

SPECIAL APPEARANCE APPEALS
by
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I. INTRODUCTION¹

Before 1997, the denial of a special appearance could be reviewed on appeal only after final judgment in the trial court. *See Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304, 307 (Tex. 1994). In 1994, however, the supreme court, in *Canadian Helicopters*, noted an exception to this rule in cases in which the trial court's assertion of personal jurisdiction is "with such disregard for guiding principles of law that the harm to the defendant becomes irreparable." *Id.* at 308. In 1995, the supreme court found "irreparable harm" in the denial of a special appearance and conditionally granted a writ of mandamus. *See National Indus. Sand Ass'n v. Gibson*, 897 S.W.2d 769, 771 (Tex.1995). In 1996, the supreme court again conditionally granted a writ of mandamus after the denial of a special appearance. *See CSR Ltd. v. Link*, 925 S.W.2d 591, 597 (Tex. 1996) ("[T]he concerns of judicial efficiency in mass tort litigation combined with the magnitude of the potential risk for mass tort actions against the defendant makes ordinary appeal inadequate.").

Then, in 1997, the legislature amended the Texas Civil Practice and Remedies Code, section 51.014, allowing an interlocutory appeal from the grant or denial of the special

¹ Thanks to Pam Baron for the use of her brain and her paper on interlocutory appeals, which is cited in this paper.

appearance of a defendant under Rule 120a, Texas Rule of Civil Procedure, except in a suit brought under the Family Code. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(a)(7). The legislative change became effective on June 20, 1997. Since the legislative change, special appearance appeals have constituted a significant portion of interlocutory appeals in the intermediate courts.

II. SPECIAL APPEARANCE – TRIAL COURT

A special appearance may be made by any party for the purpose of objecting to the jurisdiction of the court over the person or property of the defendant on the ground that the party or property is not amenable to process issued by the courts of Texas. *See* TEX. R. CIV. P. 120a(1). A special appearance shall be filed by sworn motion before any other plea, pleading, or motion. *See id.*

The plaintiff has the initial burden of pleading sufficient allegations to bring a nonresident defendant within the provisions of the long-arm statute. *See McKenna v. Edgar*, 388 S.W.2d 927, 930 (Tex. 1965). The defendant must negate all jurisdictional bases. *See Kawasaki Steel Corp. v. Middleton*, 699 S.W.2d 199, 203 (Tex. 1985).

The Texas long-arm statute governs Texas courts' exercise of jurisdiction over nonresident defendants. *See* TEX. CIV. PRAC. & REM. CODE §§ 17.041- .045. That statute permits Texas courts to exercise jurisdiction over a nonresident defendant that “does business” in Texas, and the statute lists some activities that constitute “doing business.” *See id.* at § 17.042. The list, however, is not exclusive and the supreme court has held that

section 17.042's broad language extends Texas courts' personal jurisdiction "as far as the federal constitutional requirements of due process will permit." *U-Anchor Adver., Inc. v. Burt*, 553 S.W.2d 760, 762 (Tex. 1977).

Two conditions must be met for personal jurisdiction over nonresident defendants to be constitutional: (1) the defendant has established minimum contacts with the forum state, and (2) the exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *See International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). A nonresident defendant that has "purposely availed" itself of the privileges and benefits of conducting business in the foreign jurisdiction has sufficient contacts with the forum to confer personal jurisdiction. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-76 (1985). This "purposeful availment" requirement ensures that a nonresident defendant will not be haled into a jurisdiction based solely upon "random," "fortuitous" or "attenuated" contacts or the "unilateral activity of another party or a third person." *See id.* at 475. Although not determinative, foreseeability is an important consideration in deciding whether the nonresident defendant has purposefully established "minimum contacts" with the forum state. *See Guardian Royal Exch. Assurance, Ltd. v. English China Clays, P.L.C.*, 815 S.W.2d 223, 227 (Tex. 1991).

Specific jurisdiction is established if the defendant's alleged liability arises from or is related to an activity conducted within the forum. *See id.* at 228. General jurisdiction is present when a defendant's contacts in a forum are continuous and systematic so that the

forum may exercise personal jurisdiction over the defendant even if the cause of action did not arise from or relate to activities conducted with the forum state. *See id.*; *see also Schlobohm v. Schapiro*, 784 S.W.2d 355, 357.

III. REVIEW BY COURTS OF APPEALS

An appeal from the grant or denial of a special appearance is an accelerated appeal with shorter deadlines and different rules concerning findings of fact, the record, briefing, submission, mandate, and rehearing. *See* TEX. R. APP. P. 28.1.

A. Perfecting the Appeal

In an accelerated appeal, the notice of appeal must be filed within 20 days after the order is signed. *See* TEX. R. APP. P. 26.1(b). The notice of appeal must state that the appeal is accelerated. *See* TEX. R. APP. P. 25.1(c)(6). The docketing statement must state the appeal is accelerated. *See* TEX. R. APP. P. 32.1(g).

1. Post-Judgment motions

Filing a motion for new trial will not extend the time to perfect the appeal. *See* TEX. R. APP. P. 28.1. A motion for reconsideration is equivalent to a motion for new trial. *See IPM Prod. Corp. v. Motor Parkway Realty*, 960 S.W.2d 879, 882 (Tex. App.—El Paso 1997, no pet.). Consequently, the filing of a motion for new trial will not extend the time for perfecting an interlocutory appeal. *See Dayco Prod., Inc. v. Ebrahim*, 10 S.W.3d 80, 83 (Tex. App.—Tyler 1999, no pet.).

The law is unclear whether a timely request for findings of fact and conclusions of

law extends the appellate deadlines on interlocutory appeals. One commentary suggests that a request for findings of fact and conclusions of law would extend the appellate deadline. *See* John Hill Cayce, Anne Gardner, Felicia Harris Kyle, *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 *Baylor L. Rev.* 872, 880 (1997). Another appellate scholar strongly disagrees. *See* Pamela Stanton Baron, *Interlocutory Appeals in Texas State Courts*, 10th Annual Advanced Civil Trial Law Conference, South Texas College of Law, Feb. 2001, M-11.

In an unpublished opinion, the Dallas Court of Appeals held that a timely request for findings of fact and conclusions of law does not extend the deadline for filing a notice of appeal. *See Hone v. Hanafin*, No. 05-01-00897-CV, 2002 WL 393131 (Tex. App. – Dallas 2002, pet. filed) (unpublished); *In re C.E.B.*, 2002 WL 1489452 *1 (Tex. App. – Houston [14th Dist.] 2002, no pet.)(unpublished). The reasoning in *Hone* is persuasive.

The Dallas court notes that TEX. R. APP. P. 26.1(a)(4), which extends the time for filing the notice of appeal until 90 days after judgment if a timely request for findings of fact and conclusions of law is filed, applies to final judgments, not interlocutory appeals. *See Hone*, 2002 WL 1489452 at *4. Further, if a motion for new trial will not extend the time limit, there is no reason to believe that a request for findings of fact and conclusions of law will extend the time for filing the notice of appeal. *See id.* The Dallas court also observes that allowing the extension would defeat the purpose of an accelerated appeal, which is to avoid unnecessary delay in arriving at a final disposition of the case. *See id.*

NOTE: If a court grants a special appearance and then dismisses the suit, the judgment becomes final. *See Michel v. Rocket Enng'g Corp.*, 45 S.W.3d 658, 667 n. 1 (Tex. App. – Fort Worth 2001, no pet.). Before the adoption of § 51.014(a)(7), severance orders were routinely granted so that the plaintiff could appeal the special appearance that had been granted for one defendant. *See Goodchild v. Bombardier-Rotax GMBH Motorenfabrik*, 979 S.W.2d 1, 5 (Tex. App. – Houston [14th Dist.] 1998, pet. denied).

2. Motion to extend the time for filing notice of appeal

The rules provide that an appellate court may extend the time to file the notice of appeal if the party, within 15 days of the deadline for filing the notice of appeal, files a notice of appeal in the trial court and a motion to extend time to file the notice of appeal in the appellate court. *See* TEX. R. APP. P. 26.3. The comment to the 1997 change notes, “An extension of time is available for all appeals.” *See In re D.B.*, – S.W.3d –, 2002 WL 1371228 *3 n. 7 (Tex. App. – Dallas 2002, no p. h.); *see also Ace Ins. Co. v. Zurich Am. Ins. Co.*, 59 S.W.3d 424, 426 (Tex. App. – Houston [1st Dist.] 2001, pet. denied) (allowing an extension for the notice of appeal in an accelerated appeal).

Appellate courts will imply a motion for extension of time if the notice of appeal is filed within the 15-day grace period for extensions. *See Verburgt v. Dorner*, 959 S.W.2d 615, 617-18 (Tex. 1997). Without citing *Verburgt*, the 1st court of appeals implied a motion for an extension of time to perfect an interlocutory appeal when the notice of appeal was filed 6 days after the due date. *See Ace Ins.*, 59 S.W.3d at 426. Appellants who rely on *Verburgt*, however, must offer a reasonable explanation for their failure to timely file their

notice of appeal. *See Jones v. City of Houston*, 976 S.W.2d 676, 677 (Tex. 1998).

B. Findings of Fact

The trial court is not required to, but may, file findings of fact and conclusions of law. *See* TEX. R. APP. P. 28.1. The findings of fact and conclusions of law are due 30 days after the interlocutory order is signed. *See id.*

Appellate courts routinely advise appellants to request findings of fact and conclusions of law in special appearance appeals. *See, e.g., Daimler-Benz Aktiengesellschaft v. Olsen*, 21 S.W.3d 707, 715 (Tex. App. – Austin 2000, pet. dismissed w.o.j.); *In re Estate of Judd*, 8 S.W.3d 436, 440 (Tex. App.– El Paso 1999, no pet.). If findings of fact and conclusions of law are properly requested and not filed in an interlocutory appeal, however, there is no error. *Old Kent Leasing Serv. Corp. v. McEwan*, 38 S.W.3d 220, 226 (Tex. App. – Houston [14th Dist.] 2001, no pet.); *see also Carlin v. 3V, Inc.*, 928 S.W.2d 291, 294 (Tex. App. – Houston [14th Dist.] 1996, no writ); *Smith Barney Shearson, Inc. v. Finstad*, 888 S.W.2d 111, 114 (Tex. App. – Houston [1st Dist.] 1994, no writ). Although both *Carlin* and *Finstad* were decided before the 1997 amendments to the Texas Rules of Appellate Procedure, former Rule 42, like current Rule 28.1, provided that findings of fact and conclusions of law were not necessary but could be filed. *Compare* TEX. R. APP. P. 42(a)(1) (repealed 1997) to TEX. R. APP. P. 28.1.

NOTE: An appellant should always request findings of fact and conclusions of law. The appellee, of course, should always inform the trial court that the findings are unnecessary in an interlocutory appeal and explain how the lack of findings of fact and conclusions of law will affect the review of the order.

See section V of this paper for the standard of review when no findings of fact and conclusions of law are filed (all facts necessary to support the judgment are implied and order may be affirmed on any legal theory).

The review of findings of fact and conclusions of law is discussed in section V of this paper.

C. The Record

The record, which consists of a clerk's record and (if necessary) a reporter's record, *see* TEX. R. APP. P. 34.1, is due within 10 days after the notice of appeal is filed. *See* TEX. R. APP. P. 35.1(b). The appellate court must allow the record to be filed late when the delay is not the appellant's fault, and may file the record late when the delay is the appellant's fault. *See* TEX. R. APP. P. 35.3(c).

The trial and appellate courts are jointly responsible for ensuring that the appellate record is timely filed. *See* TEX. R. APP. P. 35.3(c). That responsibility is triggered if the appellant files a notice of appeal, requests preparation of the reporter's record, and makes arrangements to pay for the clerk's record and the reporter's record or establishes an entitlement to appeal without paying for the record. *See* TEX. R. APP. P. 35.3(a), (b).

If the record is not timely filed, the appellate clerk must send a notice to the parties and the trial court. *See* TEX. R. APP. P. 37.3(a)(1). If the record is not filed because of the appellant's fault – failing to request the reporter's record or failing to pay or make arrangements to pay the clerk or court reporter – the court may dismiss the appeal for want of prosecution after giving the appellant a reasonable opportunity to cure before dismissal.

See TEX. R. APP. P. 37.3(b),(c).

In lieu of a clerk's record, the appellate court may hear an accelerated appeal on the original papers forwarded by the trial court or on sworn or uncontroverted copies of the relevant papers. *See* TEX. R. APP. P. 28.3. A party who prepares its own clerk's record can often save both time and money.

D. The Briefs

The appellate court may allow an accelerated appeal to be submitted without briefs. *See* TEX. R. APP. P. 28.3. The choice of whether to file a brief, however, does not lie with the appellant; the decision is vested solely in the discretion of the appellate court. *See Lagrone v. John Robert Powers Schools, Inc.*, 841 S.W.2d 34, 37 (Tex. App.– Dallas 1992, no writ). If no briefs are filed, the court reviews the evidence to determine if it is sufficient to support the trial court's ruling. *See Dawson v. First Nat'l Bank of Troup*, 920 S.W.2d 249, 253 (Tex. Civ. App.– Tyler 1967, no writ); *Taylor v. Latham*, 249 S.W. 542, 542 (Tex. Civ. App. – Austin 1923, no writ).

The appellant's brief is due 20 days after the record is filed. *See* TEX. R. APP. P. 38.6(a). An appellee may file a brief within 20 days after appellant's brief is filed or within 20 days of the due date of appellant's brief if appellant files no brief. *See* TEX. R. APP. P. 38.6(b). A reply brief, if any, may be filed within 20 days after the appellee's brief was filed. *See* TEX. R. APP. P. 38.6(c).

The rule for extension of time to file briefs likely applies to interlocutory appeals

because it does not exclude briefs in accelerated appeals. *See* TEX. R. APP. P. 38.6(d). The same rule, however, authorizes courts to shorten the time for filing of briefs. *See* TEX. R. APP. P. 38.6(d). Cutting the time in an accelerated appeal would obviously be appropriate.

E. Argument and Decision

Appellate courts must give precedence to accelerated appeals when deciding the order in which to submit civil cases. *See* TEX. R. APP. P. 40.1(b). The appellate court has discretion to determine whether it will hear argument. *See* TEX. R. APP. P. 39.7, TEX. R. APP. P. 39.8. The court must give the parties 21 days notice of the date of argument or submission without argument. *See* TEX. R. APP. P. 39.9. A party's failure to receive the notice does not prevent the submission or argument on the scheduled date. *See id.*

F. Judgment and Mandate

The appellate court's judgment takes effect when the mandate is issued. *See* TEX. R. APP. P. 18.6. The court may issue the mandate immediately or delay the issuance until the appeal is completed. *See id.*

G. Motion for Rehearing

In an accelerated appeal, the court of appeals may deny the right to file a motion for rehearing or shorten the time to file a motion for rehearing. *See* TEX. R. APP. P. 49.4. A motion for rehearing, if allowed and if the time is not shortened, is due 15 days after the court of appeals' judgment is rendered. *See* TEX. R. APP. P. 49.1. A court of appeals may extend the time for filing a motion for rehearing if a party files a proper motion no later than

15 days after the last date for filing a motion for rehearing. *See* TEX. R. APP. P. 49.8. A motion for rehearing is not a prerequisite to filing a petition for review in the supreme court. *See* TEX. R. APP. P. 49.9. A motion for rehearing should be no longer than 10 pages.

NOTE: Because the supreme court's jurisdiction to hear interlocutory appeals is limited, it is wise to file a motion for rehearing in the court of appeals. *See* Section IV of this paper. A motion for rehearing en banc may be a method to get a dissent to the panel's ruling and create conflict jurisdiction in the supreme court. *See id.*

H. Suspension of Trial Order

An appeal from the grant or denial of a special appearance stays the trial in some circumstances. Section 51.014 of the Remedies Code, which allows the appeal of the grant or denial of a special appearance, contains a stay provision. For suits commenced on or before September 1, 2001, an interlocutory appeal has the effect of staying the commencement of a trial in the trial court pending resolution of the appeal.

The legislature amended the subsection of 51.014 that stays the trial during an interlocutory appeal. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(c)-(f). For cases commenced on or after September 1, 2001, an interlocutory appeal from an order granting a special appearance has the effect of staying the commencement of a trial in the trial court pending resolution of the appeal. *See id.* A **denial** of a . . . special appearance, however, is not subject to the automatic stay of the commencement of trial unless the special appearance is filed and requested for submission or hearing not later than the later of :

- (1) a date set by the trial court in a scheduling order entered under the Texas Rules of Civil Procedure; or

- (2) the 180th day after the date the defendant files:
 - (a) the original answer;
 - (b) the first other responsive pleading to the plaintiff's petition; or
 - (c) if the plaintiff filed an amended pleading that alleges a new cause of action against the defendant and the defendant is able to raise a [special appearance] to the new cause of action, the responsive to the amended pleading that raised the new cause of action.

TEX. CIV. PRAC. & REM. CODE § 51.104(c).

Whether the stay encompasses only a traditional trial or extends to case-dispositive motions is unclear. See Pamela Stanton Baron, *Interlocutory Appeals in Texas State Courts*, 10th Annual Advanced Civil Trial Law Conference, South Texas College of Law, Feb. 2001, M-15; see also *City of Hidalgo Ambulance Serv. v. Lira*, 17 S.W.3d 300, 303 n.2 (Tex. App. – Corpus Christi 2000, no pet.)(stay applies only to the commencement of trial); *Siebenmorgen v. Hertz Corp.*, 1999 WL 21299, *3 (Tex. App. – Houston [14th Dist.] 1999, no pet.)(unpublished)(describes procedure to stop trial proceedings after interlocutory appeal).

IV. SUPREME COURT REVIEW

The judgment of a court of appeals is conclusive on the facts of the case in all civil cases. See TEX. GOV'T CODE § 22.225(a). The judgment of a court of appeals is also conclusive on the law in appeals from the grant or denial of a special appearance unless the justices of the courts of appeals disagree on a question of law material to the decision or unless one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court, as provided by § 22.001(a)(1) and (2). See TEX. GOV'T CODE § 22.225(c).

Demonstrating jurisdiction when there is a dissent in the court of appeals is not difficult. If the supreme court wishes to take jurisdiction and there is a dissent in the court of appeals, there is little discussion. *See, e.g., BMC*, 2001 WL 1898473 at *2. The supreme court has extended the meaning of dissent to encompass a dissent from the denial of an en banc motion for hearing in an interlocutory appeal. *See American Type Culture Collection, v. Coleman*, 2002 WL 1433719 *2 (Tex. 2002).

Arguing conflicts jurisdiction, however, can become difficult. "Litigants, attorneys, and lower appellate courts cannot know with any reasonable certainty when a case is likely to be accepted on the basis of a conflict." *Wagner & Brown v. Horwood*, 53 S.W.3d 347, (Tex. 2001)(Hecht, J., dissenting from the court's denial of a petition for review in an interlocutory appeal).

The rules seem fairly straightforward. "For this Court to have jurisdiction on the ground of conflict it must appear that the rulings in the two cases are 'so far upon the same facts that the decision of one case is necessarily conclusive of the decision in the other.' " *Gonzalez v. Avalos*, 907 S.W.2d 443, 444 (Tex.1995) (quoting *Christy v. Williams*, 156 Tex. 555, 298 S.W.2d 565, 567 (1957)); *accord, Coastal Corp. v. Garza*, 979 S.W.2d 318, 319 (Tex.1998). "The conflict must be on the very questions of law actually involved and determined, in respect of an issue in both cases, the test being whether one would operate to overrule the other in case they were both rendered by the same court." *Christy*, 298 S.W.2d at 568-569. It is also "essential that such conflict appear on the face of the opinions

themselves." *State v. Wynn*, 157 Tex. 200, 301 S.W.2d 76, 79 (1957); *accord*, *John Farrell Lumber Co. v. Wood*, 400 S.W.2d 307, 309 (Tex.1966); *Torrez v. Maryland Cas. Co.*, 363 S.W.2d 235, 236 (Tex.1962); *Employers Cas. Co. v. National Bank of Commerce*, 140 Tex. 113, 166 S.W.2d 691, 693 (1942); *Dockum v. Mercury Ins. Co.*, 134 Tex. 437, 135 S.W.2d 700, 701 (1940).

Factual similarity is not a prerequisite for supreme court jurisdiction over an interlocutory appeal if the factual differences do not serve to legitimately distinguish the holdings of the two cases. *See Bland Indep. School Dist. v. Blue*, 34 S.W.3d 547, 553 (Tex. 2000). "If a rule of decision in one case would require a different result were it applied in another case, the conflict between the two cases is sufficient to invoke our jurisdiction over an interlocutory appeal." *Id.*

When attempting to demonstrate conflict jurisdiction in the supreme court, the "conflicting case" must be a case decided before the petitioner's case. *See Collins v. Ison-Newsome*, 73 S.W.3d 178, 180 (Tex. 2001). Further, the case to which a petitioner is comparing its case must be a published decision. *See id.* at 183.

In early 2001, Pamela Baron noted that, in the past decade, the supreme court accepted conflict jurisdiction over an interlocutory appeal only three times. *See Pamela Stanton Baron, Interlocutory Appeals in Texas State Courts*, 10th Annual Advanced Civil Trial Law Conference, South Texas College of Law, Feb. 2001, M-17; *see also Wagner & Brown v. Horwood*, 53 S.W.3d 347 (Tex. 2001)(The supreme court's conflicts jurisdiction

is “more endangered than the Giant Panda.”)((Hecht, J., dissenting from the court’s denial of a petition for review in an interlocutory appeal). Then, amazingly, during 2001 and the first half of 2002, the supreme court has granted conflicts jurisdiction in interlocutory appeals nine times.

The supreme court granted petitions in three cases because of a dissent in the court of appeals. *See American Type Culture Collection*, 2002 WL 1433719 at *2; *BMC*, 2001 WL 1898473 at *2; *Travis County v. Pelzel & Assoc., Inc.*, 77 S.W.3d 246, 248 n.2 (Tex. 2002). In another case, a justice in the court of appeals dissented on the issue of the standing of a party (Hotze). *See Brown v. Todd*, 53 S.W.3d 297, 301 (Tex. 2001). Both Hotze and the City of Houston petitioned for review in an interlocutory appeal. *See id.* at 300. The City’s jurisdictional allegation was based on “importance to the jurisprudence of the state” and, thus, was without merit. *See id.* Hotze petitioned for review on the basis on conflicts jurisdiction under § 22.225(c). *See id.* Because the court’s jurisdiction was properly invoked on one issue, the court acquired jurisdiction of the entire case. *See id.* at 301.

In three cases, the supreme court found a conflict between opinions of the courts of appeals. *See Texas A & M University-Kingsville v. Lawson*, 2001 WL 1892195 *2 (Tex. 2002); *Texas Natural Resource Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002); *Texas Dep’t of Transp. v. Garza*, 70 S.W.3d 802, 806 (Tex. 2002). In two other cases, the supreme court found a conflict between the petitioner’s case and one of the supreme court’s decisions. *See Texas Dep’t of Transp. v. Ramirez*, 74 S.W.3d 864, 866

(Tex. 2002); *Texas Dep't of Criminal Justice v. Miller*, 51 S.W.3d 583, 586 (Tex. 2001).²

Drafting the statement of jurisdiction in a petition for review in an interlocutory appeal can be tricky. As Justice Hecht noted in *Wagner & Brown*, the supreme court's conflicts jurisdiction in interlocutory appeals is not only rare but also unpredictable. According to Justice Hecht, the court is also unpredictable in its requirements for the statement of jurisdiction in a petition for review. *See Daimler-Benz Aktiengesellschaft v. Olson*, 53 S.W.3d 308, 308-09 (Tex. 2000) (Hecht, J., dissenting from an order striking the petition for review and ordering it redrawn in an interlocutory appeal from the denial of a special appearance).

Rule 52.3(e) mandates that the petition contain a statement of jurisdiction without argument. *See* TEX. R. APP. P. 52.3(e). The court requested a response to the petition for review and then ordered the petition stricken and redrawn by the day before the response was due. *See Daimler-Benz*, 53 S.W.2d at 308. The court ordered the petition stricken because the jurisdictional statement contained argument on the merits in violation of Rule 53.2. *See id.*

Justice Hecht contended litigants should not be prohibited from explaining the bases for their assertions that conflict exists and should not be confined to citing the conflicts

² A recent case illustrates an exception to conflicts jurisdiction in interlocutory appeals. In *McAllen Med. Ctr., Inc. v. Cortez*, the supreme court granted jurisdiction because the court of appeals had determined it lacked jurisdiction over an interlocutory appeal. *See* 66 S.W.3d 227, 231 (Tex. 2001). The supreme court limited its review to the question of the court of appeals' jurisdiction. *See id.*

sections of the Government Code and the cases litigants believe to be in conflict. *See id.* A review of Justice Hecht’s dissent may help in drawing a petition for supreme court review of the grant or denial of a special appearance or it may merely terrify you of the prospect of having your petition stricken. You’ve been warned before you read it.

V. STANDARD OF REVIEW

Until June 2002, the supreme court had never articulated the standard for reviewing a trial court’s denial of a special appearance. The 4th court of appeals held that appellate courts should review the trial court’s decision for an abuse of discretion because personal jurisdiction involves both legal and factual questions. *See, e.g., Klenk v. Bustamente*, 993 S.W.2d 677, 681 (Tex. App. – San Antonio 1998, no pet.). Other courts of appeals, however, in special appearance interlocutory appeals, reviewed the trial court’s factual findings for legal and factual sufficiency and reviewed the trial court’s legal conclusions de novo. *See, e.g., E.L.M. LeBlanc v. Kyle*, 28 S.W.3d 99, 101 (Tex. App.– Texarkana 2000, pet. denied); *In re Estate of Judd*, 8 S.W.3d 436, 440-41 (Tex. App.– El Paso 1999, no pet.); *C-Loc Retention Sys., Inc. v. Hendrix*, 993 S.W.2d 473, 476 (Tex. App.– Houston [14th Dist.] 1999, no pet.); *Cadle v. Graubart*, 990 S.W.2d 469, 471 (Tex. App. – Beaumont 1999, no pet.); *Ball v. Bigham*, 990 S.W.2d 343, 347 (Tex. App. – Amarillo 1999, no pet.); *Garner v. Furmanite Australia Pty, Ltd.*, 966 S.W.2d 798, 802 (Tex. App. – Houston [1st Dist.] 1998, pet. denied); *Al-Turki v. Taher*, 958 S.W.2d 258, 260-61 (Tex. App.– Eastland 1997, pet. denied). The supreme court adopted the view of the majority of the courts of appeals

and overruled the cases applying the abuse of discretion standard. *See BMC*, 2001 WL 1898473, *2 (Tex. 2001).

A. Findings of Fact Not Filed

When a trial court does not issue findings of fact and conclusions of law with its special appearance ruling, all facts necessary to support the judgment and supported by the evidence are implied. *See BMC Software Belgium, N.V. v. Marchand*, 43 Tex. Sup. Ct. J. 930, 2001 WL 1898473 *3 (June 27, 2002) (no findings of fact and conclusions of law were filed in *BMC*). The trial court's ruling must be affirmed on any legal theory supported by the evidence. *See Old Kent*, 38 S.W.3d at 226.

When the appellate record includes the reporter's and clerk's records, the implied findings are not conclusive and may be challenged for legal and factual sufficiency in the courts of appeals. *See BMC*, 2001 WL 1898473 at *3.

B. Findings of Fact Filed

Although there were no findings of fact and conclusions of law filed in *BMC*, the supreme court wrote dicta that indicated findings of fact and conclusions of law in an interlocutory appeal would have the same dignity as findings of fact and conclusions of law in an appeal after final judgment. *See id.* The supreme court has previously stated that when findings of fact and conclusions of law are not required under rule 296, the findings and conclusions are helpful but not binding. *See IKB Indus. (Nigeria) Ltd. v. Pro Line Corp.*, 938 S.W.2d 440, 442 (Tex. 1997). Following that reasoning, some courts of appeals held

that findings of fact and conclusions of law filed in an appeal from a special appearance were not binding on the court. *See Mueller v. Beamalloy, Inc.*, 994 S.W.2d 855, 859 (Tex. App. – Houston [1st Dist.] 1999, no pet.); *see also Cambridge Captial Corp. v. Skandia Real Estate Group*, 2002 WL 1380420 *1 (Tex. App. – Dallas 2002, no pet.)(unpublished).

If we are to believe the dicta in *BMC*, those cases are no longer correct. In *BMC*, the supreme court discussed findings of fact and conclusions of law as if the appeal were from a final judgment. *BMC*, 2001 WL 1898473 at *2-3. If the trial court enters an order denying a special appearance and the trial court issues findings of fact and conclusions of law, the appellant may challenge the fact findings on legal and factual sufficiency. *See id.* at *2. A court of appeals reviews the appropriateness of the trial court's resolution of disputed issues for factual sufficiency. *See Old Kent*, 38 S.W.3d at 220. To determine factual sufficiency, the court examines all the evidence in the record. *See, e.g., id.* The appellate court may reverse the trial court's decision for factual sufficiency if the decision is so against the great weight and preponderance of the evidence as to be manifestly erroneous and unjust. *See id.*

For a legal sufficiency point, if there is more than a scintilla of evidence to support the finding, the no-evidence challenge fails. *See Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 84 (Tex. 1992).

NOTE: The supreme court's review of the trial court's fact findings is limited to legal sufficiency. *See BMC*, 2001 WL 1898473 at *2; *see also Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996).

Appellate courts review a trial court's conclusions of law as a legal question. *See Hitzelberger v. Samedan Oil Corp.*, 948 S.W.2d 497, 503 (Tex. App. – Waco 1997, pet. denied). The appellant may not challenge a trial court's conclusions of law for factual insufficiency; however, the reviewing court may review the trial court's legal conclusions drawn from the facts to determine their correctness. *See Templeton v Dreiss*, 961 S.W.2d 645, 656 n. (Tex. App. – San Antonio 1998, pet. denied); *Dallas County v. Sweitzer*, 881 S.W.2d 757, 763 (Tex. App. – Dallas 1994, writ denied). If the reviewing court determines a conclusion of law is erroneous, but the trial court rendered the proper judgment, the erroneous conclusion of law does not require reversal. *See BMC*, 2001 WL 1898473 at *23.