PRESERVATION OF ERROR AND AVOIDANCE OF WAIVER IN POST-TRIAL MOTIONS

Prepared by:

Kevin Dubose
Perdue & Todesco
Houston

The University of Texas School of Law

2ND ANNUAL CONFERENCE ON TECHNIQUES FOR HANDLING CIVIL APPEALS IN STATE & FEDERAL COURT
June 4 & 5, 1992
Austin, Texas

PRESERVATION OF ERROR AND AVOIDANCE OF WAIVER IN POST-TRIAL MOTIONS

by

KEVIN DUBOSE

Of Counsel
Perdue & Todesco
P. O. Box 1364
Houston, Texas 77251-1364

Director of Appellate Advocacy
University of Houston Law Center
4800 Calhoun
Houston, Texas 77204

May, 1992

TABLE OF CONTENTS

PRESERVATION OF ERROR AND AVOIDANCE OF WAIVER IN POST-TRIAL MOTIONS

I. PRELIMINARY MATTERS.

A. Scope of the Article.

This paper addresses the preservation of appellate error in civil trial courts between the receipt of the jury verdict and the filing of the appeal bond. Accordingly, the paper is predominantly devoted to post-trial motion practice. It will not treat any motions filed before or during trial. Likewise, it excludes all motions filed in the appellate court. It also does not treat instruments filed in the trial court, but exclusively directed to the appellate process (such as the written requests to prepare the statements of facts, and the designation of items to be included in transcript), even though those instruments must be filed at or before the time of filing the appeal bond.

Subjects that are covered include motions filed for the purpose of entering a judgment (motion for judgment on the verdict, motion to disregard jury findings, motion for judgment n.o.v.), motions that attack the judgment (motion for new trial, motion for remittitur, motion for judgment nunc pro tunc, and motions to vacate, correct, modify or reform the judgment), and post-trial motions in a bench trial (request for findings of fact and conclusion of law).

B. Structure of Article.

Because several types of error may be preserved by using the same type of post-trial motion, this paper is organized around the motions themselves, rather than around the error to be preserved. That way, instead of discussing identical remedies for different problems several times, each remedy will be discussed thoroughly one time.

However, because many practitioners using this article will be approaching it from the standpoint of particular types of error to be preserved, a cross-reference chart is provided at the end of the paper. By listing the various types of appellate error and the motions required to preserve them, this chart should facilitate the use of the paper.

II. MOTIONS TO ENTER A JUDGMENT.

A. Motion for Judgment on the Jury Verdict.

The "motion for judgment on the verdict" or "motion for judgment" (where the judgment is based on the jury verdict) are not discussed in the Texas Rules of Civil Procedure. If anything, Rule 300 suggests that a motion for judgment is not necessary because it states, "Where a special verdict is rendered, . . . the court ***shall*** render judgment thereon unless set aside and a new trial is granted, or judgment is rendered notwithstanding the verdict or jury findings under these rules." Tex. R. Civ. P. 300. Rule 305 provides that any party ***may*** prepare a judgment and submit it to the court, Tex. R. Civ. P. 305, but the rules do not require that a judgment be forwarded to the court. *But see Bishop v. Wollyang*, 705 S.W.2d 312, 314 (Tex. App.--San Antonio 1986, writ ref'd n.r.e.). (Contains language saying prevailing party has duty to prepare judgment and submit it to court. When party did not do so for ten years,

court's failure to dismiss for want of prosecution was not abuse of discretion, and trial court's grant of new trial was proper because court reporter's notes were lost and the losing party did not have adequate record for appeal.)

Rule 305 also does not require that a judgment be accompanied by a motion for judgment. However, the use of the motion format is a more direct request for action than simply forwarding the judgment to the court and hoping that the judge will sign it. Moreover, there may be some psychological benefit in filing a motion for judgment if the attorney is aware of any dispute concerning the way in which the jury verdict will be converted into a judgment. In that situation, if the prevailing party merely forwards a judgment to the court for signature, then the opposing party has the first opportunity to confront the judge with argument concerning the disputed matter in an adversarial pleading that attacks the proposed judgment. If the party proposing the judgment wants to be the first to confront the judge with the matter in dispute, and take the opportunity to frame the issue in a way that is most favorable to him, the first chance to do that arises in a motion for judgment.

Although motions for judgment are not required to preserve error, in some circumstances the filing of a motion for judgment may ***waive*** error. The party moving for judgment on the verdict may waive the right to complain on appeal about any portion of that verdict. The problem arises when some of the jury findings are favorable to a litigant, but other findings are adverse, and need to be challenged on appeal. In order to begin the appellate process, the litigant needs to get a judgment entered. The temptation is to file a motion for judgment on the verdict, and then challenge the adverse findings on appeal. However, Texas courts have held that a motion for judgment on the verdict is an affirmation that the jury findings were supported by the evidence, and therefore waives of the right to challenge those findings on appeal. ***See Litton Indus. Products, Inc. v. Gammage***, 668 S.W.2d 319, 322 (Tex. 1984); ***Chuck Wagon Feeding Co. v. Davis***, 768 S.W.2d 360, 366 (Tex. App.--El Paso 1989, writ denied); ***Russell v. Dunn Equipment, Inc.***, 712 S.W.2d 542, 545 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e). In two of those cases, ***Litton*** and ***Russell***, the party moving for judgment attempted to reserve the right to challenge the evidentiary support for jury findings, despite filing a motion for judgment. In ***Litton***, the motion reserved the right to "challenge any adverse judgment based upon the verdict." ***Litton***, 668 S.W.2d at 322. In ***Russell***, the motion stated that it was filed "without waiver of appeal or the right to file a motion for new trial or any other subsequent pleadings." ***Russell*** 712 S.W.2d at 545. In both cases, the appellate court held that the attempt to reserve rights and avoid waiver was unsuccessful. ***But see Emmerson v. Tunnell***, 793 S.W.2d 947, 948 (Tex. 1990) (partially prevailing party moved for judgment on the verdict, but the trial court entered a judgement for less than the verdict, and the Texas Supreme Court held that error was preserved).

In ***First National Bank of Beeville v. Fojtik***, 775 S.W.2d 632 (Tex. 1989), the Texas Supreme Court recognized that this rule places litigants with a partially successful result in a difficult position. The court observed, "There must be a method by which a party who desires to initiate the appellate process may move the trial court to render judgment without being bound by its terms." ***Id.*** at 635. The court, however, stopped short of overruling its previous decision in ***Litton***, and failed to eliminate the waiver rule entirely. Rather, the court distinguished ***Fojtik*** from ***Litton*** in two ways. First, in ***Fojtik*** the party moving for judgment had partially prevailed,

but still wanted to appeal part of the jury verdict, and the only way to begin the appellate process was to move for judgment. Second, the reservation of the right to attack the jury verdict in the motion for judgment in ***Fojtik*** was more thorough and explicit, and was contained in the motion for judgment itself, not a separate document. The ***Fojtik*** motion for judgment stated:

> While plaintiffs disagree with the findings of the jury and feel there is a fatal defect which will support a new trial, in the event the Court is not inclined to grant a new trial prior to the entry of judgment, plaintiffs pray the Court enter the following judgment. Plaintiffs agree only as to the form of the judgment but disagree and should not be construed as concurring with the content and the result.

Id.

In ***Melissinos v. Phamanivong***, 823 S.W.2d 339 (Tex. App.--Texarkana 1991, writ denied), the losing defendant filed a Response to Plaintiff's Motion for Judgment which included an alternative request to enter judgment for a lesser amount, based on a dispute over interest calculations. The Court of Appeals discussed ***Gammage*** and ***Fojtik***, and chose to apply ***Fojtik***, despite the fact that Melissinos' attorney did not attempt to reserve the right to challenge factual sufficiency at all. The court noted that the judgment requested was in the alternative, and held that procedural rules should not be used to elevate form over substance. ***Id.*** at 342.

Nevertheless, the safest course for a litigant with a partially successful jury verdict is to file a motion for judgment that includes a paragraph that copies the disclaimer in ***Fojtik.*** Anything less may result in the waiver of the right to challenge any jury findings on evidentiary grounds.

B. Motion to Disregard Jury Findings.

1. Source of authority. Rule 301 of the Texas Rules of Civil Procedure provides, " . . . [T]he court may, upon . . . motion and notice, disregard any jury finding on a question that has no support in the evidence." Tex. R. Civ. P. 301.

2. Description of motion. A motion to disregard jury findings is appropriate when the movant is asking the trial judge to ignore one or more particular jury findings (but not the whole verdict), and to render judgment based upon the remaining findings. ***See Dewberry v. McBride,*** 634 S.W.2d 53, 55 (Tex. App.-- Beaumont 1982, no writ). A proper motion to disregard must 1. designate the finding or findings sought to be disregarded; 2. specify the reason for disregarding the disputed findings; and 3. contain a request that judgment be entered upon the remaining findings after the designated erroneous findings have been disregarded. ***Dupree v. Piggly Wiggly Shop Rite Foods, Inc.***, 542 S.W.2d 882, 892 (Tex. Civ. App.--Beaumont 1976, writ ref'd n.r.e.); ***Dewberry***, 634 S.W.2d at 55.

A jury finding may be disregarded in only two circumstances: if there is no evidence in the record to support the finding, or if the finding is immaterial. ***C & R Transp., Inc. v. Campbell***, 406 S.W.2d 191, 194 (Tex. 1966); ***Stout v. Clayton***, 674 S.W.2d 821, 824-25 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.). A jury finding is immaterial when the question should not have been presented to the jury because there was no evidence to support an affirmative answer, ***Robberson Steel, Inc. v. J.D. Abrams, Inc.***, 582 S.W.2d 558, 564 (Tex. Civ. App.--El Paso 1979, no writ), or when the jury question, though properly submitted, has been rendered immaterial by other findings. ***C & R Transp., Inc. v. Campbell***, 406 S.W.2d 191, 194 (Tex. 1966); ***Blue Bell, Inc. v. Isbell***, 545 S.W.2d 563 (Tex. Civ. App.--El Paso 1976, no writ). A jury finding on an immaterial jury question should be disregarded by the trial court, because it cannot affect the judgment to be entered. ***City of San Augustine v. Roy W. Green Co.***, 548 S.W.2d 467, 470-71 (Tex. Civ. App.--Tyler 1977, writ ref'd n.r.e.).

When a trial court disregards particular jury findings there must be enough of a verdict remaining to support a judgment after the disregarded issues have been stricken. When matters are disputed, the trial court has no authority to substitute its finding for that of the jury. ***Highlands Ins. Co. v. Baugh***, 605 S.W.2d 314, 319 (Tex. Civ. App.--Eastland 1980, no writ). However, when facts are undisputed, the trial court may disregard the jury findings and render judgment based on undisputed facts for which no jury finding was necessary. ***City of San Antonio v. Theis***, 554 S.W.2d 278, 284 (Tex. Civ. App.--Tyler 1977, writ ref'd n.r.e), ***cert. denied***, 439 U.S. 807 (1978). ***See also Long v. Tascosa Nat'l Bank***, 678 S.W.2d 699 (Tex. App.--Amarillo 1984, no writ). In other words, the trial court may not disregard a jury's negative finding and substitute its own affirmative finding unless the evidence conclusively established the opposite affirmative finding. ***Texas Paper Stock Co. v. Corpus Christi Food City, Inc.***, 609 S.W.2d 259, 261-62 (Tex. Civ. App.--Corpus Christi 1980, no writ).

3. **Evidentiary standard.** The standard for determining whether to grant a motion to disregard a jury finding is a legal sufficiency or "no evidence" standard. A trial court may disregard a jury finding only if there is no evidence of probative force to support the finding. ***Overstreet v. Gibson Product Co.***, 558 S.W.2d 58, 59-60 (Tex. Civ. App.--San Antonio 1977, writ ref'd n.r.e.). If there is any contrary evidence of a probative nature, and the finding is on a material issue, then the finding may not be disregarded by the trial court. ***Long***, 678 S.W.2d at 704. The trial court is prevented from disregarding a jury finding that is supported by probative evidence, even though that finding may be against the great weight and preponderance of the evidence. ***Texas Paper Stock***, 609 S.W.2d at 261; ***Everman Corp. v. Haws & Garrett General Contractors, Inc.***, 578 S.W.2d 539, 542-44 (Tex. Civ. App.--Fort Worth 1979, no writ).

When reviewing the trial court's action in disregarding a jury finding, an appellate court may consider only that evidence, together with reasonable inferences drawn from it, which supports the jury finding that was disregarded. ***Overstreet***, 558 S.W.2d at 60. All evidence will be considered in a light most favorable to the jury finding that was disregarded, every reasonable intendment deductible from the evidence will be indulged in favor of the jury finding, only the evidence and inferences which support the finding will be considered, and all evidence and

inferences contrary to the finding will be rejected. ***Campbell v. Northwestern Nat'l Life Ins. Co.***, 573 S.W.2d 496 (Tex. 1978); ***Duren v. United States Fire Ins. Co.***, 579 S.W.2d 32 (Tex. Civ. App.--Tyler 1979, no writ).

4. Necessity for motion. A trial court has no authority to disregard a jury finding on its own initiative, ***Durham v. Uvalde Rock Asphalt Co.***, 599 S.W.2d 866, 876 (Tex. Civ. App.--San Antonio 1980, no writ), but can only disregard a jury finding upon written motion and reasonable notice. ***Dewberry***, 634 S.W.2d at 55; ***Gonzalez v. Mendoza***, 739 S.W.2d 120, 122 (Tex. App.--San Antonio 1987, no writ); ***see also Scholl v. Home Owners Warranty Corp.***, 810 S.W.2d 464, 467 (Tex. App.--San Antonio 1991, no writ). The record must reflect that notice of the motion that was given to all the parties, and that the motion was presented and ruled upon by the court. ***Moore v. Cotter & Co.***, 726 S.W.2d 237, 240 (Tex. App.--Waco 1987, no writ); ***Douglas v. Winkle***, 623 S.W.2d 764, 768 (Tex. App.--Texarkana 1981, no writ). Granting judgment in the absence of notice and hearing is error. ***Hines v. Parks***, 128 Tex. 289, 96 S.W.2d 970, 973 (1936). A similar showing of motion and notice is necessary to preserve a complaint about the denial of the motion. ***Houston County v. Leo L. Landauer & Assoc. Inc.***, 424 S.W.2d 458, 465-466 (Tex. Civ. App.--Tyler 1968, writ ref'd n.r.e.). The only exception to this rule is that the trial court may disregard a jury finding on an ***immaterial*** question, even on the court's own motion. ***Spencer v. Eagle Star Ins. Co.***, 780 S.W.2d 837, 844 (Tex. App.--Austin 1989, no writ); ***Brown v. Armstrong***, 713 S.W.2d 725, 728-29 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.) (trial court rendered judgment for doctor in medical malpractice case, despite informed consent findings against the doctor, and without a motion by doctor to disregard jury findings on informed consent, where informed consent issues were immaterial).

5. Time for filing. The rules do not contain any deadlines for the filing of a motion to disregard jury findings. It make sense to file the motion soon after the jury verdict is received, so that the first judgment signed will reflect that the disputed findings have been disregarded. A motion to disregard jury findings ***may*** be filed after a judgment has been signed, but it must be acted upon by the trial court before the original judgment becomes final. ***Eddings v. Black***, 602 S.W.2d 353, 356-57 (Tex. Civ. App.--El Paso 1980), writ ref'd n.r.e. ***per curiam*** 615 S.W.2d 168 (Tex. 1981).

C. Motion for Judgment Non Obstante Veredicto (N.O.V.).

1. Source of authority. Rule 301 of the Texas Rules of Civil Procedure provides, " . . . [U]pon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, ..." Tex. R. Civ. P. 301.

2. Description of motion. Unlike a motion to disregard jury findings, which only complains of certain findings and asks that judgment be based upon the remaining findings, a motion for judgment n.o.v. complains of the entire jury verdict, and seeks a judgment that is contrary to the jury verdict. As Rule 301 plainly states, a judgment n.o.v. is appropriate when a directed verdict would have been justified. ***Monk v. Dallas Brake & Clutch Serv. Co.***, 697

S.W.2d 780, 783-84 (Tex. App.--Dallas 1985 writ ref'd n.r.e.); ***Stout v. Clayton***, 674 S.W.2d 821, 824-25 (Tex. App.--San Antonio 1984, writ ref'd n.r.e.); ***Rowland v. City of Corpus Christi***, 620 S.W.2d 930, 932-33 (Tex. Civ. App.--Corpus Christi 1981, writ ref'd n.r.e.). A judgment n.o.v. is a harsh remedy, which should be used only in very limited circumstances. ***Wood v. Texas Farmers Ins. Co.***, 593 S.W.2d 777, 780 (Tex. Civ. App.--Corpus Christi 1979, no writ). Those circumstances were described in the ***Rowland*** case, which stated that a judgment n.o.v. is proper when: 1. a defect in the opposing party's pleading makes that pleading insufficient to support a judgment; 2. the truth of the fact propositions which, under the substantive law, establish the right of the movant, or negates the right of his opponent to judgment, is conclusively established; or 3. the evidence is insufficient to raise an issue about one or more fact propositions which must be established for the opponent to be entitled to judgment. ***Rowland***, 620 S.W.2d at 932-33; ***McCarley v. Hopkins***, 687 S.W.2d 510, 512 (Tex. App.--Houston [1st Dist.] 1985, no writ).

3. **Evidentiary standard.** Like the motion to disregard jury findings, the motion for judgment n.o.v. is evaluated on the basis of legal sufficiency, or a "no evidence" test, rather than a factual sufficiency, or "great weight and preponderance of the evidence" test. The trial court may not render a judgment n.o.v. based on factual insufficiency grounds. ***Siderius, Inc. v. Wallace Co.***, 583 S.W.2d 852, 861 (Tex. Civ. App.--Tyler 1979, no writ); ***Frost v. Sun Oil Co.***, 560 S.W.2d 467, 474 (Tex. Civ. App.--Houston [1st Dist.] 1977, no writ). If there is some evidence that amounts to more than a scintilla to support the jury verdict, the court must enter judgment consistent with the verdict, even if the verdict is against the great weight and preponderance of the evidence. ***Basin Operating Co. v. Valley Steel Prods. Co.***, 620 S.W.2d 773, 776 (Tex. Civ. App.--Dallas 1981, writ ref'd n.r.e.). The court may enter a judgment n.o.v. only when there is no evidence warranting the submission of a question to the jury, and when there is no evidence to support the jury's answer to that question. ***San Antonio Indep. School Dist. v. National Bank of Commerce***, 626 S.W.2d 794, 795-96 (Tex. App.--San Antonio 1981, no writ). This rule does not require that there be "no evidence at all" to sustain a motion for judgment n.o.v., but comprehends those situations in which the evidence is deemed legally insufficient to establish an asserted fact. ***Marquez v. Sears, Roebuck & Co.***, 625 S.W.2d 52 (Tex. App.--San Antonio 1981), ***rev'd on other grounds***, 628 S.W.2d 772 (Tex. 1982); ***Basin Operating Co.***, 620 S.W.2d at 776.

When acting upon a motion for judgment n.o.v., the trial court must consider all testimony in a light most favorable to the party against whom the motion is sought, and every reasonable intendment deducible from the evidence must be indulged in that party's favor. ***Dowling v. NADW Mktg., Inc.***, 631 S.W.2d 726, 728 (Tex. 1982); ***James v. Vigilant Ins. Co.***, 674 S.W.2d 925, 926 (Tex. App.-- Amarillo 1984, writ ref'd n.r.e.). Moreover, when reviewing a judgment n.o.v., the appellate court must also consider all evidence in a light most favorable to the party against whom the judgment n.o.v. was rendered; must indulge every reasonable intendment deducible from the evidence in that party's favor; and should consider only that evidence and those inferences from it which support the jury verdict, disregarding all contrary evidence and inferences. ***McDade v. Tex. Commerce Bank, Nat'l Ass'n***, 822 S.W.2d 713, 717 (Tex. App.--Houston [1st Dist.] 1991, writ requested); ***Best v. Ryan Auto Group, Inc.***, 786

S.W.2d 670, 671 (Tex. 1990); ***Freeman v. Texas Compensation Ins. Co.***, 586 S.W.2d 172 (Tex. Civ. App.--Fort Worth 1979, ***modified on other grounds***, 603 S.W.2d 186 (Tex. 1980). *See also Mancorp, Inc.*, 802 S.W.2d at 227.

4. Necessity for motion. A trial judge is not empowered to enter a judgment n.o.v. on his own initiative, but can do so only upon written motion and reasonable notice. ***Dewberry***, 634 S.W.2d at 55. In fact, the requirement of a motion for judgment n.o.v. is jurisdictional, and if a trial court grants a judgment n.o.v. without a proper motion seeking that relief, the trial court errs. ***Olin Corp. v. Cargo Carriers, Inc.***, 673 S.W.2d 211 (Tex. App.--Houston [14th Dist.] 1984, no writ). However, in determining whether a motion for judgment n.o.v. has been filed, the appellate court will look to the substance of the pleading, as gleaned from the body and the prayer of the instrument, rather than limiting its inquiry to the caption of the instrument. ***Dittberner v. Bell***, 558 S.W.2d 527, 531 (Tex. Civ. App.--Amarillo 1977, writ ref'd n.r.e.).

5. Time for filing. As with the motion to disregard jury findings, there are no time limits contained in the rules for filing a motion for judgment n.o.v. The better practice is to file the motion soon after the jury verdict so that the first judgment signed is the judgment n.o.v. However, a motion for judgment n.o.v. may be filed and acted upon after a contrary judgment is entered, as long as the judgment is not yet final. ***Cleaver v. Dresser Indus.***, 570 S.W.2d 479, 483-84 (Tex. Civ. App.--Tyler 1978, writ ref'd n.r.e.); ***Needville Indep. School Dist. v. S.P.J.S.T. Rest Home***, 566 S.W.2d 40, 42 (Tex. Civ. App.--Beaumont 1978, no writ).

III. MOTIONS ATTACKING THE JUDGMENT.

A. Motion for New Trial.

1. Source of authority. Motions for new trial are discussed in Rules 320-329b of the Texas Rules of Civil Procedure.

Rule 320 says that new trials may be granted for good cause, either upon a written, signed motion, or the court's own motion. The rule also provides for partial new trials of severable issues. Tex. R. Civ. P. 320.

Rule 321 states that a motion for new trial must specifically identify the action by the trial court of which the movant complains so that the objection can be clearly identified and understood by the court. Tex. R. Civ. P. 321. In that same vein, Rule 322 says that objections couched in general terms shall not be considered by the court. Tex. R. Civ. P. 322.

Rule 324 states the general rule that a complaint need not be raised in a motion for new trial in order to be preserved for purposes of appeal. The rule also outlines five exceptions to that general principle. For these required exceptions, raising a point in a motion for new trial is a required to preserve a point on appeal. Tex. R. Civ. P. 324.

Rule 326 provides that no more than two new trials can be granted to the same party in the same case based on factual insufficiency or great weight of the evidence. TEX R. CIV. P. 326.

Rule 327 discusses the standard for granting a new trial based on jury misconduct. Tex. R. Civ. P. 327.

Rule 329b describes the time for filing a motion for new trial, and the effect that the filing of a motion for new trial has on the court's retention of plenary power. Tex. R. Civ. P. 329b.

2. **Description of motion.**

a. **Purpose.** A motion for new trial is a condensed version of an appeal, although it is usually heard by the same judge who rendered judgment. The movant in a motion for new trial is seeking the trial court equivalent of a reversal and remand by the appellate court.

The purpose of a motion for new trial is to give the trial court a chance to examine assigned errors in the trial, and to have the opportunity to cure those errors by granting a new trial rather than have the case go up on appeal. ***Mushinski v. Mushinski***, 621 S.W.2d 669, 670-71 (Tex. Civ. App.--Waco 1981, no writ); ***Townsend v. Collard***, 575 S.W.2d 422, 423-24 (Tex. Civ. App.--Fort Worth 1978, no writ). However, the hearing on a motion for new trial is not a means by which the case may be tried over again, or tried differently. ***Mushinski***, 621 S.W.2d at 671; ***Scheffer v. Chron***, 560 S.W. 2d 419, 420 (Tex. Civ. App.--Beaumont 1977, writ ref'd n.r.e.).

b. **Requirement of specifics.** Rules 321 and 322 of the Texas Rules of Civil Procedure require that a motion for new trial specifically identify complaints, and not plead error generally. No point of error on appeal may be predicated upon an improper, general assignment in the motion for new trial, ***Powell v. Powell***, 554 S.W.2d 850, 855 (Tex. Civ. App.--Tyler 1977, writ ref'd n.r.e.), and assignments couched in general terms will not be considered by the appellate courts. ***Mitchell v. Chaparral Chrysler-Plymouth Sales, Inc.***, 572 S.W.2d 359, 360 (Tex. Civ. App.--Fort Worth 1978, writ ref'd n.r.e.). For example, a general objection in a motion for new trial that the trial court erred in overruling all of the movant's objections to the charge is insufficiently clear and certain to preserve the point of error on appeal. ***See Southwest Title Ins. Co. v. Plemons***, 554 S.W.2d 734, 735-36 (Tex. Civ. App.--Dallas 1977, writ ref'd n.r.e.). An assignment of error in a motion for new trial that directs the trial court to scan the movant's objections at trial, without setting forth particular objections, is an inadequate predicate for a point of error on appeal. ***Lee v. Andrews***, 545 S.W.2d 238, 247 (Tex. Civ. App.--Amarillo 1976, writ dism'd).

c. **"Presentation" not required.** The mere conclusion of a complaint in a motion for new trial, and the proper and timely filing of that motion, is sufficient to preserve error. In other words, the movant need not "present" the complaint to the court in an oral hearing prior to the time when the motion is overruled by operation of law. ***See Cecil v. Smith,*** 804 S.W.2d 509, 511-12 (Tex. 1991).

d. **As a prerequisite for appeal.** Raising a ground of error in a motion for new trial is not a prerequisite for making an argument on appeal unless the error is listed in Rule 324(b). That list includes:

1. a complaint upon which evidence must be heard, such as jury misconduct, newly discovered evidence, or failure to set aside a default judgment;

2. a complaint of factually insufficient evidence to support a jury finding;

3. a complaint that a jury finding is against the great weight and preponderance of the evidence;

4. a complaint of inadequate or excessive damages awarded by the jury;

5. incurable jury argument, if it has not been previously ruled upon by the court.

Tex. R. Civ. P. 324. No other grounds of error need to be raised in a motion for new trial in order to preserve the right to make those arguments on appeal. ***See e.g. Wilson v. Dunn,*** 800 S.W.2d 833, 837 (Tex. 1990) (complaint of defective service need not be raised in motion for new trial because its not part of list in Rule 324). However, there may be some advantage in including all of a party's potential points of error in a motion for new trial, regardless of whether Rule 324 requires their inclusion. First, an appellate court is more likely to be impressed with an appellant who did everything possible to give the trial judge the opportunity to correct his own mistakes before taking the case to the appellate court. Second, there is always a chance that the trial judge may be impressed with an assignment of error, and grant the motion for new trial. As long as there is a chance of that happening, it makes little sense to reserve any arguments until the appellate brief.

Although "no evidence" points of error need not be included in a motion for new trial, they may be preserved by inclusion in a motion for new trial if they have not been preserved in any other way. ***Cecil v. Smith***, 804 S.W.2d at 510-511.

e. **Particular grounds.** There are as many different grounds for a motion for new trial as there are reasons to reverse and remand a case on appeal. A partial list of particular grounds includes:

(1) **Jury misconduct.** Rule 327(a) provides that a motion for new trial may complain of misconduct of the jury, improper communication made to the jury, or an incorrect answer given on voir dire examination. When confronted with such a motion, the court must hear evidence concerning the jury misconduct in open court, and may grant a new trial if the misconduct is proved, if it is material, and if it reasonably appears that harm resulted to the movant. Tex. R. Civ. P. 327(a). However, rule 327(b) severely limits the proof of jury misconduct by providing that a juror may not testify about any matters discussed during the jury's deliberations, except for situations where "any outside influence was improperly brought to bear upon any juror." Tex. R. Civ. P. 329(b). ***See, e.g., Palmer Well Servs. v. Mack Trucks, Inc.***, 776 S.W.2d 575, 577 (Tex. 1989) (10-2 verdict for Defendant, but one of ten jurors in majority failed to reveal a felony indictment on voir dire; harm presumed).

(2) **Inadequate record.** When a party seeking to appeal from a judgment exercises due diligence, but is unable, through no fault of his own, to obtain a proper record of the evidence introduced at trial, a new trial should be granted in order to preserve his right to appeal. ***Hawkins v. Hawkins***, 626 S.W.2d 332, 333 (Tex. App.--Tyler 1981, no writ); ***Garcia v. Smith***, 612 S.W.2d 255, 256 (Tex. Civ. App.--Beaumont 1981, no writ); ***O'Neal v. County of San Saba***, 594 S.W.2d 185, 186 (Tex. Civ. App.--Austin 1980, writ ref'd n.r.e.). However, a new trial should be granted only where it appears that no other action will adequately protect the right of the aggrieved party to a review by the appellate court. ***Wolters v. Wright***, 623 S.W.2d 301, 305-06 (Tex. 1981). ***But see Hidalgo Chambers & Co. v. F.D.I.C.***, No. 10-89-153-CV (Tex. App.--Waco, March 22, 1990, n.w.h.) (not yet reported) (appellate court ordered new trial because trial exhibits lost).

(3) **Newly discovered evidence** Motions for new trials based on newly discovered evidence are committed to the sound discretion of the trial court. ***Wilkins v. Royal Indem. Co.***, 592 S.W.2d 64, 68-69 (Tex. Civ. App.--Tyler 1979, no writ). Motions for new trial on grounds of newly discovered evidence are not favored by the courts, and are received with careful scrutiny. ***Posey v. Posey***, 561 S.W.2d 602, 605 (Tex. Civ. App.-- Waco 1978, writ dism'd). In order to prevail on a motion for new trial based on newly discovered evidence, the movant must: 1. introduce the newly discovered evidence in admissible form at the hearing on motion for new trial; 2. show that he had no notice of the existence of the evidence before trial; 3. demonstrate that due diligence was used to obtain the evidence before trial; 4. demonstrate that the evidence is not merely cumulative, nor does it tend only to impeach; 5. show that the evidence would produce a different result if a new trial were granted. ***Fettig v. Fettig***, 619 S.W.2d 262, 267 (Tex. Civ. App.--Tyler 1981, no writ); ***Wilkins***, 592 S.W.2d at 68-69; ***Estate of Arrington v. Fields***, 578 S.W.2d 173, 179-81 (Tex. Civ. App.--Tyler 1979, writ ref'd n.r.e.). The due diligence requirement is not satisfied if it appears that the same effort used to produce the testimony after the trial would have produced the testimony if those same efforts had been used prior to trial. ***Wilkins***, 592 S.W.2d at 69; ***Scheffer***, 560 S.W.2d at 423.