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Plans are well underway for two super seminars. First, on June 8 during the Bar Convention in Dallas, we shall present the ultimate oral argument seminar. It will feature two legends of the Texas appellate bar, Rusty McMains against Mike Hatchell. They will first discuss their strategies, then argue, and finally be critiqued by the judges hearing the argument, as well as by other prominent appellate lawyers. Because they will have argued a mandamus question about discovery, we shall close the seminar with a panel discussion among judges and lawyers about the perceived mandamus problem and possible alternative remedies. You will not want to miss this special seminar, which will be followed by a cocktail reception for the appellate judiciary.

Second, our CLE Chairperson, Wendell Hall, informs me that his committee has selected David Keltner to serve as Course Director for the Fourth Annual Advanced Appellate Practice Course. It will be held in Houston on October 4-5, prior to the board certification examination. If you have attended these courses in the past, you already know their outstanding quality. This year's course will be no exception. Because we expect another sell-out, I suggest you register early.

With regard to other section business, several of our committees have met and soon will be issuing reports, which I shall summarize for you in the next edition of the *Appellate Advocate.* Perhaps the most ambitious study is being led by our new chairperson of the Federal Appellate Practice Committee, Claudia Wilson Frost. Claudia's committee is studying two issues: (1) whether the federal procedures for monitoring the filing of appellate records could be used in the state system; and (2) whether the Fifth Circuit's screening procedures and methods of judicial preparation for oral argument and participation in the decision and opinion could benefit the state practice. Her committee's report is certain to be controversial, so I urge you to provide her with any ideas you have on those subjects.

Our Appellate Court Liaison Committee, chaired by Chief Justice (Retired) Clarence A. Guittard, recently met in Dallas. Other members are Hon. Bill Bass, Hon. Richard Countiss, Hon. Preston Dial, Hon. Paul Murphy, Hon. Linda Thomas, and Hon. Michol O'Connor. They have already reported on several interesting issues. Concerning the financing of judicial campaigns, they recommend that the Section take no position until we see what changes are made in judicial selection. They did, however, find suggestions of blind funding, public financing, and arbitrary caps on contributions to be intrigning ideas. Concerning methods of judicial selection, they recommend that our Section support whatever plan eventually gains the support of the Appellate Legislative Committee of the State Bar's Judicial Section. Until then, the committee was almost equally divided about merit selection, but definitely favored non-partisan elections if an elective system is retained.

The committee determined that no state-wide mandamus crisis exists. Justice Murphy, however, is drafting a possible amendment to Texas Rule of Appellate Procedure 121(f) that would enable appellate courts, in their discretion, to refuse either oral argument or responsive briefs, but not both (assuming leave to file is granted). I shall keep you informed of the progress of this proposed amendment. The committee rejected various other proposals designed to reduce the number of mandamus petitions, such as presuming reversible error from erroneous discovery rulings, certifying discovery disputes for interlocutory appeal, abolishing most privileges, referring discovery disputes to alternative dispute resolution, and increasing filing fees.

The committee recommended that the Section should support a salary raise for research attorneys on the appellate courts. (And I recommend that we all support salary increases for the justices and all other court personnel!) Moreover, the committee has addressed another urgent need of the permanent research and staff attorneys: the financial ability to attend the Advanced Appellate Practice Course either free or for the printing cost of the materials. This is an excellent idea, and I have asked our Continuing Legal Education Committee to immediately draw up such a proposal for council approval.

Finally, Justice Bass is chairing a subcommittee to determine needs of the individual courts of appeals with regard to funding for computerized research, computers, better facilities, more staff, and more money for libraries. Specific proposals will follow his subcommittee's findings.

As you can see, Chief Justice Guittard and his committee are hard at work with concrete ideas. Our thanks is due them, but the best way to thank them is to act on their proposals. That is the next step. Will you join me?

— Roger Townsend

Reversals of Civil Judgments by Texas Appellate Courts

By Jeff Nobles
[Senior Staff Attorney, First Court of Appeals, Houston]

Texas courts of appeals consistently reverse or modify more than one of every five civil cases they consider. This is the first installment of a regular column analyzing reversals for the three months preceding the Appellate Advocate's copy deadline. This review covers opinions released between December 1989 and February 1990. But first, some background.

In fiscal year 1989, the precise number of reversals was 804 of 3,789 dispositions, or 21.2%. Office of Court Administration, *Texas Judicial System 61st Annual Report* 161 (1989). In fiscal 1986, 22.4% of civil appeals resulted in reversals or modifications. Keltner, *The Decision to Appeal (The Birth of the Blues),* Advanced Appellate Practice Course Manual (September 1987). The following year, 23% were overturned. Hecht, *Deciding Whether to Appeal and Frivolous Appeals,* Advanced Appellate Practice Course Manual (June 1988). These statistics compelled former Justice Keltner to conclude that on appeal "the chances for reversal or modification of the judgment are fairly high." *The Decision to Appeal (The Birth of the Blues)* at 7.

Of course, the prospects of overturning a specific trial court judgment cannot be determined by reading statistics. Citing the 1987 figures, Justice Hecht wrote: "Any appeal ... must be evaluated ... on its merits, not on the fate of some hypothesized average case." *Deciding Whether to Appeal and Frivolous Appeals* at 2.

The final decision to appeal depends on the will of the parties and the vagaries of the case. Nevertheless, the fate met by similar cases factors heavily into the decision to appeal. Clients insist on knowing their odds of winning. This column proposes a method for identifying similar cases, based on the different standards of review appellate courts use.

Bill James, the baseball iconoclast, once proposed five rules for evaluating statistics, three of which are pertinent here:

1. Any statistic that is never surprising is never interesting. Any statistic that is consistently surprising is probably wrong.

2. No amount of statistical evidence will make a statement invulnerable to the laws of common sense.

3. Any statistic the meaning of which can be expressed in understandable terms in a common English sentence is greatly to be preferred, other things being equal, to one that cannot.

B. James, *Baseball Abstract* 10 (1987). This column's success or failure should be measured by these standards. My goals are to provide figures that are rationally based; that provide useful, sensible, but not shocking results; that identify winning appeals; and that are expressed in plain English.

Cases Surveyed

This quarter's study relies exclusively on decisions from the courts of appeals, for two reasons. First, the decision to appeal an adverse trial judgment is different from the dilemma posed by a reversal in the court of appeals. Next quarter's column will address that distinction. Second, the much greater number of intermediate appellate court decisions provides a larger sample for analysis. Six months of supreme court decisions will be covered in next issue's column.

191 published opinions from the courts of appeals were surveyed. The courts of appeals reversed or modified 81 trial court judgments. The percentage of reversals is undoubtedly skewed because unpublished opinions were not considered.

This study assigns appellate reversals to three broad categories, corresponding to three standards of review commonly applied by the appellate courts. These standards are applied in innumerable contexts and are set out above each category.

Discretionary rulings

The first standard reviews trial court rulings for an abuse of discretion. Virtually all of the trial court's pretrial rulings — from the issuance of temporary injunctions to the decision to consolidate actions — are committed to its discretion. These rulings are rarely reversed. *See Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241-42 (Tex. 1985), *cert. denied,* 476 U.S. 1159 (1986)(trial court abuses its discretion when it acts "without reference to any guiding rules and principles").

Three trial court judgments were reversed for abuses of discretion during the survey period. These include:

Continuance. The trial court abused its discretion by denying a motion for continuance of a summary judgment hearing. *Verkin v. Southwest Center One, Ltd.,* 784 S.W.2d 92 (Tex. App. — Houston [1st Dist.] 1989, n.w.h.).

Sanctions. There is no authority for a trial court to strike a motion for new trial under Tex. R. Civ. P. 215, which authorizes the striking of *pleadings.*

Lehtonen v. Clarke, No. A14-88-00916-CV (Tex. App. — Houston [14th Dist.], January 18, 1990, n.w.h.)(not yet reported).

Severance. In *McRoberts v. Tesoro Sav. & Loan Ass'n,* 781 S.W.2d 705 (Tex. App. — San Antonio 1989, n.w.h.), the trial court abused its discretion by severing claims of guarantor liability from interwoven claims of partner liability, in a lawsuit against the guarantors/partners.

Legal rulings

At the other extreme, appellate courts may substitute their own judgment for the trial court's on pure questions of law — "legal" rulings in the narrower sense of the term. The trial court's construction of the legal effect of statutes or documents and its decision to direct a jury verdict are two examples. If shown to be harmful (often a big "if"), erroneous legal rulings at trial mandate reversal. Tex. R. App. P. 81(b)(1).

Rulings on motions for summary judgment present a special type of legal ruling. Summary judgment may be granted when the summary judgment proof establishes that there are no disputed material fact issues, and that the moving party is entitled to judgment as a matter of law. *Swillcy v. Hughes,* 488 S.W.2d 64, 67 (Tex. 1972). Summary judgments have traditionally been viewed with disfavor by appellate courts. From 1968 to 1976, 70% of all summary judgments granted were reversed on appeal. Hittner & Liberato, *Summary Judgments in Texas,* 20 St. Mary's L.J. 243, 245 n.7 (1989)(citing *City of Houston v. Clear Creek Basin Auth.,* 589 S.W.2d 671, 675 (Tex. 1979)).

As one would expect, the overwhelming majority of reversals, 60 of 81, resulted from the trial court's erroneous legal rulings.

Construction of documents: 5 reversals. A probate court incorrectly held that stock did not pass to the residuary estate subject to the provisions of a will. *Opperman v. Anderson,* 782 S.W.2d 8 (Tex. App. — San Antonio 1989, n.w.h.).

Construction of positive law: 4 reversals were caused by the trial court's misconstruction of a rule or statute. One trial court decided that an administrative rule was unconstitutional; the court of appeals held that the rule had never been legally adopted. *Central Educ. Agency v. Sellhorn,* 781 S.W.2d 716 (Tex. App. — Austin 1989, n.w.h.).

Defective default judgment: 2 reversals. In one writ of error case, a defendant in a personal injury case overturned a default judgment by arguing that it had never received an amended petition that excluded another defendant who had been named in the original petition. The court of appeals reasoned that the amendment prejudiced the remaining defendant, which lost its right of contribution. *Texas Cab Co. v. Giles,* 783 S.W.2d 695 (Tex. App. — El Paso 1989, n.w.h.).

Defective DWOP: 2 reversals. This category covers defective dismissals for want of prosecution (A refusal to reinstate a proper DWOP is reviewable only for an abuse of discretion. *Bevil v. Johnson,* 157 Tex. 621, 307 S.W.2d 85 (1957)). In one case, notice of a dismissal docket call was mailed to an incorrect address; the trial court also erred in dismissing the case with prejudice. *Alvarado v. Magic Valley Elec. Co-op, Inc.,* No. 04-88-00610-CV (Tex. App. — Fort Worth, January 17, 1990, n.w.h.)(not yet reported).

JNOV: 3 reversals. One trial court improperly disregarded a damages finding because it did not correspond with the trial testimony; the court of appeals held that "evidence corresponding to the precise amount found by the jury is not essential." *Carrow v. Bayliner Marine Corp.,* 781 S.W.2d 691 (Tex. App. — Austin 1989, n.w.h.).

Jurisdiction: 8 reversals. In one case, the trial court acted when it should not have asserted jurisdiction over the parties or the subject matter. The appellees successfully argued in a cross-point that one of them was never served and did not waive process. *Buffalo Ranch Co. Burleson County Appraisal Dist.,* 78 S.W.2d 748 (Tex. App. — Houston [14th Dist.] 1990, n.w.h.).

Jury charge: 6 reversals. For example, a jury instruction on res ipsa loquitur should not have been submitted in a medical malpractice case; its application to a novel set of facts enlarged the res ipsa doctrine, in violation of the Medical Liability and Insurance Improvement Act. *Wendenburg v. Williams,* No. B14-88-00833-CV (Tex. App. — Houston [14th Dist.], January 17, 1990, n.w.h.)(not yet reported).

Summary judgment: 27 — one-third of all reversals in the last three months.

In 11 cases, the summary judgment proof failed to negate the existence of material fact issues. In 6 of those decisions, the movant's proof was inadequate. For example, in a suit on a note, the movant failed to attach a copy of the note or recite its "relevant terms" in his motion for summary judgment. *Sorrell v. Giberson,* 780 S.W.2d 936 (Tex. App. — Austin 1989, n.w.h.). In 5 other cases, the record disclosed questions of fact. For instance, an insurer's retention of a dishonored check raised a fact issue of whether the insurer had waived the right to cancel an automobile insurance policy. *Schachar v. Northern Assurance Co.,* No. 05-89-00007-CV (Tex. App. — Dallas, January 25, 1990, n.w.h.)(not yet reported).

16 summary judgments were reversed because the trial court incorrectly applied a rule of law. 11 of those cases involved the erroneous application of a statute or rule. For instance, a trial court erroneously ruled that the workers' compensation statute barred recovery for an employer's allegedly intentional tort. *Kielwein v. Gulf Nuclear, Inc.,* 783 S.W.2d 746 (Tex. App. — Houston [14th Dist.] 1990, n.w.h.). 3 judgments were reversed because the trial court misconstrued a document. 1 summary judgment was reversed on collateral estoppel grounds;

the trial court erroneously considered a point that had already been decided by a federal court in a parallel proceeding. *Acker v. City of Huntsville,* No. A14-88--00616-CV (Tex. App. — Houston [14th Dist.], February 1, 1990, n.w.h.)(not yet reported). The final summary judgment decision centered on an erroneous choice of law. The trial court erroneously applied Texas law in ruling a personal injury action was barred by the workers' compensation act; Alabama law should have been applied. *Osborn v. Kinnington,* No. 08-89-00212-CV (Tex. App. — El Paso, January 24, 1990, n.w.h.)(not yet reported).

Wrong legal standard: 3 reversals. For instance, in *Dickerson-Seely & Assocs. v. Texas Employment Comm'n,* No. 03-89-00008 (Tex. App. — Austin, January 31, 1990), the trial court conducted a "substantial evidence" review of an administrative agency's ruling when a "preponderance of the evidence" review would have been proper.

Evidentiary sufficiency

Courts of appeals may review findings of fact for factual and legal sufficiency; the supreme court has jurisdiction over legal sufficiency questions. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error,* 38 Tex. L.Rev. 361, 368 (1960). Either type of review accords great deference to the finder of fact. Legal sufficiency, or "no evidence," points of error will be sustained only if there is no evidence of probative force to support a finding. *In re King's Estate,* 150 Tex. 662, 244 S.W.2d 660, 661 (1951). Courts of appeals can sustain factual sufficiency points only if the finding is clearly wrong and unjust in light of all the evidence. *Cain v. Bain,* 709 S.W.2d 175, 176 (Tex. 1986).

Eighteen reversals were based on the legal or factual insufficiency of the evidence.

Bench trial; factual sufficiency: 2 reversals. In one case, the trial court's damage award bore "no relation" to the testimony at trial. *Gill Sav. Ass'n v. Chair King, Inc.,* 783 S.W.2d 674 (Tex. App. — Houston [14th Dist.] 1989, n.w.h.).

Bench trial; legal sufficiency: 4 reversals. There was no evidence to support the trial court's finding that the City of Texarkana had exercised due diligence in locating a property- owner before foreclosure. *Doue v. City of Texarkana,* No. 9741 (Tex. App. — Texarkana, February 21, 1990, n.w.h.)(not yet reported).

Jury trial; factual sufficiency: 3 reversals. A farmer's testimony that a delayed water delivery caused him $14,500 in damages was not supported by factual data supporting his claim for lost profits. *El Paso Water Improvement Dist. v. Grijalva,* 783 S.W.2d 736 (Tex. App. — El Paso 1990, n.w.h.). In another case, on a "unique record," the court of appeals held that a jury could not discount recoverable medical expenses from $3,346.35 to $1,728 when the defendant failed to attack the reasonableness of the expenses at trial. The appellate court sustained a "great weight and preponderance" point of error. *Gray v. Floyd,* 783 S.W.2d 214 (Tex. App. — Houston [1st Dist.] 1990, n.w.h.).

Jury trial; legal sufficiency: 9 reversals. For example, in a tortious interference case, the court of appeals held that the appellant's motion for new trial should have been granted on a no evidence ground; the appellate court rendered judgment for the appellant. *Caller-Times Pub'g Co. v. Triad Communications,* No. 13-88-00328-CV (Tex. App. — Corpus Christi, November 21, 1989, n.w.h.)(not yet reported).

Conclusion

Early results indicate that this classification scheme passes part two of the Bill James test. In the last three months, courts of appeals were more likely to reverse cases when applying less deferential standards of review. Perhaps there were too few surprises to satisfy part one of the James test. Part three of that test is left for the reader to apply.

Many people have contributed their insights and scholarship to this study. Lynne Liberato suggested this column and continues to guide its composition. Ralph H. Brock, Richard Orsinger, and Mark E. Steiner each provided direction. In addition to the articles cited, two others were valuable background resources. The first, written by Susan Gellis, Reasons for Case Reversal in Texas: An Analysis, *16 St. Mary's L.J. 299 (1985), is widely cited as the most thorough study of its kind. The second, Mark E. Steiner's* Standards of Review in Texas Civil Cases, *prepared for the Southeast Texas Appellate Law Seminar, March 31, 1989, saved me hours of research. In Mark's words, the "acceptance of plagiarism . . . is one of the finest traditions of the bar."*

When You Are Walking On Thin Ice, You Might As Well Dance: The Danger Of Relying On The Docket Sheet Notations On Appeal.

By Jack K. Robinson, Jr.
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This scenario happens most weekday mornings in Texas courthouses. The lawyers and their clients huddle out in the hallway and attempt to settle their dispute. Meanwhile the trial judge stares at a long docket sheet and wants to get started. The trial judge repeatedly calls the case and the lawyers repeatedly announce they are talking and ask for more time to see if they can settle the case. Eventually some form of agreement, missing a lot of details, is reached, and settlement is announced to the court. The trial judge then makes an entry on the docket sheet that might look something like this:

> Parties present w attyns. M/Cont heard & denied. Recess for settlement effort. Agreement announced & read into record. Approved. Instruments to be drawn . . . [This is final disposition of case]

The terms of the actual agreement are not noted on the docket sheet. The trial judge signs the docket sheet.

Later, there can be trouble if one of the parties moves for judgment based on the agreement announced into the record. The other party responds that it has withdrawn its consent to rendition of an agreed judgment. The trial court may grant the motion for judgment and on appeal the judgment is revised. *See e.g. Formby's KOA v. BHP Water Supply Corp.*, 730 S.W.2d 428 (Tex. App. — Dallas 1987, no writ).

The purpose of this article is to explore the effect, if any, given to the trial judge's entries on the docket sheet.

Rendition And Entry Of Judgment

At the outset, it is important to understand the distinction between the *rendition* and the *entry* of a judgment. The rendition of a judgment is the announcement by the court of its conclusion and decisions upon the matter submitted to it for adjudication. *Eastin v. Eastin,* 588 S.W.2d 812, 814 (Tex. Civ. App. — San Antonio 1979, writ dism'd). The entry of the judgment is the ministerial act of providing a written statement of the judgment rendered by the court. The court's failure to correctly enter or fully recite the decision that was rendered does not defeat the rendered decision. *Coleman v. Zapp,* 105 Tex. 491, 494, 151 S.W. 1040, 1041 (1912).

There are four basic steps necessary to insure the proper rendition and entry of a judgment or order.

The first step is the announcement of the judgment by the court. The judgment is announced, whether the case is tried to the court or to a jury, when the court applies the law to the facts found and declares the rights of the parties. 4 R. McDonald, Texas Civil Practice in District and County Courts §17.05.02 (rev. 1984). When the judgment is announced in this manner, either orally in open court or by memorandum filed with the clerk, the judgment has been rendered. *Knox v. Long,* 152 Tex. 291, 295, 257 S.W.2d 289, 292 (1953); *Oak Creek Homes, Inc. v. Jones,* 758 S.W.2d 288, 290 (Tex. App. — Waco 1988, no writ).

The second step is notation of the decision on the trial court's docket sheet. 4 R. McDonald, Texas Civil Practice in District and County Courts §17.05.03 (rev. 1984). This usually occurs when the judgment is announced. When accompanied by the appropriate announcement, an entry on the docket sheet is evidence of the judgment. *Crawford v. Crawford,* 315 S.W.2d 190, 192 (Tex. Civ. App. — Waco 1958, no writ).

However, a docket entry by itself is not a judgment nor is it evidence of a judgment. Unless accompanied by the appropriate announcement, the docket entry only serves is as a memorandum for the convenience of the trial court and clerk. *Restelle v. Williford,* 364 S.W.2d 444, 445 (Tex. Civ. App. — Beaumont 1963, writ ref'd n.r.e.); *Formby's KOA,* 730 S.W.2d at 430.

The third step is for the court to sign a formal document reciting the terms of the judgment or order. McDonald, § 17.05.04 (rev. 1984). It is critical for the document to clearly and unmistakenly reflect the date it is signed. *Burrell v. Cornelius,* 570 S.W.2d 383, 384 (Tex. 1978).

The final step is for the judgment or order to be entered upon the minutes of the court. McDonald, §17.05.05 (rev 1984). The purpose of entering the judgment or order is to give the certainty necessary to permit review upon appeal, enforcement by process, and proof in other courts of the judgment or order. *Hamilton v. Empire Gas & Fuel Co.,* 134 Tex. 377, 384, 110 S.W.2d 561, 566 (Tex. Comm'n App. 1937, opinion adopted).

The Effect Of Docket Entries On Appeal

What effect is given to a judge's entries on the court's docket sheet? As a general rule, a mere docket entry is not sufficient to constitute a judgment, decree, order of the court. *Formby's KOA,* 730 S.W.2d at 430. Courts have held that a docket entry forms no part of the record that may be considered and is simply a memorandum for the trial judge's and clerk's convenience. *Energo Internat'l Corp. v. Modern Indus. Heating, Inc.,* 722 S.W.2d 149, 151 (Tex. App. — Dallas 1986, no writ); *Azopardi v. Holleberke,* 428 S.W.2d 167, 168 (Tex. Civ. App. — Waco 1968, no writ); *Restelle v. Williford,* 364 S.W.2d at 445.

A number of cases involving the review of judgments nunc pro tunc have field that docket entries are some evidence of a rendered judgment and its contents. *Escobar v. Escobar,* 711 S.W.2d 230, 232 (Tex. 1986); *Port Huron Engine & Thrasher Co. v. McGregor,* 103 Tex. 529, 534, 131 S.W. 398, 399 (1910).

In *Grozier v. L-B Sprinkler & Plumbing Repair,* 744 S.W.2d 306, 310 n. 1 (Tex. App. — Fort Worth 1988, writ denied), a summary judgment case, the Fort Worth court of appeals stated that it did not necessarily agree with the holding in *Energo,* but that a discussion of that holding was not necessary to dispose of the case. Additionally, the court stated that they did not believe Energo precluded all consideration of entries on docket sheets.

In *EMW Manufacturing Co. v. Lemons,* 741 S.W.2d 212, 216 (Tex. App. — Fort Worth 1987), *rev'd on other grounds,* 747 S.W.2d 372 (Tex. 1988), a bill of review case, the Fort Worth court of appeals recognized the controversy of whether an appellate court can consider docket sheets, but refused to address the issue. In *W.C. Banks, Inc. v. Team, Inc.,* 783 S.W.2d 783 (Tex. App. — Houston [1st Dist.] 1990, n.w.h.), the issue was whether the judge that heard the case rendered a decision. The court scrutinized the notations on the docket sheet to determine whether a decision had been rendered.

The supreme court recently found that a trial court's oral pronouncement and docket entry reinstating a cause is not an acceptable substitute for the written order required by rule 165a(3). *Emerald Oaks Hotel/Conference Center, Inc. v. Zardenetta,* 776 S.W.2d 577 (Tex. 1989). Tex. R. Civ. P. 165a(3) provides that a motion to reinstate is overruled by operation of law if "for any reason a motion for reinstatement is not decided by *signed written order* within 75 days after the judgment is signed . . ." (Emphasis added).

In reviewing a summary judgment, the court will not consider a docket sheet notation as sufficient to indicate that the trial court has sustained an objection to summary judgment evidence. *Utilities Pipeline Co. v. American Petrolina Mktg.,* 760 S.W.2d 719 (Tex. App. — Dallas 1988, no writ).

The Effect Of Docket Entries In Original Proceedings

Generally, a writ of mandamus does not issue to control or correct rulings or judgments on matters incidental to the normal trial process if an adequate remedy by appeal exists to correct any such complaints. *State Bar of Texas v. Heard,* 603 S.W.2d 829, 833-34 (Tex. 1980). But mandamus will lie when a judge refuses to act on a motion, *Mora v. Ferguson,* 145 Tex. 498, 505, 199 S.W.2d 759, 762-63 (Tex. 1947), or to correct a void order or judgment. *Urbish v. 127th Judicial Dist. Court,* 708 S.W.2d 429 (Tex. 1986). Mandamus will also lie to compel a judge to proceed to judgment or sign an order where such an act is purely ministerial and involves no exercise of discretion. *Simpson v. Charity Benev. Ass'n,* 137 Tex. 215, 218, 152 S.W.2d 1093, 1095 (1941); Tex. Gov't Code Ann. §§22.002(a), 22.221(b) (Vernon 1988).

Whether the trial judge's notation on the docket sheet forms the basis for a mandamus action is determined by the relief sought. First, if the judge has rendered a decision and noted it on the docket sheet, but refuses to sign an order or judgment, the docket sheet can be used as evidence to obtain mandamus relief compelling the trial judge to perform the ministerial act of signing an order or judgment reflecting the rendered decision. *Escobar,* 711 S.W.2d at 232; *Mora,* 199 S.W.2d at 762-63; *Simpson,* 137 Tex. at 218, 152 S.W.2d at 1095; *W. C. Banks,* 783 S.W.2d at 785. Second, if the judge has rendered a decision and noted the decision on the docket sheet, but signs an order or judgment that directly conflicts with the judgment rendered and noted on the docket sheet, the docket sheet cannot be used to defeat the formal order or judgment. *N-S-W Corp. v. Snell,* 561 S.W.2d 798, 799 (Tex. 1977). Finally, if the judge has rendered a decision and made a notation of the decision on the docket sheet, but signs an order or judgment containing clerical errors that conflicts with the judgment rendered and noted on the docket sheet, the docket sheet can be used as a basis for a judgment nunc pro tunc. *Escobar,* 711 S.W.2d at 232; *Port Huron Engine,* 103 Tex. at 534; 131 S.W.2d at 399; *City of San Antonio v. Terrill,* 501 S.W.2d 394, 396 (Tex. Civ. App. — San Antonio 1973, writ ref'd n.r.e.).

Conclusion

In summary, the Dallas court of appeals takes the position that the docket sheet forms no part of the record on appeal and will not be considered. *Formby's KOA,* 730 S.W.2d 428; *Energo Internat'l,* 722 S.W.2d 149. On the other hand, the Fort Worth court of appeals, while not directly rejecting the position of the Dallas court, appears to question the validity of this rule. *Grozier,* 744 S.W.2d at 306; *EMW Mfg.,* 741 S.W.2d 212. Additionally, the Houston First Court of Appeals has reviewed a docket sheet to determine whether a judgment had been rendered. *W.C. Banks.*

The issue of the weight to be given to the trial judge's notations on the trial court's docket sheets by an appellate court, either through mandamus or appeal, is one immersed in controversy. The best practice is 1) for the trial judge to render the decision in open court; 2) for the trial judge to promptly note the decision, in sufficient detail, on the trial court's docket sheet; and 3) for the trial lawyer, whether or not he or she likes the rendered decision, to promptly submit a written document memoralizing the rendered decision to the trial judge for signature as soon as possible.

A trial lawyer's reliance on the idea that he or she will obtain relief based on some notation by the trial judge on the docket sheet will be risky business until there is some sense of agreement concerning the weight such notations will be given. On the other hand, when you are walking on thin ice, you might as well dance.

Local Practice Review: Tex. App. — Austin

By Jessie A. Amos [Staff Attorney, Third Court of Appeals, Austin];
Patrick Shannon [Chief Staff Attorney, Third Court of Appeals, Austin];
Nancy E. Green [Associate, Baker & Botts, Austin]

Although Tex. R. App. P. Ann. 1(b) allows each court of appeals to make local rules governing practice before the court, the Third Court of Appeals has not done so. Procedures of the court follow those set out in the Rules of Appellate Procedure. The following discussion, therefore, is a guide to how the court interprets and applies the rules. It is not all inclusive, but we have attempted to cover those subjects most often encountered by attorneys or about which the court most often receives questions.

Motion Practice In General. The majority of motions filed in the court are motions for extension of time. Rule 19 outlines the basic requirements for motions generally; Rule 73, the form and content of motions for extension of time specifically. Any motion for extension of time must, of course, "reasonably explain the need therefor." The motion must set out the facts relied upon for the reasonable explanation and, if the facts are not apparent from the record or known *ex officio* to the court, be supported by affidavits or other satisfactory evidence. The court usually finds the majority of explanations, other than deliberate noncompliance, to be reasonable and allows additional time. *See Garcia v. Kastner Farms, Inc.,* 774 S.W.2d 668 (Tex. 1989).

Rules 70, 71, and 72 govern the filing of motions to postpone argument, motions relating to informalities in the record, and motions to dismiss for want of jurisdiction. Parties may move for dismissal of a cause under rules 59 and 60. Parties seeking a voluntary dismissal should be sure that the relief requested affects the desired disposition of the cause. For example, parties who have settled a dispute and wish the cause remanded to the trial court for entry of an agreed judgment should so request in their motion. The parties may also agree who is to pay the costs of the proceeding.

Generally, the clerk of the court will request an amended motion if the initial one lacks required information. Motions, other than those for rehearing or those referable to a cause before a particular panel, are assigned to the panel the chief justice presides over when the motion is filed. Unless the matter is urgent, the opposing party is allowed at least 10 days to file a response. If the appellant files a motion to dismiss or if a motion is unopposed, the court usually disposes of the motion at its next motion conference after the expiration of 10 days. The court frequently will carry an appellee's motion to dismiss until consideration of the cause on the merits.

A party is not limited to the kinds of motions described in the rules. A motion is often a legitimate vehicle for bringing a matter to the court's attention.

Withdrawal And Substitution Of Counsel. The court demands strict compliance with rule 7. In criminal cases, the court will not permit appointed counsel to withdraw. The court will permit the substitution of appointed counsel, provided the motion to substitute is accompanied by an order of the trial court appointing the new attorney.

Time For Filing Record And Briefs. The court usually allows the requested amount of time for filing a transcript or statement of facts. Unless the situation is unusual, no more than a 30 day extension for filing a brief will be granted in any single motion. In criminal cases, the court ordinarily limits each party to three extensions of time for filing a brief; on the third motion, the party will be ordered to file a brief by the date requested.

Although there is no prescribed deadline for an appellant to file an extension of time to file a brief, the court, on its own motion, will dismiss a civil appeal for want of prosecution if an appellant fails to file a brief or motion for extension of time within 30 days after the due date. Although rule 74 generally prohibits the dismissal of a criminal appeal for nonprosecution, the court is of the opinion that this prohibition is not applicable to appeals by the State. *State v. Sanchez,* 764 S.W.2d 920 (Tex. App. 1989, no pet.) (State appeal dismissed for want of prosecution).

If a cause has not been set for submission, an appellee need not file a formal motion asking for additional time to file a reply brief. Instead, counsel need only write a letter to the clerk requesting an extension of time, which the court routinely approves. The submission date is the date for which the cause has been set for oral argument. If a cause will not be argned, submission is the date on which the appellee files its brief.

Content Of Briefs. "Briefs shall be brief." Tex. R. App. P. 74. The court imposes no limitations other than the 50-page limit of rule 74(h) and the double-spaced, if typewritten, provision of rule 74(j). The 50-page limit is applied in criminal, as well as civil, cases. A party who wishes to file a longer brief must file a motion requesting leave; such motions are infrequently granted. If a brief lacks any of the requisites set out in rule 74, the clerk asks the party to provide the omitted item before the brief is filed.

Briefs may be supplemented before submission of the cause without a mo-

tion; an amendment requires leave of court. An appellant may respond to appellee's brief without leave of court.

Rule 74(d), points of error, and 74(f), argument, demand particular attention. One of the main purposes of rule 74 is to present the substance of the point relied upon and to relieve the court from having to piece together a point from the transcript and statements of facts. A party should clearly and succinctly state the point of error and direct the court to the specific portion of the record where the matter complained of or the evidence relied upon is found. The court has, on more than one occasion, requested an appellant to rebrief to provide references to the record.

Oral Argument. Pursuant to Rule 75(f), a party who desires oral argument should file a request for it when the brief is filed. The court has no specific form for the request. A party may request oral argument in a cover letter accompanying the brief or on the front of the brief itself. The clerk checks for a request when the brief is filed. Therefore, the request should not be buried in an obscure place, such as the prayer for relief. One party's request generally permits all parties to argue. If a party fails to request argument at the time the brief is filed, the court usually grants a prompt motion requesting argument. The court may, in its discretion, deny an initial request and any subsequent requests.

The court sits in two three-judge panels whose membership changes each September 1 and February 1. Currently, the court sits each Wednesday, one panel at 8:30 a.m. and the other at 1:30 ;.m. As far as practical, the court honors rules 76 and 77 by scheduling oral argument in the order the causes are ready for submission and in granting motions for advancement of submission of appeals in which the State is a party.

When a cause is set, the clerk sends notice of the date and time for argument and asks the parties to acknowledge receipt of the notice in writing. The parties may then call the clerk to ask which judges compose the panel for which the cause is set, although the panels do remain subject to change.

In a routine civil appeal, the court allows 30 minutes for appellant's argument, 30 minutes for appellee's reply and 15 minutes for rebuttal. In criminal appeals, the usual time limit is 20 minutes for each side, with the appellant permitted to reserve a portion of his time for rebuttal. Parties should request additional time well in advance of argument; however, additional time is rarely granted. Parties must also obtain leave of court if more than two counsel are to be heard.

Motions For Rehearing. As with other motions, the court has no particu lar requirements for the form and content of motions for rehearing. Although a response is not required, the court does appreciate, and may request, a response, especially in a close or complicated case.

Parties increasingly are requesting rehearing en banc. Although an appellate court may set en banc, such a hearing is not favored. Since it became a six-judge court in 1982, the court has granted only one motion for rehearing en banc. Based upon its rulings to date, the court is unlikely to grant such a motion except in the most extraordinary circumstances.

Conclusion. In this article, we have attempted to address the high points pertaining to procedure in the Third Court of Appeals. Parties with questions are encouraged to call the clerk of the court, who in most instances can provide the needed information.

Toward More Picturesque Opinions

"[I]f it walks like an enforceable agreement, talks like an enforceable agreement, and quacks like an enforceable agreement, we will regard it as one. Crosspoint one is overruled." — Chief Justice Curtiss Brown in *Stein v. American Residential Management, Inc.*, 781 S.W.2d 385 (Tex. App. — Houston [14th Dist.] 1989, writ pending).

"It's lonesome to stand before Bench and Bar, without even a leaf to hide thee; / With error disclosed, yet tis better by far than to allow my pride to control me." — Chief Justice Ronald L. Walker, Beaumont Court of Appeals in a concurring opinion in the reversal of a case in which he was the trial judge. *Watson v. Isern*, No. 09-88-00210 (Tex. App. — Beaumont, Dec. 21, 1989, n.w.h.)(not yet reported).

Hard Questions About Electing Appellate Judges

An Essay By Roger Townsend
[Partner, Fulbright & Jaworski, Houston; Chair, Appellate Practice & Advocacy Section]

We once again face an election year with no change in our method of selecting appellate judges, but we can again expect the usual hue and cry on both sides of the issue. In addition, we face recent court rulings suggesting that appellate judges will have to be selected from single-member districts. Before the passions of the election year and pressures from the Federales distort our thinking, I would like to raise a few questions — but no answers — about our system of electing judges for the Texas appellate courts.

Before we talk about changing the system, perhaps we need to learn more about the system we actually have. For instance, does our electing, rather than appointing, judges encourage lawyers who have more of a political bent than a legal bent to run for judicial office? Do we in fact encourage former state legislators to run as judges to accomplish through the courts what they could not accomplish through the legislature? If either answer is yes, is that result desirable, and why?

By electing judges, do we tempt judges to write their opinions either as a thank you for their last election or with a view to the upcoming election? I am sure we all remember the last election when statements in certain opinions were used, albeit out of context, in campaign propaganda on television. Should appellate judges decide the issues based on the merits of the cases in front of them, rather than with an eye to the eventual effect on the electorate? Or, by contrast, do we wish to hold our judges accountable to the electorate by quoting their opinions in political advertisements?

Are elected judges less likely to hold that lawyers have waived error or have prosecuted a frivolous appeal? Are elected judges less likely to criticize counsel who are unprepared or who misrepresent matters at oral argument? Do we want judges who will do this?

We have seen the State Commission on Judicial Conduct state that the elective process inherently conflicts with the duty to avoid the appearance of impropriety. The opinion of that august body is entitled to due weight. Nevertheless, we have recently seen a former state judge quoted as saying that there was nothing wrong with appointing his friends as attorneys ad litem, even though it had the appearance of impropriety. Are judges who must submit to the electoral process tempted to ignore the prohibition against the appearance of impropriety mandated by the Code of Judicial Conduct? Are they forced to compromise the ideal in favor of the more practical goal of simply avoiding actual improprieties, despite their appearance? If so, should we be honest and repeal the ideal?

With regard to campaign financing, one interesting proposal was to have lawyers contribute through the Secretary of State's office, designating the judge to whom the money should be distributed, but without the judge's knowing who made the contribution. The only objection I have ever heard to that proposal is that contributions would disappear because no lawyer would ever contribute unless the judge knew his identity. What does that say about the perceived purpose behind campaign contributions? Is that what we want to say?

None of this is intended as a recommendation for reform; instead, I think we have failed to consider the fundamental values at stake in deciding whether reform is needed. We should know more about the subject we are discussing before we change it. The debate should focus forthrightly on the policy choices identified in this essay.

The Right Cite

By Ursula Weigold
[Assistant Professor, South Texas College of Law]

1.) The New Edition of the United States Code:

Any reference to a federal statute should cite to the United States Code, which is the official federal guide.

Unofficial codes, such as the U.S.C.A. or the U.S.C.S., are generally more useful in legal research because of their annotations and editorial features, but proper citation form is to the official U.S.C.

For a federal statute, cite the title number, the code abbreviation, the section number, and the year that appears on the spine of the volume, or the year listed on the title page, or the copyright year, in that order of preference.

E.g., 11 U.S.C. §362 (1988).

The first 21 titles of the United States Code have recently been reissued in a new 1988 edition. Thus, citation to federal statutes through title 21 will be to the 1988 code. Citation to statutes in the remaining titles will be to the old 1982 code and/or supplements.

2.) Restatements of the Law

Cite the name of the restatement, the section or rule, and the year the restatement was adopted. If the version you are citing includes subsequent amendments, give the year of the last amendment.

E.g.,Restatement (Second) of Property §8.1 (1976).

Restatements have been adopted for the following subjects:

Agency	Foreign Relations 2d	Restitution
Agency 2d	Foreign Relations 3d	Security
Conflict of Laws	Judgments	Torts
Conflict of Laws 2d	Judgments 2d	Torts 2d
Contracts	Property	Trusts
Contracts 2d	Property 2d	Trusts 2d

Did You Know?

A legal assistant's time may be recoverable as part of attorney's fees if he or she performs work that has traditionally been done by an attorney, and the record establishes the following: (1) the date the services were rendered; (2) a brief description of the work performed; (3) the time spent performing the work; (4) the qualifications of the legal assistant; (5) whether the task performed was of a substantive legal nature or the performance of clerical duties; and (6) the hourly rate charged for the legal assistant. *Gill Sav. Ass'n v. Int'l Supply Co.*, 759 S.W.2d 697, 705 (Tex. App. — Dallas 1988, writ denied). — *Catherine Bukowski,* Vinson & Elkins, Houston.

When a judgment has been reversed on appeal, the statement of facts from the previous trial may be offered as summary judgment proof. *Austin Bldg. Co. v. National Union Fire Ins. Co.*, 432 S.W.2d 697, 699 (Tex. 1968); *Executive Condominiums, Inc. v. State,* 764 S.W.2d 899, 901 (Tex. App — Corpus Christi 1989, writ denied). — *Clinard J. (Buddy) Hanby,* Essmyer & Hanby, Houston.

State Civil Appellate Update

By Mark E. Steiner
[Assistant Professor, South Texas College of Law]

TEXAS SUPREME COURT

If the appellant can't come up with a good reason for reversal, the court of appeals can't do it on its own.

San Jacinto River Authority v. Duke, 783 S.W.2d 209 (1990)(per curiam).

The supreme court affirms the trial court's summary judgment after the court of appeals had reversed on grounds not raised by the appellant. "A court of appeals may not reverse a trial court's judgment in the absence of properly assigned error." The appellant did not present any of the grounds for reversal to the trial court or the court of appeals, nor were they briefed or argued.

The court of appeals' inability to raise grounds for reversal *sua sponte* is a corollary to the rule that grounds of error not asserted by points of error or argument in the court of appeals are waived.

Nunc pro tunc slam dunk.

Shadowbrook Apartments v. Abu-Ahmad, 783 S.W.2d 210 (1990)(per curiam).

The supreme court holds that a trial court's denial of a motion for judgment nunc pro tunc is not appealable.

The plaintiffs in the trial court filed a motion for nonsuit against one defendant. The trial court, however, signed an order prepared by plaintiffs' counsel that dismissed the entire suit. The plaintiffs did not complain about this order of dismissal until more than 90 days after its signing. They then filed a motion for judgment nunc pro tunc, asking the trial court to amend its earlier order to dismiss the one defendant only. The trial court denied the motion.

The plaintiffs appealed to the court of appeals, which reversed the judgment of the trial court.

The supreme court holds that if the plaintiffs were appealing the dismissal order, then their appeal was not timely and the court of appeals lacked jurisdiction to hear the appeal. If the plaintiffs were complaining of the denial of their motion for judgment nunc pro tunc, then they were not appealing a final judgment. Appeals generally are allowed only from final judgments of a district or county court.

The court also notes that a trial court is without authority to nonsuit parties without a motion for nonsuit of those parties by the plaintiff. The court concludes by hinting that the plaintiffs may be entitled to mandamus relief.

A partial statement of facts will lead to a complete defeat unless you comply with the rules.

Christiansen v. Prezelski, 33 Tex. Sup. Ct. J. 163 (Jan. 10, 1990)(per curiam).

The supreme court holds that a court of appeals cannot properly find reversible error when it does not have a complete record of the case before it and the appellant has not complied with Tex. R. App. P. 53(d).

Here, the appellant requested that only part of the record be sent to the court of appeals but she apparently failed to include in the request "a statement of points to be relied on." (The court does not expressly state how the appellant failed to comply with rule 53.) If the appellant files such a statement, the court of appeals shall presume that nothing omitted portions are relevant to the appeal. The reviewing court then is unable to ascertain whether a particular ruling by the trial court is harmful in the context of the entire trial.

On properly appealing with a partial statement of facts, *see* Hanby, *Appealing with an Incomplete Statement of Facts,* Appellate Advocate (Fall 1988).

Supreme court can review motions for extensions of time in courts of appeals.

Nolan v. Ramsey, 783 S.W.2d 212 (1990).

The court holds that it may review a court of appeals' order granting or denying an extension to file a motion for rehearing, although the apparent authority to do so has disappeared.

The current rules of appellate procedure do not provide a basis for such review. The former procedural basis was Tex. R. Civ. P. 21 (c), which was repealed and not carried forward into the new appellate rules. The court, however, says that *Banales v. Jackson,* 610 S.W.2d 732 (Tex. 1980), which interpreted rule 21(c), has not been overruled and it provides a procedure for such review.

This reasoning, at first glance, seems strained. If a statutory cause of action is repealed, the case law on that statute does not establish a

cause of action because it has not been overruled. A sound basis exists for supreme court review, although it is not mentioned by the court. The court should be able to review the overruled motions for extension, despite the repeal of rule 21(c), because the court must protect its constitutionally granted jurisdiction.

It takes two judges to have a majority.

Hayden v. Liberty Mutual Fire Ins. Co., 33 Tex. Sup. Ct. J. 280 (Feb. 28, 1990)(per curiam).

Henry David Thoreau once observed that "any man more right than his neighbors constitutes a majority of one." Ignoring Thoreau, the supreme court has reversed the Beaumont court of appeals' attempt to issue an opinion with a "majority of one."

This appeal originally was argued in the court of appeals in June 1989, with then Chief Justice Dies presiding. The opinion was issued in September 1989, after Judge Dies had resigned. The "majority" opinion was by Judge Brookshire, and Judge Burgess filed a dissent. Judge Dies' successor was shown as "not participating."

Hayden moved for rehearing, arguing that the court's opinion was not decided by a majority of the court. The court answered that Judge Dies had heard oral argument and had concurred with Judge Brookshire's opinion. "Hence, a majority of the court did agree to and did deliver the court's opinion."

The supreme court disagrees. The Texas constitution provides that a "concurrence of a majority of the judges sitting in a section is necessary to decide a case." In the Beaumont court of appeals, "the concurrence of a majority of the judges sitting on that court is required to decide a case." Judge Dies did not have the authority to participate in the decision.

Summary judgment that does not dispose of all issues pending in a counterclaim is an interlocutory judgment.

Chase Manhattan Bank, N.A. v. Fourteenth Court of Appeals, 33 Tex. Sup. Ct. J. 278 (Feb. 28, 1990).

The supreme court grants mandamus relief against the court of appeals, which had denied relief, in this dispute over whether a judgment is final.

The bank brought a deficiency action against Greenbriar North section II, which filed a counterclaim alleging wrongful foreclosure, breath of contract, and breach of the duty of good faith and fair dealing. The trial court granted Greenbriar's motion for summary judgment on the deficiency claim. When the bank later attempted to compel discovery, the trial court ruled that the summary judgment order had disposed all parties and issues before the court, and the court had lost its plenary jurisdiction. The court of appeals denied the Bank's request for mandamus relief, holding that the order granting summary judgment was final.

If a summary judgment does not refer to or mention the issues that are pending in a counterclaim, then those issues have not been adjudicated. In this case, the order granting summary judgment does not mention or refer to all of the issues in the counterclaim and, therefore, it is interlocutory.

The supreme court incorrectly granted relief against the court of appeals. The court states that the action of the court of appeals in denying the motion for leave to file is contrary to case law and constitutes an abuse of discretion. However, when a relator in the court of appeals is denied mandamus relief in that court, the mandamus proceeding in the supreme court should be against the trial court. A party brings a mandamus action against the court of appeals only when the court of appeals grants relief. The proper relief in this case is against the trial court. Once again, it appears that the supreme court, on an institutional level, has a problem with mandamus practice.

COURTS OF APPEALS

Trial court striking motion for new trial is not an appropriate sanction under Tex. R. Civ. P. 215.

Lehtonen v. Clarke, No. A14-88-00916-CV (Tex. App. — Houston [14th Dist.] Jan. 18, 1990, n.w.h.) (not yet reported).

The Fourteenth Court of Appeals holds that a trial court does not have the authority to strike a motion for new trial under Tex. R. Civ. P. 215. The trial court had ordered appellant's motion for new trial dismissed with prejudice as punishment for his failing to furnish interrogatory answers.

The court states that rule 215 does not expressly grant a trial court the power to strike a motion for new trial. Nor does the court consider such an action as "just" under the rule; it interferes with the appellate process.

Mandamus practice: The filing of a motion for leave in the supreme court is not a prerequisite for filing a motion for rehearing in the court of appeals.

Lowe v. Hollem, No. 05-90-00065-CV (Tex. App. — Dallas, Feb. 14, 1990, orig. proceeding)(not yet reported).

The lesson in this mandamus proceeding is clear: a relator

should not file a motion for rehearing in the court of appeals after filing a motion for leave to file in the supreme court.

The court of appeals originally overruled relator's motion for leave to file a petition for writ of mandamus. Relator sought mandamus review in the supreme court and also filed a motion for rehearing in the court of appeals. That court granted relator's motion for rehearing and granted leave to file, and then discovered that relator had sought relief in the supreme court. The supreme court denied relator's motion for leave to file.

The court of appeals withdrew its order granting rehearing when it discovered that relator had not disclosed his actions in the supreme court. The court states that "relator's counsel was under an obligation to furnish this Court with all facts relevant to the proceeding, particularly the fact that the same relief had been sought by relator in the Texas Supreme Court and that such court had denied relator leave to file." The court concludes that relator's application failed to set forth all facts necessary to establish his right to the relief sought.

The court does not address the interesting question of whether relator's filing the motion for leave actually divests the court of jurisdiction to entertain the motion for rehearing.

No right to hybrid representation in civil appellate cases.

Posner v. Dallas County Child Welfare Unit, No. 11-89-00054-CV (Tex. App. — Eastland, Feb. 15, 1990, n.w.h.)(not yet reported).

The Eastland court holds that a civil litigant is not entitled to hybrid representation on appeal. If counsel files a brief, then a pro se brief presents nothing for review.

Appellate Judge Ronald Walker concurs in reversing Trial Judge Ronald Walker.

Watson v. Isern, No. 09-88-00210CV (Tex. App. — Beaumont, Dec. 21, 1989, n.w.h.)(not yet reported).

Justice Walker of the Beaumont Court of Appeals sat in review of then trial judge Walker and found the trial judge wanting. Concurring in the reversal of a case he tried as judge, Justice Walker agrees with the judgment "embarrassedly but not silently." Justice Walker thus becomes the only appellate judge in recent memory to admit making a mistake.

Ralph H. Brock earlier noted in these pages [Vol. I, No. 3 (Spring, 1988), at 10] that an appellate judge who was the trial judge below not only is qualified to sit in review of his own judgment on appeal, but he has a duty to do so to break a tie between two other judges who cannot agree.

Mandamus relief available for improper plea of abatement.

Trapnell v. Hunter, No. 13-90-00007-CV (Tex. App. — Corpus Christi, Feb. 1, 1990, orig. proceeding)(not yet reported).

The Corpns Christi Court of Appeals holds that when the trial court sustains a plea in abatement, the plaintiff may not challenge the abatement while the lawsuit remains in a suspended state. "Because a trial judge may not arbitrarily halt trial proceedings, mandamus will lie to compel a trial judge to proceed to trial and judgment in a case pending in his court."

State Criminal Appellate Update

By Alan Curry
[Assistant District Attorney, Harris County, Houston]

COURT OF CRIMINAL APPEALS

No petition for discretionary review from interlocutory order of court of appeals.

Williams v. State, 780 S.W.2d 802 (Tex. Crim. App. 1989).

The State was not entitled to bring a petition for discretionary review from an order by the court of appeals abating the appeal and remanding the case to the trial court for a hearing. The court of criminal appeals will not entertain a petition for discretionary review from an interlocutory order of the court of appeals. *See Measles v. State,* 661 S.W.2d 732 (Tex. Crim. App. 1983). *Dugard v. State,* 688 S.W.2d 524 (Tex. Crim. App. 1985) is overruled.

COURTS OF APPEALS

State's notice of appeal does not have to be signed by district or county attorney.

State v. Barker, 780 S.W.2d 927 (Tex. App. — Austin, 1989, no pet.).

In a State's appeal, if the notice of appeal states that the notice of appeal is being presented by and

through the county attorney, the notice of appeal is sufficient even if it is not signed by the district or county attorney. *Cf. State v. Peck,* No. 3-89-111-CR (Tex. App. — Austin, Oct. 4, 1989) (not yet reported).

In appeal from dismissal of indictment or information, State is not required to attempt to amend indictment or information if dismissal was based upon unconstitutionality of underlying statute.

State v. Eaves, No. 7-89-304-CR (Tex. App. — Amarillo, Jan. 18, 1990)(not yet reported).
In a State's appeal from an order granting a defendant's motion to amend the indictment or information based upon the alleged unconstitutionality of the underlying statute, the State is not required to first file a motion to amend the indictment or information before pursuing the appeal. *Cf. Hancox v. State,* 762 S.W.2d 312 (Tex. App. — Fort Worth 1988, pet. ref'd).

State cannot rely upon defendant's motion for new trial in order to extend its time for filing of notice of appeal and the appellate record.

State v. Daniels, Nos. 4-89-92-CR to 97-CR (Tex. App. — San Antonio, Dec. 22, 1989)(not yet reported).

In a state's appeal from an order granting a motion for new trial, the filing of the motion for new trial by the defendant does not enlarge the time during which the State must perfect its appeal and file the record in the court of appeals.

Omission of portions of the appellate record does not require an automatic reversal.

Atuesta v. State, No. 1-88-1194-CR (Tex. App. — Houston [1st Dist.], Jan. 18, 1990)(not yet reported).

The failure of the court reporter to record the trial court's instructions to the jury given before voir dire did not require a reversal because there was no allegation that the omitted portion of the record contained matters harmful to the defendant and there was no allegation that the omission hampered the defendant's appeal in any way. *See Harris v. State,* No. 69,366 (Tex. Crim. App., June 28, 1989)(not yet reported) (slip opinion at 7). *Cf. Sheffield v. State,* 777 S.W.2d 743 (Tex. App. — Beaumont 1989, no pet.).

Court of appeals will consider record from prior trial if both parties agree.

State v. Torres, 780 S.W.2d 513, 514 n.2 (Tex. App. — Corpus Christi 1990, no pet.).

In State's appeal from a motion to dismiss an indictment, which was granted based upon a claim of double jeopardy, the court of appeals would consider the transcript of the proceedings under the prior indictment even though it was not offered into evidence. "We will consider the record from the prior trial since there appears to be no dispute between the parties that the record forwarded to us on appeal is the record of the prior trial and because there appears to be no dispute concerning what we believe are the material events which occurred at the prior trial."

Court of appeals will strike appellant's brief if it is identical to briefs filed in previous unsuccessful appeals.

Mazuera v. State, 778 S.W.2d 192 (Tex. App. — Houston [1st Dist.] 1989, no pet.).

Where the appellant's attorney raised identical points of error and filed a brief that was largely identical to other briefs he had filed in previous appeals involving different defendants who had been convicted of the same offense, the court of appeals would grant the State's motion to strike the appellant's brief where the defendants' convictions in those prior cases had been affirmed. The appellant's attorney was ordered to file another brief. *See* Tex. R. App. P. 74(o); Texas Code of Professional Responsibility DR 7-102(A)(2); Texas Code of Professional Responsibility EC 7-23.

In a *Batson* appeal, defendant cannot present, for the first time on appeal, argument or evidence to rebut trial prosecutor's racially neutral reasons for peremptory challenges.

Gardner v. State, 782 S.W.2d 541, 545 (Tex. App. — Houston [1st Dist.] 1989, pet. filed).

Vargas v. State, 781 S.W.2d 356, 359-60 (Tex. App. — Houston [1st Dist.] 1989, pet. granted).

A defendant cannot present, for the first time on appeal, arguments or evidence rebutting the trial prosecutor's racially neutral reasons for making his peremptory challenges that were presented at trial in order to defeat the defendant's claim under *Batson v. Kentucky,* 476 U.S. 79 (1986). *See Tompkins v. State,* 774 S.W.2d 195, 203 n.6A (Tex. Crim. App. 1987).

Federal Civil Appellate Update

By W. Wendell Hall
[Partner, Fulbright & Jaworski, San Antonio]

FIFTH CIRCUIT COURT OF APPEALS

Order preventing party from taking further action in state or federal courts appealable.

Phillips v. Chas. Schreiner Bank, 894 F.2d 127 (5th Cir. 1990).

28 U.S.C. § 1292(a)(1) authorizes appeals from interlocutory orders that grant or deny injunctions but it does not authorize appeals from orders that compel or restrain conduct pursuant to the court's authority to control proceedings before it, even if the order is cast in injunction terms. In this case, the district court's order prevented Schreiner Bank from taking any "further action in any state or federal court," and is therefore appealable under § 1292(a)(1).

Standard of review of Rule 12(b)(6) motions.

Bell & Murphy Assoc. v. InterFirst Bank Gateway, Inc., No. 89-1719 (5th Cir. 1990).

When reviewing a Fed. R. Civ. P. 12(b)(6) order of dismissal, the Fifth Circuit accepts the material allegations of the complaint as true and construes them in the light most favorable to the non-moving party.

Premature notice of appeal held untimely.

Barnett v. Petro-Tex Chemical Co., 893 F.2d 800 (5th Cir. 1990).

On January 9, 1989, the Broughton plaintiffs filed a motion for reconsideration of the district court's order granting summary judgment to all of the defendants entered on December 30, 1988. On January 25, 1989, the Barnett plaintiffs filed their notice of appeal. On January 30, 1989, the district court's order denying the motion for reconsideration was entered. On February 24, 1989, the Broughton plaintiffs filed their notice of appeal. The Fifth Circuit held that the Barnett's premature notice of appeal filed before the disposition of the Fed. R. Civ. P. 59(e) was ineffective. A Rule 59(e) motion filed by any party causes the time for appeal for all parties to run from the entry of the order, and renders the notice of appeal filed before the disposition of the motion of no effect.

Use of "et al." in notice of appeal insufficient for all parties.

Barnett v. Petro-Tex Chemical Co., 893 F.2d 800 (5th Cir. 1990).

The Broughton notice of appeal was captioned with the name of "Troy D. Barnett, et al.," and stated that "Robert H. Broughton, et al., plaintiffs" were appealing the case. The Fifth Circuit held that the notice of appeal was effective for Robert H. Broughton only and not for any of the other plaintiffs. Strict compliance with Fed. R. App. P. 3(c), requiring a notice of appeal specify the party or parties taking the appeal, is jurisdictional. However, the court held that reading the caption and the text together gave sufficient notice of the identity of the appellants — Robert H. Broughton and Troy D. Barnett — but no others.

Use of "et al." in notice of appeal held sufficient under the facts of the case.

Brotherhood of Railway Carmen v. Atchison, T & S F Ry Co., No. 88-7012 (5th Cir. Feb. 28, 1990).

The notice of appeal filed by the union's designated "Brotherhood of Railway Carmen (division of TCU), et al." as the appellants. None of the other five plaintiff unions were specifically named in the notice. Again addressing the question of whether the "et al." designation in the notice of appeal was sufficient under Fed. R. App. P. 3 to perfect an appeal for the five plaintiff unions not specifically named in the notice, the Fifth Circuit held that although five of the plaintiff unions were designated only as "et al." in the notice of appeal, the defect was cured by the fact that all six plaintiff unions were listed by name as appellants in a memorandum in support of appellants' motion for injunction pending appeal. The supporting memorandum was filed within 30 days of the district court's judgment dismissing the case. Thus, within the 30-day period in which notice of appeal may be filed, all six unions seeking to appeal were clearly identified to both the appellees and the court. Therefore, the notice was sufficient under Rule 3(c).

Denial of motion for continuance to conduct discovery before hearing on summary judgment motion reviewed for abuse of discretion.

Carriere v. Sears, Roebuck and Co., No. 89-3089 (5th Cir. Feb. 2, 1990).

Whether a district court's denial of a non-moving party's motion for continuance in order to conduct

discovery before the hearing on a motion for summary judgment is governed by an abuse of discretion standard of review.

Standard of review for improper jury argument.

Guaranty Serv. Corp. v. American Employers' Ins. Co., 893 F.2d 725 (5th Cir. 1990).

During closing argument, counsel for the insurance company characterized the insured as "greedy," implied that most of the insured's witnesses had lied, and stated that exaggerated insurance claims were the cause of increased insurance premiums. The court sustained the insured's objections to the arguments and admonished counsel not to make "conscience of the community" arguments and later instructed the jury that the statements of counsel were not to be regarded as evidence. The insured claimed that the improper statements created a hostile jury environment for it and that it was entitled to a new trial. The Fifth Circuit held that "[w]hen a closing argument is challenged for improprietary or error, the entire argument should be reviewed within the context of the court's rulings on objections, the jury charge, and any corrective measures applied by the trial court. Alleged improprieties may well be cured by an admonition or charge to the jury." The court added that "conscience of the community" arguments become improper when the parties' relative popular appeal, identities, or geographical locations are invoked to prejudice the viewpoint of the jurors. Here, the court held that the three comments made by the insurance company's counsel did not create in the jury the "us-against-them" attitude that the court warned against in *Westbrook v. General Tire & Rubber Co.,* 754 F.2d 1233, 1238 (5th Cir. 1985).

Daniel v. Ergon, Inc., No. 88-4611 (5th Cir. Jan. 10, 1990).

In this case of alleged improper jury argument, the Fifth Circuit observed that in determining the effect of statements made during closing argument, it would consider the record as a whole and not merely isolated remarks. Thus, appellate review is limited to plain error where no objection is made at trial, and if a timely objection is made, the focus is on whether a substantial right of the objecting party is impaired. While the defendants' objection was not made until the conclusion of closing argument, the court did not decide the proper standard in such a case because even under the more lenient standard, substantial rights of the defendants were not impaired.

Second appeal governed by law of the case doctrine.

Knotts v. United States, 893 F.2d 758 (5th Cir. 1990).

Raising issues in a second appeal that had been raised and disposed of in a previous appeal are governed by the "law of the case" doctrine. Thus, an appellate court decision rendered a one stage of a case constitutes the law of the case in all succeeding stages. The scope of the doctrine is limited in that it applies only to issues that were decided in that former proceeding and does not pertain to questions that might have been decided but were not. Nevertheless, the doctrine encompasses issues decided by "necessary implication" as well as those decided explicitly.

District court's apportionment of fault reviewed under clearly erroneous standard.

Knotts v. United States, 893 F.2d 758 (5th Cir. 1990).

In this federal tort claims act case, the Fifth Circuit held that the review of a district court's apportion of the fault between the parties in a tort case is governed by the "clearly erroneous" standard of review. Thus, the court may not alter the apportionment unless it is convinced that the district court's determination was in fact clearly erroneous.

District court's discovery sanction for failure to designate experts pursuant to the scheduling order upheld.

Geiserman v. MacDonald, 893 F.2d 787 (5th Cir. 1990).

The plaintiff in this case missed two deadlines pursuant to the district court's pretrial order for designating expert witnesses. As a result, the court prevented the plaintiff from presenting expert testimony to support his claims of legal malpractice, and the plaintiff appealed. The Fifth Circuit held that the court's order striking the lay expert witness desiguation and precluding any expert witness testimony involved both the enforcement of a scheduling order and the enforcement of local rules that would be reviewed under the abuse of discretion standard. Therefore, absent a clear abuse of discretion, the district court's decision to exclude evidence as a means of enforcement of a pretrial order would not be disturbed.

The plaintiff also argued that he had established good cause for the lay designation by establishing that the failure to timely designate the expert witnesses was caused by an alleged scheduling mistake in counsel's office. The Fifth Circuit held that it would review the district court's exercise of discretion to exclude evidence that was not properly designated by considering the following four factors: the explanation for the failure to identify the witness; the importance of the testimony; potential prejudice in allowing the testimony; and the availabili-

ty of a continuance to cure such prejudice. The court held that the plaintiff's scheduling mistake in his counsel's office is not the type of satisfactory explanation for which relief may be granted; that the expert testimony was significant to the plaintiff's case; that the defendant's trial strategy was affected by the plaintiff's delay in designating any expert witnesses; and that a continuance would not deter a future dilatory behavior, nor serve to enforce local rules or court imposed scheduling order. Thus, the Fifth Circuit held that the district court's refusal to modify the scheduling order and in its enforcement of the time deadlines was not an abuse of discretion.

New argument generally may not be raised in petition for rehearing.

Browning v. Navarro, 894 F.2d 99 (5th Cir. 1990).

In this opinion on petition for rehearing, the Fifth Circuit held that generally, a party may not raise an argument for the first time in a petition for rehearing.

Standard of review of directed verdict or judgment notwithstanding the verdict.

Treadway v. Societe Anonyme Louis-Dreyfus, No. 88-3838 (5th Cir. Feb. 14, 1990).

The standard of review for motions for directed verdict and for judgment notwithstanding the verdict is based on the principle that "it is the function of the jury as the traditional finder of fact, and not the court, to weigh conflicting evidence.... Thus, the Fifth Circuit held that these motions are inappropriate to reverse a jury's decision unless consideration of all of the evidence and inferences favorable to the non-moving party convinces the court that no reasonable jury could arrive at a contrary verdict. Additionally, the decision to grant or deny a motion for new trial is a matter for the trial court's discretion and will be reversed only for an abuse of that discretion. Thus, when the district court refuses to grant a new trial, all the factors that govern a review of his decision favor affirmance."

Standard of review of directed verdict or judgment notwithstanding the verdict.

Robinson v. Bump, No. 88-4377 (5th cir. Feb. 22, 1990).

In determining whether the district court committed an abuse of discretion in granting or denying a motion for directed verdict or for judgment notwithstanding the verdict, the Fifth Circuit considers the entirety of the evidence. The court observed that there must be substantial evidence opposed to the motions in order for the case to be submitted to the jury. *See Stokes v. Georgia Pacific Corp.,* No. 89-4403 (5th Circ. Feb. 22, 1990).

Suspension of discovery pending resolution of summary judgment motion held not an abuse of discretion.

Landry v. Air Line Pilots Ass'n Int'l AFL-CIO, 892 F.2d 1238 (5th Cir. 1990).

The court found no abuse of discretion. The district court's suspeusion of discovery pending its decision on a motion for summary judgment. The suspension might have resolved an issue that would have precluded altogether the need for discovery, thus saving time and expense. The appellant complained that the stay of discovery pending the resolution of the summary judgment motions was error. The Fifth Circuit held that the district court possesses broad discretion in supervising discovery and the stay of discovery is reviewed for an abuse of discretion.

Two-tiered standard of review used to review attorney's fee award under § 1988.

Blanchard v. Bergeron, 893 F.2d 87 (5th Cir. 1990).

In reviewing the overall amount of a prevailing party's fee award pursuant to 42 U.S.C. § 1988, the Fifth Circuit reviews the fee award to determine whether the district court abused its discretion. The district court's findings of subsidiary fact govern unless they are clearly erroneous. If the district court articulates and clearly applies the criteria for analyzing § 1988 attorneys' fees request (that is that the findings are complete enough to determine whether the court has used proper factual criteria in exercising its discretion to fix just compensation), then the fee award will be affirmed. While the attorney fees award was vacated and remanded for further consideration, the Fifth Circuit did note that, while not controlling, the plaintiff requested four times as much in attorneys' fees as defense counsel charged for the case. The case was vacated and remanded essentially because the district court's findings were too vague to enable the court to properly review the fee award.

Summary judgment may be affirmed on grounds other than those relied upon by the district court.

Bernhardt v. Richardson-Merrel, Inc., 892 F.2d 440 (5th Cir. 1990).

In this summary judgment case, the Fifth Circuit observed that it may affirm a grant of summary judgment on grounds other than those stated by the trial court. [This is a significant difference from the Texas courts' review of summary judgments.]

Unobjected to instruction reversible if it results in a miscarriage of justice.

Johnson v. Helmerich & Payne, Inc., 892 F.2d 422 (5th Cir. 1990).

The appellant complained that the district court erred by not charging the jury on the theory of strict liability. However, the appellant did not object to the jury instructions. The Fifth Circuit carved out an exception to Fed. R. Civ. P. 51 that permits review of an instruction, even if it is not objected to when the error is so fundamental as to result in a miscarriage of justice. Because the plain error exception to Rule 51 is a narrow one, if a party fails to object to jury instructions, the Fifth Circuit will uphold them on appeal if there is any reasonable basis to support them. Based upon the record, the Fifth Circuit held that the district court did not commit plain error.

District judge's conduct during trial measured by two standards; if there is an objection, it is reviewed to determine if a substantial right of the party was impaired, and if there is no objection, it is reviewed for plain error.

Johnson v. Helmerich & Payne, Inc., 892 F.2d 422 (5th Cir. Jan. 24, 1990).

The appellants argned that the district court denied them a fair trial by displaying bias for the appellees by interrupting appellants' counsel, by commenting unfairly on the evidence, and by not adequately controlling unresponsive answers given by the appellee's witnesses. The Fifth Circuit held that a district judge in a jury trial is governor of the trial for purposes of assuring its proper conduct and of determining questions of law and that he has the right and the duty to comment on the evidence to insure a fair trial. The court noted that the district court judge is also obliged to act to insure that the trial is properly conducted and not subject to delay, noting that the trial judge must exercise these powers in a reasonable manner by maintaining his objectivity in neutrality. The trial court's conduct is measured against a "standard of fairness and impartiality." When reviewing a judge's conduct, the standard of review depends upon whether an objection was made at trial: "when a timely objection is made at trial, we must determine whether the remark impaired a substantial right of the objecting party, but when a trial judge's comments deny a party an opportunity for a fair and impartial trial, we will not deny review in the absence of objections because lawyers will often hesitate to challenge the propriety of a trial judge's comments for fear of antagonizing him and thereby prejudicing their client's cases . . . when no objection is made at trial, however, appellate review is limited to plain error." In this case, the appellants did not object to the district court's comments. Therefore, based upon the plain error standard of review, the court affirmed, particularly since any potential prejudice was adequately cured by the district court's instructions to the jury both at the beginning and at the end of trial to ignore his comments and to be the sole judge of the facts (which is required if the district judge comments on the evidence).

Bankruptcy court findings reviewed identically to district court's findings.

In re Killebrew, 888 F. 2d 1516 (5th Cir. 1989).

In this bankruptcy case, the Fifth Circuit held that even though the bankruptcy case has been reviewed on appeal by the district court, the Fifth Circuit engages in review of the bankruptcy court's findings just as it would in an appeal coming from trial in a district court; thus, the Court applies the clearly erroneous standard in reviewing findings of fact by the bankruptcy court, and decides issues of law de novo.

Leave to amend reviewed for abuse of discretion.

Dole v. Mr. W Fireworks, Inc., 889 F.2d 543 (5th Cir. 1989).

Whether a district court's decision to grant or deny leave to amend pursuant to Fed. R. Civ. P. 15(a) is governed by the abuse of discretion standard of review. In this case, although Rule 15(a) provides that leave to amend "shall be freely given when justice so requires," justice did not so require in this case because the appellant was simply attempting to try the issues once more.

Texas court of appeals' decision binding where Texas Supreme Court declines a certified question from the Fifth Circuit and where there is no Texas Supreme Court authority.

Exxon Co., U.S.A. v. Banque de Paris et des Pays-Bas, 828 F.2d 1121 (5th Cir. 1989).

After certifying a question to the Texas Supreme Court and the Texas Supreme Court ordering that the question be "declined without answer," the Fifth Circuit held that a federal court in diversity jurisdiction was bound to follow precedence of the state court of appeals. The Banque De Paris contended that the controlling court of appeals' decision was deficient in that the Texas Supreme Court's notation "writ denied" and the refusal of the Texas Supreme Court to order publication of the opinion (even though the court of appeals belatedly ordered its publication) compelled the conclusion that reliance on the opinion was improper. The Fifth Circuit held that "writ denied" does not only mean that it is dissatisfied with the court of appeals' statement of the law, rather, the

notation is used also in those cases in which, for one reason or another, it chooses not to grant review. The Fifth Circuit noted that even if it concluded that the Texas Supreme Court was not satisfied that the court of appeals had correctly stated the law, "in all respects" it was not clear what the Court should make of the Texas Supreme Court's dissatisfaction. Furthermore, the Fifth Circuit held that the Texas Supreme Court's refusal to order publication of the court of appeals' opinion is even more indeterminate than the implications of that court's "denial" of writs. Accordingly, the Fifth Circuit held that it was bound by the court of appeals' interpretation of Texas law.

Insufficient record does not preclude review of case in its entirety.

Coats v. Pierre, No. 88-2308 (5th Cir. Dec. 18, 1989).

Fed. R. App. P. 10(b)(2) requires that if a finding or conclusion is challenged as contrary to the evidence, the appellant must include in the record on appeal "all evidence relevant to such finding or conclusion." The appellant failed to include in the record on appeal a transcript of the district court's decision to grant the directed verdict, with its recitation of reasons for doing so, along with the transcripts of the testimony of several witnesses, and the appellant withdrew all of its exhibits after trial rendering them unavailable to the appellate court. The appellees argued that the incomplete record precluded review of the case. The Fifth Circuit held that although a judge is not required by the Federal Rules of Civil Procedure to recite his reasons for granting a directed verdict, the court has often stated that a reasoned statement is helpful not only to counsel but also to the appellate court. Thus, in all but the simplest case, such a statement usually proves not only helpful, but essential. Accordingly, the failure of an appellant to provide the statement is a proper ground for the dismissal of the appeal, however, it is not mandatory. In reviewing whether to grant an appellee's motion to dismiss an appeal for failure to provide a transcript, the Fifth Circuit has observed that "it is clear that the dismissal of an appeal for failure to provide a complete transcript of the record on appeal is within the discretion of the court. The court is also mindful that 'the drastic sanction of dismissal should not be imposed for minor infractions of the rule.' Thus, the Court, having considered the pleadings before it and having weighed the relative hardship and prejudice to the parties, together with an examination of the applicable law, concludes, in its discretion, that it should not dismiss the appeal but should decide those issues which can be reached on the record before it." Although the Fifth Circuit chose not to dismiss the appeal, the scope of its review was necessarily limited to reviewing the available transcripts and determining whether the evidence contained in them was sufficient to raise a jury question. The Court held that it was not.

District court's dissolution of injunction pending appeal does not moot the appeal.

Coastal Corp. v. Texas Eastern Corp., 869 F.2d 817 (5th Cir. 1989).

During the pendency of an appeal of the grant of a preliminary injunction, the district court dissolved the injunction. The appellee argued that the dissolution of the injunction mooted the appeal. The Fifth Circuit held that the district court lacked authority to dissolve the injunction. The Court held that after an appeal has been filed in an injunction action, the district court may not alter the injunction except to maintain the status quo of the parties.

Law of the circuit rule prevents one panel from overruling prior panel's decision.

Brown v. United States, 890 F.2d 1329 (5th Cir. 1989).

In this taxpayer case, the Fifth Circuit noted the well established "law of the circuit" rule under which one Fifth Circuit panel may not overrule the decision, right or wrong, of a prior panel.

Admission of "facts" in appellate briefs held reversible error in a later trial.

Hardy v. Johns-Manville Sales Corp., 851 S.W.2d 742 (5th Cir. 1988).

In this case, the Fifth Circuit held that the trial court's evidentiary ruling was reversible error. The trial court admitted into evidence excerpts from appellate briefs filed in unrelated actions involving insurance coverage for injuries resulting from asbestos exposure. The court held that since facts contained in appellate briefs are not facts in the real world, but rather are merely of what the trial record reflects, the evidence is not admissible. Thus, excerpts from such appellate briefs may not properly be regarded as party admissions.

Preemption and subject matter jurisdiction are subject to de novo review.

Windfield v. Groen Division, 890 F.2d 764 (5th Cir. 1989).

In this case, the Fifth Circuit observed that preemption by federal law is a question of law reviewable de novo and that the district court's conclusion regarding subject matter jurisdiction is also reviewed de novo.

Admissibility of evidence subject to two-tiered review in certain circumstances.

Stokes v. Georgia Pacific Corp., No. 89-4403 (5th Cir. Feb. 22, 1990).

Generally, a district court's ruling on a motion for new trial is reviewed for an abuse of discretion. The Fifth Circuit observed, however, that the standard of review is somewhat narrower when a new trial is denied and somewhat broader when a new trial is granted. Nevertheless, all the evidence must be viewed in a light most favorable to the jury's verdict, and the verdict must be affirmed unless the evidence points so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary conclusion.

Personal jurisdiction is a question of law reviewed de novo where facts are not in dispute; where facts are in dispute it is reviewed to determine if the plaintiff established a prima facie case.

Bullion v. Gillespie, 895 F.2d 213 (5th Cir. 1990).

A district court's determination that personal jurisdiction can be exercised over a nonresident defendant is a question of law, reviewable de novo when the facts are not disputed. However, where the alleged facts are disputed, the party who seeks to invoke the jurisdiction of the district court bears the burden of establishing contacts by the nonresident defendant sufficient to invoke jurisdiction of the court. Thus, on a motion to dismiss for lack of jurisdiction, uncontroverted allegations in the plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits must be resolved in the plaintiff's favor to determine whether a prima facie case for personal jurisdiction exists. Because the district court failed to recognize that the plaintiff needed only to establish a prima facie case of personal jurisdiction at this pretrial proceeding, the Court found reversible error.

Where district court acts as a bankruptcy court, statute regarding appeals from bankruptcy courts to district courts does not apply.

In re Topco, Inc., No. 88-2986 (5th Cir. Feb. 20, 1990).

When a district court acts as a bankruptcy trial court, that is, when it does not review a bankruptcy court decision, the statute governing appeals to district courts from bankruptcy courts does not apply.

Tardy arguments raised in post-trial motions are not favored.

Risher v. Aldridge, 889 F.2d 592 (5th Cir. 1989).

The plaintiff belatedly raised a new argument in her motion for new trial. The Fifth Circuit observed that the Court does not look with favor upon tardy arguments that are brought to the district court's attention after counsel has had an opportunity to salvage what she may from the record. Since the district court considered and overruled the argument, the Fifth Circuit reviewed the argument and affirmed. ♣

Federal Criminal Appellate Update

By Joel Androphy
[Partner, Berg & Androphy, Houston]

COURTS OF APPEALS

Fifth Circuit overrules case that held mens rea not an elemeut of possession of an unregistered automatic weapon.

United States v. Anderson, 885 F.2d 1248 (5th Cir. 1989)(en banc).

The Fifth Circuit holds that mens rea is an element of 26 U.S.C. §5861, overruling a 1973 decision. That act makes possession of unregistered automatic weapons a felony. The Fifth Circuit, upon reconsideration, construed the act to require a culpable mental state, as a contrary construction might needlessly subject "millions of Americans" to "a possible ten year term of imprisonment."

Implied consent to mistrial order precludes application of double jeopardy.

Camden v. Circuit Court of Second Judicial Circuit, 892 F.2d 610 (7th Cir. 1989).

Habeas petitioner whose state criminal trial was declared a mistrial argued that retrial was barred by double jeopardy clause. The trial judge declared a mistrial after learning that one of jurors had expressed to sheriff and other jurors his inability to be impartial. The Seventh Circuit held that defendant's failure to object to mistrial amounted to an implied consent. Because neither government nor the trial court attempted to goad the defense to assent to a mistrial, the double jeopardy clause was not a

bar to retrial.

Miranda defective evidence held harmless error.

Campaneria v. Reid, 891 F.2d 1104 (2nd Cir. 1989).

Admission into evidence during habeas petitioner's state court trial of tape recorded interrogation taken in violation of *Miranda* was harmless beyond a reasonable doubt. The panel held that interrogation taken after Campaneria indicated that he did not wish to talk to the officer violated *Miranda.* The court determined that because Campaneria earlier had made the incriminating statements included in the taped interrogation and because of the strength of the State's case, the admission of the *Miranda* defective evidence was harmless beyond a reasonable doubt.

Profile evidence held inadmissible to prove guilt.

United States v. Quigley, 890 F.2d 1019 (8th Cir. 1989).

The Eighth Circuit joins the Eleventh and Ninth Circuits in holding that drug courier profiles may not be used as evidence of guilt. Quigley was stopped for speeding and subsequently arrested on an outstanding warrant. While inventorying the contents of the car, the arresting officer discovered one kilogram of cocaine. At trial the prosecution offered testimony that Quigley fit a drug courier profile for the purpose of showing that Quigley intended to distribute cocaine. The appeals court, however, affirmed the convictions finding the error to be harmless.

In camera hearing held a critical stage.

United States v. Bohn, 890 F.2d 1079 (9th Cir. 1989).

In a pro se appeal, the Ninth Circuit reversed after the trial court refused to allow defendant to have counsel present during in camera hearing. The trial court held an in camera hearing to determine the validity of defendant's Fifth Amendment claim. The trial court agreed to permit the presence of defense counsel during the hearing on the condition that the prosecution also be allowed to attend. The defendant attended the hearing without counsel. The Ninth Circuit held that in camera hearings are a critical stage to which the Sixth Amendment right to counsel attaches, and that the defendant had not knowingly and voluntarily waived his right to counsel. The Court noted that the harmless error doctrine does not apply to violations of the Sixth Amendment right to counsel.

Burden shifting instruction held reversible error.

Hall v. Kelso, 892 F.2d 1541 (11th Cir. 1990).

Habeas petitioner's conviction was reversed because jury instruction shifted burden of proof. The trial court instructed the jury that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will." The Eleventh Circuit panel rejected the argument that this instruction was permissible because intent was not an element of Georgia's felony murder offense. The court determined that intent to commit the underling felony was at issue.

Denial of motion to dismiss for "outrageous conduct" affirmed.

United States v. Slaughter, 891 F.2d 691 (9th Cir. 1989).

Appeals Court reviews *de novo* denial of motion to dismiss the indictment for outrageous government conduct. The Ninth Circuit panel found that the conduct of government did not so "shock the conscious" that it warranted dismissal of the indictment. The Court reversed the conviction, however, holding that the trial court abused its discretion in excluding defense witness testimony evidencing entrapment.

Reversal from trial court refusal to allow defense counsel to discuss bench conference with defendant.

United States v. Eniola, 893 F.2d 383 (D.C. Cir. 1990).

Trial court barred defense counsel from discussing the substance of a bench conference with clients. Counsel were prohibited from advising clients that one of the potential witnesses was a government informant. The appeals court reversed the conviction of one defendant because the trial court order prevented his attorney from attempting to develop an entrapment defense. The conviction of Eniola was affirmed because on appeal he did not present an "arguable scenario" in which the government could have played a role in entrapping him.

Defendant has no right to act as co-counsel.

Cross v. United States, 893 F.2d 1287 (11th Cir. 1990).

Trial court may commit reversible error either by granting or denying request to proceed pro se. However, defendant has no constitutional right to be co-counsel.

From the Editor...

I promise that this will be the last time, for a while anyway, that I will detail in this column the comings and goings of the staff attorneys for the First Court of Appeals. The relevance of their leaving the court to *Appellate Advocate* readers has been that they have been associate editors of this publication. Now it's my turn to leave the court.

If I could describe the ideal job, it would be working for a bright light in the appellate field, say David Keltner, in the appellate section of a great firm, say Haynes & Boone, and, on top of that, to continue to work with folks who support my extra-curricular activities, such as editing the *Appellate Advocate.* I have found the ideal job.

The job I have held for more than eight years also is a great job. I often have wanted to write about being a staff attorney for a Texas court of appeals, but could not find a way to do so without sounding very self-serving and a little defensive. Now that I am leaving, I have more freedom to give you — as U.S. Supreme Court staff counsel Ric Schickele calls it — a view from the shadows. Given the effect of staff attorneys on appellate practice and the relative lack of knowledge of what we do, I feel justified in writing about us in this publication for appellate lawyers.

One problem with being on the permanent legal staff of the court is trying to adequately and briefly answer the question: "What *does* a staff attorney do?"

It is hard question to answer. To begin with, we are not briefing attorneys. Being a briefing attorney certainly is an honorable endeavor that occupies a first year of practice — but not 8-1/2 years out of law school. So how do I explain how much a part of the appellate system central staff attorneys have become when our importance is limited? We are not briefing attorneys. Neither are we judges.

What we are and what we do depends on the court. Sometimes, we handle recommendations on motions, process emergency proceedings (a/k/a mandamuses), research the really hard cases that require more experienced lawyers, and write proposed opinions in less involved cases so judges can concentrate on cases requiring greater judicial decision-making. We prepare orders and notices relating to case management, monitor procedural changes to be sure the court's practices are up-to-date, and perform all sorts of special projects, like writing drafts of local rules. Always, we try to help the judges as much as possible, without usurping their proper role as the decision makers.

When I came to work at the First Court of Appeals in August 1981, I was the first staff attorney at a Texas intermediate court. I had graduated from law school the previous December. My situation was unusual; most staff attorneys have litigation experience before they join the courts.

Since I joined the court, I have observed that the courts of appeals have become more sophisticated (some would say more hypertechnical) in applying procedural rules. One reason for this is staff attorneys. Regardless of the specifics of what we do, all staff attorneys become procedural experts. That resource is there for the judges, and they use it. To find the footsteps of a staff attorney, look no further than the denial rate of motions for leave to file petitions for writ of mandamus. More than any other attorneys, we know the peculiar hoops relators must jump through before leave will be granted. One of our jobs is to identify which hoops lawyers have missed.

Sometimes people worry that non-elected officials, the central staff attorneys and briefing attorneys, have too much say in the decision-making process. Others respond that good judges won't let this happen and for bad judges it's just as well. This tension is a delicate balance for the court's attorneys and the court's judges. Maintaining the proper balance is a constant feature of the interaction of the judges and their staff members. Sometimes it presents problems for both judges and attorneys.

The staff attorneys owe a debt to many of the judges for whom we work. For me particularly, that debt is to Chief Justice Frank Evans. By his example, he has taught all of us at the First Court the importance of public service, that with patience and hard work you will finally succeed, and that your personal idea of the law doesn't matter. He has gotten us pay raises, he has allowed to be active members of the bar, he has let us write articles and edit publications, he has told us he appreciates our work. Thanks, Judge.

Finally, I think that one of the many nice things about practicing in the appellate section of Haynes & Boone will be that it will be so much easier to answer the question: "What do you do?"

It certainly won't take a full page in the *Appellate Advocate.*

— Lynne Liberato

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