

# **Damages Error: Remand or Render**

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**Chapter \_\_**

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Board Certified in Civil Appellate Law (Texas Board of Legal Specialization, 2012); State Bar of Texas, SBN 24045756

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Melissa Davis, *Procedural Protections in Punitive Damages Cases: Ensuring that Juries Are Asking the Right Questions about Wealth Evidence*, 81 TEMPLE L. REV. 1119 (2008)

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## Damages Error: Remand or Render?

*Reversible damages error can be the end of the road or a chance to start over. An appellate court's decision to remand for new trial or render judgment on appeal is often critical to the parties' relative success, and attorneys can and should posture themselves to maximize their influence over the outcome of that decision. Find out what you can use from recent Texas appellate court opinions to get the disposition you want in the event that damages or attorneys' fees evidence falls short, was improperly admitted or excluded, does not offer adequate certainty, reflects an improper measure of damages, or is the basis for an erroneous jury verdict or judgment.*

Damages-related error in the trial court can occur in several different manners. Most notably, the trial court can admit or exclude damages evidence that it should not; the jury can reach a damages finding that is not adequately supported by the evidence; the measure of damages presented in the evidence or the jury charge can differ from the proper legal measure; or the damages evidence can lack the degree of certainty necessary to permit recovery under Texas law; the jury charge can fail to properly submit damages issues; and the trial court can err in issuing judgment on a damages award or the lack thereof. When one of these errors occurs, the appellate court may reverse the trial court's judgment and remand the case for a new trial (in whole or in part) or it may reverse and render judgment as a matter of law. For the parties, the difference between these two options is monumental. But it can be difficult to predict which of these remedies is appropriate in a given case. This paper examines some recent Texas appellate court opinions addressing damages error to decipher the rules and rationales for deciding whether to remand or render after a determination that the judgment below is erroneous with respect

to its award of (or failure to award) damages or attorney's fees.

### I. Erroneous (Non-expert) Evidentiary Rulings

The rubric for determining whether to reverse a judgment based on erroneous evidentiary rulings is well established: "The trial court's error in excluding evidence of the second accident is reversible only if it probably caused the rendition of an improper judgment,"<sup>1</sup> and appellate courts determine that issue by "considering the state of the evidence, the strength and weakness of the case, and the verdict."<sup>2</sup> "[I]f erroneously admitted or excluded evidence was crucial to a key issue, the error was likely harmful," but "if the evidence was cumulative, or if the rest of the evidence was so one-sided that the error likely made no difference," then "admission or exclusion is likely harmless."<sup>3</sup>

In the context of rulings on the admissibility of damages evidence, the question of whether the evidence probably caused the rendition of an improper judgment differs depending on whether the error was an admission of improper evidence

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<sup>1</sup> No. 13-0978, — S.W.3d —, —, 2015 WL 1870072, at \*1 (Tex. Apr. 24, 2015) (mem. op.) (citing TEX. R. APP. P. 441.(a)(1)).

<sup>2</sup> *Id.* (quoting *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 871 (Tex. 2008)).

<sup>3</sup> *Id.* (quoting *Sevcik*, 267 S.W.3d at 873).

or an exclusion of proper evidence. And even if the appellate court determines that the evidentiary error probably caused the rendition of an improper judgment with respect to damages, the court must then decide whether to render judgment or remand for new trial. This analysis likewise differs depending on whether the error was an admission of improper evidence or an exclusion of proper evidence. But because of the unique “probably caused the rendition of an improper judgment standard,” the question of whether to remand or render is often heavily intertwined with the question of whether to reverse at all.

### A. Improper Admission of Damages Evidence

When a court of appeals determines that the trial court admitted improper damages evidence, there are a number of different avenues for disposition. Some are fairly straightforward. If, in the absence of the improperly admitted evidence, the evidence conclusively establishes that the plaintiff did not suffer any damages at all, the appellate court must reverse a judgment in favor of the plaintiff and render a take-nothing judgment instead, unless other issues in the appeal dictate otherwise.<sup>4</sup> Conversely, if, in the absence of the improperly admitted evidence, the evidence conclusively establishes that the plaintiff suffered

a specific amount of damages other than that awarded by the jury, the appellate court must reverse and render judgment in favor of the plaintiff in that amount (plus any other properly included amounts), unless other issues in the appeal dictate otherwise. In both circumstances, there can be little question that the erroneous admission probably caused the rendition of an improper judgment.

There are also straightforward instances of remand. In many cases, the appellate court will determine that the improperly admitted damages evidence caused the jury to award more damages than it otherwise would have—requiring reversal—but that the other damages evidence creates a fact question as to how much the jury should have awarded—requiring remand.<sup>5</sup> This is perhaps the most common outcome after improper admission of damage evidence.

On the other hand, when a trial court erroneously admits damages evidence but the jury finds that the plaintiff suffered \$0 in damages, the appellate court will generally conclude that the error did not result in the rendition of an improper judgment because the jury verdict demonstrates that the jury did not rely on the erroneously admitted evidence of damages.<sup>6</sup> In this instance, the trial court can be affirmed regardless of what

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<sup>4</sup> See, e.g., *Yorkshire Ins. Co., Ltd. v. Seger*, 407 S.W.3d 435, 443 (Tex. App.—Amarillo 2013, pet. granted) (holding that trial court erred in admitting underlying judgment as evidence of damages and rendering take nothing judgment after concluding that underlying judgment was only evidence offered to prove damages); see also *Kenny v. Portfolio Recovery Associates, LLC*, 01-14-00058-CV, 2015 WL 1135410, at \*3 (Tex. App.—Houston [1st Dist.] Mar. 12, 2015, no. pet. h.) (mem. op.) (assuming trial court did not rely on inadmissible statements in business judgment affidavit and rendering take-nothing judgment based on legal sufficiency review).

The Supreme Court of Texas originally denied the petition for review in *Yorkshire*, but granted review on rehearing of the petition for review. The issues presented in the Supreme Court directly relate to whether the underlying judgment can be considered evidence of damages in the context of that case, relating to the Court’s holdings in *State Farm v. Gandy*, 925 S.W.2d 696 (Tex. 1996) and *Evanston*

*Ins. Co. v. ATOFINA Petrochems. Inc.*, 256 S.W.3d 660 (Tex. 2008). But the parties do not challenge the correctness of the court of appeals decision to render, rather than remand, in the event that it was correct about the admissibility and effect of the underlying judgment. The briefing and current status of *Yorkshire* can be found on the Supreme Court of Texas’s webpage at [www.txcourts.gov/supreme](http://www.txcourts.gov/supreme), under cause number 13-0673.

<sup>5</sup> See, e.g., *Reliance Steel & Aluminum Co. v. Sevcik*, 267 S.W.3d 867, 875 (Tex. 2008) (reversing and remanding where plaintiff’s damages evidence would have supported lesser damages than the amount awarded by jury after the trial court’s improper admission of wealth evidence).

<sup>6</sup> E.g., *Citigroup Global Markets Realty Corp. v. Stewart Title Guar. Co.*, 417 S.W.3d 592, 602 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

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