The Appellate Advocate

State Bar Appellate Practice & Advocacy Section Report

Vol. V, No. III

Summer, 1992

ARTICLES

SPECIAL FEATURES

REGULAR FEATURES

The Chair Reports:
Another Year Completed

It hardly seems possible that a fifth year of the Appellate Practice & Advocacy Section has been completed with the return of the Bar Convention to Corpus Christi from whence the Section began. This year has been marked by steady, but unspectacular progress. Marvin Sloman, as the new chair, can be expected to take the section to new heights in a number of areas.

Advanced Civil Appellate Practice Course. Plans are being finalized for the fifth version of the appellate practice course, to be held in Dallas, September 10-11, 1992. The 1992 course director is William V. Dorsaneo, III, ably assisted by David Crump. While at least part of the course format remains the same, Dorsaneo promises innovations and new concepts, but with retention of the quality of past courses.

Texas Appellate Practice Manual. The anticipated publication the second TAPM for early 1992 has not transpired. The State Bar staff reports that the final revisions are still going forward. Two looseleaf volumes are planned and should be an excellent edition to the appellate specialist's library. So look for the announcement of publication in the fall.

As the year closes, it's been my pleasure to be the Chair for the Section. My special thanks goes to the officers, council, committee chairs and our editor. They have helped to make it a good year, but I am more than happy to pass the torch to Marvin Sloman. Give him your support and expect big things.

—Donald M. Hunt

Appealing With Findings Of Fact And Conclusions Of Law

By Warren Wayne Harris

[Porter & Clements, L.L.P. Houston; Former Briefing Attorney, Justice Eugene A. Cook, Supreme Court of Texas]

An appellant obtains a more favorable standard of review of a trial court's judgment if findings of fact and conclusions of law are filed. Thus, to preserve a more favorable standard of review on appeal, it is critical to either obtain findings and conclusions or preserve the right to complain on appeal of the trial court's failure to file findings and conclusions. This article will explain the rules for obtaining findings and conclusions and discuss challenges to findings and conclusions on appeal.

I. Request for Findings and Conclusions

THE TEXAS RULES OF CIVIL PROCEDURE REGARDING findings of fact and conclusions of law were totally rewritten in the 1990 rules changes effective September 1, 1990. *See* David E. Keltner & Lynne Liberato, *Keeping Up With . . . Appellate Practice*, THE HOUSTON LAWYER, Jan.-Feb. 1991, at 12. Any party may request the district or county court to state in writing its findings of fact and conclusions of law in a case tried without a jury. TEX. R. CIV. P. 296. In interlocutory appeals, the trial court need not, but may file findings and conclusions within thirty days after the judgment is signed. TEX. R. APP. P. 42(a)(1); *Varkonyi v. Troche*, 802 S.W.2d 63, 64 (Tex. App.—El Paso 1990, orig. proceeding).

The request for the trial court to file findings and conclusions must be made within twenty days after the judgment is signed. TEX. R. CIV. P. 296. The failure to make this request will result in waiver of the right to complain on appeal of the trial court's failure to file findings and conclusions. *See Las Vegas Pecan & Cattle Co. v. Zavala County*, 669 S.W.2d 808, 810 (Tex. App.—San Antonio), *rev'd on other grounds*, 682 S.W.2d 254 (Tex. 1984). A request that is filed before the judgment is signed is deemed to have been filed on the date of but subsequent to the signing of the judgment. TEX. R. CIV. P. 306c; *Fleming v. Taylor*, 814 S.W.2d 89, 90 (Tex. App.—Corpus Christi 1991, no writ). The request should be filed with the clerk, not the judge. TEX. R. CIV. P. 296; *see also Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 770-72 (Tex. 1989).

The trial court's duty to file findings and conclusions is mandatory. *Cherne Indus.*, 763 S.W.2d at 772. When a party makes a proper request for findings and conclusions, the trial court is required to file them within twenty days after the request was filed. TEX. R. CIV. P. 297; *see Anzaldua v. Anzaldua*, 742 S.W.2d 782, 783 (Tex. App.—Corpus Christi 1987, writ denied). Under the 1990 rules changes, the findings are to be filed as a separate document and should not be recited in the judgment. TEX. R. CIV. P. 299a; *In re O.L.*, No. 13-91-482-CV (Tex. App.—Corpus Christi June 4, 1992, n.w.h.). The trial judge's comments are not a substitute for findings and conclusions. *In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984).

II. Notice of Past Due Findings and Conclusions

A problem arises when the trial court, despite proper request, nevertheless fails to file findings and conclusions. In this situation, a notice of past due findings and conclusions must be filed within thirty days after the filing of the original request. TEX. R. CIV. P. 297; *Thompson v. Thompson*, No. 13-91-107-CV, slip op. at 6 n.3 (Tex. App.—Corpus Christi Mar. 19, 1992, writ requested). Failure to do so will result in waiver of the right to complain that the trial court failed to file findings and conclusions. *Employers Mut. Casualty Co. v. Walker*, 811 S.W.2d 270, 271 (Tex. App.—Houston [14th Dist.] 1991, writ denied). The reminder notice should be filed with the clerk and must state the date the original request was filed and the date the findings and conclusions were due. TEX. R. CIV. P. 297. The due date for the findings and conclusions is then extended until forty days from the date the original request was filed. *Id.*

III. Request for Additional Findings and Conclusions

IF THE TRIAL COURT FILES ITS FINDINGS AND CONCLUsions, any party may within ten days after the filing of the findings and conclusions request additional or amended findings or conclusions. TEX. R. CIV. P. 298. This request should only be made after the trial court files its original findings and conclusions. *Finch v. Finch*, 825 S.W.2d 218, 221-22 (Tex. App.—Houston [1st Dist.] 1992, no writ).

Generally, the trial court is required to make findings only on ultimate, controlling, and material issues. *Kansas City S. Ry. v. Catanese*, 778 S.W.2d 114, 118 (Tex. App.—Texar-

kana 1989, writ denied). The trial court is not required to make additional findings if they are merely evidentiary in nature. *Phillips v. Parrish*, 814 S.W.2d 501, 506 (Tex. App.—Houston [1st Dist.] 1991, writ denied). In stating its conclusions, the trial court is not required to set out in minute legal detail each and every theory or reason for the conclusions. *Circle Double "C" Enters., Inc. v. Wisco Elec., Inc.*, 782 S.W.2d 299, 302 (Tex. App.—Beaumont 1989, no writ). General findings and conclusions necessarily encompass all of the more specific findings and conclusions on which they are based. *See Exxon Corp. v. Tidwell*, 816 S.W.2d 455, 458 (Tex. App.—Dallas 1991, writ granted).

Requesting additional findings is necessary to prevent a ground of recovery or defense, no element of which is included in the findings, from being waived. TEX. R. CIV. P. 299; *Sears, Roebuck & Co. v. Nichols*, 819 S.W.2d 900, 907 (Tex. App.—Houston [14th Dist.] 1991, writ denied). When one or more elements of a ground of recovery or defense have been found by the trial court, omitted unrequested elements that find support in the evidence will be supplied by presumption in support of the judgment. TEX. R. CIV. P. 299; *Boy Scouts of Am. v. Responsive Terminal Sys., Inc.*, 790 S.W.2d 738, 742 (Tex. App.—Dallas 1990, writ denied). Findings or conclusions will not be presumed by the trial court's failure to file those requested additional findings or conclusions. TEX. R. CIV. P. 298; *Boy Scouts of Am.*, 790 S.W.2d at 742-43.

IV. Missed Deadline in Requesting Findings and Conclusions

FAILURE TO MEET THE DEADLINES IN REQUESTING findings and conclusions can be fatal to an attack on the trial court's failure to file findings and conclusions. The rules regarding deadlines for requesting findings and conclusions are usually strictly applied. *See Las Vegas Pecan & Cattle Co.*, 682 S.W.2d at 255-56.

A remedy for a missed deadline in requesting findings and conclusions is a motion for enlargement of time under rule 5 of the Texas Rules of Civil Procedure. TEX. R. CIV. P. 5; *see Electronic Power Design, Inc. v. R.A. Hanson Co.*, 821 S.W.2d 170, 171 (Tex. App.—Houston [14th Dist.] 1991, no writ). By using a motion for enlargement, it is possible to cure a missed deadline and thereby preserve the appellant's right to seek findings and conclusions.

Where a party misses the deadline for requesting findings and conclusions because it did not receive notice of the judgment, a motion can be filed under rule 306a(5) of the Texas Rules of Civil Procedure to extend the effective date of the judgment. TEX. R. CIV. P. 306a(5); *see also* TEX. R. APP. P. 5(b)(5). In *City of Los Fresnos v. Gonzalez*, 830 S.W.2d 627 (Tex. App.—Corpus Christi n.w.h.), the appellant filed a "Motion to Extend Computation of Time" because it did not receive a copy of the judgment within twenty days. *Id.* at 629 n.2. This motion, which was apparently filed pursuant to rule 306a(5) of the Texas Rules of Civil Procedure, allowed the appellant to then timely request findings and conclusions. *Id.* at 629.

V. Appellate Challenge to Trial Court's Failure to File Findings and Conclusions

THE TEST FOR HARM WHEN THE TRIAL COURT FAILS TO file findings and conclusions is whether the appellant would be required to guess the reasons that the trial court ruled against it. *Sheldon Pollack Corp. v. Pioneer Concrete of Texas, Inc.*, 765 S.W.2d 843, 845 (Tex. App.—Dallas 1989, writ denied); *see also* TEX. R. APP. P. 81(b)(1). The appellant should not be forced to guess the trial court's reasoning. *See Randall v. Jennings*, 788 S.W.2d 931, 932 (Tex. App.—Houston [14th Dist.] 1990, no writ).

The failure of the trial court to respond to a proper request for findings and conclusions is presumed harmful unless the record affirmatively shows that the complaining party has suffered no injury. *Cherne Indus.*, 763 S.W.2d at 772. In situations where there are two or more possible grounds on which the trial court might have ruled, the inference of harm cannot be defeated because to do so would place an undue burden on the appellant. *Electronic Power Design*, 821 S.W.2d at 171. The trial court's failure to file findings and conclusions is not, however, reversible error as a matter of law. *Guzman v. Guzman*, 827 S.W.2d 445, 447 (Tex. App.—Corpus Christi 1992, writ granted).

The trial court's failure to file findings and conclusions should be raised as a point of error on appeal. Appellate counsel should fully brief this point in the initial brief because the courts of appeals sometimes sustain this point of error before oral argument. *E.g., Electronic Power Design*, 821 S.W.2d at 170; *see* TEX. R. APP. P. 75(f). If a reply brief is necessary, the brief should be filed promptly so that it is before the court in the event the court sustains the point of error prior to oral argument.

Until recently, there was a conflict among the courts of appeals as to whether the proper remedy for the trial court's failure to file findings and conclusions was reversal of the entire case or abating the appeal and ordering the trial court to file findings and conclusions. *Joseph v. Joseph*, 731 S.W.2d 597, 599-600 (Tex. App.—Houston [14th Dist.] 1987, no writ). Apparently, all of the courts of appeals are now abating rather than reversing for the trial court's failure to file findings and conclusions where the error is remedial. *Cf. Electronic Power Design*, 821 S.W.2d at 171-72 (citing TEX. R. APP. P. 81(a) and *Cherne Indus.*, 763 S.W.2d at 773). Where the error is not remedial, the appellate court

should reverse the judgment of the trial court and remand the case. *E.g., Federal Deposit Ins. Corp. v. Morris*, 782 S.W.2d 521, 524 (Tex. App.—Dallas 1989, no writ)(trial judge no longer on bench).

If the appellant is successful in having the appeal abated for the trial court to file findings and conclusions, care should again be used in requesting additional findings and conclusions. Once the trial court has filed its findings and conclusions, the transcript should be supplemented to include the findings and conclusions. The appellant should then move for leave to amend its brief so that a full challenge can be made to the findings and conclusions. *See Rose v. Rose*, 598 S.W.2d 889, 892 (Tex. Civ. App.—Dallas 1980, writ dism'd w.o.j.).

VI. Standard of Review for Challenging Findings and Conclusious on Appeal

THE STANDARD OF REVIEW APPLIED TO THE FINDINGS of a trial court is the same as that applied to a jury's verdict. *Southwestern Bell Media, Inc. v. Lyles*, 825 S.W.2d 488, 493 (Tex. App.— Houston [1st Dist.] 1992, writ requested). Findings of fact are of the same force and dignity as a jury's verdict, *Criton Corp. v. Highlands Ins. Co.*, 809 S.W.2d 355, 358 (Tex. App.—Houston [14th Dist.] 1991, writ denied), and are reviewed for legal and factual sufficiency in the same manner as jury findings. *See Roberson v. Robinson*, 768 S.W.2d 280, 281 (Tex. 1989). Implied findings may also be challenged for factual and legal sufficiency in the same manner as jury findings. *Wadsworth Properties v. ITT Employment & Training Sys., Inc.*, 816 S.W.2d 819, 822 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

Conclusions of law are reviewed de novo as legal questions. *See Speer v. Presbyterian Children's Home & Serv. Agency*, 824 S.W.2d 589, 592 (Tex. App.—Dallas 1991, writ requested). A legal conclusion that is mischaracterized as a finding of fact will be reviewed as a conclusion of law. *Alamo Bank of Texas v. Palacios*, 804 S.W.2d 291, 293 (Tex. App.—Corpus Christi 1991, no writ).

Where findings are made by the trial court but not challenged on appeal, these unchallenged findings constitute undisputed facts and are conclusive and binding. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696 (Tex. 1986). Although the better practice is to specifically challenge each finding and conclusion about which complaint is being made on appeal, a general challenge may be sufficient. *See Exxon Corp.*, 816 S.W.2d at 458; *Fuentes v. Garcia*, 696 S.W.2d 482, 484 (Tex. App.—San Antonio 1985, no writ).

Where no findings or conclusions are filed, the trial court is presumed to have made all the findings necessary to support its judgment. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990). The appellant must show that the trial court's judgment was not supported by any legal theory raised by the evidence. *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277, 279 (Tex. 1987). The judgment will be affirmed if it can be upheld on any legal theory that finds support in the evidence. *Cano v. Rio Grande City Indep. Sch. Dist.*, No. 3-91-506-CV, slip op. at 3 (Tex. App.—Austin Apr. 29, 1992, n.w.h.).

VII. Conclusion

Findings and conclusions are essential to a full review of the case on appeal. By properly following the steps for obtaining findings and conclusions, a party preserves its right to obtain findings and conclusions or, in the event the trial court fails to file findings and conclusions, the right to complain on appeal of the trial court's failure to do so.

Did You Know?

Lynne Liberato, council member and editor of the *Appellate Advocate*, has been elected president-elect of the Houston Bar Association; and

Ann Crawford McClure, council member, has been appointed to the Board of Law Examiners.

—Ralph H. Brock

Curing Late-Filed Notices of Appeal: Is Habeas Corpus Necessary?

By Stacy Stanley
[RESEARCH ATTORNEY, SIXTH COURT OF APPEALS, TEXARKANA]

You have just been appointed as counsel on a criminal appeal. Unfortunately, the notice of appeal is past due. Your fault, the judge's fault, or nobody's fault. Your client wants to appeal anyway, so how do you get an appeal "as of right"? The answer to that question depends on where you practice.

The leading case involving notice of appeal problems is *Shute v. State*, 744 S.W.2d 96 (Tex. Crim. App. 1988), in which the Court of Criminal Appeals stated that, "in the absence of a timely, written notice of appeal, the lower court . . . [is] without jurisdiction to entertain the appeal." It would seem that if the notice is not tiinely (or if a timely request for extension has not been granted), the court does not have jurisdiction to hear the appeal. An extraordinary writ would be necessary to obtain an out-of-time appeal.

However, you may not have to crank up the habeas machine quite yet. Some courts of appeals sometimes will allow a notice of appeal to be late-filed. Two rules of appellate procedure have been cited by various courts as partial support for allowing late filing. Tex. R. App. P. 2(b) and 83 both contain language affecting the power of the courts of appeals in criminal cases. Rule 2(b) states that a court may suspend requirements of any rule, but not so as to suspend the requirements of the Code of Criminal Procedure or to extend the jurisdiction of the courts. Under Rule 83:

> A judgment shall not be affirmed or reversed or an appeal dismissed for defects or irregularities, in appellate procedure, either of form or substance, without allowing a reasonable time to correct or amend . . . .

The court in *Shute* specifically held that an appellate court acted correctly in dismissing an action for want of jurisdiction when the notice of appeal was not timely filed. It did not address either the effect of Rule 2 or Rule 83 on the problem or its constitutional implications. Several courts have concluded from *Shute* that, lacking a timely filed notice of appeal, the appellate court did not have jurisdiction. The defendant's sole remedy was to apply for a writ of habeas corpus to the Court of Criminal Appeals to obtain an out-of-time appeal. *E.g.*, *Charles v. State*, 809 S.W.2d 574 (Tex. App.—San Antonio 1991, no pet.) (Procedural rules such as TEX. R. AP. P. 2, 83 cannot create or enlarge jurisdiction); *Bermea v. State*, 779 S.W.2d 951 (Tex. App.—Amarillo 1989, no pet.); *Gomez v. State*, 763 S.W.2d 583 (Tex. App.—Corpus Christi 1988, no pet.); *Robertson v. State*, 760 S.W.2d 836 (Tex. App.—Austin 1988, no pet.) (TEX. R. APP. P. 83 inapplicable where defendant wholly fails to file notice of appeal); *Johnson v. State*, 747 S.W.2d 568 (Tex. App.—Houston [14th Dist.] 1988, no pet.) (Rule 2 doesn't expand jurisdiction; if we don't have it, we don't have it); *Scott v. State*, 747 S.W.2d 435 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd); *Corbett v. State*, 745 S.W.2d 933 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd); *Peterson v. State*, 739 S.W.2d 621 (Tex. App.—[14th Dist.] 1987, no pet.).

Other courts consider this to be a waste of judicial time and energy and they limit *Shute* to its facts. These courts allow a late-filed notice of appeal if the appellant can show the defendant desired to appeal and counsel concurrently failed to meet the requirements of the rules. These courts permit such filing in part on the constitutional right to effective assistance of counsel in an appeal as of right. *See Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1986); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963).

Counsel's failure to file a timely notice of appeal always constitutes ineffective assistance. With either retained or appointed counsel, the failure is obvious. If the missed filing date falls in the crack between trial and the appointment of appellate counsel, the right to effective assistance still has been violated because there was no assistance at all.

Some courts therefore reason that requiring a collateral habeas corpus proceeding is unnecessary and wasteful when the outcome is inevitable. *E.g.*, *Miles v. State*, 781 S.W.2d 608, (Tex. App.—Amarillo), *review dism'd* 780 S.W.2d 215 (Tex. Criin. App. 1989) (Note: This opinion was withdrawn by the court of criminal appeals *after* publication); *Boulos v. State*, 775 S.W.2d 8 (Tex. App.—Houston [1st Dist.] 1989

pet. ref'd); *Mullins v. State*, 767 S.W.2d 166 (Tex. App.—Houston [1st Dist.] 1988, no pet.); *Gomez v. State*, 763 S.W.2d 583 (Tex. App.—Corpus Christi 1988, no pet.); *Jiles v. State*, 751 S.W.2d 620 (Tex. App.—Houston [1st Dist.] 1988, pet. ref'd.) (extensive discussion based on constitutional considerations). *See Massey v. State*, 759 S.W.2d 18 (Tex. App.—Texarkana 1988, no pet.).

There is an apparent quirk in the system that requires particular care when filing a notice of appeal after a plea of gnilty or no contest. Despite Rule 83's language allowing a defendant to amend a defective notice of appeal, the court of criminal appeals overruled a case in which the Austin court had allowed a defendant to add the mandatory TEX. R. APP. P. 40(b) language about appealing pursuant to the court's permission or on matters raised by written motion and ruled on before trial. The defendant's failure to comply with the restrictive rule deprived the appellate court of its power to review any but jurisdictional matters. *Jones v. State*, 796 S.W.2d 183 (Tex. Crim. App. 1990) *overruling Jones v. State*, 762 S.W.2d 330 (Tex. App.—Austin 1988). *See Francis v. State*, 774 S.W.2d 768, 771 (Tex. App.—Corpus Christi 1989, no pet.); *but see Jones v. State*, 752 S.W.2d 150 (Tex. App.—Dallas 1988, pet. ref'd) (unsigned notice can be amended to provide jurisdiction). Since such notices are prepared by attorneys, a good argument of ineffective assistance could have been raised in this context, but no consideration of such matters appears in the final *Jones* opinion.

It has been said that a defendant should not suffer for the sins of counsel. *Swann v. State*, 737 S.W.2d 623, 624 (Tex. App.—Fort Worth 1987, no pet.). When a defendant is either 1) not informed of the right to appeal, or 2) tells counsel or the court about his or her desire to appeal, and no appeal ensues, counsel undoubtedly has sinned grievously. The defendant will ultimately, in some fashion, be afforded his appeal as of right. The only question remaining is by what procedure.

Consequential Damages, An Impact On Legal Malpractice

By Joe Villarreal, Jr.
[San Antonio]

In legal malpractice cases where damages may possibly be intertwined with the liability of joint tortfeasor/third party claim, pleadings become crucial.

If there is a settling joint tortfeasor/third-party defendant who may be partially responsible for the losses sustained as a result of the lawyer's malfeasance, problems could arise. Although such settlements would normally present a "contribution" or "set off" dilemma, if the pleadings in the malpractice case are flawed, it could significantly impact or even bar the claim.

If after settlement, the client sues the prior lawyer and only seeks actual damages, the client runs the risk of being on the short end of a motion for summary judgment. The applicability of contribution or the "one injury, one recovery" rule, becomes extremely important and needs to be addressed from the outset.

The "one injury, on recovery" rule, now codified in TEX. CIV. PRAC. & REM. CODE § 33.014, was originally announced in 1935 when the Texas Supreme Court decided *Bradshaw v. Baylor University*, 84 S.W. 2d 703 (Tex. Comm'n App. 1935, opinion adopted). There, the plaintiff sustained injuries while riding as a passenger in a school bus that collided with a train. He settled with the railroad for $6,500.00 and suit continued against the school.

Although the jury found damages to be $6,500.00, the trial court refused to enter judgment in his favor stating:

> The jury found that $6,500.00 . . . would compensate him for the injuries sustained. He had therefore been paid that exact amount. It is a rule of general acceptation that an injured party is entitled to *but one satisfaction for the injuries sustained by him*. That rule is in no sense modified by the circumstance that more than one wrongdoer contributed to bring about his injuries. *THERE BEING BUT ONE INJURY, THERE CAN, IN JUSTICE, BE BUT ONE SATISFACTION FOR THAT INJURY.*

(Emphases added).

Subsequently, in 1965, the Supreme Court decided *Palestine Contractors, Inc. vs. Perkins*, 386 S.W.2d 764 (Tex. 1965). That rule is now codified in TEX. CIV. PRAC. & REM. CODE § 33.015. The plaintiff settled with a third party. The issue was whether a minimal settlement with one of the joint tortfeasors precluded Perkins from recovering more than 1/2 of the damages from the non-settling tortfeasor. Perkins sought to recover 100% of the judgment from Palestine. The Supreme Court found that the settlement released half of the claim against Palestine even though the plaintiff received less in total damages than the amount found by the jury at trial.

The affect and application of a "dollar for dollar" (*Bradshaw*), or "comparative fault" [*Palestine*], and *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984) were examined and thoroughly explained in *Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1 (Tex. 1992).

The cases discussed the "one injury, one recovery rule." *Bradshaw*, *Palestine* and *Duncan* involved personal injuries. *Stewart Title Guaranty Co.* involved violation of DTPA. In the *Stewart* case, one issue involved was how to credit the non-settling tortfeasor with the settlement dollars paid by the other joint tortfeasor. The judgment was for less than what the settling defendant paid, however, since it was a DTPA case, the issue was whether the set-off should be applied before or after trebling. The supreme court found the set-off would be applied after the trebling of DTPA damages.

In *Perkins v. Barrera*, 607 S.W.2d 3 (Tex. Civ. App.—San Antonio 1980, no writ), the wife's divorce lawyer allegedly failed to advise her in 1967 that she was entitled to receive a portion of her husband's retirement. In 1977, she filed for partition. She settled and released all claims prior to 1977 and agreed to receiving her percentage beginning January 1, 1978.

In 1979 she sued her prior lawyer claiming she lost her rights to retirement from 1967 through January 1, 1978, due to his malfeasance. He pled waiver and estoppel, limitations, release and satisfaction and that she had instructed him not to include the retirement. The trial court granted defendant's summary judgment and holding there was "one injury and one recovery."

The court stated:

> With full knowledge that . . . it was Mr. Perkins—not Mr. Barrera—who was indebted to her for such military retirement benefits, she settled with Mr. Perkins and released her claim *for the SAME BENEFITS she is now seeking to recover from Mr. Barrera.*

(Emphases added)

Citing *Bradshaw v. Baylor University*, 84 S.W.2d703 (Tex. Com. App. 1935, opinion adopted), the court said the summary judgment was correctly entered because:

> Appellant does not allege, *nor does the evidence show*, that the community interest . . . subject to division in the partition suit, was *insufficient to make appellant whole* from any alleged failure of Mr. Barrera . . . to inform her of her rights to a share of the benefits.

(Emphasis added)

The court commented on page 6, that:

> . . . there are no allegations or prayer herein by Mrs. Perkins for any other consequential damage.

Today, under the statutory scheme of §33.014 and §33.015, a proportionate credit will be applied when the negligence of the settling tortfeasor is submitted to the jury. If there is no determination of percentage of negligence attributed to the settling defendant, a dollar credit is applied. If the negligence of a settling defendant is submitted to the jury and is determined by them, the amount paid is irrelevant.

What happens if a client sues for malpractice, sues a joint tortfeasor/third party who may be responsible for a part of the losses alleged, and then settles with the joint tortfeasor/-third party, prior to trial? Does it make a difference if the amount of settlement is less than the amount of actual damages sustained as result of the prior lawyer's malfeasance? Obviously, if the client settles with the joint tortfeasor/third-party prior to trial, no issue is submitted to the jury relating to the settling tortfeasor's percentage of liability. If the lawyer is not part of the suit against the joint tortfeasor/third-party or is not included in the settlement or release, does that settlement bar recovery against the lawyer or is he only entitled to a credit under the statute?

This was partially answered recently in *Raine vs. Strother*, No. 04-91-00660-CV (Tex. Civ. App.—San Antonio 1992, (n.w.h.). The opinion is un published; thus, under T.R.A.P. 90(i), cannot be cited as authority. However, the opinion is clear and concise and distinguishes the *Perkins* case.

In *Raine*, plaintiff sued her divorce lawyer for malpractice alleging various causes of action, including violation of DTPA, legal malpractice, breach of fiduciary duty and implied and expressed warranty. She claimed actual losses, interest damage, attorney's fees and consequential damages. The trial court granted a summary judgment based on the ruling in *Perkins*.

On appeal, the court of appeals set out the allegations of the plaintiff. They also noted that plaintiff, Raine, had sued for actual damages, loss of interest damages, consequential damages for mental anguish and loss of financial independence and attoruey's fees damages.

The court reversed the summary judgment and said, in part:

> While we do not disagree with the reasoning and holding in [*Perkins*], we find it to be clearly distinguishable because [the appellate court] . . . in two different places, specifically noted that the plaintiff Perkins had not sued for consequential damages as did Mrs. Raine in the instant case.

Perkins is still the law. It would appear, however, that its future applicability will be severely restricted. When a client sues a joint tortfeasor/third-party defendant and also sues the prior lawyer for legal malpractice and the damages are intertwined, a settlement with the joint tortfeasor/third-party defendant may impact on the malpractice claim. It becomes imperative that the pleadings in the malpractice suit be carefully worded and reviewed. Not only should you include every possible viable theory of recovery but the plaintiff must seek consequential, as well as actual damages.

If the pleadings seek only actual damages, a settlement with a joint tortfeasor/third-party defendant who may be partially liable, creates a risk of Perkins' application. The trial court may have to grant a summary judgment motion, assuming there is proper summary judgment proof.

Tex.App.—Corpus Christi: Practice Before The Thirteenth Court Of Appeals

By Linda Breck
(Senior Staff Attorney, Corpus Christi Court of Appeals]

Local Rules

The Thirteenth Court of Appeals adopted local rules on June 18, 1991, which have been approved by the Supreme Court and the Court of Criminal Appeals. The rules address the procedures specific to practicing before the Corpus Christi Court. A copy of the local rules is sent to each practitioner who files a case in the Court.

Overview

The Court was created by the legislature in 1963. The Court chambers and clerk's office are located on the tenth floor of the Nueces County Courthouse in Corpus Christi. The Court hears cases from a 20-county area extending from Wharton County to Cameron County. In 1989, the legislature passed legislation that requires all cases originating in Cameron, Willacy and Hidalgo Counties to be heard in Cameron or Hidalgo county. A panel travels regularly to these locations. All cases originating in Nueces County are heard in Nueces County.

The Court consists of six justices who sit in two panels, which rotate every two months. Each justice has a briefing attorney who serves the Court for two years. The Court also has a permanent staff of five. The Chief Staff Attorney handles criminal matters and the Senior Staff Attorney handles civil matters. The research attorneys rotate among the members of the Court as their assistance is needed.

For the fiscal year beginning September 1, 1990, and ending on August 31, 1991, there were 314 criminal appeals, 349 civil appeals and 77 original proceedings filed in the Court. These statistics include cases which were transferred to the 13th Court of Appeals.

Motions

Motions are not submitted to the Court for consideration for 10 days except emergency and agreed motions. A three-judge panel rules on motions. The Court will reeeive motions by fax. The policy is set forth in the local rules.

Original Proceedings

All original proceedings are given priority status. The Court endeavors to act on motions for leave to file within one day if possible. A panel of the Court acts on motions in original proceedings. Generally, opposing counsel in mandamus actions is not asked to respond prior to the Court's decision on the motion for leave.

Submission

Cases are generally submitted to the Court on Thursday at 9 a.m. Opinions of the Court and rulings on motions are also announced on Thursday morning. Often, the Court will hear cases on consecutive days when it travels to Hidalgo or Cameron counties.

Original proceedings may be scheduled on any day. Ordinarily, in both civil and criminal matters, cases are set for submission when the appellant's brief is filed. The parties are not notified of the panel designation, but may request that information from the clerk's office.

The Court generally hears only emergency matters during July and August.

Oral Argument

Oral argument should be requested when the brief is filed. If additional time is required, the parties should notify the Court by motion. The local rules cover argument thoroughly. The Court will reset oral argument only in emergencies.

Opinions

Prior to submission, a justice on the panel is randomly selected to author the opinion. It is contemplated that the entire panel has read the briefs before argument. Generally, the writing judge has not prepared a draft opinion prior to argument.

After a justice writes an opinion, it is submitted to the other justices on the panel for their comments and approval. The other justices on the Court also receive a copy of the opinion in circulation to insure uniformity.

Citations

The Court prefers Texas Supreme Court, Court of Criminal Appeals, and Thirteenth Court of Appeals opinions to be cited for propositions of law, if possible.

Conclusion

The Court has great respect for the attorneys who practice before it and desires to make your experience practicing before the Thirteenth Court of Appeals a positive one. Please feel free at any time to contact the Clerk of the Court if you have any problems or questions.

These rules apply to both civil and criminal cases, unless otherwise specified, and are to serve as an addition to the procedures set forth in the Texas Rules of Appellate Procedure. Attorneys are directed to comply with the applicable provisions set forth below. These rules have been promulgated pursuant to Tex. R. App. P. 1(b) and have been prepared as an aid to all attorneys who practice before our Court. If the Rules of Appellate Procedure are amended, and as amended conflict with the rules below, then the Rules of Appellate Procedure will govern.

Pursuant to Tex. R. App. P. 6, correspondence or other communications relative to any matter before the Court must be conducted with the Clerk and shall not be addressed to or conducted with any of the justices or other members of the Court's staff.

The Court thanks the attorneys who practice before this Court for their cooperation.

I. APPEARANCE

Only attorneys of record will be allowed to appear before this Court to present documents and argue cases. A party may proceed pro se before this Court, but, if an attorney of record is designated, only that attorney will be allowed to proceed with the appeal. If an out-of-state attorney wishes to practice before this Court, a motion requesting leave to appear should be filed so that permission may be granted by the Court.

II. GENERAL PROVISIONS

Generally, a document is marked "received" rather than filed because there is some defect in the document or it is not timely filed. The Court will notify the attorney of any defect and allow sufficient time for correction. The attorney should attempt to cure the defect immediately. Any motions which do not comply with the Texas Rules of Appellate Procedure or local rules should be amended as soon as possible to comply with these rules. Failure of an attorney to cure a defect in the record within the prescribed time or amend a motion to comply with the rules may result in sanctions against the attorney and/or dismissal of the case.

An original and three copies of briefs, motions, or any other papers directed to this Court shall be filed, unless otherwise requested by this Court.

The Court will accept non-voluminous, routine motions transmitted by facsimile machine. Such motions will be considered "filed" as of the date of transmission, if they comply with all applicable rules. The Court will not be responsible for events which disrupt, impair, or render impossible the receipt of motions transmitted by facsimile machine. Motions may be transmitted both during and after normal working hours. The party transmitting a motion by facsimile machine to the Court shall notify the opposing party by facsimile machine, if possible, in addition to proper service of the motion. The sender shall forward the original of such motion, any required copies, and filing fees to the Court on the same day the motion has been sent to the Court by facsimile machine.

Any costs or monies tendered to this Court should be paid by check. The checks directed to this Court should be made payable to the Clerk of the Court of Appeals. In connection with this rule, the Court will charge for checks returned by the bank, and the appeal will be subject to dismissal for failure to tender the proper fees.

The cost for making copies of opinions, briefs, motions, letters, or any other papers in this Court is $1.00 per page. The minimum fee for certification of a document is $5.00, or $1.00 per page if in excess of five pages.

When papers are filed prior to the filing of the record, (for example, a motion for extension of time to file the record), the certificate of service should include opposing counsel's complete name and address.

Pursuant to Tex. R. App. P. 18(d), when any portion of the record is checked out, the record must be returned in the same condition in which it was received; otherwise, counsel may be required to have it recertified by the proper trial court official. Do not disassemble any portion of the record. A person commits an offense if he intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record. Texas Penal Code Ann. §§ 37.10.

All persons wishing to see a Judge or Court employee should remain in the reception area until permission is granted to enter the Court's chambers.

There will be no smoking. Public smoking is prohibited by Corpus Christi City Ordinance except in designated areas. There is no designated area for public smoking on the tenth floor.

CRIMINAL (ADDITIONAL PROVISIONS):

An attorney appointed or retained to represent a defendant in a criminal case shall represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the trial judge grants the attorney's timely motion to withdraw as counsel by signed, written order, or the attorney is otherwise relieved of his duties by the trial or appellate court or replaced by other counsel. Art. 26.04, Texas Code of Criminal Procedure; *Ex parte Axel*, 757 S.W.2d 369 (Tex. Crim. App. 1988).

For a discussion of indigent appeals, please see *Abdnor v. State*, 712 S.W.2d 136 (Tex. Crim. App. 1986).

III. MOTIONS Tex.R.App.P. 4(g), 19, 73

All motions should be supported by an affidavit and should contain a certificate of service.

The Court normally does not rule on any motion before the expiration of ten days. This gives the opposing party an opportunity to reply. However, if the opponent joins in the motion before the expiration of ten days, the Court may consider the motion without further delay. If an attorney opposes a motion, such opposition should be accompanied by a short brief citing supporting authorities. Only in rare instances will the Court permit a hearing on a motion. Ordinarily, motions are ruled on and the attorneys are notified of the rulings by letter. Proposed orders should not be submitted by attorneys, unless requested.

The Court normally does not grant extensions in excess of that which is prayed for, and in many instances, will shorten the length of time requested. Therefore, the attorneys should not wait for a ruling by the Court, but should meet all deadlines and perform all other action in the time and manner requested in their motions at the earliest possible date. Motions should state an accurate estimate of the time necessary for completion of the document and should comply with Tex. R. App. P. 73.

Whenever a document may be filed as a matter of right, there is no need to accompany the document with a motion for leave to file it. However, such a motion must accompany documents offered for filing after the filing date has passed. If the motion for leave is granted by this Court, then the document will be marked "filed" as of the date of its initial receipt, unless otherwise stated.

When an extension of time is requested

for filing the transcript, the facts relied upon to reasonably explain the need or an extension must be supported by the affidavit of the county or district clerk or any designated representative which shall include the clerk's estimate of the earliest date when the transcript will be available for filing.

When an extension of time is requested for filing the statement of facts, the facts relied upon to reasonably explain the need for an extension must be supported by a detailed affidavit of the court reporter. See Tex. R. App. P. 73(i). If the statement of facts is not timely filed or a timely motion pursuant to Tex. R. App. P. 54(c) is not filed and granted, the appeal will be submitted on the transcript alone. See Tex. R. App. P. 53(m) and 54(a).

The Court prefers that motions for extensions of time to file briefs be filed on or before the time for filing the brief has expired. The motion should comply with Tex. R. App. P. 73.

IV. BRIEFS Tex. R. App. P. 74.

Adherence to the briefing rules set forth in the Texas Rules of Appellate Procedure will be strictly enforced.

All briefs should be short and succinct. The Court requires the briefs to be typed with 10-point (pica) letter-quality type, on 8-1/2 inch by 11 inch bond paper, double spaced, on one side of the paper and fastened on the left side. All pages shall have margins of at least one inch at the top, bottom, and each side.

Appellate briefs in civil and criminal cases shall not exceed fifty pages, exclusive of pages containing the table of contents, index of authorities, points of error, and any addendum containing statutes, rules, regulations, etc. The Court may, upon motion, permit a longer brief. A court of appeals may direct that a party file a brief, or another brief, in a particular case. If any brief is unnecessarily lengthy or not prepared in conformity with these rules, the Court may strike the brief.

If any party desires oral argument, THAT PARTY shall file a request for argument at the time of the filing of the brief. Pursuant to Tex. R. App. P. 75(f), a party to the appeal desiring oral argument shall file a request therefor at the time he files his brief in the case. The request for argument should be typed on the bottom left-hand corner of the brief. Failure of a party to file a request at the proper time shall be deemed a waiver of his right to oral argument in the case.

Reply briefs may be filed as a matter of right up to the date of submission and oral argument. However, reply briefs must be only in reply to the opponent's brief and must adhere to the briefing rules in the Rules of Appellate Procedure.

The Court welcomes a letter with additional or recent citations at any time without leave of court. If, however, a party wishes to amend or supplement his brief in any other manner, or to file a post-submission brief, the party must first obtain leave of court. Normally, new points of error will not be allowed subsequent to submission of the case to the Court.

During oral argument, the Court may request additional briefs. Such brief must be filed at the time stated by the Court or, if no time is specified, within ten days after oral argument. The opposing party may file a reply to such brief within ten days after the filing of such brief.

This Court requires that citations conform to the current Texas Rules of Form, published by the Texas Law Review. Writ and petition history should always be included. The Court does not require the parallel Texas Report citations.

V. SUBMISSION AND ORAL ARGUMENT Tex. R. App. P. 75.

Submission day is usually Thursday, unless otherwise stated. Submission of a case will not be reset, except in cases of emergency.

Failure of a party to timely file a request for oral argument shall be deemed a waiver of his right to oral argument in the case.

The rights, requirements and duties with respect to oral argument are covered by Tex. R. App. P. 75.

Prior to submission, the panel hearing the case will familiarize itself with the briefs and discuss the issues presented. In an effort to make oral argument meaningful and beneficial, when announcements are requested at submission, the Court may advise the parties or their counsel the time it estimates will be appropriate for the presentation of the issues by oral argument. Should the parties or their counsel feel more or less time is needed, the Court may consider changing its estimate; otherwise, oral presentations will be limited to the time allotted.

In presenting oral argument, it is helpful to the Court for the parties to present the common sense rationale for the positions on the major points at issue rather than restate the material covered in the briefs. Repetition is generally not helpful but the ability to answer questions candidly and logically is generally beneficial.

If more than one attorney is arguing for each side, the argument time should be divided by agreement among the attorneys. If an agreement cannot be reached by the attorneys, the Court should be advised of this fact at the time the Court calls for announcements on submission day.

Cases cited during oral argument that are not contained in the original briefs must be presented to the Clerk and opposing counsel in writing. A post-submission letter with certificate of service to the Clerk is sufficient.

All attorneys are required to dress in appropriate business attire while in Court.

Attorneys are required to sign the attorney register on the Clerk's desk in the courtroom when they arrive for argument.

No photograph or sound recording is to be made in the courtroom without prior permission of the Court.

VI. APPLICATIONS FOR WRIT OF ERROR AND PETITIONS FOR DISCRETIONARY REVIEW

Please note that two deposits must be made in civil cases. One deposit ($50.00) is made payable to the Clerk of the Supreme Court for filing fees, and the other deposit ($15.00) is made payable to the Clerk of the Court of Appeals for forwarding costs. No filing fees are required in criminal cases.

Pursuant to Tex. R. App. P. 101, in every criminal case the Court reviews the petition for discretionary review and summarily reconsiders its own opinion without request from counsel.

VII. CASES REMANDED FROM COURT OF CRIMINAL APPEALS

After a case is remanded to this Court from the Court of Criminal Appeals, the attorney should consider filing a supplemental brief in light of recent changes in the law. The Court welcomes further assistance from counsel at this stage. If counsel elects not to file a supplemental brief, he should notify this Court and opposing counsel of his decision not to file a supplemental brief.

VIII. NOTICE OF APPEAL IN CRIMINAL CASES

Pursuant to Tex. R. App. P. 40(b)(1), when a notice of appeal is filed, the clerk of the trial court should notify this Court of counsels' names, mailing addresses and state bar numbers. If appellant is pro se, an appropriate mailing address is needed, not just the county jail address. If information on the notice of appeal changes, the clerk should mail an amended notice of appeal form to this Court.

State Civil Appellate Update

By Clinard J. (Buddy) Hanby
[Solo practitioner, Houston]

Texas Supreme Court

Right to file Second Motion for Rehearing clarified:

Havner v. E-Z Mart Store, Inc., 825 S.W.2d 456 (Tex. 1992).

Havner obtained a judgment from the trial court. The Court of Appeals reversed and rendered, and Havner moved for rehearing. The Court of Appeals denied that motion, but issued a new opinion containing "minor non-substantive changes." The judgment of the court was unchanged. Havner then filed a second motion for rehearing containing the same points of error, as its previous motion. This was also denied, and Havner filed an application for writ of error, which was timely only in relation to the denial of the second motion for rehearing. E-Z Mart moved to dismiss.

Held: "To put the matter at rest once again, we hold that a party may file a further motion for rehearing as a matter of right if the Court of Appeals alters in any way its opinion or judgment in conjunction with the overruling of a prior motion for rehearing."

Parental Immunity still exists:

Shoemake v. Foqel, Ltd., 826 S.W.2d 933 (Tex. 1992).

The issue in this case is whether a negligent defendant can recover contribution from a negligent parent in a case involving injury to a child. All nine justices agree that parental immunity still exists as to "alleged acts of ordinary negligence which involve a reasonable exercise of parental authority or the exercise of ordinary parental discretion with respect to provisions for the care and necessities of the child." The justices disagree over a matter of pleading. The majority holds that a pleading that defendant was "not entitled to indemnity or contribution as a matter of law" was sufficient absent a special exception, to raise the issue of parental immunity. Alternatively, the majority holds that parental immunity need not be pleaded if it is "apparent on the face of the petition and established as a matter of law." The dissent disagrees with both propositions.

Of equal interest is that the case is before the court without a statement of facts and, apparently, without complying with TEX. R. APP. P. 53(d). A statement of facts is not normally needed where the only issue on appeal involves what judgment was proper on a jury verdict or trial court findings of fact. *Cf.* TEX. R. CIV. P. 307. However, the trial court apparently sustained the parental immunity contention, and the defendant appealed without a statement of facts. Thus, there should, perhaps, have been a presumption in the absence of a statement of facts that parental immunity was tried by consent, and this dispute over pleading seems moot.

More on the saga of the wrong cause number

City of San Antonio v. Rodriguez, 828 S.W.2d 417 (Tex. 1992).

The City filed a notice of appeal and motion to modify and correct judgment with the proper style but a totally incorrect cause number (88-CI-14572 instead of 87-CI-23305). The Court of Appeals, citing *Philbrook v. Berry*, 683 S.W.2d 378 (Tex. 1985), dismissed the appeal.

The Supreme Court holds:

Assuming that *Philbrook* was correctly decided, it is not controlling in this case. In *Philbrook*, the party names associated with the original and severed cause numbers were identical. Consequently, the different cause numbers were crucial to the proper management of the two cases. In the instant case, the cause number *incorrectly* transcribed on the City's notice of appeal has no association with or similarity to the style of the case now before us, and there is no suggestion of confusion regarding the judgment from which the City sought appeal.

The Supreme Court again emphasizes that decisions should "turn on substance rather than procedural technicality," and holds that the incorrect cause number was not fatal to the jurisdiction of the court of appeals.

Mueller v. Saravia, 826 S.W.2d 608 Tex. 1992)

Plaintiff sued two defendants in cause number 90-CI-11255. On February 11, 1991, the trial court in an order bearing cause no. 90-CI-11255 rendered a take-nothing summary judgment in favor of the first defendant and, in the same order, severed the claim against the first defendant and assigned this claim a new cause number, 90-CI-11255A. On February 26, the trial court rendered a take-nothing summary judgment in favor of the second defendant under cause number 90-CI-11255.

Plaintiff filed a motion for new trial on March 7, 1991 bearing cause number 90-CI-11255, but seeking a new trial in *both* cases. On the same day, plaintiff filed a motion to reconsolidate, and the trial court granted this motion on May 6, 1991. Plaintiff later appealed from the judgment in favor of the first defendant.

The Court of Appeals dismissed, citing *Philbrook*. The Supreme Court holds:

> Assuming that *Philbrook* was properly decided, Mueller's appeal still survives dismissal under its standard. *Philbrook* demands no

more than that "the motion for new trial must be filed in the *same cause* as the judgment the motion assails." *Philbrook*, 683 S.W.2d at 379 (emphasis added).

Editorial Comment: Life would be much simpler if the court would simply admit that *Philbrook* is *not* "properly decided" and stop creating hyper-technical distinctions.

"Legal holiday" expanded:

In the Matter of V.C., 829 S.W.2d 772 (Tex. 1992).

Miller Brewing Co. v. Villarreal, 829 S.W.2d 770 (Tex. 1992).

In each of these cases, the Commissioner's Court of a county declared a holiday and closed the courthouse on a day that was not a holiday under state law. Both appellants filed an appeal bond that was late unless the Commissioner's Court's holiday was a "legal holiday" under TEX. R. CIV. P. 4. Held: Any day the courthouse is closed by order of Commissioner's Court is a "legal holiday" under the rules. Happy Holiday!

Granted Writs Of Error

Smith v. Sewell, 35 TEX. SUP. CT. J. 605 (April 8, 1992).

The Supreme Court has granted a writ of error to determine whether an intoxicated person who injures himself or herself has a cause of action under the Dram Shop Act.

C&H Nationwide, Inc. v. Thompson, 35 TEX. SUP. CT. J. 777 (May 27, 1992).

The Supreme Court has granted a writ of error to determine whether prejudgment interest may be awarded on future damages or unsegregated past and future damages under the 1987 tort reforms.

Court Of Appeals Cases

Trial court can extend time to request findings:

Electronic Power Design, Inc. v. R.A. Hanson Co., 821 S.W.2d 170 (Tex. App.—Houston [14th Dist.] 1991, n.w.h.).

The trial court sustained defendant's special appearance and dismissed the case. Plaintiff filed a timely request for findings of fact and conclusions of law, but its notice that the findings and conclusions were past due was one day late. On the forty-third day after the judgment, the trial court granted an extension of time in which to file the notice of past due findings and conclusions, but the trial court still failed to file the findings of fact and conclusions of law. Appellee contends on appeal that the findings and conclusions were never properly requested because the trial court lacked jurisdiction to grant the extension.

Held: The Court of Appeals first notes that, under the rules, a timely request for findings of fact and conclusions of law extends the time to perfect appeal. "We see no reason why, under the current rules, the extension of the trial court's plenary power over its judgment should not also be triggered by the filing of a request for findings of fact and conclusions of law."

Therefore, the granting of the motion for enlargement of time was within the court's jurisdiction. After determining that the failure to file findings and conclusions was not harmless, the court abated the appeal and remanded to correct the error.

Post-judgment sanctions order not appealable:

First Nat'l Bank v. Birnbaum, 826 S.W.2d 189 (Tex. App.—Austin 1992, n.w.h.).

The bank recovered a money judgment against the Birnbaums in a previous case. The bank now sought a turnover order. The Birnbaums responded with a motion for sanctions under Rule 13. The trial court made a docket entry denying the turnover order and a written order granting sanctions. The bank appeals.

Held: Appeal Dismissed. The written order does not dispose of the motion for turn-over. The docket entry is not an acceptable substitute for a written judgment and cannot be appealed. As a result, there is no final judgment.

Only in Dallas.

Inman's v. Transamerica Comm. Fin, 825 S.W.2d 473 (Tex. App.—Dallas 1991, n.w.h.).

After apparently complex litigation, the trial court entered a judgment largely favorable to Transamerica. Inman's perfected appeal. Later, on the last day to perfect appeal, Transamerica filed a cash deposit in lieu of cost bond and a written request for a *complete* statement of facts. Seven days later, Inman's also filed a request for a statement of facts. This opinion is written on Inman's motion for extension of time to file the statement of facts.

Held: The court first rules that Inman's cannot rely on Transamerica's timely written request for a statement of facts. The court notes that all parties can rely upon any party's motion for new trial to extend appellate deadlines because TEX. R. APP. P. 41 (a) (1) explicitly so states. A party may rely upon an opposing party's appeal bond because *Donwerth v. Preston II Chrysler-Dodge*, 775 S.W.2d 634 (Tex. 1989, so held and TEX. R. APP. P. 59 (a) (i) (B) prevents unilateral dismissal to the prejudice of adverse parties. "In contrast, with respect to requests to court reporters, no comparable provisions exist that justify one party's reliance upon another party's request." Thus, "[T]he rules *implicitly suggest* that the other parties have no basis for relying upon an appellant's request and must, therefore, make their own request."

Thus, Inman's must make a reasonable explanation of this failure to make a timely request. The court holds that neither ongoing settlement negotiation

nor the time required to raise the deposit demanded by the court reporter furnishes a reasonable explanation for failure to make a timely request. Thus, the court denies the extension of time to file a statement of facts.

On rehearing, Inman's contends that the one-week delay did not contribute to the inability of the court reporter to timely prepare the statement of facts. In response, the court refuses to follow two other courts of appeals which have held that a failure to timely request a statement of facts is not a basis for denial of a motion for extension if the failure did not contribute to the delay. As a rationale for this result, the court mutilates *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668 (Tex. 1989) (which does not address this issue and surely stands for liberal granting of extensions) and somehow concludes that it has changed the law on this issue.

Only in Dallas II.

Moore v. State, 825 S.W.2d 172 (Tex. App. Dallas 1992, n.w.h.)(en banc).

This is a bond forfeiture appeal. The appeal bond was due September 9, 1991. The *pro se* appellant mailed the bond on September 5 to:

> Bond Forfeiture Clerk
> Frank Crowley Cts. Bldg.
> 133 N. Industrial, 2nd Floor
> Dallas, Texas 75207

The bond was filed on September 16. TEX. R. APP. P. 4(b) provides that the bond is timely if:

> sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed as filed in time.

Held: Although anyone taking the trouble to open the envelope could see from the style of the case that the district clerk was the proper recipient, the court of appeal notes that offices of both the district and county clerk are at the same address. Thus, the envelope was not "properly addressed." Appeal Dismissed.

> The five dissenting justices note that the Appellee concedes that everything would be fine if the envelope had been addressed to "Felony Bond Forfeiture Clerk" rather than "Bond Forfeiture Clerk." The dissent further notes - that the bond did, indeed, arrive, without delay, in the hands of the correct official. The dissent states: "Regrettably, the majority denies Moore appellate review because he did not comply with the hypertechnical interpretation of rule 4(b)."

Enough said.

Time to appeal from out-of-state judgment

Harbison Fischer Manufacturing Co. Inc. v. Mohawk Data Sciences Corp., 823 S.W.2d 679 (Tex. App.—Fort Worth 1991, n.w.h.).

This is an appeal contending that a New York judgment should not be afforded full faith and credit. Appellees move to dismiss, arguing that the time to perfect appeal runs from the date the New York court signed the judgment. The court of appeals holds that, in this situation, the time to appeal runs from the date the out-of-state is filed in Texas.

Appellee's attorneys are hereby nominated for the lead pen award for the year's most frivolous appellate argument.

Party estopped from appealing by accepting benefits:

Smith v. Texas Commerce Bank, 822 S.W.2d 812 (Tex. App.—Corpus Christ 1992, writ denied).

Smith appeals from the partition of a trust estate. However, Smith has accepted about $30,000, a portion of what he is owed under the partition. Smith has twice moved to enforce the judgment. In addition, Smith has received or maintained possession of several tracts of land awarded him under the partition. There is no evidence of economic hardship.

Held: Appeal dismissed. "[A]cceptance of benefits and efforts to enforce a judgment estops a party from challenging the trial court's judgment."

Fact findings needed on a plea in abatement:

Hopkins v. NCNB Texas Nat'l Bank, 822 S.W.2d 353 (Tex. App.—Fort Worth 1992, n.w.h.).

This is an appeal from an order abating a case because of an earlier proceeding pending in another county. The court holds that a party is entitled to findings of fact when a plea in abatement is sustained. However, in this case the error was harmless.

State Criminal Appellate Update

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

Court Of Criminal Appeals

In a state's appeal, tbe elected prosecuting attorney must sign or personally and expressly authorize the state's notice of appeal.

State v. Muller, 829 S.W.2d 805 (Tex. Crim. App. 1992).

TEX. CRIM. PROC. CODE ANN. art. 44.01 (Vernon Supp. 1992) mandates that only the elected "prosecuting attorney" may "make" the State's notice of appeal within the required 15-day period—either through the physical act of signing the State's notice of appeal or by personally and expressly authorizing an assistant to file a specific notice of appeal on his behalf.

State v. Shelton, 830 S.W.2d 605 (Tex. Crim. App. 1992).

A State's notice of appeal containing the signature of the assistant county attorney and the "signature stamp" of the elected prosecuting attorney was insufficient to show that the elected prosecuting attorney personally and expressly authorized the assistant county attorney to file the State's notice of appeal on his behalf.

State v. Rosenbaum, 830 S.W.2d 793 (Tex. App.—Houston [14th Dist.] 1992, n.p.h.).

A State's notice of appeal containing the signature of the special prosecuting attorney who prosecuted the appeal was insufficient to give the court of appeals jurisdiction of the case, even though the elected prosecuting attorney obtained an order from the trial court specifically exempting him from having to sign the notice of appeal.

To preserve error as to the admission of evidence as conditionally relevant, tbe defendant must move to strike the evidence if the condition is not satisfied.

Fuller v. State, 829 S.W.2d 191 (Tex. Crim. App. 1992).

When evidence is admitted as conditionally relevant under Tex. R. Crim. Evid. 104(b) and the proponent of the evidence (i.e., the State) fails to satisfy the condition making the evidence relevant and consequently admissible, the opponent of the evidence (i.e., the defendant) must move to strike the evidence that was erroneously admitted, or he has failed to preserve error—even though he has already objected to the evidence when it was first offered.

In pre-*Geesa* cases, the "rcasonably hypothesis" test also still applies to the sufficiency of circumstantial evidence of a defendant's intentional or knowing possession of a controlled substance.

Garcia v. State, No. 683-90 (Tex. Crim. App., June 3, 1992) (not yet reported).

Concerning appeals from cases tried before *Geesa v. State*, 820 S.W.2d 154 (Tex. Crim. App. 1991), the "reasonable hypothesis analytical construct" still applies to those cases in which the appellate court is asked to determine whether the State proved through circumstantial evidence whether the defendant intentionally or knowingly possessed a controlled substance. *But cf. Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim.App. 1991) (even for pre-*Geesa* cases, the "reasonable hypothesis analytical construct" does not apply to a determination of the sufficiency of circumstantial evidence relied upon to prove an accused's intent).

An appellate court can reform a trial court's judgment to reflect tbe jury's affirmative finding of the use and/or exhibition of a deadly weapon.

French v. State, 830 S.W.2d 607 (Tex. Crim. App. 1992).

An appellate court has the authority to reform a trial court's judgment to reflect the jury's affirmative finding of the use and/or exhibition of a deadly weapon. *See Asberry v. State*, 813 S.W.2d 526, 530-31 (Tex. App.—Dallas 1991, pet. ref'd). *But cf. Creeks v. State*, 773 S.W.2d 334 (Tex.App.—Dallas 1989, pet. ref'd).

Courts Of Appeals

In a defendant's appeal from a misdemeanor plea of guilty or no contest, he or she ean only appeal that matter set forth in the notice of appeal.

Nelson v. State, No. 1-91-329-CR (Tex. App.—Houston [1st Dist.], Mar. 3, 1992) (not yet reported).

When a defendant appeals from a misdemeanor conviction after entering a plea of guilty or no contest, his notice of appeal need not comply with all of the requirements of TEX. R. APP. P. 40(b)(1) to give the court of appeals jurisdiction. However, when that same defendant's notice of appeal only states that he is appealing the trial court's denial of his motion to suppress, the defendant preserves error concerning only that matter. *Compare Lemmons v. State*, 818 S.W.2d 58 (Tex. Crim. App. 1991) *with Wilson v. State*, 811 S.W.2d 700 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd).

In a defendant's appeal from a plea of guilty or no contest, he or she can appeal a matter set forth in the plea bargain agreement, even though it is not stated in his notice of appeal.

Brown v. State, 830 S.W.2d 171 (Tex. App.—Dallas 1992, n.p.h.).

If a defendant enters a plea of guilty or no contest and his notice of appeal does not state, as required by TEX. R. APP. P. 40(b)(1), that the trial court granted permission to appeal or that the defendant is appealing the trial court's ruling on a pre-trial motion, the defendant can still appeal those matters if his plea bargain agreement with the State reflects that he intended to appeal those matters. *Compare Jones v. State*, 796 S.W.2d 183 (Tex. Crim. App. 1990) *with Riley v. State*, 825 S.W.2d 699 (Tex. Crim. App. 1992).

In a defendant's appeal from a plea of guilty or no contest, he can appeal matters that occurred after the entry of the plea, even though that is not stated in his notice of appeal.

Owens v. State, 832 S.W.2d 109 (Tex. App.—Dallas 1992, n.p.h.); *Davis v. State*, 832 S.W.2d 356 (Tex. App.—Dallas 1992, n.p.h.).

A defendant who appeals from a plea of guilty or no contest can still appeal matters that occurred after the entry of the plea even if the defendant's notice of appeal fails to state that the defendant was appealing with permission of the trial court or that he or she was appealing the trial court's denial of a pre-trial motion.

An appellate court can abate an appeal to give the trial court jurisdiction to hear an out-of-time motion for new trial.

State ex rel. Holmes v. Shaver, 824 S.W.2d 285 (Tex. App.—Texarkana 1992, orig. proceeding).

While the trial court did not have the jurisdiction to grant the defendants' out-of-time motions for new trial after their notices of appeal had been filed in the appellate court, the appellate court could abate the appeal so that the trial court could hear the out-of-time motions for new trial. *See Harris v. State*, 818 S.W.2d 231 (Tex. App.—San Antonio 1991, no pet.).

A defendant cannot make an interlocutory appeal from a trial court's denial of the motion for acquittal.

Underwood v. State, 829 S.W.2d 227 (Tex. App.—Waco 1992, n.p.h.).

A defendant cannot make an interlocutory appeal from a trial court's denial of his motion for acquittal, made after the trial court has declared a mistrial.

A court of appeals can consider a point of error that does not separate state and federal constitutional issues into separate grounds for relief.

Segura v. State, 826 S.W. 178 (Tex. App.—Dallas 1992, no pet.).

If a defendant does not separate federal and state constitutional issues into separate grounds for relief, the ground for relief is multifarious. *See Heitman v. State*, 815 S.W.2d 681, 690-91 n.23 (Tex. Crim. App. 1991); *McCambridge v. State*, 712 S.W.2d 499, 502 n.9 (Tex. Crim. App. 1986). However, an appellate court can consider such a point of error under TEX. R. APP. P. 83. *See Davis v. State*, 817 S.W.2d 345 (Tex. Crim. App. 1991).

A trial court cannot enter a "nunc pro tunc" order to show that the defendant timely filed his written notice of appeal.

Bates v. State, 830 S.W.2d 341 (Tex. App.—Houston [14th Dist.] 1992, n.p.h.).

A trial court has no authority to enter a "nunc pro tunc" order to show a timely filed written notice of appeal, when the record does not show that the written notice of appeal was timely filed.

The sufficiency of the evidence concerning the State's proof of enhancement allegations is not weighed hy the trial court's charge to the jury.

Harrell v. State, 832 S.W.2d 154 (Tex. App.—Houston [14th Dist.] 1992, n.p.h.).

The sufficiency of the evidence concerning the State's proof of enhancement allegations is not weighed by the trial court's charge to the jury. *Cf. Boozer v. State*, 717 S.W.2d 608 (Tex. Crim. App. 1984); *Benson v. State*, 661 S.W.2d 708 (Tex. Crim. App. 1982).

Federal Civil Appellate Update

By W. Wendell Hall
[Partner, FULBRIGHT & JAWORSKI, San Antonio]

Fifth Circuit Court Of Appeals

Federal standard of review applies in diversity case.

Atchison, T. and S.F. Ry. Co. v. Sherwin-Williams Co., 963 F.2d 746 (5th Cir. 1992).

In a diversity case, federal standard of review of the sufficiency of the evidence applies rather than the state standard of review.

Plaintiff may move to amend pleading if court dismisses his complaint, hut not his action.

Whitaker v. City of Houston, 963 F.2d 831 (5th Cir. 1992).

In this case on the last page of a "Memorandum and Order" the district court dismissed the Plaintiff's "claims" and did not indicate whether it was dismissing the Plaintiff's *action* or his *complaint*. Compounding the confusion, the district court failed to enter judgment on a separate document as required under Rule 58. The court noted that it could nevertheless elect to take jurisdiction over the appeal where the order was "the final decision in the case" and the "appellee did not object to the taking of the appeal in the absence of a judgment." Here, the City did not object to the omission of a Rule 58 judgment and the order constituted a final judgment under 28 U.S.C. § 1291 as it ended "the litigation on the merits." Having determined that the court *may* take jurisdiction, it then considered whether it should decline jurisdiction. Because the status of the post-judgment motions were not unclear due to the lack of a Rule 58 judgment and the notice of appeal was not rendered untimely due to the absence of a Rule 58 judgment, the court accepted jurisdiction since "there [was] little to be gained from dismissing now and inflicting this case on another panel later."

The court next addressed the issue whether the Plaintiff had the right to amend his complaint under Rule 15(a) even though it had been dismissed by the district court. *Noting a split among the circuits*, the Fifth Circuit adopted the position that a Plaintiff is allowed to amend under Rule 15(a) with leave of court — but not as of course — if the district court dismissed only the Plaintiff's *complaint*, not his *action*. If the order dismissed the *action*, the Plaintiff cannot amend and the order is subject to the thirty-day appeal limit. If, on the other hand, the order dismisses the *complaint*, the Plaintiff may amend with leave of court or the Plaintiff may appeal. The finality of an order dismissing a *complaint* is destroyed if a Plaintiff files a Rule 15(a) motion to amend. If the motion is denied, finality is reestablished. Finally, once a Rule 58 judgment is entered, amendment of the complaint is no longer possible.

Remand "in the spirit of federalism" not authorized by statute.

In re International Paper Co., 961 F.2d 558 (5th Cir. 1992).

In this case the district court remanded the case to state court "in the spirit of federalism." International Paper sought review of the remand order by mandamus. The court first observed that remand orders issued under § 1447(c) and for lack of subject matter jurisdiction are unreviewable. The court also noted that it was an open question whether a remand order based on a timely-filed motion alleging a defect in removal procedure was reviewable. Here, the remand order was reviewable by mandamus because the district court lacked authority to remand the case on the stated grounds. The court vacated the remand order.

Use of "et al." in notice of appeal is usually fatal.

In re Manguno, 961 F.2d 533 (5th Cir. 1992).

The notice of appeal recited "Mamie King, et al." The Plaintiffs argued without success that all parties understood that the language "Mamie King, et al." applied to all five members of the King family. While the court found the argument persuasive, it noted that the Supreme Court had disagreed with that argument and held that it had no jurisdiction over anyone other than Mamie King.

Fifth Circuit decides amount of attorney's fee rather than remand.

Sidag Aktiengesellschaft v. Smoked Food Prods. Co., No. 91-1135 (5th Cir. June 12, 1992).

Here, the district court departed from the Fifth Circuit's mandate to award attorney fees if on remand the district court found frivolity by the appellees (which it found). Rather than remanding (since this case was on its fourth appeal), the Fifth Circuit found what it determined to be a reasonable attorney fee since the record contained all of the evidence necessary to make such a determination.

Dismissal for lack of jurisdiction must be without prejudice.

Davis v. United States, 961 F.2d 53 (5th Cir. 1992).

Where district court dismisses action for lack of subject matter jurisdiction, it is error to dismiss with prejudice; the order of dismissal must be without

prejudice.

Fifth Circuit may hear issue for first time on appeal in limited circumstances.

Lindsey v. Federal Deposit Ins. Corp., 960 F.2d 567 (5th Cir. 1992); *Hermann Hosp. v. MEBA Medical and Benefits Plan*, 956 F.2d 569 (5th Cir. 1992).

The Fifth Circuit will not address an issue for the first time on appeal unless it is a purely legal question and the court's refusal to consider it would result in a miscarriage of justice.

A "meritless" appeal does not equate with a "frivolous" appeal.

Valley Ranch Dev. Co. v. Federal Deposit Ins. Corp., 960 F.2d 550 (5th Cir. 1992).

A frivolous appeal is one that relies on legal points that are not arguable on the merits. Here, the appeal was "meritless" but not frivolous; therefore, attorney's fees not awarded under FED. R. APP. P. 38.

Certification to state supreme court not a panacea

Transcontinental Gas Pipeline Corp. v. Transportation Ins. Co., 958 F.2d 622 (5th Cir. 1992).

In this diversity case the Fifth Circuit refused to certify the underlying legal issue to the state supreme court even though the supreme court had not spoken on the issue. The court stated that it had a duty to decide the case as would an intermediate appellate court of the state in question. The court also noted that "[c]ertification is not a panacea for resolution of those complex or difficult state law questions which have not been answered by the highest court of the state. Neither is it to be used as a convenient way to duck our responsibility" in diversity jurisdiction.

Review of denial of intervention of right without findings is de novo.

Ceres Gulf v. Cooper, 957 F.2d 1199 (5th Cir. 1992).

In this appeal, the Fifth Circuit reviewed the appeal of the denial of intervention under FED. R. CIV. P. 24(a)(2) (intervention of right). The court observed that normally it reviews the district court's findings under the abuse of discretion standard. Here, the district court did not list any reasons why it denied the intervention; therefore, it reviewed the ruling *de novo*.

Absence of sufficient findings and conclusions requires remand.

Chandler v. City of Dallas, 958 F.2d 85 (5th Cir. 1992).

In this case the district court verbally announced certain findings of fact and conclusions of law. The court declined to prepare any other findings of fact and conclusions of law as required under FED. R. CIV. P. 52(a). The City moved to vacate the judgment and remand for findings and conclusions. The Fifth Circuit agreed. The court held that the court's verbal findings and conclusions were insufficient in detail and exactness to demonstrate the factual and legal basis for the ultimate conclusions reached by the court. Because the district court did not at any point articulate its resolution of many of the factual and legal issues necessary to support the judgment, the court vacated the judgment and remanded for findings and conclusions. The Fifth Circuit concluded:

> The findings of fact and conclusions of law play a duet; the district court tunes one to the other. Under Federal Rule of Civil Procedure 52(a), the district court must record appropriate portions of the musical selection for us to hear on appeal. When we hear a blank tape, however, we cannot evaluate the tenor of the melody.

Block that metaphor, Judge Buchmeyer!

Findings of fact based on wrong legal standard not reviewed by clearly erroneous standard.

In re Medrano, 956 F.2d 101 (5th Cir. 1992).

In this disbarment proceeding (from the Western District of Texas), the district court applied the preponderance of evidence standard instead of the clear and convincing standard. Because the court based its findings of fact on the wrong standard, the Fifth Circuit was not bound by the clearly erroneous standard of review.

Amendment of pleading in this case held to be an abuse of discretion.

Prudhomme v. Tenneco Oil Co., 955 F.2d 390 (5th Cir. 1992).

While a district court has broad discretion in the management of its docket (even granting disfavored eve-of-trial amendments to amend pleadings), the issue in this appeal was whether the district court abused its discretion when, on the very morning of trial, it permitted the plaintiff to seek recovery on the basis of strict liability even though, some three months before trial the district court had ordered the dismissal of the plaintiff's motion to amend their complaint to add a cause of action in strict liability. The Fifth Circuit held that it was an abuse of discretion because the district court's earlier dismissal of the claim induced the defendant to its prejudice to refrain from preparing to defend the claim. That part of the judgment was reversed.

***Sua sponte* remand for procedural defect after thirty days vacated.**

Federal Deposit ins. Corp. v. Loyd, 955 F.2d 316 (5th Cir. 1992).

In this case, the FDIC appealed the district court's order of remand pursuant to 12 U.S.C. § 1819(b)(2)(C) and NCNB sought review over the court's remand order by mandamus because, among other things, the district court exceeded its authority in remanding the case more than thirty days after the

removal. Here, twenty-one months after the FDIC and NCNB removed the state court litigation to federal court, the district court *sua sponte* remanded the case to state court solely on the ground that the original motion for removal was procedurally defective as having not been timely filed. The Fifth Circuit agreed with the FDIC's appeal and NCNB's mandamus. The court held that it had jurisdiction to review the court's remand order because the court exceeded its statutory authority by remanding the case *sua sponte* for procedural defects in the removal later than thirty days after the removal. The court noted that remands based on *timely* motions to remand for a defect in removal procedure *may* be unreviewable under the new § 1447(c), but because the remand motion in this case was untimely, the court did not reach the issue whether remands based on timely motions are not reviewable.

Whether a motion is a Rule 59 or Rule 60 motion determines validity of notice of appeal — two important cases interpreting *Harcon Barge*.

United States v. One 1988 Dodge Pickup, 959 F.2d 37 (5th Cir 1992).

On April 17, 1991, the district court entered a default judgment forfeiting the truck at issue to the United States. On April 22, Robert Buendia filed a motion to set aside the default judgment which the court denied on May 15. Buendia filed a motion for rehearing on May 22, and a notice of appeal on May 28. On May 29, the district court denied the motion for rehearing. No other notice of appeal was filed. The issue on appeal was whether the May 28 notice of appeal was nullified by the May 22 motion for rehearing that was not disposed of until May 29.

The Fifth Circuit first observed that if, under *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665 (5th Cir.) (en banc), *cert. denied*, 479 U.S. 930 (1986), the April 22 motion to set aside the April 17 default judgment is treated for purposes of FED. R. APP. P. 4(a)(4), as a motion under FED. R. CIV. P. 59, then the notice of appeal would be nullified by the pendency of the May 22 motion for rehearing. This is because in that situation the May 22 motion for rehearing, complaining of the May 15 order overruling the April 22 motion, would, under *Harcon Barge*, be regarded as a Rule 59 motion directed to the overruling of a prior Rule 59 motion (the April 22 motion); as such, the May 22 motion would not come with Rule 4(a)(4) because Rule 4(a)(4) does not embrace a second Rule 59 motion that merely challenges the denial of the original Rule 59 motion.

On the other hand, if, the court noted, the April 22 motion, despite being filed and served within ten days after the April 27 judgment it sought to set aside, is regarded as a Rule 60(b) motion, and thus not within Rule 4(a)(4), the May 22 motion for rehearing would nullify the notice of appeal under Rule 4(a)(4). This is because an order (here, the May 15 order) denying a motion that is treated as one under Rule 60(b) is not only itself appealable, but it is also properly subject to a Rule 59 motion (bere, the May 22 motion), and in such instance a timely Rule 59 motion brings into play Rule 49(a)(4). Under that hypothesis, the May 22 motion, filed within ten days of the May 15 order it sought to set aside, would be regarded as a Rule 59 motion under *Harcon Barge* and, as it was not disposed of until May 29, would nullify the May 28 notice of appeal.

So, which is it? Following the Seventh Circuit's decision in *Anilina Fabrique de Colorants v. Aakash Chemicals*, 856 F.2d 876 (7th Cir. 1988), the Fifth Circuit held that any motion that calls into question the correctness of the judgment is functionally the a motion under Rule 59(e). Applying *Harcon Barge* to default judgments, the court held that the April 22 motion, filed and served within ten days after entry of the April 17 judgment, was a Rule 59(e) motion for purposes of Rule 4(a)(4). Therefore, the May 22 motion attacking the May 15 denial of the April 22 motion, was not a motion within Rule 4(a)(4). Accordingly, the May 22 motion, though not disposed of until May 29, did not nullify the May 28 notice of appeal. The court had jurisdiction.

Britt v. Whitmire, 956 F.2d 509 (5th Cir. 1992).

On May 15, 1990, the district court granted a partial summary judgment to the defendant, but did not file a separate judgment as required by FED. R. CIV. P. 58. The plaintiff filed a notice of appeal on May 30, and an amended notice on June 4. On June 8, the defendant moved for entry of final judgment. On September 7, the district court granted summary judgment on all claims and entered a separate final judgment in compliance with Rule 58. The plaintiff did not file a notice of appeal from the September 7 order. Instead, he filed a motion for leave to amend out of time his original notice of appeal filed on May 30 (to appeal the September 7 order), alleging that he had not filed a timely notice because he had miscalculated the date on which such notice was due. The district court granted the plaintiff's motion. The Fifth Circuit dismissed the appeal.

The court held that it reviews extensions of time under FED. R. CIV. P. 4(a)(5) for abuse of discretion, giving great deference to the district court's determination of excusable neglect when the application for extension is made before the expiration of the initial time period during which a notice of appeal must be filed. When the application is made after that period has expired, however, less deference is required, and the more lenient "good cause" standard does not apply at all. Thus, when a party files a motion for extension of time after the initial period for appeal has expired, that party must make a showing of excusable neglect. The court held that "miscalculation of the deadline" does *not* constitute excusable neglect.

The court observed that in *Harcon Barge Co. v. D & G Boat Rentals,*

Inc., 784 F.2d 665 (5th Cir.) (en banc), *cert. denied*, 479 U.S. 930 (1986), it held that under Rule 49(a)(4), a FED. R. CIV. P. 59(e) motion nullifies a previously filed notice of appeal but a Rule 60 motion does not. Thus, the court reviewed the issue whether the defendant's June 8 motion to enter final judgment was a Rule 59 (e) motion to amend the district court's judgment (in which event the September 7 order granting summary judgment rendered the plaintiff's May 30 notice of appeal a nullity) or whether the defendant's motion sought merely to correct a clerical error under Rule 60(a) (in which event the plaintiff's May 30 notice of appeal was valid). The court held that the defendant's June 8 motion was not a Rule 60(a) motion because the effect of granting the motion was more than a mere correction of a clerical error by the district court since it sought to amend the court's May 15 order to grant summary judgment on two other claims. Because the motion was a Rule 59(e) motion.

Finally, the court reviewed whether the defendant's Rule 59(e) motion was timely filed (within 10 days after the entry of judgment). If the defendant's motion was filed in a timely manner, then the motion destroyed the effectiveness of the plaintiff's May 30 notice of appeal. If it was not timely under Rule 59(e), then Rule 60(b) governed and its effect and the plaintiff's notice of appeal was valid. Here, the district court did not enter a separate final judgment pursuant to Rule 58 to accompany its May 15 order granting partial summary judgment. Thus, there was no final judgment either when the plaintiff filed his May 30 notice of appeal or later when the defendant filed its June 8 motion for entry of final judgment. The court held that when a Rule 59(e) motion is filed before final judgment has been entered, the motion is timely whenever filed and serves to nullify a previously filed notice of appeal. Accordingly, the May 30 notice of appeal was nullified by the June 8 motion for entry of judgment.

Motion to proceed *in forma pauperis* in Fifth Circuit constitutes valid notice of appeal.

Tijerina v. Plentl, 958 F.2d 133 (5th Cir. 1992).

In this inmate pro se appeal, the inmate filed a timely motion for new trial after filing his notice of appeal. Within thirty days of the court's order denying his motion for new trial, the inmate moved to proceed *in forma pauperis* accompanied by an affidavit in support of motion to proceed on appeal *in forma pauperis*. The Fifth Circuit held that the notice of appeal was extinguished by his motion for new trial, but that his motion to proceed *in forma pauperis* in the Fifth Circuit was the substantial equivalent of a notice of appeal and invoked the court's jurisdiction.

Committee Nominates 1992-'93 Officers And Council Members

The Section's Nominating Committee, consisting of Michael A. Hatchell of Tyler, Sarah B. Duncan of San Antonio, Rosemary T. Snider of Marshall, and chaired by Ralph H. Brock of Lubbock, nominated the following slate of officers and council members:

Chairman-Elect—L. Wayne Scott of San Antonio

Vice-Chairman—Hon. Michol O'Connor of Houston

Secretary-Treasurer—Kevin Dubose of Houston

Council Member—Timothy Patton of San Antonio

Council Member—Ann Crawford McClure of El Paso

Federal Criminal Appellate Update

By Joel Androphy & Sandra Morehead
[BERG & ANDROPHY, Houston]

Trial court's limitation of defendant's closing argument to ten minutes is not an abuse of discretion.

United States v. Moye, 951 F.2d 59 (5th Cir. 1992)

Although the Fifth Circuit stated that it would probably have granted a longer time period, it nonetheless found that the limitation of a defendant's closing argument to ten minutes was not an abuse of discretion. The Court noted that it was a simple case which was tried in two days, and the only issue was intent.

Trial court may permit defendant to put on rebuttal argument after co-defendant's closing.

United States v. Cardascia, 951 F.2d 474 (2d Cir. 1991)

Because the defendants were shifting the blame and had inconsistent defense strategies, the trial court had discretion to allow a defendant to put on a rebuttal argument after his co-defendant's closing, but before the prosecution's rebuttal. The Second Circuit noted that the trial court, in order to ensure a fair and orderly procedure may control the order of closing arguments, so long as the prosecution is given the opportunity to open in accordance with FED. R. CRIM. P. 29.1.

A government agent's rough notes of an interview with a witness, when confirmed by that witness, become Jencks' material.

United States v. Boshell, 952 F.2d 1101 (9th Cir. 1991)

Although an agent's rough notes of interviews with a witness are not normally considered Jencks material because they are not statements of a wituess, they become Jencks material if confirmed by the witness. In this case, the agent went back over the notes with the witness, who confirmed certain facts. The agent then dictated certain portions of the notes into a tape recorder, a transcript of which was provided to the defendant. The Ninth Circuit held that the notes had been adopted by the witness and should have been turned over to the defendant.

Gender is a factor when considering duress for sentencing purposes.

United States v. Johnson, 956 F.2d 894 (9th Cir. 1991)

A downward departure for acting under duress is permissible during sentencing, even if the duress was not sufficient to form a complete defense to the crime charged. In addition, the court may consider the "battered woman syndrome", in making a determination of duress during sentencing. In this case, the defendants had been beaten and threatened by a drug "kingpin", and were under duress to aid him in his drug dealings. Although the jury did not buy duress as a defense at trial, the Ninth Circuit held that the trial court should have considered the "battered woman syndrome" in its sentencing decision.

Three drug transactions committed within 15 days of one another considered separate crimes for purposes of "career offender" sentence enhancement.

United States v. Roach, 958 F.2d 684 (6th Cir. 1992)

A defendant's sentence was enhanced based on the "Career Offender Act." Three of the four charges used for the enhancement occurred within 15 days of one another; therefore, the defendant contended that they should be considered a single criminal episode. The Sixth Circuit disagreed, stating that 18 U.S.C. § 924(e) only requires that the acts occur on different "occasions" from one another. The Court then determined that since the acts occurred on different days (March 11, 12 & 26), that they were different "occasions."

Trial court may not consider non-charged conduct when determining the base offense level.

United States v. Goldfaden, 959 F.2d 1324 (5th Cir. 1992)

The trial court erred in selecting a base offense level using relevant but uncharged conduct. The Fifth Circuit held that the base offense level most applicable to the offense of conviction must be chosen. Relevant conduct is not to be considered unless the applicable guideline provides more than one base offense level. In this case, there was only one base offense level for the conduct charged, mishandling of other environmental pollutants, and the trial court was in error when it chose the base offense level for mishandling of hazardous or toxic substances based on uncharged product.

Psychiatric evaluation made at pre-trial detention center is considered Brady material.

United States v. Spagnoulo, 960 F.2d 990 (11th Cir. 1992)

A defendant was given a psychiatric evaluation after he attacked another inmate at a pre-trial detention facility. The evaluation concluded that he should not be punished because he had a mental disorder which motivated the assault. Although the report was in the possession of the FBI, it was not provided to the defendant. The Eleventh Circuit reversed and remanded the case because the report would have significantly aided an insanity defense had the defendant had access to it.

Collateral estoppel may be applicable in criminal prosecution, even when

prior cause of action was civil.

United States v. Rogers, 960 F.2d 1501 (10th Cir. 1992)

The Eleventh Circuit held that the United States had been given a full and fair opportunity to litigate securities fraud issues in SEC civil action. Therefore, the Government was estopped from prosecuting defendant criminally based on the same conduct.

Defendants may assert prejudice from mid-trial publicity that centers on their co-defendant.

United States v. Aragon, 962 F.2d 439 (5th Cir. 1992)

A defendant may be unfairly prejudiced by mid-trial publicity that centers on his co-defendant. In this case, the Fifth Circuit held that the mere fact that defendants' names were mentioned as being tried with co-defendant who received negative mid-trial publicity, was enough to show prejudice. The defendants' convictions were reversed because the trial court failed to voir dire the jury regarding the extensive publicity.

Prosecutor's statements placing the prestige of the government and the court behind him were improper.

United States v. Smith, 962 F.2d 923 (9th Cir. 1992)

The Ninth Circuit reversed a defendant's conviction after the prosecutor made improper remarks during closing. The remarks included: (1) his job and that of the government was to "get to the truth" not to gain a conviction, (2) his job and that of the government was to "ferret through the smoke screens and lead the jury to the truth", and (3) if he had done anything wrong during the trial, he wouldn't be there because the court would not permit it. The Court held that the cumulative effect of these type comments was to submit the prosecutor's personal opinion of guilt to the jury, backed up by the approval of the government and the court.

No mistrial when six of nine defendants plead guilty during trial.

United States v. Ramirez, 963 F.2d 693 (5th Cir. 1992)

In three consecutive days of trial, six of nine defendants pled guilty and were dismissed from the case. The remaining defendants asked for a mistrial, claiming that despite an instruction to disregard the missing defendants, it was clear that they had pled guilty. The Fifth Circuit affirmed the trial court's denial of a mistrial, holding that the instruction was sufficient to protect the remaining defendants' interests.

Renew Your Section Membership

Where else can you get pertinent, scholarly articles on Texas appellate practice, along with updates on civil and criminal appellate decisions, all for only $10 a year? Be sure you don't miss a single issue of the *Appellate Advocate*. If you have not already renewed your membership for 1992-93, now is the time to do so—while this is on your mind and the form is right here in front of you. If you've already renewed, pass the membership form on a colleague.

Please ☐ renew my membership ☐ add my name as a new member of the Section.

NAME _____
[Please Type or Print]

STATE BAR NUMBER _____

FIRM _____

ADDRESS _____

CITY _____ STATE _____ ZIP _____

Mail this form with your check for $10.00, payable to the Section, to

Kevin H. Dubose
Secretary-Treasurer
Appellate Practice and Advocacy Section
P.O. Box 1364
Houston, Texas 77251-1364

From The Editor . . .

This is the last issue of the *Appellate Advocate* that I will edit. Until now, I have been its only editor.

Exit columns like this always have the obligatory thank yous. My appreciation is warmly and genuinely felt. My deepest appreciation belongs to Ralph Brock. Ralph is the father of our section. He also is in actuality the co-editor of this publication. He takes the typed words from the computer disk and transforms them into a publication. He also spots errors, updates cites and is the last word on what goes into this newsletter.

The case update columns are the backbone of the publication. They have been ably written by Mark E. Steiner, Alan Curry, Joel Androphy, Wendell Hall and Buddy Hanby. Alan Curry's column has another remarkable characteristic. It has always been on time. I can mark the deadline by the arrival of his state criminal update.

Thanks also to all those who have contributed articles. No longer do I have to solicit articles. They just arrive in the mail—usually in publishable form.

Equal to Ralph Brock's contribution is that of my secretary, Vicki Lindberg. She coordinates the articles and calls the columnists to urge them to send in their articles. Only she will be more relieved than I to pass on these responsibilities.

My appreciation extends to the section chairs I have worked with—all have given broad reign and complete support in compiling this publication.

One of the highest honors of my career has been being editor of the *Appellate Advocate*. I give you my thanks.

—Lynne Liberato

STATE BAR OF TEXAS
P.O. Box 12487, Capitol Station
Austin, Texas 78711

Appellate Advocate
State Bar Appellate Practice & Advocacy Section Report

NON PROFIT ORGANIZATION

U.S. POSTAGE
PAID
Permit No. 1804
Austin, Texas

DATED MATTER— PLEASE EXPEDITE!