

# **APPELLATE RELIEF**

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## APPELLATE RELIEF

### I. INTRODUCTION

How do you spell relief? It depends. The relief an appellate court can and will award is determined by a chain of events that begins with the filing of the plaintiff's petition in the trial court and ends only when the last rehearing motion is denied. Care taken early in the process to position the case for the appropriate relief will be rewarded as it moves forward to final appellate disposition. As important as the facts and the legal arguments may be, winning on the facts in the trial court and on the law in the appellate court avails the advocate nothing if those victories are not translated into an award of favorable relief.

### II. THE OUTER LIMITS: RULES AND JURISDICTIONAL PRINCIPLES

An appellate court can never grant more relief than it is authorized to give. The scope of potential relief a particular appellate court can give can be found both in the rules governing appellate judgments and in basic jurisdictional principles.

#### A. The Courts of Appeals – TEX. R. APP. P. 43

##### 1. Options for Relief from the Court of Appeals

TEX. R. APP. P. 43 governs the judgments of the courts of appeals. Under that rule, the courts of appeals may, on the appropriate appellate record, do any of the following:

- (a) affirm the trial court's judgment in whole or in part;
- (b) modify the trial court's judgment and affirm it as modified;
- (c) reverse the trial court's judgment in whole or in part and render the judgment that the trial court should have rendered;
- (d) reverse the trial court's judgment and remand the case for further proceedings;
- (e) vacate the trial court's judgment and dismiss the case; or
- (f) dismiss the appeal.

TEX. R. APP. P. 43.2.

##### 2. Affirmance

Affirmance constitutes a ratification of the trial court's judgment by the appellate court. *McWilliams v. McWilliams*, 531 S.W.2d 392, 394 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1975, no writ). Affirmance is appropriate if the trial court's judgment is correct on any legal theory that is supported by the evidence. *Black v. Dallas County Child Welfare Unit*, 835 S.W.2d 626, 630 n.10 (Tex. 1992). Summary judgment forms a notable exception: a summary judgment may be affirmed only on the grounds raised in the motion. See *Progressive*

*County Mutual Insurance Co. v. Boyd*, 177 S.W.3d 919, 921 (Tex. 2005).

Unless the court of appeals finds error, affirmance is the *only* option. "Absent error in the trial court mandating a reversal, the court of appeals cannot reverse in the interest of justice." *Davis v. Bryan & Bryan, Inc.*, 730 S.W.2d 643, 644 (Tex. 1987).

##### 3. Modification

The court of appeals has "the power to modify incorrect judgments when the necessary data and information is available to do so." *Abron v. State*, 997 S.W.2d 281, 282 (Tex. App. – Dallas 1998, pet. ref'd). See, e.g., *Hagedorn v. Tisdale*, 73 S.W.3d 341, 354 (Tex. App. – Amarillo 2002, no pet.) (modifying judgment from dismissal without prejudice to dismissal with prejudice).

##### 4. Reversal and Rendition

Upon finding error, the court of appeals should, where possible, render judgment rather than remand. TEX. R. APP. P. 43.3; see *Lone Star Gas Co. v. Railroad Commission*, 767 S.W.2d 709, 710 (Tex. 1989). For example, on cross motions for summary judgment the appellate court should "either affirm the judgment that the trial court rendered or reverse the judgment and render the judgment that the trial court should have rendered." *Jones v. City of Houston*, 907 S.W.2d 871, 875 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1995, writ denied). Partial reversal and rendition of a severable part of the trial court's judgment is permissible. TEX. R. APP. P. 43.3

##### 5. Reversal and Remand

Remand is appropriate where it is necessary for further proceedings or required in the interests of justice. TEX. R. APP. P. 43.3; see *Wright v. Sport Supply Group, Inc.*, 137 S.W.3d 289, 299 (Tex. App. – 2004 Beaumont, no pet.). The court can reverse a severable part of the judgment and remand that part of the cause to the trial court, and affirm the remainder of the judgment. *Torres v. Johnson*, 91 S.W.3d 905, 912 (Tex. App. – Fort Worth 2002, no pet.); see TEX. R. APP. P. 44.1(b). The court may not, however, order a separate trial on unliquidated damages if liability is contested. TEX. R. APP. P. 44.1(b); see *Minnesota Mining & Manufacturing Co. v. Nishika, Ltd.*, 953 S.W.2d 733, 740 (Tex. 1997) ("Remand of both liability and damages is mandatory under these circumstances").

When an appellate court remands a cause to the trial court, the case is reopened in its entirety unless the appellate court's decision specifically limits the scope of remand to a particular issue or issues. See *Graham Savings & Loan Ass'n v. Blair*, 986 S.W.2d 727, 729 (Tex. App. – Eastland 1999, no pet.); *University of Texas System v. Harry*, 948 S.W.2d 481, 483 (Tex. App. – El Paso 1997, no pet.).

If a reversal is limited to particular fact issues, that limitation must be clear from the court's decision. *See Garcia v. Martinez*, 988 S.W.2d 219, 221 (Tex. 1999); *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986). Where the court limits a subsequent trial on remand to a particular issue, the trial court is restricted to a determination of that particular issue. *See Hudson*, 711 S.W.2d at 630.

In an effort to "provide the trial court with guidance in the retrial," the appellate court may address issues which, although not necessary to the appellate court's disposition of the case, are likely to come up again on retrial. *Edinburg Hospital Authority v. Trevino*, 941 S.W.2d 76, 81 (Tex. 1997); *see In re J.B.*, 93 S.W.3d 609, 617 (Tex. App. – Waco 2002, pet. denied).

#### 6. Vacation of the Judgment and Dismissal of the Case

The present rules give authority to courts of appeals to vacate a trial court's judgment and dismiss the case. *Young Materials Corp. v. Smith*, 4 S.W.3d 84, 84 (Tex. App. – Waco 1999, no pet.). This disposition may be appropriate in the event of settlement, *see* Section V.C, *infra*, or if the trial court lacked jurisdiction.

#### 7. Dismissal of the Appeal

Dismissal of the appeal is appropriate for want of jurisdiction, for want of prosecution, or where the appellant has failed to comply with a rule, order, or notice requiring action within a specified time. TEX. R. APP. P. 42.3. The court should not dismiss an appeal for a procedural defect, however, if any arguable interpretation of the rules would preserve the appeal. *Verburg v. Dorner*, 959 S.W.2d 615, 616 (Tex. 1997).

Dismissal of the appeal leaves the judgment of the trial court in force, as though no appeal had been taken. *E.g., Robertson v. Land*, 519 S.W.2d 227, 229 (Tex. Civ. App. – Tyler 1975, no writ). It is thus a first cousin of affirmance, identical except that the trial court judgment does not have whatever psychological attributes arise from ratification by the appellate court.

#### 8. Remittitur

The court of appeals may suggest a remittitur. TEX. R. APP. P. 46.3; *see Formosa Plastics Corp. USA v. Presidio Engineers & Contractors*, 960 S.W.2d 41, 51 (Tex. 1998). "If part of a damage verdict lacks sufficient evidentiary support, the proper course [for the court of appeals] is to suggest a remittitur of that part of the verdict." *Larson v. Cactus Utility Co.*, 730 S.W.2d 640, 641 (Tex. 1987).

The rules do not prescribe the procedural steps to be taken by a court of appeals in suggesting remittitur. Various sequences come to mind. First, the court may suggest a remittitur in its opinion, withholding judgment until it is known whether the remittitur will be

filed. Alternatively, the court may render a judgment of reversal and remand, indicating in its opinion that the judgment will be modified and affirmed in the event that a remittitur is timely filed. Finally, the court may issue a conditional judgment specifying the different outcomes of the case with and without a remittitur; such a judgment would, however, be of an interlocutory nature and would require a further judgment before conclusion of the appeal.

Even where the court of appeals does not suggest remittitur, voluntary remittitur is sometimes available. "If a court of appeals reverses the trial court's judgment because of a legal error that affects only part of the damages awarded by the judgment, the affected party may – within 15 days after the court of appeals' judgment – voluntarily remit the amount that the affected party believes will cure the reversible error." TEX. R. APP. P. 46.5. If the court of appeals determines that the remittitur cures the error, it must accept it and reform and affirm the trial court's judgment. *Id.* If the court determines that the remittitur does not cure the error, but that remittitur is appropriate, it must suggest a remittitur in accordance with Rule 46.3. *Id.*

If, in a case where the trial court has suggested remittitur, the case is appealed before the remittitur is filed, the remitting party may file its remittitur in the court of appeals. TEX. R. APP. P. 46.1. Under those circumstances, "the court of appeals must then render the judgment that the trial court should have rendered if the remittitur had been made in the trial court." *Id.*

#### 9. Priority of Appellate Relief

"[W]hen a party presents multiple grounds for reversal of a judgment on appeal, the appellate court should first address those points that would afford the party the greatest relief." *Bradleys' Electric, Inc. v. Cigna Lloyds Insurance Co.*, 995 S.W.2d 675, 677 (Tex. 1999). In particular, it is error for a court of appeals to dispose of a case on a remand issue without first deciding any rendition issues. *Id.*

#### 10. Costs

The court of appeals' judgment should award appellate costs to the prevailing party. TEX. R. APP. P. 43.4; *Camerena v. Texas Employment Commission*, 754 S.W.2d 149, 152 (Tex. 1988). It is, however, within the court of appeals' discretion to tax costs otherwise if required by law or for good cause. TEX. R. APP. P. 43.4; *see, e.g., Recognition Communications, Inc. v. American Automobile Ass'n*, 154 S.W.3d 878, 894-95 (Tex. App. – Dallas 2005, pet. denied). Good cause is often present when, for example, both parties prevail on significant portions of the appeal. *See, e.g., City of Austin v. Capitol Livestock Auction Co.*, 453 S.W.2d 461, 465 (Tex. 1970).

Appellate costs include the costs for preparation of the clerk's record and the reporter's record that were

incurred by the prevailing party. TEX. R. APP. P. 43.4 Appellate costs do not include appellate attorneys' fees where no finding regarding those fees was made by the trial court. *Radio Station WQCK v. T.M. Communications, Inc.*, 744 S.W.2d 676, 677 (Tex. App. – Dallas 1988, no writ).

### 11. The Supersedeas Bond

Where the court of appeals' judgment affirms the trial court judgment or modifies that judgment and renders judgment against the appellant, the court of appeals must render judgment against the sureties on the appellant's supersedeas bond, if any, for the performance of the judgment and for any costs taxed against the appellant. TEX. R. APP. P. 43.5.

The rules are silent regarding the treatment of the supersedeas bond in an appellate judgment of reversal. Since "[t]he court of appeals may make any other appropriate order that the law and the nature of the case require," TEX. R. APP. P. 43.6, it is appropriate for an appellant who seeks reversal of the trial court judgment also to seek an explicit discharge of the sureties on the supersedeas bond. Even though a judgment of reversal and rendition has this effect by operation of law, *e.g.*, *In re Castle Texas Production Ltd.*, 157 S.W.3d 524, 528 (Tex. App. – Tyler 2005, no pet.), sureties are often unfamiliar with that principle and seek the comfort of a discharge in express language.

### 12. Damages for a Frivolous Appeal

The court of appeals may, on its own motion or on motion of a party, after providing the offending party with notice and an opportunity to respond, award damages to each prevailing party for having to defend a frivolous appeal. TEX. R. APP. P. 45. The court of appeals' consideration of the frivolity issue is limited to the record, briefs, and other papers filed in the appeal. *Id.* Although imposing damages is within the court's discretion, that discretion is rarely exercised, with relief limited to truly egregious circumstances. *Conseco Finance Servicing Corp. v. Klein Independent School District*, 78 S.W.3d 666, 676 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2002, no pet.).

## **B. The Supreme Court – TEX. R. APP. P. 60**

### 1. Options for Relief from the Supreme Court

TEX. R. APP. P. 60 governs judgments of the Supreme Court. Under that rule, the Supreme Court may do any of the following:

- (a) affirm the lower court's judgment in whole or in part;
- (b) modify the lower court's judgment and affirm it as modified;
- (c) reverse the lower court's judgment in whole or in part and render the judgment that the lower court should have rendered;

- (d) reverse the lower court's judgment and remand the case for further proceedings;
- (e) vacate the judgments of the lower courts and dismiss the case; or
- (f) vacate the lower court's judgment and remand the case for further proceedings in light of changes in the law.

TEX. R. APP. P. 60.2.

Most of the options available to the Supreme Court under Rule 60.2 mirror those available to the courts of appeals under Rule 43.2. Unlike the courts of appeals, however, the Supreme Court has the leeway to vacate a lower court's judgment and remand the case for further proceedings in light of changes in the law without first finding error. TEX. R. APP. P. 60.2(f); *see, e.g.*, *Texas Department of Public Safety v. Callender*, 51 S.W.3d 296 (Tex. 2001) (*per curiam*).

Like the courts of appeals, the Supreme Court may also, upon finding error, reverse and remand in the interest of justice when rendition would otherwise be appropriate. TEX. R. APP. P. 60.3. The Court generally will not exercise this discretion unless it has overruled existing precedents on which the losing party relied at trial, or when it appears from the record that the losing party might be able to recover under some other established legal theory that was not developed at the first trial. *Westgate, Ltd. v. State*, 843 S.W.2d 448, 455 (Tex. 1992).

Analogous to the rule that a trial court judgment may generally be affirmed on any ground supported by the record, *see* Section II.A.2, *supra*, a court of appeals' judgment, even if premised on erroneous reasoning, may be affirmed by the Supreme Court on grounds not reached by the court of appeals (if the grounds are within the Supreme Court's jurisdiction). *E.g.*, *McKelvy v. Barber*, 381 S.W.2d 59, 64 (Tex. 1964). Alternatively, the Court may remand to the court of appeals for consideration of such points. *E.g.*, *Miller v. Keyser*, 90 S.W.3d 712, 720 (Tex. 2002).

Finally, although an appellant ordinarily waives any complaint about the trial court's judgment that is not raised in the court of appeals, a complaint which arises from the court of appeals' judgment may be raised either in a motion for rehearing in the court of appeals or in a petition for review in the Supreme Court. *Bunton v. Bentley*, 153 S.W.3d 50, 53 (Tex. 2004) (*per curiam*).

### 2. Remittitur

The rules do not expressly provide for the filing of a voluntary remittitur in the Supreme Court. *Formosa Plastics Corp. USA v. Presidio Engineers & Contractors*, 960 S.W.2d 41, 51 (Tex. 1998). Recognizing that omission, the Court has concluded that it cannot accept voluntary remittitur where fact questions are involved

but has left open the possibility that it will accept voluntary remittitur where based on a question of law. *Id.* Presumably, if the Court were to conclude such remittitur were appropriate, it would accept that remittitur and reform and affirm the trial court's judgment. *Cf.* TEX. R. APP. P. 46.5.

### 3. Costs

The Supreme Court's judgment must award the prevailing party the costs incurred by that party in the Supreme Court. TEX. R. APP. P. 60.4; *Bradley Motors, Inc. v. Mackey*, 878 S.W.2d 140, 141 n.1 (Tex. 1994). It may award the prevailing party the costs incurred by that party in the court of appeals and in the trial court. TEX. R. APP. P. 60.4. The Court may tax costs otherwise as required by law or for good cause. *Id.*

### 4. The Supersedeas Bond

When affirming, modifying, or rendering judgment against the party who appealed the trial court's judgment, the Supreme Court must render judgment against the sureties on the supersedeas bond, if any, for performance of the judgment and for any costs taxed against that party. TEX. R. APP. P. 60.5.

As with the court of appeals, it is appropriate to ask that the Supreme Court expressly discharge the supersedeas bond if it reverses or vacates the judgment secured by the bond. *See* Section II.A.11, *supra*.

### 5. Damages for a Frivolous Appeal

Like the courts of appeals, the Supreme Court has authority under the rules to award damages based on frivolous filings if it concludes that either a petition for review or a direct appeal meets that threshold. TEX. R. APP. P. 62. The Court's consideration is limited to the records, briefs, and other filings in the appeal, whether in the court of appeals or with the Court itself, and must follow notice and opportunity for response. *Id.*

## C. Jurisdictional Limits on Supreme Court Relief

By constitution and statute, the judgment of a court of appeals is "conclusive on the facts of the case." TEX. CONST. art. V, § 6; TEX. GOV'T CODE § 22.225. This enigmatic pronouncement has been construed to mean that the Supreme Court has no jurisdiction to entertain claims of factual insufficiency or "great weight and preponderance" of the evidence. *E.g., Hall v. Villarreal Development Corp.*, 522 S.W.2d 195, 195 (Tex. 1975). Where a party properly prays for such relief, however, the Supreme Court must remand such issues to the court of appeals. *Davis v. City of San Antonio*, 752 S.W.2d 518, 521 (Tex. 1988).

## D. The Effect of Mootness on Appellate Relief

### 1. In General

If a case becomes moot while on appeal, all previous orders and judgments should be set aside (without

regard to the merits), and the *cause*, not merely the *appeal*, should be dismissed. *E.g., City of Garland v. Louton*, 691 S.W.2d 603, 604-05 (Tex. 1985); *Gua-jardo v. Alamo Lumber Co.*, 159 Tex. 225, 317 S.W.2d 725, 726 (1958); *Texas Foundries, Inc. v. International Moulders & Foundry Workers' Union*, 151 Tex. 239, 248 S.W.2d 460, 461 (1952). Dismissal of the appeal alone would be highly improper, inasmuch as it would have the effect of affirming the judgment below without considering the appellant's points of error. *Texas Foundries*, 248 S.W.2d at 461.

### 2. Voluntary Payment of the Judgment

A judgment debtor's voluntary satisfaction of an adverse judgment can moot the controversy, waiving the debtor's right to appellate relief and requiring dismissal of the cause. *Miga v. Jensen*, 96 S.W.3d 207, 211 (Tex. 2002). That said, "payment on a judgment will not moot an appeal of that judgment if the judgment debtor clearly expresses an intent that he intends to exercise his right of appeal and appellate relief is not futile." *Id.* at 212.

### 3. Acceptance of Benefits Under the Judgment

"[A] litigant cannot treat a judgment as both right and wrong, and if he has voluntarily accepted the benefits of a judgment, he cannot afterward prosecute an appeal therefrom." *Carle v. Carle*, 149 Tex. 469, 234 S.W.2d 1002, 1004 (Tex. 1951). Thus, an appellant cannot *voluntarily* accept the benefits of a judgment and continue to pursue appellate relief from that judgment. *See L.P.D. v. R.C.*, 959 S.W.2d 728, 731 (Tex. App. – Austin 1998, pet. denied). There is an exception, however, for acceptance of a benefit which is not potentially inconsistent with the relief sought on appeal: "where the reversal of a judgment cannot possibly affect an appellant's right to the benefit secured under a judgment, then an appeal may be taken." *See Carle*, 234 S.W.2d at 1004.

## III. SETTING THE STAGE: TRIAL COURT PREDICATES FOR APPELLATE RELIEF

### A. The Pleadings

"A plaintiff must recover upon the facts stated in his pleadings." *Gibson v. Fauber*, \_\_\_ S.W.3d \_\_\_, 2004 Tex. App. LEXIS 8289 (Tex. App. – Tyler 2004, pet. denied). Thus, the appellate courts will not award any relief that is not supported by the pleadings in the case. *See Paul v. Merrill Lynch Trust Co.*, 183 S.W.3d 805, 812 n.11 (Tex. App. – Waco 2005, no pet.).

Appellate relief is limited by the facts and theories set forth in a party's pleading even where the pleading at issue contains a general prayer for relief. *Id.* "[A] general prayer for relief must be consistent with the claims in the petition." *Id.* (citing *Kissman v. Bendix Home Systems, Inc.*, 587 S.W.2d 675, 677 (Tex. 1979) ("Only the relief consistent with the theory of the claim

reflected in the petition may be granted under a general prayer”)).

### B. Preservation of Appellate Complaint

Appellate relief is unavailable unless appellate complaint has been properly preserved. Generally, “[t]o preserve a complaint for appellate review, a party must present to the trial court a timely request, motion, or objection, state the specific grounds therefor, and obtain a ruling.” *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex. 1999); TEX. R. APP. P. 33.1. In other words, “[a]ll a party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks himself entitled to it, and to do so clearly enough for the judge to understand him at a time when the court is in a position to do something about it.” *White v. State*, 958 S.W.2d 460, 462 (Tex. App – Waco 1997, no pet.). Failure to do so precludes relief on appeal.

Some appellate complaints must be preserved through particular procedural mechanisms. Factual insufficiency points, for instance, along with contentions that a jury finding is against the overwhelming weight of the evidence, must be raised in a motion for new trial in order to preserve the right to seek reversal and remand on those grounds. TEX. R. CIV. P. 324(b)(2) & (3); see *Cecil v. Smith*, 804 S.W.2d 509, 510-11 (Tex. 1991). The same is true for complaints of inadequacy or excessiveness of damages found by the jury, complaint on which evidence must be heard, and complaints of incurable jury argument if not otherwise ruled on by the trial court. TEX. R. CIV. P. 324(b)(1), (4) & (5).

Legal insufficiency (no evidence) or “matter of law” points, on the other hand, “may be raised by either (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.” *Cecil*, 804 S.W.2d at 510-11. On the proper record, rendition is appropriate, if the point has been preserved through any of the first four of those procedural mechanisms. *Horrocks v. Texas Department of Transportation*, 852 S.W.2d 498, 499 (Tex. 1993) (*per curiam*) (“Ordinarily, an appellate court should render judgment after sustaining a complaint as to the legal sufficiency of the evidence”). If, however, the point has been preserved only in a motion for new trial, only reversal and remand is available. *Id.*

### C. The Notice of Appeal

The filing of a notice of appeal invokes the appellate court’s jurisdiction over all parties to the judgment or order appealed. TEX. R. APP. P. 25.1(b). Even so, “[t]he appellate court may not a grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause,” TEX. R. APP.

P. 25.1(c), so any party that seeks to benefit from a change to the trial court’s judgment must file a timely notice of appeal. See *Landon v. S&H Marketing Group*, 82 S.W.3d 666, 685-86 (Tex. App. – Eastland 2002, no pet.) (refusing to allow a party to assert a claim for affirmative relief in the absence of a notice of appeal).

The appellant may seek to limit the scope of appellate relief by requesting only a partial reporter’s record accompanied by a statement of the points or issues to be presented on appeal. TEX. R. APP. P. 34.6(c)(1). Once such a request has been made, appellate relief will be limited to those points or issues. *Id.* In response, any other party may designation additional exhibits and testimony to be included in the record. TEX. R. APP. P. 34.6(c)(2). Once such designations are made, it will be presumed that the designated portions of the record constitute the entire record for the limited issues on appeal. TEX. R. APP. P. 34.6(c)(4); see *Furr’s Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 377 (Tex. 2001).

## IV. ASKING FOR RELIEF: THE BRIEFS

The relief available to a party on appeal (particularly, but not exclusively, the appellant) is framed by the party’s appellate brief. The issues presented, the argument, and the prayer all affect the availability of the desired appellate relief.

### A. The Issues Presented

“[A]n appellate court cannot reverse a trial court’s judgment absent properly assigned error.” *Pat Baker Co. v. Wilson*, 971 S.W.2d 447, 450 (Tex. 1998); compare *American General Fire & Casualty Co. v. Weinberg*, 639 S.W.2d 688, 689 (Tex. 1982) (declaring fundamental error, requiring reversal absent a proper assignment of error, “a rarity”).

Moreover, the appellant must raise an issue on appeal as to each independent ground that supports the ruling it seeks to reverse; otherwise, the ruling will be affirmed on the unchallenged, independent ground. See *Harris v. General Motors Corp.*, 924 S.W.2d 187, 188 (Tex. App. – San Antonio 1996, writ denied) (“When a separate and independent ground that supports a judgment is not challenged on appeal, the appellate court must affirm;” quotation omitted). In the summary judgment context, this can best be accomplished by including in the issues presented a general complaint which states that “the trial court erred in granting the motion for summary judgment.” See *Malooly Brothers, Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970).

While proper presentation of the issues is critical to obtaining the desired appellate relief, appellate courts “liberally construe issues presented to obtain a just, fair, and equitable adjudication of the rights of the litigants.” *El Paso Natural Gas Co. v. Minco Oil &*

*Gas*, 8 S.W.3d 309, 316 (Tex. 1999). Thus, an omitted issue is adequately preserved, and consequently the desired appellate relief available, when the omitted issue is deemed “so inextricably entwined [with a stated issue] that one cannot be mentioned without automatically directing attention to the other.” *Id.* (quoting *Consolidated Engineering Co. v. Southern Steel Co.*, 699 S.W.2d 188, 192 (Tex. 1985)).

Where the trial court renders judgment notwithstanding the verdict (*non obstante veredicto*), the appellee must raise in its brief on appeal “any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been rendered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of the jury’s findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel.” TEX. R. CIV. P. 324(c). Failure to bring forward such cross-points waives the appellee’s right to appellate relief on those issues in the event that the court of appeals finds error in the trial court’s judgment notwithstanding the verdict. *Id.*

The court of appeals is obligated to address every issue that is raised in the briefs and is necessary to the final disposition of the appeal. TEX. R. APP. P. 47.1; see *Office of Public Utility Counsel v. Public Utility Commission*, 878 S.W.2d 598, 599-600 (Tex. 1994).

### B. The Argument

In addition to properly assigning error, the appellant must also provide the appellate court with authority to support its position if it hopes to obtain appellate relief. See *NRG Exploration v. Rauch*, 905 S.W.2d 405, 411 n.6 (Tex. App. – Austin 1995, writ denied). “Where an appellant cites no authority in support of a point of error, the court should overrule the point of error.” *Id.* Likewise, the appellant must provide citations to the record on appeal which support its issues if it hopes to obtain appellate relief. See *Tri-Steel Structures, Inc. v. Baptist Foundation*, 166 S.W.3d 443, 452 (Tex. App. – Fort Worth 2005, pet. denied).

### C. The Prayer

It is easy to forget what we knew so well as children: if you want a gift from Santa, you must write him a letter and tell him what you want. If you forget to specify that your new wagon should be red, you cannot complain when you receive a blue one instead. Similarly, there is no excuse for submitting an elaborate factual and legal argument without clearly telling the appellate court what you hope to get from it. See TEX. R. APP. P. 38.1(i) (prayer must “clearly stat[e] the nature of the relief sought”).

In a typical appeal, the appellant wants a number of different things, often in a prioritized order of preference. Obviously, the trial court’s judgment should be reversed, or at least modified. But then what? Rendition, if a plausible outcome, is always the appellant’s first choice. What comes second? And third? Would a reversal and rendition of the exemplary damage award be better or worse than a new trial? And what about the modification prayers? Are they in the alternative to one another? Or are the cumulative?

A little careful organization will give the appellate court a road map to follow. In particularly complex cases, clarity can often be assured by cross-referencing applicable portions of the argument. Whether or not such cross-referencing is included, a clear delineation and prioritization of the various forms of requested relief should be provided.

It is also important when praying for relief not to overlook seemingly secondary issues such as costs and the fate of the supersedeas bond. Appellants need to ask that the appellate court’s judgment release the obligations of the surety under the supersedeas bond, whereas appellees need to seek rendition of judgment against the sureties on the bond. Both sides should seek their costs on appeal, and the appellant should ordinarily seek its costs in the trial court.

Failure to ask for particular relief may limit the appellate court’s options. See *Davis v. City of San Antonio*, 752 S.W.2d 518, 521 (Tex. 1988) (refusing to consider the City’s alternative request for remand where the City failed to raise that point in its opening brief); *Wisdom v. Smith*, 146 Tex. 420, 424, 209 S.W.2d 164, 166 (1948) (court of appeals had no jurisdiction to consider factual insufficiency of the evidence where the only relief prayed for by the appellant was reversal and rendition).

Finally, a party may specifically pray that it not receive relief to which it might otherwise be entitled. See *Stevens v. National Education Centers, Inc.*, 11 S.W.3d 185, 186 (Tex. 2000) (per curiam) (petition for review denied because petitioner, although entitled to remand, sought only rendition and specifically prayed that it not be granted a new trial).

### D. The Reply Brief

Appellate courts will not grant relief which is sought for the first time in the appellant’s reply brief. *Howell v. Texas Workers’ Compensation Comm’n*, 143 S.W.3d 416, 439 (Tex. App. – Austin 2004, pet. denied); see TEX. R. APP. P. 38.3. This is true even if that relief is sought in response to an issue raised in the appellee’s brief. *Barrios v. State*, 27 S.W.3d 313, 322 (Tex. App. – Houston [1<sup>st</sup> Dist.] 2000, pet. ref’d) (“Pointing out the absence of an appellant’s argument does not raise the argument or entitle appellant to assert that argument for the first time in his reply brief. If the rule were construed otherwise, an appellee could

never point out matters not raised by an appellant for fear of reopening the door”).

### E. The Motion for Rehearing

Likewise, appellate courts will typically not grant relief which is sought for the first time on a motion for rehearing. *See, e.g., In re Nexion Health at Humble, Inc.*, \_\_\_ S.W.3d \_\_\_, 49 Tex. Sup. J. 43 (2005). Appellate relief may be sought initially on rehearing, however, where it is necessitated by error arising for the first time in the appellate judgment. *Bunton v. Bentley*, 153 S.W.3d 50, 53 (Tex. 2005) (*per curiam*).

Relief from an erroneous exercise of jurisdiction is also available even if raised for the first time in a motion for rehearing. *Tullos v. Eaton Corp.*, 695 S.W.2d 568 (Tex. 1985) (*per curiam*). Jurisdiction is a fundamental question and can be raised at any time. *Cox v. Johnson*, 638 S.W.2d 867, 868 (Tex. 1982).

### V. SETTLEMENT: BROADENING THE AVAILABLE RELIEF

Obviously, where a case is settled, the parties no longer desire (or, at least, are no longer entitled to) appellate relief on the merits. Nevertheless, the appeal remains pending and must be disposed of in some manner. The choice among various potential non-merits dispositions of an appeal turns primarily on the desired disposition of the underlying judgment; that choice must be made on an informed and thoughtful basis, taking into account the existing posture of the case and the desired posture following consummation of the settlement.

By agreement of the parties, an appellate court may grant certain forms of relief beyond those available in a contested appeal. In particular, the court may

- (a) render judgment effectuating the parties' agreement;
- (b) set aside the trial court's judgment without regard to the merits and remand the case to the trial court for rendition of judgment in accordance with the agreement; or
- (c) abate the appeal and permit proceedings in the trial court to effectuate the agreement.

TEX. R. APP. P. 42.1(a)(2). A severable portion of the proceeding may be resolved using these same options. TEX. R. APP. P. 42.1(b).

Keep in mind, however, that the appellate court's judgment belongs to the court, not to the parties. While appellate courts are generally amenable to disposing of appeals pursuant to settlement in the manner desired and specified by the parties, public policy considerations place an outer bound on the parties' ability to craft an appellate disposition. A court will not, for example, render an agreed declaratory judgment that Texas never rejoined the Union after the Civil War, or

a Draconian agreed injunction that shocks the appellate court's conscience. And, of course, settling parties cannot insist on appellate disposition which prejudices the rights of non-settling parties or of non-parties to the appeal. *Elizondo v. Northeast Independent School District*, 853 S.W.2d 862, 863 (Tex. App. – San Antonio 1993, no writ); TEX. R. APP. P. 42.1(b).

### A. Affirmance

As previously mentioned, an affirmance constitutes a ratification of the trial court's judgment. *See* Section II.A.2, *supra*. Affirmance is thus an appropriate settlement disposition only when the parties desire the trial court's judgment, now bearing the appellate court's imprimatur, to remain in effect.

Affirmance (or alternatively dismissal of the appeal) is an appropriate appellate disposition where the settlement of a money judgment involves future payments, and the plaintiff wants the usual judgment enforcement mechanisms to be available if the defendant defaults. If the trial court's judgment contains injunctive relief, affirmance is unlikely to be an appropriate disposition unless the parties specifically desire the injunctive relief to remain in effect.

Similarly, a judgment for declaratory relief that is affirmed pursuant to settlement will remain binding on the parties, and may create consequences extending beyond the immediate dispute. Indeed, any type of agreed judgment may carry with it *res judicata* or collateral estoppel effects, *see, e.g., Brown v. Wood*, 239 S.W.2d 195, 199 (Tex. Civ. App. – Dallas 1951, writ ref'd), except to the extent that the language or spirit of the settlement agreement circumscribes or eliminates those effects, *see Coakley v. Reising*, 422 S.W.2d 502, 511 (Tex. Civ. App. – Corpus Christi 1967), *rev'd on other grounds*, 436 S.W.2d 315 (Tex. 1968).

### B. Dismissal of the Appeal

Since the interests of most plaintiffs in a settlement do not extend beyond the monetary settlement consideration which they are receiving, dismissal of the appeal is generally the appropriate disposition when an appeal by the plaintiff from a take-nothing judgment is settled.

### C. Vacation of the Trial Court's Judgment and Dismissal of the Cause

The direct and collateral consequences of an extant trial court judgment can be avoided by having the appellate court vacate the judgment from which appeal has been taken. Concurrently with this relief, the appellate court can dismiss the cause, with or without prejudice. The effect of such a disposition is the same as if the trial court had dismissed the cause, with or without prejudice. Absent special circumstances, vacation and dismissal with prejudice is the preferred dis-

position where a money judgment for the plaintiff is settled while on appeal.

#### **D. Vacation of the Trial Court's Judgment and Dismissal of the Appeal**

The distinction between dismissal of the *cause* and dismissal of the *appeal* is well established. See Section II.D.1, *supra*; *Freeman v. Burrows*, 141 Tex. 318, 171 S.W.2d 863 (1943). Yet is it shocking how often this distinction is overlooked by appellate courts in their haste to dispose of a settled appeal. It is inappropriate to do anything to affect the trial court's judgment in conjunction with dismissal of an appeal, since dismissal of the appeal recreated the situation which would have existed had no appeal been filed. Nevertheless, one sometimes sees appellate judgments which vacate the trial court's judgment and dismiss the appeal.

Vacation of the trial court's judgment and dismissal of the appeal creates a procedural conundrum, because there is no final disposition of the case and can never be one. The trial court's judgment is gone, having been vacated. The appellate court's judgment disposes of the appeal, but does not dispose of the case. In due course, the appellate court will lose plenary power. See TEX. R. APP. P. 19. The trial court lost plenary power long ago, see TEX. R. CIV. P. 329b(f), and never regains it through remand. There is no judgment, and no court with jurisdiction to render one; the case is simply lost in space.

#### **E. Vacation of the Trial Court's Judgment and Rendition of a New Judgment**

A vacation of the trial court's judgment can be combined with relief other than dismissal, such as the rendition of a new judgment by the appellate court. This is the appropriate appellate disposition where, for example, injunctive relief, different from any which the trial court may have awarded, is to remain in effect after the settlement. It may also be appropriate where a money judgment is to be put in place without immediate satisfaction of the judgment.

#### **F. Modification and Affirmance**

Modification and affirmance is very similar to vacation and rendition, in that the old judgment is removed and a new judgment put in its place; the only difference is that the ancestry of the new judgment extends back to the trial court proceedings instead of originating in the appellate court. The appellate disposition may therefore be appropriate where, for example, a discrete portion of the judgment (*e.g.*, punitive damages, prejudgment interest, or injunctive relief) is to be deleted as part of the settlement while leaving the rest of the judgment in place. It may also be appropriate where the priority of a judgment lien is important.

#### **G. Vacation of an Appellate Opinion**

Settlements after an initial appellate opinion are sometimes driven by the desire to avoid a precedent which a party (usually the defendant) perceives as undesirable. In earlier days, this was often accomplished by asking the appellate court on rehearing to vacate its opinion as part of the disposition pursuant to settlement, or by asking the Supreme Court to vacate the court of appeals' opinion pursuant to settlement. See, *e.g.*, *Borden, Inc. v. De La Rosa*, 831 S.W.2d 304 (Tex. 1992); *Texas Health Enterprises, Inc. v. Krell*, 830 S.W.2d 922 (Tex. 1992).

This practice has, however, fallen into disfavor. Now, a settlement agreement or motion for dismissal may not be conditioned on withdrawal of an appellate opinion. Tex. R. App. P. 42.1(c), 56.3. Both the court of appeals and the Supreme Court retain discretion to vacate an opinion pursuant to settlement, *id.*, but the Supreme Court has indicated that it will not routinely do so, *Houston Cable TV, Inc. v. Inwood West Civic Association*, 860 S.W.2d 72, 73 (Tex. 1993), and the courts of appeals have generally adopted a similar attitude, as has the Supreme Court of the United States, see *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994).

#### **H. Disposition of Cases in the Supreme Court**

Settlement of a case during the pendency of a petition for review in the Supreme Court involves, practically speaking, fewer options for disposition than those available at the Court of Appeals level.

The Court can dismiss a petition pursuant to settlement, with the effect that the judgment of the court of appeals stands. See, *e.g.*, *Metzger Dairies, Inc. v. Olguin*, 38 Tex. Sup. Ct. J. 319 (Mar. 2, 1995) (before grant of application); *Huckabay v. Irving Healthcare Authority*, 38 Tex. Sup. Ct. J. 130 (Dec. 22, 1994) (after grant).

Although it has the power to do so, the Supreme Court will generally not affirm or modify a judgment pursuant to settlement, or vacate and render a new judgment; instead, the Court will typically grant an application without regard to its merits, vacate the judgments below, and remand to the trial court for proceedings in aid of settlement. TEX. R. APP. P. 56.3. Vacating the court of appeals' opinion is generally not an option. See Section V.G, *supra*.

## **VI. CONCLUSION**

The process of crafting appropriate appellate relief begins in the trial court and continues unabated throughout the case. If appropriate relief is timely sought through the proper procedural mechanisms, and pursued through final appellate judgment, the prevailing party can ultimately say, with Shakespeare, "For this relief much thanks." William Shakespeare, *Hamlet*, act I, sc. i (1624).