ERROR RESUSCITATION AND RESURRECTION: BREATHING LIFE INTO YOUR APPEAL

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I. Introduction.

When you are hired as appellate counsel before trial, you have significant influence over your future arguments on appeal because you can ensure proper error preservation. You can draft and argue the *Robinson* motions. You can handle objections and tenders at the charge conference.

On the other end of the spectrum, when you are hired after trial, you have no influence over what was preserved, and consequently, what appellate arguments are available to you. You are stuck with the record as it is.

There is a window in-between these two situations: when you are hired after a verdict but before post-trial briefing. At that juncture, you are not necessarily stuck. You did not get to draft the charge or object at the charge conference. You did not get to handle expert challenges. But you can still preserve errors that were unobjected to at trial and add arrows to your quiver on appeal.

We focus on the latter two scenarios that appellate counsel faces, which we tackle separately. In the first section, we address errors that you can preserve in post-verdict motions even when they were unobjected-to at trial. Because you must breathe life back into these errors while still in the trial court, we refer to this approach as "error resuscitation."

In the second part of the paper, we discuss errors that can be raised for the first time on appeal, which you may be searching for if you've been hired after the conclusion of trial proceedings and don't like your odds on the preserved errors. Because you can bring these unpreserved errors back to life on appeal, we call this "error resurrection."

II. Error Resuscitation, Post-Verdict but Pre-Appeal.

The general rule for error preservation is that parties must timely and specifically object at trial to preserve error and obtain a ruling. TEX. R. CIV. P. 273, 274 (jury charge); TEX. R. EVID. 103(a) (rulings on evidence); TEX. R. APP. P. 33.1(a) (preservation). If trial counsel did not comply with these rules in real time, the error was not preserved. *But* if you have been hired in the window period between trial and appeal, you can breathe life back into errors that fall into the following categories in a motion for new trial or motion for judgment notwithstanding the verdict.

A. Experts.

There is no need to timely object to preserve a no-evidence challenge to expert testimony that is "conclusory or speculative and therefore non-probative on its face."

Coastal Transport Co., Inc. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 233 (Tex. 2004).

In *Coastal Transport*, the defendant, Coastal, made a no-evidence challenge concerning gross negligence. The plaintiff, Crown Central, pointed to its expert's testimony on conscious indifference. The expert had answered "yes" to a handful of questions that merely parroted the legal standard for gross negligence to the expert witness, like the following: "In your opinion, did Coastal have an actual subjective awareness of the risk involved in failing to stop using probes that can have [sensor failure] problems?" Although Coastal had not objected at trial that the expert was unqualified or that his testimony was unreliable, the Texas Supreme Court reversed and rendered for the defendant based on this conclusory testimony. The Court held that "bare conclusions" from the expert that were "factually unsubstantiated" were not "some evidence" of gross negligence, even when unobjected to.

The Court distinguished no-evidence challenges to "conclusory" testimony—which do not require a timely objection for preservation—from reliability challenges where the expert's underlying methodology is at issue—which do require a timely objection. *Id.* The latter situation requires a timely objection because the trial court must go beyond the face of the record to evaluate the expert's methodology, technique, or data. *Id.*

The Court reaffirmed and appeared to expand that holding in *City of San Antonio v. Pollock*, 284 S.W.3d 809 (Tex. 2009). In *Pollock,* the plaintiffs alleged their daughter's childhood leukemia was caused by her *in-utero* exposure to benzene. Their experts testified to that effect. The City did not object to the admissibility of the experts' testimony. The City did however argue pre- and post-verdict that their opinions were conclusory. 284 S.W.3d at 815-16.

On appeal, the plaintiffs argued that the City's challenge to their experts' testimony was really a challenge to its reliability—to the data used and the experts' methodology. *Id.* at 818. The City responded that it was not challenging reliability, and conceded that it agreed with much of the experts' methodology. The majority agreed with the City and concluded that the challenge was not a reliability challenge, but simply that the conclusory testimony was not the type of opinion testimony that could support a judgment. *Id.* at 819-20.

The dissent disagreed, noting the Supreme Court had previously drawn a distinction between a no-evidence reliability complaint and a no-evidence conclusory complaint. *Id.* at 824. (citing *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 910 (Tex. 2004). The dissent concluded that the City's complaints about analytical gaps were "nothing more than an unpreserved reliability challenge." *Id.* at 828. The dissent warned that the majority's opinion "blurs the distinction between expert testimony that purports to have a basis in science (unreliable testimony) and expert testimony that lacks any apparent support apart from the expert's claim to superior knowledge (conclusory testimony)." *Id.* at 828.

The Court recently revisited this distinction in *Pike v. Texas EMC Mgmt., LLC*, 610 S.W.3d 763, 787 (Tex. 2020). In *Pike*, the Court noted that complaints that an expert failed to deduct certain costs from his calculations was a "methodology" challenge that required a timely objection. *Id.* at 788. But a challenge that an expert used an assumed price in his calculation, which lacked a factual basis and was not "validated through any market analysis or study" was a legal-sufficiency challenge that did not require a timely objection. *Id.* at 788. So too was an argument that an expert based certain financial projections on "unfounded assumptions about the Partnership's sales increases." *Id.* The Texas Supreme Court described expert testimony as conclusory and legally insufficient—and therefore not requiring an objection—when the expert "failed to bridge the analytical gap between the facts on which he relied and his conclusion." *Id.* at 789.

Thus, under *Pike*, you can resurrect error in the admission of unobjected-to expert testimony by casting your post-trial attack on the expert as identifying an "analytical gap" between the facts and the expert's conclusion. As you think about this approach, recall that the standard for a *Robinson* challenge on reliability is whether there is "simply too great an analytical gap between the data and the opinion proffered." *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726-27 (Tex. 1998).

B. Unobjected-to jury questions.

Under Texas Rule of Civil Procedure 279, you can challenge a jury question (which presumably the jury answered adversely for your client) for factual or legal sufficiency for the first time after a verdict, even if your client previously requested it. TEX. R. CIV. P. 279; *Musallam v. Ali*, 560 S.W.3d 636, 639 (Tex. 2018).

In *United Scaffolding v. Levine*, the Texas Supreme Court has further expanded the scope of post-verdict charge challenges. In *United Scaffolding*, an employee 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. 537 S.W.3d 463, 467 (Tex. 2017). Levine sued United Scaffolding, claiming it improperly constructed the scaffold and failed to remedy or warn of the dangerous condition of the scaffold. *Id.*

The case was tried to a jury and submitted in a general-negligence question. The jury found in Levine's favor on liability but failed to award him several elements of damages he sought. Levine filed a motion for new trial, which the trial court granted. *Id.* at 468. In the second trial, the case was again submitted in a general-negligence question. United Scaffolding did not object to the submission or tender a premises-liability question. The jury rendered a verdict in Levine's favor, and United Scaffolding filed a motion for new trial and for judgment NOV. In its JNOV motion, United Scaffolding argued—for the first time—that the trial court improperly submitted a general-negligence question when Levine's claim sounded in premises liability.

In a 6-3 opinion, the Court held that the defendant had properly preserved in its JNOV motion its argument that the plaintiff submitted the wrong legal theory to the jury in the second trial, even though it had not objected to the jury charge. 537 S.W.3d at 481. The Court reversed and rendered judgment for the defendant because the defendant only needs to object under Rule 279 if the plaintiff submits a theory of recovery "defectively."

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