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Principled Appellate Decisions

D. Todd Smith

April 11, 2013

Overview

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- The "right" result on appeal depends on your perspective, but several factors go into reaching a principled appellate decision.
- Our discussion will examine some concepts appellate judges should apply—as well as some pitfalls to avoid—when deciding cases.
- Along the way, we'll consider some illustrative "sound bites" from a recent survey of board-certified appellate practitioners.


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## Appellate Decision-Making




- Appellate decisions are made based on the law, how the law applies to the facts, and the application of procedural rules.
- Principled appellate decisions:
  - adhere to stare decisis (the law);
  - identify and apply the correct standard of review (how the law applies to the facts);
  - address all arguments for reversal and, conversely, do not rely on unassigned or unbriefed issues or unnecessary dicta; and
  - whenever possible, reach the merits of an issue rather than rely on waiver.

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## Appellate Decision-Making



- Concepts make the law easier to apply uniformly
- Assist counsel in advising their clients
- Increase public confidence in the judiciary

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## Stare Decisis—The Law



- Vertical stare decisis: Once SCOTX announces a legal proposition, it is binding precedent on all Texas courts.
- Courts adhere to precedent to promote efficiency, fairness, legitimacy, and stability.
- Adherence “results in predictability in the law, which allows people to rationally order their conduct and affairs.”

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## Stare Decisis—Vertical



- Doctrine has greatest force in statutory construction—the Legislature can correct if SCOTX gets it wrong.
- An appellate court’s decisions should not change merely because the judges have changed.
- But SCOTX will depart from precedent when faced with “compelling reasons.”

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## Stare Decisis—Horizontal



- Intermediate appellate courts must follow the law of Texas. Sometimes easier said than done.
- A decision by one intermediate court panel binds future panels, absent either:
  - a decision from a higher court or the same court sitting en banc; or
  - an intervening and material change in statutory law.
- But, in docket equalization situations, SCOTX has now made clear that the transferee court must follow precedent from the transferor.

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## Stare Decisis—Takeaways



- “Public perception of fairness is diminished when the certainty and predictability of court decisions is compromised.”
- “But the public's confidence in our courts is strengthened by the assurance that the courts in a single jurisdiction view the law uniformly and apply it consistently.”

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## Stare Decisis Sound Bites



“In advising a client what do you say? ‘If the court follows the law you win, but in your case they will probably ignore it.’ It doesn’t say much for the system. If it’s going to be all equity and feel good in the courts of appeal they should just say so and save us all a lot of time briefing.”

“On some subject matters (in my experience workers’ compensation, but I am sure there are others), the courts are disinterested in engaging in the tedious statutory analysis necessary to reach the just result, and disinterested in liberally construing the statute to effect the goals of the statute. If disinterested, perhaps they could pass off to a judge or law clerk who is willing to engage in intellectually honest decision-making.”

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## Stare Decisis Sound Bites



“Litigants make settlement decisions based on legal authorities. Frequently a case will fail to settle because the two sides have honest differences about the reach of a prior holding. Counsel will advise the client to litigate (rather than settle) based on the X case. What is counsel supposed to say to the client when an opinion comes out with no mention of that case? ‘Sorry, our appellate courts can’t read.’”

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## Stare Decisis—Takeaways



- Principled appellate decisions encourage predictability and stability in the law by:
  - following SCOTX/CCA/statutory authority;
  - following prior decisions from a panel of the same court of appeals or the en banc court;
  - applying the law of a transferor court to the extent it differs from the transferee court's decisions; and
  - confronting and addressing on-point authorities in a written opinion.

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## Standards of Review—Law Applied to Facts



- SORs define the relationship between trial and appellate courts.
- SORs are the appellate court's measuring stick: they frame the issues, define the depth of review, and assign power among judicial actors.
- Determine the amount of deference to be given the lower court's decision.

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## Standards of Review—Law Applied to Facts



- A litigant who is unfamiliar with “the standard of review for each issue . . . may find himself trying to run for a touchdown when the basketball rules are in effect.” John C. Goldbold, 11th Cir.
- One of the appellate courts’ tasks is to help litigants avoid this mistake by clearly delineating and applying the SOR in their opinions.

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## The Major Civil Standards



- De novo
  - Applies to relatively few trial court rulings
- Abuse of discretion
  - Most frequently used (and misused)
- Evidentiary sufficiency (legal and factual)
  - Has undergone significant changes since *City of Keller*

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## De Novo Review



- Pure questions of law: no deference afforded to the trial court's decision
  - E.g., contract construction/determination of whether contract or will is ambiguous
  - Subject matter jurisdiction
- Reviewing court will re-determine questions of fact or law under de novo review

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## Abuse of Discretion Defined



- Usually defined as:
  - Decision that is “arbitrary, unreasonable, and without reference to any guiding rules or principles”
  - “So arbitrary and unreasonable as to amount to a clear and prejudicial error of law”
  - Whether, in the reviewing court's opinion, the facts present an appropriate case for the trial court's action

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## 5 Steps for Analyzing Abuse of Discretion



- Discretion implies a choice. Abuse of discretion means there was only one choice, and the choice made was wrong.
- Question 1: Legal support for the decision?
  - Determine what law applies. No discretion!
  - Good faith argument for a change in the law? Court can abuse its discretion by failing to apply law that **ISN'T CLEAR OR DOESN'T EXIST AT THE TIME.**
    - “[A] trial court’s “erroneous legal conclusion, even in an **unsettled** area of law, is an abuse of discretion.” *Perry v. Del Rio*, 66 S.W.3d 239, 257 (Tex. 2001).

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## 5 Steps for Analyzing Abuse of Discretion



- Question 2: Does the law provide the trial court with power to act?
  - Jurisdiction
  - Any law precluding action on the matter?
- Question 3: If the law allows the trial court to act, does the law explain *how* the action must be taken?
  - Range of actions available to the trial court
  - Notice provisions? Hearing required? Evidentiary or non-evidentiary?
  - Scope of review is in play: what can court consider?

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## 5 Steps for Analyzing Abuse of Discretion



- Question 4: Given what the court was entitled to consider, did the court have sufficient information to make the decision it did?
  - Legal and factual sufficiency?
  - These overlap the abuse of discretion standard of review in many types of cases, e.g., family law
  
- Question 5: Did the trial court apply the law to the facts in the correct manner to reach the decision?

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## Legal Sufficiency—*City of Keller*



- Traditional statement of standard—evidence is legally insufficient if:
  - There is a complete absence of evidence of a vital fact
  - The court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact
  - The evidence offered to prove a vital fact is no more than a “mere scintilla”
  - The evidence establishes conclusively the opposite of a vital fact

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## Inclusive v. Exclusive Standard



- Before *City of Keller*, courts were using both an inclusive and an exclusive standard
  - Exclusive: court considers only the evidence and inferences that tend to support the finding and disregards all contrary evidence and inferences
  - Inclusive: court considers all record evidence in the light most favorable to the jury verdict, and indulges every reasonable inference in favor of verdict
- Question presented: “Must an appellate court reviewing a verdict for legal sufficiency start by considering all the evidence or only part?”

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## What *City of Keller* Means



- Commentators said the standards were different; *City of Keller* says both of these are correct and arrive at the same result.
- *City of Keller's* reformulated standard: whether you review all the evidence or only evidence supporting the verdict, proper legal sufficiency review must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.

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## When to Consider Contrary Evidence



- Court said the rule has never been that courts *must* reject all contrary evidence in a no-evidence review. *Must* consider it if:
  - There is no favorable evidence
  - Evidence provides context that must be considered
  - Evidence renders supporting evidence incompetent
  - Despite favorable evidence, the contrary evidence establishes conclusively the opposite of a vital fact
- Court then gave a series of examples of contrary evidence that *cannot* be disregarded.

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## Factual Sufficiency



- Review all the evidence in the record.
- Either “insufficient evidence” or “great weight and preponderance of the evidence” arguments, based on which party had burden of proof at trial.
  - If appellant is attacking adverse finding on issue that other party had burden to prove, argument must be that the evidence is insufficient to support the finding.
  - If appellant bore the burden of proof, argument must be that the evidence supporting the adverse finding is against the great weight....

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## Criminal Cases: Sufficiency of the Evidence



- After the recent decision in *Brooks v. State*, there is only one test for sufficiency of the evidence in criminal cases:
  - Considering all of the evidence in the light most favorable to the verdict, was a jury rationally justified in finding guilt beyond a reasonable doubt?
- CCA overruled *Clewis v. State*, which provided for a factual sufficiency review of the evidence supporting a conviction: viewing the evidence in a neutral light, was a rational jury justified in finding guilt beyond a reasonable doubt?

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## Future of Factual Sufficiency in Civil Cases



- Factual sufficiency is a relatively infrequent basis of reversal when evidence conflicts.
- Comes up in reviewing jury findings on damages or segregation of attorney fees, e.g., some evidence of damages/fees, but not within the range of evidence offered.

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## Future of Factual Sufficiency in Civil Cases



- Reviewing “reasonableness” of verdicts looks like factual sufficiency review, which SCOTX has no jurisdiction to perform.
- Fate of factual sufficiency depends on how far *City of Keller* goes.

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## Standards of Review Sound Bites



**“I recently participated in an oral argument . . . in which it became clear that one of the Justices was unfamiliar with *City of Keller*. In the words of the great Forrest Gump, ‘that’s all I have to say about that.’”**

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## Standards of Review—Takeaways



- Principled appellate decisions:
  - respect the trial court’s authority and afford its decisions the appropriate level of deference;
  - set out the correct standard of review for the issue presented; and
  - properly apply the SOR to the record below.

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## Grounds for Reversal—Address All



- Under TRAP 47.1, a court of appeals “must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to the final disposition of the appeal.”
- SCOTX has described this provision as mandatory and has stated that courts of appeals are not at liberty to disregard it.

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## Grounds for Reversal—No Lawyering



- Under TRAP 33.1, a party must assert a complaint by timely request, objection, or motion to the trial court to preserve error.
- Appellate courts are authorized to reverse only for assigned error. Courts exceed their role when they raise and address unassigned and unbriefed issues.

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## Grounds for Reversal—No Lawyering



- When courts take on issues not raised, they become advocates rather than independent and fair arbiters of the law.
- The parties and their lawyers are in the best position to exercise discretion and professional judgment regarding what issues to raise.
- Appellate courts properly consider and decide only those issues.

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## Grounds for Reversal—No Dicta



- A decision that decides a dispositive issue, yet goes on to address other points also violates TRAP 47.1 by addressing more than is “necessary” to resolve the appeal.
- This also may result in an improper advisory opinion, which SCOTX has held to be prohibited under Article II, section 1 of the Texas Constitution.

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## Grounds for Reversal—No Dicta



- “Finally, there is the settled principle that courts should exercise restraint when deciding cases. The cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further.”

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## Grounds for Reversal Sound Bites



"I am concerned the courts do not deal with the most important points raised on appeal . . ."

"Address the arguments that are made and don't ignore them."

"Write opinions that address all of our arguments. This is another way of saying: be intellectually honest."

"Address the arguments that are actually made in the brief, not some generic version of the argument that would be made in a generic brief."

". . . three different courts of appeals failed to address what I thought were my most important points for reversal. The judges may say that it was because I did such a poor job of briefing that they did not understand my points, but that is not a problem I encounter very often in trial courts."

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## Grounds for Reversal Sound Bites



"Do not raise issues or arguments neither party raised unless clearly identified as *sua sponte*."

"Request post-submission briefing before writing an opinion that takes a different angle than addressed in briefs."

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## Grounds for Reversal—Takeaways



- **Principled appellate decisions:**
  - address every ground asserted for reversal or otherwise necessary to a final disposition;
  - do not rely on unassigned or unbriefed issues to reach their result; and
  - avoid unnecessary dicta.

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## Merits Over Waiver



- **Waiver comes up most often in context of:**
  - preservation of error in the trial court; and
  - briefing waiver in appellate courts.
- **SCOTX has expressed a strong preference that lower courts resolve appeals based on the merits rather than procedural technicalities.**

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## When Is a Waiver Finding Appropriate?



- When ignoring waiver would require more than a slight relaxation of the rule, but would instead render the rule meaningless.
- When a party clearly fails to follow an explicit method for preserving error.
  - Charge complaints or evidence admitted without objection
  - Evidence excluded without offer of proof
  - Trying to expand issues when appeal was brought on a partial record

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## *Sua Sponte* Briefing Waiver Problem



- Case study: *Stanley Works v. WFISD*  
(<http://www.search.txcourts.gov/Case.aspx?cn=12-0552>)
- CA held that Stanley's brief "does not include any arguments or authorities in support of" an issue and "that the issue has been waived because it has been inadequately briefed."
- CA made this finding *sua sponte*. The opposing party never raised it, and Stanley did not know it was coming until disposition.

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## *Sua Sponte* Briefing Waiver Problem



- CA denied Stanley's motion for rehearing, which pointed out error in the holding.
- Among other things, Stanley's petition for review argued that CA should have given notice and required amendment first per TRAP 38.9(a)
- Stanley had substantial amicus support for its position, but SCOTX denied review and has since denied rehearing

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## *Sua Sponte* Briefing Waiver Problem



- If this kind of “stealth waiver” can be found against Stanley and its counsel—a sophisticated consumer and provider of legal services, respectively—it can be found against anyone.
- Practical problems:
  - How does counsel on the receiving end of such a waiver finding explain it to the client?
  - Less sophisticated clients may target lawyer for malpractice
  - Creates perception among lawyers that appellate courts don't follow the rules, are taking the easy way out, or are aiming for “rough justice”

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## *Sua Sponte* Briefing Waiver Problem



- Avoid these problems and their consequences by having clerk's offices send notice letters before basing opinions on briefing waiver:
  - Consistent with TRAP 44.3, which states that “[a] court of appeals must not affirm . . . a judgment . . . for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects.”
  - Fulfills SCOTX directive to decide cases on the merits whenever possible

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## Merits Over Waiver Sound Bites



**“Let’s have some common sense decisions instead of upholding a clearly bad judgment solely because the appellant didn’t dance around the courthouse nude on a full moon.”**

**“They sometimes exalt preservation of error into a hyper-technical art form, devoid of substantial justice.”**

**“Quit looking for waiver, particularly implied waiver, as a basis for affirming the decisions of the trial court. Implied waiver should be a very rare exception, not the prevailing rule of law.”**

**“It would be nice if the courts would quit making rulings that reflect the ‘easy way out’ and get down to the real issues.”**

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## Merits Over Waiver Sound Bites



“Waiver almost guarantees that the malpractice carrier be notified, the client is lost, and the lawyer humiliated. The judges who almost routinely do this have forgotten what it’s like to practice law . . .”

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## Merits Over Waiver Takeaways



- **Principled appellate decisions:**
  - strike a balance between express error-preservation rules and SCOTX’s directive that cases turn on their merits whenever possible; and
  - avoid *sua sponte* waiver holdings unless the parties have been provided an opportunity to address the issue.

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## Final Thought

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“The danger today is that an older generation of the bar may be losing all confidence in the steadiness of the courts in their work. That is bad. The danger today is that the middle and younger generation of the bar may have already lost all confidence in the steadiness of both the courts in their work and in the law in its. That is worse.”

Karl N. Llewellyn, *The Common Law Tradition—Deciding Appeals* 15 (1960).

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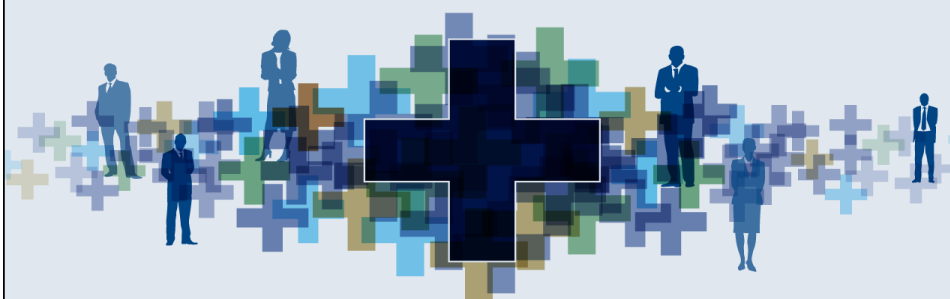
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