SELLING YOUR CASE AT TRIAL, SELECTING APPELLATE ISSUES TO PURSUE, AND OTHER IMPLICATIONS OF ERROR PRESERVATION RULINGS

By

STEVEN K. HAYES
Law Office of Steven K. Hayes
777 Main Street
Suite 600
Fort Worth, Texas 76102
www.stevehayeslaw.com

With many thanks for editing help to

HANNAH CLINE SHOSS	**HENRY SEGELKE** Solo practitioner in Houston, Texas

Hannah and Henry edited earlier versions of this paper
(If you find mistakes, it's because Steve ignored their advice, or has added stuff since then)

STEVEN K. HAYES
LAW OFFICE OF STEVEN K. HAYES
500 Main Street, Suite 340
Fort Worth, Texas 76102
Direct Phone: 817/371-8759 Facsimile: 817/394-4436
www.stevehayeslaw.com
E-mail: shayes@stevehayeslaw.com

Education:
- Harvard Law School, J.D. in 1980
- Austin College, B.A. in 1977, *summa cum laude*

Public Service:
- Briefing Attorney assigned to the Honorable Charles Barrow, Supreme Court of Texas, 1980-1981
- Assistant County Attorney, Bell County, Texas, 1984-1985

Practice:
- Civil Appeals

Admitted:
- State Bar of Texas
- Supreme Court of the United States
- Fifth Circuit Court of Appeals
- United States District Courts (all Districts in Texas)

Member:
- American Law Institute (2005-present)
- Bell-Lampasas-Mills Counties Bar Association (1984-1992; former Director) and Young Lawyers Association (former President, Director)
- Eldon B. Mahon Inn of Court (Emeritus, 2010-present; President 2009-2010; Executive Committee, 2010-2013)
    - Serjeant's Inn of Court of North Texas (2012-present)
- State Bar of Texas
    - Appellate Law Section (Chair, 2016-2017; Council, 2008-2011; Course Director, Advanced Civil Appellate Law Seminar, 2012).
    - Litigation Section Council (2011-2017); Co-Chair, Online CLE Committee (2013-2016) and News for the Bar (2011-2013)
    - Life Fellow, Texas Bar Foundation
- Tarrant County Bar Association (1993-2020; Director, 2005-2008, 2013-2015, 2020)
    - Appellate Law Section (Chair, 2007-2008)
    - Mentor of the Year, 2009-2010, Fort Worth-Tarrant County Young Lawyers' Association.
- Texas Association of Defense Counsel

TABLE OF CONTENTS

Implications of Error Preservation Rulings

1. Other Error Preservation Resources.

Before getting to the rest of this paper, I want to flag certain other error preservation resources which merit your attention. Because this paper does not purport to be a comprehensive error preservation discussion, some of these other resources may provide more ready or helpful answers to your specific problems. There are volumes of such good error preservation papers. They populate the Advanced Civil Litigation Seminars, Advanced Civil Appellate Seminars, and Appellate Law 101 Seminars conducted by the State Bar of Texas, and the State and Federal Appeals Seminars and Civil Litigation Seminars conducted by the University of Texas. Three particular papers which you might want to make part of your trial notebook are these:

1) Christina Crozier and Polly Graham, *Preservation of Error at Trial*, State Bar of Texas Advanced Trial Strategies (2015);
2) Andrew Sommerman, *Preserving Error and How to Appeal*, State Bar of Texas 27th Annual Advanced Civil Appellate Practice Course (2013);
3) Jadd Masso, *Tops Traps in Preserving Error for Appeal*, State Bar of Texas 36th Annual Litigation Update Institute (2020);
4) Steven K. Hayes, *Anticipation and Prevention of Error Preservation Ambushes*, State Bar of Texas 42nd Annual advanced Civil Trial Seminar (2019); and
5) Steven K. Hayes, updated by Dabney Bassel, *Error Preservation Post-Trial: How to Avoid that Sinking Feeling*, SBOT Civil Appellate Practice 101 (2012);

The Crozier/Graham and Hayes/Bassel papers are arranged chronologically, and might make suitable trial notebook materials. My paper on anticipating and preventing preservation ambushes covers complaints your opponents can raise for the first time on appeal–or after it is too late for you to fix the problem, and its table of contents provides a checklist of such complaints which you need to anticipate and fix ahead of time. *See*, Appendix 5.

For summary judgment practice, you really ought to obtain and use David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 60 S. Tex. L. Rev. 1 (2019) (this is the most recent iteration of this work), and Timothy Patton, *Summary Judgment Practice in Texas*, LexisNexis. Finally, make sure you get Yvonne Ho, *Preservation of Error: Percolating Appellate Conflicts*, SBOT 6th Annual Advanced Trial Strategies Course (2017). It will help you sort out preservation issues where a split of authority exists–thereby perhaps enhancing the likelihood the Supreme Court might take your case.

If you have a discrete topic you would like to research for error preservation decisions, let me suggest this search matrix, which is what I use:

Take whatever error preservation subject you have, and (using your favorite legal search engine) add that to the following search phrases:

- 33.1 and –cv (and, to find decisions of the Texas Supreme Court, instead of –cv, use COURT (Supreme)); &
- "did not waive" or preserv! or waive! w/s error or object! or challenge! or "do not address" or "by consent" or "first time on appeal" or "not presented" or present! or "does not argue' or "argues only" or analogous or "comport with" and -cv and not 33.1 and –cv [and, instead of –cv, use COURT (Supreme) for decisions of the Texas Supreme Court).

If you are interested in criminal cases, you can replace the "-cv" with "-cr," and "COURT (Supreme)" with "COURT (Criminal)."

Finally, I want to mention one more resource, an error preservation blog I post every couple of weeks, which I call "Update on Error Preservation in Texas Civil Cases." In it, I compile the error preservation decisions I found in Texas civil cases for the prior couple of weeks, and I have them sorted by category and correlated to the various elements of TRAP 33.1. There are usually 20-30 new error preservation decisions which you and your trial lawyers can scan relatively quickly, to see if anything has popped up which applies to things you find yourself doing. I always share it on my LinkedIn page (if you follow me there, you should get it), and there is a link to it on the resume page on my website.

2. Implications of Error Preservation: A tool to sell your case, a prism through which to pick winning issues on appeal.

This paper continues to grow like Topsy. A big portion of it looks like a paper presented at the 2015 Advanced Civil Appellate Practice Seminar. However, those portions of the paper have been updated to include error preservation cases through the fiscal year ending May 31, 2021. Additionally, a new section deals with error preservation rulings of the Texas Supreme Court for the four fiscal years ending August 31, 2014-2017. After making those additions, I think the overall message for trial lawyers, and appellate lawyers assisting at trial, remains the same: use TEX. R. APP. P. 33.1, the general error preservation rule, as a tool to sell your case in the trial court. But for lawyers embarking on the appeal of the case–which in the post-verdict/post-judgment stage, long before the notice of appeal–I think a different message exists: as you try to winnow the potential appellate issues to a winning combination, evaluate those potential issues which face a preservation problem through two prisms:

1) the error preservation tendencies of the Supreme Court, as reflected in this paper; and

2) the really fine work reflected in Yvonne Ho, *Preservation of Error: Percolating Appellate Conflicts*, SBOT 6th Annual Advanced Trial Strategies Course (2017). It will help you identify preservation issues where a split of authority exists–thereby perhaps enhancing the likelihood the Supreme Court might take your case.

Implications of Error Preservation Rulings

Knowing the Supreme Court's tendencies as to error preservation, and the error preservation topics which the Supreme Court might need to address to resolve disagreements among courts of appeals, will help you evaluate the likelihood that an error preservation problem might attract the Supreme Court to write on the merits on your case–or the likelihood that such a problem will preclude the Supreme Court addressing an appellate issue–or a case involving such an issue–on the merits. As I pointed out in the 2015 paper (and will repeat in this paper), an issue facing an error preservation problem is not a free swing at the fences; it is fraught with potential negative ramifications for your likelihood of success on the appeal.

So let's take a look at error preservation, the opportunities it provides us, and the problems which result from initiating an error preservation fight which we lose. Let's start by looking at the general error preservation rule. That rule, TEX. R. APP. P. 33.1, not only lays out the predicate for preserving error, but it gives us carte blanche to do so in a way that sells our cases to our trial court audience.

3. Carte Blanche for selling your case while you preserve error: TRAP 33.1.

The general error preservation rule in Texas (for both civil and criminal cases) is TEX. R. APP. P. 33.1. It became effective September 1, 1997.

When you look at TRAP 33.1, you see that it is not merely a protective device–it is a magic wand which transforms your opponent's challenge or tactic into an open-ended invitation to sell your case while preserving error. It allows you to point out to the court that you are *mandated* to complain to the court and to *state the grounds on which you seek the trial court's ruling with sufficient specificity* to make the trial court aware of your complaint. TRAP 33.1. Not only that, it allows you to point out to the court that you need a ruling from the court on your objection, and that you have to object if the trial court fails to rule.

Specifically, TRAP 33.1 requires that, as a prerequisite to presenting a complaint for appellate review, the record must show:

1) the complaint was made:

   a) to the trial court;

   b) by a timely request, objection, or motion;

2) the request, objection, or motion must have

   a) stated the grounds for the ruling being sought

I) with sufficient specificity to make the trial court aware of the complaint; or

ii) the specific grounds were apparent from the context; or

b) complied with the requirements of the Texas rules of evidence or civil or appellate procedures

3) the trial court:

a) expressly or implicitly ruled on the request, objection, or motion; or
b) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal.

TRAP 33.1(a). On trials to the court, legal and factual sufficiency complaints may be made for the first time on appeal. TRAP 33.1(d).

Now, let's look at the error preservation opportunities to sell a case which we allowed to get away. First, we will look at the universe of error preservation decisions in civil appeals, to see what trends and tendencies in those cases might tell us, and then we will look at specific examples of opportunities that got away.

4. The Opportunities as Shown by the Statistics.

A. The Universe: civil cases decided by the courts of appeals in Fiscal Years 2014 through 2016

According to my interpretation of the annual reports from the Office of Court Administration, in fiscal years 2014 through 2016, the courts of appeals issued 6,919 opinions on the merits in civil cases.[1] In those same fiscal years, I found 1,351 opinions from courts of appeals which dealt with error preservation issues in civil cases. Collectively, those opinions contained 1,583 holdings concerning error preservation. I won't tell you I caught all the error preservation rulings by courts of appeals in civil cases in fiscal years 2014 through 2016, but I'm pretty sure that I caught almost all, if not all, the opinions which cited TEX. R. APP. P. 33.1 (1,059). I also know I caught a lot of opinions in those fiscal years which ruled on error preservation issues without citing Rule 33.1 (524).

[1] I include in this number the cases OCA designated as: Cases affirmed; Cases modified and/or reformed and affirmed; Cases affirmed in part and in part reversed and remanded; Cases affirmed in part and in part reversed and rendered; Cases reversed and remanded; and Cases reversed and rendered.

Implications of Error Preservation Rulings

B. Overwhelmingly, we took advantage of opportunities to sell our cases.

The numbers indicate that, as a rule, parties overwhelmingly agree as to what issues were raised in the trial court-i.e., we overwhelmingly agree as to what the case was about. In roughly 80.5% of the cases decided on the merits during FYE 2014-2016, and roughly 94.3% of the issues in cases decides on the merits in those three years, the parties seem to agree there is no error preservation issue.

Why do I say that? Well, only about 19.5% of the cases decided on the merits during FYE 2014 through 2016 involved error preservation–meaning that nearly 80.5% did not. As to the percentage of issues which involve error preservation, assume with me for a moment that, on average, civil appellate cases decided on the merits by courts of appeals during fiscal years 2014 through 2016 involved four issues. I cannot tell you that I kept track of how many issues were raised in the error preservation cases I profiled, much less in all the cases decided by the courts of appeals. But I can tell you that I published a summary of the issues raised in civil appeals in the Second Court of Appeals for about 12 years. Based on that experience, I believe that four issues per case is a safely conservative estimate. *See* *Issues Presented in Some Civil Cases Pending Before the Second Court of Appeals*, compiled and updated by Steven K. Hayes; copyright 2003 to present.

If each of the 6,919 opinions on the merits in civil cases handed down by appellate courts in Texas in FYE 2014 through 2016 had 4 issues each (on average), that means the cases decided by those opinions raised about 27,676 issues. I only found 1,583 issues (more or less) on which error preservation was challenged–i.e., only about 5.7% of the issues dealt with on the merits by the courts of appeals on civil cases in fiscal years 2014 through 2016. That means that the parties agreed that roughly 94.3% (or possibly more) of the issues on appeal were appropriately raised in the trial court. That's not bad.

C. However, when parties disagreed as to whether an issue was preserved, courts almost always held it was not.

The sobering news is that, in those 5.7% or so of the issues where the parties disagree as to whether error was preserved, the courts of appeals hold that error was not preserved about 81% of the time, for these reasons:

- 52.9%, complaint not raised at all in the trial court;
- 13%, complaint was not timely, or did not comport with other rules;*
- 8.1%, failure to obtain a ruling or failure to make a record;*
- 5.6%, complaint raised at trial is different than raised on appeal;
- 3.8%, complaint in the trial court was not specific enough.

Total: 83.4%, more or less.*

Implications of Error Preservation Rulings

* For FYE 2014, I lumped together the cases in which error was not preserved for failure to obtain a ruling or make a record with those cases in which error was not preserved because of untimeliness or failure to comport with the other rules. I did separate those categories for 2015 and 2016. Hence, the sum of the separate categories will vary a little from the total percent of cases in which error was not preserved.

Think about the foregoing numbers. More than half the time, the courts of appeal held that error was not preserved because the complaint simply was not raised at all in the trial court. These were opportunities to sell our cases which we collectively missed. In yet another fifth of the error preservation decisions, the courts of appeals hold that error was not preserved because of what I refer to as "mechanical" deficiencies, to wit:

- the party did not raise the complaint in a timely fashion;
- the complaint failed to comply with the governing rule (e.g., TRE 103 concerning an evidentiary ruling, or TRCP 251-254 for continuances);
- the party did not get a ruling on the complaint; or
- the record does not reflect the complaint or the ruling.

Nearly 10% of the time, making a record or obtaining a ruling might have preserved error.

The following table shows the foregoing:

Table 1. Error Preservation Rates: Why Courts of Appeals Hold Error Was Not Preserved

Error was Preserved	Error Not Preserved	Obj. specific enough	Obj. not specific enough	Obj. not raised at all	Other (no ruling or record, not timely, d/n follow rules)	No record or no ruling	Issue on appeal diff. than at trial	D/n have to raise issue at trial
FYE 2014								
13.3%	81.3%	13.3%	5.8%	51.7%	18.9%	*	4.9%	5.4%
FYE 2015					Not timely, d/n follow rules**	No record, no ruling**		

10.4%	81.9%	10.6%	3.4%	53.7%	8.4%**	8.8%**	7.5%	7.7%
FYE 2016								
12.1%	77.6%	12.1%	2.4%	51.8%	12.3%	7.1%	4.0%	7.5%
All Yrs.								
12.1%	80.9%	12.1%	3.8%	52.9%	13%**	8.1%**	5.6%	7.0%

* I did not separately compile this data for FYE 2014; **Since data was not compiled separately for these components in FY 2014, these reflect only the 2015 data.

As you can see, the reasons error preservation failed remained remarkably constant over the three years. I will refer to these combined numbers for the three fiscal years as "The Average." First, we will talk about what that "Average" tells us about lost opportunities to sell our cases in the trial courts. Then we will look at error preservation decisions on specific topics to see if they might identify future opportunities for us to sell our cases while preserving error.

D. Other lessons from "The Average": While in the trial court, make a record, get a ruling, and repeatedly contemplate what your case is about.

What do I take from "The Average?" First, "The Average" should remind us to make a record of, and get a ruling on, our objections. Rule 33.1 not only entitles us to both, it demands that we do both. Getting a ruling and making a record might change the error preservation outcome nearly 10% of the time. After all–why wouldn't we want a record to show us selling our case, and get some feedback from the judge on what we're selling? If nothing else, that feedback from the judge might give us a heads up about how to argue our case during the rest of the time it's in the trial court.

Much more than that, "The Average" suggests we might not spend as much time as we should thinking about all the issues our cases involve, or how to properly preserve and use them. When preservation was challenged, over 60% of the time parties apparently thought of an objection or complaint after it was too late to raise it. I am not going to say that lawyers can realistically anticipate every complaint that might arise at trial. No one can. And perhaps identifying the complaints involved in our cases 95% of the time is as much as we can realistically hope for.

But maybe we can do better. I categorized the error preservation holdings in 2014, 2015, and 2016. Here are those categories, listed in descending order (i.e., ranked in order of the most to the fewest error preservation holdings) for the three years:

Table 2. The Most Common Error Preservation Issues

Implications of Error Preservation Rulings

FYE August 31 for the following years: % of Total Error Preservation Decisions in Civil Cases for the following years consisted of decisions as to the following topics:						
Issue	**2014**	**2015**	**2016**	**2022***	**Annual Avg.**	**Annual Average Running Total**
Evidence	10.10%	11.10%	15.70%	13.55%	12.61%	12.61%
Jury Charge (incl. Jury Instructions)	5.80%	7.50%	7.00%	4.98%	6.32%	18.93%
Summary Judgment	7.90%	5.20%	3.40%	7.97%	6.12%	**25.05%**
Attorney's Fees	3.00%	5.40%	5.00%	2.19%	3.90%	28.95%
Legal Sufficiency	3.40%	4.50%	2.50%	3.19%	3.40%	32.34%
Affidavits	3.20%	3.60%	2.90%	3.59%	**3.32%**	35.67%
Constitutional Challenges**	1.70%	2.00%	4.30%	3.19%	2.80%	38.46%
Continuance	3.40%	2.00%	1.80%	2.99%	2.55%	41.01%
Expert Witness	3.90%	2.90%	1.80%	1.20%	2.45%	43.46%
Discovery	3.00%	1.80%	1.40%	2.39%	2.15%	**45.61%**
Pleadings	1.70%	2.50%	1.60%	2.19%	2.00%	47.61%
Due Process	3.00%	0.90%	1.40%	2.59%	1.97%	49.58%
Notice	1.10%	2.50%	1.80%	1.79%	1.80%	51.38%
Judgment	1.50%	0.70%	2.10%	1.99%	1.57%	52.95%
Sanctions	0.90%	1.80%	1.20%	1.20%	1.28%	54.22%
Factual Sufficiency	1.50%	1.40%	1.40%	0.60%	1.23%	55.45%
Testimony	1.50%	0.40%	1.60%	0.00%	0.88%	56.32%
Jury Argument	1.50%	1.10%	0.50%	0.00%	0.78%	57.10%

* Does not include opinions issued approximately 10/7-10/21/2021.

** Not including Due Process claims.

Some things jump out from the foregoing table. As with the reasons courts of appeals hold that error was not preserved, the twelve issues which most often involve error preservation rulings–which comprise nearly half of the error preservation issues the courts of appeals deal with–remained relatively constant for the three years covered here. Eight of the eleven most frequent error preservation categories relate to things it would seem lawyers have the time to prepare for (e.g., Jury Charge, Summary Judgment, Attorney's Fees, Affidavits, Constitutional Challenges,

Continuance, Discovery, and Pleadings). That same thing can also be said about at least five of the next seven most common categories (Due Process, Notice, Sanctions, and Judgments). Maybe this indicates that it would not hurt for all of us to periodically spend some quiet time reflecting about our cases, and perhaps getting a second set of eyes to assist us in that exercise. Perhaps one way to couch our ongoing case reviews is to periodically ask ourselves the following questions on each aspect of our cases:

> What will I argue if the court disagrees with me on this?
>
> What will the other side argue in response to my position on this?
>
> What will the other side do to try to thwart my efforts to raise this issue, present this piece of evidence, or make this argument?
>
> How can I take these opportunities to sell my case?

Just a thought.

5. The Big Picture from looking at preservation rates as to the most common individual error preservation issues.

I've compiled a table showing the preservation rates for the most common error preservation issues in Appendix 1. That table also compares, for each category, the error preservation rates for FYE 2014 through 2016. That table also shows whether, for FYE 2016, the party which claimed error was preserved won, or won in significant part, or lost on the merits of the appeal (I did not keep track of all those numbers in FYE 2014 and 2015). The numbers in Appendix 1 show some things.

A. The appellate lawyer must ruthlessly evaluate the error preservation issue. Those who lose on the error preservation fight fair dismally on the merits.

Successful, seasoned appellate practitioners will advise their parties to ruthlessly pare their appeals down to the three or four strongest, most viable issues. We probably should follow that same advice when deciding whether to pursue an issue on appeal as to which there is an error preservation problem–and when deciding to challenge whether error has been preserved. Let me tell you why I've come to that conclusion.

For this subsection of the paper, I want to set a baseline. In their exhaustive paper on why courts of appeals reverse trial courts, Lynne Liberato and Kent Rutter sliced and diced a year's worth of appellate decisions concerning why courts of appeals reverse–that is, why Appellants win. *See* Lynne Liberato and Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 48 HOUSTON

Implications of Error Preservation Rulings

LAW REVIEW 994 (2012) (for a paper which looks at the reasons for reversal in FYE 8/31/2019, *see* Kent Rutter & Natasha Breaux, *Reasons for Reversal in the Texas Courts of Appeals*, 57 Hous. L. Rev. 671 (2020)). Overall, they found there was about a 36% reversal rate on civil cases in Texas courts of appeals in FYE 2011–a figure that dropped to 30% in FYE 2019. 2012 paper at 999, 2020 paper at 676. For their study, a "reversal" meant the "court of appeals reversed a significant part [though not necessarily all] of the judgment," and an affirmance meant that the court of appeals at most "reversed or modified only a relatively small" part of the judgment. *Id.*, at 1024-1025. Neither 30% nor 36% are terribly high success rates–that's not an evaluation of the courts of appeals, that's just an observation that the odds disfavor the appealing party.

I do not have success rate numbers for FYE 2014-2015 comparable to those Lynne and Kent compiled. But for FYE 2016, I kept track of whether the party claiming error was preserved won outright on the merits of the appeal, won in significant part on the merits, or lost outright on the merits. I realize that whether a party won in "significant part" an appeal is probably in the eye of the beholder, and the way I see that criteria may not match how Lynne and Kent viewed it. But what I can tell you is that, for FYE 2016:

1) not quite half of the most commonly seen error preservation issues correlate with a win on the merits at a level seen by Lynne and Kent in their study;
2) the average rate of success on the merits for the seventeen most commonly seen error preservation issues is about one-fifth less than the average success rate for appeals seen by Lynne and Kent; and
3) parties that unsuccessfully *challenge* error preservation see their opponents win on the merits at a rate nearly twice the average success rate seen by Lynne and Kent.

The following tables show why I come to those conclusions:

Table 3. Correlating Error Preservation Issues With Success on Merits of the Appeals.*

Issue	Percent of Error Pres. Decisions+	Associated with success on the merits for party claiming preservation-
Evidence	10.7%	22.7%
Jury Charge (incl. Jury Instructions)	6.7%	39.5%
Summary Judgment	6.5%	33.3%
Attorney's Fees	4.3%	35.7%
Legal Sufficiency	4.0%	42.9%

Implications of Error Preservation Rulings

Issue	Percent of Error Pres. Decisions+	Associated with success on the merits for party claiming preservation-
Affidavits	3.4%	25.0%
Expert Witness	3.3%	10.0%
Constitutional Challenges*	1.9%	0.0%
Continuance	2.6%	10.0%
Discovery	2.3%	0.0%
Pleadings	2.2%	33.3%
Notice	1.9%	10.0%
Due Process	1.9%	12.5%
Factual Sufficiency	1.5%	12.5%
Jury Argument	1.3%	33.%
Judgment	1.1%	41.7%
OVERALL AVERAGE		**27.2%**

* None of these involve known Pro Se appeals.
\+ The numbers in this column are the totals for the three fiscal years FYE 2014-2016.
\- The numbers for this success rate column are for only FYE 2016.
** Not including Due Process claims.

I feel certain that getting more data will affect the foregoing numbers. But, in the meantime, only seven of the sixteen issues which most often involve error preservation disputes are associated with a winning percentage on the merits that rival even the average success rate found on appeal by Lynne and Kent. Those seven categories are (in order of frequency) Jury Charge, Summary Judgment, Attorney's Fees, Legal Sufficiency, Pleading, Judgment, and Jury Argument. More than half of the issues most commonly involving error preservation disputes were associated with winning on the merits no more than about 2/3 as often as the average reported by Lynne and Kent–and, for FYE 2016, nearly half of the issues most commonly involving error preservation disputes were associated with winning on the merits at only about 1/3 the rate of the averages reported by Lynne and Kent. The point here is that it is terribly difficult to reverse a trial court ruling on appeal, the issues most commonly involved in error preservation fights do not, as a rule, correlate with improving those odds, and most often those issues correlate with diminishing the odds of success on the merits.

Let's flesh out this out a little bit by looking at the rates of success on the merits for those parties which unsuccessfully claim error was preserved, and which unsuccessfully challenge whether error was preserved, as compared to the average success rate on the merits found by Lynne and Kent

in their study. Here is a table which does that:

Table 4. Correlating Success on Error Preservation With Success on the Merits.

Category	Complaining party's winning % (on the merits) on appeal.
Overall Average, Liberato/Rutter, 2012	36%
Preservation cases in which error was not preserved, FYE 2016	17.8%
All error preservation cases, FYE 2016	27.2%
Preservation cases in which error was preserved, FYE 2016	60.3%
Preservation cases in which error did not have to be preserved FYE 2016	68.2%

See Appendix 3.B. The foregoing numbers eliminate error preservation cases involving the commitment of sexually violent predators, the termination of parental rights, and pro se cases, because those discrete kinds of cases have preservation and merits success rates which are almost zero.

Folks, the numbers in the foregoing table are significant. Lynne and Kent found that an appeal nets a significant reversal 36% of the time. In FYE 2016, when a party pursued an issue on which it failed to preserve error, it only won significant relief on the appeal as a whole about 17.8% of the time–less than half of the success rate found in Lynne and Kent's study. And when a party *unsuccessfully* contends that error was *not* preserved (either because error was preserved or because it did not have to be raised at trial), the likelihood its opponent will significantly prevail on the merits of the appeal skyrockets to nearly 60-68%–nearly twice the reversal rate found in the study done by Lynne and Kent. So unsuccessfully challenging error preservation correlates with nearly doubling the success rate of your opponent.

What does that tell us about cases involving error preservation in the courts of appeals? That both pursuing an issue which has not been preserved below, or challenging an issue as to which error has been preserved, correlates to losing on the merits at a much higher rate than normal.

I doubt that being on the wrong side of an error preservation issue disposes the courts against us; I think it more likely being on that wrong side indicates that we have grasped at straws in a desperate situation. But I do know the above-mentioned correlations exist. And I think that

correlation behooves us to carefully evaluate whether to pursue an issue where error preservation is an issue–or whether to challenge preservation on an issue which has probably been preserved. Or, perhaps, when we find ourselves in either of those situations, perhaps we should carefully, and candidly, evaluate the strength of our position on appeal, and talk to the client about the strengths and weaknesses of the case, and what options the client might have. Every product has a shelf life, and it may be best to sell our appeal, or our trial court judgment, before that shelf life expires.

In ruthlessly evaluating whether to assert an issue as to which there is a preservation problem, or whether to challenge an issue as to which our opponent probably preserved error or can raise for the first time on appeal, consider the following observations from the patterns I've seen in the last two to three years.

1. Do not unwittingly succumb to that most frequent and perhaps unfulfilling of error preservation sirens, to wit, complaints about evidence.

The most common error preservation topic is Evidence. Evidence accounts for about thirteen percent of the error preservation docket. Evidentiary complaints survive a preservation challenge on appeal only about 15% of the time, for all the reasons you would expect in what is usually a situation necessitating immediate reaction and constant diligence:

- thirty percent of the time, the complaint was untimely, did not comply with other rules, was not ruled on or on the record–nearly double the rate of the Average;
- nearly forty percent of the time, the complaint was not raised at all.

Keep in mind, too, that an evidentiary complaint will only succeed on appeal if we show an abuse of discretion, and show that the incorrect evidentiary ruling resulted in an erroneous judgment. *See* Sec. 5.E, *infra*. That does not happen terribly often–when an evidentiary complaint was challenged on error preservation grounds, the party claiming the evidentiary complaint was preserved obtained a favorable judgment from the court of appeals only about 23% of the time.

In a world where the courts of appeals tell us to limit the number of our issues to no more than six, and preferably as few as three, and with a huge hill to climb in order to prevail on this most frequently pursued, and overwhelmingly unsuccessful, error preservation issue, it makes sense to at least make sure that the complaint passes the mechanical requirements of TRAP 33.1. If your complaint about an Evidence ruling is questionable in any respect, you might be well off to place it at the top of your list to cull from your brief.

2. Complaints with error preservation problems about factual sufficiency in a jury trial are more unfulfilling than complaints about evidence.

In a non-jury trial, you can raise factual sufficiency complaints for the first time on appeal.

Not so in jury trials–in a jury trial, you *must* raise a factual sufficiency complaint in a motion for new trial, or it is not preserved. Tex. R. Civ. Pro. 324(b)(2).

The error preservation rate for a factual sufficiency complaint averages about 12.5%, and roughly 90% of the time the party claiming it preserved error as to a factual sufficiency complaint failed to obtain a judgment on appeal that was favorable in any respect.

3. A complaint about a continuance which has error preservation problems is not often associated with a favorable judgement for the party asserting the complaint.

Only about 10% of the time did the preservation-challenged party complaining about the granting or denying of a continuance obtain a judgment which was favorable in any respect. Nearly half of the preservation-challenged complaints about continuances failed because they did not satisfy the mechanical requirements of TRAP 33.1–that is, the complaint was not timely, did not comply with other rules, or the party did not get a ruling or make a record. Given the really poor success rate on appeal for preservation-challenged parties asserting a complaint about continuances, it really looks like appeals involving a preservation-challenged complaint about continuances are a bit desperate. Keep that in mind.

4. Similarly, if you have a preservation problem concerning a constitutional complaint, ruthlessly evaluate whether to raise that complaint on appeal.

In terms of decisions involving error preservation, 90-100% of the time Constitutionality and Due Process issues fail because they are not raised at all in the trial court, and (as you would expect) their error preservation rate is abysmal (3% or less, overall). Furthermore, the parties asserting a preservation-challenged complaint concerning a constitutional issue other than due process issue never got a favorable judgment on appeal, and the due process complainers only obtained a favorable judgment on appeal about 12%.

4. Other issues which have poor preservation rates and merits success rates also bear ruthless evaluation: complaints about attorney's fees, expert witnesses, continuances, and notice.

A review of Appendix 1 will identify complaints about other issues which have low error preservation rates and merits success rates. Those include complaints about attorney's fees, expert witnesses, continuances, and notice. It remains true that every complaint, and appeal, succeeds or fails on its own merits, and that is true as to appeals which involves complaints about these issues. But the experience of others suggests that complaints about these issues, if associated with an error preservation problem, may correlate with an overall weak appeal.

Implications of Error Preservation Rulings

B. Parties claiming error is preserved lose that fight at an overwhelming rate. Only one of the issues most commonly facing an error preservation challenge survive that challenge more than a third of the time. Most of those issues survive that challenge 20% of the time or less.

If you look at the first column in Appendix 1, you will notice some pretty wild swings in error preservation rates between 2014 through 2016 on some issues. For example, error was preserved on legal sufficiency challenges 40% of the time in 2014, not at all in 2015, and 21.4% in 2016. But you will also notice that, for the three most common categories (the "Big Three"–Evidence, Jury Charge, and Summary Judgment) the error preservation rates were pretty consistent between 2014 through 2016. It could be that, unless you have at least 30 error preservation decisions a year (such as you have with the Big Three), you get swings like we see from year to year (if you only look at a group of 15 decisions, for example, one decision can swing the numbers by 6%).

But the point is, only one does well from an error preservation standpoint. On legal sufficiency complaints, 60% of the time the complaining party preserves error or the complaint could be raised for the first time on appeal. But the overwhelming bulk of those cases come from the parties which challenge preservation not realizing that a legal sufficiency complaint concerning a bench trial can be raised for the first time on appeal. Even the most promising issue–Jury Argument–saw error preserved only about 25% of the time. All the remainder of the most common error preservation issues saw error preserved about 20% of the time or less, most were at 10% or less, and none of the remainder had a combined preservation rate/can raise for the first time on appeal rate of no more than about 22%. There are no common error preservation issues where the courts have indicated a tendency toward leniency, and the parties claiming that error was preserved overwhelmingly lose on the preservation fight

C. Except for legal (and factual) sufficiency in a bench trial, none of the issues which can be raised for the first time on appeal are among the most common error preservation issues.

In addition to legal and factual sufficiency in a bench trial, there are other issues which can be raised for the first time on appeal (jurisdiction, etc.), and we will mention them later. But note that none of these other issues are really among the most commonly raised error preservation issues. Perhaps everyone understands they can be raised for the first time on appeal, and we should be surprised if they were more commonly involved in error preservation decisions.

D. Two of the six most frequent error preservation issues on appeal–Summary Judgment and Attorney's Fees–most often fail because the complaints were not raised at trial. This may be explained by the time constraints in Summary Judgment practice, and a failure to treat a claim for attorney's fees as a significant cause of

action.

Summary Judgment and Attorney's Fees are the third and fourth most common error preservation issues on appeal, respectively, counting for nearly 10% of the error preservation docket. And yet, despite the frequency with which they appear on the error preservation docket, most of the time these complaints fail because they were not raised at trial (49% of the time Summary Judgment complaints fail because they are not raised at trial; that is true 70% of the time as to Attorney's Fees complaints).

As to Summary Judgments, I think a large part of the problem comes from the time constraints we face in summary judgment practice. Many times, we have three weeks–often in the middle of an otherwise busy practice and in a case which is coming down to the trial or to other trial-related deadlines–to respond to a motion for summary judgment, and fully object to that motion and the evidence supporting it. We have only a third that long to object and reply to a response. And, despite the protections which discovery and special exceptions practice affords us, summary judgment practice may be the moment when our opponents' position first completely comes into focus for us. Three weeks (or less) in the middle of a hectic schedule is not necessarily the best time to think of everything which can thwart your opponents' arguments and tactics.

As to Attorney's Fees, I think we often do not fully embrace, or address, the fact that attorney's fees can comprise a really significant part of an adverse judgment. We need to approach, from the very beginning, the claim for attorney's fees as a separate, distinct, element-driven cause of action, and that it deserves as much of our attention as the other causes of action in the case. If we intend to thwart–or prosecute, depending on which side we are on–a claim for fees, we cannot treat that claim as an afterthought if we intend to preserve error for appeal.

The "failure to raise in the trial court" aspect of both of these error preservation categories reinforce the argument that we should periodically review and reflect on the issues in our cases, and think about what we will need on appeal as to each cause of action should the case go wrong in the trial court.

E. You have to make a record of your complaint and get a ruling on it. We see the failure to do so most frequently regarding complaints about affidavits (41.2%), discovery (29.4%), continuances (21.1%), and summary judgments (13%). Draft an order for, and use the order during, the hearing on the same.

The Supreme Court periodically reminds us that "[i]n the absence of a record, we presume the evidence was sufficient to support the trial court's findings. See *In re D.S.*, 602 S.W.3d 504, 510 n.9 (Tex. 2020)." *In the Interest of G.X.H.*, 627 S.W.3d 288, 300 (Tex. 2021). Similarly, "[w]here, as here, the trial court held an oral hearing on the proposed extension and the parties failed to bring forth the record of that hearing on appeal, we will presume the trial court made the necessary

findings to support the extension orally on the record at the hearing." *Id.*, at 299. "[T]o preserve their complaints about the absence of a record of the hearing," a party has to raise that complaint in the trial court or it will be waived." *Id.*

These issues probably demonstrate more than any other areas the need to have a well-drafted order before your hearing, and to make sure the judge uses it at the hearing. Judges will tell you such an order is an invaluable road map for them, and an essential checklist for you. As the Supreme Court has most recently said, in a case involving summary judgment objections, "***the best practice for a party objecting to summary judgment evidence*** is to secure a written order on the objection from the trial court." *Fieldturf United States v. Pleasant Grove Indep. Sch. Dist.*, 642 S.W.3d 829, 838-39 (Tex. 2022) , *emphasis supplied*. The same is true on other complaints, as well. Not only does a signed order confirm the judge has ruled, it helps remind you of all the things you need to cover, and should remind you to create a record of the same, as well.

6. The most frequent error preservation categories: specific examples of additional opportunities to sell our cases.

The three categories with the most frequent error preservation holdings-evidence, jury charge, and summary judgment-account for nearly one fourth of the total error preservation decisions in fiscal years 2014 through 2016. If we throw in the error preservation decisions involving affidavits, that total rises to a little over 27% of those error preservation decisions. The ten issues with the most frequent error preservation holdings account for nearly half of the error preservation decisions in fiscal years 2014 through 2016. The eighteen issues which most frequently see error preservation fights account for nearly 60% of those fiscal years' error preservation decisions. So the remainder of this paper will deal substantively with those issues which most frequently see error preservation fights. You may be surprised about the opportunities which exist to sell your case in these categories.

A. Affidavits.

Error preservation decisions concerning affidavits come up most frequently in the context of summary judgment practice. But because the use of affidavits also occurs in other settings, this paper addresses error preservation disputes about affidavits as a standalone category.

Before discussing the affidavit cases, I really need to mention two great resources on affidavits, both of which address them in the context of summary judgment practice. Those two resources are: David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 60 S. Tex. L. Rev. 1 (2019) (this is the most recent iteration of this work), and Timothy Patton, *Summary Judgment Practice in Texas*, LexisNexis.

Now for the cases. In an error preservation context, lawyers are less likely to make a record

for a complaint about an affidavit, or get a ruling on that complaint, than any other issue. So remember, as to your complaints about affidavits:

- Prepare an Order;
- Make a record of the hearing; and
- Get the judge to sign the Order.

Don't be reluctant to get a hearing on your objections. If the other side's evidence is improper, then why should the judge allow that improper evidence to tarnish the justness of your cause? Perhaps an objection to an affidavit is accompanied by a "we'll sort it out later" attitude driven by time-constraints. Just remember, the time for sorting it out is at the hearing where the affidavit is used, if not before. And if you do not feel strongly enough about the complaint to bring it to the trial judge's attention and get a ruling, then don't bring it up on appeal–unless, of course, your complaint is one of the few which can be raised on appeal for the first time.

It is out of the "first time on appeal" category that a (perhaps) unexpected warning coming out of this area for the lawyer who *submits* an affidavit to the trial court: not all objections to an affidavit have to be made in the trial court. This means you might get all the way to the court of appeals–or the Supreme Court, for that matter–without knowing you have a defective affidavit that requires a reversal of the judgment you won in the trial court. In that regard, here is a summary of the substantive law concerning preserving error as to affidavits:

> Texas law divides defects in summary judgment affidavits into two categories: (1) defects in form and (2) defects in structure. For the first category, defects in form, the complaining party must make an objection in the trial court and obtain a ruling at or before the summary judgment hearing . . . . For the second category, defects in substance, the complaining party may raise the issue for the first time on appeal.

Coward v. H.E.B., Inc., 2014 WL 3512800, 2014 Tex. App. LEXIS 7637, 5-6 (Tex. App.–Houston [1st Dist.] July 15, 2014, no pet.).

So let's break this down, and deal first with defects in form–as to which complaints must be made and ruled on in the trial court. These defects include:

(1) the absence of a jurat on the affidavit (*Mansions*, 365 S.W.3d at 317-318); or the failure of the notary to sign the affidavit (*Seim v. Allstate Texas Lloyds*, 551 S.W.3d 161, 165-166 (Tex. 2018).

(2) a failure to affirm that assertions in the affidavit are true and correct. *Parker v. Hunegnaw*, 2014 WL 800998, 2014 Tex. App. LEXIS 2257, 15-17 (Tex. App.-Houston [14th Dist.] Feb. 27, 2014, no pet.);

(3) a failure to state, or demonstrate, that the affidavit is made on personal knowledge. *Isaac*

v. Vendor Res. Mgmt., 2016 Tex. App. LEXIS 7547, *5-8 (Tex. App. Austin July 15, 2016, no pet.); *Everbank v. Seedergy Ventures, Inc.*, 2016 Tex. App. LEXIS 7319, *21-22 (Tex. App.–Houston [14th Dist.] July 12, 2016, no pet.); *Fjell Tech. Group v. Unitech Int'l, Inc.*, 2015 Tex. App. LEXIS 966, 11-13 (Tex. App.–Houston [14th Dist.] Feb. 3, 2015); *CMC Steel Fabricators v. Red Bay Constructors*, 2014 WL 953351, 2014 Tex. App. LEXIS 2693, 15-17 (Tex. App.-Houston [14th Dist.] Mar. 11 2014, no pet.). However, see below concerning the substantive defect in an affidavit which affirmatively reflects on its face that the affiant does not have personal knowledge.

(4) the affidavit contains hearsay. *Hanks v. Huntington Nat'l Bank*, No. 01-15-00188-CV, 2016 Tex. App. LEXIS 3179, *22 (Tex. App. Houston 1st Dist. Mar. 29, 2016, pet. denied) (held, hearsay objection is not sufficiently specific to preserve objection about hearsay within hearsay as to attachments to business records affidavit); *Cedillo v. Immobiliere Jeuness Establissement*, 2015 Tex. App. LEXIS 9017, *10-11 (Tex. App.– Houston [14th Dist.] Aug. 27, 2015); *Fjell*, 2015 Tex. App. LEXIS 966, at *11-13; *Clef Constr. v. CCV Holdings*, 2014 Tex. App. LEXIS 9534 (Tex. App.–Houston [14th Dist.] July 17, 2014, pet. denied);

(5) inconsistencies caused by errors made in affidavits. *Wakefield v. Wells Fargo Bank, N.A.*, 2013 WL 6047031, 2013 Tex. App. LEXIS 14018 (Tex. App.-Houston [14th Dist.] Nov. 14 2013, no pet.);

(6) the fact that the affiant is an interested witness, and her testimony is not clear, positive and direct, and free from contradictions and inconsistencies, thus failing to satisfy the requirement of TRCP 166a(c) as to the type of affidavit on which a trial court could grant summary judgment. *Shepherd v. Mitchell*, No. 05-14-01235-CV, 2016 WL 2753914, 2016 Tex. App. LEXIS 4926, *9 (Tex. App.–Dallas May 10, 2016, no pet.); *Parkway Dental Assocs., P.A. v. Ho & Huang Props., L.P.*, 391 S.W.3d 596, 604 (Tex. App.—Houston [14th Dist.] 2012, no pet.);

(7) a complaint that the affidavit is a "sham" in that it contradicted the affiant's deposition testimony. *Bowser v. Craig Ranch Emergency Hosp., L.L.C.*, 2015 Tex. App. LEXIS 6631, *5-6 (Tex. App.–Dallas June 29, 2015); *Am. Idol, Gen., LP v. Pither Plumbing Co.*, 2015 Tex. App. LEXIS 4431, 7 (Tex. App.–Tyler Apr. 30, 2015); and

(8) an unauthenticated attachment to an affidavit. *Avery v. LPP Mortg., Ltd.*, No. 01-14-01007, 2015 WL 6550774, 2015 Tex. App. LEXIS 11136, *7 (Tex. App.–Houston [1st Dist.] Oct. 29, 2015, no pet.).

Stop and think about it–objections as to all these issues give you a chance to complain about evidence that is so weak that your opponent will not, or cannot, even properly prove it up. You can rail about this to the trial court, in the context of talking about the justness of your case. And as to these objections about defects in form, don't just merely complain that the affidavit is defective. Because you must state the specific defect (e.g., that the affidavit lacked personal knowledge or contained hearsay) really stand up and shout about it. *Clef Constr,*, 2014 Tex. App. LEXIS 9534 at *7.

Another warning. While it is true that TRAP 33.1 "relaxe[d] the requirement of an express ruling and codifie[d] caselaw that recognized implied rulings," don't rely on such an implied ruling.

Instead, have the trial judge to rule expressly on this objection about evidence which is worthless. The Supreme Court has most recently reaffirmed the need for an express ruling, where it said two things:

1) "A trial court's on-the-record, unequivocal oral ruling on an objection to summary judgment evidence qualifies as a ruling under Texas Rule of Appellate Procedure 33.1, regardless of whether it is reduced to writing." *But*
2) "As a practical matter, sometimes summary judgment hearings are transcribed, and sometimes they are not; ***the best practice for a party objecting to summary judgment evidence*** is to secure a written order on the objection from the trial court. But if no such order is issued, and the reporter's record of the hearing reveals an unequivocal oral ruling on the objection, that ruling is sufficient for error-preservation purposes." *Fieldturf United States v. Pleasant Grove Indep. Sch. Dist.*, 642 S.W.3d 829, 838-39 (Tex. 2022) , *emphasis supplied*. Also expounding on the requirement for an express ruling on such objections are *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572 (Tex. 2017); *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 165-166 (Tex. 2018); *see also Capitol Wireless, LP v. XTO Energy, Inc.*, 2014 WL 3696084, 2014 Tex. App. LEXIS 8028, 14-15 (Tex. App.–Fort Worth July 24, 2014, no pet.). Keep in mind, the court of appeals may not consider a notation on a docket sheet to constitute a ruling–even one which says "denied obj's." *Goins v. Discover Bank*, No. 02-20-00128-CV, 2021 WL 1136077, 2021 Tex. App. LEXIS 2310, at *3 n.3 (Tex. App.—Fort Worth Mar. 25, 2021, no pet. hist.) (memo op. on reh'g). In addition to the opportunity to get the trial judge engaged in your endeavor by ruling, there is another practical reason you should not count on an implied ruling. Not only do informal reports from former staff attorneys reflect that courts of appeals are very reluctant to find such implied rulings, none of the 2014 cases found such an implied ruling. "Merely granting or denying the summary judgment is, in and of itself, insufficient" to provide a ruling on an objection to a summary judgment affidavit. *Id.* Get. An. Express. Ruling. On. Your. Objection. If the trial court fails to rule, ask it to rule, file a motion requesting it to rule, and file a written objection to its failure to rule. *CMC*, 2014 Tex. App. LEXIS 2727, at *16-17; TRAP 33.1(a)(2)(B).

Now let's move to defects in substance–as to which complaints may be raised for the first time on appeal. These defects include:

(1) that statements in an affidavit are conclusory. *Lenoir v. Marino*, 2014 Tex. App. LEXIS 12703 (Tex. App.–Houston [1st Dist.] July 2, 2015); *Coward*, at 5-6. This conclusory nature can be shown by the contents of an exhibit controverting the averments in an affidavit. *Akins v. FIA Card Servs., N.A.*, 2015 Tex. App. LEXIS 1729, 7-8 (Tex. App.–Amarillo Feb. 23, 2015, no pet.); *County Real Estate Venture v. Farmers & Merchants Bank*, 2015 Tex. App. LEXIS 1409, 3 (Tex. App.– Houston [1st Dist.] Feb. 12, 2015, no pet.). But keep in mind–just because an affiant draws a conclusion in an affidavit does not make the affidavit conclusory, when the affiant "identified the facts on which that conclusion is based." *Nationwide Coin & Bullion Res., Inc. v. Thomas*, Nos. 14-19-00632-CV, 14-19-00633-CV, 2020 WL 6741694, 2020 Tex. App. LEXIS 8909, at *8 (Tex.

App.—Houston [14th Dist.] Nov. 17, 2020, no pet. hist.) (memo op.);

(2) an affidavit that affirmatively demonstrates the affiant's lack of personal knowledge. *Old Republic Ins. Co. v. Cross*, No. 05-14-01204-CV, 2015 WL 8014402, 2015 Tex. App. LEXIS 12400, *5 (Tex. App.–Dallas Dec. 7, 2015, no pet.)

(3) that the evidence in the affidavit is legally insufficient. *Bastida v. Aznaran*, 444 S.W.3d 98, 105 (Tex. App.–Dallas 2014, no pet.);

(4) the "failure to attach an affidavit or otherwise authenticate their expert report" means the report amounts to no evidence. *Kolb v. Scarbrough*, No. 01-14-00671-CV, 2015 Tex. App. LEXIS 2943, 9-11 (Tex. App.–Houston [1st Dist.] Mar. 26, 2015, no pet. h.); and

(5) whether unanswered requests for admission attached to and referenced in an affidavit are deemed admitted under Rule 198.2(c)). *Ordonez v. Solorio*, 480 S.W.3d 56, 63 (Tex. App.—El Paso 2015, no pet.) .

So, just because an affidavit you filed does not draw an objection in the trial court, don't think that you are necessarily out of the woods. You may find out on appeal that the affidavit was impermissibly conclusory, or contained legally insufficient evidence. This means that you have to be doubly sure at the trial court level that your affidavit passes muster.

B. Attorney's Fees.

On only two of the common error preservation issues did parties fare worse, in terms of surviving an error preservation challenge, than they did on a complaint about attorney's fees (those other two issues involved due process complaints and other constitutional complaints). About 70% of the failures of parties to preserve error about complaints regarding attorney's fees came from failing to make any objection at all about the issue in the trial court. I wonder if this reflects some innate reluctance to challenge the testimony of another lawyer. In any event, I think this abysmal preservation rate concerning complaints about attorney's fees underscores the need to treat a claim for fees as a discrete, potentially very valuable claim *from the very beginning of the lawsuit*–and to prepare to either prove or disprove the elements of that claim or the affirmative defenses to it.

Examples of objections concerning attorney's fees which you will fail to preserve if you do not present them to the trial court include the following:

(1) a failure to segregate fees between claims on which fees are recoverable and those on which they are not. *Helms v. Swansen*, No. 12-14-00280-CV, 2016 WL 1730737, 2016 Tex. App. LEXIS 4540, *23 (Tex. App.–Tyler Apr. 29, 2016, pet. denied); *Garcia v. Baumgarten*, No. 02-14-00267-CV, 2015 WL 4603866, 2015 Tex. App. LEXIS 7878, *19-20 (Tex. App.-Austin July 30, 2015, no pet.); *Parham Family L.P. v. Morgan*, 434 S.W.3d 774, 791 (Tex. App.-Houston [14th Dist.] no pet.). The complaint about segregation must also be timely–when summary judgment proceedings result in an award of fees, the complaint about the failure to segregate must come in the response to the motion for summary judgment seeking fees–"a post-summary judgment hearing letter

brief and a motion to disregard the court's prior finding" are too late. *Weaks v. White,* 479 S.W.3d 432, 440 (Tex. App.—Tyler 2015, pet. denied). Other authority suggests that one must object during trial or request a jury instruction regarding the segregation of fees in order to preserve a complaint about a failure to segregate. *Hill v. Premier IMS, Inc.*, No. 01-15-00137-CV, 2016 WL 2745301, 2016 Tex. App. LEXIS 4911, *22 (Tex. App.–Houston [1st Dist.] May 10, 2016, no pet.).

As to a failure to segregate complaint coming out of a bench trial, we have a quagmire. As the Dallas Court of Appeals noted:

> One of our sister courts has noted that "there is as yet no consistent rule about when an objection to the failure to segregate attorneys' fees must be raised in a case tried without a jury," Home Comfortable Supplies, Inc. v. Cooper, 544 S.W.3d 899, 908 (Tex. App.—Houston [14th Dist.] 2018, no pet.), and some courts have ruled that an objection to failure to segregate must be made "before the trial court issues its ruling." Huey-You v. Huey-You, No. 02-16-00332-CV, 2017 Tex. App. LEXIS 8750, 2017 WL 4053943, at *2 (Tex. App.—Fort Worth Sept. 14, 2017, no pet.) (mem. op.); see also Cooper, 544 S.W.3d at 908-09 (collecting cases).

Anderton v. Green, 555 S.W.3d 361, 372 n.4 (Tex. App.—Dallas 2018, no pet.). One court has held that since legal and factual insufficiency points in a bench trial may be raised for the first time on appeal, and this would include a complaint that there is factually insufficient evidence to support an award of fees which equaled the unsegregated amount. *Bos v. Smith*, 2016 Tex. App. LEXIS 2490, *53-54 (Tex. App.–Corpus Christi Mar. 10, 2016) supplemental petition at 2016 Tex. App. LEXIS 3389 (pet. denied); *see also Young v. Terral*, No. 01-14-00591-CV, 2015 WL 8942625, 2015 Tex. App. LEXIS 12422, *14 (Tex. App.–Houston [1st Dist.] Dec. 8, 2015, no pet.). However, the Corpus Court has subsequently held that a failure to segregate complaint in a bench trial must be raised in the trial court, or that complaint is waived. *Allstate Fire & Cas. Ins. Co. v. Rodriguez*, No. 13-18-00616-CV, 2021 WL 3777165, 2021 Tex. App. LEXIS 7095, at *8-9 n.4 (Tex. App.—Corpus Christi Aug. 26, 2021, no pet.hist.)(mem.op.);

(2) a party's failure to comply with the applicable attorney's fee statute. *Enzo Invs., LP v. White*, 468 S.W.3d 635, 651 (Tex. App.-Houston [14th Dist.] 2015, pet. denied) (holding that fees cannot be recovered under TCPRC 38.001 against a partnership); *Coffin v. Bank of Okla*., 2014 WL 198410, 2014 Tex. App. LEXIS 578, *2 (Tex. App.-Dallas Jan. 16, 2014, no pet.). This would also include a complaint that a party failed to present the claim as required by the relevant statute that provides for attorney's fees. *Cannon v. Castillo*, 2014 WL 3882190, 2014 Tex. App. LEXIS 8656, 7-8 (Tex. App.–Eastland Aug. 7, 2014, no pet.). It would also include a complaint that a party failed to serve a copy of an attorney's fee affidavit under TCPR Sec. 18.001(d). *Jamshed v. McLane Express Inc.*, 449 S.W.3d 871, 884 (Tex. App.-El Paso 2014, no pet.);

(3) a complaint that the party did not incur fees, or that fees were excessive. *Tom Bennett & James B. Bonham Corp. v. Grant*, 2015 Tex. App. LEXIS 2639, 85 (Tex. App.–Austin Mar. 20, 2015); *Davis v. Chaparro*, 431 S.W.3d 717, 727 (Tex. App.-El Paso 2014, pet. denied); and

(4) a complaint that the copies of time records supporting the fees were redacted. *Bosch v. Frost Nat'l Bank*, 2015 Tex. App. LEXIS 7481, *18 (Tex. App.–Houston [1st Dist.} July 21, 2015);

(5) a complaint that the jury, and not the judge, should make the finding about reasonable and necessary attorney's fees. *Jefferson County v. Ha Penny Nguyen*, 2015 Tex. App. LEXIS 8052, *74-75 (Tex. App.–Beaumont July 31, 2015);

(6) that there was no evidence to support the jury's award of $-0- in attorney's fees. *Daugherty v. Highland Capital Mgmt., L.P.*, No. 05-14-01215-CV, 2016 Tex. App. LEXIS 9117, *25-27 (Tex. App.–Dallas Aug. 22, 2016, no pet. history). Keep in mind–if you do not object to the failure to award fees at the first trial (including appellate fees), or fail to prove up the same in that trial, there is authority that you cannot pursue that attorney's fee claim at the second trial. *Cimco Refrigeration, Inc. v. Bartush-Schnitzius Foods Co.*, 518 S.W.3d 57, 62 n.9 (Tex. App.—Fort Worth 2015), reversed and remanded 518 S.W.3d 432, 438 (Tex. 2017), reaffirmed on issue on remand, 518 S.W.3d 57, 62 n.9 (Tex. App.—Fort Worth 2015, pet. denied); *Hill v. Premier IMS, Inc.*, No. 01-15-00137-CV, 2016 WL 2745301, 2016 Tex. App. LEXIS 4911, *26-27 (Tex. App. Houston [1st Dist.] May 10, 2016, pet. denied);

(7) an objection that fees are not just or equitable under the Declaratory Judgment Act–and a mere general objection to the award of fees because the other side's arguments lack merits will not preserve an objection as to whether the fee award was equitable or just. *City of Helotes v. Cont'l Homes of Tex., LP*, No. 04-15-00571-CV, 2016 WL 3085924, 2016 Tex. App. LEXIS 5742, *10-11 (Tex. App.–San Antonio June 1, 2016, no pet.);

(8) that the only claim on which the opposing party could recover relief did not allow for the recovery of attorney's fees. *Swinnea v. ERI Consulting Eng'rs, Inc.*, 481 S.W.3d 747, 758 (Tex. App.—Tyler 2016, no pet.); and

(9) the method of calculating fees. *Dias v. Dias*, 2014 Tex. App. LEXIS 12676, 30-31 (Tex. App.–Corpus Christi Nov. 25, 2014).

Also, if you are an attorney ad litem and want your fees, ask for them in the trial court; otherwise, you will not have preserved an objection as to the trial court's failure to award you fees. *In re Estate of Velvin*, 2013 WL 5459946, 2013 Tex. App. LEXIS 12267 (Tex. App.–Texarkana Oct. 1, 2013, no pet.).

C. Constitutional Challenges (and see Due Process, below).

An argument that a client's constitutional rights have been violated must be raised in the trial court or it is not preserved. *Matzen v. McLane*, No. 20-0523, 65 Tex. Sup. Ct. J. 181, 2021 WL 5977218, 2021 Tex. LEXIS 1192, at *25 (Dec. 17, 2021) (held, complaints that a commitment "must be subjected to 'strict scrutiny'" and about the need to "narrowly tailor[]" "infringement of [a] 'fundamental liberty interests" must be raised in the trial court to be preserved.) "Both we and the United States Supreme Court have held that constitutional error was waived in comparable circumstances [i.e., a due process complaint]." *In the Interest of L.M.I.*, 119 S.W.3d 707, 711 (Tex. 2003) *Dreyer v. Greene*, 871 S.W.2d 697, 698 (Tex. 1993); *see also Odyssey 2020 Acad., Inc. v. Galveston Cent. Appraisal Dist.*, 624 S.W.3d 535, 544-45 (Tex. 2021); *In re M.R.*, No. 02-15-00221-CV, 2015 WL 6759249, 2015 Tex. App. LEXIS 11297, *20 (Tex. App.–Fort Worth

Nov. 3, 2015, no pet.). In one respect, error preservation decisions involving constitutional issues are similar to decisions involving attorney's fees: of the more than 30 error preservation decisions in fiscal years 2014 through 2016 which involved a party complaining of a constitutional rights violation, all but two of those decisions held that error had not been preserved because the party had failed to raise the complaint in the trial court.

If the constitutions of this nation or state protect your client, make sure that you say so in the trial court. Those constitutions are the basis of our legal system(s), and if your case involves such complaints, you should never pass up an opportunity to say so.

Having said that, in the criminal sphere–and perhaps carrying over in the related civil area of forfeiture, and beyond–is the concept that the "constitutional prohibition of ex post facto laws has been held to be a *Marin* category-one, 'absolute requirement' that is not subject to forfeiture by the failure to object. *See Ieppert v. State*, 908 S.W.2d 217 (Tex. Crim. App. 1995). *See also Sanchez v. State*, 120 S.W.3d 359, 365-66 (Tex. Crim. App. 2003). On the other hand, an 'as applied' constitutional challenge to a statute's retroactivity is subject to a preservation requirement and therefore must be objected to at the trial court in order to preserve error. *Reynolds v. State*, 423 S.W.3d 377, 383 (Tex. Crim. App. 2014)." *Tafel v. State*, 524 S.W.3d 642, 680 (Tex. App.—Waco 2016)) (Grey, C.J., dissent), reversed and remanded on other grounds, *Tafel v. State*, 536 S.W.3d 517, 523 (Tex. 2017)

D. Continuance.

In fiscal years 2014 through 2016, parties were more effective at preserving error about continuances (or, more accurately, the lack thereof) than they were on all but four of the issues most commonly involving error preservation.

However, it does appear that parties may have let the circumstances surrounding the need for a continuance panic them a little bit in terms of dotting the i's and crossing the t's. For example, parties were more likely to fail to comply with certain mechanical requirements of TRAP 33.1 (untimely complaint, failing to comply with other rules) concerning a complaint about continuances than they were as to any other error preservation category. They were also more likely to fail to comply with the other mechanical requirements of TRAP 33.1 (failure to make a record, failure to get a ruling) than they wee as to all but two of the other issues which commonly involve error preservation fights. So, with that in mind:

- make sure that you comply with the requirements of TRCP 251–i.e., file a written motion, and support it by an affidavit, or make sure that the other party agrees to the continuance, or confirm that the operation of law mandates the granting of a continuance. *M. F. v. State*, No. 03-15-00666-CV, __ WL __, 2016 Tex. App. LEXIS 7106, *4 (Tex. App.–Austin July 7, 2016, pet. denied); *Gonzalez v. Reyna*, 2015 Tex. App. LEXIS 6764, *4 (Tex. App.–Corpus

Christi July 2, 2015); *Wakefield v. Wells Fargo Bank, N.A.*, 2013 WL 6047031, 2013 Tex. App. LEXIS 14018 (Tex. App.-Houston [14th Dist.] Nov. 14 2013, no pet.);

- make sure that you make a record of the hearing on the continuance. *Gonzales*, 2015 Tex. App. LEXIS, *4; *Lane-Jones v. Estate of Jones*, 2014 WL 3587377, 2014 Tex. App. LEXIS 7900, 6-7 (Tex. App.–Houston [14th Dist.] July 22, 2014, no pet.); and
- make sure that you get a ruling from the trial court. *Wilson v. Dorbandt*, No. 03-14-00553-CV, 2016 WL 768143, 2016 Tex. App. LEXIS 1837, *19 (Tex. App.–Austin Feb. 24, 2016, pet. denied); *Gonzales*, 2015 Tex. App. LEXIS 6764, *4; *Brown v. Bank of Am., N.A.*, 2013 WL 6196295, 2013 Tex. App. LEXIS 14494 (Tex. App.–Dallas Nov. 25, 2013, pet. denied). This is always the safe bet, even though courts of appeals do seem to be inclined to find that a trial court implicitly denied a motion for continuance by proceeding with the hearing in which a continuance was sought. *Roper v. Citimortgage, Inc.*, 2013 WL 6465637, 2013 Tex. App. LEXIS 14518 (Tex. App.–Austin Nov. 27, 2013, pet. denied) (memorandum opinion).

And keep in mind–not opposing another party's motion for continuance is *not* the same thing as joining in the motion and asking for the relief, and will not preserve a complaint that the trial court erred by not granting the continuance. *Heat Shrink Innovations v. Medical Extrusion Technologies*, No. 02-12-00512-CV, 2014 WL 5307191, 2014 Tex. App. LEXIS 11494, 25-26 (Tex. App.–Fort Worth Oct. 16 2014, pet. denied).

There was one other indication that parties may have let a sense of panic adversely affect their continuance motions: as compared to "The Average," parties complaining on appeal about a continuance ruling were more likely to pursue a different issue on appeal than was true on all but one other error preservation category (namely, the Jury Charge).

So, for purposes of pursuing a continuance, the lesson here might be to take a moment, make sure you're thinking about all the reasons a continuance should (or should not be) granted, make sure you have complied with TRCP 251, and then make sure you make a record and get a ruling from the trial court. And let the trial court know why the justness of your case will not see the full light of day unless you have a little more time.

E. Discovery.

We do a little worse preserving complaints about discovery than we do with the Average, largely because we don't raise the complaint in the trial court, or fail to do so in a timely fashion and in keeping with specific pertinent rules. So remember, object to the discovery request before the discovery becomes due. *In the Interest of T.J.S.*, No. 05-15-00138-CV, __ WL ___, 2016 Tex. App. LEXIS 8282, *12-13 (Tex. App.–Dallas Aug. 2, 2016, no pet. history); *In re Lowery*, No. 05-14-01509-CV, 2014 Tex. App. LEXIS 13633, 7-8 (Tex. App.–Dallas Dec. 18, 2014, no pet.). If you have not gotten something in discovery which you requested, file and have the motion to compel

heard and ruled on before the pertinent trial or hearing on the motion for summary judgment. *In re Dong Sheng Huang*, 491 S.W.3d 383, 385 (Tex. App.—Houston [1st Dist.] 2016); *Lewis v. Ally Fin. Inc.*, No. 11-12-00290-CV, 2014 Tex. App. LEXIS 13004, 11-12 (Tex. App.–Eastland Dec. 4, 2014, no pet.). If deadlines in rules, statutes, or scheduling order make discovery impossible to comply with, ask for a continuance or to reset deadlines, where possible–otherwise, you will waive your complaint about those deadlines interfering with discovery. *St. Germain v. St. Germain*, No. 14-14-00341-CV, 2015 WL 4930588, 2015 Tex. App. LEXIS 8633, *13-15 (Tex. App.–Houston [14th Dist.] Aug. 18, 2015, no pet.). If you failed timely to disclose discovery or to identify witnesses, ask the court to find that there was good cause timely to supplement the discovery or that the failure would not unfairly surprise or prejudice the other parties–and remember that you have the burden to make that showing. *In the Interest of T.K.D-H*, 439 S.W.3d 473, 478 (Tex. App.–San Antonio 2014, no pet.), TRCP 193.6(a), (b). And, if you do timely object to the production of documents, don't thereafter later offer those documents for production–doing so will render your objection irrelevant. *In re Ramsey*, No. 10-16-00003-CV, 2016 WL 3564407, 2016 Tex. App. LEXIS 6857, *3-4 (Tex. App.–Waco June 29, 2016, no pet. history).

The Supreme Court has recently held that a party can preserve a complaint about the overbreadth and irrelevance of documents sought by the other side by first asserting the same in a response to a motion to compel–assuming, of course, that the first time the pertinent documents were sought was in that motion to compel, and not in a prior request for production. *In re Nat'l Lloyds Ins. Co.*, 507 S.W.3d 219, 223 (Tex. 2016) . But the point here is that the first time you have an objection about any discovery matter, assert the objection.

F. Due Process.

In the three years covered by this study, when error preservation was at issue, only one due process complaint was preserved. The reason the remainder of the complaints were not preserved is that none of them were raised at trial. Only 12.5% of the time did a party asserting a challenged due process complaint get any kind of a favorable judgment on appeal. That makes due process complaints on appeal look, collectively, somewhat desperate. If you have a due process complaint, raise it in the trial court.

G. Evidence.

As mentioned earlier, evidentiary issues have consistently been the single biggest category of error preservation decisions. In addition to the error preservation decisions which involved affidavits (none of which are examined in this section), nearly twelve percent of the error preservation decisions in FYE 2014 through 2016 involved evidentiary rulings (including decisions regarding affidavits raises that number to about 15%). There are at least 190 error preservation decisions in the three years covered by this study that involve evidentiary complaints. Studying those decisions is probably a paper in and of itself. We cannot cover all those decisions here.

Implications of Error Preservation Rulings

But we can fairly say that the dynamics of how we fare on appeal regarding these issues should further incentivize us to try to anticipate, and prepare for, evidentiary problems. Such preparation can help us do two things better:

1) decide whether the evidentiary fight on appeal is worth the powder; and
2) improve our chances at making an evidentiary objection which passes muster on appeal.

Let's take these in order.

Is the fight worth the powder? No one can dispute that both objecting to improper evidence, and defeating an improper objection to your evidence, are important. Not only does such evidence impede, or enable (as the case may be), the telling of your story. Additionally, error preservation practice allows you the opportunity to expound on the justness of your cause. But if we do not anticipate the particular evidentiary fight, then it is forced on us unexpectedly, and we have to react on instinct and fight back. This means that we don't have the time to analyze whether the fight is really worth it in the greater scheme of things. And that go-no go decision on the evidentiary fight is a very important part of the error preservation picture. As Justice Michael Massengale pointed out in a presentation that he and I made at the Advanced Civil Appellate Seminar of the State Bar in 2014, error on appeal "may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." TRE 103(a)(1), entitled "Rulings on Evidence." Also keep in mind that appellate courts:

(1) review a trial court's ruling on evidentiary matters under an abuse of discretion standard;
(2) must uphold the trial court's evidentiary ruling if there is any legitimate basis for the ruling; and
(3) will not reverse a judgment based on a claimed error in admitting or excluding evidence absent a showing that the error probably resulted in an improper judgment.

Willie v. Comm'n for Lawyer Discipline, 2015 Tex. App. LEXIS 2466, 27 (Tex. App–. Houston [14th Dist.] Mar. 17, 2015); see also *In re Heinemann*, No. 09-14-00303-CV, 2016 WL 349119, 2016 Tex. App. LEXIS 880, *3-4 (Tex. App.–Beaumont Jan. 28, 2016, no pet.). That is a very high threshold to cross. It does not mean you should not fight about evidentiary matters in the trial court. But it does mean that, to the extent reasonably possible, you should pick the fights you really want to push on appeal, and avoid the ones that are not worth it.

TRAP 33.1 requires that our complaints in the trial court satisfy the specific pertinent rules and statutes, and Rule 103(a)(1) specifically requires a *timely* objection, "stating the *specific* ground of objection, if the specific ground was not apparent from the context."

In terms of making a specific enough objection concerning evidence, be aware that "'a general objection to an insufficient predicate'" or the fact that you "did not 'think the entire predicate

ha[d] been laid'" does not preserve an objection. *In the Interest of A.A.*, 2013 WL 6569922, 2013 Tex. App. LEXIS 14997 (Tex. App.-Houston [1st Dist.] Dec. 12, 2013, pet. denied); see also *State v. Stockton Bend 100 Joint Venture*, No. 02-14-00307-CV, ___ WL ___, 2016 Tex. App. LEXIS 6167, *40-44 (Tex. App.–Fort Worth June 9, 2016, pet. denied) and *Schreiber v. Cole*, 2015 Tex. App. LEXIS 5098, *15 (Tex. App.–Amarillo May 19, 2015, no pet.).

So, anticipating potential evidentiary problems and challenges will not only help us decide whether the fight will really help our situation, but it also will assist in making sure that, at least on appeal (and perhaps at trial), we win the fights we pick.

Once we decide the fight is worth having, what other problems do we face, in addition to not making our evidentiary objections specific enough? Well:

- **If your evidence is excluded, make an offer of proof**. TRE 103 requires you not only to make that offer but also to make that offer "as soon as practicable, but before the court's charge is read to the jury." Rule 103(b). While " an offer of proof is not a work-around for the foundational requirement that an expert's qualifications be proven," the offer of proof requirement can be satisfied by an oral representation of (for example) an expert's qualifications "referencing page and line numbers of the same deposition testimony they sought to present by video." *Gunn v. McCoy*, 554 S.W.3d 645, 667 (Tex. 2018) Remember, making that offer gives you a free shot at selling your case to the trial court. In FYE 2014 through 2015, roughly 20% of the failures to preserve error concerning evidentiary complaints saw the party fail to make an offer of proof. "Error may be predicated on a ruling that excludes a party's evidence only if the substance of the evidence was made known to the court by the offer, or was apparent from the context within which questions were asked. TRE 103(a)(2); TRAP 33.1 (a)(1)." *In re Commitment of Lovings*, 2013 WL 5658426, 2013 Tex. App. LEXIS 12927, *2-3 (Tex. App.–Beaumont Oct. 17, 2013, no pet.); see also *Polsky v. State*, No. 03-14-00068-CV, 2016 WL 2907975, 2016 Tex. App. LEXIS 5081, *40-41 (Tex. App.–Austin May 13, 2016), pet. granted, jdgmt vacated, remanded for settlement, *Polsky v. State*, No. 16-0747, __WL__, 2017 Tex. LEXIS 460, at *1 (May 12, 2017); *Qui Phuoc Ho v. MacArthur Ranch, LLC*, 2015 Tex. App. LEXIS 9175, *15-17 (Tex. App.–Dallas Aug. 28, 2015). "'To preserve error concerning the exclusion of evidence, the complaining party must actually offer the evidence and secure an adverse ruling from the court.'" *City of San Antonio v. Kopplow Dev., Inc.*, 441 S.W.3d 436, 440-441 (Tex. App.–San Antonio 2014, pet. denied).

- **Get a ruling on your objection**. In roughly ten percent of the error preservation decisions related to evidence, the party failed to obtain a ruling as to its objection. An instruction to 'move along' is not a ruling." *Nguyen v. Zhang*, 2014 Tex. App. LEXIS 9311 (Tex. App.–Houston [1st Dist.] Aug. 21, 2014, no pet.); see also *Qui Phuoc Ho*, 2015 Tex. App. LEXIS 9175, *15-17. Get the judge involved and interactive–the court's ruling on the offer

may give you insight into how to structure the rest of your case.

Finally, keep in mind that a "ruling on a motion in limine preserves nothing for review." *Blommaert v. Borger Country Club*, 2014 WL 1356707, 2014 Tex. App. LEXIS 3682, *6-7 (Tex. App.–Amarillo 2014, pet. denied); see also *Rivera v. 786 Transp., LLC*, 2015 Tex. App. LEXIS 6676, *10-11 (Tex. App.–Houston [1st Dist.] June 30, 2015, no pet.). You must make a timely and specific objection when the offending evidence is offered at trial. *Id.*

H. Expert Witness.

One aspect of error preservation about expert witnesses should put fear in the heart of each of us who offers the testimony of an expert witness: "a party need not object in order to challenge the expert testimony as conclusory or speculative on its face; it need only preserve a challenge to the legal sufficiency of the evidence, which it may do post-verdict." *Pike v. Tex. EMC Mgmt.*, LLC, 610 S.W.3d 763, 786 (Tex. 2020). This would include a complaint that an expert's "assumed sales price per ton has no basis in fact," and that "his projections for years after 2011 were based on unfounded assumptions about the Partnership's sales increase" (*Pike*, at *44), and that an expert's opinions were "baseless and that he ignored his own methodology." *In re Hood*, No. 09-16-00012-CV ___ WL ___. 2016 Tex. App. LEXIS 8751, *12-13 (Tex. App.–Beaumont, Aug. 11, 2016, no pet.). In other words, as is true with affidavit testimony, you may not realize that you have a problem with the conclusory nature of your expert's testimony until it is too late to do anything about it.

Contrast the objection about the conclusory nature of the expert's testimony with the objection that the expert's opinion is unreliable (at least one subset of which is that the expert's methodology is improper). These unreliability objections must be asserted, and a ruling obtained on them, before trial or when the testimony is offered. *Emerson Elec. Co. v. Johnson*, 627 S.W.3d 197, 204 (Tex. 2021) (held, objection that expert failed to opine as to whether the compressor's dangerousness was unreasonable is apparently not included in objection about expert testifying that the compressor was dangerous); *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 787 (Tex. 2020) (a complaint about an expert's "failure to deduct certain costs [when calculating damages for losses] is a challenge to the formula he used to determine EBITDA," and thus is a challenge to the expert's reliability); *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816-81 (Tex. 2009); *In re Guardianship of Westbo*, No. 01-14-00705-CV, 2016 WL 262282, 2016 Tex. App. LEXIS 613, *20-21(Tex. App.–Houston [1st Dist.] Jan. 21, 2016, pet. denied); *Transcon Realty Investors, Inc. v. Wicks*, 442 S.W.3d 676, 681-682 (Tex. App.–Dallas 2014, pet. denied); *Vega v. Fulcrum Energy, LLC*, 415 S.W.3d 481, 490-491 (Tex. App.–Houston [1st Dist.] 2013, pet. denied). This kind of objection would include a complaint that the expert failed to deduct certain operational costs when calculating earnings. *Pike v. Tex. EMC Mgmt., LLC*, 610 S.W.3d 763, 787 (Tex. 2020) . Similarly, if your complaint is that revealing the facts or data underlying the expert's opinion would violate TRE403 (unfair prejudice outweighs probative value)) or TRE 705 (said facts and data are unfairly prejudicial), you must also object at or before the time evidence is admitted, and obtain a ruling on

our objection. *In re Commitment of Brooks*, 2014 WL 989700, 2014 Tex. App. LEXIS 2802, *1 (Tex. App.–Beaumont Mar. 13, 2014, pet. dismissed w.o.j.). For an example of how to preserve a complaint about the reliability of an expert, see *Acadia Healthcare Co. v. Horizon Health Corp.*, 472 S.W.3d 74, 87 (Tex. App.—Fort Worth 2015), affirmed in part and reversed and remanded in part, all on other grounds, 520 S.W.3d 848, 887 (Tex. 2017).

I'll admit that the whole conclusory/reliability spectrum causes my head to hurt. Justice Harvey Brown and Melissa Davis made a presentation at the 2015 Advanced Civil Appellate Seminar, complete with paper, concerning issues related to Expert Witnesses. I would encourage you to get that paper. Hon. Harvey Brown, Melissa Davis, *Eight Gates for Expert Witnesses: 15 Years Later*, SBOT 29th Annual Advanced Civil Appellate Practice Seminar (2015). Justice Brown also has an earlier paper on the subject. Justice Harvey Brown, *Expert Witness, 2012 Update*, SBOT 28th Annual Advanced Personal Injury Course (2012). Additionally you should consider referencing the following materials: Carlos Edward Cardenas, James W. Christian, Michael Emmert, Rebecca Simmons, *How to Effectively Use Expert Witnesses: Expert Witness 2014 Update*, SBOT 31st Annual Litigation Update Institute (2015).

Keep in mind, to be timely, your objection about an expert witness must satisfy a deadline earlier than the trial, if a docket control order sets such an earlier deadline for challenging expert testimony. *Lone Star Engine Installation Ctr., Inc. v. Gonzales*, No. 05-14-01616-CV, 2016 WL 2765079, 2016 Tex. App. LEXIS 5006, *28-29 (Tex. App.–Dallas May 11, 2016, pet. denied) (memo op.).

I. Factual Sufficiency.

In a bench trial, you do not need to raise a factual sufficiency complaint in the trial court *at all*–that is, you can raise it for the first time on appeal. In fact, the Supreme Court has pointed out in the default judgment context that "Texas Rule of Appellate Procedure 33.1(d) specifically offers a defaulting party an appellate remedy to challenge the sufficiency of the evidence in a case tried to the bench...for the first time on appeal"–even if the defaulting party did not assert or was unsuccessful in pursuing a motion for new trial under *Craddock*. *In re Marriage of Williams*, 646 S.W.3d 542, 544-45 (Tex. 2022) (held, trial court's property division was not supported by the evidence, which is a sufficiency challenge that may be raised for the first time on appeal). This is because of "the differences between a sufficiency challenge and a *Craddock* motion;" a "motion under *Craddock* does not attempt to show an error in the judgment; rather, [but] seeks to excuse the defaulting party's failure to answer by showing the Craddock elements," while "a complaint of legally or factually insufficient evidence assails the judgment, seeking to show that it is not supported by evidence presented in the trial court." *In re Marriage of Williams*, 646 S.W.3d 542, 545 (Tex. 2022)

But in a jury trial, you do have to raise the complaint in the trial court, and there is only one

way to preserve a factual insufficiency point in such cases–you *have* to raise it in a *motion for new trial*. *In the Interest of D.T.*, 625 S.W.3d 62, 75 n.8 (Tex. 2021); *L.C. v. Tex. Dep't of Family & Protective Servs.*, 2015 Tex. App. LEXIS 5770, *3-4 (Tex. App.–Austin June 8, 2015); *W. B. v. Tex. Dep't of Family & Protective Servs*., 2014 Tex. App. LEXIS 9173, 1-2 (Tex. App.–Austin Aug. 20, 2014, no pet.); TEX. R. CIV. PRO. 324(b)(3). That may explain the fact that 84% of the time parties fail to preserve a factual sufficiency complaint, they fail: (1) to raise the complaint at all; and/or (2) to comply with the pertinent rule, i.e., Rule 324.

There are also other complaints that can be preserved only through a motion for new trial: that a jury finding is against the overwhelming weight of the evidence; the inadequacy or excessiveness of the damages found by the jury; incurable jury argument (see below); or any complaint on which evidence must be heard, such as jury misconduct, newly discovered evidence, or failure to set aside a judgment by default. TRCP 324(b). We will talk about jury argument in a minute. The other bases which require a new trial motion to preserve error do not come up often enough to be included here.

A lot of times, the last thing you want at the end of the trial is another trial. You've told your story, and you are physically and mentally exhausted. But if the jury got it wrong, you are entitled to another go. In a jury trial, if you think that the evidence is factually insufficient to support the verdict, file a motion for new trial saying so. Once again, this gives you the opportunity to rail about the justness of your case, and how wrong the jury was. Take advantage of that opportunity.

J. Judgment.

There are not many cases dealing with error preservation as to Judgments–it barely made the top sixteen error preservation categories, with only twenty-two decisions in three years. Its rarity may have something to do with the fact that, when Judgment formation time comes around, everyone's focus has really sharpened. The trial or summary judgment hearing has happened and–absent getting the bum's rush–we have had time to think about what to do to wrap it up for the trip to the appellate court. Nonetheless, the fact that error preservation cases about judgments rank in the top sixteen show that we ought to take note of some of the lessons these cases offer.

First, I would argue that, when you prepare your petition or your answer, draft a proposed judgment which outlines all relief you think your client entitled to–and then draft the proposed judgment which you think your opponent would say allows all the relief he/she/they/it are entitled to. It is true that most cases are settled, and the dispositive document for those cases is often just a nonsuit or take nothing judgment. But those cases involve a settlement, and you cannot anticipate what you will need to settle a case if you have not thought about the best case scenario for both parties. For those cases which end with a trial, summary or evidentiary, you will need a judgment to end the case. Your exercise in drafting these judgments will not be wasted–they will tell you where this case may go, and they will inform what you need to do to win, or to preserve error if you

lose.

When you get to the end of the case and the drafting of the judgment which will become effective, think through what you will argue on appeal about why the Judgment is insufficient or incorrect–for example, the judgment gives more relief than was asked for. As a rule, those arguments must be made in the trial court in order to preserve them. *Teri Rd. Partners, Ltd. v. 4800 Freidrich Lane L.L.C.*, 2014 WL 2568488, 2014 Tex. App. LEXIS 5957, 18-19 (Tex. App.–Austin June 4, 2014, pet. denied). The same can be said for an objection that the written judgment does not conform to the judge's earlier oral pronouncements. *In re Marriage of Williams*, No. 14-15-000-90-CV, 2016 WL 2997094, 2016 Tex. App. LEXIS 5426, *2-3 (Tex. App.–Houston [14th Dist.] May 24, 2016). Similarly, if the judgment is merely "voidable" (i.e., is contrary to a statute, constitutional provision, or rule) as opposed to "void" (i.e., the trial court has no jurisdiction), then you must raise that challenge to the judgment in the trial court. In the Interest of M.L.G.J., No. 14-14-00800-CV, __ WL __ 2015 Tex. App. LEXIS 2750, 8 (Tex. App.–Houston [14th Dist.] Mar. 24, 2015, no pet.); *see In re Ayad*, No. 22-0078, __WL __ (Tex. Dec. 16, 2022) (opinion on rehearing). If you want something in the judgment–for example, an attorney's fee award–then you have to ask for it in the trial court, or you will have waived the same. *Kelley/Witherspoon, LLP v. Armstrong Int'l Servs.*, 2015 Tex. App. LEXIS 7720, *14-15 (Tex. App.–Dallas July 27, 2015)

Furthermore, if you are the losing party, always make sure that you never sign a judgment in such a way that waives your right to appeal–I have a friend who will never even approve a judgment as to form only. Having said that, noting such a limitation on your signature probably preserves your complaint, especially if you make it clear that you are objecting to the judgment. *Seeberger v. BNSF Ry. Co.*, 2013 WL 5434141, 2013 Tex. App. LEXIS 12108, *5, 13 (Tex. App.–Houston [1st Dist.] Sept. 26, 2013, pet. denied). Don't think you can agree to something in the Mediated Settlement Agreement and then think you can complain about that on appeal if you don't object to the judgment containing that same language. *Cojocar v. Cojocar*, No. 03-14-00422-CV, 2016 WL 3390893, 2016 Tex. App. LEXIS 6335, *12-13 (Tex. App.–Austin June 16, 2016, no pet.) Be especially careful about signing a document, like an Agreed Order, which consents to an Agreed Judgment. Doing so without reservation, and doing so without withdrawing your prior consent to the Agreed Judgment may waive any right you have to challenge the sufficiency (legal or factual) of the evidence supporting the Judgment. *Gonzalez v. Wells Fargo Bank, N.A.*, 441 S.W.3d 709, 713-714 (Tex. App.–El Paso 2014, no pet.). In a similar vein, if you file a post-judgment motion attacking the judgment, and proposing another judgment, you cannot complain on appeal about judgment language which you included in the form of the judgment you proposed. *Robles v. Mann*, No. 13-14-00211-CV, 2016 WL 1613316, 2016 Tex. App. LEXIS 4135, *15-16 (Tex. App.–Corpus Christi Apr. 21, 2016, no pet.).

There are some really good papers, as well some good things to think about regarding judgment formation. You should get and review those every time you begin creating or reviewing a draft of a judgment. On a pretty routine basis, either the SBOT Advanced Civil Appellate Seminar

or the Appellate Law 101 Seminar include such papers. *See* Justice Brett Busby, Anne Johnson, *Trial Judgment Traps*, SBOT 27th Annual Advanced Civil Appellate Seminar (2013); Anne Johnson, *Translating a Jury Verdict into a Judgment*, SBOT 26th Annual Advanced Civil Appellate Seminar (2012).

K. Jury Argument.

Interestingly, there are also not many cases involving error preservation issues about jury argument. That may reflect the much-discussed decline in jury trials. But the following findings may also indicate that (most of the time) we have in fact given a lot of thought to, and react pretty well to, what should or should not come up in jury arguments:

- the relatively few error preservation decisions about jury arguments–it is the second least common category among the top seventeen, having only 13 decisions in two years; and
- the fact that courts hold that objections about jury arguments were preserved far more often than any of the other most frequent error preservation categories–which, at only a 30% error preservation rate, may be like bragging that one is the least ugly man, but it is still something.

If the jury argument to which you object is curable, you have to assert the objection at the time the argument is made, and ask for an instruction that the jury disregard the argument, or you will waive it. *In re Tesson*, 413 S.W.3d 514, 524 (Tex. App.–Beaumont 2013, pet. denied). If the jury argument at issue is incurable, then you must raise that complaint no later than your motion for new trial, or you will waive it. TRCP 324(b)(5); *In re Lopez*,462 S.W.3d 106, 114 (Tex. App.–Beaumont Apr. 9, 2015, pet. denied); *Cowboys Concert Hall-Arlington v. Jones*, 2014 WL 1713472, 2014 Tex. App. LEXIS 4745, *62 (Tex. App.–Fort Worth May 1, 2014, pet. denied). Not only that, but you must bring forth a record which allows the court of appeals to "consider the record as a whole to determine whether the argument was so extreme as to be incapable of cure." *In the Estate of Davidson*, No. 05-15-00432-CV, __ WL __, 2016 Tex. App. LEXIS 8801, *8-11 (Tex. App.–Dallas Aug. 11, 2016, no pet.). And if you invite the argument of the other side, then you really won't have a complaint on appeal. *In re Dodson*, 434 S.W.3d 742, (Tex. App.-Beaumont 2014, pet. denied). By the way, you can open the door (i.e, invite the other side's jury argument) as early as in opening statement. *Pojar v. Cifre*, 199 S.W.3d 317, 338 (Tex. App.–Corpus Christi 2006, pet. denied).

In terms of what are improper (though perhaps not necessarily incurable) jury arguments, consider re-reading the comment to TRCP 269 (which lists at least 24 improper jury arguments). Where is the dividing line between curable and incurable jury arguments? That discussion is really beyond the scope of this paper. But, generally speaking, incurable jury argument is argument which: (a) by its nature, degree and extent, constitutes such error that an instruction from the court, or

retraction, could not remove its effect; and (b) probably caused rendition of an improper verdict. Bradley M. Whalen, *Opening Statement and Closing Argument*, 4th Annual Advanced Civil Trial Strategies (2015), citing *Living Centers of Tex., Inc. v. Penalver*, 256 S.W.3d 678, 680 (Tex. 2008) (*per curiam*). One court has said that an argument was not incurable if "the argument was not so extreme that a 'juror of ordinary intelligence could have been persuaded by that argument to agree to a verdict contrary to that to which he would have agreed but for such argument.'" *In re Pilgrim*, 2015 Tex. App. LEXIS 6476, *10-11 (Tex. App.–Beaumont June 25, 2015). Here are some examples of incurable jury argument, listed by *Penalver* and reported by Mr. Whalen:

a) likening opposing counsel's arguments concerning limiting damages to a Nazi Germany program under which the elderly were used for medical experiments and murdered;

b) appealing to racial prejudice;

c) unsupported, extreme and personal attacks on opposing counsel and witnesses;

d) accusing opposing counsel of manipulating witnesses in the absence of evidence of witness tampering; and

e) comments which impugn the court's impartiality, equality and fairness.

Id. The following, while objectionable, have been held to not constitute incurable jury argument:

a) referring to an opposing party as a "liar, a cheat, a thief, and a fraud" where there are allegations and some evidence of deceit. *Business Staffing, Inc. v. Viesca*, 394 S.W.3d 733, 749 (Tex. App.–San Antonio 2012, no pet.). *See also In the Estate of Davidson*, No. 05-15-00432-CV, __ WL __, 2016 Tex. App. LEXIS 8801, *8-11 (Tex. App.–Dallas Aug. 11, 2016, no pet.);

b) violating an order in limine not to mention a party's absence from the court house (harmless because a party's absence is obvious). *Id.* at 750;

c) violating an order in limine concerning mention of financial hardship should the jury fail to award damages. Id. at 750;

d) violating an order in limine concerning settlements among parties. *Columbia Med. Center of Las Colinas v. Bush*, 122 S.W.3d 835, 862 (Tex. App.–Fort Worth 2003, pet. denied); and

e) "'inferring that [client] and his attorney . . . were engaged in [] criminal activity' that involved 'funneling payments on the aircraft back to [the attorney's] criminal client." *Tanguy v. Laux*, 2015 Tex. App. LEXIS 6495, *12-17 (Tex. App.–Houston [1st Dist.] June 25, 2015).

See, Whalen, *Opening Statement and Closing Argument*, supra.

L. Jury Charge (including instructions).

The second most numerous category of error preservation decisions involves the jury charge, including instructions. We do better in preserving error on Jury Charge than we do on all but one of the other issues most commonly involved in error preservation fights–but that still means that nearly 80% of the time courts hold that attorneys have not preserved error as to the charge. Nearly

one fifth of the error preservation fights concerning the jury charge find the court of appeals holding that the issue raised on appeal is different than the issue raised in the trial court, and 40% of the time the complaint raised on appeal was not raised at all in the trial court.

I suspect most error preservation problems regarding the charge arise from the difficult nature of the charge itself, combined with the fact that-most of the time-the charge is put together very shortly after the evidence closes. The Supreme Court once said that "the process of telling the jury the applicable law and inquiring of them their verdict is a risky gambit in which counsel has less reason to know that he or she has protected a client's rights than at any other time in the trial." *State Dep't of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 240 (Tex. 1992). *Payne* was an error preservation case under the former TEX. R. APP. P. 52(a), and I believe it was probably the seed bed of the language in Rule 33 which requires our complaints be specific enough to make the trial court "aware" of them. *Id.*, at 241.

What is the answer to preventing these problems with the charge? Goodness knows, we want to avoid these problems. After all, the charge is the place where we get the jury to tell us the facts that confirm the story we have tried to tell. Perhaps, on the difficult or unusual cases, we should schedule the charge conference(s) such that they begin in earnest weeks before the trial starts. We have the ability to make this happen by virtue of scheduling orders which we request from the trial courts. Doing so would address the daunting challenge faced by trial counsel which the Supreme Court noted in *Payne* over twenty years ago:

> The preparation of the jury charge, coming as it ordinarily does at that very difficult point of the trial between the close of the evidence and summation, ought to be simpler. To complicate this process with complex, intricate, sometimes contradictory, unpredictable rules, just when counsel is contemplating the last words he or she will say to the jury, hardly subserves the fair and just presentation of the case. Yet that is our procedure. To preserve a complaint about the charge a party must sometimes request the inclusion of specific, substantially correct language in writing, which frequently requires that even well prepared counsel scribble it out in long-hand sitting in the courtroom.

Id., at 240.

Scheduling your jury charge conferences in advance of the trial will also give you the opportunity to discover what the trial court is inclined to do with your proposed charge, thereby potentially helping you to preserve error. In that regard, consider the following example from the Supreme Court of some pre-trial rulings about spoliation instructions:

> In light of Wackenhut's specific reasons in its pretrial briefing for opposing a spoliation instruction and the trial court's recognition that it submitted the instruction over Wackenhut's objection, there is no doubt that Wackenhut timely made the trial court aware of its

> complaint and obtained a ruling. Under the circumstances presented here, application of Rules 272 and 274 in the manner Gutierrez proposes would defeat their underlying principle. *See Payne*, 838 S.W.2d at 241. Therefore, we conclude that Wackenhut preserved error.

Wackenhut Corp. v. Gutierrez, 453 S.W.3d 917, 920 (Tex. 2015).

The Supreme Court has also recently held that when a party's "objection to the [jury] question and its argument [about that question] in the court of appeals are similar in substance," the party has preserved error. *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp*., 482 S.W.3d 559, 572 (Tex. 2016). And it has also held that when a party "rel[ies] on established precedent" at the charge conference to "request[] that the trial court define" an element (to wit, the "intent" required in an intentional injury workers' compensation charge), the party "preserved error." *Berkel & Co. Contrs. v. Lee*, 612 S.W.3d 280, 284 (Tex. 2020).

If you put an accelerated charge conference schedule in place, however, be ever vigilant as to any indication that the trial court has accelerated the deadline by which you must make your final objections to the charge. In fact, you might want to build a defined deadline for making such final objections into the scheduling order. TRCP 272 allows those objections to be made "before the charge is made to the jury." But if the trial court says something like "[T]omorrow when we come in, I'm not going to mess with this [charge] any further," you may be shut out of making further objections to the charge before the case goes to the jury the next morning. *King Fisher Marine Serv., L.P. v. Tamez*, 443 S.W.3d 838, 842 (Tex. 2014).

There really is no replacement for periodically reviewing the rules governing jury charges (i.e., TRCP 271-279). In a very brief and certainly not exhaustive nutshell, those Rules set at least the following error preservation bars you must clear:

> Rule 272–if you don't make an objection to the charge, it is waived;
> Rule 274–you must point out distinctly the objectionable matter in the charge and the grounds of your objection. Any complaint is waived unless specifically included in the objection.
> Rule 276–submit written instructions, questions, and definitions. Get the trial court to refuse them or to modify them in writing, which fundamentally preserves your objection, etc.
> Rule 278–while you are entitled to a question or instruction for any legally viable claim or defense supported by the pleadings and evidence, you cannot complain about a failure to submit a question unless you submit one in substantially correct wording, and the same is true for the failure to submit instructions or definitions.

In addition to the foregoing thumbnail sketch of this area on which pots of ink have been spilled, here are some examples for you to consider in terms of making your objection sufficiently specific and timely:

Implications of Error Preservation Rulings

- if a broad form question involves valid and invalid theories, make a *Casteel* objection as to form, either by citing *Casteel* (*Acadia Healthcare Co. V. Horizon HealthCorp*., 472 S.W.3d 74, 99 (Tex. App.–Fort Worth 2015, affirmed in part and reversed and remanded in part, all on other grounds, 520 S.W.3d 848, 887 (Tex. 2017) or *Casteel's* test (*Benge v. Williams*, 472 S.W.3d 684, 709 (Tex. App.–Houston [1st Dist.] 2015), aff'd 548 S.W.3d 466 (Tex. 2018); *Burbage v. Burbage*, 447 S.W.3d 249, 258 (Tex. 2014). One court has held that this objection preserves a similar objection as to a question conditioned on the answer to the question which was objected tol *Hulcher Srvs. v. Emmert Indus. Corp.*, No. 02-14-00110-CV, __WL__, 2016 Tex. App. LEXIS 928, *58 (Tex. App.–Fort Worth Jan. 28, 2016, pet. denied).
- mentioning *Casteel* and its progeny, "a defendant must object to both the lack of evidence supporting a claim *and* an apportionment question predicated on more than one ground of recovery." *Emerson Elec. Co. v. Johnson*, 627 S.W.3d 197, 211 (Tex. 2021). Failing to timely object to an apportionment question which covers multiple liability questions waives the *Casteel* objection as to the apportionment question. *Id.*
- if answering one question should be conditioned on the answer to another question, say so, and object if an instruction requiring such conditioning is not included. *Trinity Materials, Inc. v. Sansom*, No. 03-11-00483-CV, 2014 WL 7464023, 2014 Tex. App. LEXIS 13884, *43 (Tex. App.–Austin Dec. 31, 2014, pet. denied); *Bishop v. Miller,* 412 S.W.3d 758, 782 (Tex. App.–Houston 2013, no pet.).
- if the other side improperly failed to segregate the evidence between recoverable and non-recoverable attorney's fees, object to the jury question, and request an instruction to the jury that it apportion attorney's fees among the various claims. *Aon Risk Servs. Southwest v. C.L. Thomas*, 2014 Tex. App. LEXIS 13652, 26-27 (Tex. App.–Corpus Christi Dec. 19, 2014, no pet.); *Metroplex Mailing Servs. v. RR Donnelley & Sons Co.*, 410 S.W.3d 889, 901 (Tex. App.–Dallas 2013, no pet.).
- while *Wackenhut* may give you some protection, you might want to wear both belt and suspenders just to be sure. For example, just because the trial court overruled your pre-trial objection to an instruction, don't stop objecting to it. Object to it every time the judge asks if you have objections, and don't submit proposed instructions on the subject without reservation or condition. *A & L Indus. Servs. v. Oatis,* 2013 Tex. App. LEXIS 13765, *30-31 (Tex. App.–Houston 2013, no pet.).
- if the damage question includes a period of time that was barred in part by the statute of limitations, you must object to the question in that regard. *Kamat v. Prakash*, 420 S.W.3d 890, 909-910 (Tex. App.-Houston [14th Dist.] 2014, no pet.). More broadly, if the damage question submits an improper measure of damages (for example, it fails to take into account the economic loss rule), you must object to that question. *Caldwell v. Wright*, No. 10-14-00244-CV, __ WL __, 2016 Tex. App. LEXIS 8633, *6-9 (Tex. App.–Waco Aug. 10, 2016, extension granted to file petition). An objection is also required to the charge on the grounds that the damage question would allow for a double recovery. *Premier Pools Mgmt.*

Corp. v. Premier Pools, No. 05-14-01388-CV, __ WL __, 2016 Tex. App. LEXIS 8813, *24 (Tex. App.–Dallas Aug. 12, 2016, pet. denied);

- you have to submit a written instruction which you contend should be in the charge (*Lerma v. Border Demolition & Envtl., Inc.*, 459 S.W.3d 695, 700 (Tex. App.–El Paso 2015, pet. denied)) and object as to the failure to include the instruction (*Internacional Realty, Inc. v. 2005 RP West, Ltd.*, 449 S.W.3d 512, 532 (Tex. App.–Houston [1st Dist.] 2014, pet. denied)). Merely submitting a proposed question containing the instruction will not preserve your objection unless the record demonstrates that the trial court ruled on the proposed question. *Irika Shipping S.A. v. Henderson*, No. 09-13-00237-CV, 2014 Tex. App. LEXIS 13550, *22 (Tex. App.–Beaumont Dec. 18, 2014, no pet.). This is especially true if the trial court indicates it is not taking the time to read through objections which were filed. *Shamoun & Norman, LLP v. Hill*, 483 S.W.3d 767, 793 (Tex. App.—Dallas 2016), affirmed in part, reversed in part and remanded, both on other grounds, 544 S.W.3d 724, 744 (Tex. 2018);
- if you feel that a contract did not exist, then object on that basis to the court submitting *any question at all* which asks the jury to find whether a contract was breached. *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.*, 2014 WL 3107507, 2014 Tex. App. LEXIS 5691, 11-17 (Tex. App.-Corpus Christi May 29, 2014), reversed at 482 S.W.3d 559, 571 (Tex. 2016); see also *Martin v. Beitler*, No. 03-13-00605-CV, 2015 WL 4197042 2015 Tex. App. LEXIS 6894, *20 (Tex. App.–Austin July 7, 2015, no pet.).
- your objection must be specific enough to make the trial court aware of your complaint–for example, merely asking to add the phrase "if you find there was a dealer franchise agreement" failed to "give the trial judge fair notice . . . [the party] was requesting a question and isntruction on its affirmative defense of excuse by a prior material breach." *Colo. Cnty. Oil Co. v. Star Tex Distribs., Inc*., No. 14-14-00905-CV, 2016 WL 2743452, 2016 Tex. App. LEXIS 4908, *17-18 (Tex. App.–Houston [14th Dist.] May 10, 2016, no pet.).

With regard to *Gulf Energy*, mentioned above, the Supreme Court reversed the court of appeals on a couple of error preservation issues. As to the holding mentioned above, the Court held that when the objection at trial was "similar in substance" to the issue on appeal and therefore was preserved. *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.*, 482 S.W.3d 559, 572 (Tex. 2016). On another issue, the Court held that error was not waived "by [the defendant] failing to request a definition of good faith in conjunction with the question" which the defendant had submitted on its good faith defense. *R.R. Comm. v. Gulf Energy Exploration*, 482 S.W.3d 559, 571 (Tex. 2016). The requested question "generally tracked the pertinent statutory language" of the good faith defense set out in Tex. Nat. Res. Code §89.045, as the case law required, but the defendant did not "request an accompanying extra-statutory definition" of good faith. *Id.* The Court held that it was "particularly loath to find waiver for failing to propose a definition of a statutory term when no case law provided explicit guidance on what the proper definition of that term should be." *Id.*

If you do face a situation in which a complaint about a jury charge was not raised in the

charge conference, keep in mind that a complaint that a question is immaterial because it asks the jury to answer a question of law does not have to be raised prior to the jury answering the charge. *Park Plaza Solo, LLC v. Benchmark-Hereford, Inc.*, No. 07-16-00004-CV, 2016 Tex. App. LEXIS 11487, at *9 (Tex. App.—Amarillo Oct. 24, 2016).

Finally, take advantage of the "Preservation of Charge Error (Comment)" which you can find in the PJC. COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES: GENERAL NEGLIGENCE, INTENTIONAL PERSONAL TORTS, WORKERS' COMPENSATION PJC 32.1 (2014 ed.).

M. Jury Answers–Conflicting.

While courts do not typically write about this topic, the Supreme Court has muddied, and then clarified, this issue recently, and so we need to cover it here.

Recently, in applying TEX. R. CIV. P. 295, the Texas Supreme Court held that "a party who claims that jury answers fatally conflict must raise that objection with the trial court before the court discharges the jury," and failing to do so waives the objection. *Los Compadres Pescadores, L.L.C. v. Valdez*, 622 S.W.3d 771, 787 (Tex. 2021). That's what I had thought was always the law until April 2018, when a plurality of the Court (with only seven justices sitting) said that while "[g]enerally, a party should object to conflicting answers before the trial court dismisses the jury," the "absence of such an objection, however, should not prohibit us from reaching the issue of irreconcilable conflicts in jury findings." *USAA Lloyd's Co. v. Menchaca*, 545 S.W.3d 479, 526 (2018) (Green, J., plurality, joined by Chief Justice Hecht, Justices Guzman and Brown). The dissent noted that Rule 295 only says that if a purported verdict "is defective, the court *may* direct it to be reformed." *Id.*, at 527 (emphasis in dissent). The dissent said that holding that "the Rule 295 verdict-reformation process is the *only* remedy for conflicting jury answers . . . misconstrues Rule 295, misapplies our precedent, and ignores trial realities, as this case demonstrates." *Id.*, at 527. In discussing various cases in which post-judgment motions challenged allegedly conflicting jury answers, the four justice dissent said that they "do not believe our preservation requirements prevent us from ruling in USAA's favor or even from considering the issue of conflicting jury issues in this case." *Id.*, at 530.

The other three justices participating in the *Menchaca* decision held that "we have long held that a judgment will not be reversed 'unless the party who would benefit from answers to the issues objects to the incomplete verdict before the jury is discharged, making it clear that he desires that the jury redeliberate on the issues or that the trial court grant a mistrial," and applied that same rule to conflicting answers. *Menchaca*, at 519. Having said that, this three justice majority opinion held that, because "of the parties' obvious and understandable confusion over our relevant precedent and the effect of that confusion on their arguments in this case," a "remand is necessary here in the interest of justice," even though error was not preserved and the fatal conflict in the jury answers was

not fundamental error which avoided the need to preserve error. *Menchaca*, at 521.

All of this is to say: if you have an objection about irreconcilably conflicting jury answers, raise that objection prior to the judge dismissing the jury. However, don't be surprised if your opponent raises such a complaint after the dismissal of the jury.

Keep in mind, too: *Menchaca* dealt with "irreconcilable conflicts" in jury answers, not with incomplete jury answers or unresponsive jury answers. In all, I would not advise knowingly failing to object to irreconcilably conflicting jury answers until after the trial court dismisses the jury. You may have three Supreme Court justices on your side (one of the four dissenting justices, Justice Brown, has moved to the Federal district bench), but that strikes me as short of a winning hand. But at least one court of appeals has held–in its reasoned decision denying a mandamus, and over a dissent–that some post-verdict motions may preserve the complaint about conflicting jury answers despite the lack of an objection before the dismissal of the jury. *In re Auto*., No. 08-18-00149-CV, 2020 Tex. App. LEXIS 10387, at *19-23 (Tex. App.—El Paso Dec. 30, 2020, no pet. hist.) (mem. op.).

N. Legal Sufficiency.

In a *bench trial*, one does not need to object as to legal sufficiency in order to preserve a complaint to that effect on appeal. TRAP 33.1(d). That is true, for example, where the parties try the issue of attorney's fees to the court. *Exco Operating Co., LP v. McGee*, No. 12-15-00087-CV, __ WL __. 2016 Tex. App. LEXIS 8934, *2-3 (Tex. App.–Tyler Aug. 17, 2016, no pet.). Therefore, it should come as no surprise that a lot of the error preservation rulings recognize that fact. Just remember, if you are the party with the burden of proof in a non-jury trial, your opponent does not have to object in the trial court to the asserted lack of evidence, and thus you may not have a chance to fix this problem until the appeal, when it is too late to do so. *See* "Factual Sufficiency," *supra*, for a discussion of how a sufficiency challenge can first be raised on appeal to challenge a default judgment, even in the absence of having challenged the default via a *Craddock* motion.

But, when we focus on jury trials, we find that we do no better on preserving error on legal sufficiency claims than we do in The Average. There are numerous ways to preserve a legal sufficiency challenge to a jury verdict. For example, the Supreme Court has recently affirmed that one may preserve a legal sufficiency challenge by making that objection to the jury charge–meaning that it would "evaluate the sufficiency of the evidence against the charge the trial court should have given." *Berkel & Co. Contrs. v. Lee*, 612 S.W.3d 280, 284 (Tex. 2020).. To preserve your legal sufficiency challenge to the jury verdict, you must take advantage of at least one of the means for making that complaint in the trial court:

> After a jury trial, a legal-sufficiency challenge may be preserved in the trial court in one of the following ways: (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. Aero Energy, Inc. v. Circle C Drilling Co., 699 S.W.2d 821, 822 (Tex. 1985). Preservation of a factual-sufficiency challenge requires a motion for new trial. M.S., 115 S.W.3d at 547 (citing Tex. R. Civ. P. 324(b)(2)).

In the Interest of D.T., 625 S.W.3d 62, 75 n.8 (Tex. 2021) ; see also *Dudley Constr., Ltd. v. ACT Pipe & Supply, Inc.*, 545 S.W.3d 532, 542 (Tex. 2018), affirmed in part and reversed and remanded in part, both on other grounds, 545 S.W.3d 532, 542 (Tex. 2018); *In re A.L.P.*, No. 11-15-00011-CV, 2015 WL 5192066, 2015 Tex. App. LEXIS 8817, *11 (Tex. App.–Eastland Aug. 21, 2015, pet. denied). But remember: if you file a motion for directed verdict claiming that there is legally insufficient evidence, and the trial court denies that motion, and then you (or any other party) proceeds to elicit more evidence, you must renew your legal sufficiency complaint by one of the mechanisms recognized in TRCP 324, or you will waive your objection. *In the Interest of A.R.M.*, 2014 Tex. App. LEXIS 3744, *13-14 (Tex. App.–Houston [14th Dist.] Apr. 8, 2014, no pet.).

O. Notice.

Periodically, the Supreme Court reminds us that we waive our complaint about a failure to give or, or inadequacy of, notice of a hearing if we fail to raise that complaint in the trial court. *In the Interest of G.X.H.*, 627 S.W.3d 288, 300 (Tex. 2021).

We tend not to raise a complaint about notice, or not to raise it in a timely fashion or in compliance with specific rules, more often than is true with The Average. "To preserve a complaint of untimely notice under rule 21a, the complaining party must object under that rule, request additional time to prepare for the hearing, and obtain a ruling by the court on each objection or request." *Holland v. Friedman & Feiger*, No. 05-12-01714-CV, 2014 WL 6778394, 2014 Tex. App. LEXIS 12892, 16-17 (Tex. App.–Dallas Dec. 2, 2014, pet. denied). If you participate in a hearing without objecting as to the amount of notice concerning that hearing you will have waived any complaint as to the notice. If you complain you received no notice at all of the hearing (such as notice of submission of a summary judgment motion), you can preserve that complaint by a motion for new trial after the hearing. *Ready v. Alpha Bldg. Corp*., 467 S.W.3d 580, 584 (Tex. App.–Houston [1st Dist.] 2015, no pet.). And keep in mind that sometimes one can pitch a complaint about notice in a way that did not have to be raised in the trial court–for example, in a bench trial scenario, one can challenge the sufficiency of the evidence of notice for the first time on appeal. *Onabajo v. Household Fin. Corp. III*, No. 03-15-00251-CV, __ WL __, 2016 Tex. App. LEXIS 7454, *7 (Tex. App.–Austin July 14, 2016, no pet.).

P. Pleadings.

TRCP 90 provides that you will waive every omission, defect, or fault in a pleading which

you do not specifically point out in writing and bring to the attention of the trial court before the instruction or charge to the jury, or (in a non-jury case) before the judgment is signed. If you have a problem with the other side's pleadings–including their insufficiency, or the failure to allege all conditions precedent to a claim or defense or required notice–then object, except, and get a hearing and ruling on the issue. This would include a complaint about the timeliness of the filing of your opponent's pleading. *Lombardo v. Bhattacharyya*, 437 S.W.3d 658, 663 (Tex. App.--Dallas July 30, 2014, pet. denied). And then, when the trial occurs, object to evidence, claims, and defenses which are not supported by the pleadings. Otherwise, waiting until an appeal to complain about the pleadings will not bear much fruit. If you file a motion to strike a late filed pleading, get a ruling on the motion–or, just as if you failed to file such a motion or to object, you will not preserve your complaint. *Drew v. Elumenus Lighting Corp.*, 2015 Tex. App. LEXIS 4694, 13-14 (Tex. App.–Dallas May 7, 2015, pet. denied).

Furthermore, keep in mind any statutory schemes which may impose a duty on you to file a pleading–such as a plea in abatement if you are a defendant in a defamation claim who has not received a written request for a correction, clarification, or retraction. *Warner Bros. Entm't v. Jones*, 611 S.W.3d 1, 16 n.49 (Tex. 2020)

That leads us to the general rule that your "affirmative defense . . . must be pleaded unless tried by consent. Tex. R. Civ. P. 94." *Loya Ins. Co. v. Avalos*, 610 S.W.3d 878, 882 n.3 (Tex. 2020)) (because the party "raised collateral estoppel for the first time at a summary judgment hearing and said nothing in writing on the matter until their appellate briefing, they forfeited the defense.").

The Court's comment in *Avalos* reminds us to avoid trying an unpleaded issue by consent. Rule 67; *Huth v. England*, No.03-14-00002-CV, 2016 WL 2907922, 2016 Tex. App. LEXIS 4978, *6-7 (Tex. App.–Austin May 12, 2016, no pet.). "Trial by consent applies in the exceptional case where the record as a whole clearly demonstrates that the parties tried an unpled issue. . . . To determine whether an issue was tried by consent, appellate courts 'must examine the record not for evidence of the issue, but rather for evidence of trial of the issue.' *Mastin*, 70 S.W.3d at 154." *In re Estate of Curtis*, 465 S.W.3d 357, 375 (Tex. App.—Texarkana 2015, pet. dismissed). For example, when "the evidence . . .was relevant to a pleaded issue . . . its admission without objection does not demonstrate a 'clear intent' by the parties to try the unpleaded issue of breach of an implied covenant against encumbrances." *Gharbi v. Hemmasi*, No. 03-07-00036-CV, 2015 WL 4746682, 2015 Tex. App. LEXIS 8209, *16-17 (Tex. App.–Austin Aug. 6, 2015, no pet.)

The Discovery Rule presents an especially tricky application of the trial by consent doctrine–if the plaintiff does not plead the Rule, the defendant's summary judgment motion does not have to address it. But if the plaintiff's msj response (or evidence at trial) raises the Discovery Rule, the defendant must complain that the Rule was not pled, and if the defendant fails to do so, it will have waived its complaint about the lack of pleading. *Gonzalez v. Vantage Bank Tex.*, No. 04-21-00285-CV, __WL__, 2022 Tex. App. LEXIS 7876, at *8-9 (Tex. App.—San Antonio Oct.

26, 2022, no pet. h.)(mem.op.)

Q. Sanctions.

I suspect that it is difficult to stay focused when one is accused of sanctionable conduct, but you must do so if you want to preserve error on the various issues involved in a sanctions situation. "A sanctions order is required to state the particulars of good cause supporting sanctions. Tex. R. Civ. P. 13. Failing to object to the form of the sanctions order, however, waives any error." *Grotewold v. Meyer*, 457 S.W.3d 531, 536 (Tex. App.–Houston [1st Dist.] 2015, no pet.), citing *Robson v. Gilbreath*, 267 S.W.3d 401, 407 (Tex. App.—Austin 2008, pet. denied). The failure to object to the lack of particularized findings in the sanctions order will waive the complaint about a lack of such findings. *Estate of Anne Farish Huffhines*, No. 02-15-00293-CV, 2016 WL 1714171, 2016 Tex. App. LEXIS 4469, *29 (Tex. App.–Fort Worth Apr. 28, 2016, pet. denied, rehearing pending). There is at least some authority for the proposition that a "motion for new trial [which] generally alleged that the trial court erred in assessing sanctions but did not detail or address any evidence which [the sanctioned party] believed supported his claims" was not sufficient to preserve error about the lack of the particulars of good cause in the sanctions order. *John Kleas Co. v. Prokop*, No. 13-13-00401-CV, 2015 Tex. App. LEXIS 3162, *34 (Tex. App.–Corpus Christi Apr. 2, 2015, no pet.). But remember–even if you complain that the sanctions order lacks the requisite particularity, just in case you lose on that point, you still must also complain about the excessiveness of the fees or their lack of relation to the alleged sanctionable conduct to raise those points on appeal. *Shops at Legacy Inland v. Fine Autographs & Memorabilia Retail Stores*, No. 05-14-00889-CV, 2015 Tex. App. LEXIS 4724, 6-7 (Tex. App.–Dallas May 8, 2015, pet. denied). When you complain about that excessiveness, you do preserve that complaint. *Nath v. Tex. Children's Hosp.*, 446 S.W.3d 355, 365 (Tex. 2014).

A party successfully preserved error when she "objected to the evidence submitted . . . in support of [the] sanctions request, specifically arguing that fees incurred before the misstatements were not related to her [sanctionable] conduct." *Zuehl Land Dev., LLC v. Zuehl Airport Flying Cmty. Owners Ass'n*, 2015 Tex. App. LEXIS 3979, 29 (Tex. App.–Houston [1st Dist.] Apr. 21, 2015, no pet.). And at least one court has pointed out that a complaint "that there was no evidence to support the imposition of sanctions . . . . may be raised for the first time on appeal." *Wells v. May*, No. 05-12-01100-CV, | 2014 WL 1018135, 2014 Tex. App. LEXIS 1610, *1 (Tex. App.–Dallas Feb. 12, 2014, no pet.). Perhaps the same thing is true for a factual sufficiency complaint in a sanctions proceeding which was entirely a bench trial. TRAP 33.1(d).

R. Summary Judgment.

Here we are at the third of the big three categories of error preservation problems–Summary Judgments. Before launching in to the revelations of fiscal years 2014 through 2016, let me once again recommend to you the previously mentioned resources on summary judgment practice which

you ought to consult: David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 60 S. Tex. L. Rev. 1 (2019) (this is the most recent iteration of this work), and Timothy Patton, *Summary Judgment Practice in Texas*, LexisNexis.

Summary Judgment decisions comprise nearly 7% of all error preservation decisions covered by this paper. If combined with the Affidavit category, which this paper has already addressed, Summary Judgments would account for about 10% of the error preservation decisions studied here.

With regard to summary judgment practice, we are twice as likely to fail to get rulings on objections or to make a record than the "Average," and our objections are more likely than the Average to be untimely or to fail to comply with specific rules. With potentially the entire lawsuit riding on the procedure, coming at a point when everyone has had time to figure out what the lawsuit is about, and with at least some period of time to sit and reflect on what we are doing, why do we do so poorly on these aspects of error preservation in summary judgment practice?

In the first place, the general summary judgment rule, which TRAP 33.1 requires that we satisfy, in itself requires an express presentation of complaints to the trial court:

> The motion for summary judgment shall state the specific grounds therefore. . . . Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.

TRCP 166a©. And in a traditional summary judgment motion, the movant has the "burden to establish conclusively" its entitlement to summary judgment–and summary judgment "'may not be affirmed on appeal on a ground not presented to the trial court in the motion,'" such as one statutory prong on which summary judgment was not sought in the trial court. *Energen Res. Corp. v. Wallace*, 642 S.W.3d 502, 515 (Tex. 2022), *quoting State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010).

You don't have to use language in your appellate briefs identical to what you said in your motion for summary judgment–for example, an appellate argument that one cannot be liable for defamation for "accurately reporting the allegations of chamber members" was preserved by "argu[ing] in its motion for summary judgment that statements in the articles regarding allegations that had been made against [plaintiff] were substantially true." *Scripps NP Operating, Ltd. Liab. Co. v. Carter*, 573 S.W.3d 781, 791 (Tex. 2019), citing Tex. R. Civ. P. 166a©. Similarly, a summary judgment response which argued a homeowners' association "'selectively enforced' its restrictive covenants and failed to engage in 'fair dealing'...in an 'equal and same manner'" preserved a complaint that the HOA arbitrarily enforced its restrictive covenants for purposes of Property Code Section 202.004(a)–even if the non-movant "did not use the words 'arbitrary, capricious, or discriminatory,'" and did not cite the pertinent Code Section and instead cited a provision of the covenants. *Li v. Pemberton*, 631 S.W.3d 701, 704 (2021).

Implications of Error Preservation Rulings

But there are a myriad of issues relating to a summary judgment which you must raise in the trial court in order to preserve them for appeal. Consider the following, and think about how each one would give you the opportunity to sell your case:

● if you contend that you have not had an adequate opportunity for discovery before a summary judgment hearing, you "must file either an affidavit explaining the need for further discovery or a verified motion for continuance." *Kaldis v. Aurora Loan Servs.*, 424 S.W.3d 729, 736 (Tex. App.-Houston [14th Dist.] 2014, no pet.); *Morgan v. BAC Home Loans Servicing, LP*, 2014 WL, 2507661, 2014 Tex. App. LEXIS 5931 (Tex. App.-Houston [1st Dist.] June 3, 2014, no pet.); *Correa v. CitiMortgage Inc*., 2014 WL 3696101, 2014 Tex. App. LEXIS 8029, 3-4 (Tex. App.–Fort Worth July 24, 2014, no pet.)

● if the motion for summary judgment is unclear or ambiguous, challenge it through special exceptions (*Coleman v. Prospere*, 2014 Tex. App. LEXIS 10546, 28-29 (Tex. App.–Dallas Sept. 22, 2014, no pet.)) and if the motion for summary judgment was filed outside the time limits in the scheduling order, make that objection, too (*Wilson v. Colonial County Mut. Ins. Co.*, 2015 Tex. App. LEXIS 4261, 9-10 (Tex. App.–Dallas Apr. 27, 2015, no pet.)).

● if the other side moves for summary judgment on one of your claims which the trial court has already dismissed, you must raise the prior dismissal as an objection in the trial court in order to complain about that issue on appeal. *O'Carolan v. Hopper,* 414 S.W.3d 288, 310-311 (Tex. App.–Austin 2013, no pet.).

● in order to argue on appeal that a document in the summary judgment evidence was irrelevant and inadmissible, you must make that objection in the trial court. *Brown v. Bank of Am., N.A.*, 2013 WL 6196295, 2013 Tex. App. LEXIS 14494, *8 (Tex. App.—Dallas Nov. 25, 2013, pet. denied); *Hernandez v. Gallardo*, 458 S.W.3d 544, 547 (Tex. App.–El Paso 2014, pet. denied) (same, hearsay); *Weeks v. Bank of Am., N.A.*, 2014 WL 345633, 2014 Tex. App. LEXIS 1093, *13 (Tex. App.–Fort Worth Jan. 30, 2014, no pet.) (same, hearsay objection); *Johnson v. McDaniel*, 2014 Tex. App. LEXIS 5705 (Tex. App.-Amarillo May 28, 2014, no pet.) (same, lack of authentication). You also must get a ruling on your objection. *Hernandez v. Gallardo*, 458 S.W.3d 544, 547 (Tex. App.–El Paso 2014, pet. denied). Generally speaking, as pointed out with regard to affidavits, defects in substance may be raised for the first time on appeal, but defects as to form must be raised in the trial court or they are waived. *Id.*.; *Seaprints, Inc. v. Cadleway Props.*, 446 S.W.3d 434, 441 (Tex. App.–Houston [1st Dist.] 2014, no pet.).

● You have to get a ruling on your objections to summary judgment evidence. While a "trial court's on-the-record, unequivocal oral ruling on an objection to summary judgment evidence qualifies as a ruling under Texas Rule of Appellate Procedure 33.1, regardless of whether it is reduced to writing," and because "a reporter's record of such a [summary judgment] hearing is generally unnecessary for appellate purposes," "the best practice for a party objecting to summary

judgment evidence is to secure a written order on the objection from the trial court." *Fieldturf United States v. Pleasant Grove Indep. Sch. Dist.*, 642 S.W.3d 829, 838 (Tex. 2022)

● remember to refer to what this paper said, above, about affidavits, because your summary judgment practice will undoubtedly include affidavits, and the objections thereto.

● get a ruling on your objections to summary judgment evidence *before* the rendition of summary judgment. *Johnson v. Bank of Am., N.A.*, 2014 Tex. App. LEXIS 11900, *9 (Tex. App.–Beaumont Oct. 30 2014, no pet.). And remember, the trial court can render summary judgment before it signs an order on the motion. Additionally, you should have the court rule on your objections "at, before, or very near the time the trial court rules on the motion for summary judgment." *Marhaba Partners Ltd. P'ship v. Kindron Holdings, LLC*, 457 S.W.3d 208, 217 (Tex. App.–Houston 14th Dist. 2015, pet. denied). Do not assume that the court of appeals will presume that the trial court's granting or denial of a motion for summary judgment implies a ruling on your objections. *See* Patton, *Summary Judgments in Texas*, §6.10[4][e]. Some courts will presume such a ruling (Fort Worth); some will not (Austin, Beaumont, El Paso, Houston [14th] Dallas, Tyler); and some have gone both ways (Houston [1st and 14th], Waco, Texarkana, Corpus Christi). *Id.* No appellate court wants to have to deal with your leaving this situation unclear, and at best it will not inure to your benefit to do so. Get a ruling.

● if the trial court sustains the other side's objections to your summary judgment evidence, make sure that you have either responded to the other side's objection, or that you object to that ruling on the record and get a ruling on your objection–and it certainly wouldn't hurt to do both. *McMordie v. McMordie*, No. 07-14-00393-CV, 2015 WL 4536614, 2015 Tex. App. LEXIS 7702, *10 (Tex. App.–Amarillo July 24, 2015, pet. denied); *Villejo Enters., LLC v. C.R. Cox, Inc.*, No. 04-19-00882-CV, 2021 WL 185528, 2021 Tex. App. LEXIS 371, at *7 (Tex. App.—San Antonio Jan. 20, 2021, no pet.) (memo op.) *Cunningham v. Bobby Anglin*, 2014 WL 3778907, 2014 Tex. App. LEXIS 8416, 7-9 (Tex. App.–Dallas July 31, 2014, pet. denied); *Montenegro v. Ocwen Loan Servicing, LLC*, 419 S.W.3d 561, 568-569 (Tex. App.-Amarillo 2013, pet. denied).

● if a witness statement is not sworn to, you must object to it on that grounds to preserve the complaint for appeal. *Gonzalez v. S. Tex. Veterinary Assocs*., 2013 WL 6729873, 2013 Tex. App. LEXIS 15215, *9-10 (Tex. App.–Corpus Christi Dec. 19, 2013, pet. dism'd w.o.j.)

● if the trial court sustains the other side's motion to strike your response as late filed, object to that ruling and have the court rule on your objection. *Dotson v. Tpc Group*, 2015 Tex. App. LEXIS 2385, 9 (Tex. App.–Houston [1st Dist.] Mar. 12, 2015, no pet.);

● if you move for leave to file an affidavit late, get the motion heard and ruled on (before the summary judgment hearing), but don't set it for hearing after the summary judgment hearing, and then cancel the hearing on your motion for leave after the MSJ is granted. *Bailey v. Respironics,*

Inc., 2014 WL 3698828, 2014 Tex. App. LEXIS 8003, 22-23 (Tex. App.–Dallas July 23, 2014, no pet.).

● if you fail to get an order from the trial court granting or denying your no-evidence motion for summary judgment, you will fail to have preserved error as to the trial court's failing to grant your motion. *Cantu v. Frye & Assocs., PLLC*, 2014 WL 2626439, 2014 Tex. App. LEXIS 6384, 36-37 (Tex. App.-Dallas June 12, 2014, no pet.).

● if the trial court grants a summary judgment that exceeds the scope of the motion to which it is directed, you must raise that complaint in the trial court. *Haubold v. Medical Carbon Research Inst.*, 2014 WL 1018008, 2014 Tex. App. LEXIS 2863, *7 (Tex. App.-Austin Mar. 14, 2014, no pet.). The same is true if the other side files a motion to modify asking the trial court to enter a summary judgment order that grants more relief than was requested in the summary judgment motion. *Vanderpool v. Vanderpool*, 442 S.W.3d 756 (Tex. App.–Tyler 2014, no pet.).

● The Discovery Rule presents a tricky situation–if the plaintiff does not plead it, the defendant's summary judgment motion does not have to address it. But if the plaintiff's msj response raises the Discovery Rule, the defendant must complain that the Rule was not pled, and if the defendant fails to do so, it will have waived its complaint about the lack of pleading. *Gonzalez v. Vantage Bank Tex.*, No. 04-21-00285-CV, 2022 Tex. App. LEXIS 7876, at *8-9 (Tex. App.—San Antonio Oct. 26, 2022, no pet. h.)(mem.op.)

While we must raise all the foregoing complaints in the trial court in order to preserve them, we know that there are some kinds of complaints which do not have be raised in the trial court in order to preserve them for appeal. Such complaints are few in number, but let's look at some examples of them. These complaints show us the kinds of things movants must do correctly, because their opponents can lay behind the log until the appeal, when it is too late for the movant to correct the deficiency:

● if you file a no-evidence motion for summary judgment, you must specify the element or elements of the claim or defense as to which you claim there is no evidence. A no-evidence motion which fails to do so "is insufficient as a matter of law and does not require an objection." *Jose Fuentes Co. v. Alfaro*, 418 S.W.3d 280, 288 (Tex. App.—Dallas 2013, pet. den.); see also *Corral-Lerma v. Border Demolition & Envtl. Inc.*, 467 S.W.3d 109, 120 (Tex. App.–El Paso 2015, pet. denied), vacated and remanded in part on other grounds by supplemental opinion, 474 S.W.3d 481, 482 (Tex. App.—El Paso 2015).

● as movant in a traditional summary judgment, you must make sure that your summary judgment evidence "prove[s] [your] entitlement to judgment as a matter of law on a traditional summary-judgment ground." *Thu Binh Si Ho v. Saigon Nat'l Bank*, 438 S.W.3d 871, 872-873 (Tex. App.–Houston [14th Dist.] July 22, 2014, no pet.); see also *Auz v. Cisneros*, 477 S.W.3d 355, 359

(Tex. App.–Houston 14th Dist. 2015, no pet.). This is a different question from whether a particular piece of evidence should not have been admitted because it did not prove the elements necessary to recover on the cause of action. *Id.* Put another way, the non-movant can challenge "the legal sufficiency of the evidence supporting summary judgment" for the first time on appeal. *Direct Adver., Inc. v. Willow Lake, LP*, No. 13-14-00212-CV, __ WL __, 2016 Tex. App. LEXIS 3542, *8-9 (Tex. App.–Corpus Christi Apr. 7, 2016, no pet.); *Murray v. Pinnacle Health Facilities XV*, 2014 WL 3512773, 2014 Tex. App. LEXIS 7642, 6-8, n. 4 (Tex. App.– Houston [1st Dist.] July 15, 2014, pet. denied).

● And remember, as a movant on a traditional summary judgment: "'Summary judgment may not be affirmed on appeal on a ground not presented to the trial court in the motion.'" *Energen Res. Corp. v. Wallace*, 642 S.W.3d 502, 515 (Tex. 2022), *quoting State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010) (holding that lack of actual knowledge as a ground for a traditional msj was not raised by a traditional motion which sought judgment because "Chapter 95 applied to plaintiffs' claims and that [defendant] neither exercised nor retained control over plaintiffs work under section 95.003(1).")

● as movant, be sure to file all of your evidence on time, or obtain leave of court to file evidence late. Failing to do one of those two things leaves you vulnerable on appeal to a complaint that your evidence should not have been considered. *Alphaville Ventures, Inc. v. First Bank*, 429 S.W.3d 150, 154-155 (Tex. App.-Houston [14th Dist.] 2014, no pet.).

A complete absence of authentication of evidence is a defect of substance which may be raised for the first time on appeal. *Hernandez v. Gallardo*, 458 S.W.3d 544, 547 (Tex. App.–El Paso 2014, pet. denied). There is a conflict as to whether a failure to attach sworn or certified copies of documents referenced in an affidavit filed in support of or opposition to a motion for summary judgment is a defect in form, not substance, that is waived by the lack of an objection in the trial court. Yvonne Ho, *Preservation of Error: Percolating Appellate Conflicts*, SBOT 6th Annual Advanced Trial Strategies Course (2017).

S. Zoom trials.

I don't know how often we will see preservation problems revolving around Zoom trials–it seems clear that we will see Zoom trials, and certainly Zoom hearings, in the future. I think the watchword here is, if you have an objection to being forced into a Zoom trial or a hearing, make all your objections in a sufficiently specific manner as soon as you can and get a hearing and ruling on the same–even if your objection is based on the constitution. Early cases indicate the failure to do so will waive your complaint. *In re M.A.A.*, Nos. 04-22-00186-CV, 04-22-00187-CV, 04-22-00188-CV, __ WL__, 2022 Tex. App. LEXIS 8098, at *7-8 (Tex. App.—San Antonio Nov. 2, 2022, no pet. h.); *In the Int. of J.C.N.*, No. 05-21-01163-CV, 2022 WL 1284169, 2022 Tex. App. LEXIS 2894, at *12-13 (Tex. App.—Dallas Apr. 29, 2022) (A party cannot complain on appeal that

the trial court took a specific action the complaining party requested."); *In re D.B.S.*, No. 05-20-00959-CV, 2021 WL 1608497, 2021 Tex. App. LEXIS 3153, at *14 (Tex. App.—Dallas Apr. 26, 2021) (no. pet. hist.) (held, in part, "Although the trial court indicated an understanding that Mother would prefer an in-person hearing, the objection did not apprise the court of the complaint made on appeal that the Confrontation Clause required an in-person hearing. We conclude the constitutional issues raised on appeal were not preserved in the trial court.")

7. Some Unusual Error Preservation Situations You Will Never See–Until You Do.

Having dealt with the most common error preservation problems, we will wrap up by dealing with a few unusual error preservation situations, the kind of thing that you might practice your entire career and not see. Which means these things have no importance to you at all–until you do see them.

If you need to disqualify opposing counsel on a conflicts basis, file the motion to do so as soon as the conflict becomes apparent to you. This advice holds true no matter what your grounds for disqualification. As soon as the grounds "became apparent" to you–which will always be a fact specific situation–move for disqualification. *In re Trujillo*, 2015 Tex. App. LEXIS 11394, *4-5 (Tex. App.-El Paso Nov. 4, 2015, no pet. h.). Cases indicate that waiting even 4 to 8 months will waive the disqualification. *Id.*, citing "*Buck v. Palmer*, 381 S.W.3d 525, 528 (Tex. 2012) (unexplained delay of seven months amounted to waiver); *Vaughan v. Walther*, 875 S.W.2d 690, 691 (Tex. 1994) (delay of six and a half months constituted waiver); *Enstar Petroleum Company v. Mancias*, 773 S.W.2d 662, 664 (Tex. App.–San Antonio 1989, orig. proceeding)(finding waiver where party waited four months to file motion to disqualify)." Three and a half months may not be too long to wait to file the motion to disqualify-if the rest of the facts surrounding the delay are in your favor-but why run the risk. *See In re Kahn*, No. 14-15-00615-CV, 2015 Tex. App. LEXIS 12199, *6-7 (Tex. App.–Houston 14th Dist. Dec. 1, 2015) (orig. proceeding). File your motion promptly.

If you intend to challenge the granting of a motion for new trial, file your petition for mandamus as soon as possible. Waiting seventeen months to file a mandamus challenging the granting of a new trial is too long. Laches will bar your petition. There are even cases which have held that delays of four to six months result in laches barring the mandamus. *In re Timberlake*, No. 14-15-00109-CV, 2015 Tex. App. LEXIS 12279, *6 (Tex. App.-Houston [14th Dist.] Dec. 3, 2015) (orig. proceeding).

If your opponent files an affidavit before trial asserting the reasonableness and necessity of their attorney's fees, don't thank them for the free discovery. Instead, challenge the affidavit in compliance with TEX. CIV. PRAC. & R. CODE §18.001. Otherwise, you may not get to cross-examine the other side's lawyer about the reasonableness and necessity of their fees. One court has even held that a complying affidavit can prove up the reasonableness and necessity

of fees on appeal. *Hunsucker v. Fustok*, 238 S.W.3d 421, 432 (Tex. App.–Houston [1st Dist.] 2007, no pet.). If your opponent fails to timely serve an attorney's fee affidavit, you must raise that complaint in the trial court or you will waive it. *Jamshed v. McLane Express Inc.*, 449 S.W.3d 871, 884 (Tex. App.–El Paso 2014, no pet.).

8. How Error Preservation Plays Out in the Various Courts of Appeals.

Our various courts of appeals have no discretion as to which cases they decide and which they do not–they are not courts of discretionary jurisdiction. So perhaps we should title this section "Decisions We Force On the Various Courts of Appeals." But let's take a look at these dynamics, and see what guidance they may offer in terms of how we raise or defend against error preservation arguments.

A. Error Preservation Land–a dark and foreboding place.

If you look at Appendix 2, you will see a table which compares and contrasts the error preservation practices of the various courts of appeals for FYE 2014. Appendix 3 does the same thing for the combined FYE 2014 through 2016. So comparing Appendix 3 to Appendix 2 gives you a feel for which way the trend went after 2014.

If you study the two tables, you also become aware of the danger which accompanies a trip to Error Preservation Land, regardless of the court. Even the brightest spots are dismally foreboding, and the darkest are places from which almost no one returns.

1. Avoid Error Preservation Land. It is an unforgiving place. Very, very, very few safely pass through it in any court.

Two courts–Beaumont, on its non-Sexually Violent Predator cases, and Corpus Christi-Edinburg–held that error was preserved, or that a complaint did not have to be raised in the trial court to raise it on appeal, more than 25% of the time. Five courts–Amarillo, El Paso, Fort Worth, Houston 1st, and San Antonio–held that error was preserved or could be raised for the first time on appeal between 20-25% of the time. Each of the remaining 7 courts hold that error is preserved (or can be raised for the first time on appeal) a smaller percentage of the time. Eastland did so 10% of the time, Waco 5.4% of the time.

Those are poor chances of success. These statistics just underscore the need to evaluate whether you have preserved error–or had to–before raising an issue on appeal. If at least 70% of the time even the most lenient court will find that your complaint cannot survive an error preservation challenge, Error Preservation Land is not a forgiving or promising place to visit.

2. Parties in one court seem to find themselves in Error Preservation Land far

more often than do parties in other courts.

Nearly a third of the civil cases decided on the merits in the Fourteenth Court in Houston involve error preservation issues. That's about fifty percent more than any other court of appeals, including that of its sister Houston First Court right across the hall. I don't know why that is, or what you can do about it, other than to be especially careful to vet your appeal for preservation issues before filing an appeal that might end up in that court. One other study does indicate that the Fourteenth Court may more strictly monitor its gates concerning permissive interlocutory appeals than the First Court, indicating that perhaps it views the various appellate thresholds as being higher than does the First Court. Rich Phillips and Justice Jane Bland pointed out that, at least through the first five years or so of permissive interlocutory appeals, the First Court was about three times as likely to accept a permissive appeal as was the Fourteenth Court. *See* Phillips, Richard B., Jr., and Bland, Justice Jane, *Strategies for Certified Interlocutory Appeals in State Court*, The University of Texas School of Law 26th Annual Conference on State and Federal Appeals (2016), pp. 6-7. The First Court allowed permissive interlocutory appeals 27% of the time (4 out of 15), while the Fourteenth Court only accepted such appeals about 10% of the time (1 out of 21).

As Cliff Robertson said in playing Cole Younger in *The Great Northfield Minnesota Raid*, it is a wonderment.

At first glance, it appears that Beaumont sees a greater percentage of its decisions on the merits involve error preservation than does any other court of appeals. However, if you eliminate the cases involving the commitment of sexually violent predators, the percentage of its decisions which involved error preservation would be about 9.3%, only about 2/3 the average of all the courts of appeals. I think it's legitimate here to eliminate those cases from any analysis involving the Beaumont Court. Why? Because in FYE 2015 and 2016, Beaumont handed down all but one of such SVO decisions coming out of the courts of appeals, and in none of those decisions did Beaumont hold that error had been preserved.

Like the Houston 1st Court, four of the other courts–El Paso, Dallas, Fort Worth, and Tyler–deal with error preservation in about 20% of their civil decisions on the merits. Six of the remaining eight courts do so on about 13-17% of civil cases decided on the merits. The two exceptions to the foregoing categorization are Beaumont (as to its Non-Sexually Violent Offender cases) and San Antonio, in which only about 9-11% of the civil cases involve error preservation.

3. For all but two of the courts, TRAP 33.1 will guide your journey through Error Preservation Land at least two-thirds of the time–but the increasing number of error preservation decisions may be causing a downward trend in that tendency.

All but two of the courts expressly invoked and follow the light of TRAP 33.1 in at least 60%

of their trips through Error Preservation Land. Those two courts are the Houston 14th and San Antonio, which both expressly invoke TRAP 33.1 in at least 55% of their error preservation rulings.

A court's failure expressly to invoke TRAP 33.1 in addressing an error preservation question does not necessarily make its decision wrong. For example, if the particular objection in question did not comply with the requisites of another pertinent rule, like TRCP 272, *et seq*, for a jury charge matter or TRCP 166a for a summary judgment question, and it was on that basis that the court resolved the matter, then there was probably no harm in failing to mention TRAP 33.1. It is possible that the court addressed a general error preservation question without mentioning TRAP 33.1, but it was clear the court followed the directives of that Rule.

Having said that, it does bear considering whether to distinguish authority cited by your opponent which does not rely on TRAP 33.1. I won't go into the bases for that argument here, but you can see some of observations I have for that point in a prior paper on the subject. *See* Steven K. Hayes, *Conversations With the Court: A Theme for Preserving Error Under TEX. R. APP. P. 33.1*, SBOT 28th Annual Advanced Civil Appellate Practice Course (2014), pp. 30-36.

And having said that, I will also say this: if you decide to challenge whether the other side has preserved error on a particular issue, it behooves you to tether your challenge to TRAP 33.1, for two reasons: (1) it's legally correct to do so; and, at least as important, if not more so (2) courts have shown that they are *more than twice as likely to find that error was preserved if they do not invoke TRAP 33.1 in their error preservation analysis*. *See* Appendix 3.A (Error Preserved 18.4% of the time when TRAP 33.1 is not invoked, compared to 8.9% of the time when it was).

4. There are some complaints which you can raise for the first time on appeal.

You might want to review the paper Heidi Bloch presented at the Advanced Civil Appellate Seminar in 2015 for her take on some things that can be raised for the first time on appeal. *See* Elizabeth G. "Heidi" Bloch (presenter) and Jennifer Buntz (author), *Unwaivable Error and Argument That Still Work Even if You Think of Them for the First Time on Appeal*, SBOT 29th Annual Advanced Civil Appellate Practice Course (2015). During the 2014-2016 time frame, courts have found that about one in twenty issues which involve error preservation did not have to be raised below to be pursued on appeal. As you evaluate your appeal and the issues you will pursue, if you think you have hit upon something that is particularly strong that was arguably not raised below, screen it through the following filters before discarding it:

- lack of jurisdiction, one component of which can be standing. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445-46 (Tex. 1993); *Legarreta v. Fia Card Servs., N.A.*, 412 S.W.3d 121, 124 (Tex. App.–El Paso 2013, no pet.); *but see Pike v. Texas EMC*, 610 S.W.3d 763, 778 (Tex. 2020) ("challenging [a party's] ability to recover the lost value of its interest in the Partnership" is a challenge to capacity, and "is not a matter of constitutional standing that implicates

subject-matter jurisdiction" which may be first raised on appeal) *Jefferson Cty. v. Jefferson Cty. Constables Ass'n*, 546 S.W.3d 661, 666 (Tex. 2018) (held, "illegality [of a contract] is an affirmative defense to a claim, not an impediment to a party's standing to assert it. Tex. R. Civ. P. 94."). At a recent (Summer 2021) airing of the State Bar's *Texas Supreme Court Update CLE* webinar, Professor Wayne Scott critiqued the idea that standing is a jurisdictional issue, pointing out that standing was not considered jurisdictional until *Tex. Ass's. of Bus. V. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex. 1993), when the Supreme Court held "standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury."

- so long as the inadequacy of notice appears on the face of the record, failure to give the notice of trial required by Rule 245 in the context of a post-appearance default judgment is a complaint which can be first raised on appeal. *Fifteen-Thousand One-Hundred Ninety-Six Dollars & Forty-One Cents in United States Currency v. State*, No. 03-16-00015-CV, 2016 Tex. App. LEXIS 12294, at *3-8 (Tex. App.—Austin Nov. 18, 2016);
- the judgment is "void" (i.e., the trial court has no jurisdiction) as opposed to merely "voidable" (i.e., is contrary to a statute, or constitutional provision or rule) . *In the Interest of M.L.G.J.*, No. 14-14-00800-CV, __ WL __ 2015 Tex. App. LEXIS 2750, 8 (Tex. App.–Houston [14th Dist.] Mar. 24, 2015, no pet.). A subcategory of this issue is the temporary injunction order which fails to comply with the mandatory requirements of rule of civil procedure 683, which most courts of appeal hold creates a void order that can be challenged for the first time on appeal. *Freedom LHV, LLC v. IFC White Rock, Inc.*, No. 05-15-01528-CV, 2016 WL 3548012, 2016 Tex. App. LEXIS 6837, *4-5 , citing *El Tascaso, Inc. v. Jireh Star, Inc.*, 356 S.W.3d 740, 744-745 (Tex. App.–Dallas 2011, no pet.) "(collecting cases)." *See also* concurring opinion of Chief Justice Frost in *Hoist Liftruck Mfg. v. Carruth-Doggett, Inc.*, 485 S.W.3d 120, 124 (Tex. App.–Houston [14th] 2016, no petition), for positions of various courts of appeals and rationale for changing the law.
- The ambiguity of a contract, at least in the context of appealing from the granting of a motion for summary judgment. *KSWO TV Co. v. KFDA Operating Co., LLC*, 442 S.W.3d 695, 704 (Tex. App.—Dallas 2014, no pet.). However, if the appeal follows a judgment based on a verdict or trial to the court, there is some difference of opinion as to whether ambiguity may be first raised on appeal, outside the trial by consent context. *See Crow-Billingsley Stover Creek, Ltd. v. SLC McKinney Partners, L.P.*, No. 05-09-00962-CV, 2011 WL 3278520, 2011 Tex. App. LEXIS 5986, at *23 (Tex. App.—Dallas Aug. 2, 2011, no pet.), commenting on *Sage St. Assocs. v. Northdale Constr. Co.*, 863 S.W.2d 438, 444 (Tex. 1993)
- mootness–whether that mootness existed, but no one complained about it, at the trial court level, or whether the mootness occurred after the case went up on appeal. *Speer v. Presbyterian Children's Home*, 847 S.W.2d 227, 229 (Tex. 1993); *In the Interest of J.J.R.S.*, 627 S.W.3d 211, 225 (Tex. 2021);
- most versions of sovereign immunity *Rusk State Hospital v. Black*, 392 S.W.3d 88 (Tex. 2012). This would include an argument that "there is no evidence that [plaintiff] had a good-faith, reasonable belief that she engaged in a protected activity under the TCHRA" because "for those suits where the plaintiff actually alleges a violation of the TCHRA" the "Legislature has waived immunity." *San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 136 (Tex. 2015);

●attacks on void orders;

●defects in the substance of affidavits. As discussed earlier, these defects include:

(1) that statements in an affidavit are conclusory. *Coward*, at 5-6; and

(2) that the evidence in the affidavit is legally insufficient. *Bastida*, 444 S.W.3d at 105; and

(3) the failure to authenticate a report, as mentioned earlier. *Kolb*, at 9-11.

(4) There is a conflict as to whether a failure to attach sworn or certified copies of documents referenced in an affidavit filed in support of or opposition to a motion for summary judgment is a defect in form, not substance, that is waived by the lack of an objection in the trial court. Yvonne Ho, *Preservation of Error: Percolating Appellate Conflicts*, SBOT 6th Annual Advanced Trial Strategies Course (2017).

●questions about the judge's authority to hear the case, etc. *Sparkman v. Phillips*, 2015 Tex. App. LEXIS 2512, 4-5 (Tex. App.-Tyler Mar. 18, 2015);

●in a bench trial, legal and factual sufficiency points may be raised for the first time on appeal. TRAP 33.1(d). In addition, an attack on the legal sufficiency of the grounds for summary judgment raised by a movant–such as an attack on the legal sufficiency of the evidence respecting damages–may be raised for the first time on appeal. *Direct Adver., Inc. v. Willow Lake, LP*, No. 13-14-00212-CV, __ WL __, 2016 Tex. App. LEXIS 3542, *8-9 (Tex. App.–Corpus Christi Apr. 7, 2016, no pet.);

●the failure of the summary judgment motion to specify the ground on which a summary judgment is based. *Sanchez v. Roberts Truck Ctr. of Tex., LLC*, No. 07-17-00213-CV, ___ WL ___, 2018 Tex. App. LEXIS 8213, at *3-4 (Tex. App.—Amarillo Oct. 9, 2018, no pet. h.)

●a complaint that an expert's testimony is "wholly conclusory, is essentially a no-evidence claim; consequently, it is the type of claim that an appellant may raise for the first time in his appeal." *In re Dodson*, 434 S.W.3d 742, 750 (Tex. App.-Beaumont 2014, pet. denied);

●a new rule of law announced after the trial court's decision;

●fundamental error. However, if you intend to pursue a fundamental error argument, be aware of the following:

> In light of the strong policy considerations favoring the preservation-of-error requirement, the Supreme Court of Texas has called the fundamental-error doctrine 'a discredited doctrine." *See id.* [*20] At most, the doctrine applies when (1) the record shows on its face that the court rendering the judgment lacked jurisdiction, (2) the alleged error occurred in a juvenile delinquency case and falls within a category of error on which preservation of error is not required, or (3) when the error directly and adversely affects the interest of the public generally, as that interest is declared by a Texas statute or the Texas Constitution. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006); *In the Interest of B.L.D.*, 113 S.W.3d at 350-51.

In the Interest of M.M.M., 428 S.W.3d 389, 398 (Tex. App.–Houston [14th Dist.] 2014, pet. denied); see also *Cisneros v. Cisneros*, No. 14-14-00616-CV, 2015 Tex. App. LEXIS 2352, 4-6 (Tex. App.–Houston [14th Dist.] Mar. 12, 2015);

●a constitutional violation if the constitutional violation was not recognized before the case was appealed. *GM Acceptance Corp. v. Harris Cty. Mun. Util. Dist. #130*, 899 S.W.2d 821, 823 (Tex. App.—Houston [14th Dist.] 1995, no writ), citing *Jones v. Martin K. Eby Constr. Co.*, 841 S.W.2d 426, 428 (Tex. App.–Dallas 1992, writ denied). Under this "right not recognized' rule, failure to present a constitutional challenge to the trial court is excused if: 1) the claim was so novel that the basis of the claim was not reasonably available; or 2) the law was so well settled that an objection would have been futile. *Id*. If the Supreme Court has granted a petition on a related issue, the constitutional issue does not fall within this exception. *Id*.;

●In an administrative law context, typically one has to raise one's complaint before the administrative agency/at the administrative level in order to challenge the ruling of the administrative body/judge on that issue. However, this is not true if the agreement governing one's complaint does not place that issue within the purview of the administrative agency. *In the Interest of P.L.*, No. 07-18-00157-CV, 2018 WL 4039230, 2018 Tex. App. LEXIS 6770, at *4-8 (Tex. App.—Amarillo Aug. 23, 2018, pet. denied) (memo op.); or

●when the other side just doesn't notice that you have argued something your party did not argue below (the waiver of waiver). I would not count on this last one happening very often.

For other instances of such error, *see* Martin Seigel, *How to Beat Waiver Arguments*, 28 TEXAS LAWYER 12, June 18, 2012, at 22.

5. Your complaint at trial must be sufficiently specific–but what exactly does that mean?

TRAP 33.1 provides that you must make your complaint at trial with "sufficiently specific to make the trial court aware of the complaint." That begs the question of when a complaint is "sufficiently specific."

I have another paper that addresses this topic in far greater detail. Steven K. Hayes, *Conversations With the Court: A Theme for Preserving Error Under TEX. R. APP. P. 33.1*, SBOT 28th Annual Advanced Civil Appellate Practice Course (2014), pp. 42-44. There are several tests used by the courts in determining whether a complaint was, or was not, sufficiently specific. Most recently, the Supreme Court expressly applied the specificity requirement of TRAP 33.1 to hold that arguing that "arbitration was appropriate because the claims asserted . . .arose out of the agreement and [the other side] should not avoid arbitration after receiving the agreement's economic benefits" was "'sufficiently specific[] to make the trial court aware of the [direct-benefits estoppel] complaint.'" *Bonsmara Nat. Beef Co. v. Hart of Tex. Cattle Feeders*, 603 S.W.3d 385, 400 n.26 (Tex. 2020). In a case which did not invoke Rule 33.1, the Supreme Court has indicated that when the charge objection at trial is "similar in substance" to the issue on appeal it will be sufficient. *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.*,482 S.W.3d 559, 572 (Tex. 2016). In another case which failed to mention Rule 33.1, the Court has held that a complaint was sufficient even though "it does not specify every reason" to support it. *Arkoma Basin Exploration Co. v. FMF Assocs.*

1990-A, Ltd., 249 S.W.3d 380, 388 (Tex. 2008) (held, motion for new trial asserting that evidence was legally insufficient to support damage award preserved error. Trial court had ordered a remittitur) (but, *see below*, for how courts of appeals have held complaints not preserved based on *Arkoma*' language decrying "stock objections" and exhalting the "cardinal rule" of preservation–i.e., "an objection must be clear enough to give the trial court an opportunity to correct it.'").

Nor does a party's failure to cite case law in the trial court preclude the party from relying on that case law on appeal, when the party's "trial-court arguments expressed the basic rationale for the objection" supported by the case law. *Comm'n for Lawyer Discipline v. Cantu*, 587 S.W.3d 779, 781-82 (Tex. 2019). And the Supreme Court has subsequently noted that "parties are free to construct new arguments" in support of unwaived issues properly before the court," commenting that "an 'issue' is a 'point in dispute between two or more parties.' Issue, BLACK'S LAW DICTIONARY (10th ed. 2014)." *State Office of Risk Mgmt. v. Martinez*, 539 S.W.3d 266, 273 (Tex. 2017); *see also Adams v. Starside Custom Builders, LLC,* 547 S.W.3d 890, 896 (Tex. 2018) (held, the complaining party "was not required on appeal or at trial to rely on precisely the same case law or statutory subpart that we now find persuasive"), citing *Greene v. Farmers Ins. Exchange*, 446 S.W.3d 761, 764 n.4 (Tex. 2014), a property insurance case. The Supreme Court continues to rely on *Greene* to confirm that, "while we do not consider unraised issues, 'parties are free to construct new arguments in support of issues properly before the Court,'" *N. E. Indep. Sch. Dist. v. Riou*, 598 S.W.3d 243, 252 n.36 (Tex. 2020). In *Riou*, the party arguing that she preserved a complaint "acknowledges that she 'did not expressly specify that the good cause per se standard was the wrong legal standard' before the school board. But she maintains she nonetheless 'argued against the sufficiency of the evidence used to support the [hearing examiner's] recommendation,'" which the Court held was an "argument [that] supports Riou's larger position that the Commissioner's decision lacks substantial evidence—a position she has maintained at every stage." *Id.*, at 252-253. The Supreme Court has held that a complaint was sufficiently specific–without mentioning TRAP 33.1–when the complaint at trial "included arguments that reasonably match the contentions carried forward in this appeal, including the arguments we ultimately find dispositive," and, while the complaints "did not have to fully elaborate the Teachers' argument....[t]hey adequately captured the essence of the timeliness argument the Teachers later advanced in more detail in the courts. This was sufficient to preserve error in this context" of whether teachers had timely filed their proceeding with the administrative agency. *Davis v. Morath*, 624 S.W.3d 215, 227 (Tex. 2021). And the Court has recently reaffirmed that "new arguments" can be first raised on appeal:

> This Court has 'often held that a party sufficiently preserves an issue for review by arguing the issue's substance, even if the party does not call the issue by name.' *St. Joh`n Missionary Baptist Church v. Flakes*, 595 S.W.3d 211, 214 (Tex. 2020). In the same vein, parties on appeal need not always 'rely on precisely the same case law or statutory subpart' on which they relied below. *Adams v. Starside Custom Builders, LLC*, 547 S.W.3d 890, 896 (Tex. 2018). And while appellate courts 'do not consider issues that were not raised . . . below,' parties may 'construct new arguments in support of issues' that were raised. *Greene v.*

> *Farmers Ins. Exch.*, 446 S.W.3d 761, 764 n.4 (Tex. 2014). These principles have been applied in reviewing grants of summary judgment. *See Scripps NP Operating, LLC v. Carter*, 573 S.W.3d 781, 791 (Tex. 2019); *Nath*, 446 S.W.3d at 365.

Li v. Pemberton Park Cmty. Ass'n, 631 S.W.3d 701, 704 (Tex. 2021) (footnotes omitted).

Here are some other tests invoked by the various courts of appeals, in cases in which they almost universally hold that the complaint was *not* sufficiently specific:

- Multiple courts of appeal have invoked language from the Supreme Court's decision in *Arkoma*–which, as set out above, held that a legal sufficiency complaint in a motion for new trial preserved error–to hold a complaint was *not* preserved. *See*, *Tex. Constr. Specialists, L.L.C. v. Ski Team VIP, L.L.C.*, No. 14-20-00124-CV, 2022 Tex. App. LEXIS 1475, at *23-24 (Tex. App.—Houston [14th Dist.] Mar. 3, 2022, no pet. hist.)(mem.op.) (held, complaint that TCPRC Sec. 38.001 did not allow fee recover against an LLC not preserved by a Chapter 38 objection about failure to segregate fees, quoting *Arkoma* at 387: "'[T]he cardinal rule for preserving error is that an objection must be clear enough to give the trial court an opportunity to correct it.'"); *In re Foster*, No. 03-21-00203-CV, 2022 Tex. App. LEXIS 1549, at *5-9 (Tex. App.—Austin Mar. 4, 2022) (held, complaint based on another state's law not preserved by a "general no-evidence point" challenging a single jury finding, quoting *Arkoma*'s "cardinal rule" language and "'stock objections may not always preserve error.'")

- whether the argument on appeal "comports with" the argument at trial. *L.H. v. N.H.*, NO. 02-15-00116-CV, 2015 WL 7820489, 2015 Tex. App. LEXIS 12319, *8 (Tex. App.–Fort Worth Dec.3, 2015).
- whether a complaint "specifically relates to" what was raised in the trial court. *Pointe West Ctr., LLC v. It's Alive, Inc., Pointe W. Ctr., LLC v. It's Alive, Inc.*, 476 S.W.3d 141, 148 (Tex. App.—Houston [1st Dist.] 2015, pet. denied); *see also Pitts & Collard, L.L.P. v. Schechter*, 369 S.W.3d 301, 312 (n. 5) (Tex. App.– Houston [1st Dist.] 2011, no pet.) (dicta);
- whether the issues on appeal were "sufficiently similar" to the complaint at trial in order to be preserved. *Wilson v. Deutsche Bank Trust Co. Americas*, No. 01-12-00284-CV, 2014 Tex. App. LEXIS 9463, 8-9 (Tex. App.-Houston [1st Dist.] Aug. 26, 2014, no pet.); or
- whether "those expressions [used at trial] do not accurately capture their argument" made on appeal. *Kamat v. Prakash*, 2014 Tex. App. LEXIS 881, *35-36 (Tex. App.-Houston [14th Dist.] Jan. 28, 2014, no pet.);
- when the "complaint on appeal does not match the objection made in the trial court." *In re Commitment of Born*, No. 02-19-00272-CV, 2020 WL 6788213, 2020 Tex. App. LEXIS 8974, at *32 n.10 (Tex. App.—Fort Worth Nov. 19, 2020 no pet.) (memo op.) (a hearsay objection is not preserved by a complaint that evidence was "speculative," nor by a complaint that it was irrelevant).

However, one court held that a party could pursue a complaint on appeal even though the party did "not articulate the complaint in the same way [in the trial court] as they do on appeal." *SCC Partners, Inc. v. Ince*, 496 S.W.3d 111, 118 (Tex. App.—Fort Worth 2016, pet. dismissed).

Courts usually do not base their error preservation rulings on a lack of, or sufficient, specificity. The other elements of error preservation draw far more attention than specificity. It is maddeningly hard to find a specificity holding when you need one. You might check out my other paper (mentioned above) as a starting point, or search for the foregoing standards (and cases that cite the foregoing authority) to see what pops up.

B. There may be something about a given court's docket that we must allow for in analyzing its tendencies.

We've already talked about some characteristics of the courts of appeals in the foregoing sections. I will not necessarily repeat those comments here, but I will try to make a few observations about each court, below. Remember, none are very forgiving on error preservation, a couple seem to deal with error preservation much more than the others, and all of them invoke TRAP 33.1 on the majority of their error preservation decisions–with all but a couple invoking TRAP 33.1 in the vast majority of their decisions. So consider the following sections of the paper against that background.

Furthermore, to the extent there are variations between the courts of appeals, we may need to ask if there is some docket-driven explanation for those variations. For example: the Sexually Violent Predator component of the Beaumont Court's docket, discussed above. To get a more accurate picture of the Beaumont court for most civil cases, we need to eliminate the SVP component of the Beaumont court's docket.

Additionally, we might need to try to adjust for the effect, if any, on the analysis of a court's tendencies from cases transferred pursuant to docket equalization. I've run out of steam to try to identify, and adjust the analysis for, cases the Supreme Court transferred from one court to another for docket equalization purposes. But, for FY 2015 and 2016, I looked at certain types of cases which are not subject to transfer for docket equalization purposes–i.e., arbitration cases, cases seeking dismissals in healthcare liability claims related to expert reports, Citizen Participation Act cases, and parental right termination cases. It appears that TRAP 33.1 is not invoked as frequently in error preservation decisions in those kinds of non-transferable cases as it is in all error preservation decisions (52.7% v. 64.25%). Appendix 3.D. That might explain why the analysis in this paper would show that a transferor court invoked TRAP 33.1 less frequently than a transferee court, but it would not explain why a court was less inclined to invoke TRAP 33.1 in non-transferrable cases. In error preservation decisions in the aforementioned non-transferable cases, courts held that error was preserved a little less frequently in non-transfer as transfer cases (9.6% to 11.4%). *Id*.

Implications of Error Preservation Rulings

But the transferor/transferee message here is a little muddled–if we look at the tendencies of courts of appeals related to error preservation, we find (with a couple of minor exceptions) that both transferor and transferee courts are above and below the average, for any given tendency, in proportion to the percentage of all courts above and below average, and as in proportion to the relative numbers of transferor and transferee courts. See Appendix 3.C.

So I'm not sure what to say about the transfer docket factor, other than to speculate that it might signal parties are a little less adept than normal at preserving error in cases leading to interlocutory appeals.

If anyone has a suggestion as to reasons why the tendencies vary between courts of appeals, let me know and I'll see if I can drill down on it. But, otherwise, the search for the needle in fourteen haystacks will await some future epiphany.

C. Specific tendencies which may affect how you brief error preservation issues in the various courts of appeals.

In prior versions of this paper, I tried to come up with something specific to say about all the courts of appeals. But, as indicated above, the fact of the matter is that the courts are, other than as set out above, remarkably similar to each other. When you start approaching an error preservation issue in a specific court of appeals, I would encourage you to view the tendencies shown on the spreadsheet in Appendix 3 to see if there is some tendency, specific to your court, which might influence your decision as to how to frame your error preservation challenge or defense, or that might direct your research in that court for specific authority.

9. And what of the Supreme Court?

I have profiled four years of merits opinions issued by the Supreme Court which involved error preservation. The four years ended August 31, 2014-2017. I have identified 39 merits opinions which addressed error preservation issues, involving 42 rulings on error preservation issues. In terms of spotting trends, that's not much of a population. Most of the Court's error preservation holdings are not striking, though some are. Before getting to those holdings, I want to look at some tendencies of the Court. While every case stands and falls on its own merits, I do think some of the Court's tendencies over the last three or four years seem so pronounced that they bear mentioning. I believe they will help you decide whether to pursue an appellate issue with error preservation problems.

A. The Supreme Court's error preservation tendencies and error preservation conflicts among the courts of appeals: Prisms through which you should view a potential appellate issue with an error preservation problem.

Implications of Error Preservation Rulings

I do not know what percentage of the Court's cases involve an error preservation issue. Quite frankly, I don't have enough time to make that determination–one would need to examine every petition and response for error preservation arguments. Maybe some day I'll do that, or maybe Don Cruse will develop an algorithm which does it automatically. But if we look at the merits opinions which the Court issues, including those in which the Court addresses error preservation, we can glean some guidance as we try to decide whether to pursue certain appellate issues with potential error preservation problems. In fact, I think you should evaluate the pursuit of an appellate issue with error preservation problems through two prisms:

1) the tendencies of the Court, as reflected in this paper; and

2) the really fine work reflected in Yvonne Ho, *Preservation of Error: Percolating Appellate Conflicts*, SBOT 6th Annual Advanced Trial Strategies Course (2017). It will help you identify preservation issues where a split of authority exists–thereby perhaps enhancing the likelihood the Supreme Court might take your case.

Knowing the Supreme Court's tendencies as to error preservation, and the error preservation topics which the Supreme Court might need to address to resolve disagreements among courts of appeals, will help you evaluate the likelihood that an error preservation problem will preclude the Supreme Court addressing an appellate issue–or a case involving such an issue–on the merits.

1. First, a pet peeve: Why in the world does the Supreme Court only cite Rule 33.1 in less than one-third of the cases in which it addresses error preservation? Is it because practitioners don't invoke Rule 33.1 in their briefing?

For some reason, in more than seventy percent of its merits decisions which address error preservation, the Supreme Court does not cite TRAP 33.1. It only cited Rule 33.1 in 11 merits opinions, that I found, which is only about 28% of its 39 merits opinions in which it addressed error preservation. That is less than half the rate at which courts of appeals cite Rule 33.1 in their error preservation cases. *See* Section 7.A.3, *supra*. The Rule was promulgated by the Court, and the Court should expressly invoke it in every error preservation decision, if for no other reason than to promote uniformity in any area–error preservation–which affects about 20% of the civil cases going through the courts of appeals, and 10% of the Supreme Court's merits opinions.

For all I know, the fault is ours. Perhaps we practitioners with error preservation issues before the Court need to make sure that we invoke and apply Rule 33.1 in our error preservation briefing. At some ethereal level, our failure to invoke Rule 33.1 might hamstring the Court from invoking it on its own, to avoid discussing that which the parties have not raised. Perhaps we all need to remember to invoke Rule 33.1, which was adopted 20 years ago after much thought to carry on a rule-based tradition to error preservation now more than three-quarters of a century old. Steven K. Hayes, *Conversations With the Court: A Theme for Preserving Error Under TEX. R. APP. P. 33.1*,

Implications of Error Preservation Rulings

SBOT 28th Annual Advanced Civil Appellate Practice Course (2014), pp. 22-29.

Rant over. On to more helpful stuff.

2. The Big Four: Half of the Court's error preservation rulings have involved jury charge, exemplary damages, summary judgment, or jurisdiction.

We should take note of things that happen more than half the time. Doing so gives us a road map which is more likely than anything else to get you where you want to go. Four areas–jury charge, summary judgment, exemplary damages, and jurisdiction–accounted for over half of the cases and issues in which the Supreme Court addressed error preservation in a merits opinion. To wit: 21 of the Court's 39 error preservation cases (54%), and 24 of the Court's 42 error preservation rulings (57%). The Court only addressed the remaining error preservation issues once or twice each during the four year period. When identifying issues which you might want to pursue, even though they have error preservation problems, these four bear keeping in mind as the most likely the Court will address in a merits opinion. Here is the breakdown:

Preservation Issue	**Cases (%)/ Issues(%)***
Jury Charge	9(23.4%)/ 12(28%)
Summary Judgment	6(15%)/ 7(17%)
Exemplary Damages	3(7.7%)/ 3(7.1%)
Jurisdiction	3(7.7%)/ 3(7.1%)

* 39 total merits opinions involving error preservation, 42 total preservation issues in those opinions.

Interestingly, you will recall that jury charge and summary judgment were two of the four topics which most frequently involved error preservation challenges in the courts of appeals. *See* Section 4.A, Table 3, *supra*.

3. The mere presence of an error preservation issue will not dissuade the Court from writing a merits opinion.

The Office of Court Administration determines the "Granted Petitions for Review Finally Disposed Of" by the Supreme Court for each fiscal year. In comparing the number of merits

opinions which involve error preservation decisions to that "Granted/Disposed" number for the last four fiscal years,[2] we see that a couple of years only about 6% of the Court's merits opinions dealt with error preservation, while in a couple of years about 17-18% of its merits opinions addressed error preservation. The four year average was 11.8%:

Fiscal Year Ending 8/31	% of Merits Opinions Involving Error Preservation
2014	16.7%
2015	6.6%
2016	6.3%
2017	18.5%
Avg.	11.8%

So, the mere presence of an error preservation issue to dissuade the Court from taking a case it wants to write on. As the numbers below show, however, the cases the Court does write on do not generally have error preservation issues which preclude them writing on the substantive issues. So the numbers show that you should not shy away from presenting an issue which may face a preservation challenge–but you should make sure that you will win that preservation fight.

4. As you might expect with a court of discretionary jurisdiction, when the Court writes an opinion on the merits, it usually holds that error was not waived below.

In two-thirds of its error preservation rulings in merits opinions, the Court held that error had been preserved, or that the complaint could be first raised on appeal. The breakdown was as follows:

- error was preserved in 52.4% of those rulings;
- error could be first raised on appeal in another 14.3% of those rulings;
- a combined total of 66.7% of the Court's error preservation rulings held error had not been waived.

---

[2] I got the number for FYE 2017 from Pam Baron, pending OCA's report for the year.

Implications of Error Preservation Rulings

Those numbers held constant whether the party claiming that error was preserved was: the petitioner (error not waived in 75% of error preservation rulings); the plaintiff (ditto, 64.3%); or the defendant (same, 67.9%). Only when the respondent claimed that it had not waived error did the non-waiver rulings dip to a 50-50 proposition. Unless otherwise mentioned, you can find the table reflecting the foregoing numbers at Appendix 4.1.

These results should not surprise. One would not think the Court would hear oral argument on a substantive issue which faced an insurmountable preservation hurdle. So, if the Court sets the case for oral argument, you should assume the odds are against the Court holding that a party asking for relief failed to preserve error, and take that into account when you prepare for argument, and further evaluate your case.

5. If the Supreme Court sets the case for oral argument, Plaintiffs facing an error preservation challenge do not fare well on the merits–especially on the four most common error preservation topics addressed by the Court.

If you examine Pam Baron's last paper on the subject, she concluded that (for the fiscal years ending 2014-2016) the Court reversed in about 80% of its merits-based opinions. Pamela Stanton Baron, *Texas Supreme Court Docket Update 2016*, State Bar of Texas 30th Annual Advanced Civil Appellate Practice Course (2016), p. 2.

Does the presence of an error preservation issue impact the likelihood of reversal? I don't know–I did not compile reversal rates in cases involving error preservation to compare with Pam's overall numbers. But I did look at parties which faced error preservation challenges, and how often those parties won on the merits in merits-based opinions, at least for the three fiscal years ending 2015-2017 (which partially overlaps Pam's three years). For those three years, the party facing an error preservation challenge won outright on the merits, or won in significant part on the merits, about sixty percent (61.5%) of the time. Sixty percent of the petitioners facing error preservation challenges won on the merits, and 63.6% of such respondents won on the merits. Unless otherwise mentioned, you can find the table reflecting the foregoing numbers at Appendix 4.2.

But the foregoing generalizations only emphasize how poorly plaintiffs fare on opinions on the merits when facing error preservation challenges in the Supreme Court, at least when the plaintiff is also a respondent. For the three fiscal years 2015-2017, when plaintiffs faced error preservation challenges, they won (or won significantly) on the merits only 40% of the time. This abysmal performance is mostly attributable to how poorly plaintiffs who were respondents performed on the merits when they faced an error preservation challenge–those parties won on the merits only 23.1% of the time. Defendants which faced error preservation challenges, on the other hand, won (or won significantly) on the merits three quarters of the time. *Id.*

You might ask how this compares to how plaintiffs fared in the courts of appeals, as

compared to defendants. Over the two years I've finished compiling (FYE 2015 and 2016), plaintiffs and defendants fared remarkably similarly in the courts of appeals–defendants found themselves the subject of error preservation challenges about twice as often as plaintiffs (roughly 618 cases to 332 cases) but both types of parties either preserved error, or presented an issue which could first be raised on appeal, about the same: 19.4% of the time for plaintiffs, and 19.8% of the time for defendants. The two parties also won or won in significant part about the same–roughly 25.8% of the time for plaintiffs, and roughly 30% of the time for the defendants. Appendix 3.E shows the break down.

The point of all this is that plaintiffs–or at least plaintiffs who are respondents–fare far worse in the Supreme Court than do defendants. If you represent a plaintiff respondent which faces an error preservation challenge on appeal, you face long odds of winning on the merits in the courts of appeal–but you those odds shine like a beacon on the hill compared to your odds in the Supreme Court.

B. Specific error preservation holdings.

1. The Big Four: Jury charge, summary judgment, exemplary damages, and jurisdiction.

As to the Big Four (jury charge, exemplary damages, jurisdiction, and summary judgment), any numbers or percentages you see below are for the entire four years of the study period–i.e., FYE 2014-2017.

A. Jury Charge

The current test for whether a complaint is specific enough–i.e., made "with sufficient specificity to make the trial court aware of the complaint" (TRAP 33.1(a)(1)(A)–finds its roots in a jury charge case about a quarter century ago. *State Dep't of Highways & Public Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992) ("There should be but one test for determining if a party has preserved error in the jury charge, and that is whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling."). As pointed out above, *Payne* discussed the difficulties presented by preserving a complaint about the charge, and opined that "preparation of the jury charge . . . ought to be simpler." *Id.*, at 240.

1. The Court seems a little more preservation-friendly as to the jury charge–a legacy of *Payne*?

Perhaps it is appropriate, or telling, that a quarter century after *Payne* and twenty years after the adoption of TRAP 33.1 the Supreme Court continues to deal with preservation of charge error more than any other preservation topic; in the four years of the study, it held that error was preserved

the vast majority of the time. Only three times that I found did the Court hold that a party did not preserve a complaint about the charge–and two of those opinions were handed down on the same day. *J&D Towing, LLC v. Am. Alternative Ins. Corp.*, 478 S.W.3d 649, 678 (Tex. 2016); *Burbage v. Burbage*,447 S.W.3d 249, 258 (Tex. 2014); *King Fisher Marine Serv., L.P. v. Tamez*, 443 S.W.3d 838, 847 (Tex. 2014). In those three instances a defendant claimed it had preserved error; in one case the party facing the error preservation challenge won on the merits, for the most part (*Burbage*); in two cases that party (the petitioner, both times) lost on the merits (*J & D Towing*; *King Fisher*).

During the four years of the study, about three quarters of the time, the Court held that charge error had not been waived. *See BP Am. Prod. Co. v. Red Deer Res., LLC* 526 S.W.3d 389, 402 (Tex. 2017); *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 482 (Tex. 2017); *USAA Tex. Lloyds Co. v. Menchaca*, No. 14-0721, 2017 Tex. LEXIS 361, at *6 n.8 (Tex. Apr. 7, 2017), withdrawn on rehearing on other grounds but reaffirmed as to this point, 545 S.W.3d 479, 487 n.8 (Tex. 2018); *Brady v. Klentzman*, 515 S.W.3d 878, 885 (Tex. 2017); *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.*, 482 S.W.3d 559, 572 (Tex. 2016); *Wackenhut Corp. v. Gutierrez*, 53 S.W.3d 917, 918 (Tex. 2015).

2. The things that caused the Court to hold a party did not preserve charge error.

The Court's most impactful holding from the 2014-2017 era that charge error was *not* preserved came in *King Fisher*. In *King Fisher*, the Court held that the party failed to preserve charge error by failing to comply with an unobjected-to, trial court-imposed deadline for objecting to the charge which was earlier than established by Rule 272. *King Fisher*, 443 S.W.3d at 847. That holding was a specific topic of conversation in several CLE programs that occurred in the immediate post-2014 time frame. The other two cases in which the Court held that a party did not preserve charge error were not particularly earth-shattering. In those cases, the Court held that:

- failing to assert a "*Casteel*-type objection to form" or a "specific objection to the submission of" questions about damages waived a complaint about "impermissibly combin[ing] valid and invalid theories of liability . . . [in] the broad-form damages question." *Burbage*, 447 S.W.3d at 258.

(As an aside, at the writing of this paper, the Supreme Court has heard oral argument in, but not yet decided, *W&T Offshore Inc. v. Wesley Fredieu*, case number 18-1134 from Harris County and Houston's 14th Court of Appeals. A couple of the issues in that case (according to Osler McCarthy's summation of the issues) are: (1) whether by failing to object to a broad-form borrowed-employee submission W&T waived error; and (2) whether such an employee's status is always a legal determination for the court. The trial court granted W&T's motion for judgment despite the verdict, ruling the borrowed-employee question to be one of law, not fact, but the appeals court reversed. *Fredieu v. W&T Offshore, Inc.*, 584 S.W.3d 200, 222 (Tex. App.—Houston [14th Dist.] 2018, pet. granted 2/14/20, oral arg. conducted). We will see whether the Supreme Court weighs in on the need

to object to a broad-form jury submission, and whether this case involved such a submission.)

- in a case where it was not entirely clear to me whether the pertinent complaint related to "the jury charge or the amount of the damages" or both, the Court held that "attack[ing] only the legal availability of loss-of-use damages" in the trial court did not preserve an argument "that a remand was necessary to determine the proper amount of loss-of-use damages." *J&D Towing, LLC v. Am. Alternative Ins. Corp.*, 478 S.W.3d 649, 678 (Tex. 2016).

3. Pre-charge conference actions which preserved charge error: *Wackenhut* holds that a pre-charge conference charge objection can preserve a complaint-if the trial court says it kept that objection in mind.

In *Wackenhut*, the Court held that "the party opposing the [spoliation] instruction preserved error by responding to a pretrial motion for sanctions. . . [even though it] later fail[ed] to formally object to the instruction's inclusion in the jury charge until after it was read to the jury." *Wackenhut*, 53 S.W.3d at 918. The Court noted the "procedural rules governing jury charges state in pertinent part that objections to the charge 'shall in every instance be presented to the court . . . before the charge is read to the jury' and . . . 'must point out distinctly the objectionable matter and the grounds of the objection,'" *Id.*, citing Rules 272, 274. Invoking *Payne's* "test . . . whether the party made the trial court aware of the complaint," the Court held that the trial court's ruling, on the plaintiff's pre-trial motion for sanctions, that a spoliation instruction would be allowed, and its statements at the motion for new trial hearing that it had heard and ruled on the defendant's objections to the spoliation instruction, "confirms that the trial court was aware of, and rejected, Wackenhut's objection to the inclusion of a spoliation instruction before the charge was read to the jury." *Id.*

The lesson here: if you intend to argue that you preserved charge error, get the trial court to confirm on the record what it was aware of, and argue *Payne* in the Supreme Court.

4. Charge conference objections which preserved charge error: an objection at the charge conference preserves an appellate complaint which is "similar in substance."

The Court gave several lessons as to how an objection to the charge during the charge conference preserves a somewhat differently worded complaint on appeal. These all might prove useful by analogy, but the big takeaway here is the Court's holding that a complaint at trial preserves error for a complaint on appeal which is "similar in substance." *Gulf Energy*, 482 S.W.3d at 572. Unfortunately, the Court did not mention Rule 33.1 in *Gulf Energy*, an omissions in which it engages with distressing frequency in its error preservation decisions. But here are the decisions about charge conference objections:

Implications of Error Preservation Rulings

Charge Conference Objection	**Argument on Appeal**	**Court Holding**
Party objected "'to the failure to have a formation question with regard to the contract,' arguing: 'With the way [the question] is submitted now, it will allow a breach of contract prior to the meeting of the minds, which is antithetical to the law of breach of contract because it is vague and because also question one, the way it is worded, does not tie in when the actual agreement was reached and when the breach may have occurred.'" *Gulf Energy*, 482 S.W.3d at 572.	Party "argued that the trial court 'erred by instructing the jury that there was a legally binding contract . . . on May 19, 2008,' and that the submitted question 'erroneously assumes that the Railroad Commission entered into a legally-enforceable agreement to postpone plugging the well on May 19, 2008,'" and "further argued that, assuming the parties entered into a valid contract, 'it was not formed until June 9, so nobody breached the June 9 contract by plugging the well on May 26.'" *Gulf Energy*, 482 S.W.3d at 572.	"We agree with the Commission that its objection to the contract question and its argument in the court of appeals are ***similar in substance***. The Commission contended both at the charge conference and on appeal that the May 19 agreement was not binding and that the issue of contract formation should have been submitted to the jury." *Gulf Energy*, 482 S.W.3d at 572, ***emphasis supplied***.

Implications of Error Preservation Rulings

Charge Conference Objection	Argument on Appeal	Court Holding
"USAA did object . . . on the ground that the question impermissibly combined 'contractual damages from Question 1 and statutory damages from Question 2, [because] Texas courts have held that extra[-]contractual damages need to be independent from policy damages.' . . . USAA complained that submitting just one damages question for all damages arising either under the policy or under the statute or both would make it 'unclear potentially if we get 'yes' answers to [Questions] 1 and 2 what the damages are based on.'" *Menchaca*, at *6, n. 8.	"USAA contends that Menchaca cannot recover any amount of policy benefits because the jury failed to find that USAA breached its obligations under the policy. Although the jury did find that USAA violated the Insurance Code, USAA contends that Menchaca cannot recover policy benefits based on [*6] that finding alone." *Menchaca*, at *6.	"We conclude that USAA's objections were sufficient to make clear its position that contractual damages are independent from statutory damages and must be based on a finding that USAA breached the policy." *Menchaca*, at *6, citing *Payne*

In another case, the Court confirmed that the media defendants preserved error at trial by objecting that "the jury charge did not require Wade to prove them false. Neither did it require him to establish actual malice before obtaining punitive damages," and "went further, submitting in writing proposed questions requiring Wade to prove falsity and actual malice." *Brady*, 515 S.W.3d at 885.

5. Post-verdict actions which preserved charge error: a post-verdict objection preserves error as to "a purely legal issue" that does not affect the jury's role as fact-finder, or as to an otherwise immaterial issue.

There were three holdings in this category–and all three occurred in the last three months in which the Court handed down opinions in 2017. In these cases, the Court held that since the jury's answer to a question was immaterial–most often, because the objecting party's argument "raises purely a legal issue"–objections to the questions did not have to be submitted at the charge conference, but could be submitted in post-verdict motions:

- " BP preserved error on the immateriality issue by raising these concerns post-verdict

in a motion for judgment in disregard, in a motion for judgment notwithstanding the verdict, and in a motion for new trial." *Red Deer*, at *31. The question was immaterial because it asked the jury to determine capability of production in paying quantities on a different date than set in the shut-in clause and after constructive production under that clause took effect. *Id.*

- "We also conclude that USAA's argument [that plaintiff cannot recover any policy benefits because the jury found that USAA violated the insurance code, but failed to find USAA breached the policy] raises a purely legal issue that does not affect the jury's role as fact-finder, and that USAA thus preserved the argument by asserting it as a ground for its motion for judgment based on the jury's verdict." *Menchaca*, at *6 n.8.
- "[W]e hold that USI preserved its submission argument by raising it in a motion for judgment notwithstanding the verdict. *See Menchaca* . . . (. . . defendant's argument was a purely legal issue . . . preserved . . . in a post-verdict motion). . . . [C]it[ing] *Olivo* in support of its request for a take-nothing judgment [in its motion for judgment notwithstanding the verdict] . . . . gave the trial court notice of USI's complaint that the verdict was based on an immaterial theory of recovery that could not support Levine's recovery on a premises liability claim." *United Scaffolding*, at *37.

6. The Court is "loath" to require a jury question to include an extra-statutory definition of a statutory term when no statute or case law defines the term. Tracking the pertinent statutory language is good enough.

In *Gulf Energy*, the trial court refused to submit a question about one party's statutory good faith. *Gulf Energy*, 482 S.W.3d at 571. The Court said the party was entitled to the question–the opposing party said the question did not preserve error because it did not include a definition of "good faith." The Court announced it was "particularly loath to find waiver [of a complaint about a trial court's failure to submit a question to the jury] for failing to propose a definition of a statutory term [here, "good faith"] when no case law provided explicit guidance on what the proper definition of that term should be." *Gulf Energy*, 482 S.W.3d at 571. In *Gulf Energy*, the party had "generally tracked the pertinent statutory language" and thus "complied with Rule 278," and did not waive error "by failing to request an accompanying extra-statutory definition." *Id.*

7. A case study in the difficulties and disagreements regarding preserving charge error–*United Scaffolding*.

United Scaffolding's 6-3 decision, holding that a charge error complaint was preserved by a post-verdict motion, emphasizes the difficulties which still remain in dealing with charge error–especially concerning those cases which involve an injury which arguably invokes the murky

law at the confluence of negligence and premises liability. It also emphasizes the importance of distinguishing between the following:

- those situations in which a theory of recovery or defense is defectively submitted–which requires an objection to preserve error; and
- those situations in which the correct theory is entirely omitted, when no objection is necessary.

United Scaffolding involved the second trial of what the Supreme Court characterized as a "slip-and-fall case." *Id.*, *1 (June 30, 2017). The workman alleged he "slipped on a piece of plywood that had not been nailed down, causing him to fall up to his arms through a hole in the scaffold." Id.,*2. Come charge time, the Plaintiff requested "only a general-negligence theory of recovery, without the elements of premises liability as instructions or definitions." *Id.* In fact, "the court in the second trial simply used the same question [the Defendant] had proposed in the first trial." Boyd, J., Dissent, *80-81.

Post-verdict and on appeal, the Defendant argued that the general negligence submission was incorrect and would not support a judgment for Plaintiff. Plaintiff "argues that even if his claim should have been submitted under a premises liability theory of recovery, [Defendant] either waived the argument because it did not object to the jury charge or invited the error by requesting a general-negligence submission in the first trial." *United Scaffolding*,*34. The Court rejected both arguments, based on the concept that a premises liability claim is a theory of recovery distinct from a general negligence claim. The Court said "[c]onsidering Levine's pleadings, the nature of the case, the evidence presented at trial, and the jury charge in its entirety, we hold that Levine's claim is properly characterized as one for premises liability," as opposed to a claim for negligence. *Id.*, *33. The Dissent vigorously disagreed with this conclusion.

> [The Majority] holds that Rule 279 is irrelevant here because 'the correct theory of recovery was omitted entirely.' . . . I disagree. Although a premises-liability claim is independent from an ordinary-negligence claim, it is still rooted in negligence principles.

Boyd, J., Dissent, *79-80.

The Majority "recognize[d]. . . that a defendant must preserve error by objecting when an independent theory of recovery is submitted defectively. See Tex. R. Civ. P. 279." That "includes when an element of that theory of recovery is omitted. *See id.*" But, despite the Dissent's objections, the Majority stuck fast to the negligence/premises distinction, and held that "when, as in this case, the wrong theory of recovery was submitted and the correct theory of recovery was omitted entirely, the defendant has no obligation to object." *United Scaffolding*, at *35. The Dissent also disagreed with that holding:

Implications of Error Preservation Rulings

> We have held, and the Court specifically notes, . . . that a plaintiff may submit a premises-liability claim by submitting a question on control and 'a broad-form negligence question,' as long as 'instructions that incorporate the . . . premises defect elements . . . accompany the questions.' *Olivo*, 952 S.W.2d at 529. The jury charge here included a broad-form negligence question but lacked a question on control and instructions on the premises-liability elements. According to the Court's own rule, this is merely a defective submission, not a complete omission. . . . I agree with Levine that USI waived its complaint by failing to object to the omitted elements. See Tex. R. Civ. P. 279 (explaining [*80] when 'omitted element or elements shall be deemed found by the court in such manner as to support the judgment').

Boyd, J., Dissent, *79-80.

The Majority also held that the defendant did not waive, or invite error, by requesting the general negligence submission in the first trial. "[O]nce the trial court ordered a new trial, [Defendant] could invite error only in the second trial. *See Wilkins v. Methodist Health Care Sys.*, 160 S.W.3d 559, 563 (Tex. 2005)." Id., at *36-37. The Dissent disagreed with the foregoing, as well:

> I agree with [Plaintiff] that [Defendant] invited the trial court to err by proposing the ordinary-negligence question. Since the record reflects that the court in the second trial simply used the same question [Defendant] had proposed in the first trial, and it does not reflect that [Defendant] ever withdrew the question it had proposed in the very same case, [Defendant] invited the error of which it now complains.

Id., at *80-81.

Finally, the Court held that the Defendant "preserved its submission argument by raising it in a motion for judgment notwithstanding the verdict." *Id.*, *37 "[Defendant] cited *Olivo* in support of its request for a take-nothing judgment. This gave the trial court notice of USI's complaint that the verdict was based on an immaterial theory of recovery that could not support [Plaintiff's] recovery on a premises liability claim." *Id.*

The foregoing discussions by the *United Scaffolding* Majority and Dissent show how difficult this is. When the Justices disagree about whether a premises liability claim is a subset of negligence or not–and whether that means that a negligence question, without premises instructions, is defective (and thus needing an objection to preserve error) or amounts to an immaterial question not needing a pre-verdict objection–we realize the daunting task we face on the charge. Recall the goals of error preservation: conserving judicial resources, allowing for more accurate judicial decision-making, and preventing surprise to one's opponent on appeal. *Mansions in the Forest, L.P., v. Montgomery County*, 365 S.W.3d 314, 317 (Tex. 2012). As the Court said in an opinion from 2017,

Implications of Error Preservation Rulings

"[u]ndergirding these rules [i.e., Rule 166a(c)'s "state the specific grounds" and TRAP 33.1's "sufficient specificity" tests] is the principle that the trial court should have the chance to rule on issues that become the subject of the appeal." *ETC Mktg. v. Harris Cnty. Appraisal Dist.*, 518 S.W.3d 371, 376 (Tex. 2017). After thinking about those goals, ask yourself whether those goals are promoted by a party which does not object to the trial court's submission of a jury question which that party submitted in a prior trial, but as to which it is allowed to preserve error by a post-verdict motion which "cites *Olivo* in support of [a post-verdict] request for a take-nothing judgment." *United Scaffolding*, at *37. Six Justices noted that to hold otherwise "would effectively force the defendant to forfeit a winning hand." *United Scaffolding*, at *35-36. Which means that, if you represent the party with the burden on a claim or an affirmative defense, make very, very sure you know exactly what kind of claim or defense you have, and request the charge accordingly.

If you have to argue that a post-verdict motion preserved charge error–and perhaps other error which is "a purely legal issue" (lack of an unpled presentment supporting a Chapter 38 claim for attorney's fees?), you should mine *United Scaffolding*, and *Red Deer* and *Menchaca* for the help they provide.

B. Exemplary Damages

There were only two cases, and three rulings, in which the Court dealt with an error preservation issue involving exemplary damages. In both cases, the defendant claimed that it preserved error. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 881 (Tex. 2017); *Zorrilla v. Aypco Constr. II*, 469 S.W.3d 143 (Tex. 2015). In one case, the Court held that the defendant "did not challenge the exemplary damages award on constitutional grounds in the trial court," and therefore did not preserve that complaint. Having said that, the defendant won on the merits, with the Court holding that the defendant preserved a separate complaint about exemplary damages. *Zorrilla*, 469 S.W.3d at 155 n.10, 157.

Two important take-aways from the exemplary damage preservation rulings:

- a motion for new trial will timely preserve a claim that exemplary damages are capped, as provided in Tex. Civ. Prac. & Rem. Code §41.008(c)–at least in " the absence of a plea and proof of cap-busting conduct." *Zorrilla*, 469 S.W.3d at 157.

- responding to an amended motion for entry of judgment, and specifically adopting the response of other defendants that any given defendant cannot be held jointly and severally liable for exemplary damages assessed against other parties, will preserve that complaint by the adopting defendant. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 881 (Tex. 2017).

C. Jurisdiction

Implications of Error Preservation Rulings

Subject matter jurisdiction can be first raised on appeal. Nothing new there. In the examples the Supreme Court addressed in the last few years, it held:

- "[A] jurisdictional holding can never be dicta because subject-matter jurisdiction must exist before we can consider the merits, a challenge to it cannot be waived." *Tex. Propane Gas Ass'n v. City of Hous.*, 622 S.W.3d 791, 797-98 (Tex. 2021).
- "jurisdictional arguments concerning immunity waiver cannot be waived." *San Antonio Water Sys. v. Nicholas*, 461 S.W.3d 131, 136 (Tex. 2015) (held, argument that "there is no evidence that [plaintiff] had a good-faith, reasonable belief that she engaged in a protected activity under the TCHRA" "implicates [a defendant's] immunity from suit" under the TCHRA because "'the Legislature has waived immunity only for those suits where the plaintiff actually alleges a violation of the TCHRA.'"); and
- "[E]xhaustion of administrative remedies is an issue of subject-matter jurisdiction." *Clint Indep. Sch. Dist. v. Sonia Herrera Marquez ex rel. Their Minor Children*, 487 S.W.3d 538, 558 (Tex. 2016) (held, parents must first exhaust their administrative remedies under the Education Code as to their constitutional claims against a school district before bringing those claims in the district courts).

But the Court did have the opportunity to point out that "the UDJA does not confer jurisdiction, but 'is merely a procedural device for deciding cases already within a court's jurisdiction.' *State v. Morales*, 869 S.W.2d 941, 947 (Tex. 1994) (citation omitted)." *Wells Fargo Bank, N.A. v. Murphy*, 458 S.W.3d 912, 916 (Tex. 2015). The Court pointed out that the "pleadings sufficiently characterize the parties' claims as being within the purview of the UDJA." *Id.* The plaintiff argued on appeal that the defendant could not recover fees under the UDJA because "neither party pleaded a cognizable claim for declaratory relief." *Id.* Because the plaintiffs "did not preserve their re-characterization argument regarding their own claim in the trial court, . . . it was error for the court of appeals to address it sua sponte." *Id.* So the lesson here is–if the trial court awards the other party attorney's fees under the UDJA, and you don't think either party has made a UDJA claim, say so in the trial court.

D. Summary Judgment: your motion and response must be specific–context matters--and it's not necessarily too late to get your summary judgment evidence before the trial court so long as a final judgment has not been signed.

1. Make sure your motion or response specifically mention the grounds on which you rely. Context matters.

In at least three opinions, the Supreme Court affirmed the mandate of Rule 166a© that "'[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.'" *ETC Mktg. v. Harris Cnty. Appraisal Dist.*,

518 S.W.3d 371, 377 (Tex. 2017); *ExxonMobil Corp. v. Lazy R Ranch, LP*, 511 S.W.3d 538, 545-546 (Tex. 2017); *see also McAllen Hosps., L.P. v. State Farm County Mut. Ins. Co.*, 433 S.W.3d 535, 541-542 (Tex. 2014) (held, Court would not "read into" a hospital lien statute a cause of action for enforcement of a lien because that issue "was not raised in the trial court as a ground for summary judgment and was not briefed in the court of appeals or in this Court, and therefore has not been preserved for our review.")

Lazy R and *ETC* go further, though. Both point out that a motion for summary judgment must "'state the specific grounds'" entitling the movant to judgment. *Lazy R*, 545-546; *ETC*, at 376, citing Rule 166a©. *ETC* also recited the "sufficient specificity" test of Rule 33.1; *Lazy R* did not mention Rule 33.1. Having mentioned both Rule 166a© and Rule 33.1, *ETC* pointed out that "[u]ndergirding these rules is the principle that the trial court should have the chance to rule on issues that become the subject of the appeal." *Id.* Here are the reasons the Court held the summary judgment motions in those two cases did not "state the specific grounds" for judgment:

Case	Holding
Lazy R	while the "motion for summary judgment . . . mention[ed] that the Ranch should not be entitled to its requested relief," it did not specifically mention that the nonmovant should not be entitled to receive the injunctive relief it admittedly "was then requesting." *Id.*
ETC	"The body of the motion, the prayer for relief, and the accompanying affidavits were devoted entirely to discussion of the Commerce Clause.. . . ETC cannot devote an entire motion to one federal argument and seek to argue a distinct state-law position on appeal by relying on [one sentence in the motion] . . . that is ambiguous in isolation. Context matters. And in the context of this motion there is no question that ETC failed to present the temporary-period ground at all, let alone specifically. Accordingly, ETC waived any complaint on appeal involving Sections 11.01© and 22.01(a) of the Tax Code." *ETC*, at 376.

You might contrast the foregoing holdings with that in *Rincones*, in which the Court held that a plaintiff preserved the argument that the defendant "can be liable for tortious interference through its agency relationship" with others. *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572 (Tex. 2017). The Court held that plaintiff had preserved this argument, despite the fact that the plaintiff's "discussion of this argument in his response to summary judgment is brief and not specific." *Id.*. The plaintiff had merely "alleged that 'Exxon and WHM empowered DISA . . . as agents to implement its [sic] drug[-]testing policy.'" *Id.*

In *Lazy R*, it did not matter that "the availability of injunctive relief was discussed at the hearing on the motion"–in fact, apparently both parties discussed it at the summary judgment hearing–because "the motion itself did not 'present' the issue" of the nonmovant's entitlement to injunctive relief, depriving the Court of the ability to address that issue. *Lazy R*, at 546. And in *ETC*,

where the trial court had denied the petitioner's motion for summary judgment in a battle of competing motions, the Court pointed out that Rule 166a© prohibited the Court from considering, as a ground for reversal, an issue not expressly presented to the trial court by written motion, answer, or other response. *ETC*, *377.

2. If there is no final judgment, and the claim not fully adjudicated, it may not be too late to submit summary judgment proof by way of a motion for reconsideration–if the motion is ruled on.

The Court also held that a "ratification defense was timely presented and ruled on by the trial court," in the summary judgment context, where the defendant (which had raised ratification in its answer and, without summary judgment proof, in response to the other side's motion for summary judgment) "present[ed] its summary-judgment proof . . . in connection with a motion for reconsideration, before the unpooling claim had been fully adjudicated and prior to final judgment," and the trial court had denied both motions. *Samson Expl., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 783 (Tex. 2017). The Court pointed out that "the record reflects the trial court considered Samson's motion, as it had discretion to do, . . . and specifically ruled on it. This is sufficient to meet the preservation requirements of Rule 33.1. Accordingly, Samson's ratification defense was timely presented and ruled on by the trial court." *Id.*, at 784.

3. No matter what TRAP 33.1 says about implied rulings, get a signed order on your objections to summary judgment evidence.

For almost twenty years, the courts of appeals have disagreed as to whether an order granting a motion for summary judgment can serve as an implicit ruling on objections to summary judgment evidence. *See* Section 5.Q, *supra*; Patton, *Summary Judgments in Texas*, §6.10[4][e]. In 2017, the Supreme Court held that when "[t]he record contains no order sustaining the objection," an objection to "late-filed summary-judgment evidence. . . . has been waived," because "[e]ven objected-to evidence remains valid summary-judgment proof 'unless an order sustaining the objection is reduced to writing, signed, and entered of record.' *Mitchell v. Baylor Univ. Med. Ctr.*, 109 S.W.3d 838, 842 (Tex. App.—Austin [*sic*-Dallas] 2003, no pet.)." *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572 (Tex. 2017). The Court issued this holding without discussing the disagreement among the various courts of appeals on this issue, and without mentioning Rule 33.1, much less its provision that allows an implicit ruling on complaints,

In June 2018, without mentioning *Rincones*, the Supreme Court potentially injected uncertainty into this area in its Per Curiam opinion in *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 162 (Tex. 2018). *Seim v. Allstate Tex. Lloyds* dealt with an objection to the form of an affidavit (apparently the failure of a notary to sign a jurat). In *Seim*, the Supreme Court first seemed to endorse the holding in *Rincones* by

saying that "[w]e hold the Fourth and Fourteenth courts have it right," expressly endorsing the following holdings from those courts:

- "it is incumbent upon the party asserting objections [as to an affidavit's form] to obtain a written ruling at, before, or very near the time the trial court rules on the motion for summary judgment or risk waiver." *Seim*, at 165, quoting *Dolcefino v. Randolph*, 19 S.W.3d 906, 926 (Tex. App.-Houston [14th Dist.] 2000, pet. denied);
- "a trial court's ruling on an objection to summary[-]judgment evidence is not implicit in its ruling on the motion for summary judgment." *Seim*, at *165-166, citing *Well Sols., Inc. v. Stafford*, 32 S.W.3d 313, 317 (Tex. App.-San Antonio 2000, no pet.).

But instead of invoking *Rincones*, and expressly requiring an "order sustaining the objection . . . reduced to writing, signed and entered of record," the *Seim* Court focused on whether the trial court had impliedly ruled on the objection to the summary judgment evidence. For example, *Seim* said that "nothing in this record serves as a clearly implied ruling by the trial court on Allstate's objections" to the summary judgment affidavit. In support of that assertion, the Supreme Court pointed out that "even without the objections, the trial court could have granted summary judgment against the [Plaintiffs] if it found that their evidence did not generate a genuine issue of material fact," a fact which Defendant "has argued . . . in its briefing to this Court." *Seim*, at *166. The Court then held that the objection as to form was waived because Defendant "failed to obtain a ruling from the trial court on its objections to the affidavit's form." *Seim*, at 166. This leaves us to wonder if that ruling must be in writing, or if an implied ruling is good enough, or whether a ruling on a motion for summary judgment may be an acceptable implied ruling in those situations where the trial court could not have granted summary judgment if the objected to evidence created a fact issue. In any event, the Supreme Court reversed and remanded the case to the court of appeals, for it to consider whether the Defendant was "still entitled to summary judgment on other grounds." *Seim*, at 166.

Where does that leave us? I still think a written ruling of some kind is probably required, but in any event everyone should keep following the best practice of getting a written order as to your objections, to avoid an expensive, tedious, confusing error preservation fight that does not get you any closer to the resolution of your case–or worse. *Ahmad v. State*, 615 S.W.3d 496, 502 (Tex. App.—Houston [1st Dist.] 2020), no pet.). And whatever you do, don't allow the trial judge to sign an order granting a summary judgment motion which reflects that "it considered the 'evidence and arguments of counsel,' without any limitation," because that is an "'affirmative indication' that the trial court considered [your opponent's] response and the evidence attached to it." *B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 259-62 (Tex. 2020).

4. As to a traditional summary judgment motion, the non-movant can challenge the legal sufficiency of the summary judgment grounds

for the first time on appeal.

While not earth-shattering, the Court did reaffirm that "the party moving for traditional summary judgment . . . ha[s] the burden to submit sufficient evidence that established on its face that 'there is no genuine issue as to any material fact" and that it is 'entitled to judgment as a matter of law.' Tex. R. Civ. P. 166a©." *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511(Tex. 2014). Even if the "non-movant . . . fails to raise any issues in response to a summary judgment motion," it "may still challenge, on appeal, 'the legal sufficiency of the grounds presented by the movant.'" *Id*.

2. Different preservation mechanisms

Here are a few examples of error preservation vehicles which the Court approved during the 2014-2017 time frame.

A. A motion for reconsideration of an interlocutory summary judgment order, and your own post-order motion for summary judgment, may serve as vehicles to get summary judgment evidence before the trial court–if it has not signed or rendered a final judgment.

That was the holding in *Samson Expl., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 783 (Tex. 2017). Having said that, do not consider this holding as the best way to do things–only consider it as a possible tool to salvage a disaster.

B. A response to a motion for entry of judgment will preserve a complaint about joint and several liability.

A response to a motion for entry of judgment will preserve a complaint that any given defendant cannot be held jointly and severally liable for exemplary damages assessed against other parties. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 881 (Tex. 2017).

C. Motions for New Trial

A timely motion for new trial will preserve a claim that exemplary damages are capped, as provided in Tex. Civ. Prac. & Rem. Code §41.008(c)–at least in "the absence of a plea and proof of cap-busting conduct." *Zorrilla*, 469 S.W.3d at 157.

That concludes our four year tour of the Supreme Court. I hope you have enjoyed the narration, and that it helps.

11. Don't forget–new arguments in support of properly raised issues are always O.K.

Thankfully, we won't explore how to distinguish between "complaints," which TRAP 33.1 requires we present in the trial court (sometimes referred to as "issues"), and "arguments" which support such "complaints" or "issues." But we should always keep in mind that, while the Supreme Court assures us that "we do not consider unraised issues," it also points out that "'parties are free to

construct new arguments in support of issues properly before the Court.'" N. E. Indep. Sch. Dist. v. Riou, 598 S.W.3d 243, 252 n.36 (Tex. 2020), *quoting Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 764, n. 4 (Tex. 2014). Perhaps you can avoid your opponent's complaint about waiver by casting your new spin as an argument in support of a clearly preserved issue.

11. Conclusion.

I hope that this paper will have given you some examples of things that will help you hone your error preservation skills, and evaluate whether to pursue appellate issues with preservation problems. More than that, I hope that it has helped you think about using error preservation not just as a way to keep your case alive on appeal, but also as a means to sell your case effectively at the trial court level. Good luck to you all!

Implications of Error Preservation Rulings

APPENDIX

1. Preservation Rates for the Most Common Error Preservation Problems (2014 through 2016).

2. Comparing Individual Courts of Appeals to the Average (FYE 2014).

3. Comparing Individual Courts of Appeals to the Average (2014 through 2016).

3.A. Rates of Error Preservation, and Reasons Error Was Not Preserved, Correlated by Citing of TRAP 33.1, for Fiscal Years 2014 through 2016.

3.B. The Correlation Between the Result on an Error Preservation Decision and the Result on the Merits (September 1, 2015 through May 18, 2016).

3.C. Correlating the Tendencies of Transferor Courts, Transferee Courts, and All Courts (2014 through 2016).

3.D. 2015: Comparing Averages on All Cases to Certain Non-transfer Cases (Arbitration, Healthcare Liability, Citizens Participation Act, Parent Child Relationship).

3.E. How parties fare in the courts of appeals on error preservation (FYE 2015-2016)

4.1. Texas Supreme Court: How Often Error Was Preserved or Can First Be Raised on Appeal (Fiscal Years Ending August 31, 2014-2017)

4.2. Texas Supreme Court: How Parties Claiming Error Was Not Waived Fared on the Merits

5. Checklist for Litigators Trying to Anticipate and Avoid Ambushes

	AF	AG	AH	AI	AJ	AK	AL	AM	AN	AO	AP	AQ	AR	AS	AT	AU	AV
177	**Appendix 1. Preservation Rates for the Most Common Error Preservation Issues in FYE 2014-2016 (unless otherwise stated)**													**FYE 2016: Success on the Merits**			
178	Preservation Rate Range (in %): FYE 2014 {2015} 2016	Rank	**FYE 2014-2016 Category**	**Number of Decisions**	**Preserved**	**Not Preserved**	**Specific Enough**	**Not Specific Enough**	**Not Raised at All**	**Not timely, d/n comply with other rules***	**No ruling, no record***	**Issue Different Than at Trial**	**D/n have to raise at trial**	**2016: Party Claiming Error Preserved Won on the Merits**	**2016: Party Claiming Error Preserved Lost on the Merits**	**2016: Party Claiming Error Preserved Won in Significant Part on the Merits**	**2016: Win + Win in Significant Part on the Merits**
179	13.3 {10.4} 12%	0	AA-The Unpreserved Avg.	1584	12.0%	81.0%	12.1%	3.8%	53.0%	13.0%	8.1%	5.6%	7.0%	12.9%	69.8%	14.3%	27.2%
180	12.8{12.9}12.3	1	***Evidence***	***190***	***12.6%***	***84.2%***	***12.6%***	***8.4%***	***37.9%***	***22.6%***	***9.1%***	***8.4%***	***3.2%***	***12.5%***	***76.1%***	***10.2%***	***22.7%***
181	22.2{19.0}24.3	2	***Jury Charge***	***106***	***21.7%***	***77.4%***	***21.7%***	***8.5%***	***40.6%***	***8.5%***	***2.5%***	***17.0%***	***0.9%***	***7.9%***	***60.5%***	***31.6%***	***39.5%***
182	7.9{10.7}11.1	3	Summary Judgment	84	9.5%	79.8%	9.5%	2.4%	48.8%	21.4%	13.0%	0.0%	10.7%	5.6%	61.1%	27.8%	33.3%
183	7.1{0.0}7.4	4	Attorney's Fees	71	4.2%	90.1%	4.2%	5.6%	70.4%	7.0%	7.0%	1.4%	5.6%	0.0%	53.6%	35.7%	35.7%
184	40.0{0.0}21.4	5	***Legal Sufficiency***	***56***	***16.1%***	***39.3%***	***16.1%***	***0.0%***	***35.7%***	***1.8%***	***2.4%***	***0.0%***	***44.6%***	***28.6%***	***50.0%***	***14.3%***	***42.9%***
185	6.7{10}0.0	6	Affidavits	49	6.1%	77.6%	6.1%	6.1%	28.6%	10.2%	41.2%	4.1%	16.3%	12.5%	68.8%	12.5%	25.0%
186	11.1{17.6}10.0	7	***Witness***	***45***	***13.3%***	***77.8%***	***13.3%***	***4.4%***	***53.3%***	***13.3%***	***0.0%***	***6.7%***	***8.9%***	***10.0%***	***80.0%***	***0.0%***	***10.0%***
187	0.0{9.1}4.2	8	Constitutionalit	57	3.5%	96.5%	3.5%	1.8%	91.2%	3.5%	0.0%	0.0%	0.0%	0.0%	95.8%	0.0%	0.0%
188	25.0{9.1}0.0	9	***Continuances***	***32***	***15.6%***	***84.4%***	***15.6%***	***0.0%***	***31.3%***	***28.1%***	***21.1%***	***12.5%***	***0.0%***	***0.0%***	***80.0%***	***10.0%***	***10.0%***
189	10.0{8.7}13.3	10	Discovery	30	10.0%	86.7%	10.0%	0.0%	53.3%	16.7%	29.4%	0.0%	3.3%	0.0%	100.0%	0.0%	0.0%
190	12.5{14.3}25.0	11	***Pleading***	***30***	***16.7%***	***83.3%***	***16.7%***	***3.3%***	***66.7%***	***6.7%***	***4.5%***	***3.3%***	***0.0%***	***22.2%***	***66.7%***	***11.1%***	***33.3%***
191	0.0{13.3}0.0	12	Notice	28	7.1%	85.7%	7.1%	0.0%	64.3%	14.3%	0.0%	7.1%	7.1%	10.0%	90.0%	0.0%	10.0%
192	0.0{0.0}12.5	13	Due Process	24	4.2%	95.8%	4.2%	4.2%	91.7%	0.0%	0.0%	0.0%	0.0%	12.5%	87.5%	0.0%	12.5%
193	14.3{0.0}12.5	14	Factual Sufficiency	24	8.3%	87.5%	8.3%	0.0%	66.7%	16.7%	0.0%	4.2%	4.2%	12.5%	87.5%	0.0%	12.5%
194	42.9{16.7}0.0	15	***Argument***	***16***	***25.0%***	***68.8%***	***25.0%***	***0.0%***	***43.8%***	***12.5%***	***6.3%***	***6.3%***	***6.3%***	***0.0%***	***66.7%***	***33.3%***	***33.3%***
195	14.3{0.0}13.6	16	***Judgment***	***22***	***18.2%***	***81.8%***	***18.2%***	***4.5%***	***68.2%***	***4.5%***	***0.0%***	***4.5%***	***0.0%***	***16.7%***	***41.7%***	***25.0%***	***41.7%***
196																	
197			***bold, italics indicates a preservation rate higher than the average***														
198			* these categories were not split out for 2014, so the numbers here are for FYE 2015 and 2016.														

	A	B	C	D	E	F	G	H	I	J	K	L	M
41	**Appendix 2. Error Preservation Tendencies (FYE 2014)**				**As a % of Error Preservation Decisions**								
42	Court Number	Court Name	% of Total Cases Which Are Error Preservation Cases	Error Preservation Rulings as a % of total issues*	Which Are Based on Rule 33.1**	In Which Error is Preserved	In Which Error is Not Preserved	In Which Objection is Specific Enough	In Which Objection is Not Specific Enough	In Which Complaint Was Not Raised at All	Others (no ruling, no record, not timely, d/n comply with other rules,etc.)	Issue raised at trial different than asserted on appeal	D/n have to raise
43	1	Houston 1st	15.0%	4.3%	73.6%	17.0%	79.2%	17.0%	3.8%	49.1%	22.6%	3.8%	3.8%
44	2	Fort Worth	17.4%	5.5%	78.6%	21.4%	73.8%	21.4%	0.0%	40.5%	23.8%	9.5%	4.8%
45	3	Austin	13.8%	3.8%	81.8%	21.2%	72.7%	21.2%	9.1%	54.5%	3.0%	6.1%	6.1%
46	4	San Antonio	8.0%	2.2%	79.2%	20.8%	79.2%	20.8%	0.0%	58.3%	16.7%	4.2%	0.0%
47	5	Dallas	16.7%	5.0%	78.8%	6.1%	84.8%	6.1%	3.0%	53.0%	24.2%	4.5%	9.1%
48	6	Texarkana	13.3%	3.8%	77.8%	11.1%	88.9%	11.1%	0.0%	88.9%	0.0%	0.0%	0.0%
49	7	Amarillo	16.8%	5.0%	85.0%	15.0%	75.0%	15.0%	10.0%	40.0%	25.0%	0.0%	10.0%
50	8	El Paso	17.4%	4.7%	68.8%	6.3%	81.3%	6.3%	6.3%	68.8%	6.3%	0.0%	12.5%
51	9	Beaumont	36.2%	11.0%	90.2%	9.8%	88.2%	9.8%	9.8%	56.9%	19.6%	2.0%	2.0%
52	10	Waco	13.3%	4.6%	81.8%	0.0%	100.0%	0.0%	9.1%	81.8%	9.1%	0.0%	0.0%
53	11	Eastland	14.1%	3.5%	84.6%	7.7%	84.6%	7.7%	0.0%	76.9%	7.7%	0.0%	7.7%
54	12	Tyler	9.5%	2.7%	75.0%	12.5%	87.5%	12.5%	12.5%	50.0%	25.0%	0.0%	0.0%
55	13	Corpus	18.9%	6.0%	89.5%	18.4%	73.7%	18.4%	7.9%	39.5%	21.1%	5.3%	7.9%
56	14	Houston 14th	27.4%	7.9%	53.0%	12.0%	83.1%	12.0%	8.4%	44.6%	20.5%	9.6%	4.8%
57		The Unpreserved Average	17.1%	5.0%	76.0%	13.5%	81.2%	13.5%	5.8%	51.6%	18.8%	4.9%	5.4%
58													
59	Greater Than the Overall %	Smaller Than the Overall %	None										

Appendix 3. Comparing Individual Courts of Appeals to Unpreserved Average: How and Why the Courts Ruled (FYE 2014-2016)

					% of Error Preservation Rulings In Which:										
Ct. No.	Court Name	Total Cases	% of Total Cases Which Are Error Preservation Cases	% of Total Rulings Which Are Error Preservation Rulings*	TRAP 33.1 Was Invoked	Error Was Preserved	Error Was Not Preserved	Complaint Was Specific Enough	Complaint Was Not Specific Enough	Complaint Was Not Raised at All/Was Withdrawn	Others (not timely, d/n comply with other rules,etc., [2014-2016]; no ruling, no record [2014])**	No record, no ruling (for 2015 and 2016)	Issue raised at trial different than asserted on appeal	D/n have to raise complaint at trial
7	Amarillo	348	12.9%	3.6%	66.0%	12.0%	78.0%	12.0%	10.0%	50.0%	12.0%	6.7%	2.0%	10.0%
3	Austin	700	17.3%	4.8%	70.7%	10.5%	85.0%	10.5%	6.0%	59.4%	9.8%	9.0%	3.0%	4.5%
9	Beaumont	366	29.2%	9.0%	77.3%	10.6%	81.8%	10.6%	5.3%	50.8%	14.4%	7.4%	6.8%	7.6%
9	Beaumont, Non-SVP^	366	9.3%	2.9%	66.7%	11.9%	69.0%	11.9%	4.8%	45.2%	7.1%	9.5%	2.4%	19.0%
13	Corpus Christi (incl. CC/Edinburg)	472	14.6%	4.3%	74.1%	19.8%	74.1%	19.8%	7.4%	39.5%	19.8%	4.7%	4.9%	6.2%
5	Dallas	986	22.0%	6.3%	66.1%	9.3%	81.5%	9.7%	1.2%	50.8%	15.7%	10.4%	6.0%	9.3%
11	Eastland	259	13.5%	3.9%	72.5%	7.5%	90.0%	7.5%	5.0%	67.5%	12.5%	3.7%	2.5%	2.5%
8	El Paso	264	19.7%	6.3%	68.2%	15.2%	78.8%	15.2%	6.1%	53.0%	9.1%	8.0%	4.5%	6.1%
2	Fort Worth	555	21.6%	6.8%	71.7%	15.8%	78.3%	15.8%	1.3%	50.0%	11.8%	8.2%	9.2%	5.9%
1	Houston 1st	897	19.4%	5.7%	64.2%	14.7%	77.9%	14.7%	2.0%	52.0%	13.2%	10.6%	2.9%	7.4%
14	Houston 14th	767	29.5%	8.6%	55.5%	11.8%	81.4%	11.8%	4.2%	52.9%	11.8%	7.8%	7.2%	6.8%
4	San Antonio	737	11.0%	3.0%	57.5%	13.8%	77.0%	13.8%	4.6%	51.7%	12.6%	4.8%	4.6%	9.2%
6	Texarkana	212	17.9%	5.1%	72.1%	7.0%	86.0%	7.0%	4.7%	62.8%	9.3%	0.0%	9.3%	7.0%
12	Tyler	182	20.3%	6.5%	72.3%	8.5%	85.1%	8.5%	2.1%	59.6%	8.5%	12.8%	4.3%	6.4%
10	Waco	174	16.7%	5.3%	83.8%	2.7%	94.6%	2.7%	2.7%	70.3%	16.2%	0.0%	5.4%	2.7%
	Avg.	6919	19.5%	5.7%	66.9%	12.1%	80.9%	12.1%	3.8%	52.9%	13.0%	8.1%	5.6%	7.0%

	* Assumes 4 issues per case	of Unpreserved	< 95% of Unpreserved Avg.	None	Within 5% of Average		^ Decisions involving Sexually Violent Predators are eliminated from the figures on this row, which reflects decisions			**For 2014, includes no record, no ruling; for remaining years, includes only other listed criteria.				

Appendix 3.A. Rates of Error Preservation in Courts of Appeals, Correlated by Citing of Rule 33.1										
Fiscal Years 2014-2016										
2014-2016, for Courts of Appeals	**Total Error Preservation Decisions**	**Error Preserved**	**Error Not Preserved**	**Complaint Specific Enough**	**Complaint Not Specific Enough**	**Complaint Not Raised At All/ withdrawn**	**Others (no ruling, no record, not timely, d/n comply with other rules,etc.)***	**No record, no ruling (solely 2015 and 2016)**	**Issue raised at trial different than asserted on appeal**	**D/n have to raise to preserve**
All Decisions, Cts. App.										
2014	466	62	379	62	27	241	88		23	25
2015	557	58	456	59	19	299	47	49	42	43
2016	561	70	448	70	14	299	71	41	23	43
Totals	1584	190	1283	191	60	839	206	90	88	111
		12.0%	81.0%	12.1%	3.8%	53.0%	13.0%	5.7%	5.6%	7.0%
33.1 Decisions, Cts. App.										
2014	355	33	308	33	25	206	57		20	14
2015	376	30	324	31	10	212	26	40	36	22
2016	342	33	292	33	9	217	26	25	15	17
Totals	1073	96	924	97	44	635	109	65	71	53
		8.9%	86.1%	9.0%	4.1%	59.2%	10.2%	6.1%	6.6%	4.9%
Non-33.1 Decisions, Cts. App.										
2014	111	29	71	29	2	35	31		3	11
2015	181	28	132	28	9	87	21	9	6	21
2016	219	37	156	37	5	82	45	16	8	26
Totals	511	94	359	94	16	204	97	25	17	58
		18.4%	70.3%	18.4%	3.1%	39.9%	19.0%	4.9%	3.3%	11.4%
	***For 2014, includes no record, no ruling; for remaining years, includes only other listed criteria.**									

Appendix 3.B: Correlating the Result on Error Preservation with the Result on the Merits of the Appeal (FYE 2016)

		Total	Party Claiming Error Preserved Won on the Merits	Party Claiming Error Preserved Lost on the Merits	Party Claiming Error Preserved Won Part, Lost Part on the Merits	Party Claiming Error Preserved Won in Significant Part of the Merits	Party Claiming Error Preserved Won+Won in Significant Part on Merits
For All Error Preservation Decisions		567	12.9%	69.8%	17.3%	14.3%	27.2%
For All Error Preservation Decisions in Which Error Was Not Preserved		450	4.4%	78.7%	16.9%	13.3%	17.8%
For All Error Preservation Decisions in Which Error Was Preserved		73	43.8%	39.7%	16.4%	16.4%	60.3%
For All Error Preservation Decisions in Which Error Did Not Have to be Raised in the Trial Court		44	47.7%	29.5%	22.7%	20.5%	68.2%

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
22	**Appendix 3.C. Correlating The Tendencies of Transferor and Transferee Courts With the Tendencies of All Courts.**														
23	**Type of Court**			**% of Total Cases Which Are Error Preserva-tion Cases**	**% of Total Rulings Which Are Error Preserva-tion Rulings***	**TRAP 33.1 used**	**Error Was Pre-served**	**Error Was Not Pre-served**	**Com-plaint Was Specific enough**	**Com-plaint Was Not Specific Enough**	**Com-plaint Was Not Raised at All/Was With-drawn**	**Others (no ruling, no record for 2014, not timely, d/n comply with other rules, etc., for 2014/ 2015)**	**No record, no ruling (only for 2015)**	**Issue raised at trial differ from issues on appeal**	**D/n have to raise com-plaint at trial**
24	% of All Cts. Below Avg.			71.4%	71.4%	28.6%	64.3%	42.9%	64.3%	50.0%	50.0%	51.1%	64.3%	57.1%	57.1%
25	% of Transferor Courts Below Avg.			60.0%	60.0%	20.0%	60.0%	40.0%	60.0%	60.0%	60.0%	40.0%	60.0%	60.0%	40.0%
26	% of Transferee Courts Below Avg.			71.4%	71.4%	28.7%	71.4%	42.9%	71.4%	28.7%	42.9%	57.1%	71.4%	71.4%	57.1%
27	% of Mixed Courts Below Avg.			100.0%	100.0%	50.0%	50.0%	50.0%	50.0%	100.0%	50.0%	100.0%	50.0%	0.0%	50.0%
28	% of Courts Below Avg. Which Are Transferor Courts			30.0%	30.0%	25.0%	33.3%	33.3%	33.3%	42.9%	42.9%	25.0%	33.3%	37.5%	28.6%
29	% of Courts Below Avg. Which Are Transferee Courts			50.0%	50.0%	50.0%	55.6%	50.0%	55.6%	28.7%	42.9%	50.0%	55.6%	63.5%	57.1%
30	% of Courts Below Avg. Which Are Mixed Courts			20.0%	20.0%	25.0%	11.1%	16.7%	11.1%	28.7%	14.2%	25.0%	11.1%	0.0%	14.3%
31	According to the Miscellaneous Orders of the Supreme Court affecting 2014-2015 which effected Docket Equalization Transfers: 36% of Courts are Transferor Courts (Austin,														
32	Beaumont, Dallas, Fort Worth, Waco); 50% of Courts are Transferee Courts (Amarillo, Corpus Christi/Edinburg, Eastland, El Paso, Houston 1st, Houston 14th, Texarkana); 14% of Courts are both Transferor and Transferee Courts (San Antonio, Tyler)														

Appendix 3.D. 2015: Comparing Averages on All Cases to Certain Non-transfer Cases (Arbitration, Healthcare Liability, Citizens Participation Action, Parent Child Relationship)													
	Number of Cases	Rule 33.1 invoked, % of Preservation Decisions	Error Preser-vation Decisions	Error Was Preserved	Error Was Not Preserved	Complaint Was Specific enough	Complaint Was Not Specific Enough	Complaint Was Not Raised at All/Was Withdrawn	Others (not timely, d/n comply with other rules,etc.)	Others (no record, no ruling)	Issue raised at trial different than asserted on appeal	D/n have to raise complaint at trial
Non-transfer Cases 2015	75	46	87	5	74	4	0	49	13	5	8	8
Non-transfer Cases 2016	67	42	80	11	65	11	2	46	10	3	4	4
Totals	142	88	167	16	139	15	2	95	23	8	12	12
		52.7%	100.0%	9.6%	83.2%	9.0%	1.2%	56.9%	13.8%	4.8%	7.2%	7.2%
All 2015 Cases	456	376	557	58	456	59	19	299	47	49	42	43
All 2016 Cases	494	342	561	70	448	70	14	299	71	41	23	43
Totals	950	718	1118	128	904	129	33	598	118	90	65	86
		64.2%	100.0%	11.4%	80.9%	11.5%	3.0%	53.5%	10.6%	8.1%	5.8%	7.7%
2015 Non-transfer type Cases	75	46	87	5	74	4	0	49	13	5	8	8
		52.9%		5.7%	85.1%	4.6%	0.0%	56.3%	14.9%	5.7%	9.2%	9.2%
All 2015 Cases	456	376	557	58	456	59	19	299	47	49	42	43
		67.5%		10.4%	81.9%	10.6%	3.4%	53.7%	8.4%	8.8%	7.5%	7.7%

Appendix 3.E: How parties fare in the courts of appeals on error preservation decisions (FYE 2015-2016)							
Party	Cases/ Issues	Preserved	Not	D/n/have to	Cases Won	Cases Lost	Cases Won in Significant Part
Plaintiff	332/376	12.8%	80.1%	6.6%	12.8%	72.3%	12.8%*
Defendant	618/744	11.2%	80.2%	8.6%	13.3%	68.5%	16.7%

* Won part, lost part for 2015 (did not record whether won in significant part)

Appendix 4.1: How Often Error Was Preserved or Can First Be Raised on Appeal (Fiscal Years Ending August 31, 2014-2017)	
Cases	**Held, Error Was Preserved, Or Can First Be Raised on Appeal**
All Cases	66.7%
Petitioner Claimed Error Preserved	75.0%
Respondent Claimed Error Preserved	50.0%
Plaintiff Claimed Error Preserved	64.3%
Defendant Claimed Error Preserved	67.9%

Appendix 4.2: How Parties Claiming Error Was Not Waived Fared on the Merits						
All Cases FYE 2015-2017	**Party Claiming Error Preserved Won**	**Party Claiming Error Preserved Lost**	**Party Claiming Error Preserved Won Part, Lost Part**	**Party Claiming Error Preserved Won or Won in Significant Part**	**Petitioner Claimed Error Preserved**	**Respondent Claimed Error Preserved**
All Cases	46.2%	38.5%	15.4%	61.5%	64.1%	35.9%
Petitioner Claimed Error Preserved	53.3%	40.0%	6.7%	60.0%	100.0%	0.0%
Respondent Claimed Error Preserved	36.4%	36.4%	27.3%	63.6%	0.0%	100.0%
Plaintiff Claimed Error Preserved	30.0%	60.0%	10.0%	40.0%	76.9%	23.1%
Defendant Claimed Error Preserved	56.3%	25.0%	18.8%	75.0%	57.7%	42.3%

APPENDIX 5: CHECKLISTS FOR COMPLAINTS WHICH CAN FIRST BE RAISED ON APPEAL, OR AFTER THE TRIAL

A. Complaints that can first be raised on appeal:

1. Fundamental error.
   a. Lack of subject matter jurisdiction.
      i. The many guises of lack of subject matter jurisdiction
      ☐ An order signed after the expiration of plenary power
      ☐ Preemption
      ☐ Statutory prerequisites to suit–maybe
      ☐ The damages in a claim exceed the trial court's jurisdiction
      ☐ A state agency has exclusive original jurisdiction
      ☐ A case involving the political question doctrine
      ☐ Sovereign immunity (and governmental immunity?)
      ☐ Trial court action on remand inconsistent with/beyond the appellate court's judgment and mandate
      ☐ The failure to join an indispensable party
      ☐ Internal management of a voluntary association
      ☐ Ecclesiastical abstention doctrine
      ii. Other components of subject matter jurisdiction
      ☐ Standing
      ☐ Ripeness
      ☐ Mootness
      ☐ Defective service
      iii. ☐ A temporary injunction order which does not comply with Rule 683. **CONFLICT**
   b. ☐ An important public interest or public policy
   c. ☐ Certain issues in juvenile cases
   d. ☐ Certain issues in parental-right termination cases
2. Other stuff
   a. ☐ Ambiguity of contracts
   b. Complaints about judges
      i. ☐ The art. V, §11 constitutional disqualification (judge's interest, connection with the parties, or as prior counsel in the case).
      ii. ☐ Actions beyond the scope of the judge's assignment
      iii. ☐ Challenge to a trial judge's qualifications
      iv. ☐ A trial judge may not testify as a witness at trial
      v. ☐ A trial judge's bias or prejudice shown on the face of the record
   c. ☐ Inadequate notice of a hearing (so long as you don't show up for the hearing in question). **CONFLICT**
   d. ☐ Change in applicable law. **CONFLICT**
   e. ☐ Complaints about legal and factual sufficiency in a bench trial
   f. That the Vexatious Litigant statute bars a lawsuit and an appeal
   g. ☐ Certain complaints about affidavits in, and other aspects of, summary judgment practice

i. the following substantive defects in affidavits
☐ a conclusory statement. **CONFLICT**
☐ a subjective belief
☐ an unsubstantiated opinion
☐ a lack of relevance
☐ the parol evidence rule
☐ that a party's own interrogatory responses may not be used in its favor in a no evidence challenge,
☐ an unsigned affidavit

ii. ☐ A complaint that an affidavit shows it is not based on personal knowledge (**CONFLICT** about affidavit's mere failure to show personal knowledge).

iii. ☐ A failure to attach sworn or certified copies of documents referenced in a summary judgment affidavit. **CONFLICT**

iv. ☐ The failure to authenticate a document in motion practice.

h. ☐ That the no-evidence motion for summary judgment is not sufficiently specific. **CONFLICT**

i. ☐ That the traditional summary judgment motion fails to prove the entitlement of the movant to judgment as a matter of law

B. Complaints which can be raised when it's too late to fix them.

1. ☐ Legal and factual sufficiency complaints can first be raised on appeal in a civil non-jury trial, and in post-trial motions in jury trials. For example:
☐ A complaint that expert testimony is speculative or conclusory on its face can first be raised after the evidence is offered–but you should preserve that complaint as you would a complaint about legal sufficiency. **CONFLICT**

☐ One court of appeals, and a concurrence in another court, say that complaining about a party's failure to segregate its attorney's fees in a bench trial is a legal/factual sufficiency complaint–but most courts don't, and the disagree about the deadline for such a complaint. **CONFLICT**
☐ At least one court of appeals has held that a legal insufficiency complaint as to damages can be made in a post-trial motion.
☐ Other complaints characterized as legal insufficiency complaints.

2. Immaterial jury findings can first be challenge in post-verdict motions. For example:
☐ the question asks the jury about damages on an irrelevant date
☐ the question asks the jury to find whether there was negligence in a case pled as a premises liability claim
☐ a jury finding on a defamation claim was immaterial, because the cause of action actually sounded in business disparagement
☐ the question asks the jury to find reasonable attorney's fees when recovery of fees is sought under Chapter 38 against an LLC
☐ A case study in the difficulties and disagreements regarding immateriality and preserving charge error–United Scaffolding.

3. Jury findings regarding a "purely legal issue" can first be challenged in post-verdict motions. For example:
   ☐ that Chapter 95 applies
   ☐ exemplary damages are capped
   ☐a party is not jointly and severably responsible for exemplary damages

   ☐contractual damages are independent of statutory damages
4. ☐ Incurable jury argument. Tex. R. Civ. P. 324(b)(5)
5. ☐ You may be able to complain about irreconcilably conflicting jury answers after the trial court dismisses the jury–but I would not advise counting on it.