

Common Problem Areas in Civil Appeals:

Adventures in Keeping Appeals on Track and Derailing Others

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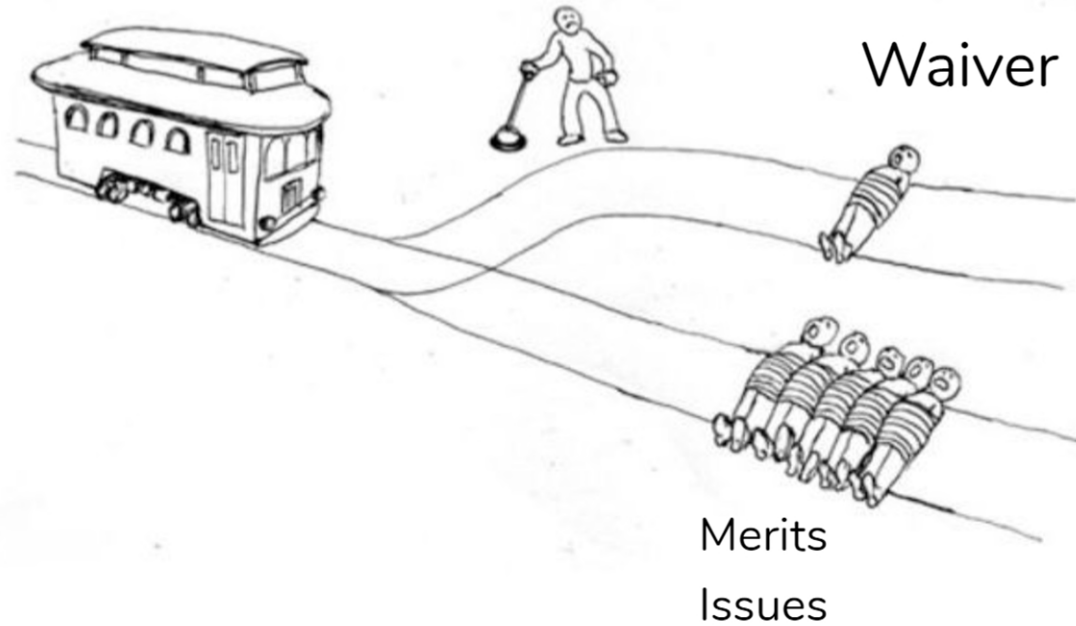
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Overview

- Issues That Can Derail Appeals
- Today:
 - Summary Judgment: Evidentiary Objections
 - Jury Charges: Post-Verdict Objections
 - Judgment Formation: Finality Problems
- More in the Paper



Don't Put the Court in This Position



Summary Judgment Problem Area: Preserving Evidentiary Objections

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- An Implied Ruling Problem
- For Example
 - Movant objects to inadmissible summary judgment evidence
 - Summary judgment order doesn't mention objection
- Can the objected-to evidence still raise a fact issue on appeal?

Summary Judgment Problem Area: Preserving Evidentiary Objections

- Yes! But it depends...
- TRAP 33.1: Timely Objection + Ruling
- TRAP 33.1(a)(2)(A) allows for implied rulings
- Does SJ order implicitly sustain movant's objections?

Summary Judgment Problem Area: Preserving Evidentiary Objections

- Probably not!
- *Seim v. Allstate* (Tex. 2018)
 - “[E]ven if a party objects to an opponent’s summary-judgment evidence, the evidence remains part of the summary-judgment proof unless an order sustaining the objection is reduced to writing, signed, and entered of record.”
- Reasoning: Same preservation standard as trial

Summary Judgment Problem Area: Preserving Evidentiary Objections

- Potentially critical problem for appellee-movant
- *Seim* resolves a COA split
- But there may be exceptions
- *E.g.*, SJ order necessarily predicated on exclusion
 - That is, motion based solely on exclusion

Summary Judgment Problem Area: Preserving Evidentiary Objections

- Practically Speaking
 - Even prevailing movants must show rulings on many evidentiary objections
- Keep in Mind
 - Substantive objections can be raised for the first time on appeal
 - Formal objections must be preserved in trial court
 - Are you comfortable with the difference?

Summary Judgment Problem Area: Preserving Evidentiary Objections

- Substantive defects
 - = incompetent evidence; no evidence
 - *E.g.*, conclusory, complete failure to authenticate, lack of relevance
- Formal defects
 - = competent but inadmissible; can raise a fact issue
 - *E.g.*, hearsay, improper authentication, lack of jurat
- The line can be blurry

Summary Judgment Problem Area: Preserving Evidentiary Objections

- Tips in Trial Court
 - Safest bet is to object
 - Object in writing
 - Get ruling in writing
 - Timeliness: include objections in proposed order
 - Be specific: beware partial objections

Summary Judgment Problem Area: Preserving Evidentiary Objections

- Analysis on Appeal if No Express Ruling
 1. Is the defect substantive or formal?
 2. If formal, was there an implicit ruling?
- Tips on Appeal
 - Be careful about scope of review
 - Appellants **must** separately challenge evidentiary rulings
 - Beware substantive objections

Jury Charge Problem Area: Objections Preserved Post-Verdict

Jury Charge Problem Area: Objections Preserved Post-Verdict



Jury Charge Problem Area: Objections Preserved Post-Verdict

- A Scary Problem
 - Jury returns verdict favorable to plaintiff
 - Defendant then argues **for the first time** that the charge asked the wrong question.
 - After
 - The charge conference
 - The trial
 - The jury's long gone
 - Defendants can get a take-nothing judgment!

Jury Charge Problem Area: Objections Preserved Post-Verdict

- Two Recent Texas Supreme Court Cases
- Both Post-Verdict Objections
- Both Reverse and Render Take-Nothing for Defendants
- *United Scaffolding v. Levine* (Tex. 2017): Tried on the wrong theory
- *BP Am. Prod. v. Red Deer* (Tex. 2017): Immaterial finding

Jury Charge Problem Area: Objections Preserved Post-Verdict

United Scaffolding v. Levine (Tex. 2017)

- What Happened
 - Personal injury suit
 - **Trial 1:** Submitted on *defendant's* general negligence question
 - Verdict partly for plaintiff
 - Plaintiff obtains a new trial after two mandamus actions

Jury Charge Problem Area: Objections Preserved Post-Verdict

United Scaffolding v. Levine (Tex. 2017)

- What Happened (cont'd)
 - **Trial 2:** Submitted again on same general negligence question
 - Defendant does not object to question
 - Plaintiff obtains much larger verdict
 - **Post-Trial:** Defendant seeks JNOV
 - Argues for first time: premises liability, not negligence

Jury Charge Problem Area: Objections Preserved Post-Verdict

United Scaffolding v. Levine (Tex. 2017)

Supreme Court Holdings

1. Case sounded in premises liability, not general negligence.
2. Plaintiff must obtain necessary liability findings.
3. If question wholly omitted, defendant has no burden.
4. General negligence question wholly omitted premises liability.

Jury Charge Problem Area: Objections Preserved Post-Verdict

United Scaffolding v. Levine (Tex. 2017)

Supreme Court Holdings (Cont'd)

5. Defendant preserved error post-verdict.
6. Defendant did not invite error in first trial.
7. **OUTCOME:** Reverse and render. Take nothing.

Jury Charge Problem Area: Objections Preserved Post-Verdict

Tips After *United Scaffolding*

1. Be sure about your cause of action
2. Don't rely on your opponent to fix it
3. May need multiple questions to be safe
4. Partial or whole omission? Can defendant afford to wait?
5. Carefully examine objections after a losing verdict
6. Beware invited error



Jury Charge Problem Area: Objections Preserved Post-Verdict

BP v. Red Deer (Tex. 2017)

What Happened

- **Jury Charge:** Production on 6/13/12?
- **Charge Conference:** No objection to 6/13/12
- **Post-Verdict:** Defendant argues for first time that 6/13/12 is immaterial.

Jury Charge Problem Area: Objections Preserved Post-Verdict

BP v. Red Deer (Tex. 2017)

Holdings

1. Pertinent date was 6/4/12, not 6/13/12.
2. 6/13/12 was immaterial.
3. Defendant preserved error post-verdict.
4. Reverse and render take-nothing.

Jury Charge Problem Area: Objections Preserved Post-Verdict

Tips After *Red Deer*

1. Be careful to ask about right facts
2. May need multiple questions if unclear
3. Do not assume opponent will correct you in charge conference
4. Carefully reread charge after verdict
5. Immaterial or defect? Can defendant afford to wait?
6. Maybe remand instead of render



Judgment Formation Problem Area: Oh, I Didn't Mean FINAL Final

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- Finality Is Critical
 - Appellate clock (TRAP 26.1)
 - Plenary power clock (TRCP 329b(d))
- Unexpected finality can be disastrous or at least frustrating

Judgment Formation Problem Area: Oh, I Didn't Mean FINAL Final

- *Lehmann* (Tex. 2001) Standard
 - For orders without conventional trial on the merits
 - Two Types of Final Judgments:
 1. Actually disposes of every pending claim and party; or
 2. Clearly and unequivocally states that it finally disposes of all claims and all parties

Judgment Formation Problem Area: Oh, I Didn't Mean FINAL Final

*Lehmann Magic Language**

“This judgment finally disposes of all parties and all claims and is appealable.”

*For “clear and unequivocal” test

Judgment Formation Problem Area: Oh, I Didn't Mean FINAL Final

Magic Language Really Works

- *In re Elizondo* (Tex. 2018)
 - **Order's Purpose:** Remove a lien on defendant's property.
 - **Effect of Finality:** Dismissed entire case with prejudice
- *In re Daredia* (Tex. 2010)
 - **Order's Purpose:** Default against non-answering defendant
 - **Effect of Finality:** Dismissed case against answering defendant
- Can't be fixed nunc pro tunc!

Judgment Formation Problem Area: Oh, I Didn't Mean FINAL Final

Tips on *Lehmann* Finality

1. Bright-line test with few exceptions
2. Read all orders carefully as they come in
3. If it's close, treat it as final
4. Rule applies to what may seem to be interlocutory
5. Rule applies even if trial court tries to fix it without plenary power



Questions?

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