</sup> An excellent overview of the Supreme Court’s treatment of causation in the last decade is Charles R. “Skip” Watson, Jr., *Proof of Causation: Selected Causation Trends Before the Supreme Court* in State Bar of Texas, ADVANCED CIVIL APPELLATE PRACTICE COURSE, Chpt. 20 (Sept. 9-10, 2004).

*Texas, Inc. v. Mason*, 143 S.W.3d 794, 799 (Tex. 2004) (as a matter of law, cause-in-fact is not established where the defendant's conduct does no more than furnish a condition which makes the injury possible); *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (expert's affidavit that he "suspects" a manufacturing defect caused the fire in a truck is no evidence of causation); *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 729 (Tex. 2003) (per curiam) (because expert opinion was pure speculation and piled inference upon inference, there was no legally sufficient evidence that a premises defect caused a repairman to fall from the roof); *Leitch v. Hornsby*, 935 S.W.2d 114, 119 (Tex. 1996) (no evidence of causation because such cannot be based on speculation or conjecture).

Further defining cause-in-fact, the Court has held that the cause-in-fact component of proximate cause "requires proof that an act or omission was a **substantial factor** in bringing about injury which would not otherwise have occurred." *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995) (emphasis added); see also *Western Investments, Inc. v. Urena*, 162 S.W.3d 547, 552 (Tex. 2005) (no evidence landlord's negligence was substantial factor in causing sexual assault of one tenant by another tenant). Another way of viewing cause-in-fact is "but for" defendant's acts, plaintiff would not have been injured. See *Southwest Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 274 (Tex. 2002) (no evidence that school's failure to provide protective equipment for impromptu touch football game was a substantial factor in bringing about plaintiff's injury and without which no harm would have been incurred); *Excel Corp. v. Apodaca*, 81 S.W.3d 817, 820-22 (Tex. 2002) (employee presented no evidence that but for the employer's negligence he would not have developed cumulative trauma disorders); *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 357 (Tex. 1993) ("plaintiffs must show that but for GM's omission the accident would not have occurred").

The test for the second prong of proximate cause, foreseeability, is whether a person of ordinary intelligence would have anticipated the danger his or her negligence creates. *Southwest Key Program*, 81 S.W.3d at 274. The question of foreseeability generally involves a practical inquiry into whether the injury "might reasonably have been contemplated" as a result of defendant's conduct. *Doe*, 907 S.W.2d at 478 (injuries were so remotely related to defendant's failure to investigate, screen, or supervise volunteers that no reasonable mind could anticipate the result).

Because the Court is subjecting causation to the closest scrutiny in a fact-intensive analysis, examine your case to see whether you can make a legal sufficiency attack on plaintiff's evidence of causation. If successful, it will result in a take-nothing judgment in your client's favor.

### C. Jury Charge Error

While jury charge error generally only results in a remand for new trial and not a rendition of judgment, it is nevertheless one of the best sources for reversible error. Sometimes it is just advantageous to have backup jury charge error for purposes of settlement discussions if your client has been hit with a large verdict. Most plaintiffs and their attorneys are not eager to retry the case or undertake the risk of not getting as favorable a verdict again (except in South Texas). Just be sure to select a mediator who understands appellate review well enough to appreciate and explain the risks on appeal to the plaintiffs.

#### 1. Steps to Take to Preserve Error in the Jury Charge

There are a multitude of objections that can be made to the jury charge -- far beyond the scope of this paper. But the following is list of things to think about in terms of preserving error in the charge and setting up your “big deal” appeal.

(1) Actually, this first step takes place quite early on. Draft a mock up of the whole jury charge (plaintiff’s and defendant’s questions and instructions) before you start taking depositions or requesting discovery. It gives you a roadmap for what you’ve got to prove; and you can be deposing witnesses using the same terms that the jury is going to be instructed on. Sometimes, you can get a deposition witness to admit away a cause of action by getting him to establish your defense or admit the absence of an essential element of the plaintiff’s claim -- that is, if your opponent has not done his or her legal research and properly prepared the witness in light of controlling law. However, this mock-up charge is for your side’s eyes only; you don’t want to educate the opposing side.

(2) As you’re preparing the mock-up charge, the best source is the TEXAS PATTERN JURY CHARGE volumes. But keep in mind that those volumes are published roughly every two years and, while updated at that time with recent Supreme Court cases and statutory amendments that require a change in the PJC submission or comment, every section is not completely researched and updated each edition. Therefore, you need to take a look to see if there’s been a recent Supreme Court case or a court of appeals case in the district where your trial is pending that might alter what’s in PJC.

(3) When it comes time to submit a proposed charge to the trial court, as a defendant, do not give the court the entire charge. You only have to submit questions and instructions upon which you have the burden of proof -- *i.e.*, defenses or counterclaims. And that is all you should propose. In fact, I entitle that document “Defendant’s Proposed Questions and Instructions.” There are no signature lines for the judge to accept or reject. The appropriate time for that is on the requested submissions tendered to the court in the jury charge conference. If there is an instruction on a claim of the plaintiff’s that I particularly want, I’ll put it in the proposal, noting what question it

accompanies. It is the plaintiff's charge for the most part and a defendant only reacts to that charge. You certainly don't want to remind the plaintiff to submit necessary predicates like malice for exemplary damages. If they forget to do so, then they can't recover punitives. And you don't want to be assisting them in submitting their case. Let them make mistakes and take advantage of those mistakes by preserving error for appeal at the jury charge conference.

(4) At the charge conference, make your objection clear by stating what's wrong with the submission and why it is wrong in terms of the evidence or supporting legal authority. Get a ruling on your objection. If there is an omitted question upon which you have the burden of proof, tender that question in proper form and object to its omission from the court's charge. If you complain of an instruction being incorrect, even if you do not have the burden of proof on that instruction, tender it in proper form and object to the error in the court's charge instruction. On your tenders, place a signature line for accept/deny and make sure the judge signs it if the tendered submission is denied.

## **2. Premises Defect versus Negligent Activity**

One time when charge error can give rise to appellate rendition of a take-nothing judgment is when the plaintiff fails to submit an essential question or instruction necessary to support a claim or submits it on the wrong theory. *See Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 529 (Tex. 1997). A good example of such an instance -- and one that as defense counsel I often see in premises liability cases -- is the failure of the plaintiff to distinguish between a premises defect case and a negligent activity case.

Premises owners may be liable for negligence in two situations: (1) those arising from a premises defect; and (2) those arising from an activity. *Redinger v. Living, Inc.*, 689 S.W.2d 415, 417 (Tex. 1985); *see also Olivo*, 952 S.W.2d at 527 (injury caused by drill pipe thread protectors left on ground of work site arose from premises defect, not negligent activity); *American Indus. Life Ins. Co. v. Ruvalcaba*, 64 S.W.3d 126, 133-34 (Tex. App.--Houston [14th Dist.] 2001, pet. denied) (holding no evidence to support trial court's finding of negligent activity as opposed to condition of premises); *Mansfield v. C.F. Bent Tree Apartment Ltd. P'ship*, 37 S.W.3d 145, 152 (Tex. App.--Austin 2001, no pet.) (trespasser plaintiff's claim of negligent failure to provide adequate security was not a negligent activity; rather was premises defect theory); *Exxon Corp v. Garza*, 981 S.W.2d 415, 420 (Tex. App.--San Antonio 1998, pet. denied) (negligence in allowing installation of wrong kind of connections in transformers stated cause of action for premises defect); *Wal-Mart Stores, Inc. v. Bazan*, 966 S.W.2d 745, 746 (Tex. App.--San Antonio 1998, no pet.) (razor blade left on store parking lot was dangerous condition of premises); *Lucas v. Titus County Hosp. District/Titus Memorial Hosp.*, 964 S.W.2d 144, 153 (Tex. App.--Texarkana) (broken chair in hospital waiting room constituted premises defect), *pet. denied*, 988 S.W.2d 740 (Tex. 1998)(per curiam).

To recover under a negligent activity theory, the plaintiff must prove that he was injured by, or as a contemporaneous result of, the negligent activity itself, rather than a condition created by the negligent activity. *Timberwalk Apts., Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998) (failure to provide adequate security stated premises liability claim), citing *Keetch v. Kroger*, 845 S.W.2d 262, 264 (Tex. 1992). If the injury is caused by a condition created by the activity rather than the activity itself, the plaintiff is limited to a premises liability theory of recovery. *Pifer v. Muse*, 984 S.W.2d 739, 742 (Tex. App.--Texarkana 1998, no pet.); *McDaniel v. Continental Apartments Joint Venture*, 887 S.W.2d 167, 171 (Tex. App.--Dallas 1994, writ denied).

For cases where negligent activity has been found, see *Saenz v. David & David Const. Co., Inc.*, 52 S.W.3d 807, 810-12 (Tex. App.--San Antonio 2001, pet. denied) (negligent activity, not condition of premises, where worker injured in construction accident sued general contractor for negligence of crane operator in moving material and failure to follow safety measures; such equals dangerous manner in which work being done); *Laurel v. Herschap*, 5 S.W.3d 799, 802 (Tex. App.--San Antonio 1999, no pet.) (in suit against employee of subcontractor against general contractor, held to be negligent activity when subcontractor's injury was caused by falling pipe, which fell after general contractor directed work be stopped while pipe was in mid-air).

If the evidence is that of contemporaneous negligent activity, then the proper submission is common law negligence. Cf. *Plainview Motels, Inc. v. Reynolds*, 127 S.W.3d 21, 34-35 (Tex. App.--Tyler 2003, pet. denied) (not error for trial court to refuse to submit tendered issue of negligent activity to jury where no evidence of contemporaneous activity by defendant). If the injury arises from a condition of the premises, then the jury charge submission of negligence must be based on the *Keetch* premises liability instruction found in PJC 66.4 and not a general negligence instruction. See *Olivo*, 952 S.W.2d at 529. The rationale for that holding is the clear demarcation the Supreme Court has made between injuries arising from negligent activity and those arising from a premises condition. As the Court made clear in *Olivo*, a simple negligence question, unaccompanied by the appropriate premises liability elements as instructions, cannot support a recovery in a premises defect case. 952 S.W.2d at 529; see also *Reinicke v. Aeroground, Inc.*, 167 S.W.3d 385, 387-88 (Tex. App.--Houston [14th Dist.] 2005, pet. denied); *Price Drilling Co. v. Zertuche*, 147 S.W.3d 483, 486-88 (Tex. App.--San Antonio 2004, no pet.). Thus, failure to secure proper jury findings on a premises liability claim waives that claim, and absent any other valid theory of liability, entitles the defendant to a judgment that plaintiff take nothing. *Olivo*, 952 S.W.2d at 530.

## **VI. CONCLUSION**

As is clear from the foregoing, whether you're going to have a "big deal" appeal actually starts from the moment you start working on the case. Determine if your case presents legal issues that the Supreme Court may find important to the jurisprudence of the state or issues about which the courts of appeals are in conflict. Develop those issues through discovery and the presentation of evidence. Preserve those issues pre-trial, during trial, and post-trial. If you lose at trial, present them to the court of appeals. If you lose there, present them in a way to the Supreme Court that they cannot refuse to grant your petition for review. And have a great oral argument!

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