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High Value Verdict Reversals

TUESDAY, JULY 9, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Reversing The Multi-million Dollar Verdict

Presented by Sean Higgins

34% Of Appealed Jury Verdicts Are Reversed In Texas

- 77% Legal insufficiency
 - 9% Charge error
 - 5% Factual insufficiency (new trial)
-
- *Source: Liberato & Rutter, Reasons for Reversal in Texas Courts of Appeals, Hou L. Rev. 2012.*

11.7% Of Private Party Civil Judgments Reversed In Federal Court

Source: <http://www.uscourts.gov/statustics/table/b-5/statistical-tables-federal-judiciary/2018/06/30>

What Is Harmful Error?

- FRCP 61, the Harmless Error rule.
- “An error is not harmless if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.”
- *Matusick v. Erie Cty. Water Auth.*, 757 F.3d 31, 50 (2nd Cir. 2014).

Texas Follows A Simpler Definition

- Error is harmful if it was reasonably calculated to and probably did cause an erroneous judgment.
- *Gee v. Liberty Mut. Fire Ind. Co.*, 765 S.W.2d 394, 396 (Tex. 1989)

Trial Conduct Of Counsel

- The conduct of counsel is not reviewed on appeal.
- The trial court's application of its discretion in addressing that conduct is.
- Therefore, you must:
 - Object
 - Request instruction
 - Move for mistrial



Multi-Million Dollar Verdict Reversals: Jury Instruction Issues

Eileen GilBride
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Statistics

- **2017 – National Center for State Courts – Court Statistic Project**
 - **civil appeals were affirmed 40% (Alabama) to 86% (District of Columbia) of the time**
 - **most states fell in the 60-80% affirmance range**

Statistics

- **civil appeals were reversed 7% (Iowa) to 38% (Hawaii) of the time for intermediate appellate courts – most fell in the 13% to 25% range**
- **higher reversal rate in court of last resort: 8% (Delaware) to 59% (Texas)**
 - **most fell in the 24% to 45% range**

Failure to Properly Instruct

- one of the best arguments for overturning a bad verdict
- also a frequent justification for reversals
- trial lawyers need to
 - preserve objections to the other side's instructions
 - ensure your instructions will survive appellate scrutiny

Ensure Your Instructions Survive Appellate Scrutiny

- **Substantively**
 - **Be right on the law**
- **Procedurally**
 - **Make sure your proposed instructions are in the record**

Preserve Objections to your Opponent's Instructions

- **Procedurally**
 - **make specific objections on the record when instructions are argued**
 - **file written objections**
- **Substantively**
 - **Make your substantive argument to the trial court, even if you are sure the court will reject it**

Legal Or “Matter Of Law” Insufficiency

- “JMOL is warranted only if a reasonable jury would not have a legally sufficient basis to find for the nonmovant.”
Chirstopher v. DePuy Orthopedics, Inc., 888 F.3d 753 (5th Cir. 2018).
- Reviewing court may exclude erroneously admitted evidence from the determination. *Weisgram v. Marley*, 628 U.S. 440, 457 (2000)

Texas's Aggressive No Evidence Review

Evidence is legally insufficient where the proof of a vital fact is completely absent or, while present, amounts to no more than a scintilla. *Jelinek v. Casas*, 328 S.W.3d 526, 532 (Tex. 2010); *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). Inadmissible evidence cannot support a verdict. And incompetent evidence, even when it is admitted without objection, will not support a verdict. *City of Keller*, 168 S.W.3d at 812. Evidence is legally insufficient if the undisputed evidence rebuts the existence of a vital fact. *Jelinek*, 328 S.W.3d at 532; *City of Keller*, 168 S.W.3d at 810. Evidence is legally insufficient where evidence contrary to the verdict is conclusive. *Id.* at 817.

Scope Of Review Includes All Evidence

“We consider all the evidence, drawing all reasonable inferences and resolving all credibility determinations in the light most favorable to the non—moving party.” *Flowers v. S. Reg’l Physician Servs.*, 247 F.3d 229, 235 (5th Cir. 2001).

Scope Of Review Includes All Evidence

Legal insufficiency of the evidence may only be apparent when all of the evidence is placed in context. *City of Keller*, 168 S.W.3d at 811. Hence, the court must consider evidence contrary to the verdict if doing so reveals that the evidence supporting the verdict is incompetent. *Id.* If the evidence supporting the verdict is circumstantial, the Court must consider all of the circumstantial evidence, and the competing inferences that may be drawn from that evidence. *Id.* at 802.

Evidentiary Insufficiency & New Trial

- Verdict against the great weight of the evidence. *Cates v. Creamer*, 431 F.3d 456 (5th Cir. 2005)
- The damages awarded are inadequate or excessive. *Cranpark, Inc. v. Rogers Grp.*, 821 F.3d 723, 727 (6th Cir. 2016)
- A judgment should be set aside for factual insufficiency where the evidence is so weak as to render the jury's verdict clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986) (per curiam); *Dyson v. Olin Corp.*, 692 S.W.2d 456, 457 (Tex. 1985)



Multi-Million Dollar Verdict Reversals: Case Examples

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Case examples – improper attorney conduct

- ***RJ Reynolds v. Calloway*, 201 So. 3d 753 (Fla. App. 2016)**
- ***RJ Reynolds Tobacco Co. v. Schleider*, 2018 WL 6786635 (Fla. App. 2018).**

Case examples – jury instructions

- ***DuPray v. JAI Dining Services*, 432 P.3d 937 (Ariz. App. 2018)**
- ***Southeastern Pain Specialists, PC v. Brown*, 811 S.E.2d 360 (Ga. 2018)**

Case examples – excessive verdicts

- *Torres v. Concrete Designs*, 2019 WL 1567813 (Ohio App. 2019) (affirmed \$42M)
- *Odom v. RJ Reynolds Tobacco Co.*, 254 So.3d 268 (Fla. 2018) (affirmed \$6M)
- *Polett v. Public Communications, Inc.*, 2016 WL 3154155 (Pa. Super. 2016) (reversed \$26M)
- *Berkowitz v. Soper*, 128 A.3d 1159 (N.J. App. 2016) (reversed \$2M)



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Preparing The Appeal Begins Before Trial

- Identify issues early.
- What issues will be problematic and must be preserved?
- What issues will garner favorable attention on appeal?
- What should the record contain to support those issues?

Challenge Expert Witnesses To Preserve Error

- Unchallenged expert testimony can kill an appeal.
- *702/Daubert* motions to preserve error.
- Failure to object = expert testimony that is some evidence.

Developing The Expert Record

- Thorough depositions of key experts.
- Elicit admissions to support motion to exclude.
- Treatises and articles in the record as court exhibits.

Charge error

- Legally inaccurate instructions.
- Instructions or questions commenting on the weight of the evidence.
- Commingling valid theories with invalid theories.
- Omitting instructions on a defense or an inferential rebuttal.

Why Preserving Charge Error Matters

- Cannot complain on appeal an unobjected to charge.
- Evidentiary sufficiency will be measured against a legally inaccurate but unobjected to charge.
- Inferential rebuttals that have not been tendered are not considered.

Preserving charge error

- Mechanics vary from jurisdiction to jurisdiction.
- Object to questions and instructions and get a ruling.
- Tender instructions and questions in substantially correct form.

Preserving Evidentiary Sufficiency

- Directed Verdict/JMOL motions at close of plaintiff's case and at close of the evidence.
- JNOV/Renewed JMOL.
- Motion for new trial.



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