Texas Supreme Court Practice

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CHAPTER 23

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Secretary, Appellate Section; treasurer (2000-2001); council member (1996-1999)
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Member, Civil Appellate Law Exam Commission, Texas Board of Legal Specialization
Chair, University of Texas School of Law, Annual Conference on Techniques for Handling Civil Appeals in State and Federal Court, 1996, 1997, and 2000
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SELECTED PUBLICATIONS

Help! The Other Side Has Filed a Petition for Review — What Do I Do Now? State Bar Of Texas, Texas Supreme Court Practice, June 2002.
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 (co-author).
The Civil Amicus Brief, 13 APPELLATE ADVOCATE 4 (Fall 2000).
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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.

Texas Supreme Court Practice

By Pamela Stanton Baron

INTRODUCTION AND OVERVIEW

In September 1997, the Texas Supreme Court amended the appellate rules and its internal operating procedures to materially alter the way it reviews cases. The Court now uses something similar to the certiorari process in the United States Supreme Court, where the petitioner files a very short initial filing that attempts to convince the Court that the case is important and thus the Court should exercise its discretionary jurisdiction. Most of these filings (about 75%) are denied without full briefing. In the remaining 25%, the Court requests full briefing on the merits. About a third of these (or 9% of all petitions filed) are granted and set for argument. *See* 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).

This paper answers frequently asked questions about the multiple step review process, from pre-filing to rehearing.

I. BEFORE YOU FILE A PETITION FOR REVIEW

A. *Should I bother: What are the odds of success?*

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.

Before filing, it is useful to take a hard look at the issues of the particular case to determine whether it makes sense to proceed. 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. To obtain a grant under the first category, the petitioner should 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 should be limited to 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.

B. *What if the court of appeals' opinion is unpublished?*

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.

It is important, then, to file promptly with the court of appeals a motion to publish. The motion should be thoughtful and persuasive rather than pro forma. The motion should explain why the court's opinion meets one or more of the criteria for publication set forth in TRAP 47.4. The explanation should be backed up with research, identifying for the court similar issues that have been published and why the court's opinion provides additional guidance to the trial bench and bar in future cases presenting similar issues. If the court denies the motion, it is possible to petition the Supreme Court for publication, but such motions are rarely granted.

C. *Is rehearing in the court of appeals required?*

Not usually. Under TRAP 49.9, a motion for rehearing in the court of appeals is no longer a prerequisite for Supreme Court review. The harder question is: is rehearing advisable? Since the rule change, one Supreme Court justice has consistently taken the position that a party who is serious about pursuing its case will seek rehearing in the court of appeals. *See, e.g.,* Justice Nathan L. Hecht and E. Lee Parsley, *Procedural Reform: Whence and Whither* (Sept. 1997). As a practical matter, however, since the Supreme Court no longer routinely has staff memoranda prepared on all cases, it is unlikely that the justices will even notice in the review process whether or not a party has sought rehearing unless the court of appeals has issued a new opinion on rehearing.

In the author's opinion, there are three reasons to seek rehearing in the court of appeals. First, if the party wants to complain to the Supreme Court of an error arising for the first time in the court of appeals' opinion and judgment, it may be prudent to ensure that error is preserved by filing a motion for rehearing. (Note, though, that TRAP 53(f) seems to suggest that error arising for the first time in the court of appeals need not be preserved.) In addition, a good argument can be made that rehearing may be necessary to preserve any new error that may be taken to the United States Supreme Court. Second, a party should pursue rehearing if there is a reasonable chance that the court of appeals will correct or limit its error. Because rehearing is not required, the rehearing motion may be directed to particular errors and need not address every point or issue that the party will bring forward in the petition for review. Third, a party may want to seek rehearing simply to gain additional time to prepare its petition for review.

D. *Is it a good idea to line up amicus support and, if so, when?*

One way of showing that a case is important to the jurisprudence of the state is to have other parties that are interested in or affected by the issue file amicus briefs with the Court. It is good idea to send the court of appeals' opinion to potential amici immediately after the opinion issues. For maximum benefit, an amicus brief urging the Court to grant a petition for review should be filed before a response or waiver letter is filed to ensure that the amicus is before the justices when they rule on the petition — although the justices have about a month to act on the petition once it is forwarded, some may complete their review during the first week and may not revisit their decision if an amicus brief comes in later.

The best use of an amicus brief is to provide context for the issues presented; it should avoid repeating arguments made by the parties. By explaining the larger picture, the amicus can demonstrate to the Court that the decision has broad effect and is thus important to the jurisprudence of the state. An amicus brief must disclose the source of any payment made for preparing the brief. TRAP 11. For a more extensive discussion of amicus briefs, *see* Pamela Stanton Baron, *The Civil Amicus Brief*, 13 APPELLATE ADVOCATE 4 (Fall 2000). If briefs on the merits are later requested, the amicus need not file a new brief and should not unless there is something new and important to address.

II. PETITION FOR REVIEW FILING MECHANICS

A. *When is the petition due?*

The petition is due no later than 45 days after (1) the date of the court of appeals' judgment, if

no motion for rehearing is filed; or (2) the date of the court of appeals' last ruling on all timely filed motions for rehearing. TRAP 53.7(a).

B. ***What about cross-petitions?***

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).

It is important to note that 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.

C. ***How do I get an extension of time to file the petition?***

File a motion with the Supreme Court no later than fifteen days after the due date. TRAP 53.7(f). The motion must state: the due date; the length of the extension sought; the facts reasonably explaining the need for an extension; the number of previously granted extensions; the court of appeals; the dates of the court of appeals' judgment; and the case number and style of the case in the court of appeals. TRAP 10.5(b). The motion must include a certificate of conference. TRAP 10.1(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. (So Respondents should not waste energy and goodwill by opposing them.) 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.

There is no requirement that the party notify the court of appeals of the extension request. It is nonetheless a good idea to ensure that the mandate does not issue prematurely. *See* Question II I, below.

D. ***What if the court of appeals issues a new opinion on rehearing after one of the parties has filed a petition for review; what if a party files its petition before the court of appeals has ruled on all of the motions for rehearing; what if the court of appeals refuses to rule on a pending motion for rehearing because a party has filed a petition for review; what if . . . ?***

Look at TRAP 53.7(b). The Court has written a long and fairly complicated rule to resolve all potential problems in transferring jurisdiction over the case from the court of appeals to the Supreme Court. For any readers who still remember the debacle in *Rose v. Doctors Hospital*, those problems should never recur. If another party files a petition while your rehearing is still pending, it is a good idea to file a letter with the Court stating that a rehearing motion is still pending in the case. The Court will delay acting on the petition until the motion for rehearing has been overruled. You should also file a letter indicating that the motion for rehearing has been ruled upon and attach a copy of the court of appeals' order.

E. ***Where is the petition filed and how many copies are required?***

An original and eleven copies of the petition (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.

If you file the petition with the court of appeals by mistake, the rule treats the petition as having been filed in the Supreme Court on that same day; the clerk of the court of appeals is instructed to forward the petition to the Supreme Court immediately. TRAP 53.7(g).

F. ***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.

G. *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.

H. *Is there a filing fee?*

Yes. There is a filing fee of $75.00.

I. *Should I let the court of appeals know I've filed a petition for review or extension motion?*

The rules do not require that a party notify the court of appeals that a petition has been filed or an extension requested. It is helpful to notify the court anyway. In several cases, courts of appeals have issued the mandate even though the case was pending at the Supreme Court. Once the mandate issues, the winning party may seek to enforce the judgment. A simple letter to the court of appeals' clerk could avoid having to ask the court later to recall the mandate or to stop enforcement proceedings pending recall of the mandate.

J. *Post-filing: How do I get information on my case via the internet?*

One the case has been assigned a docket number by the clerk, you can track filings and actions in the case on the Court's website:

www.supreme.courts.state.tx.us

You can also register to receive e-mail alerts of any change in the Court's docket sheet. This is a very useful service.

III. PETITION FOR REVIEW FORMATTING MECHANICS

A. *What are the basic formatting rules?*

The petition 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 petition is strictly limited. The petition 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.

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 petitions 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 petitions 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. While the party

has an opportunity to redraw the petition, a second failure may result in the petition being struck. TRAP 9.4(i).

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.

IV. PETITION FOR REVIEW CONTENTS

A. *Can't I just file my brief from the court of appeals instead of a petition for review?*

No. And don't try to get around this by attaching copies of the court of appeals' briefs in the appendix to the petition. *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 are the required contents of the petition for review?*

The petition must contain the following items in the following order:

- 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 53.2.

C. *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 (leave blank if no number is assigned yet); (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.

D. *Is there anything tricky about identifying parties and counsel?*

Sort of. The list must include <u>all</u> parties to the trial court's judgment, whether they are participating in the appeal or not. The list must also include the names and addresses of all trial counsel and all appellate counsel. TRAP 53.2(a).

The disclosure of all parties is necessary to permit the justices to determine whether they are disqualified or should be recused from hearing the case. The disclosure also ensures that all interested parties receive notices from the clerk.

If there are many parties to the trial court's judgment, such as in a class action, it is helpful to provide the clerk with a diskette containing the information. Call the clerk's office (512/463-1312) to discuss formatting requirements.

E. *What needs to be in the table of contents?*

The petition must have a table of contents, which must "indicate the subject matter of each issue or point, or group of issues or points." TRAP 52.3(b). There are several ways to accomplish this result. One is simply to recopy under "Issues Presented" in the table of contents all of the issues listed in the petition. 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.

F. *Is there anything unusual about the index of authorities?*

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

G. *Some people are drafting the statement of the case in a table format; is this a good idea and what does it look like?*

Yes, the table format is a good idea. 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).

H. *Should the statement of jurisdiction ever be more than 10 words long?*

The answer to this question is changing. The rule certainly discourages anything more than a bare bones recitation of the statutory basis for jurisdiction: the petition should state briefly and "without argument" the basis for jurisdiction, such as dissent or conflict. TRAP 53.2(e). And, this paper has previously advised such an approach, limiting the statement in most cases to "This Court has jurisdiction under section 22.001(a)(6) of the Texas Government Code."

But a different approach seems to be called for because (1) the petition for review process has affected the types of cases the Court is granting, with the focus shifting to important issues or the resolution of conflicts among the courts of appeals; and (2) the justices have candidly admitted at CLE conferences that they spend very limited time reviewing each petition. Consequently, it is important to list every legitimate possible basis for jurisdiction under Tex. Gov't Code § 22.001(a)(1) (dissent), (2) (conflict), (3) (construction or validity of statute), or (6) (importance to the jurisprudence of the state). Each basis should be followed by a short explanation of no more than a sentence or two, stating the reasons the case is important to the jurisprudence, or what the conflict is and why it matters. Not every case is going to be a case of first impression construing a statute having state-wide impact on which courts of appeals have issued conflicting interpretations, but cases having one or more of those elements are more likely to get to briefs on the merits than those that do not. If jurisdiction is questionable, such as in an interlocutory appeal, it is very important to clearly identify and explain the basis for jurisdiction.

CAUTION: In the jurisdictional statement, keep the explanation of why the petition should

be granted short. The Court has struck a petition for review as violating TRAP 53.2(e) when the statement of jurisdiction was five pages long. *Daimler-Benz Aktiengeselschaft v. Olson*, 44 Tex. Sup. Ct. J. 15 (Oct. 12, 2000) (Hecht, J., dissenting to order striking petition for review; comparing petition in another case that was not struck despite three page jurisdictional statement).

I. *What is the difference between issues and points of error?*

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).

In the Supreme Court, the issues presented is one of the most important part of the petition. It is worth, then, spending time in framing the issues to ensure they are not too global ("Did the trial court abuse its discretion? Was the j.n.o.v. improper?"). At the other end of the spectrum, the judges do not like long issues that state all of the facts of the case, then ask some question based on those facts.

The issue should be framed the way the Court would write the issue in the first paragraph of an opinion deciding the case. It is helpful to look at holding sentences from Court opinions. The following are examples:

- The question presented is whether a company that markets and sells its products through independent contractor distributors and exercises control by requiring in-home demonstration and sales, owes a duty to act reasonably in the exercise of that control. *Read v. The Scott Fetzer Co.*, 990 S.W.2d 732, 733 (Tex. 1998).

- The issue in this case is whether an independent contractor's willingness to follow a premises owner's instructions, though no such instructions were given, is legally sufficient evidence of the premises owner's "right to control" in a premises liability case. *Coastal Marine Service of Texas, Inc. v. Lawrence*, 988 S.W.2d 223, 224 (Tex. 1999) (per curiam).

- We consider three issues in this petition for review: (1) when is a party, who seeks judicial review of a Texas Workers' Compensation Commission Appeals panel decision, required to file a copy of its petition with the Commission under the Texas Labor Code section 410.253; (2) whether "the mailbox rule" applies to section 410.253 filings in judicial review actions under Texas Labor Code chapter 410, subchapter G; and (3) whether an untimely section 410.253 filing with the Commission deprives the trial court of jurisdiction over the judicial review action. *Albertson's, Inc. v. Sinclair*, 984 S.W.2d 958, 959 (Tex. 1999) (per curiam).

J. *What are unbriefed issues?*

While the issues presented should list every issue that the petitioner desires to bring forward, if there are more than one or two issues, as a practical matter they cannot all be briefed in the argument section of the petition. 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.

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."

K. *Can I waive error by failing to raise all issues in the petition for review?*

Yes. The issues stated must encompass all complaints about issues decided by the court of

appeals. If the court of appeals did not reach an issue or point of error, however, that issue may, but need not, be raised in the petition. The issue may be raised later in the reply, any brief, or even in a motion for rehearing. TRAP 53.4; *see also Associated Indemnity Co. v. CAT Contracting, Inc.*, 904 S.W.2d 276, 288 (Tex. 1998) (no waiver by failing to assign as error points court of appeal did not reach).

L. *Is there anything special about the statement of facts in the petition for review?*

No. 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 petition. 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).

M. *Is a summary of argument required? Why, when the petition is so short?*

The petition must include a summary of the argument. TRAP 53.2(h). The summary must be "succinct, clear, and accurate" and may not merely repeat the list of issues presented. *Id.*

With the argument unlikely to be more than about ten pages of fairly large type, in the author's opinion, the summary should be optional, but it is not. It is the justices' opinions that count, though, and many of them like the summary and read it carefully. Like the argument section, the summary should stress the reasons the Court should hear the case.

N. *What is the Court looking for in the argument section of the petition?*

The Court is looking for a reason to grant. The rule makes clear that the focus should be the reasons the Court should 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 concept that the case is important to the jurisprudence of the state should pervade the entire petition.

Not all cases that the Court decides to hear are important to the jurisprudence of the state. Many of the justices also believe that an important function of the Court is to correct clear error. It is possible to pitch the argument in terms of clear and easily correctable error that has resulted in unfairness (quite often, a failure of a lower court to hear the merits of the case), rather than importance, in an effort to convince the Court to correct the error in a short per curiam opinion without hearing oral argument. Generally, a petition seeking error correction should be very short with only one or two issues. It should make clear that there are no complicating factors, like waiver, that would impede a simple fix.

O. *The prayer isn't very important, right?*

It is in some cases. The prayer should contain the judgment the petitioner would like the Court to issue. In most cases, the relief requested is quite clear and the prayer doesn't really add any insight. In complicated cases where several arguments are made in the alternative, though, the prayer can be very important in explaining to the Court exactly what type of judgment would issue under each particular scenario. A well-written prayer can provide vital guidance to the Court in drafting the judgment.

P. *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).

V. APPENDIX TO PETITION FOR REVIEW

A. *What is the appendix and why is it necessary?*

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. 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. The appendix includes both required and optional items, discussed below.

B. *What must be included in the appendix?*

The following items must be included in the appendix unless "voluminous or impractical":

- The judgment or other appealable order of the trial court from which relief in the court of appeals was sought;
- The jury charge and verdict, if any, or the trial court's findings of fact and conclusions of law;
- The opinion and judgment of the court of appeals; and
- The text of any rule, regulation, ordinance, statute, constitutional provision, or other law (except case law) on which the argument is based, and the text of any contract or other document that is central to the argument.

TRAP 53.2(k).

C. *Can't I put anything else I want in there too?*

Within limits. The rules permit inclusion in the appendix of any other items 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 the page limitations of the petition. *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 petitions 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.

D. *Do I separately bind the appendix?*

The appendix may either be bound with the petition 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 petition 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 9.3(k). If it is separately bound, it must comply with the binding and cover requirements discussed above, *see* TRAP 9.3(f).

VI. RESPONSE TO PETITION FOR REVIEW

A. *What do I need to do immediately if I am the respondent?*

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 v-mail 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. *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.

C. ***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 B. 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.

D. ***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.

E. ***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).

F. ***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.

G. ***What are the mechanics of filing a voluntary response?***

The response is limited to 15 pages, excluding the identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, signature, proof of service, and the appendix. TRAP 53.6. The same formatting, margins, binding, cover, etc. requirements apply that apply to the petition for review. *See* TRAP 9.4. An original and eleven copies are required. TRAP 9.3(b).

H. ***Do the mechanics differ for a requested response?***

No, with two exceptions, one of which is very important. <u>Read the letter requesting the response carefully</u>. Usually, the Court requires that the response be received in the clerk's office by a certain date and time. This means <u>the mailbox rule does not apply</u> and the clerk must have the filing in hand by the date and time specified in the letter.

I. ***What are the required contents of a response?***

The response must contain the following items in the following order; the starred items are optional and are discussed at the end of the list:

- 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.

There is no need to include a section on identity of parties and counsel unless the petition has made mistakes or omissions in the list. TRAP 53.3(a). The respondent need not include a statement of the case or a statement of facts unless the respondent is dissatisfied with the discussion in the petition. TRAP 53.3(b).

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."

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.* 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 response.

The argument section must be included, as well as summary of the argument. It is important to remember that the argument must address only the issues raised in the issues statement of the petition and response. TRAP 53.3(e).

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.

J. *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, 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.

VII. PETITIONER'S REPLY

A. *Should I file a reply?*

Only if there is something new to say. A reply should never be filed to repeat arguments or to get the last word in.

B. *If I file a reply, when is it due?*

The reply must be filed within 15 days after the response is filed. TRAP 53.7(e). However, the Court may decide the case without waiting for a reply to be filed. TRAP 53.5.

C. *What are the mechanics of the reply?*

The reply may not exceed eight pages, exclusive of the table of contents, the index of authorities, the signature, and proof of service. TRAP 53.6. Other sections do not count in the page limit (such as statement of the case) but these other items really have no place in a reply. The reply must follow all of the same formatting rules as the petition.

D. *Does the rule set out any substantive requirements for the reply?*

The rule provides that the reply may address "any matter in the response." TRAP 53.5.

VIII. 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 option 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
Issue 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. You can listen to a recording of the orders by calling 512/463-1312 and choosing option 2. The time the recorded information is available varies from week to week. Most of the time the information is available shortly after 9:00 a.m.; the introductory message can be misleading, listen to the whole tape before concluding that the orders are not yet available. Orders are also available on the Court's bulletin board at 512/463-6649 and at the Court's website: http://www.supreme.courts.state.tx.us. The time of availability varies. The bulletin board is faster in posting orders and opinions but it can be hard to get through. The web site tends to post the orders later in the day.

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.

IX. BRIEFS ON THE MERITS

A. *What does it mean when the Court ask for briefs on the merits?*

If the request is made at the same time the Court schedules the case for oral argument, it means that at least four justices have decided the petition should be granted. If the request for briefs is not accompanied by a setting of the case for argument (or an indication that the case will be set later), it means at least three justices (two, if requested before October 1999) are interested in learning more about the case. It could also mean that the Court is considering granting the case or issuing a per curiam opinion. The odds of either of these events happening goes up significantly when the Court asks for full briefing on the merits. *See* Parsley and Parsley.

When the Court asks for full briefing on the merits, it will also ask a court briefing attorney to prepare a study memo. If briefs are requested but the case is not granted and set for argument, the memo is assigned to one of the nine justice's office on a rotation so that each chambers receives every ninth memo assignment. If briefs are requested at the same time the case is granted and set for argument, the study memo is assigned to the chambers of the justice who drew the opinion in the case. The memo is prepared within thirty days after the response brief on the merits is filed. The briefing attorney does not wait for the petitioner's reply brief on the merits. The memo deadlines may not be extended unless the Chief Justice approves. As a practical matter what this means is that the case should be discussed at the next petitions conference about thirty days after the response deadline. At that conference, the justices will decide whether to grant, deny, or draft a per curiam opinion.

At the same time briefs on the merits are requested, the Court also asks for the record to be forwarded from the court of appeals if the record has not already been requested.

B. *Should I file a brief on the merits; can I waive the filing of the brief?*

You should file a brief on the merits if you have something to add to the petition for review. If there are unbriefed issues in the petition for review, those must be addressed in the brief on the merits or they are waived. *See Sipriano v. Ozarka Natural Springs Water Co.*, 1 S.W.3d 75, 76 n.2 (Tex. 1999). If the petition does not address out-of-state cases, treatises, law reviews, and larger policy questions relevant to the issues, these should be discussed in the brief on the merits.

If the brief on the merits would simply repeat without elaboration the contents of the petition for review, choose to stand on the petition for review and waive the filing of a brief on the merits. The Court's letter asking for briefs on the merits advises attorneys of this option: "Please note that any party may elect to rely upon the briefs already on file with the Court by notifying this office in writing no later than the due date of the brief. . . . The filing of a notification letter shall invoke the same timetable as the filing of a brief."

C. *Can I file the brief from the court of appeals instead?*

Yes. Any party may rely on the brief filed in the court of appeals instead of filing a brief in the merits. TRAP 55.5. Although the rule does not require it, the Court would like a party relying on a prior brief to file 12 copies with the clerk. A failure to file the copies will result in the case being delayed until the copies are provided.

The author does not recommend reliance on a prior brief, especially for the petitioner. The petitioner already has filed a petition for review, which frames the issues for the Supreme Court. The court of appeals' brief does not address the problems in the court of appeals' opinion nor discuss the importance of those issues to the jurisprudence of the state.

D. *What is the difference between briefs filed on the merits and the petition and response?*

The format and designated sections of briefs on the merits and the petition and response are identical. *Compare* TRAP 53.2 and 55.3 *with* TRAP 55.2 and 55.3. The big difference is that briefs on the merits have a page limit of 50 pages (excluding the identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of jurisdiction, issues presented, signature, proof of service, and appendix). TRAP 55.6.

A party filing a brief on the merits should assume that the justices will not refer back to the petition for review. The brief should thus be a free-standing document that repeats all of the contents of the petition and expands and amplifies the argument. It may even be a good idea to provide a complete appendix even though the same materials are attached to the petition for review.

The issues presented in the briefs on the merits need not be identical to those in the petition. TRAP 55.2(f). However, the parties may not raise additional issues or change the substance of the issue raised in the petition. *Id.* A petitioner filing a brief on the merits who fails to present arguments on all issues raised in the petition waives the now-unbriefed issues. *Sipriano v. Ozarka Natural Springs Water Co.*, 1 S.W.3d 75, 76 n.2 (Tex. 1999). As discussed above, the briefs on the merits should discuss unbriefed issues and develop out-of-state case, treatises, and law reviews relevant to the issues. It is also important to explore fully the policy ramifications of the decision.

E. *Does petitioner have the right to reply?*

Yes. The letter asking for briefs will set out the time for filing a reply. The reply is limited to 25 pages. TRAP 55.6.

F. *What is the time for filing the various briefs?*

The time is set out in the letter from the Court asking for briefs on the merits. In the unlikely event the clerk fails to set out a briefing schedule in the letter, TRAP 55.7 sets a default schedule. Parties may ask for the time to be extended. TRAP 55.7. Note, though, that in a handful of cases the Court sets the case for oral argument at the same time it requests briefs on the merits. The Court is less likely to grant an extension when it has set a case for argument. The Court has granted a least one extension request when a case had been set for argument. There, though, the extension was agreed to by all parties, the adjustments were very slight, and the Court still received all of the briefs well before the time for argument. Remember that an extension request must comply with TRAP 10.5(b) and must (like every other motion except a motion for rehearing) contain a certificate of conference.

G. *What are the mechanics for filing the briefs?*

The same as the petition. The briefs must be filed with the clerk on the specified date. Unless the letter asking for briefs states otherwise, the mailbox rule applies and the briefs may be mailed to the clerk on or before the last day for filing. TRAP 9.2(b) (setting forth requirements for compliance with mailbox rule).

The same formatting, margin, binding, cover, etc. requirements apply as applied to the petition and response. An original and eleven copies are required. TRAP 9.3(b).

H. ***Is there a filing fee?***

No, there is no filing fee for any of the briefs on the merits. If the Court grants the case and sets it for argument, the petitioner is assessed an additional fee of $75.00.

I. ***What happens next?***

If the case has been set for argument, the Court will hear argument on the scheduled date. If the case has not been set for argument, the Court will discuss the case at conference once briefs on the merits have been filed and a study memo prepared. The Court will decide whether to grant, deny, dismiss w.o.j., or issue a per curiam opinion. The decision will be announced on the Court's regular Thursday orders and confirmed in a letter to counsel from the clerk. Granted cases will usually be set for argument at the same time the Court announces its decision to grant. It is not unusual for the argument date to be as little as three weeks after the Court announces the grant.

X. DECISION WITHOUT ARGUMENT

A. ***When can the Court issue an opinion without hearing argument?***

Any time six justices agree not to hear argument. TRAP 59.1.

B. ***As a practical matter, when is the Court likely to dispense with oral argument?***

The Court is evaluating more closely whether argument will really help resolution of each case. If the argument will not be of significant assistance to the Court because the issues are very narrow or very clear-cut, the Court is more likely to proceed without argument. The Court is less likely to dispense with oral argument in a case presenting an important issue that may generate participation by amici curiae.

C. ***Aren't these per curiam opinions written by staff attorneys and not justices?***

No. Per curiam opinions are drafted just like opinions in which argument is heard. The staff will assist in drafting the opinion, but the justice who is urging the adoption of a per curiam opinion in the case takes responsibility for the opinion.

D. ***What's the difference between a per curiam opinion and an opinion signed but issued without argument?***

Whether the names of the justices are shown. The Court may dispense with oral argument on the vote of six justices, whether or not those six agree on the disposition of the case. TRAP 59.1. Ordinarily, the result is a "per curiam" unsigned opinion. Occasionally, though, one or more justices decide to write a separate concurring or dissenting opinion in a case in which oral argument has not been heard. It is the Court's general policy in these circumstances to issue the opinions without argument but to show by name the justices joining the various opinions.

XI. ORAL ARGUMENT

A. ***When does the Court hear argument?***

The Court hears argument three weeks each month, on Wednesday at 9:00 a.m. Arguments usually begin in September and continue through April. The Court does not hear argument late in the term when it is focusing on issuing opinions. The Court usually sets a case for argument at the same time that it announces its decision to grant the petition; the parties can get as little as three weeks' notice of the setting.

The arguments are usually completed before the Court breaks for lunch. Occasionally, the Court will continue the arguments in the afternoon or set cases to begin at 2:00 p.m.

Argument is usually held in Austin in the Supreme Court's courtroom. Under a new constitutional provision, though, the Court may hear argument outside of Austin. The Court has heard arguments in cities all over the state, including Waco, Dallas, Fort Worth, Lubbock, and San Antonio. Tex. Const. art. V, § 3a.

B. ***How do I know what the Court is interested in hearing?***

The Court previously granted applications for writ of error on specific points. Although the Court retained jurisdiction over the entire case, the points granted were an indication of the

Court's principal areas of interest. Under the petition for review process, the Court no longer grants on points or issues so it is harder to judge what issues are the primary focus. Usually, though, the parties know which one or two issues in the petition are the critical issues and those should be the focus of the argument. You should be prepared to answer questions on any issue.

You should also think about how a decision in your case affects other cases and other situations and be prepared to answer questions about them. Do not answer "that's not this case." You need to be able to explain why the decision you seek will not have adverse effects on other situations.

C. *How do the justices prepare for argument?*

The case will be assigned to one of the justices before the argument. The cases are assigned by random draw, with each justice generally receiving one-ninth of the cases. (A justice who is late in circulating an opinion does not participate in the draw until a draft opinion is circulated.) If a staff study memo has not already been prepared on the case, the assigned justice's chambers must prepare a memo within 30 days after the response brief is filed or by the Friday before the argument, whichever is earlier.

The justices read the briefs very carefully and tend to ask numerous questions. An attorney preparing for argument should focus on possible questions and prepare thoughtful answers. The most important function of the argument is to answer questions and concerns that the justices have.

The Court meets after the arguments and takes a tentative vote on how the case should be resolved. The assigned justice has four months to circulate a draft opinion to the Court.

D. *How much time does each side get?*

The rule provides that the time is whatever the Court orders. TRAP 59.4. In virtually every case, though, even complex ones, each side gets only twenty minutes. The petitioner may reserve part of its time for rebuttal. It is possible to file a motion with the Court to enlarge the time for argument; these motions are almost never granted.

E. *How do I know which parties are aligned as petitioner and respondent; what about amici?*

It's obvious when there are only two parties and one petition for review. The problem arises when there are multiple petitions and the Court has granted all of them. Parties that the Court decides to align must share the twenty minutes for argument. Usually the Court picks only one petitioner (ordinarily the party who filed first) and labels everyone else a respondent, even though the respondents may disagree on a number of issues. It is possible to file a motion to align the parties before the argument. TRAP 59.4. In the absence of a motion, though, the Court will make the alignment, which will be reflected in the submission schedule released (usually) the Friday before the argument.

Amici are not parties and have no right to argue unless they can persuade a party to surrender part of its twenty minutes. TRAP 59.6. The amicus must also obtain leave of Court to argue. *Id.*

F. *Can I split my time?*

You can, but it's a bad idea. The rule encourages argument by only one counsel. TRAP 59.5. And, inevitably, a justice will direct a question to whichever attorney is not responsible for that particular issue during the split argument time. Splitting of argument usually cannot be avoided when there are multiple parties on a side. If the first attorney exceeds the time allocated, though, that time is usually subtracted from the second counsel's time for argument. (So make sure you go first.) Only two counsel may appear on a side, and counsel may not split the time for rebuttal. *Id.*

G. *What are the mechanics for checking in with the clerk, using visual aids, knowing where to sit, etc.?*

The courtroom opens at 8:30 a.m. the day of the argument. Counsel must be screened through a metal detector and then check in with the marshal of the court. Petitioner must tell the marshal the amount of time reserved for rebuttal. The petitioner sits on the left side of the courtroom and the respondent sits on the right. No more than two counsel may sit at counsel table during the argument unless a motion has been

previously submitted to and granted by the Court. TRAP 59.5.

Visual aids must be checked in at the clerk's office. It is helpful to provide a bench copy because, given the length of the bench, the justices will not all be able to read a display board. There is a filing fee of $25.00, which covers all exhibits and bench copies.

Chief Justice Phillips will call each case. There is a ten to fifteen minute break between cases. The marshal of the Court introduces counsel for the petitioner and the respondent; the petitioner is not reintroduced for rebuttal. You need not repeat your name. The Court discourages introducing co-counsel or the client. Just say, "May it please the Court," and start into the argument. There will be a green warning light when five minutes are remaining and then a red light when your time has expired. When the red stop light comes on, you may finish your sentence or complete an answer to a question. You may not continue after that, though, even to add a conclusion or a prayer, unless another question is asked.

H. *Is the argument recorded?*

Yes. Copies may be obtained from the clerk's office for $5.00 per tape. Copies may be picked up at the clerk's office; copies will be mailed only when the clerk is provided with a self-addressed stamped envelope large enough for the tapes.

I. *Can I file a brief after the argument?*

There is no provision in the rule for post-submission briefing. However, the Court regularly accepts such filings without a motion. As with any brief, though, a post-submission brief should not be filed simply to get the last word in and to repeat earlier arguments. Only file a brief if there is a substantial, previously unaddressed question raised during oral argument or if a post-submission brief filed by another party or an amicus necessitates a reply.

XII. REHEARING OF DENIAL OF PETITION OR ISSUANCE OF OPINION

A. *When is the rehearing motion due?*

Rehearing must be filed no later than 15 days from the date the Court renders judgment or issues an order on a petition for review. TRAP 64.1.

B. *Can I ask for an extension?*

Yes. The motion must be filed within fifteen days of the rehearing deadline. TRAP 64.5. As a practical matter, it is better practice to file the extension motion as soon as possible after the Court's decision issues. The motion must comply with the rule governing extension motions, TRAP 10.5(b), and must contain a certificate of conference.

C. *Should I bother to file a rehearing when the Court denies my petition? If it issues an opinion?*

The Court grants very few rehearing motions. In the term ended August 31, 2000, the Court granted 2 out of 44, or 4.5%, of rehearing motions filed in causes and 2 out of 262, or 0.7%, of rehearing motions filed in cases in which review was sought by petition for review or application for writ of error. In the preceding term ended August 31, 1999, 6 out of 59, or 10.1%, of rehearing motions filed in causes and 7 out of 234, or 2.9%, of rehearing motions filed in cases in which review was sought by petition for review or application for writ of error.

The chances for a grant of a rehearing on petition for review are slim and are even slimmer if the rehearing motion simply repeats earlier arguments. These motions are virtually automatically denied. Rehearing has a better chance if the Court has taken longer than usual to act on the petition and has asked for a response or full briefing in the case. This means that at least some of the justices thought there might some merit in granting the case. To be successful, the rehearing motion must creatively raise new arguments and reasons the case is important to the state's jurisprudence. It may be helpful to garner amicus support for rehearing. Amicus briefs should be filed quickly, though, because the Court generally acts on rehearing motions promptly.

Rehearing when the Court issues an opinion is a different task. While the Court is unlikely to change the judgment, it may alter its writing which could affect disposition of the case on remand or impact other cases. The motion should point out specific mistakes or problem language in the Court's opinion. The rehearing motion

should also address larger policy issues and problems that the Court's opinion creates. And, of course, amicus support is always helpful.

D. *What is the form and content of a rehearing motion?*

The rule provides little guidance, other than to require that the motion specify the points relied upon for rehearing. TRAP 64.2. The motion is limited to fifteen pages. TRAP 64.6. Oddly, there is no exclusion from the page limit of any section of the motion, such as the issues presented or the index of authorities. While these should not count in the fifteen page limit, this remains an open question under the new rules. All of the formatting, binding, and cover rules apply to motions for rehearing. While the rules technically require a certificate of conference on motions for rehearing, the Court does not enforce this requirement.

E. *Should I respond to a rehearing motion?*

It is not necessary to respond. The rule provides that the Court (except in "exceptional" cases) will not grant rehearing without asking for a response. TRAP 64.3. However, the Court has, in at least two cases, granted a petition for review on rehearing without first requesting or receiving a response; it should be noted that in both cases the grant occurred just before the six-month time for the Court to act on rehearing motions was about to expire. No. 98-0132, *Intratex Gas Co. v. Beeson*, 42 Tex. Sup. Ct. J. 624 (May 6, 1999); No. 98-0034, *Keck, Mahin & Cate v. National Union Fire Ins. Co.*, 42 Tex. Sup. Ct. J. 1042 (July 8, 1999).

Most rehearing motions are denied so, as a general rule, it is preferable not to respond unless the rehearing motion has raised new arguments that have not been previously addressed. If the response will simply repeat earlier arguments, do not file it unless the Court requests a response.

F. *How are rehearing motions processed?*

Motions for rehearing of petitions are immediately distributed to all nine justices without waiting for a response. The rehearing is put on the "conveyor belt" to be overruled on the next orders list after about 30 days have passed unless a justice takes some action to request a response, discuss, or study the case.

Motions for rehearing of causes are also immediately distributed to the full Court. The justice who authored the majority opinion, however, is responsible for making a recommendation on the motion and for putting the motion on the agenda for disposition.

G. *What's this constitutional amendment requiring action on the motion within 6 months?*

Tex. Const. art. V, § 31 now provides that "if the supreme court does not act on a motion for rehearing before the 180th day after the date on which the motion is filed, the motion is denied." In at least one instance since the adoption of the amendment, the Court failed to rule on a rehearing motion and the motion was overruled by operation of law. *See In re General Elec. Capital Corp.*, 41 Tex. Sup. Ct. J. 503 (Mar. 13, 1998). Since then, the Court has creatively wired around the constitutional deadline by simply granting the motion for rehearing before the six month deadline with "opinion to follow." *See, e.g., Holland v. Wal-Mart Stores, Inc.*, 42 Tex. Sup. Ct. J. 160 (Dec. 3, 1998) (per curiam) (motion for rehearing granted; opinion to follow), *opinion issued*, 42 Tex. Sup. Ct. J. 875 (July 1, 1999); *Quick v. City of Austin*, 42 Tex. Sup. Ct. J. 154 (Nov. 19, 1998) (motion for rehearing granted; opinion to follow), *opinion issued*, 42 Tex. Sup. Ct. J. 1217 (Sept. 30, 1999); *In re American Home Products*, 42 Tex. Sup. Ct. J. 154 (Nov. 19, 1998) (motion for rehearing granted; opinion to follow), *opinion issued*, 42 Tex. Sup. Ct. J. 252 (Dec. 31, 1998). In another case, the Court granted a petition for writ on rehearing just before the six-month deadline was about to expire. No. 98-0132, *Intratex Gas Co. v. Beeson*, 42 Tex. Sup. Ct. J. 624 (May 6, 1999). The Court granted without asking for or receiving a response to the rehearing motion as required by TRAP 64.3. The same thing happened in No. 98-0034, *Keck, Mahin & Cate v. National Union Fire Ins. Co.*, with one additional problem. The Court set the case for argument without even requesting briefs on the merits from the parties. *Compare* 42 Tex. Sup. Ct. J. 1042 (July 8, 1999) (granting petition and setting case for argument) *with* 43 Tex. Sup. Ct. J. 2 (Oct. 7, 1999) (canceling argument and requesting briefs on the merits).

H. *Can I file a second rehearing motion?*

No. The Court will not consider a second motion for rehearing. TRAP 64.4. The clerk will return the motion unfiled.

XIII. 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. The Court maintains a bulletin board dial-up system for downloading the orders and opinions of the Court at 512/463-6649. In addition, 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 Petition for Review

NO. 00-0944

IN THE
SUPREME COURT OF TEXAS

CITY OF AUSTIN,
Petitioner,

V.

TRAVIS COUNTY LANDFILL COMPANY, L.L.C.,
Respondent.

PETITION FOR REVIEW OF THE CITY OF AUSTIN

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November 15, 2000 Attorneys for Petitioner

IDENTITY OF PARTIES AND COUNSEL

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Respondents/Appellees/Cross-Appellants/Plaintiffs:	**Travis County Landfill Company, L.L.C.**
Trial and appellate counsel for Respondents:	John McClish WOMACK & MCCLISH, P.C. 1801 Lavaca, Suite 120 Austin, Texas 78701-1398 512/474-9875 512/474-9894 (telecopier)

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STATEMENT OF THE CASE

Nature of the Underlying Case:	Inverse condemnation suit by Travis County Landfill Company, L.L.C. ("TCLC"), under TEX. CONST. art. I, § 17 and *United States v. Causby*, 328 U.S. 256 (1946), for taking of landfill property by low and frequent overflights that allegedly interfered with TCLC's ability to build into the airspace above the property. The City asserted that there was no interference from the overflights because the property was already subject to other height restrictions, including a clearance and obstruction easement held by the City of Austin prohibiting the building of structures above a certain height.
Trial Court:	The Honorable Suzanne Covington, 201st Judicial District Court of Travis County, Texas.
Disposition:	Rendered judgment for TCLC in the amount of $2,950,000.00, plus prejudgment and post-judgment interest.
Court of Appeals:	Third Court of Appeals in Austin, Texas. Opinion by Aboussie, C.J., joined by Kidd, J. Dissenting opinion by Patterson, J. Decision ordered published, 25 S.W.3d 191.
Court of Appeals' Disposition:	Affirmed.
Motion for Rehearing:	The Court of Appeals rendered its decision on August 26, 1999. The City's timely-filed motion for rehearing was overruled more than a year later, on August 31, 2000, without opinion.

STATEMENT OF JURISDICTION

This Court has jurisdiction under TEX. GOV'T CODE § 22.001(a)(1) because the court of appeals' justices disagreed on a question of law material to the decision. Justice Patterson dissented, stating that, contrary to the majority opinion, "it must be shown that TCLC's use and enjoyment of the land was substantially impaired apart from the limitations imposed on it by the clearance easement." 25 S.W.3d at 213.

This Court also has jurisdiction under TEX. GOV'T CODE § 22.001(a)(6) because:

(1) the issue presented is of constitutional dimension — whether a taking occurs under TEX. CONST. art I, § 17 when the property is already burdened by other restrictions;

(2) as the court of appeals recognized, this case requires the application of *United States v. Causby*, 328 U.S. 256 (1946), to a set of facts not previously presented, 25 S.W.3d at 201 (noting "the difference between this case and earlier overflight cases"); and

(3) the court of appeals' opinion jeopardizes the effectiveness of similar clearance easements held by other cities on land near Texas airports.

ISSUES PRESENTED

The United States Supreme Court held in *United States v. Causby*, 328 U.S. 256, 266 (1946), that the "air is a public highway" and a taking by overflight occurs if and only if flights over the property "are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." Under *Causby*:

> Does a taking by overflight occur when other restrictions on the property, including a valid obstruction and clearance easement, prevent the exercise of the very right that TCLC asserts was taken — the right to vertically expand its landfill?
>
> In determining whether there has been a taking by overflight, must TCLC show that the overflights themselves caused a direct and immediate interference with the enjoyment and use of its property or is it sufficient to show that general airport operations, including any pre-existing easements relating to airport operations, interfered with the enjoyment and use of its property?

UNBRIEFED ISSUES

There is no taking by overflight because TCLC's ability to vertically expand its landfill is barred by federal height restrictions and the City's Height Hazard Ordinance.

Alternatively, the charge improperly instructed the jury on the takings issue, and the City of Austin did not waive error.

The court of appeals abused its discretion in denying the City's motion on rehearing to supplement the clerk's record when (1) the materials identified in the motion had been submitted to the court of appeals as an appendix to a brief, without objection, prior to issuance of the court of appeals' opinion; (2) the materials were in the trial court clerk's record and were available upon request by the court of appeals at any time prior to issuing its opinion; and (3) the motion to supplement the clerk's record was unopposed.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Travis County Landfill Company, L.L.C. (TCLC) owns 133.56 acres of raw land one-half mile south of Austin Bergstrom International Airport (ABIA). 1 CR 2A; 5 RR PX1-5, DX2; 1 RR 140. TCLC's predecessor-in-interest, 244 Joint Venture, purchased the property in 1983, when it was adjacent to Bergstrom Air Force Base. 1 RR 140, 154.

The Easement. In 1983, and at all times relevant to this litigation, the property was subject to a perpetual and assignable Deed of Easement. 1 RR 170-72; 5 RR DX2; *see also* 1 RR 152-54, 172-73 (TCLC knew of easement restrictions at time of purchase). The Deed of Easement was originally held by the United States government and was subsequently assigned to the City of Austin. 5 RR DX2, DX9; 1 RR 172.

The Deed describes certain airspace above the property as approach-departure and transition zones and grants the easement holder the following rights over that airspace:

> (1) The continuing perpetual rights to trim or remove only those portions of trees, bushes, shrubs, or any other perennial growth or undergrowth infringing upon or extending into or above the approach zone plane and the transitional zone as described above.
>
> (2) The continuing perpetual right to trim or remove only those portions of the growth of such trees, bushes, shrubs or any other perennial growth or undergrowth which could in the future infringe upon or extend into or above the approach zone plane and the transition zone as described above.
>
> (3) The right to remove, raze, or destroy those portions of building, other structures, and land extending into or above the approach zone plane and the transitional zone as described above.
>
> (4) The right to prohibit the future construction of building or other structures from infringing upon or extending into or above the approach zone plane and the transitional zone as described above.
>
> (5) The right to ingress and egress over said land to effect and maintain the necessary clearance.

5 RR DX2 at 839 (emphasis added). In other words, the prior landowner had sold the right to build structures on the property, including landfills, into the zones designated by the easement. 1 RR 172-73 (admission by TCLC's manager that easement holder could prohibit building of structures over a certain height). This type of easement, which bars obstructions in the airspace and permits clearance of any obstructions, is known as a *clearance or obstruction easement*.

Separate and apart from the clearance and obstruction easement, the Deed also grants an easement to allow military flights over the property, as follows:

> In addition to the rights described above, Grantors convey the right of unobstructed passage of all military aircraft and aircraft operated under military control . . . in all air space above the surface of Grantors' property, the number of passages not to exceed 60,900 per year; together with the right to cause in all air space above the surface of Grantors' property such noises, vibrations, fumes, fuel particles, and such other related effects as may result from the operation of aircraft landing at, taking off from, or operating at or on Bergstrom Air Force Base, notwithstanding the extent of interference with such noises, vibrations, fumes, fuel particles, and such other related effects, may cause to the use of Grantors' remainder estate.
>
> Grantors agree to hold the United States and its assigns harmless for any claim by grantors for interference with the use and enjoyment of property located beneath the property described above which interference is caused by the passage of aircraft operating within the scope of this easement.

5 RR DX2 at 839-40. This easement, called an *avigation easement*, does not address the height of structures or vegetation on the property but instead is designed to protect the holder against claims that non-height-related effects of overflights — like noise, vibrations, or fumes — interfere with the use and enjoyment of the property.

The Proposed Landfill. The members of 244 Joint Venture formed a partnership to obtain a Type IV landfill permit for the property, allowing the deposit of only non-putrescible waste, such as construction rubble, tree clippings, and tires. 1 RR 145, 148. The

partnership obtained a Type IV permit in 1988, but did not develop the property. 1 RR 155-56. The permit contained height limitations consistent with those in the Deed of Easement. 1 RR 152. The partnership was later restructured to form TCLC, which acquired the property from 244 Joint Venture in late 1993. 1 RR 145-47. At the time of trial, the property was still undeveloped raw land. 1 RR 176-77.

Commencement of Operations at ABIA. The federal government decided to close Bergstrom Air Force Base in the early 1990's. 1 RR 157; 2 RR 67. Under a 1942 agreement between the City and the federal government, the Bergstrom property reverted to City ownership. 1 RR 214-15. Austin voters approved the building of a new airport at Bergstrom in May 1993. 1 RR 157-58. The City officially took ownership of the property in September 1993. 2 RR 55. At the time TCLC acquired the property in December 1993, then, it knew of the City's plans to operate a municipal airport at Bergstrom. It also knew that the property was burdened by the height restrictions set forth in the Deed of Easement. 1 RR 172-75. And, because TCLC's property is adjacent to the airport, it is subject to FAA regulations and a City Height Hazard Zoning Ordinance, which also prohibit obstructions in the same zones as the Deed of Easement. 2 RR 25-26, 31-32, 64-65; 5 RR DX3.

The City began preliminary operations at Bergstrom in early July 1997. 1 RR 228. By March 1998, ABIA traffic had included over 6,000 civilian flights. 1 RR 228-30. Additionally, military flights, including Air Force One, continued to operate in and out of ABIA. 1 RR 226, 229-30, 232; 2 RR 57; 3 RR 130-31. The approach and glide slope designated by the FAA for flights in and out of ABIA are the same as the zones delineated in the Deed of Easement. 2 RR 31-32, 64-65.

The Litigation. TCLC filed suit on June 24, 1997, when preliminary operations began at ABIA. 1 CR 2. TCLC claimed that civilian overflights through its airspace were not within the scope of the military avigation easement and constituted a taking of property under the Texas Constitution. 1 CR 3-5. At trial, TCLC asserted that the City took its ability to build its landfill higher into the airspace above its property. TCLC's manager testified that, if its property were not adjacent to ABIA, the TNRCC would "very likely" modify TCLC's permit to allow vertical expansion of the proposed landfill. 1 RR 204. That testimony, though, was premised not on cessation of civilian overflights, but on the closing of ABIA airport. *Id.* TCLC did not assert nor attempt to prove any other type of interference from civilian overflights, such as noise, vibrations, or fumes.

The jury answered liability and damage questions favorably to TCLC. 1 CR 188-89. The trial court rendered judgment on the verdict in the amount of $2,950,000. 1 CR 232-33. The trial court also filed findings of facts and conclusions of law concluding that the City had taken TCLC's airspace rights by overflight. 1 CR 237-38.

The court of appeals affirmed in a 2-1 decision, with Justice Patterson dissenting. 25 S.W.3d 191. The justices disagreed on whether the civilian overflights could result in a taking based on TCLC's inability to vertically expand its proposed landfill when such expansion was barred in any event by the clearance easement.

SUMMARY OF THE ARGUMENT: WHY THE PETITION SHOULD BE GRANTED

Under the decision below, the City must pay TCLC nearly $3,000,000 for the alleged taking of a right TCLC never had — the right to vertically expand its proposed landfill. The Deed of Easement assigned to the City by the federal government explicitly prohibited such an expansion. Not only is the result erroneous, the court of appeals employed reasoning that

lowers the constitutional bar for a taking, misapplies United States Supreme Court precedent to novel facts, and creates wide-spread uncertainty for airport operators in Texas.

As the Supreme Court held in *United States v. Causby*, 328 U.S. 256, 261 (1946), because the "air is a public highway," not all flights over private land constitute a taking. A taking by overflight occurs <u>if and only if</u> the <u>flights</u> "are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *Id.* at 266. Here, TCLC did not show that the overflights themselves caused direct, immediate, and substantial interference. Instead, as a careful reading of the court of appeals' opinion makes clear, TCLC showed only that the existence of the airport — including easements, zoning, and federal regulations that are necessary to its safe operation — limited TCLC's ability to vertically expand its yet-to-be-built landfill. By finding a taking based on operation of the airport generally, and not flights over TCLC's land in particular, the court of appeals has lowered the constitutional bar announced in *Causby*.

The court of appeals recognized that it was applying *Causby* to novel facts. 25 S.W.3d at 201 (noting "the difference between this case and earlier overflight cases"). That difference is not accidental, and, as Justice Patterson recognized in her dissent, it is a distinction that makes a difference. In all of the overflight cases cited by TCLC and the court of appeals, the plaintiff showed interference as a direct result of noise, vibrations, lights, fuel spray, or similar disturbances attributable to the low and frequent flights. Not one of those cases involved a situation like the one presented here — where the plaintiff's property was subject to a clearance easement and the only alleged interference from the overflights was on the ability to build taller structures on the property.

The court of appeals' opinion establishes a new type of takings claim allowing property owners to recover even when flights over their property are not causing any harm. Further, the court of appeals' opinion nullifies rights granted to the City under the Deed of Easement. TCLC is permitted to recover for the taking of its ability to vertically expand its landfill. Yet the easement clearly prohibits such an expansion and, in fact, would give the City the right to tear it down. Clearance and obstruction easements near a municipal airport are not unique to Austin. Under the court of appeals' opinion, airport operators who have obtained similar easements to limit the height of structures near airports may now, as illogical as it may seem, be sued for inverse condemnation for a taking of the right to build structures above the easement restrictions.

The petition should be granted to make clear that the *Causby* standard for a taking applies in Texas, to ensure that clearance easements are given effect, and to eliminate claims for a taking of rights a party has previously bargained away.

BRIEF OF THE ARGUMENT

As a general rule, the "air is a public highway," and a landowner's interest in land is subject to the passage of aircraft above it. *United States v. Causby*, 328 U.S. 256, 261 (1946). The landowner's interest extends to the airspace over the property only to the extent it can be used to benefit the underlying land. *Id.* at 264-66. Consequently, "[f]lights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *Id.* at 266. The overflights themselves must be the cause of the harm. *See id.* at 266-67.

Here, TCLC's right to use the airspace above its land was encumbered. As Justice Patterson observed in her dissent, "Because TCLC, the landowner here, owns its land

subject to a clearance or obstruction easement, however, it no longer has the unlimited right, *inter alia*, to build into the airspace above its land." 25 S.W.3d at 209. For that reason, as Justice Patterson correctly concluded, under *Causby*, "it must be shown that TCLC's use and enjoyment of the land was substantially impaired apart from the limitations imposed on it by the clearance easement." *Id.* at 213 (emphasis added).

In contrast, the majority treated TCLC's property as if it were free and clear of the height restrictions contained in the easement. It did this by using a lower standard of proof for a taking than *Causby* requires, confusing the initial question of whether there was a taking at all with the measure of damages, and, contrary to *Causby*, requiring an avigation easement for all flights over private land, even when there is no resulting harm.

The court of appeals has lowered the constitutional bar for a taking by overflight.

The facts in *Causby* provide the paradigm for overflight cases. There, the plaintiffs' property near an airport was continually overflown at very low levels by military aircraft, including bombers and transports. 328 U.S. at 259. The Supreme Court described the noise as "startling," upsetting and injuring the plaintiffs' chickens, and destroying the use of the property as a commercial chicken farm. *Id.* The noise and the excessive glare from the lights also deprived the plaintiffs of sleep and left them "nervous and frightened." *Id.* The Court held that the overflights were the "direct and immediate cause" of interference with the use and enjoyment of the property. *Id.* at 266-67.

Subsequent cases cited in the court of appeals' opinion involved similar facts, where noise, vibrations, lights, jet spray, and other effects related to the overflights themselves interfered with the use of the property. *Griggs v. Allegheny County*, 369 U.S. 84, 87 (1962) (noise and vibrations); *City of Houston v. McFadden*, 420 S.W.2d 811, 813 (Tex. Civ.

App.—Houston [14th Dist.] 1967, writ ref'd n.r.e.) (noise, intense vibrations, lights, and jet fuel spray); *Jefferson County v. Farris*, 476 S.W.2d 457, 458 (Tex. Civ. App.—Beaumont 1972, orig. proceeding) (allegations similar to those in *McFadden*).

The court of appeals admitted that this case does not fit the traditional overflight paradigm. 25 S.W.3d at 201 (observing "the difference between this case and earlier overflight cases"). It recognized that TCLC did not show that noise, vibrations, and similar effects of overflights affected TCLC's use of the property. 25 S.W.3d at 201; *see also* 3 RR 130 (no noise impact on TCLC's property).

There is no other evidence in this case that the overflights interfered with the use and enjoyment of TCLC's property. The only testimony directly addressing the effect of overflights was from David Bolton, the City's expert, who testified that the overflights themselves do not affect the value of TCLC's property. 3 RR 93 ("that [referring to overflights] doesn't affect the value of the property"); 3 RR 94 ("Well, I think what you're asking me, do overflights themselves affect value, and I don't think the airplanes flying over a landfill affect value."); 3 RR 99 ("overflights themselves over a landfill, I do not think has any effect on value"). The only other testimony was the plaintiff's expert's vague statement that low and frequent flights add "potential hazards" to the property. 2 RR 199. He did not specify what those hazards were, and he admitted that he had not calculated any additional costs as a result of overflights. 2 RR 201. Unquantified, vague hazards do not constitute an immediate, direct, and substantial interference.[1]

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[1] In their valuation testimony, the experts referred to an "increased risk" factor. This evidence does not satisfy *Causby*, as it does not connect the overflights with a direct, immediate, and substantial interference with TCLC's property. Instead, as the court of appeals' opinion makes clear, this testimony is directed to risk from operating near an airport, not risks from the

Citing no evidence that the overflights interfered with TCLC's use and enjoyment of the property, the court of appeals instead based its decision on evidence that the property was adversely affected by being located near an airport. Every reference in its opinion to the alleged harm in this case is premised on operation of the airport generally, and not flights over TCLC's land in particular. *See* 25 S.W.3d at 196 ("but for the airport it was 'extremely likely' that the [TNRCC] would grant a vertical expansion of the existing permit") (emphasis added); *id.* at 201 ("airport operations caused a decrease in the fair market value of TCLC's land") (emphasis added); *id.* at 202 ("the City cannot argue that airport operations did not decrease the fair market value of TCLC's land") (emphasis added). But that is not the standard for a taking by overflight. *Cf. Felts v. Harris County*, 915 S.W.2d 482, 486 (Tex. 1996) (contrasting *McFadden*, in which the property owner suffered specific harm from overflights, with situation in which plaintiff complains of general "interferences attributable to neighboring public works").

The court of appeals' approach — which does not require a showing that the overflights caused interference with the use and enjoyment of TCLC's property, as *Causby* demands — is exemplified by the following passage:

> We note finally that even without the height restrictions burdening TCLC's property, frequent low level overflights would prevent TCLC from

(footnote cont'd) overflights themselves. 25 S.W.3d at 201 ("Both the City and TCLC presented appraisers who testified that **airport operations** caused a decrease in the fair market value of TCLC's land for two reasons: TCLC's inability to vertically expand its landfill on one hand, but also the **increased risk associated with operating a landfill in close proximity to a municipal airport**.") (emphasis added); *id.* at 202 ("Sayers cited as reasons for the increased risks such things as possible changes in FAA regulations, and the manner in which the landfill operator would have to oversee the landfill **in light of its proximity to a municipal airport**.") (emphasis added); *see also* TCLC's Brief of Appellee at 13 ("Every witness who testified agreed that the property is subject to additional risk **because of ABIA operations** . . ..") (emphasis added).

> stacking its landfill into the airspace over its land. In other words, if the FAA and the City suddenly removed all of the height restrictions currently affecting TCLC's land, TCLC would still maintain that overflights alone diminished the value of its property.

25 S.W.3d at 202 (emphasis added). But the only way all these height restrictions would be "suddenly removed" is if the airport were closed. Contrary to the court of appeals' analysis, TCLC is not complaining about the airport, as that is not the constitutional standard; it is complaining about the overflights. The proper inquiry, then, is not what would happen if the City closed the airport, but what would happen if the City stopped the civilian overflights of which TCLC is allegedly complaining. And the answer is that nothing would change. If the City simply stopped civilian overflights over TCLC's property, while keeping the airport operational, TCLC would not gain the right to stack its landfill higher. Under the military avigation easement, the City would still have the right to continue to direct military flights over TCLC's property.[2] Additionally, the City would still have a valid clearance easement that would limit the height of the landfill. The court of appeals never explains how or why the height restrictions in the Deed of Easement would be "suddenly removed." Even if ABIA were closed to all air traffic, the City would still have the contractual right under the Deed to limit the height of structures on TCLC's property. *See* 25 S.W.3d 212 (Patterson, J., dissenting) ("Thus, the right to build a structure into the airspace on the land is part of TCLC's 'bundle of rights' only to the extent it does not violate the clearance easement.").

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[2] Further, nothing in the record suggests that FAA regulations and City zoning limiting the height of structures would be "suddenly removed" if the airport were to remain open but the civilian overflights stopped.

The court of appeals confuses the issue of whether there has been a taking at all with the measure of damages.

Contributing to the erroneous analysis in the court of appeals' opinion is a failure to distinguish between the threshold inquiry of whether there has been a taking at all and the separate and subsequent calculation of damages. As the dissenting justice correctly recognized, "The majority confuses a measure of damages for the very existence of the harm." 25 S.W.3d at 210. The appraisal experts did agree that a determination of the market value of the property under a proper measure of damages would direct that the appraiser ignore "project influence," *i.e.*, the effect of the airport. 2 RR 73-75, 149-53. But testimony about the amount of damage is relevant only after a taking has been shown. Under *Causby*, the landowner must first demonstrate a direct, immediate, and substantial interference with the use and enjoyment of its property before the amount of damages is considered. *See* 328 U.S. at 266-67; *see also* Amicus Brief of City of San Antonio.

The court of appeals confuses the law governing avigation and clearance easements.

Finally, the court of appeals misunderstood the nature of avigation and clearance easements. The majority was concerned with whether the City's non-military flights over TCLC's property were within the scope of the existing avigation easement. Whether the City's civilian overflights were within the scope of the military avigation easement, though, is not the end of the inquiry. Instead, there is the issue of whether the City needed to obtain avigation rights to fly civilian aircraft over the property in the first place. And again the answer is *Causby*. The City must acquire or "take" an avigation easement only if the overflights are so low and frequent as to be a direct, immediate, and substantial interference with the enjoyment and use of the land. That showing was not made in this particular case.

This does not mean that easement holders are free to expand upon their avigation rights at will. If the additional air traffic interferes with the use of the property — by increased noise, fumes, or vibrations — then a taking claim can be asserted.

The court of appeals similarly misunderstood the City's argument on the effect of the clearance easement, taking it to mean that clearance easements always bar claims for an unconstitutional taking by overflight. The City's actual position is that the clearance easement bars the particular claim here because there is no showing that overflights caused any interference with the use and enjoyment of the property separate and apart from the existing height restrictions dictated by the clearance easement. The clearance easement would not bar a takings claim based on other effects of overflight, such as increased noise, fumes, or vibrations.

The court of appeals' misunderstanding of avigation and clearance easements has done more than produce the wrong result in this case. It has also created uncertainty for airport operators throughout the state. The court of appeals' opinion suggests that, contrary to *Causby*, an avigation easement must always be acquired for any and all flights over land near an airport. It allows property owners to bring takings claims even if the overflights do not themselves cause any harm. The court of appeals also abrogates the rights of an airport operator under a valid clearance easement. It thus recognizes a new type of taking in which holders of clearance easements may be sued for having "taken" the very rights that were conveyed to them in the easement.

CONCLUSION AND PRAYER

The City of Austin prays that this Court grant the petition to make clear that the *Causby* standard applies in Texas, to ensure that clearance easements are given effect, and to eliminate claims for a taking of rights a party has previously bargained away.

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

I certify that, on November 15, 2000, I served a copy of this petition by First Class, United States mail on the following:

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In addition, a courtesy copy of this petition has been provided to the following counsel for amicus curiae:

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Appendix B: Sample Waiver Letter

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BOARD CERTIFIED,
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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 C: 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. FSCR 17. The revised order also deleted the June 19

[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.

date for the end of the discovery period. *Id.* <u>The trial date and the date for dispositive motions did not change.</u> *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.

Respectfully submitted,

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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]