

**Help! The Other Side Has Filed a Petition for Review —
What Do I Do Now?**

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Practice Before the Supreme Court of Texas

June 21, 2002

Austin, Texas

CHAPTER 6

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SELECTED PUBLICATIONS

The Texas Supreme Court by the Numbers: A Statistical Survey, University of Texas School of Law, Tenth
 Annual Conferences on Techniques for Handling Civil Appeals in State and Federal Court, May 2001
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The Civil Amicus Brief, 13 APPELLATE ADVOCATE 4 (Fall 2000).
Prejudgment Appellate Remedies, State Bar of Texas, Advanced Civil Trial Course, Fall 2000.
Mandamus Filings and Trends, University of Texas School of Law, Tenth Annual Conferences on
 Techniques for Handling Civil Appeals in State and Federal Court, June 2000.
Petitions for Review: Frequently Asked Questions, 12 APPELLATE ADVOCATE 3 (June 1999).
The Texas Supreme Court's 1998-1999 Term, State Bar of Texas, Advanced Civil Appellate Practice
 Course, October 1999.
A Mandamus Tour of Texas, University of Texas School of Law, Advanced Evidence and Discovery
 Symposium, May 1999 (co-author with Justice Deborah Hankinson).
The Texas Supreme Court's 1997-1998 Term: Something Old, Something New, San Antonio Appellate
 Section, Summer 1998.

Help! The Other Side Has Filed a Petition for Review — What Do I Do Now?

By Pamela Stanton Baron

I. FIRST THINGS FIRST: MAKING A PLAN

A. *What do I need to do immediately?*

You need to do four things: (1) calendar the due date for the response to the petition for review or waiver letter (the difference is discussed below) as thirty days after the date the petition is filed; (2) calendar the due date for any cross-petition for review also as thirty days after the date the petition is filed (whether you need to file a cross-petition is also discussed below); (3) register to receive vmail notices at the Court's website:

www.supreme.courts.state.tx.us

which will automatically inform you by e-mail of any activity in the case appearing on the court's docket sheet; and (4) evaluate your case to determine whether it is likely to attract the interest of one or more justices.

B. *Realistically, what are the chances the Court will grant the other side's petition?*

It is important to understand how likely it is the Court will grant the petition. Generally, the Court hears only about nine to twelve percent of the cases seeking review. For example, in the term ended August 31, 2000, the Court agreed to hear 97 of 1063 appeals filed, or slightly more than nine percent. In the preceding term ended August 31, 1999, the Court agreed to hear approximately 108 of 1006 appeals filed, or a little less than eleven percent.

The successful petitions can be grouped into two broad categories: cases presenting an issue of statewide importance on which the Court will hear oral argument and write a full opinion; and cases presenting a clear error that can be easily corrected in a short per curiam opinion without the need for argument. It is important to bear in mind the factors the Supreme Court considers in deciding whether to grant review: (1) whether there is a dissent in the court of appeals on an important point of law; (2)

whether there is a conflict between two or more courts of appeals on an important point of law; (3) whether the case involves the construction or validity of a statute; (4) whether the case involves constitutional issues; (5) whether the court of appeals has committed an error of law of such importance that it merits correction; and (6) whether the court of appeals has decided an important issue of law that should be, but has not been, decided by the state's highest civil court. TRAP 56.1(a). To fit within the category of grants by per curiam opinion, the petition must usually address only one or two issues and must convince the Court that there is a clear error of law that is simple to correct in a short opinion. In both categories, the Court is more likely to grant if there is a sense that the court of appeals' opinion is not just wrong, but also has resulted in unfairness to the parties.

The great majority of the appeals that are granted are seeking review of a published court of appeals' opinion. Although the Court does not track how many of its cases are based on a published court of appeals' opinion, the author reviewed the Supreme Court orders for an eight-month period during the 1998-1999 term. Of the 595 cases (excluding petitions that were dismissed, settled, or withdrawn), the Court issued a ruling on 296 published opinions and 299 unpublished opinions. The Court granted, either by setting for argument or issuing a per curiam opinion, 68 of those cases, 54 challenging published opinions and only 14 challenging unpublished decisions of the courts of appeals. (Of the unpublished opinions, only one of the cases was granted and set for argument; the rest were resolved by per curiam opinion.) This works out to an approximate grant rate of 11.4 percent for published cases and 2.3 percent for unpublished cases. A refusal to publish by the court of appeals substantially decreases the likelihood of review by the Supreme Court.

C. Should I try to line up amicus support?

As a respondent, the thinner the file at the Court the better. Amicus briefs call attention to a case and suggest that it is important because it affects other parties not before the Court. As a general rule, it is better for the respondent not to encourage amicus support until if and when the case is granted and set for argument. If you think that is likely to happen, then getting amicus lined up ahead of time is always a good idea.

II. THE NEED FOR A CROSS-PETITION FOR REVIEW**A. Do I need to file a cross-petition?**

Any party seeking to alter the court of appeals' judgment must file its own petition for review. TRAP 53.1. Complaints asking for a different or more favorable judgment below cannot be raised by cross-point in a response to a petition for review. For example, if the court of appeals took away an award of attorney's fees or interest, those could be reinstated only on the basis of a cross-petition.

B. When is the cross-petition due?

If any party timely files a petition for review, then any other party may file a subsequent petition either 45 days after the court of appeals' last ruling on all timely filed motions for rehearing or 30 days after the filing of another party's timely-filed petition (including any extensions), whichever is later. TRAP 53.7(c). The mechanics are the same as those for a petition for review. The rules do not specifically provide for the filing of a combined cross-petition for review and response, although the author has submitted one and had it accepted (note that the combined document might need to be limited to fifteen pages, though).

III. RESPONSE TO PETITION FOR REVIEW: THE DECISION WHETHER TO FILE**A. Should I file a response or a waiver letter?**

There is no provision in the rules for the filing of a waiver letter, but it is a procedure that the Court has developed and encouraged. Rather than filing a response, the respondent may instead submit a waiver letter indicating an intention not to file a

response unless one is requested by the Court. Once it receives a waiver letter, the Court will place the petition on a 30-day track for automatic denial unless one or more justices request a response. The Court requests a response in approximately 25% of the cases it reviews. Pamela Stanton Baron and Stacy R. Obenhaus, *The Texas Supreme Court by the Numbers: A Statistical Survey 2*, University of Texas School of Law, 11th Annual Conference on State and Federal Appeals (May 2001). Because voluntary responses are filed in about 20% of the cases, this means the Court considers responses in roughly half the cases filed. *Id.*

Speaking at CLE conferences, most of the justices discourage the filing of a response. They do encourage respondents to file letters waiving the response unless one is requested by the Court. A waiver letter does not waive anything, because, under the rules, the Court cannot grant a petition without first requesting a response. TRAP 53.3. If you choose not to file a response, you should immediately file a waiver letter with the clerk.

But — despite what the justices say, waiving a response may not be the best strategy in every case. Filing a waiver letter is fine in a case where the court of appeals' opinion is unpublished and there is no important issue or large judgment that is likely to attract attention. Remember, though, that it takes the vote of only one justice to request a response. Any case with a big judgment, a big issue, a novel legal theory, or that has attracted media attention is likely to generate the request for a response. It makes sense in those cases to go ahead and file a response voluntarily so that the justices will not be considering the petition without having a response to balance their initial impression of the case.

B. What does a waiver letter look like and when and where is it filed?

There is no special form for a waiver letter. The letter should be addressed to the clerk, identify the style and number of the case, and indicate that no response will be filed unless requested by the Court. An example is attached to this paper as Appendix A. The waiver letter should be filed with the Supreme Court clerk as soon as possible after the petition is filed. The Court requires an original

letter plus eleven copies. TRAP 9.3(b). There is no filing fee.

C. *What are the advantages and disadvantages of filing a waiver letter?*

There are several advantages. First, it speeds up the process. The Court will not wait for the response time to pass or the response to be filed before considering whether to grant the petition. This is particularly a good move in a case that the Court is likely to deny. Second, it saves the client money. Third, if the Court eventually asks for a response, you at least have some signal on the level of interest in the case.

The disadvantage is obvious — having the justices form an initial impression of the case with only one side’s position before them.

D. *If I file a response, when is it due?*

A voluntary response (one that is not requested by the Court) must be filed no later than 30 days after the petition is filed. TRAP 53.7(d).

E. *If I file a waiver and the Court asks for a response, don’t I get less time?*

No, you should still get thirty days. There were a few glitches early on in the process and a few respondents did not get a full response time. That should no longer occur.

BUT — Read the letter requesting the response carefully. Usually, the Court requires that the response be received in the clerk’s office by a certain date and time. This means the mailbox rule does not apply and the clerk must have the filing in hand by the date and time specified in the letter.

IV. RESPONSE TO PETITION FOR REVIEW: CONTENTS

A. *Can’t I just file my brief from the court of appeals instead of a response?*

No. And don’t try to get around this by attaching a copy of the court of appeals’ brief in the appendix to the response. *See Wal-Mart Stores, Inc. v. Sturges*, No. 98-1107, 42 Tex. Sup. Ct. J. 374 (Feb. 11, 1999) (striking appendix that included “argumentative material,” *i.e.*, the court of appeals’ briefs).

B. *What should I try to accomplish in the response?*

Obviously, you should try to convince the Court not to grant the petition. There are several ways to accomplish this. One is to convince the Court that there was no error in the court of appeals’ opinion. Another is to convince the Court that the case and the issues are not important, that the situation will never come up again (or that the Court has recently resolved the issue and should not devote additional resources to it), that the dollar amount is too small, that the resolution will not affect anyone other than the parties to the immediate case, that rough justice was done in the courts below, and so forth. Another useful approach is just to make the case too hard to resolve simply by arguing any legitimate basis of waiver of the main issues or by showing complicating factors in the procedural history or facts of the case.

C. *What are the required contents of the response?*

The response must contain the following items in the following order; the starred items are optional and are discussed under the appropriate section headings below:

- Identity of parties and counsel*
- Table of contents
- Index of authorities
- Statement of the case*
- Statement of jurisdiction*
- Issues presented*
- Statement of facts*
- Summary of the argument
- Argument
- Prayer
- Appendix*

TRAP 53.3.

D. *What goes on the cover; do I ask for oral argument on the cover or in a separate motion?*

The cover must contain the following information: (1) the number of the case; (2) the style of the case; (3) the title of the document being filed; (4) the name of the party filing the document; and (5) the name, mailing address, telephone and fax

number, and State Bar number for lead counsel for the filing party. TRAP 9.4(g).

There is no provision in the rules for asking the Supreme Court for oral argument in an ordinary appeal. *Compare* TRAP 9.4(g) (request to court of appeals); TRAP 39.7 (request to court of appeals). Oddly, the rules do allow a request for argument in cases involving certified questions. TRAP 58.7(b). Anyway, the Court decides on its own whether to hear argument in a case. TRAP 59.1, 59.2. A party who does not ask for oral argument gives the impression of being more familiar with the Court's procedures than one who asks for argument.

E. Does the response need to repeat the identity of parties and counsel?

No. There is no need to include a section on identity of parties and counsel in the response unless the petition has made mistakes or omissions in the list. TRAP 53.3(a).

F. What needs to be in the table of contents?

The response must have a table of contents, which should "indicate the subject matter of each issue or point, or group of issues or points." TRAP 53.2(b). There are several ways to accomplish this result. One is simply to recopy under "Issues Presented in Response" in the table of contents all of the issues listed in the response. If the headings in the argument section of the petition track the issues, putting the headings in the table of contents may suffice. No matter how structured, though, the issues, headings, and subheadings in the table of contents should serve as an outline or summary of the argument. The table of contents is often the first place the justices and court attorneys look — don't miss this opportunity to persuade the Court that your argument has merit.

G. Is there anything unusual about the index of authorities?

No. The index must list the authorities alphabetically and show the pages of the response where the authorities are cited. TRAP 53.2(c).

H. Does the response need a statement of the case and, if so, what format should I use?

Technically no, strategically, yes. The respondent need not include a statement of the case

unless the respondent is dissatisfied with the discussion in the petition. TRAP 53.3(b). The author always includes a statement of the case in the response as it is likely that the petitioner has omitted some key facts in the procedural history or that different facts will need to be emphasized (for example, the fact that the court of appeals' opinion is unpublished).

The table format for the statement of the case is very effective. It provides the most basic information about the case in a very easy to read and understand format. Members of the Court have expressed a strong preference for the table format. *See* Douglas W. Alexander and Lori Ellis Ploeger, *Petition for Review Practice*, South Texas College of Law, Civil Appellate Law Course for Practitioners at L-6 (Dec. 1998).

The case statement should "seldom" exceed one page and must not discuss the facts. TRAP 52.3(d). The statement of the case must provide the following information:

- the nature of the case (*e.g.*, trespass to try title, divorce);
- the trial judge who signed the order appealed from;
- the designation of the trial court and county;
- the trial court's disposition;
- the parties in the court of appeals;
- the court of appeals' district;
- the names of the participating court of appeals' justices, including who authored the majority and any other opinions;
- the court of appeals' disposition; and
- the citation for the court of appeals' opinion or a statement that the court of appeals has designated the opinion not for publication.

TRAP 53.2(d). An example is provided as Appendix B to this paper.

I. Do I need a statement of jurisdiction and what should be in it?

The statement of jurisdiction should be omitted unless the respondent is contesting jurisdiction. TRAP 53.3(d). If so, the reasons the Court lacks jurisdiction should be concisely stated. *Id.* For example, in an interlocutory appeal, the respondent would state briefly that there is no

dissent or conflict and the court therefore lacks jurisdiction. If the petitioner has alleged a conflict, the respondent should briefly state why there is no conflict giving rise to jurisdiction. A respondent should not contest jurisdiction on the basis that the case is not important. This should be contained in the summary of the argument and the argument section of the brief.

J. *Should the response contain a statement of issues or points of error?*

The respondent need not list the issues presented unless: (1) the respondent is dissatisfied with the statement of issues in the petition. (In the author's view, the respondent should almost always recast the issues in a light more favorable to the respondent.); (2) the respondent is asserting independent grounds for affirming the court of appeals' judgment; or (3) the respondent is asserting grounds that establish a right to a judgment that is less favorable to the respondent than the court of appeals' judgment but more favorable than the judgment requested by the petitioner, such as a remand for a new trial rather than a take nothing judgment. TRAP 53.3(c). Note that complaints about issues that the court of appeals failed to address may be raised at any time, even on rehearing. TRAP 53.4.

Often, the way the issue is framed in a case will have a significant effect on the answer. In recasting the issues, the respondent should try to emphasize their lack of importance to the jurisprudence of the state — by emphasizing facts, by raising questions of waiver, etc. This is what the author refers to as the Casablanca defense: “. . . the problems of three little people don't amount to a hill of beans in this crazy world.”

It is useful to look at Court opinions to see how the Court itself frames issues, and to prepare issues in a similar fashion. The issues framed by the Court are general short, law-based rather than fact-based, and somewhat neutral.

Issues differ from the old points of error. While either are permitted, issues are preferable. Issues are slightly more general and free-form than points of error. Points of error tend to be mechanical complaints identifying the mistake-

maker (the trial court erred), the form of the mistake (in granting the motion for judgment n.o.v.), and why it was a mistake (because there was some evidence of fraud). Points of error are sometimes very unhelpful in finding out what the case is really about. Issues do not have to identify the particular form of the error or even who made it. They focus on the basic questions the appellate court has to answer: Does execution of a release disclaiming reliance on pre-release representations bar a claim for fraudulent inducement? The rule provides that a broad issue “will be treated as covering every subsidiary question that is fairly included.” TRAP 53.2(f).

K. *Should the response address petitioner's unbriefed issues; can a response contain unbriefed issues?*

The rules permit the petitioner to preserve the issues by listing them in the issues presented section, but allows the petitioner to focus its argument on the best one or two issues in the argument section of the petition. TRAP 53.2(i). These unbriefed issues may be addressed later if the Court asks for full briefing on the merits. The response need not address these unbriefed issues and probably should not, as it is more important to use the limited pages available to address the arguments actually made in the petition.

It is possible for the respondent to have unbriefed issues. The respondent may want to call to the court's attention alternative grounds for affirming the judgment below, but may not have the space available in the response to brief those grounds. When issues listed will not be briefed in the argument section, it is common practice to designate in parentheses that the issue is an “unbriefed issue.”

L. *Can I waive anything by failing to list it in the issues in the response?*

Probably not. But you may have already waived it. Remember, as discussed above, if the respondent seeks more favorable relief than granted by the court of appeals, the respondent must file its own cross-petition. These cannot be raised by cross-point. Issues that assert points the court of appeals did not reach are not waived by failing to include them in the response; these may be raised

even as late as the motion for rehearing. But it is a good idea to list them in the issues in response to mark them for the Court so that they don't get overlooked later.

M. *Should the response include a statement of facts?*

Again, technically no, strategically, yes. The respondent need not include a statement of facts unless the respondent is dissatisfied with the discussion in the petition. TRAP 53.3(b). In virtually every case, the respondent will want to emphasize different or additional facts. It is always amazing how many facts petitioners omit or distort when the standard of review is no evidence.

The rules require that the facts be stated "concisely and without argument." TRAP 53.2(g). The statement of facts counts in the fifteen-page page limit so the facts need to be straightforward. Remember, the more words spent on the facts, the less room there is left for the critical argument section of the response. One space-saving technique is to focus on the most critical facts and to reference the court of appeals' opinion for the remainder (assuming the court of appeals' factual discussion is both comprehensive and accurate). It is helpful to use subheadings if the fact statement exceeds two or three pages. It is also easier for the Court to understand when the facts are presented in chronological order.

The statement of facts must "affirm that the court of appeals correctly stated the nature of the case, except in the particulars pointed out." TRAP 53.2(g). The statement must be supported by references to the Clerk's Record (formerly known as the transcript), usually abbreviated "CR," *e.g.*, CR 333, and the Reporter's Record (formerly known as the statement of facts), "RR," *e.g.*, RR 245. *Id.*

The statement of facts should also include a brief procedural history of the case, even if slightly repetitive of the statement of the case. TRAP 53.2(g).

N. *Is a summary of argument required?*

The response must include a summary of the argument. TRAP 53.3, 53.2(h). The summary must be "succinct, clear, and accurate" and may not

merely repeat the list of issues presented. TRAP 53.2(h).

The justices repeatedly state that they like the summary and read it carefully. The author now titles this section "Summary of the Argument: Review of the Petition is Unwarranted," and focuses exclusively on reasons the Court should not grant the petition.

O. *What is the Court looking for in the argument section?*

The Court is looking for a reason to grant or not to grant the petition. The rule makes clear that the focus should be the reasons the Court should or should not exercise jurisdiction "with specific reference to the factors listed in Rule 56.1(a)." TRAP 53.2(i). Those factors are:

Among the factors the Supreme Court considers in deciding whether to grant a petition for review are the following:

- (1) whether the justices of the court of appeals disagree on an important point of law;
- (2) whether there is a conflict between the courts of appeals on an important point of law;
- (3) whether a case involves the construction or validity of a statute;
- (4) whether a case involves constitutional issues;
- (5) whether the court of appeals appears to have committed an error of law of such importance to the state's jurisprudence that it should be corrected; and
- (6) whether the court of appeals has decided an important question of state law that should be, but has not been, resolved by the Supreme Court.

TRAP 56.1(a); *see* Tex. Gov't Code § 22.001(a)(6) (only if "the error is of such importance to the jurisprudence of the state that, in the opinion of the Supreme Court, it requires correction" will the Court grant the petition).

The phrase "of importance to the jurisprudence of the state" is not explicitly defined by rule or statute. Besides TRAP 56.1(a), it is useful to look

at the rule setting out standards for the court of appeals to employ in determining whether an opinion merits publication:

An opinion should be published only if it does any of the following: (a) establishes a new rule of law, alters or modifies an existing rule, or applies an existing rule to a novel fact situation likely to recur in future cases; (b) involves a legal issue of continuing public interest; (c) criticizes existing law; or (d) resolves an apparent conflict of authority.

TRAP 47.

Justice Hecht outlined his own standards for granting a case in his dissenting opinion on first hearing in *Maritime Overseas v. Ellis*, 40 Tex. Sup. Ct. J. 110 (Nov. 15, 1996) (Hecht, J., dissenting to denial of application for writ of error). In asserting that the writ should have been granted, Justice Hecht noted the size of the damage award, the importance of the central legal issue, the fact that the central legal issue had not been authoritatively addressed (presumably by the Texas Supreme Court), the existence of dissents and conflicts in the court of appeals, the granting of a similar issue in a pending case, the fact that the case was well briefed by capable counsel, and the existence of error in the court of appeals' judgment.

The response then should try to negate as many of these considerations as possible.

P. *What goes in the prayer?*

Not every much in the response. Usually, a single sentence should suffice: "Respondent prays that the petition for review be denied."

Q. *Well, at least I can't get the certificate of service wrong, right?*

You can if you don't include all the items required by the rule: the date and manner of service; the names and addresses of each person served; and, for each attorney served, the name of the party represented by that attorney. TRAP 9.5(e).

R. *Does the response need an appendix?*

The respondent may have no need for an appendix. The requirements for the respondent's

appendix are the same as for petitioner's with one important exception: the respondent need not include materials already contained in the petitioner's appendix. TRAP 53.3(f). In short, only if the petitioner has omitted something from the appendix or the respondent is relying on some statute or other authority not provided by the petitioner is there a need for the respondent to have an appendix at all.

Remember, at the time the petition is filed, the Court does not have the record. The record is forwarded by the court of appeals only if the record is requested by the Supreme Court. See TRAP 54.1. The appendix provides the Court with an abridged copy of the record, focusing on those items most useful in deciding whether or not to grant the petition. If the petitioner has failed to include a copy of a key order or motion, the omitted item should be included in an appendix to the response.

The rules permit inclusion in the appendix of any item pertinent to the issues, "including copies or excerpts of relevant court opinions, statutes, constitutional provisions, documents on which the suit was based, pleadings, and similar material." TRAP 53.2(k)(2).

The rule specifically prohibits using the appendix to avoid page limitations. *Id.* In other words, do not put argumentative material in the appendix. The Court has struck an appendix that included copies of the court of appeals' briefs. *Wal-Mart Stores, Inc. v. Sturges*, No. 98-1107, 42 Tex. Sup. Ct. J. 374 (Feb. 11, 1999). Also bear in mind that many of the justices carry documents while traveling and do not appreciate overloaded (*i.e.*, heavy) appendices.

Although the required contents of the appendix suggest that case law should not be included, if there are one or two cases on which the decision turns, it is helpful to include them in the appendix, even if they are Texas cases.

The appendix may either be bound with the response or separately. TRAP 9.3(h). In the author's opinion, it is preferable not to pad the appendix — include only the documents required by the rule and any other documents that are essential to an understanding of the case — and to bind the appendix with the response rather than separately. The justices often carry the materials home for review and having everything in one

document ensures that the appendix will not go astray. The appendix must be tabbed and indexed. TRAP 9.4(h). If it is separately bound, it must comply with the binding and cover requirements discussed below. *Id.*; *see* TRAP 9.3(f).

V. RESPONSE TO PETITION FOR REVIEW: FILING MECHANICS

A. *When is the response due?*

A voluntary response (one that is not requested by the Court) must be filed no later than 30 days after the petition is filed. TRAP 53.7(d). When the Court requests a response, the due date is usually thirty days from the date of the Court's request. Read the letter requesting the response carefully. Usually, the Court requires that the response be received in the clerk's office by a certain date and time. This means the mailbox rule does not apply and the clerk must have the filing in hand by the date and time specified in the letter.

B. *How do I get an extension of time to file the response?*

File a motion with the Supreme Court no later than fifteen days after the due date. TRAP 53.7(f). Remember, though, that the Court will begin acting on the petition on the thirtieth day it is filed in the absence of a response or extension request. The motion must state: the due date; the length of the extension sought; the facts reasonably explaining the need for an extension; and the number of previously granted extensions. TRAP 10.1(a)(5). **The Court will not grant an extension request without a certificate of conference.** If the facts relied on in the motion are within the personal knowledge of the attorney signing the motion, the motion need not be verified. TRAP 10.2. The Court requires the filing of an original plus eleven copies of the motion. TRAP 9.3(b). There is a \$10.00 filing fee.

The Court routinely grants first motions. It will grant a second motion if there's a good reason, but will usually indicate on the order that no further extensions will be granted.

C. *Where is the response filed and how many copies are required?*

An original and eleven copies of the response (and any separately bound appendix) are filed with

the Supreme Court clerk. TRAP 53.7(a); TRAP 9.3(b). The mailing address is Post Office Box 12248, Austin, TX 78711. The delivery address is Supreme Court Building, 201 W. 14th Street, Room 104, Austin, TX 78701. The phone number for the clerk's office is 512/463-1312.

D. *Can I use Federal Express?*

It depends. Never, never use Federal Express when you are sending the filing package on the due date. To get the benefit of the "mailbox" rule, the filing must be sent either first class, express, registered, or certified mail, must be properly addressed, and must be deposited in the mail on or before the last day for filing. TRAP 9.2(b). Federal Express won't count. If you are filing a few days before the deadline, it is okay to use an overnight carrier, but be sure to confirm with the clerk's office that the filing actually gets there the next day. If the overnight carrier loses the filing package, you may need to put an extra set in the mail on or before the last day for filing. If you don't do this, and the carrier is late, your filing is late.

E. *Can I file electronically or by fax?*

No. There are a few exceptions to this rule, but they involve emergency situations and filings requested by the Court on an expedited basis. Assume you cannot file by fax unless the clerk has informed you otherwise.

F. *Is there a filing fee?*

No.

VI. RESPONSE TO PETITION FOR REVIEW: FORMATTING MECHANICS

A. *What are the basic formatting rules?*

The response must be typed on standard 8½ by 11 inch paper with one-inch margins on both sides and at the top and bottom. Text must be double spaced except for block quotes, footnotes, short lists, and issues or points. Typeface for text must be either (1) standard 10 cpi (character per inch) non-proportionally spaced Courier typeface or (2) 13-point or larger proportionally spaced typeface. If a proportionally spaced typeface is used, footnotes may be printed in typeface no smaller than 10-point.

The length of a response is strictly limited. The response may not exceed 15 pages excluding the following sections: the identity of parties and counsel, the table of contents, the index of authorities, the statement of the case, the statement of jurisdiction, the issues presented, the signature, proof of service, and the appendix. TRAP 53.6. The Court does not grant requests to exceed the page limitations.

B. *Can I staple the copies or is binding required?*

Either may be used, but the document must lie flat when open. TRAP 9.4(f). In the author's opinion, as a general rule, any document more than five pages in length should be bound with front and back covers. Binding should be spiral binding that allows the brief to lie flat. Plastic binding is preferable to metal because it is easier to remove and replace the binding for easier copying.

C. *Why can't the cover be red; isn't that a good way to get the Court to pay attention?*

All responses must have a cover that allows the ink on the clerk's stamp to be visible. The red ink does not show up well on plastic covers or on dark covers like red, black, or dark blue. The rule thus prohibits these types of covers. TRAP 9.4(f).

D. *Why are so many filings getting bounced?*

Many filings do not comply with the typeface rules, the margin rules, or the page limitation rules. The Court is rejecting documents that don't comply. Both the clerk's office and even some of the justices are carefully screening petitions for noncompliance.

E. *What is 13 point proportionally spaced typeface anyway?*

If a type is non-proportional, all letters take the same amount of space. This is the typeface used by your old manual typewriter. Proportional type squeezes the letters together if there is extra space. So, unless you are writing only the letter "o", a line of proportional type will hold many more characters than a line of non-proportional type. The standard old typewriter size is 10 cpi, which means that ten characters (no matter what characters they are) fit into one inch of type. To make sure everybody gets about the same number of letters in their petition, the Supreme Court has determined that a 13-point

non-proportional typeface is equivalent to the old standard 10 cpi. 13-point type looks quite large and is not standard formatting on most word processing software. In Word for Windows, use CG Times or Times New Roman and set the size either by typing it into the toolbar window for type size or do the same in the Font Window from the Format Menu. In WordPerfect for Windows, use CG Times or Times New Roman; 13 is a type size option in the toolbar window.

VII. SUPREME COURT PROCEDURES FOR PROCESSING PETITIONS FOR REVIEW

NOTE: The internal operating procedures of the Supreme Court are very complex and are still in flux. This paper does not purport to provide the reader an in-depth understanding of those procedures. For a more detailed explanation, see Lee Parsley and Julie Caruthers Parsley, *Texas Supreme Court Internal Procedures and Statistics*, University of Texas School of Law, Tenth Annual Conference on State and Federal Appeals (June 2000) ["Parsley and Parsley"].

A. *Is the petition immediately forwarded to the Court by the clerk?*

No. The petition is not forwarded until the 30 day time period for filing a reply has passed or a response or letter waiving a response has been filed.

B. *After the petition is forwarded, is it assigned to a particular chambers for review?*

No. Under the petition for review system, all nine justices receive a copy of the petition and appendix and any response and reply. No chambers is assigned the job of reporting the case to the full court before the case is first considered.

C. *What is the "conveyor belt" and how does it work?*

After a case is forwarded to the Court for disposition, the Court's administrative assistant puts the case on the agenda to be denied about 30 days later unless one or more justices take some action to prevent automatic denial. See Parsley and Parsley. This process has been informally referred to by practitioners as the "conveyor belt" or the "pipeline."

D. How does a petition get taken off the conveyor belt?

When one or more justices take some action to pull it off before the deadline for action. Each justice is given a vote sheet on all the cases listing a number of options, any of which will prevent the automatic denial of the case. These options include discussing the case at conference, requesting a study memo, requesting full briefing on the merits, requesting the record, granting, issuing a per curiam opinion, dismissing, or refusing the case.

E. How many votes does it take to . . . ?

The Court's internal procedures, which are subject to change, currently provide that the following number of votes are required to take the following actions:

- Discuss at conference — 1
- Request response — 1
- Request record — 1
- Request briefs on the merits — 3*
- Request study memo — 3*
- Hold case for another case — 6
- Deny — (by default)
- Refuse — 6
- Dismiss — 5
- Dismiss w.o.j. — 5
- Grant — 4
- Grant original proceeding — 5
- Issue per curiam — 6
- Signed opinion without argument — 6
- Improvidently grant — 6

See Parsley and Parsley. * The Court changed the number of votes to request a study memo and to request briefs on the merits from two to three beginning the first week in October 1999.

F. What happens once a petition is taken off the conveyor belt?

If a justice marks a ballot sheet to request a response or the record, the case is put on hold until the requested material has been received. It will then be put on the conference agenda for discussion. In all other situations, the case will be put on the conference agenda for discussion. Parsley and Parsley at 5.

At conference, if there are four votes to grant, the Court will grant the petition, set the case for argument, and ask for briefs on the merits if they have not already been requested. Most of the time, though, the Court will ask for briefs on the merits before deciding whether to grant review. If there are three votes for a study memo or briefing on the merits, the Court will request briefing on the merits and the record. A briefing attorney will prepare a study memo within thirty days after the response brief is received. The case will then be returned to the agenda and the Court will decide whether to grant, deny, dismiss w.o.j., or issue a per curiam opinion.

G. If my case is taking a long time, is there any way I can find out what's going on?

Not really. The Court's deliberation process is secret. It is illegal to contact a justice or court attorney about the status of a particular case. You can check with the clerk's office to make sure you have received notices of all actions taken by the Court, such as requesting the record or a response.

The average time to disposition for most petitions is under three months. The process takes significantly longer if a response or full briefing on the merits is requested.

H. How do I find out what action the Court has taken on the petition for review?

The Court issues orders at 9:00 a.m. most Thursdays. Orders and opinions are posted on the Court's website:

<http://www.supreme.courts.state.tx.us>.

The time of availability varies. The clerk's office also sends notice to counsel of action taken on the petition.

I. Does the Court ever impose sanctions when it is considering a petition for review?

Very rarely and only for egregious behavior. As a general rule, imposing sanctions is more trouble than it is worth. The Court has to give notice and an opportunity to respond and must determine that the petition is frivolous. TRAP 62.

VIII. RESOURCES

A. *Are there any on-line resources that can help?*

It is very helpful to keep up with recent Texas Supreme Court opinions to know what issues may appeal to the Court. Information about the Court and copies of the Court's opinions and orders are available on its website:

<http://www.supreme.courts.state.tx.us>

There is currently no on-line guide to Texas Supreme Court practice.

B. *What about print resources?*

The following papers may be helpful:

Elizabeth V. (Ginger) Rodd, *What is Important to the Jurisprudence of the State?*, University of Texas School of Law, 11th Annual Conference on State and Federal Appeals (May 2001).

Lee Parsley and Julie Caruthers Parsley, *Texas Supreme Court Internal Procedures and Statistics*, University of Texas School of Law, Tenth Annual Conference on State and Federal Appeals (June 2000).

Pamela Stanton Baron, *The Civil Amicus Brief*, 13 APPELLATE ADVOCATE 4 (Fall 2000).

Pamela Stanton Baron, *Petitions for Review: Frequently Asked Questions*, 12 APPELLATE ADVOCATE 3 (June 1999).

Pamela Stanton Baron and Stacy R. Obenhaus, *The Texas Supreme Court by the Numbers: A Statistical Survey*, University of Texas School of Law, 11th Annual Conference on State and Federal Appeals (May 2001).

Appendix A: Sample Waiver Letter

PAMELA STANTON BARON
ATTORNEY AT LAW

POST OFFICE BOX 5573
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BOARD CERTIFIED,
CIVIL APPELLATE LAW,
TEXAS BOARD OF LEGAL
SPECIALIZATION

June 21, 2002

Mr. John Adams
Clerk, Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711

Re: No. 02-3333, *Dr. Hugo Z. Hackenbush v. Otis B. Driftwood*

Dear Mr. Adams:

By this waiver letter, the respondent, Otis B. Driftwood, respectfully waives the filing of a response to the petition for review. It is respondent's understanding that the Court will not grant the petition without first requesting a response.

Sincerely,

Pamela Stanton Baron
Counsel for Otis B. Driftwood

By signature above, I certify that, on June 21, 2002, I served a copy of this letter by United States First Class Mail on the following counsel for the petitioner: (1) J. Cheever Loophole, MILLER & LOOPHOLE, L.L.P., Post Office Box 768, Austin, Texas 78767; (2) S. Quentin Quale, WAGSTAFF, QUALE, DEVERAUX & MARX, L.L.P., Post Office Box 7566, Austin, Texas 78763.

Appendix B: Sample Response

No. 02-9999

IN THE
SUPREME COURT OF TEXAS

JEFFREY T. SPAULDING,
Petitioner,

v.

R. T. FIREFLY, GLORIA TEASDALE, RONALD KORNBLow,
AND KORNBLow & FIREFLY, A GENERAL PARTNERSHIP,
Respondents.

RESPONSE TO PETITION FOR REVIEW

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JUNE 21, 2002

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STATEMENT OF THE CASE

Nature of the Underlying Case: Suit by Jeffrey T. Spaulding, an attorney, against R. T. Firefly and others claiming tortious interference with a contingent fee contract between Spaulding and Vera Marcal.

Trial Court: Hon. Bob Roland, 999th District Court, Fredonia County, Texas.

Disposition: (1) After the time for responding to outstanding discovery had passed, denied Spaulding’s motion for continuance premised on the pendency of the discovery requests; (2) after the trial date set by the docket control order, granted Firefly’s no evidence motion for summary judgment challenging the absence of evidence of a willful and intentional act of interference; and (3) denied all other relief requested, including Firefly’s traditional summary judgment motion. CR 248, 249.

Court of Appeals: Fifteenth Court of Appeals in Sylvania, Texas.
Opinion by Ravelli, J., joined by Chicolini and Baravelli, JJ.
Decision issued October 2, 2001.
Opinion designated “Do not publish.”

Court of Appeals’ Disposition: Affirmed, The court held that the trial court did not abuse its discretion in denying the motion for continuance, which requested a delay only until the time for responding to outstanding discovery had passed, when the summary judgment was not granted until after that date. The court further held that the trial court correctly granted the no evidence motion for summary judgment because Spaulding failed to produce any evidence of a willful and intentional act of interference in response to the motion. The court of appeals did not reach Firefly’s conditional cross-points asserting alternative grounds for affirming the trial court’s judgment..

ISSUES IN RESPONSE

1. A trial court does not abuse its discretion in denying a motion for continuance on a no evidence motion for summary judgment when:
 - the motion asks only for a delay until the time for responding to specifically identified, outstanding discovery has passed;
 - after the time for responding to discovery has passed and discovery responses have been served, the plaintiff fails to seek a further continuance, fails to object to the responsiveness of the discovery, and does not supplement his response to the motion for summary judgment;
 - the plaintiff has had adequate time for discovery in the pending case and has previously had the opportunity to engage in discovery in a related case;
 - the trial court delays ruling on the motion for summary judgment until after the time for responding to outstanding discovery has passed; and
 - the trial court's ruling on the summary judgment motion is also after the scheduled trial date set forth in the docket control order.
2. The trial court properly granted the no evidence motion for summary judgment because Spaulding produced no evidence of a willful and intentional act of interference.
3. Alternatively, the trial court's judgment should be affirmed on grounds presented to but not reached by the court of appeals. (Unbriefed in this Response.)

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

This is a dispute between two attorneys, Jeffrey T. Spaulding and R. T. Firefly. Spaulding sued Firefly and others, charging that Firefly tortiously interfered with a contingent fee contract between Spaulding and Vera Marcal. CR 3-4.¹

Spaulding filed suit on October 26, 1999, the day limitations expired. CR 2. All of the defendants (except Ronald Kornblow) were served on November 8, 1999. CR 26. The defendants that had received service answered on November 12, 1999. First Supp. CR (“FSCR”) 6. Apparently, the answer was misplaced by the district clerk’s office, and Spaulding took a default judgment on December 2, 1999. FSCR 2. A new trial was granted January 12, 2000. FSCR 10.

On March 14, 2000, the trial court issued its original docket control order. FSCR 15. The order set June 5, 2000 as the trial date. *Id.* It also required that all dispositive motions be set for hearing no later than May 22, 2000. *Id.* The order further set deadlines for discovery, challenges to experts, and pleadings, but those deadlines were after the scheduled trial date. *Id.* More than a month later, on April 20, Spaulding brought to the trial court’s attention the conflict between the trial date and the dates for objections to experts and pleadings amendments. FSCR 14. The trial court signed a revised docket control order on May 2, changing the dates for objections to experts and pleadings amendments to bring them in line with the scheduled trial date of June 5.

¹ Spaulding also sued Gloria Teasdale, who is Firefly’s spouse and associate; Kornblow & Firefly, which is currently a d/b/a for Firefly; and Ronald Kornblow, a retired “of counsel” attorney of Kornblow & Firefly. CR 2, 7.

FSCR 17. The revised order also deleted the June 19 date for the end of the discovery period. *Id.* The trial date and the date for dispositive motions did not change. *Id.* Spaulding took no further action with respect to the docket control order. He never asked the trial court to clarify the discovery deadline. He never asked that the trial date be continued to a later date. He never asked that the deadline for dispositive motions be reset.

The only discovery initiated by Spaulding prior to the summary judgment filings was a request for disclosure. *See* FSCR 11. The Firefly defendants responded to Spaulding's request for disclosures on March 3, 2000, and filed a supplemental response on April 5, 2000. FSCR 11, 12.

Defendants filed traditional and no evidence motions for summary judgment on April 28, virtually the last day they could do so under the docket control order, which required that dispositive motions be set no later than May 22. CR 19, 25; *see* FSCR 17; TEX. R. CIV. P. 166a(c) (requiring service of summary judgment motion at least 21 days prior to hearing date). The no evidence motion contended that there was no evidence of a vital element of Spaulding's cause of action, specifically, a willful and intentional act of interference. CR 21. The traditional motion asserted that: (1) the evidence conclusively showed that there was no willful and intentional act of interference; (2) Spaulding's contract related to a different cause of action from the one on which Marcal recovered; (3) Spaulding previously litigated and lost on the issue of whether his contract covered the cause of action on which Marcal recovered; and (4) limitations expired as to

defendant Kornblow because he was not timely served. CR 27-31.

It was not until May 3, six months after suit was filed and several days after the summary judgment motions were filed, that Spaulding sought further discovery through four sets of admission requests, a set of interrogatories, and a request for production. Second Supp. CR 1-145. The 30-day response period for these discovery requests ended on June 2, three days before the trial setting. TEX. R. CIV. P. 196.2(a), 197.2(a), 198.2(a).

On May 15, 2001, Spaulding filed a motion for continuance of the defendants' motions for summary judgment and a combined response to both the traditional and no evidence summary judgment motions. CR 84, 151. The motion for continuance specifically listed each of the six outstanding discovery requests and asked solely for the following relief:

Plaintiff, Jeffrey T. Spaulding, requests a continuance until time for response to the pending discovery has passed. Plaintiff should then be allowed an adequate time to review the responses of Defendants and properly respond to Defendants' Motions for Summary Judgment.

CR 85 (emphasis added) (attached as Tab A). The facts alleged in the response are discussed in the argument section below, except to note here that Spaulding relied on Marcal's deposition testimony from other litigation between these same parties. CR 131. The trial court had before it uncontroverted evidence that Spaulding had intervened in litigation in which Firefly represented Marcal — claiming that Spaulding was entitled to his contingent fee even though he had been fired by Marcal — and that Spaulding had the opportunity to engage in considerable discovery in that litigation. CR 66, 74, 78, 80, 131.

Defendants served responses to all outstanding discovery requests on June 2. FSCR 99, 100; *see also* FSCR 103 (submitting additional documents on June 20). After receiving these responses, Spaulding did not object to their responsiveness, he did not seek a further continuance, and he did not supplement his summary judgment response. He did not take these steps even though the motions for summary judgment were pending and the time set for the trial in the docket control order had passed. Spaulding asserts he served further discovery on June 2, although the discovery is not in the appellate record and was never brought to the attention of the trial court.

On June 26, 2001, the trial court denied the motion for continuance. CR 248. On that same date, the trial court granted the no evidence motion for summary judgment. CR 249. The trial court did not explicitly rule on the traditional motion for summary judgment, but the judgment includes a “Mother Hubbard” clause denying all other relief CR 249. Spaulding appealed and defendants perfected a conditional cross-appeal asserting that the judgment could also be affirmed on the grounds contained in the traditional motion for summary judgment. The court of appeals affirmed without reaching the cross points.

**SUMMARY OF THE ARGUMENT:
REVIEW OF THE PETITION IS UNWARRANTED**

Spaulding argues that this case should be used as a vehicle for the Court to hold that a trial court always abuses its discretion in permitting the filing of a no evidence motion for summary judgment before the end of the discovery period. There are multiple problems with this argument, the most obvious being that Spaulding never asked the trial

court for the relief he seeks here. In his motion for continuance, Spaulding identified six outstanding discovery requests — due on June 2 — and asked the trial court for “a continuance until time for response to the pending discovery has passed” and until he had time to review those responses and supplement his response. The trial court effectively granted Spaulding all of the relief he requested. The defendants timely responded to the discovery requests, and the court delayed ruling on the summary judgment motions until more than twenty-one days after the June 2 deadline had passed. Further, the rule Spaulding urges does not support the relief he seeks here. The discovery period had closed before the trial court ruled on the summary judgment motions. The original docket control order contained a June 19 date for the end of discovery; once that date was deleted, the end of the discovery period under the rules would be 30 days before the trial date. The June 5 trial date was clearly stated in every docket control order issued by the court. Thus, not only had the discovery period ended well before the trial court granted summary judgment, it was also three weeks past the scheduled trial date.

The no evidence motion for summary judgment challenged the existence of evidence supporting one element of tortious interference, a willful and intentional act of interference. To commit a willful and intentional act of interference, a party must knowingly induce one of the contracting parties to breach its obligations. Merely entering into a contract with a party with the knowledge of that party’s contractual obligations to someone else is not the same as inducing a breach. The court of appeals, as Spaulding admits, applied the correct standard in reviewing the circumstantial evidence

he presented in his response. At most this evidence shows that Marcal fired Spaulding and retained Firefly. Carefully reviewing all of the evidence cited by Spaulding, the court of appeals correctly held that the evidence, including the inferences Spaulding stretches to draw from it, “does not ‘transcend mere suspicion’ about whether the Firefly parties committed a willful and intentional act of interference, and it stacks ‘inference upon inference.’” Slip Op. at 16.

The court of appeals committed no error of law in its unpublished opinion and review should be denied.

BRIEF OF THE ARGUMENT IN RESPONSE

I. The trial court did not abuse its discretion in denying the motion for continuance.

When a party contends it has not had adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance. TEX. R. CIV. P. 166a(g); *Tenneco Inc. v. Enter. Prod. Co.*, 925 S.W.2d 640, 647 (Tex. 1996); *Green v. City of Friendswood*, 22 S.W.3d 588, 594 (Tex. App.–Houston [14th Dist.] 2000, pet. denied). The party seeking a delay must allege that he cannot present facts essential to opposing the summary judgment motion and provide an explanation supporting his contentions. TEX. R. CIV. P. 166a(g).

The standard of review both for denial of a continuance and for denial of adequate time for discovery is abuse of discretion. *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex.1986); *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 145 (Tex. App.–Houston

[14th Dist.] 2000, pet. denied). The test for abuse of discretion is “whether the court acted without reference to any guiding rules and principles.” *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). In reviewing the denial, the court may consider the entire record. *See Collins v. Cleme Manor Apts.*, 37 S.W.3d 527, 532 (Tex. App.–Texarkana 2001, no pet.). The primary focus, though, should be the “reasons presented to the trial judge at the time the request is denied.” *State v. Crank*, 666 S.W.2d 91, 95 (Tex. 1984).

Here, the trial court did not abuse its discretion in denying Spaulding’s motion for continuance because: (1) the trial court effectively granted the relief requested in the motion for continuance by delaying any ruling on motions for summary judgment until after the delay requested by Spaulding; (2) the deadline for discovery had passed before the trial court ruled; (3) Spaulding’s arguments here and in the court of appeals were never brought to the attention of the trial court and are waived; and (4) in any event, Spaulding had adequate time for discovery in this case and in a related case.

A. The trial court effectively granted all the relief requested in the motion for continuance.

In his motion for continuance, Spaulding specifically identified and attached six outstanding discovery requests. He then asked for a “continuance until time for response to the pending discovery has passed” and until he had time to review those responses and supplement his response. CR 85. The response date was June 2. The trial court took no action until after the discovery responses were filed and, in fact, waited an additional three weeks before ruling on the motions for summary judgment and the motion for

continuance. Spaulding was thus given the delay he requested.

Spaulding took no action after receiving the responses to the six discovery requests. He did not seek a further continuance or assert that he needed additional discovery or more time to respond to the summary judgment motions. Nor did he supplement his response. He did not complain to the trial court that the discovery responses were incomplete, nor seek a motion to compel, which he admits would be the “natural next step.” Brief of Appellant at 13.

Under these circumstances, the trial court essentially gave Spaulding all the relief requested. It did not abuse its discretion in proceeding to decide the summary judgment motions after the time requested in the continuance had elapsed.

B. The end of the discovery period was over before the court denied the motion for continuance and granted summary judgment.

Spaulding asserts that the trial court always abuses its discretion in deciding a no evidence summary judgment motion filed before the end of the discovery period, unless “the court, after notice and hearing, makes a specific finding of extraordinary circumstances, and *then* gives twenty-one (21) days notice of hearing.” Petition at 9 (emphasis in original). Spaulding’s argument is premised on his underlying assertion that the trial court ruled on his motion for continuance “before the expiration of any discovery period imposed by order or the rules.” *Id.* at 3 (statement of issue). That argument is not preserved for review, and it is of no benefit to Spaulding given the facts of this case.

This argument is a 180 degree switch from what Spaulding asserted in the court of appeals. There, he recognized that the discovery period had expired well before the trial

court took any action on the motion for continuance and summary judgment motions. Brief of Appellant at 10-11. Spaulding’s analysis in the court of appeals was correct. The original docket control order contained a June 19 date for the end of discovery. Even if that were the relevant date, the trial court’s ruling was made after that period had come and gone. But the trial court deleted the June 19 date in an amended docket control order, thus leaving the end of the discovery period to be determined under the default provisions of the rules — 30 days before the trial date. TEX. R. CIV. P. 190.3(b)(1)(B); *see also Pape v. Guadalupe-Blanco River Auth.*, 48 S.W.3d 908, 913 (Tex. App.–Austin 2001, no pet.). As Spaulding recognized in the court of appeals, the trial court’s action shortened the discovery period. Brief of Appellant at 10-11 (discussing trial court deletion, “making the discovery period even shorter”). The June 5 trial date was clearly stated in every docket control order issued by the court. The discovery period ended on May 4. The trial court did not rule on the no evidence motion for summary judgment until more than seven weeks after that date. Thus, even if Spaulding’s trial-court-always-abuses-its-discretion argument were correct, it would still not afford him the relief he seeks.

C. Most of the arguments made by Spaulding in this Court and the court of appeals were never brought to the attention of the trial court and are waived.

As the court of appeals correctly held, the trial court *cannot* have abused its discretion by failing to grant a different motion for continuance from the one that Spaulding actually filed. Most of Spaulding’s arguments were never brought to the

attention of the trial court and are waived. TEX. R. APP. P. 33.1. These include:

- The primary argument raised in the petition for review and just discussed — because Spaulding never asked the trial court to delay action until after the end of the discovery period;
- Any complaint that the discovery deadline and docket control order were confusing or that the discovery period was unreasonably short, because he never made these arguments in the trial court;
- Any complaint that the Firefly parties' responses to discovery were incomplete, because Spaulding made no record in the trial court to support this claim by filing a motion to compel or similar pleading; and
- Any complaint that Spaulding needed additional time for further discovery once he had received responses to the six identified discovery requests because he made no record in the trial court.

Not surprisingly, the court of appeals concluded that “Spaulding did not urge below many of the arguments he now raises.” Slip Op. at 11. The same is true here.

D. In any event, Spaulding had adequate time for discovery.

Whether a nonmovant has had an adequate time for discovery for purposes of Rule 166a(i) is “case specific.” *Tempay, Inc. v. TNT Concrete & Constr., Inc.*, 37 S.W.3d 517, 522 (Tex. App.—Austin 2001, pet. denied), quoting *McClure v. Attebury*, 20 S.W.3d 722, 729 (Tex. App.—Amarillo 1999, no pet.). An adequate time for discovery is determined by the nature of the cause of action, the nature of the evidence necessary to controvert the motion, and the length of time the case has been active in the trial court. *Specialty Retailers*, 29 S.W.3d at 145. A court may also look to factors such as the amount of time the motion has been on file, the amount of discovery completed, and whether the discovery deadlines are specific or vague. *Id.*; *Tempay*, 37 S.W.3d at 522. A trial court

should presume that a plaintiff has investigated his case prior to filing. *Martinez v. City of San Antonio*, 40 S.W.3d 587, 591 (Tex. App.–San Antonio 2001, pet. denied).

This case was filed on the last day before limitations expired. The trial court could presume that Spaulding investigated his case before filing it. Furthermore, the trial court could take into consideration the prior intervention by Spaulding in the lawsuit between Marcal and her family. The intervention developed out of the same incident and involved many of the same issues as the present case. The trial court could see from the record that there had been considerable discovery in that intervention.

However, even taking only the present suit into consideration, there was ample time for discovery. Defendants served an answer and a discovery request on Spaulding on November 12, 1999. FSCR at 6. Nothing prevented Spaulding from also beginning discovery immediately. Measured from that date, Spaulding had over six months in which to conduct discovery before his summary judgment response was due. Even measured from January 12, 2000, the day on which the default judgment was set aside, Spaulding had over four months in which to conduct discovery. During the entire time from the commencement of the suit until the filing of the motions for summary judgment, Spaulding served only *one* discovery request, a request for disclosure. *See* FSCR 11.

After the filing of the motions for summary judgment, Spaulding served six additional discovery requests. Second Supp. CR 1-145. However, he *knew* that the requested discovery would not be due until after the deadline for his summary judgment response. Yet he made no effort to obtain discovery by the more expeditious means of

taking depositions. The trial court, in fact, delayed ruling on the motion for summary judgment until well after the discovery responses were served. Spaulding did not supplement his summary judgment response and did not complain to the trial court that the responses to the discovery requests were inadequate. The trial court did not abuse its discretion by failing to grant more time.

II. The trial court correctly granted the motion for summary judgment because Spaulding failed to produce any evidence of a willful and intentional act of interference.

The no evidence summary judgment challenged the existence of evidence supporting one element of tortious interference — a willful and intentional act of interference. *Holloway v. Skinner*, 898 S.W.2d 793, 795-796 (Tex.1995). To commit a willful and intentional act of interference “a party must be more than a willing participant; it must knowingly induce one of the contracting parties to breach its obligations.” *John Paul Mitchell Sys. v. Randalls Food Mkts., Inc.*, 17 S.W.3d 721, 730 (Tex. App.–Austin 2000, pet. denied), *citing Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex.1993). “Merely entering into a contract with a party with the knowledge of that party’s contractual obligations to someone else is not the same as inducing a breach.” *Paul Mitchell*, 17 S.W.3d at 731. Spaulding thus had the burden to offer more than a scintilla of evidence that Firefly knowingly induced Marcal to breach her contract.

Spaulding admits that the court of appeals applied the correct standard for review of circumstantial evidence: it must transcend mere suspicion and the fact suggested must be a reasonable inference in light of all the known circumstances; circumstantial evidence

is no evidence when it is so slight that any plausible inference is purely a guess; and facts may not be proved by unreasonable inferences or by stacking inference upon inference. Slip. Op. at 13 (citations omitted).

In his petition, Spaulding lists five pieces of circumstantial evidence, for which he provides no record citation. He accompanies the list with inferences he claims the court of appeals should have drawn. Each is discussed below, and none raises a fact issue.

Petition at 11: “(1) A few days prior to breaching the contract, Ms. Marcal had referred a new matter to Petitioner (from which the Court must infer she was generally satisfied with his performance.”

Marcal testified that she referred a call to Spaulding from an oil and gas lessee on her property: “Pat [Spaulding] said for me not to talk to them. That he would handle it.” CR 146. The mere fact that Marcal trusted Spaulding to talk with a mineral lessee does not show that she was happy with his handling of the Rose litigation. The court of appeals correctly held that evidence of whether Marcal had a good reason for terminating Spaulding is separate from and fails to raise a fact issue on whether Firefly engaged in a willful and intentional act of interference. Slip Op. at 15.

Petition at 11-12: “(2) Ms. Marcal did not recall making any decision to breach her contract with Petitioner prior to the day she did so (from which fact the Court must infer she made the decision to breach it at the very time she was in Respondent’s office.”

Spaulding did not raise this argument in the court of appeals, and it is not supported by Spaulding’s summary judgment response. Marcal testified that she did not recall when she decided to hire Firefly. CR 146. This has no bearing on the timing of her decision to fire Spaulding and does not support the inference urged by Spaulding.

Petition at 12: “(3) Ms. Marcal had no specific ground for dissatisfaction with Petitioner’s performance as a lawyer (from which fact the Court must infer that her reason for breaching the contract was something other than dissatisfaction with Petitioner’s performance).”

Apparently, Spaulding is relying on portions of Marcal’s deposition where she testified that his courtroom performance was at least as good as the other attorneys present, he was not a “bumbling fool,” he appeared “rather shrewd,” and he adequately handled a deposition. CR 138, 141, 144. To the extent that the record shows a date of these instances, they are all prior to a significant dispute that arose between Spaulding and Marcal and her husband during a mediation after which Marcal lost trust in Spaulding. CR 135, 139. The fact that Marcal became dissatisfied with Spaulding at a later point in the litigation does not show that Firefly tortiously interfered. Further, as the court of appeals correctly recognized, even had Marcal been completely unjustified in discharging Spaulding, this would not be any evidence that *Firefly* tortiously interfered.

Petition at 12: “(4) Ms. Marcal’s letter terminating the contract was prepared at the same time and place and on the same equipment as Mr. Firefly’s letter asserting his intention to take over the case (from which fact the Court must infer that Mr. Firefly had the opportunity to induce Ms. Marcal to breach the contract, and provided her physical assistance in doing it.”

Marcal testified that she wrote her letter, and it was typed, in Firefly’s office. CR 126, 137. Merely typing Marcal’s letter is not an act of tortious interference. An act of interference requires evidence that Firefly *induced* Marcal to breach the contract; evidence that he assisted her after she had already decided to do so would not be enough.

Petition at 12: “(5) Respondent’s contract with Ms. Marcal was essentially identical to and patterned upon Petitioner’s contract, except it undercut Petitioner’s fee (from which this Court must infer that Respondent had knowledge of Petitioner’s agreement, and the financial motive to induce Ms. Marcal to breach it).”

The fact that Firefly may have liked the language in Spaulding’s contract dealing with the rather unusual situation where recovery on a contingent fee is likely to be in property rather than money does *not* show an act of interference. Some of the work on the case was already done, so it was natural for Firefly to give Marcal a slightly better contract. These circumstances do not show an act of interference.

The court of appeals correctly held that the circumstantial evidence cited by Spaulding “does not ‘transcend mere suspicion’ about whether the Firefly parties committed a willful and intentional act of interference, and it stacks ‘inference upon inference.’” Slip Op. at 16.

CONCLUSION AND PRAYER

Respondents pray that the petition for review be denied.

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CERTIFICATE OF SERVICE

I certify that, on June 21, 2002, I served a copy of this response by First Class, United States mail on the following:

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APPENDIX A TO RESPONSE TO PETITION FOR REVIEW

MOTION FOR CONTINUANCE

[OMITTED FROM THIS SAMPLE RESPONSE]