ERROR PRESERVATION

Enlisting a second set of eyes.

WRITTEN BY **STEVEN K. HAYES**

Comments here are fully explored in *Implications of Error Preservation Rulings,* presented at the State Bar of Texas 39th annual Litigation Update Institute (2022) and *Anticipating and Preventing Error Preservation Ambushes* from the State Bar's 13th annual Business Disputes Seminar (2021). Many, many thanks to those who inspired my *Ambushes* paper: Elizabeth G. "Heidi" Bloch and Jennifer Buntz, who presented *Unwaivable Error and Argument That Still Work Even if You Think of Them for the First Time on Appeal* at the State Bar's 29th annual Advanced Civil Appellate Practice Course (2015).

Enlisting a second set of eyes will help you avoid common preservation problems and take advantage of post-trial preservation tools the Supreme Court has recognized.

Statistics show that more than one-third of Texas preservation decisions have involved, in order of frequency: evidence, jury charge, summary judgment, attorneys' fees, legal sufficiency, and affidavits.

Appellate decisions concerning evidence reinforce the need for caselaw which convinces the trial court to admit your evidence and exclude your opponent's. Decisions on the remaining preservation topics show the benefit of getting someone whose judgment you trust to help you identify and preserve your complaints.

Summary judgments and affidavits.

On summary judgment issues, use two published "second set of eyes," each cited more than 100 times in appellate decisions: Timothy Patton's *Summary Judgments in Texas: Practice, Procedure and Review,* published by LexisNexis, and *Summary Judgments in Texas: State and Federal Practice,* by Judge David Hittner and Lynne Liberato.[1]

Summary judgment rules scream for having a second set of eyes to ensure you've preserved your complaints. Your motion "shall state the specific grounds therefor"; courts won't sustain your summary judgment on other grounds.[2] Further, courts will not reverse a summary judgment in your opponent's favor on "issues not expressly presented to the trial court by written motion, answer, or response."[3] A second set of eyes can help ensure your motion asserts all necessary "specific grounds"—including all elements of your opponent's claims or defenses supported by no evidence—or whether your response preserves all necessary issues.

The following complaints about summary judgment affidavits must be preserved in the trial court through rulings on timely, specific complaints:

- a jurat is missing,[4] a notary didn't sign it,[5] or it's in a foreign language;[6]
- an interested witness' testimony is not clear, positive, direct, and free from contradictions and inconsistencies;
- the affiant failed to affirm assertions are true and correct, or to show personal knowledge of the same;
- the affidavit is a sham, contradicting prior deposition testimony;
- an attachment is unauthenticated; or
- the affidavit contains hearsay or inconsistencies.

More importantly, a second set of eyes can help ensure your affidavits don't suffer from the following deficiencies which your opponent can first attack on appeal (depending on the court of appeals):

- your affiant makes conclusory statements;
- your expert's report is not authenticated by an affidavit;
- your affiants affirmatively show they lack personal knowledge;
- documents referenced in but not attached to an affidavit are not in evidence; and
- your affidavit provides legally insufficient evidence.

You don't want to discover these deficiencies in the appellate court.

Use a written order for rulings on summary judgment evidentiary objections.

I know what you'll say. "The Supreme Court told me in *Fieldturf* that an oral 'ruling [on summary judgment evidentiary objections] is sufficient for error-preservation purposes.'"[7] Make no mistake: *Fieldturf* requires that "the reporter's record of the hearing reveals an unequivocal oral ruling on the objection."[8] The exchange between court and lawyers during summary judgment hearings is often—maybe usually—anything but "unequivocal." Do what *Fieldturf* recognized was "the best practice for a party objecting to summary judgment evidence," i.e., "secure a

written order on the objection from the trial court."[9] Preparing a written order forces you to be the second set of eyes re-evaluating the importance of each objection, perhaps abandoning some during evidentiary negotiations with opposing counsel. A written order also gives you a checklist to ensure you cover all your objections at the hearing, and gives the trial court a roadmap as to necessary rulings. Get a written ruling.

Jury charge.

Recent cases emphasize how a second set of eyes can help your jury questions and instructions cover the waterfront and that you don't forget an objection to your opponents' offerings.

A second set of eyes might discern that your claims or defenses have terms requiring definitions (like "good faith.").[10] More frighteningly important, those eyes might help ensure your questions request a finding on the type, and correct details, of the case or defense you have pled and proved. For example: a premises liability claim requires a premises liability question, not a negligence question.[11] If your claim (including your damages) sounds in business disparagement, don't submit only a defamation question.[12] If your question asks the jury to make a finding about some issue as of a specific date, get the date right.[13] Running afoul of these examples may get you an immaterial finding, which can be first challenged post-trial.

In objecting to your opponents' questions and instructions, a second set of eyes will help identify every aspect of the other side's questions that commingle elements as to which there is evidence with elements as to which there is none, including questions apportioning damages.[14] You have to assert a *Casteel* objection to such questions.[15]

A second set of eyes can help you make use of post-trial preservation tools provided by the Supreme Court.

Adverse jury findings are disheartening. Grieve the loss, catch your breath, and use the post-trial tools recognized by the Supreme Court to preserve complaints for appeal, including new complaints that a second set of eyes may see.

Traditional post-jury trial motions (to disregard jury findings, for judgment, for judgment notwithstanding the verdict or for a new trial) can be vehicles to assert complaints about an immaterial jury finding (mentioned above),[16] a "purely legal issue,"[17] and (perhaps most powerfully) legal insufficiency. Purely legal issues can relate to the applicability of Chapter 95, and capping of, or joint and several liability for, exemplary damages.[18] We cannot list all "legal insufficiency" challenges here (like expert testimony being facially conclusory or speculative,[19] or there being legally insufficient evidence to prove contract formation[20]) but always assert a generic legal sufficiency complaint as to each pertinent finding—so that when a Eureka moment strikes you during appeal, you can cast that previously unarticulated complaint as legal insufficiency.

A warning on segregation of attorneys' fees: Don't be the test case. Segregate, and object to the failure to segregate, when fee evidence is offered.

At least in bench trials, some intermediate appellate courts require an objection when fee evidence is offered,[21] at least one held that failure to segregate is a legal/factual sufficiency point that Texas Rules of Appellate Procedure Rule 33.2(d) allows to first be raised on appeal,[22] and others have set the deadline between those two extremes. Don't be the test case that decides the issue. Object to the failure to segregate attorneys' fees no later than when the fee evidence is offered.

Conclusion.

Preservation is hard. Seeing all your potential complaints—before it's too late—is harder yet. Enlisting a second set of trusted eyes to preserve your complaints, both pre- and post-trial, may give you a leg up on this aspect of effective advocacy. **TBJ**

NOTES

1. 60 S. Tex. L. Rev. 1 (2019), revised publication imminent.
2. Tex. R. Civ. Pro. 166a(c).
3. *Id.* See also *ETC Mktg. v. Harris Cty. Appraisal Dist.,* 528 S.W.3d 70, 75 (Tex. 2017); see also *ExxonMobil Corp. v. Lazy R Ranch, LP,* 511 S.W.3d 538, 545-546 (Tex. 2017).
4. *Mansions in the Forest, L.P., v. Montgomery County,* 365 S.W.3d 314, 317 (Tex. 2012).
5. *Seim v. Allstate Texas Lloyds,* 551 S.W.3d 161, 165-166 (Tex. 2018).
6. *In re Sandoval,* 619 S.W.3d 716, 722 (Tex. 2021).
7. *Fieldturf United States v. Pleasant Grove Indep. Sch. Dist.,* 642 S.W.3d 829, 839 (Tex. 2022).
8. *Id.,* emphasis supplied.
9. *Id.*
10. *R.R. Comm'n of Tex. v. Gulf Energy Exploration Corp.,* 482 S.W.3d 559, 572 (Tex. 2016).
11. *United Scaffolding, Inc. v. Levine,* 537 S.W.3d 463, 482 (Tex. 2017).
12. *Innovative Block of S. Tex., Ltd. v. Valley Builders Supply, Inc.,* 603 S.W.3d 409, 427 (Tex. 2020).
13. *BP Am. Prod. Co. v. Red Deer Res., LLC,* 526 S.W.3d 389, 402 (Tex. 2017).
14. *Emerson Elec. Co. v. Johnson,* 627 S.W.3d 197, 211 (Tex. 2021).
15. *Crown Life Ins. Co. v. Casteel,* 22 S.W.3d 378, 388-89 (Tex. 2000).
16. *Red Deer,* 526 S.W.3d at 402.
17. *USAA Tex. Lloyds Co. v. Menchaca,* 545 S.W.3d 479, 487 n.8 (Tex. 2018).
18. *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, 158 (Tex. 2015).
19. *Emerson Elec.,* 627 S.W.3d at 204.
20. *Musallam v. Ali,* 560 S.W.3d 636, 638 (Tex. 2018).
21. *Home Comfortable Supplies, Inc. v. Cooper,* 544 S.W.3d 899, 908 (Tex. App.—Houston [14th Dist.] 2018, no pet.).
22. *Bos v. Smith,* 492 S.W.3d 361, 385 (Tex. App.—Corpus Christi 2016), aff'd in part, rev'd in part on other grounds, 556 S.W.3d 293 (Tex. 2018)).

STEVEN K. HAYES
is a solo civil appellate lawyer in Fort Worth and past chair of the State Bar of Texas Appellate Section. For more information, go to stevehayeslaw.com.