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The Chair Reports

This has been an active year for the Appellate Practice and Advocacy Section. The Section has initiated several ambitious projects, and has involved a large number of new participants in Section activities. It also has been a year in which the important work of the Section has taken place in committees. Accordingly, it seems appropriate to devote this edition of "The Chair Reports" to reports from committee chairs. I give you the "The Chairs' Reports":

Warren Harris, Chair, Appellate Pro Bono Committee:

"The Pro Bono Committee's purpose is to provide experienced appellate counsel for pro bono cases that require appellate representation. The Pro Bono Committee accepts referrals of pro bono appeals from legal service organizations and individual attorneys. The Committee accepts appeals on a statewide basis and refers the cases to local volunteer appellate counsel. Local bar association appellate practice sections in Austin, Dallas, El Paso, and Houston have formed pro bono committees that provide a statewide network for placing pro bono appeals. We are still looking for help in San Antonio and Fort Worth."

Robert M. "Randy" Roach, Chair, Appellate Judicial Survey Committee:

"The Judicial Survey Committee has completed two drafts of a judicial survey that includes questions about oral argument, brief writing, ethics, and court procedures. The survey is extensive in its breadth. The Committee will have completed a final draft of the survey by the time this report is published. This draft will be submitted to the State Bar survey experts for their input. A final survey will then be sent to all Texas appellate judges. We hope to report the survey results by early this summer."

Charles R. "Skip" Watson, Chair, Appellate Lawyer's Creed Committee:

"The Appellate Lawyer's Creed Committee is drafting two documents. The first is an Appellate Lawyer's Creed that will contain principles to guide the day-to-day practice of the appellate bar. The second document will be called "Standards for Conduct for Appellate Practitioners," which we hope that all Texas appellate courts will adopt and mail to counsel with notice of filing correspondence. The Standards of Conduct will focus on the appellate practitioner's duties to the administration of justice under law and the other participants in the process, including judges, opposing counsel and parties, in addition to clients. The committee is not aware of an Appellate Creed or Standards of Conduct for appellate advocates in any other state."

Doug Alexander and Pam Baron, Co-Chairs, The Committee Formerly Known as the Appellate Practice Manual Update Committee:

"No longer charged with producing a new edition of the Texas Appellate Practice Manual (see "The Chair Reports" in the last edition), the Committee has taken on two new projects. The first is a pocket guide to the amended appellate rules that are likely to become effective early next year. Unlike the West paperback of all state court rules, the pocket guide will contain only the full text of the appellate rules as amended, will be extremely compact and lightweight, will feature a comprehensive index, and will contain a preface highlighting major changes. In conjunction with the pocket guide, the committee will publish a collection of brief articles on each of the major rule changes in an edition of the *Appellate Advocate* dedicated to the new rules."

Lori Gallagher, Chair, User-Friendly Courts Committee:

"The User-Friendly Courts Committee set three goals for this year:

(1) Contact each Court of Appeals regarding current local rules and practice and publicize those rules and practices. The Committee will publish those findings.

(2) Share the results of the Houston Appellate Bench/Bar Conference held in September 1995 and encourage other local appellate bench/bar conferences.

(3) Act as a liaison between the bench and bar to (a) identify and alleviate technical or procedural roadblocks to appellate courts hearing cases on the merits, and (b) improve relations between the bench and bar. The Committee invites practitioners and judges to communicate with the Committee members regarding user friendly court concerns so that the Committee can attempt to address these concerns."

Kathy Butler, Chair, Annual Meeting Program Committee:

"The Bar Convention Program Committee is in full swing. We are working hard to make this year's program — an appellate law game show called "Appellate Jeopardy" — both entertaining and informative. The program will be presented at the State Bar Annual Meeting in Dallas on Friday, June 21, 1996, from 2:00 - 5:00 P.M., with a reception immediately following."

I asked the committee chairs to make their reports brief so that they would all fit on one page. The only problem with that request is that these brief reports do not adequately describe the hard work that the committees have done. Almost all of the committees have met several times, the meetings have been productive, and each committee will produce a tangible result within the next several months. I appreciate the good work done by these committees more than I can say. The committee structure is the backbone of the Section.

— Kevin H. Dubose

Interlocutory Appeals Of the Denial of a Summary Judgment Based on an Assertion of Qualified Immunity

by Lana S. Sbadwick
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I. Overview

There is generally no right to appeal interlocutory orders. Appeals are allowed only from final orders or judgments.[1] Nevertheless, the Texas Rules of Appellate Procedure permit appeals from interlocutory orders "when allowed by law".[2] The six exceptions, created by statute, are found in section 51.004 of the Texas Civil Practice and Remedies Code.[3] This article will cover one of those exceptions; specifically, the right of a governmental employee to an interlocutory appeal of the denial of a motion for summary judgment on the grounds of immunity.[4] The employee's right to an interlocutory appeal affects the sovereign's right to an interlocutory appeal.

In Texas, the overruling of a motion for summary judgment is interlocutory and not appealable.[5] Texas statutory law now allows officers or employees of the state or its political subdivision to appeal a denial of summary judgment if immunity has been asserted.[6] Added by legislation in 1989, section 51.014(5) of the Civil Practice and Remedies Code provides that:

> *A person* may appeal from an interlocutory order of a district court, county court at law, or county court that:
>
> * * *
>
> (5) *denies a motion for summary judgment that is based on an assertion of* immunity *by an individual who is an officer or employee of the state or a political subdivision of the state.*[7]

Prior to enactment of this section, a state appellate court lacked jurisdiction to entertain these appeals even though federal courts allowed them.[8] At the time of its enactment, federal courts recognized the right to appeal the denial of a motion for summary judgment based on immunity.[9] The right to an interlocutory appeal of the denial of a motion for summary judgment based on immunity now applies to state suits filed after the effective date of the statute — June 14, 1989.[10] **A motion for new trial need not be filed in order to take an appeal from these interlocntory orders.**[11]

A Section 51.014(5) interlocutory appeal is available where there has been an assertion of "*immunity*".[12] "Immunity" in this context encompasses "qualified", "offieial", or "good faith" immunity.[13] It also applies to "absolute immunity".[14] While these types of immunity apply to an official or employee of a governmental entity, sovereign immunity applies to the governmental unit.[15] Sovereign immunity and qualified immunity are affirmative

continued ...

[1] TEX. CIV. PRAC. & REM. CODE ANN. § 51.012 (Vernon 1986) (Appeal or writ of error to the Court of Appeals may only be taken "from a final judgment of the district or county court"); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992); *North E. Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966).

[2] TEX. R. APP. P. 42(a)(1). *See also New York Underwriters Ins. Co. v. Sanchez*, 799 S.W.2d 677, 679 (Tex. 1990); *Cherokee Water Co. v. Ross*, 698 S.W.2d 363, 365 (Tex. 1985, orig. proceeding) (an appellate court only has jurisdiction over final judgments unless an interlocutory appeal is specifically provided for by statute).

[3] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(1)-(6) (Vernon Supp. 1996).

[4] *Id.* at § 51.014(5).

[5] *Schlipf v. Exxon Corp.*, 644 S.W.2d 453, 454 (Tex. 1982).

[6] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5). *Huddleston et al. v. Maurry*, 841 S.W.2d 24, 27 (Tex. App.—Dallas 1992, writ dism'd w.o.j.).

[7] PRAC. & REM. CODE ANN. § 51.014(5) (emphasis added).

[8] *v. Flores*, 740 S.W.2d 493 (Tex. App.—Corpus Christi 1987, orig. proceeding [leave denied]) (State appeal dismissed for want of jurisdiction where game warden sued under 42 U.S.C. § 1983 and argued that TEX. R. APP. P. 42 (a)(1) permitting interlocutory appeals where "allowed by law" applied to his federal right to immunity from suit). *Noyola* was overruled by the subsequent enactment of section 51.014(5).

[9] *See Mitchell v. Forsyth*, 472 U.S. 511 (1985).

[10] *Emerson v. Borland*, 838 S.W.2d 951, 952 (Tex. App.—Austin 1992, no writ).

[11] TEX. R. APP. P. 42(a)(1). However, the notice of appeal must be filed within twenty days after the judgment is signed. *Id.* at 42(a)(3). The record must be filed within thirty days of the judgment. *Id.* The deadlines for filing the briefs are also accelerated. *See Id.* An appellate court is without jurisdiction to consider a late-filed bond or motion to extend time for filing the bond. *City of Beverly Hills v. Guevara*, 886 S.W.2d 833, 834 (Tex. App.—Waco 1994), *rev'd on other grounds*, 904 S.W.2d 655 (Tex. 1995). Moreover, an appellate court does not have the authority to grant extensions of time to file the record or briefs unless the tardiness of filing is "reasonably explained". *Id.* at 834-35.

[12] TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5).

[13] The terms "qualified immunity", "official immunity", and "good faith immunity" will be used interchangeably. *See Travis v. City of Mesquite*, 830 S.W.2d 94, 100-01 n.2 (Tex. 1992) (Cornyn, J., concurring) (opinion on motion for rehearing); *Cameron County v. Alvarado*, 900 S.W.2d 874, 878 n.2 (Tex. App.—Corpus Christi 1995, writ dism'd w.o.j.)("qualified immunity", "official immunity" and "good faith immunity" are interchangeable terms).

[14] *See, e.g., Font v. Carr*, 867 S.W.2d 873 (Tex. App.—Houston [1st Dist.] 1993, writ dism'd w.o.j.).

[15] *See Baker v. Story*, 621 S.W.2d 639, 643-44 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.) (discussion of rationale behind sovereign and official immunity). Governmental units enjoy immunity from tort liability unless that immunity has been waived by the provisions of the Tort Claims Act. TEX. CIV. PRAC. & REM. CODE ANN. § 101.025(a) (Vernon 1986) ("Sovereign immunity to suit is waived and abolished to the extent of liability created by [the Texas Tort Claims Act]".). *See also State v. Brannan*, 111 S.W.2d 347, 348 (Tex. Civ. App.—Waco 1937, writ ref'd) (brief discussion of sovereign immunity).

defenses.[16] Both defenses must be pled or they will be waived.[17]

Qualified immunity may be invoked whenever a governmental employee is sued in his individual or official capacity.[18] The defense of official immunity "when successfully invoked ... renders an officer's immunity an *immunity from suit*, not just immunity from liability."[19] Under the doctrine of official immunity, government employees are immune from personal liability in tort actions for discretionary acts performed in good faith in the course and scope of their employment.[20] The doctrine of official immunity evolved to encourage public officers to carry out their duties without fear of personal liability.[21]

The right to an interlocutory appeal where there has been an assertion of "immunity" is more expansive than the language of recently enacted § 51.014(5). Section 51.014(5) clearly gives a *government official* the right to an interlocutory appeal; however, a *governmental entity* is also entitled to an interlocutory appeal where the sovereign's claim to immunity is based on the employee's qualified immunity. An interlocutory appeal by a governmental entity will be dismissed for want of jurisdiction if the sovereign does not claim sovereign immunity *based on* the official immunity of its employee. In other words, a claim of sovereign immunity alone will not suffice. The sovereign's right to an interlocutory appeal applies whenever a governmental entity may be held vicariously liable for the acts of its employee and there is an assertion of the official immunity of the governmental employee. The right to an interlocutory appeal in these cases is generally limited to an appeal to a court of appeals. Absent an exception under the Texas Government Code, the Texas Supreme Court does not have jurisdiction over interlocutory appeals.

II. Iuterlocutory Appeals By The Government Employee

A. Generally

The clear language of section 51.014(5) gives a government employee thc right to an interlocutory appeal from the denial of a motion for summary judgment based on immunity. The cases of *Ervin v. James* and *Koerselman v. Rhynard* illustrate this principle. The facts in *James* are as follows. An arrestee sued two deputy constables for assault and negligence.[22] The district court denied the deputies' motion for summary judgment on the grounds of qualified immunity and the deputies appealed. After noting that it had jurisdiction under § 51.014, the court of appeals reversed and rendered for the deputies holding that they were immune as a matter of law.[23]

In *Rhynard*, a university professor sued the state and various university officials after he was denied tenure.[24] The trial court granted summary judgment for the university on the ground of sovereign immunity.[25] The court also granted the motions of other university officials on the basis of official immunity but denied the chairperson's motion on the same ground.[26] The partial summary judgment was rendered final by severing the department chairperson from the other defendants.[27] The chairperson appealed. The court of appeals acknowledged that it had jurisdiction under §51.014(5).[28] It reversed and rendered after finding the chairman officially immune.[29]

B. The Right To An Interlocutory Appeal Applies Whether The Employee Is Sued Iudividually Or In His Official Capacity

The defense of immunity, and the right to an interlocutory appeal of the denial of a motion for summary judgment based on that immunity, does not turn on whether an official is sued in his individual or official capacity. This issue has been litigated in Texas courts.[30] In *Boozier*, an airport superintendent sued an airport police officer for defamation, intentional infliction of emotional distress, and tortious interference with contract.[31] The trial court denied the officer's motion for summary judgnient and the police officer appealed.[32] The interesting issue raised was the argument made by the appellee; i.e., that the officer had no standing to bring the appeal because she was sued in her *individual*, as opposed to her *official* capacity.[33] The appellee argued that the acts for which the officer was sued were "unofficial" because they were not committed in the course and

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[16]*See City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994) (qualified immunity is an affirmative defense).

[17]*See Davis v. City of San Antonio*, 752 S.W.2d 518, 519 (Tex. 1988) (governmental immunity is an affirmative defense that is waived if not pled).

[18]*Boozier v. Hambrick*, 846 S.W.2d 593 (Tex. App.—Houston [1st Dist.] 1993, no writ).

[19]*Travis v. City of Mesquite*, 830 S.W.2d at 102 n. 4.

[20]*City of Lancaster*, 883 S.W.2d at 653 (The test for qualified immunity is three-pronged. To invoke the defense of official immunity the official niust prove that: (1) the acts where within his scope of employment; (2) he was performing a discretionary, not ministerial act; and (3) he acted in good faith.). *See also* TEX. CIV. PRAC. & REM. CODE ANN. § 101.026 (Vernon 1986) (government employees are not subject to the Tort Claims Act's waiver of immunity where individual immunity exists).

[21]*Travis v. City of Mesquite*, 830 S.W.2d at 102 n. 4, 103 ("The articulated basis for such immunity is: the importance of avoiding distraction of officials froni their governmental duties; the desire to avoid inhibition of discretionary action; minimizing deterrence of able people from public service; avoiding the costs of an unnecessary trial; and insulating officials from burdensome discovery".); *Baker v. Story*, 621 S.W.2d at 643-44 (general discussion of rationalc of official immunity).

[22]*Ervin v. James*, 874 S.W.2d 713, 715 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

[23]*Id. and* at 717-18.

[24]*Koerselman v. Rhynard*, 875 S.W.2d 347, 349 (Tex. App.—Corpus Christi, 1994, no writ).

[25]*Id.*

[26]*Id.*

[27]*Id.*

[28]*Id.*

[29]*Id.* at 353.

[30]*See, e.g., Boozier v. Hambrick*, 846 S.W.2d at 593. Note that a suit against a governmental officer in his official capacity is a suit against the governmental entity. *City of Dallas v. England*, 846 S.W.2d 957, 959 (Tex. App.—Austin 1993, writ dism'd w.o.j.).

[31]*Boozier*, 846 S.W.2d at 595.

[32]*Id.*

[33]*Id.*

scope of her employment.[34] The court of appeals noted that "the scope of section 51.014(5) is one of the issues decided in this appeal".[35]

The court of appeals held that:

> *The application of section 51.014 does not depend on whether the employee is sued in her individual or official capacity.* It simply states that when the employee moves for summary judgment on an assertion of immunity and the motion is denied, the denial is reviewable by appeal. [Citation omitted]. *The capacity in which the employee is sued may be relevant to the issue of what kind of immunity applies, if any, but that is an issue for the appellate court to determine when it hears the appeal. That issue is not determinative of whether there can be an appeal.*[36]

The court of appeals concluded that the officer had a right to an interlocutory appeal of the denial of her motion for summary judgment and reversed and rendered.[37] There are good reasons for this rule. The doctrine of immunity was created in order to encourage public employees to carry out their duties without fear of liability—either for themselves, or their employer, the governmental entity.

C. The Right To An Interlocutory Appeal Applies Whether There Is A Claim Of "Official Immunity" Or "Absolute Immunity"

"Absolute immunity" has been extended to judges and to officials performing adjudicative functions.[38] A governmental employee has the right to an interlocutory appeal whether he claims "*absolute immunity*", or "*qualified, good faith immunity*".[39] The court in *Font* decided both issues. In this case, a bail bondsmen sued an assistant district attorney on the grounds that he unconstitutionally interfered with his right to earn a living by advising the sheriff to require plaintiff to show additional proof of sufficiency of surety before accepting additional bonds.[40] The A.D.A. moved for summary judgment on the grounds of absolute immunity, and alternatively, qualified immunity.[41] The trial court denied his motion for summary judgment and he appealed.[42]

The court held that Appellant was not entitled to absolute immunity because the act of advising county officials about bail bondsmen was not a part of the judicial process.[43] The court held that absolute prosecutorial immunity for decisions to prosecute or not to prosecute criminal complaints where not decisions which were involved in plaintiff's suit.[44] The court of appeals then addressed the A.D.A.'s qualified immunity defense finding he failed to conclusively prove he was entitled to qualified immunity.[45] The court of appeals affirmed finding that the trial court properly denied the motion for summary judgment.[46]

As it relates to the interlocutory appeal statute, *Font* illustrates that a court of appeals has jurisdiction to determine any issue of immunity which has been asserted by an official in a motion for summary judgment. The language of the statute applies to the denial of a summary judgment based on "an assertion of *immunity* by an individual who is an officer or employee of the state or a political subdivision of the state."[47] Although this section of the interlocutory appeal statute is generally applied to an assertion of "*official immunity*", *Font* illustrates that the statute also allows an appeal by a official who has been denied a summary judgment based on "*absolute immunity*".

D. The Right To An Interlocutory Appeal Applies Only To Immunity; It Does Not Apply To Other Claims

Although a governmental employee is entitled to an interlocutory appeal from a denial of a motion for summary judgment based on immunity, he is not entitled to an interlocutory appeal of other claims. For instance in *Huddleston*, city police officers argued that the trial court erred in overruling their motion for summary judgment because their actions were not a proximate cause of the collision as a matter of law.[48] The court dismissed these points holding that the officers' right to appeal hinged only on a statutory grant allowing an interlocutory appeal of the denial of a motion for summary judgment based on *immunity*. The issue of proximate cause was held not to be before the court.[49]

Likewise in *Aldridge*, the court held that the issue of official immunity and quasi-judicial immunity raised by university colleagues in their motion for summary judgment would be heard; however, the appeal would not address other issues such as whether plaintiffs stated a cause of action, or whether the alleged defamatory statements were protected by free speech.[50] This action was an interlocutory appeal from the denial of a motion for summary judgment based on immunity in a suit claiming defamation, tortious interference, and negligent infliction of emotional distress.[51] Thus, under Texas case law and the clear language of § 51.014(5), a government employee's right to an

continued ...

[34] *Id. at 595 n. 1.*

[35] *Id.*

[36] *Id.* at 596 (citing § 51.014(5)) (emphasis added).

[37] *Id.* and at 598.

[38] *Font v. Carr*, 867 S.W.2d at 876.

[39] *See Id.* and at 873, 879.

[40] *Id.* at 875.

[41] *Id.* at 876.

[42] *Id.* at 875.

[43] *Id.* at 874.

[44] *Id.* at 876-79.

[45] *Id.* at 879, 882.

[46] *Id.* at 882.

[47] TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (emphasis added).

[48] *See Huddleston*, 841 S.W.2d at 27.

[49] *Id.*

[50] *See Aldridge v. De Los Santos*, 878 S.W.2d 288, 292-94 (Tex. App.—Corpus Christi 1994, writ dism'd w.o.j.).

[51] *Id.* at 292.

... *from the preceding page*

interlocutory appeal is invoked only for claims of *immunity*—the statute does not allow an interlocutory appeal of other claims.[52]

III. "Derivative Immunity"—Interlocutory Appeals By The Sovereign Where Sovereign Immunity Is Based On The Official Immunity Of The Sovereign's Employee

A. Generally

The only nexus to the liability of the sovereign is the actions of its employee. If a government employee is immune from tort liability, the government is also immune if the entity's assertion of sovereign immunity is *based on* the immunity of its employee. Accordingly, if the employee has the right to an interlocutory appeal, the governmental entity is also entitled to a interlocutory appeal if it asserts immunity based on the official immunity of its employee. While the sovereign's right to an interlocutory appeal is not affected by whether or not the employee appeals, it may not bring an interlocutory appeal if it claims sovereign immunity under any other theory.

B. The Sovereign Has A Right To An Interlocutory Appeal If Sovereign Immunity Is Based On The Official Immunity Of The Governmeut Employee

The sovereign has a right to an interlocutory appeal if it files a motion for summary judgment urging sovereign immunity based on the official immunity of its employee and its motion is denied. The opinions of the Texas Supreme Court and the court of appeals in *Kilburn* are instructive in this regard. In this case, the court of appeals dismissed the appeal saying that the statute permitting interlocutory appeals *by a government employee* from an order denying summary judgment based on *immunity*, does not permit an interlocutory appeal from an order denying the *city's* motion on the grounds of *governmental immunity*.[53] Notably, the city failed to raise the issue of the qualified immunity of its employee. The *court of appeals dismissed the appeal for want of jurisdiction holding that § 51.014(5) permits only interlocutory appeals filed by individual governmental employees.*[54]

On appeal to the Texas Supreme Court, the Court noted that one of the issues before it was "*the scope of a governmental entity's authority to appeal interlocutory orders on questions of sovereign immunity.*"[55] It wrote that "[i]n denying the application for writ of error, though, *we should not be viewed as approving the court of appeals' assertion that a political subdivision of the state has no right under section 51.014(5) to appeal the denial of a motion for summary judgment.*"[56] The Court reasoned that "while section 51.014 itself does not define the term 'person,' other statutory provisions make clear that the term encompasses governments and governmental subdivisions."[57] Therefore, "a *claim of sovereign immunity may be 'based on' an individual's assertion of qualified immunity and therefore within the ambit of section 51.014(5).*"[58] Thus, under the Texas Supreme Court opinion of *Kilburn*, a governmental entity has the right to an interlocutory appeal if its claim of sovereign immunity is based on the official's assertion of immunity. Texas courts have adhered to this interpretation.

For instance in *Half-Price Books*, the estate of a suspect shot by an off-duty police officer providing security for the store sued the store, the city, and the off-duty officer.[59] The officer and the City of Dallas jointly moved for summary judgment based on the officer's qualified immunity.[60] The trial court denied the motion and the city and the officer appealed.[61] The Dallas court of appeals noted that it had jurisdiction to entertain an interlocutory appeal by the official, and citing *Kilburn*, it also noted it had jurisdiction to review the denial of a governmental entity's motion for summary judgment "that is based on its employee's qualified immunity defense".[62] The same decision was made by the Fourteenth Court of Appeals in *Ochoa*.[63]

Harris County v. Ochoa was an interlocutory appeal in a personal injury, wrongful death and survival action.[64] A death occurred during a high speed police chase and Harris County and its deputies were sued. Plaintiffs argued that the deputies were negligent in initiating and maintaining the pursuit and that the County was vicariously liable for this negligence.[65] Defendants filed a motion for summary judgment on the grounds of governmental and official immunity and the trial court denied the motion.[66] On appeal, Defendants argued that the officers were entitled to summary judgment because they were officially immune.[67] Harris County also argued that it was not liable absent the liability of the deputies, and that it was immune from liability for the claims pled against it for its own acts.[68] The court of appeals noted that "because of the limited appellate jurisdiction

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[52] *See also Boozier*, 846 S.W.2d at 596-97 (official immunity only claim reviewed in interlocutory appeal; claims of truth, privilege, estoppel, and tortious interference would not be reviewed).

[53] *City of Houston v. Kilburn*, 838 S.W.2d 344, 345 (Tex. App.—Houston [14th Dist.] 1992), *writ denied per curiam*, 849 S.W.2d 810 (Tex. 1993).

[54] *Id.*

[55] *City of Houston v. Kilburn*, 849 S.W.2d 810, 811 (Tex. 1993) (per curiam) (emphasis added).

[56] *Id.* at 812 (emphasis added).

[57] *Id.* at 811. *See* TEX. GOV'T CODE ANN. § 311.005(2) (Vernon 1988) (defining "person" to include any "government or governmental subdivision or agency"). *See also Huddleston*, 841 S.W.2d at 29 (same analysis).

[58] *Kilburn*, 849 S.W.2d at 812 (emphasis added).

[59] *City of Dallas v. Half Price Books, Records, Magazines, Inc.*, 883 S.W.2d 374, 375-76 (Tex. App.—Dallas 1994, no writ).

[60] *Id.* at 375.

[61] *Id.*

[62] *Id.* at 376.

[63] *See Harris County v. Ochoa*, 881 S.W.2d 884 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

[64] *Id.* at 885.

[65] *Id.*

[66] *Id.*

[67] *Id.* at 886.

[68] *Id.*

of this appeal, we will only address the immunity defense and not the merits of the case."[69]

The court of appeals held that the deputies were officially immune.[70] Significantly, it also held that:

> *[s]ince the deputies in this case were protected by official immunity, the county was also protected.* In the absence of the deputies' liability, Harris County was not liable under the Tort Claims Act. Thus, the trial court also erred in denying summary judgment in favor of Harris County.[71]

The court reversed and rendered for the deputies and Harris County.[72]

In *Newsom*, a bystander struck by a stray bullet during the pursuit of a fugitive sued the City of Houston and its police officers.[73] The bystander claimed that the officers had acted negligently and that the city was negligent through is employees.[74] The officers and the city moved for summary judgment based on the qualified immunity of the officers, the city's governmental immunity based on the officers' qualified immunity, and the non-existence of a cause of action under the Tort Claims Act.[75] The district court denied the motion for summary judgment and the city and the officers brought an interlocutory appeal.[76] The city and the officers brought one point of error contending that the trial court erred in denying their motion for summary judgment based on official immunity.[77] The city based its immunity on the immunity of the officers.[78]

The court of appeals reversed and rendered for the officers holding that the trial court erred as a matter of law in denying the officers' motion for summary judgment because they were officially immune.[79] The court also reversed and rendered for the city holding that because the city's liability was tied to the actions of its officers, the city was also immune.[80] The court reasoned that "[b]ecause the officers were protected by official immunity, the city was also protected. If an employee is protected from liability under the doctrine of official immunity, then the governmental entity's sovereign immunity remains intact."[81]

Thus Texas courts are in agreement. Because the only nexus to the liability of the sovereign is the actions of the governmental employee, the sovereign is entitled to an interlocutory appeal if its assertion of sovereign immunity is based on the official immunity of the employee. The sovereign is not entitled to an interlocutory appeal of other claims.

C. The Sovereign's Right To An Interlocntory Appeal Encompasses Only A Claim Of Sovereign Immunity Based On The Official Immunity Of Its Employee; It Does Not Apply To Other Claims

As we have seen, interlocutory appeals are allowed a governmental entity where the denial of the entity's motion for summary judgment is based on an assertion of sovereign immunity based on the official immunity of its employee. Because the entity's liability is based on the acts of its employee and therefore on its employee's immunity, an interlocutory appeal is permitted by the sovereign where there is a denial of a summary judgment on that basis. The appeal of the sovereign will be dismissed for want of jurisdiction where it fails to assert that its immunity is based on the immunity of its employee. The interlocutory appeal statute does not permit an appeal by the sovereign based only on sovereign immunity or other claims.

For instance in *City of Mission*, a city employee sued the city and city employees for wrongful termination, conspiracy, and slander.[82] The city and the employees moved for summary judgment based on sovereign immunity, no cause of action, privilege, truth, and opinion.[83] Although the employees were entitled to move for summary judgment on the defense of qualified immunity they failed to do so.[84] The trial court denied the motion for summary judgment and Appellants brought an interlocutory appeal.[85]

The court of appeals dismissed the appeal for want of jurisdiction saying:

> In the case before us, the City asserted as its ground for summary judgment that it was not liable because of *sovereign immunity. Appellants Townsend, Ortiz, and Garza did not move for summary judgment on the basis of qualified immanity and the City did not assert that its sovereign immunity claim was based on its employees' qualified immunity.* Section 51.014(5) provides that a person may appeal from an interlocutory order that denies a summary judgment motion based on qualified immunity. Since appellants' grounds for summary judgment were not based on qualified immunity, § 51.014(5) does not afford appellants an interlocutory appeal from the denial of their summary judgment motion.[86]

Accordingly, neither the sovereign, nor the government employee, is entitled to an interlocutory appeal unless that appeal is based on the immunity of the government employee.

continued ...

[69] *Id.*

[70] *Id.* at 889.

[71] *Id.* at 890 (citations omitted) (emphasis added).

[72] *Id.*

[73] *City of Houston v. Newsom*, 858 S.W.2d 14, 16 (Tex. App.—Houston [14th Dist.] 1993, no writ).

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.* at 17.

[79] *Id.* at 19.

[80] *Id.*

[81] *Id.* (citing *City of Houston v. Kilburn*, 849 S.W.2d at 812).

[82] *City of Mission v. Ramirez*, 865 S.W.2d 579, 580 (Tex. App.—Corpus Christi 1993, no writ).

[83] *Id.*

[84] *Id* at 582.

[85] *Id.* at 580.

[86] *Id.* at 582 (citing *Kilburn*, 849 S.W. 2d at 842) (emphasis added).

... from the preceding page

Likewise in *City of Irving v. Pak*, the city filed a motion for summary judgment on the ground that it was entitled to sovereign immunity because the incident was not the result of the operation of a motor-driven vehicle or a condition or use of tangible or real property.[87] Its employees appealed the denial of their motion for summary judgment based on official immunity.[88] Although the court noted that "[a] claim of governmental immunity may be based on an individual's assertion of official immunity and therefore fall within the ambit of section 51.014(5)", the court of appeals dismissed the city's appeal for want of jurisdiction.[89] The court noted that:

> [t]he City's motion for summary judgment did not contend that the City was entitled to governmental immunity on the ground that the [employees] were entitled to official immunity. *Because the City's claim of governmental immunity was not based on the ground that the [employees] were entitled to official immunity, the City is not entitled to an interlocutory appeal of the trial court's denial of the motion for summary judgment. Accordingly, we dismiss the City's appeal.*[90]

Thus, a sovereign is allowed only an interlocutory appeal of the denial of a motion for summary judgment based on sovereign immunity based on the immunity of its employee. Extending this doctrine further, the following cases clarify that while a sovereign is allowed an interlocutory appeal on this basis, the court of appeals will not address any other claims during the appeal.

For example, *Alvarado* was a high speed case brought against the county and its deputies under § 101.021(1).[91] The deputies moved for summary judgment on qualified immunity, and the county moved for summary judgment urging sovereign immunity based on the employees' qualified immunity.[92] The trial court denied the motions, and the county and the deputies perfected an interlocutory appeal.[93] The court of appeals addressed both claims.[94] Significantly, the court refused to address the denial of a summary judgment based on the county's sovereign immunity arising out of the county's performance of a governmental function or from the county's method of providing police protection.[95] The court of appeals held that it did not have jurisdiction to do so.

Likewise in *Half-Price Books*, although the city had also moved for summary judgment on the basis of sovereign immunity and the plaintiff's failure to give notice under the Tort Claims Act, on appeal the city urged only that the trial court erred in not granting summary judgment because of the officer's right to summary judgment.[96] The court noted that it had "jurisdiction over the city's point of error only to the extent that it is based on [the officer's] assertion of qualified immunity".[97] In *Village of Bayou Vista*, a defamation case, the village and a village alderman moved for summary judgment asserting governmental immunity, absolute privilege, and official immunity.[98] The court of appeals held that it would consider only the claims based on immunity.[99]

A sovereign has a right to an interlocutory appeal of a claim of sovereign immunity based on the official immunity of its employee. A court of appeals will dismiss an appeal for lack of jurisdiction if the sovereign brings an appeal that is not based on this claim. Moreover, a court of appeals will refuse to address other claims or causes of action during this interlocutory appeal.

D. The Sovereign's Right To An Interlocutory Appeal Is Not Affected By Whether The Governmental Employee Appeals

The right of the sovereign to an interlocutory appeal should not be affected by whether the government employee actually appeals as long as the sovereign's assertion of sovereign immunity is based on the official immunity of its employee. Indeed, pursuant to the language in *Kilburn* that "sovereign immunity may be 'based on' an individual's assertion of qualified immunity and therefore within the ambit of section 51.014(5)",[100] a governmental entity is entitled to an interlocutory appeal if *its claim* of sovereign immunity is based on the official immunity of its employee.

Huddleston was a wrongful death and survivor action brought against a city and its officers by the survivors of a motorist who was killed during a high speed police chase.[101] The trial court denied defendants' motions for summary judgment based on qualified immunity.[102] The officers and the city appealed.[103] Interestingly, Plaintiffs argued that if "person" under § 51.014(5) were to include a governmental subdivision, the range of appeals under that section would be "overly broad", allowing "a government subdivision to appeal an interlocutory order based on an individual's immunity, *regardless of whether the individual*

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[87] *City of Irving v. Pak*, 885 S.W.2d 189, 191 (Tex. App.—Dallas 1994, writ dism'd w.o.j.). *See also* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1986) (governmental liability for condition or use of tangible property or operation or use of a motor-driven vehicle or equipment).

[88] *City of Irving*, 885 S.W.2d at 190.

[89] *Id.* at 191-92.

[90] *Id.* (citation omitted) (emphasis added).

[91] *Cameron County v. Alvarado*, 900 S.W.2d at 877-78.

[92] *Id.* at 878.

[93] *Id.* at 877.

[94] *Id.* at 878.

[95] *Id.* at 878-79.

[96] *Half-Price Books*, 883 S.W.2d at 375 n.1.

[97] *Id.* (citing *Kilburn*, 849 S.W.2d at 812).

[98] *Village of Bayou Vista v. Glaskox*, 899 S.W.2d 826, 828 (Tex. App.—Houston [14th Dist.] 1995, no writ).

[99] *Id.*

[100] *Kilburn*, 849 S.W.2d at 812.

[101] *Huddleston*, 841 S.W.2d at 26.

[102] *Id.*

[103] *Id.*

has appealed the order himself".[104] The court of appeals wrote that "*[r]egardless of whether the individual [official] appeals*, the governmental agency should also have the right to an interlocutory appeal because *its* liability is based on the actions of its employee."[105]

In *dicta*, *Huddleston* expressed that the sovereign is entitled to an interlocutory appeal where there is a claim of official immunity even if the official does not appeal. Although it was dicta because the officials in this case actually appealed,[106] the logic expressed in that opinion was correct. As we have seen, the only tie to the sovereign's liability is the actions of the sovereign's employee. Again, the term 'person' in § 51.014(5) has been held to encompass governmental entities.[107] As long as that entity asserts immunity based on the immunity of its employee, the sovereign is entitled to an interlocutory appeal.

IV. Absent a Conflict Among Decisions, Interlocutory Appeals Under Section 51.014(5) Are Allowed Only at a Court of Appeals

As a general rule, the Texas Supreme Court does not have jurisdiction to hear interlocutory appeals. Section 22.225 of the Texas Government Code provides that:

> Except as provided by Subsection (c) or (d), a judgment of a court of appeals is conclusive on the law and facts, and *a writ of error is not allowed from the supreme court, in the following civil cases: ... (3)* an appeal from an interlocutory order appointing a receiver or trustee or from *other interlocutory appeals that are allowed by law.*[108]

One of the exceptions to this section, found in subsection (c), provides:

> This section does not deprive the supreme court of jurisdiction of a civil case brought to the court of appeals from an appealable judgment of a trial court in which the *justices of the courts of appeals disagree on a question of law material to the decision* or in which one of the *courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court*, as provided by Subdivisions (1) and (2) of Section 22.001(a).[109]

Therefore, an interlocutory appeal from the denial of a motion for summary judgment based on immunity may generally be taken only to a court of appeals. The only exceptions are where: (1) the justices of the court of appeals disagree on a material question of law; or (2) the decision conflicts with a decision of another court of appeals or the Texas Supreme Court. The restrictions found in these sections of the Government Code explain why so many cases dealing with interlocutory appeals have a writ history notation of "*writ dism'd w.o.j.*".[110]

V. Conclusion

Interlocutory appeals are now permitted by governmental entities and their employees where there is a claim of official immunity or sovereign immunity based on the official immunity of governmental employees. The employee's right to an interlocutory appeal arises whether he is sued in his individual or official capacity. It also arises whether he alleges "official" or "absolute" immunity. Moreover, the sovereign is entitled to an interlocutory appeal where sovereign immunity is based on the official immunity of its employee. The sovereign is entitled to this appeal even if its employee does not appeal.

Although interlocutory appeals are not allowed for claims which are not based on the official immunity of a governmental employee, allowing these appeals saves taxpayer dollars by limiting needless litigation and discovery. It also minimizes distraction to officials in the performance of their public duties. Consequently, section 51.014(5) advances the policy behind the doctrine of immunity itself.

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[104] *Id.* at 29 (emphasis added).

[105] *Id.* at 30 (emphasis added).

[106] *Id.* at 26.

[107] *Kilburn*, 849 S.W.2d at 811.

[108] § 22.225(b) (Vernon Supp. 1996) (emphasis added).

[109] *Id.* at § 22.225(c) (Vernon 1988) (emphasis added).

[110] *See supra* (cases cited throughout this article).

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by Clinard J. "Bnddy" Hanby
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The Woodlands

TEXAS SUPREME COURT

Dominant Jnrisdiction: Appellate Style

Miles v. Ford Motor Co., 909 S.W.2d 884 (Tex. 1995)

This case was tried in Rusk County. An appeal from Rusk County lies to either the Texarkana or Tyler Court of Appeals. There were three plaintiffs, one who was severely injured in an automobile accident and a brother and step father who asserted loss of consortium claims. There were two defendants, Ford Motor Co. and Stanley, the driver of the car involved in the accident. The trial court granted summary judgment rejecting the loss of consortium claims. The remaining claims went to trial, and the jury found against Ford on all remaining claims but exonerated Stanley. The trial court signed a judgment on the verdict on March 9, 1995. Later that same day, plaintiffs perfected an appeal to the Texarkana Court, challenging the summary judgment and the take-nothing judgment in favor of Stanley. On March 29, 1995, Ford perfected appeal to the Tyler Court.

Plaintiffs moved to dismiss Ford's appeal, and Ford moved to transfer plaintiffs' appeal to Tyler. The Texarkana Court ruled that it had no jurisdiction to transfer an appeal, and forwarded the motion to the Supreme Court. The Supreme Court first notes that, although it typically uses its authority to transfer appeals to equalize dockets, TEX. GOV'T CODE, § 73.001 does not limit its transfer authority to that purpose. The Court then devotes a footnote to outlining the procedure for a motion to transfer: "The party requesting a transfer should file a copy of the motion to transfer in each of the two courts of appeals, asking that, when the motion is forwarded to the Supreme Court, each court of appeals advises the Supreme Court in writing whether it has any objection to the proposed transfer. Any briefs in favor of the proposed transfer should also be filed in each court of appeals and forwarded with the transfer motion." Turning to the merits, the Court rejects Ford's argument good cause exists for the transfer because it is appealing a large judgment, but the plaintiffs' appeal is worth, at most, a small percentage of that amount. Instead, the Court adopts the rule generally applied to conflicting trial court jurisdiction: "[T]he court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts." The Court notes that there are exceptions to the principle of dominant jurisdiction and orders that the Tyler appeal be abated, not dismissed, so Ford can resume its appeal if it appears at any time that plaintiffs "filed the first appeal merely as a sham." Finally, the Supreme Court notes the numerous problems created by overlapping court of appeals districts and urges the Legislature to correct the situation.

Editorial Comment: I am informed by a reliable source that the Legislature did do something sensible — once — in 1895.

Saved By the Conrtesy Copy

Stokes v. Aberdeen Ins. Co., No. 95-0405 (Tex. Mar. 7, 1996)

The infamous postcard from the district clerk notifying the parties of the judgment contained the wrong date. As a result, plaintiff's counsel, thinking he was days early, sent his motion for new trial via overnight courier to the district clerk on the last day for filing. Fortunately, he also mailed a copy to the judge of the court on the same day. The court of appeals later dismissed the appeal.

The Supreme Court rules that the clerk is merely an agent of the judge. Thus, mailing to the judge satisfies the mailbox rule, TEX. R. APP. P. 4(b), provided the document is received by the clerk not more than 10 days late. It is clear that the clerk received the copy sent by courier. The copy mailed and the copy received by the clerk need not be the same copy. The appeal was timely, and the case is remanded to the court of appeals.

Trial Court *Required* to Sauction?

Mendoza v. Eighth Court of Appeals, No. 95-0796 (Mar. 7, 1996)

Defense counsel saw a notebook and roll of film that he thought were his work product in the possession of plaintiffs' counsel. Defendant moved for sanctions for discovery abuse. During the hearing on the motion plaintiffs' counsel invoked the Fifth Amendment when asked where he got the notebook. The trial court denied sanctions, but the court of appeals granted a writ of mandamus and directed the trial court to impose sanctions on plaintiffs' counsel.

Plaintiff's counsel seeks a writ of mandamus from the Supreme Court. The Supreme Court first rejects the argument that a motion for rehearing in the court of appeals is a prerequisite to seeking a writ of mandamus from the Supreme Court. Turning to the merits, the Supreme Court notes that an "appellate court may not disturb a trial court's factual determination on mandamus review." The Supreme Court implies that a different result might be required had the trial court had nothing before it other than the invocation of the Fifth Amendment, but the trial court also had the notebook itself, which had been tendered *in camera*. This was sufficient to support an implied finding that plaintiffs' counsel had not stolen defendant's work product.

It Helps to Know Who Your Client Is

Huie v. DeShazo, No. 95-0873 (Feb. 9, 1996)

This is a mandamus proceeding growing out of a suit against a trustee for breach

continued ...

... *from the preceding page*

of fiduciary duties. The beneficiary attempted to take the deposition of an attorney hired by the trustee using trust funds and frequently consulted by the trustee in the course of administering the trust. The attorney refused to answer numerous questions on the basis of attorney-client or work product privilege. The trial court held that an attorney paid out of trust funds may not assert attorney-client or work product privilege against the beneficiary.

The Texas Supreme Court disagrees with cases in a number of other jurisdictions and holds that a trustee who retains an attorney is the "client" and may assert privileges even against the beneficiary. Respondent also argues that, even if the privileges are potentially applicable, relator did not meets its burden of proving a privilege as to many of the unanswered questions. An examination of the record reveals that the evidence offered to prove the privilege was, indeed, thin. Nevertheless, the Supreme Court states: "The trial court's ruling is based on its conclusion that the attorney-client privilege does not apply to any pre-litigation communications between a trustee and the trustee's attorney, a contention we have rejected. In light of this holding, we believe the trial court should have an opportunity to consider, in the first instance, whether Huie has carried his evidentiary burden as to each of the Certified questions ...."

No Supreme Court Jurisdiction on Factual Sufficiency? Well ... hmmmm.

Ortiz v. Jones, No. 95-1152 (Feb. 9, 1996)

Jones was injured when her car collided with a car driven by Ortiz. Jones had a series of discussions with the adjuster for Ortiz' insurance carrier, and the insurance carrier issued four checks as a result of the accident. The one at issue here was for $500 and was marked "all claims bodily injury 6/07/89." After a non-jury trial, the trial court found that both parties intended the check to cover future medical problems arising from the accident and that Jones was aware of a potential problem with her back before accepting the check. Thus, the trial court ruled that acceptance of the check operated as a settlement of all bodily injury claims arising out of the accident. The court of appeals held that the evidence was factually insufficient to support the finding that the check was intended to release future personal injury claims.

Citing *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986), the Supreme Court reaffirms that, in sustaining a factual sufficiency challenge, the court of appeals must "clearly state why the jury's finding is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust." The Supreme Court describes the opinion of the court of appeals as "perfunctory" and identifies factors not mentioned by the court of appeals that arguably support the findings by the trial court. The Supreme Court concludes that the court of appeals misapplied the factual sufficiency standard of review by not considering these factors and remands to the court of appeals.

Sole Proximate Cause

Bel-Ton Electric Service, Inc. v. Pickle, 915 S.W.2d 480 (Tex. 1996)

This is a wrongful death case resulting from an on-the-job injury. Defendant sought a jury instruction that the conduct of fellow employees (who were immune from suit under the Workers' Compensation Act) was the sole proximate cause of the injury. The trial court refused the instruction and the court of appeals, finding no evidence of sole proximate cause, affirmed.

In a *per curiam* opinion the Supreme Court identifies some evidence of sole proximate cause. The Supreme Court also finds some evidence that defendant's conduct was a proximate cause. Without conducting a harmless error analysis, the Supreme Court remands for a new trial.

> *Editorial Comment: If the conduct of a third party is the* sole *proximate cause of an injury, it is logically impossible for defendant's conduct to be* a *proximate cause of the injury. It follows that a jury* necessarily *rejects a sole proximate cause defense by making a finding of proximate cause. The sole proximate cause instruction amounts to nothing more than a comment on the weight of the evidence and should be abolished. Likewise, the author finds it hard to believe that failure to give this instruction "was reasonably calculated to cause and probably did cause rendition of an improper judgment."* Cf. Treme v. Young, *38 Tex. Sup. Ct. J. 838 (June 15, 1995).*

Clarification of the DWOP Rule

Smith v. Babcock & Wilcox Construction Co., Inc., 913 S.W.2d 467 (Tex. 1995)

Smith's attorney had two trials set for the same day. He filed an unsworn motion for continuance in which he inaccurately alleged that the other case was older. After a telephone conference, the trial court denied the motion. According to Smith's attorney, the trial court said it would reconsider the motion if the other case actually went to trial, but neither the trial court nor the other attorneys recalled this statement. Smith did not appear for trial because the other case did, in fact, go to trial. The attorney for an intervenor aligned with Smith reurged the motion for continuance, but the trial court dismissed the case for want of prosecution. Smith's motion to reinstate was denied, and the court of appeals affirmed.

The Supreme Court notes that, under TEX. R. CIV. P. 165a, a trial court should reinstate a case where the failure to appear "was not intentional or the result of conscious indifference but was due to an accident or mistake or that the failure has been otherwise reasonably explained." The Court holds that a "failure to appear is not intentional or due to conscious indifference within the meaning of the rule merely because it is deliberate; it must also be without adequate justification." Another trial setting was an adequate justification. The incorrect statements in the motion for continuance may have been grounds for sanctions, but were not grounds for dismissal.

The Record in Administrative Appeals

Nueces Canyon Cons. ISD v. Central Education Agency, No. 95-0793 (Feb. 9, 1996)

This is an administrative appeal. The record of the proceeding before the agency was the only evidence introduced at trial. On appeal, Appellant designated the agency record for inclusion in the transcript. The initial transcript did not include the agency record, but appellant sought leave to file a supplemental transcript

which included the record and a certificate from the court reporter showing that the record had been admitted into evidence at trial. The court of appeals denied leave to supplement and affirmed on the basis that the agency record must be part of the statement of facts, not part of the transcript.

The Supreme Court holds that: "an appellant may bring an administrative record in an appeal governed by the Administrative Procedure Act to an appellate court as part of a statement of facts or transcript so long as a court reporter's certificate or other evidence demonstrates that the trial court admitted the record."

COURTS OF APPEALS

Statements of Facts in Divorce Cases: Order With Care

Brown v. Brown, No. 08-95-44-CV (Tex. App.—El Paso Feb. 1, 1996)

This is a divorce case. Child custody was tried to a jury and child support and property division tried to the court. Appellant challenged only the rulings on child support and property division, and did include the evidence from the custody trial in the statement of facts. Appellant did not include a statement of her points on appeal in her request to the court reporter for a statement of facts as required by TEX. R. APP. P. 53(d). The court of appeals presumes that the evidence introduced at the child custody trial supports all of the trial court's findings and overrules all points of error.

> *Editorial Comment: Yikes! This TRAP may be even worse than it appears from the opinion. The court's opinion implies that compliance with TEX. R. APP. P. 53(d) would have solved this problem. That's not necessarily so.* See Schafer v. Conner, *813 S.W.2d 154 (Tex. 1991), (holding that a complete statement of facts was needed to challenge the adequacy of the damages despite compliance with rule 53(d)).*

Written Order Needed to Preserve Error?

Pride Petroleum Services, Inc. v. Crisswell, No. 08-95-00023-CV (Tex. App.— El Paso Mar. 7, 1996)

This is a personal injury case. Defendant apparently preserved its challenges to the legal sufficiency of the evidence only in a motion for directed verdict. However, defendant obtained no written ruling on this motion.

The court of appeals notes that a number of cases have held that a motion for directed verdict preserves no error unless there is a written ruling on the motion. *See Wal-Mart Stores, Inc. v. Berry*, 833 S.W.2d 587, 590 (Tex. App.— Texarkana 1992, writ denied); *Western Co. v. Southern Pacific Transportation Co.*, 819 S.W.2d 952, 956 (Tex. App.— Austin 1991, no writ); *Soto v. Southern Life & Health Ins. Co.*, 776 S.W.2d 752, 754 (Tex. App.— Corpus Christi 1989, no writ); *Superior Trucks, Inc. v. Allen*, 664 S.W.2d 136, 145 (Tex. App.— Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Southwestern Materials Co. v. George Consol. Inc.*, 476 S.W.2d 454, 455 (Tex. Civ. App.— Houston [14th Dist.] 1972, writ ref'd n.r.e.). However, noting that defendant "made a detailed, lengthy oral motion for directed verdict that was overruled by the trial judge ... in open court, were recorded, and are included in the statement of facts," the court of appeals declines to follow the earlier cases and rules that a ruling in the statement of facts preserves error.

Effect of Intervenor's Motion for New Trial

State & County Mutual Fire Ins. Co. v. Kelly, 915 S.W.2d 224 (Tex. App.— Austin 1996)

State & County sued its insured seeking a declaratory judgment that there was no coverage for a particular accident. The insured did not answer, and the trial court signed a default judgment of January 25, 1995. On February 24, 1995, the last day of the trial court's plenary jurisdiction, the surviving spouse of the individual killed in the accident filed a motion to intervene in the declaratory judgment action and a motion for new trial. The trial court granted the motion to intervene on February 27, 1995 and signed an order granting the motion for new trial on May 1, 1995.

The insurance carrier seeks a writ of mandamus. The court of appeals holds that a motion to intervene must be made before the trial court renders judgment. Thus, the surviving spouse never became a party to the action. A trial court may grant a new trial on its own motion, and the court states that it is not improper for an interested non-party to move for a new trial. However, only a motion for new trial filed by a party acts to extend a trial court's plenary power. Both the order granting the motion to intervene and the order granting a new trial are void.

Bona Fide Attempt to Perfect Appeal

Garcia v. Caremark, Inc., No. 13-95-128-CV (Tex.App.—Corpus Christi February 29, 1996)

Appellant (apparently by mistake) filed a copy of the appeal bond with the clerk rather than the original. After the time in which to appeal had passed, appellant filed the original. Appellees move to dismiss the appeal, but the court of appeals holds that filing the copy represented a "bona fide attempt to invoke appellate court jurisdiction" and the defects could be cured by later filing the original. In addition, appellees argue that the original is defective because appellant did not file an affidavit demonstrating the solvency of the surety. The court of appeals quickly rejects this novel argument.

Appealability of Alteration of Class

De Los Santos v. Occidental Chemical Corp., 13-95-321-CV (Tex. App.—Corpus Christi February 29, 1996)

This is a multi-party case growing out of a chemical release from Occidental's plant. The trial court originally certified a mandatory class of plaintiffs. After some members of the class objected, the trial court amended its order and allowed some of the members to "opt out" and pursue their own law suits. The main case went to trial, and the jury rendered a verdict on liability and ordinary damages for the plaintiffs. However, the parties reached a settlement before the punitive damage issue was tried. One provision of the settlement required the parties to move the trial court again to amend its certification order and again make the plaintiff class mandatory. The trial court granted this motion, and the class members who had previously "opted out" attempt to appeal.

Appeal dismissed. The court of appeals notes that TEX. CIV. PRACT. & REM. CODE, § 51.014(3) authorizes an interlocu-

continued ...

... *from the preceding page*

tory appeal from an order that "certifies or refuses to certify a class." The court cites with approval a prior case holding that an order withdrawing certification can be appealed. To hold otherwise, "would give the trial court the power to circumvent appellate review by first granting, then withdrawing class certification." However, the court notes other cases holding that orders altering the size or definition of the class cannot be appealed. The court holds that changing the type of class from "opt out" to mandatory is not certifying or refusing to certify a class within the meaning of the statute.

Make Sure Your Form Motion for Extension Says Both Transcript and Statement of Facts

Jarrell v. Serfass, 916 S.W.2d 719 (Tex. App.— Waco 1996)

After losing her personal injury suit to the jury, plaintiff perfected appeal. She filed a timely motion for extension of time to file the statement of facts but no motion for extension of time to file the transcript. She argues that the extension of time for filing the statement of facts applied to the entire record. The court of appeals, however, rejects this argument: "Because Jarrell's original motion referred only to the statement of facts, it was sufficient to extend the time for filing only the statement of facts." The appeal is dismissed.

Motions In Limine Don't Preserve Error? Don't Count On It

National Union Fire Ins. Co. v. Kwiatkowski, 915 S.W.2d 662 (Tex. App.—Houston [14th Dist.] 1996)

This was originally a suit for workers' compensation and for breach of the duty of good faith. The trial court severed the workers compensation claim and tried it first. During pre-trial the trial court granted the compensation carrier's motion in limine and ordered plaintiff's counsel not to introduce evidence regarding the plaintiff's financial distress or the carrier's alleged mishandling of the claim. Nevertheless, plaintiffs counsel repeatedly made arguments or attempted to introduce evidence on those issues. The carrier objected in all but a few instances, and the trial court sustained most of the objections and, in one instance, instructed the jury to disregard improper argument. The verdict was for plaintiff, and judgment was rendered accordingly.

Despite the usual rule that a motion in limine presents nothing for review, the court of appeals states: "The cumulative effect of trial counsel repeatedly violating a court's order in limine may be grounds for reversal." In this case, the court of appeals considers the short length of the trial and the number of infractions, and reverses and remands for a new trial.

Non-Snits, Non-Final, and What Is In That Record, Anyway

Atchison v. Weingarten Realty Management Co., 916 S.W.2d 74 (Tex. App.— Houston [1st Dist.] 1996)

This is a slip and fall case. Atchison sued Weingarten, and Weingarten brought third-party actions for contribution and indemnity. On June 13, 1994, the trial court granted a summary judgment against Atchison in favor of Weingarten. The judgment did not contain a Mother Hubbard clause and did not purport to dispose of the third-party actions. Atchison filed a timely motion for new trial. On August 25, 1994, Weingarten filed a notice of non-suit of the third-party claims, but the trial court did not sign an order sustaining the non-suit. On September 13, 1994 (one day late if the June 13 judgment was final), Atchison filed an appeal bond. The court of appeals later abated the appeal, and the trial court signed an order granting the non-suit on July 18, 1995. Weingarten renews its argument that the June 13, 1994 judgment was final and the appeal should be dismissed.

The court of appeals first discusses the effects of a recent Supreme court holding that, for appellate purposes, a non-suit must be "granted" in a written order: Where, as here, the non-suit disposes of the last unadjudicated claim, "appellate timetables still do not begin to run until the trial court either signs an order granting the nonsuit or signs a final judgment that explicitly memorializes the nonsuit or contains a 'Mother Hubbard' clause." The court suggests in *dicta* that, even where the non-suit is filed before a ruling on the other claims, any judgment disposing of the other claims is not appealable unless the it contains a Mother Hubbard clause or the trial court signs an order either (1) dismissing the non-suited defendant (2) severing plaintiff's claims against the non-suited defendant. Thus, on the face of the pleadings, there was no final judgment until the trial court approved the non-suit in July of 1995. Appellant's appeal bond was almost ten months premature, but is deemed timely under the rules. Weingarten, however, further argues that its cross- claims for contribution and indemnity exist only as derivative claims of plaintiff's primary cause of action. Thus, Weingarten argues that the June 13, 1994 judgment is final because it *necessarily* disposed of those claims. The court of appeals acknowledges that "Weingarten's cross-claims for contribution and indemnity were no longer viable after the trial court rendered the summary judgment." However, the court rules that, in the absence of a Mother Hubbard clause, a summary judgment "must *explicitly* dispose of all issues and parties before the judgment becomes final .... The prophylactic effect of this rule is to provide clear notice to the parties that a final judgment has been rendered, giving the parties fair warning that the applicable appellate timetables have begun to run."

The court then starts to turn to the merits but never gets there. The motion for summary judgment itself is not in the appellate record, but a document that purports to be the motion for summary judgment is attached as an exhibit to Atchison's motion for new trial. Weingarten has objected to this defect in its brief, but plaintiff has made no attempt to file a supplemental transcript. The court notes that TEX. R. APP. PROC. 71 states that "all motions relating to informalities in the manner of bringing a case into court shall be filed within thirty days after the filing of the transcript in the court of appeals." The court holds, however, that the rule does not apply to this motion. Finally, the court presumes that the missing document supports the trial court's ruling and affirms.

Texas Criminal Appellate Update

by Alan Curry
Assistance District Attorney
Houston

COURT OF CRIMINAL APPEALS

A court of appeals is required to review a defendant's claim that the evidence is factually insufficieut as to the elements of the charged offense.

Clewis v. State, No. 450-94 (Tex. Crim. App., Jan. 31, 1996) (not yet reported)

From the beginning, appellate jurisdiction included the power to examine factual sufficiency, and every appellate court with crinninal jurisdiction has recognized, acknowledged, and utilized that power. *See* TEX. CRIM. PROC. CODE ANN. art. 44.25 (Vernon Supp. 1996).

Furthermore, the standard of review for the legal sufficiency of the evidence under *Jackson v. Virginia* does not satisfy a non-capital defendant's right to an appellate review of fact questions.

Moreover, the proper standard of review for the factual sufficiency of the evidence as to the elements of the charged offense is the one articulated by the Austin Court of Appeals in *Stone v. State,* 823 S.W.2d 375, 381 (Tex. App.—Austin 1992, pet. ref'd, untimely filed). That is, when reviewing the factual sufficiency of the evidence as to the elements of the charged offense, the court of appeals views all of the evidence, without viewing the evidence in the light most favorable to the verdict, and sets aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.

Finally, in conducting a factual sufficiency review, an appellate court reviews the factfinder's weighing of the evidence and is authorizcd to disagree with the factfinder's determination. This review, however, must be appropriately deferential so as to avoid an appellate court's substituting its judgment for that of the jury. When conducting a factual sufficiency review, an appellatc court cannot substitute its judgment for that of the factfinder since this would violate the defendant's right to trial by jury. If an appellate court reverses a conviction on the basis of factually insufficient evidence, it should vacate the conviction and remand the cause for a new trial.

The so-called "affirmative links doctrine" is still utilized in reviewing thc sufficiency of the evidence to support a defeudant's conviction for possession of a controlled substauce.

Brown v. State, No. 852-94 (Tex. Crim. App., Dec. 13, 1995) (not yet reported)

While the "reasonable hypothesis" test no longer applies to an appellate court's review of the legal sufficiency of the evidence in a case involving circumstantial evidence, appellate courts can still review the presence of "affirmative links" in reviewing the legal sufficiency of the evidence to support a defendant's conviction for possession of a controlled substance. *See Hackleman v. State,* No. 3-94-76-CR (Tex. App.—Austin, Feb. 14, 1996) (not yet reported)

The Texas Court of Crimiual Appeals is not required to review the sufficiency of the evidence to support the jury's negative answer to the mitigation special issue at the punishment stage of a capital murder trial.

McFarland v. State, No. 71,557 (Tex. Crim. App., Feb. 21, 1996) (not yet reported)

TEX. CRIM. PROC. CODE ANN. art. 44.251(a) (Vernon Supp. 1996) does not require the Texas Court of Criminal Appeals to review the sufficiency of the evidence to support the jury's negative answer to the mitigation special issue in a capital murder case.

December 24 is not a legal holiday for the purposes of filing a document.

Mendez v. State, No. 319-95 (Tex. Crim. App., Jan. 17, 1996) (not yet reported)

Under the Texas Rules of Appellate Procedure, if a document, such as a motion for new trial, is due on December 24, it must be filed on or before December 24, or it is untimely filed, because December 24 is not a legal holiday. *See* TEX. R. APP. P. 31(a)(1); TEX. R. APP. P. 5(a); TEX. GOV'T CODE ANN. §§ 662.003, 662.021 (Vernon 1994).

The court of appeals mnst consider a document that was offered and admitted into evidence as an exhibit, even though it is not coutaiued iu the statemeut of facts, but the transcript only.

Pitts v. State, 916 S.W.2d 507 (Tex. Crim. App. 1996)

If the record reflects that a document, such as a defendant's judicial confession, is offered and admitted into evidence, it can be considered by the court of appeals as part of the record, even though the document does not appear as part of the statement of facts. Therefore, the court of appeals should have considered the defendant's judicial confession in the transcript in determining the sufficiency of the evidence to support the defendant's conviction under TEX. CRIM. PROC. CODE ANN. art. 1.15 (Vernon Supp. 1996).

Cf. Moreno v. State, 858 S.W.2d 453 (Tex. Crim. App. 1993).

Compare Melendez v. State, 902 S.W.2d 28 (Tex. App.—Houston [14th Dist.] 1995, pet. granted) (exhibits are part of the record) *with Gomez v. State,* 905 S.W.2d 735 (Tex. App.—Houston [14th Dist.]1995, pet. granted) (exhibits are not part of the record).

If an appellate court reverses a case because of error that occurred duriug the voir dire examiuation, the appellate court should reverse and remand only

continued ...

... *from the preceding page*

for a new punishment hearing if the error dealt only with tbe punishment stage of the trial.

Ransom v. State, No. 71,633 (Tex. Crim. App., Feb. 21, 1996) (not yet reported)

Voir dire error regarding a subject that a jury would consider only during the punishment stage of the trial is error affecting punishment only, unless the defendant produces evidence showing that the error necessarily produced a jury biased against the defendant on the issue of guilt. If the defendant produces no such evidence, such voir dire error should only require a reversal and a remand for a new punishment hearing. *See* TEX. CRIM. PROC. CODE ANN. art. 44.29(c) (Vernon Supp. 1996).

COURTS OF APPEALS

A defeudant's notice of appeal can be iucluded with his motion for new trial.

A defendant cannot complain about error occurriug during the guilt/innocence stage of the trial if he fails to include all portions of the record, including any hearing at the punishment stage of the trial.

Horowitz v. State, No. 1-93-1022-CR (Tex. App.—Houston [1st Dist.], Nov. 22, 1995) (not yet reported)

A defendant's written notice of appeal can be included within an otherwise timely filed motion for new trial.

If the record reveals that a hearing was held on punishment, and the defendant has failed to include that hearing in the record before the court of appeals, the court of appeals will summarily affirm the defendant's conviction, even if the defendant raises only error that occurred during the guilt/innocence stage of the trial, because the punishment hearing could have contained an admission of guilt by the defendant that would have waived any error committed during the punishment stage of trial.

See McGlothlin v. State, 896 S.W.2d 183 (Tex. Crim. App. 1995); *DeGarmo v. State,* 691 S.W.2d 657 (Tex. Crim. App. 1985).

A document must be timely filed and must reveal the defendant's desire to appeal in order to be viewed as a proper and timely filed notice of appeal.

Cooper v. State, No. 2-94-226-CR (Tex. App.—Fort Worth, Feb. 29, 1996) (not yet reported)

An order appointing counsel for the purposes of a possible appeal, standing alone, does not constitute a written notice of appeal for the purposes of TEX. R. APP. P. 40(b)(1). Furthermore, the court of appeals cannot consider other documents filed outside the time period required by TEX. R. APP. P. 41(b)(1) in obtaining jurisdiction over a defendant's appeal.

Cf. Miles v. State, 842 S.W.2d 278 (Tex. Crim. App. 1989), which the court of appeals notes was meant to be an unpublished opinion that cannot be cited as authority.

A defendant who desires to appeal from a revocatiou of his probation need only file a "general" notice of appeal.

Manganello v. State, No. 4-94-808-CR (Tex. App.—San Antonio, Jan. 17, 1996) (not yet reported)

A defendant who desires to appeal from a trial court's order revoking his "regular" probation or community supervision does not have to file a written notice of appeal that complies with TEX. R. APP. P. 40(b)(1), because the requirements of that rule only apply to appeals from convictions.

Cf. Fregia v. State, 903 S.W.2d 94 (Tex. App.—Beaumont 1995, no pet.); *Shepherd v. State,* 884 S.W.2d 571 (Tex. App.—Waco 1994, no pet.).

A defendant, who enters a plca of guilty or uo contest in accordance with a plea bargain and is placed on deferred adjudication, need only file a "general" notice of appeal.

Strowenjans v. State, No. 5-93-1583-CR (Tex. App.—Dallas, Jan. 18, 1996) (not yet reported)

A defendant, who enters a plea of guilty or no contest in accordance with a plea bargain—and is then placed on deferred adjudication community supervision, can still appeal the trial court's denial of his written pre-trial motion to suppress even if his notice of appeal does not state that he is appealing the written pre-trial motion to suppress or that he was given permission to appeal by the trial court. Those requirements of TEX. R. APP. P. 40(b)(1) do not apply to appeals from being placed on deferred adjudication community supervision.

See McLennan v. State, 796 S.W.2d 324 (Tex. App.—San Antonio 1990, pet. ref'd); *Watson v. State,* 884 S.W.2d 836 (Tex. App. —El Paso 1994, pet. granted).

But cf. Martinez v. State, 906 S.W.2d 651 (Tex. App.—Fort Worth 1995, no pet.).

Cf. Fregia v. State, 903 S.W.2d 94 (Tex. App.—Beaumont 1995, no pet.)

A defendant who enters a plea of guilty or no contest in accordance with a plea bargain cannot appeal the trial court's denial of his motion to suppress unless that motion to suppress appears in the record.

Al Haj v. State, 916 S.W.2d 660 (Tex. App.—Houston [14th Dist.] 1996)

When a defendant enters a plea of guilty or no contest in accordance with a plea bargain, he cannot appeal the trial court's ruling on a motion unless that motion appears in the record, even if the trial court's ruling on the motion appears in the record. This is true because TEX. R. APP. P. 40(b)(1) contemplates a defendant's appeal from a *written* motion. *But cf. Jones v. State,* No. 7-93-370-CR (Tex. App.—Amarillo, Jan. 16, 1996) (not yet reported).

A misdemeauor defendant, who enters a plea of guilty or no contest iu accordance with a plea hargain, cannot appeal a matter, which was not raised by a written motion prior to trial, or upon which the trial court granted permission to appeal.

Taylor v. State, 916 S.W.2d 680 (Tex. App.—Waco 1996)

After a defendant enters a plea of guilty or no contest in a misdemeanor case in accordance with a plea bargain, he cannot appeal a matter, such as the absence of a written jury waiver, unless he raised that matter in a written pre-trial motion or unless he had permission from the trial court to appeal that matter. *Cf. Lemmons v. State,* 818 S.W.2d 58 (Tex. Crim. App. 1991) (holding that such information need not be in notice of appeal in order to appeal from misdemeanor plea).

In a State's appeal from a trial court's order granting a motion to suppress, the State mnst timely certify that the appeal is not taken for delay and that the suppressed evidence is of substantial importance in the case.

State v. Janicek, No. 3-95-324-CR (Tex. App.—Austin, Feb. 21, 1996) (not yet reported)

If the State desires to appeal a trial court's ruling granting a motion to suppress, the prosecuting attorney must certify to the trial court that the appeal is not taken for the purposes of delay and that the suppressed evidence is of substantial importance in the case, and he must do so within the 15-day period required by TEX. CRIM. PROC. CODE ANN. art. 44.01(d) (Vernon Supp. 1996). Merely filing a written notice of appeal is not sufficient. *See State v. Jackson,* No. 1-95-330-CR (Tex. App.—Houston [1st Dist.], Feb. 8, 1996) (not yet reported).

The State cannot appeal a trial court's finding that the evidence was insufficient to support the allegations in the enhancement paragraphs of the indictment.

Hackleman v. State, No. 3-94-76-CR (Tex. App.—Austin, Feb. 14, 1996) (not yet reported)

The State does not have the right to file a cross-appeal under TEX. CRIM. PROC. CODE ANN. art. 44.01(c) (Vernon Supp. 1996) in order to challenge the trial court's adverse finding on the sufficiency of the evidence to support the allegations in the enhancement paragraphs of the indictment, as such would violate the defendant's right against double jeopardy.

A defendant may not pursue an interlocutory appeal from a trial court's denial of her motion to suppress.

McKown v. State, No. 2-95-509-CR (Tex. App.—Fort Worth, Jan. 18, 1996) (not yet reported)

A defendant may not pursue an interlocutory appeal from a trial court's denial of her motion to suppress.

In order to bring an appeal during a State's appeal, the defendant must timely file a separate written notice of appeal.

State v. Washington, No. 1-95-934-CR (Tex. App.—Houston [1st Dist.], Jan. 11, 1996) (not yet reported)

A defendant is permitted to file a cross-appeal when the State brings a State's appeal, but the defendant must timely file a separate written notice of appeal.

But cf. State v. Vogel, 852 S.W.2d 567 (Tex. App.—Dallas 1992, pet. ref'd); *State v. Garcia,* 823 S.W.2d 793 (Tex. App. —San Antonio 1992, pet. ref'd); *State v. Clouse,* 839 S.W.2d 459, 463 (Tex. App. —Beaumont 1992, no pet.).

In order to obtain a reversal for a missing portion of the record, a defendant must show that a court reporter was present or requested.

Brown v. State, No. 2-93-8-CR (Tex. App. —Fort Worth, Feb. 28, 1996) (not yet reported)

A defendant is not entitled to a new trial under TEX. R. APP. P. 50(e) because of a missing portion of the record if he does not satisfy his burden to show that a court reporter was present or requested at the proceeding that is alleged to be missing from the record.

In order to ohtain a reversal because of a missing portion of the record, a defendant is not required to make a written request for the statement of facts if such a request would he useless.

White v. State, 916 S.W.2d 78 (Tex. App. —Houston [1st Dist.], Jan. 25, 1996) (not yet reported)

In order to be entitled to a reversal because of a lost or destroyed record under TEX. R. APP. P. 50(e), a defendant is not required to make a written request for the statement of facts or a designation of the record on appeal if such request or designation would have been useless. The Texas Court of Criminal Appeals had granted the defendant an out-of-time appeal seven years after his conviction. The court reporter had since died, and her notes could not be located.

NOTICE OF ANNUAL MEETING

- Report of Nominating Committee and Election of Section Officers
- Other Business
- Program: Appellate Jeopardy (*see* Page 10)

Friday, June 21st, 2:00 – 5:00 p.m.

Wyndham Anatole Hotel, Dallas

- Reception Following

Fifth Circuit Civil Appellate Update

by Marcy Hogan Greer
FULBRIGHT & JAWORSKI L.L.P.
Austin

Appellate Jnrisdiction: Sanctions: Evidence—Authenticity

Baulch v. Johns, 70 F.3d 813 (5th Cir. 1995)

The court of appeals refused to consider an interlocutory appeal from a district court's denial of a motion for summary judgment based on qualified immunity because the district court's denial of the motion was based on the existence of a disputed fact. Of interest is the fact that the court, after concluding that it did not have jurisdiction over the appeal, went on to impose sanctions on the appellant under 28 U.S.C. § 1927 for knowingly basing its appeal on a frivolous evidentiary argument.

A district court is not required to find that authenticity of a document has been conclusively established before admitting the disputed evidence. For example, when a document appears on its face and by its contents to be a public record, such as an autopsy report or criminal conviction, the "internal indicia of reliability" and proof of the process by which the copy was obtained may suffice under Federal Rule of Evidence 901.

Appellate Review: Sufficiency of the Evidence

Ham Marine, Inc. v. Dresser Industries, Inc., 72 F.3d 454 (5th Cir. 1995)

When the very existence of a contract was at issue in the district court and the interpretation of that contract turned on the jury's consideration of extrinsic evidence, the standard of review applicable to the jury's interpretation of the contract was the more deferential "sufficiency of the evidence" standard generally applied to a jury's factual findings.

The jury's assessment of damages will not be reversed unless it is clearly erroneous. Only when a damages verdict is "so large as to shock the judicial conscience, so gross or inordinately large as to be contrary to right reason, so exaggerated as to indicate bias, passion, prejudice, corruption, or other improper motive" will it be reversed as excessive (quoting *Caldarera v. Eastern Airlines, Inc.*, 705 F.2d 778, 783 (5th Cir. 1983)). Appellate review is even more circumscribed when the trial judge reviews and approves the verdict.

Arbitration

Gulf Coast Industrial Workers Union v. Exxon Co., 70 F.3d 847 (5th Cir. 1995)

The district court properly vacated an arbitration award after the arbitration board refused to consider a key piece of evidence, on the grounds that it was hearsay, even though it had told the offering party during arbitration that the evidence had been admitted. While expressly acknowledging that judicial review of arbitration awards is "extraordinarily narrow," the court of appeals noted that the Federal Arbitration Act allows a district court to vacate an arbitration award when arbitrators improperly refuse to consider material evidence.

Attorneys' Fees

McDonald's Corp. v. Watson, 69 F.3d 36 (5th Cir. 1995)

The district court's discretion to deny attorneys' fees when a contract provides for their recovery is much more limited than when a statute permits them: "The district court abuses its discretion if it awards contractually-authorized attorneys' fees under circumstances that make the award inequitable or unreasonable or fails to award such fees where inequity will not result." One example of where the court may decline to award contractual fees is when the plaintiff pursues a claim unnecessarily.

Certification to State Court/Erie Guess

Naquin v. Prudential Assurance Co., 71 F.3d 512 (5th Cir. 1995) (per curium)

When a state supreme court declines to accept certification from the court of appeals, the federal court is relegated to making an *Erie* guess in order to decide the case.

Employment/Magistrates/Confidential Informant

Castillo v. Frank, 70 F.3d 382 (5th Cir. 1995)

The district court's order of referral of a case to a magistrate judge did not deprive the court of jurisdiction or authority to review the magistrate judge's order compelling disclosure of the identity of a confidential informant. Because the statute permitting referral requires the district court to apply a "clearly erroneous" standard when reviewing the magistrate judge's ruling on a non-dispositive pretrial motion, "the statute can only be construed to give the district court authority to review such rulings."

Even if the district court had exceeded its authority or improperly reviewed the order, its refusal to require disclosure of the informant was viewed as harmless error because the credibility of the confidential informant was not relevant to the material issue of whether the defendant-employer based its termination decision on an honest belief that the plaintiff had violated its policies and procedures.

Evidence: Quashing a Suhpoena: Reopening the Record

Robinson v. Comm'r Internal Rev., 70 F.3d 34 (5th Cir. 1995)

Taxpayers won a substantial verdict against a bank in an underlying action that was later compromised. In the judgment reflecting the post-judgment settlement, the state trial court allocated settlement proceeds among the various categories of relief awarded by the jury, including punitive damages, so as to minimize the

taxpayers' tax liability. The allocation formula was contested in the tax court, and the taxpayers sought to subpoena the state court judge who entered the judgment to testify whether he "rubber-stamped" the settlement or made actual findings on the allocations. The court of appeals upheld the tax court's decision to quash the subpoena as not constituting an abuse of discretion—"A judge may not be asked to testify about his mental processes in reaching a judicial decision."

The denial of a motion to reopen the record for admission of additional evidence is "not subject to review except upon a demonstration of extraordinary circumstances which reveal a clear abuse of discretion." Further, the motion must be denied if the evidence was available at trial or "could have been obtained with reasonable diligence."

Expert Wituesses: Sanctions: Findings of Fact: Appellate Procedure: Injunction

Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546 (5th Cir. 1996)

An order striking the designation of expert witnesses as a sanction is reviewed for an abuse of discretion. Both the determination that a party violated the discovery order and resulting sanction imposed are reviewed under this standard:

> The district court's discretion in such matters has been described as 'broad' ... and 'considerable' .... Accordingly, '[i]t is unusual for an appellate court to find abuse of discretion in these matters.' ... Generally, we will only reverse the trial court's discovery rulings in 'unusual and exceptional case[s].'
>
> [Internal citations and quotations omitted.] In concluding that the district court had not abused its discretion in striking the expert witness designation, the court of appeals upheld the literal application of the trial court's accelerated discovery schedule under new Rule 26(a) of the Federal Rules of Civil Procedure.

Pursuant to Rule 26(a), the parties had been ordered to exchange designations of experts and produce written reports containing "a complete statement of all opinions to be expressed and the basis and reasons therefor," as well as data and information relied upon, exhibits, qualifications, and a listing of other cases in which the expert had participated at least ninety days prior to trial. Cedar Point apparently made limited disclosures at the 90-day cutoff and subsequently "amended" and "supplemented" its earlier disclosures to complete the picture. The district court's finding that Cedar Point's initial expert disclosures did not meet the rigid standard of Rule 26 was held to be within its discretion: "The purpose of rebuttal and supplementary disclosures is just that—to rebut and supplement. These disclosures are not intended to provide an extension of the deadline by which a party must deliver the lion's share of its expert information." Because Rule 26(a) requires these disclosures, it was not necessary for the Sierra Club to file a motion to compel before the trial court could strike Cedar Point's experts.

When a trial court adopts the winning party's proposed findings of act and conclusions of law with minimal revisions, the court of appeals "review[s] the court's findings of fact with caution."

On cross-appeal, Sierra Club argued that the trial court lacked jurisdiction to amend its earlier injunction because Sierra Club had already perfected an appeal to the Fifth Circuit. The court of appeals noted that Rule 62(c) regarding injunctions presents an exception to the general rule that a notice of appeal divests the district court of jurisdiction. The Fifth Circuit found that the court's amending order was a permissible modification under Rule 62(c) for which the district court maintained jurisdiction. Orders under Rule 62(c) are reviewed for an abuse of discretion, and the court of appeals found no such abuse.

Expert Witnesses: Evidence

Pedraza v. Jones, 71 F.3d 194 (5th Cir. 1995)

Citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2799 (1993), the court of appeals held that the district court did not abuse its discretion in refusing to admit as expert testimony on the issue of heroin withdrawal the affidavit of an individual whose sole qualification was his status as a long-time heroin addict. Further, the proffered "expert" affidavit was not competent as a lay opinion because the affiant had no knowledge of the plaintiff's mental condition and the testimony was not "helpful to a clear understanding of his testimony or the determination of a fact in issue" and was conclusory.

Judicial Estoppel: Interpleader: Appellate Jurisdiction

Ergo Science, Inc. v. Martin, 73 F.3d 595 (5th Cir. 1996)

Ordinarily, an order granting interpleader is interlocutory, but a trial court can certify the order as final pursuant to Rule 54(b) so that an appeal can be taken immediately.

The doctrine of judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine of judicial estoppel "prevents internal inconsistency, precludes litigants from 'playing fast and loose' with the courts and prohibits parties from deliberately changing positions based upon the exigencies of the moment." The court of appeals also rationalized: "Faced with a burgeoning docket and with a complex commercial lawsuit at hand, a district judge must be able to winnow the issues for trial. This includes reliance on statements made by counsel in open court disavowing specific claims." In this case, because one party's trial counsel specifically disavowed any interest in the interpled fund, the party he represented was precluded from making a subsequent claim against the fund.

If the trial court misinterprets a party's representation as judicial estoppel, the proper relief is to pursue a motion to set aside the judgment pursuant to Rule 60(b).

Judicial Immnnity: Receiver: Motion To Dismiss—Rule 12(b)(6)

Davis v. Bayless, 70 F.3d 367 (5th Cir. 1995)

Court-appointed receivers are entitled to share the appointing judges' absolute immunity so long as the challenged actions are taken in good faith and within the scope of the authority granted to the receiver.

Since the receiver's immunity is derivative from the appointing judge, the court of appeals evaluated judicial immunity. Judges are afforded absolute immunity

continued ...

when they perform normal judicial functions unless they act "in the clear absence of all jurisdiction." A judge is not deprived of immunity "because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction'" (quoting *Stump v. Sparkman*, 435 U.S. 349, 357-60 (1978)). The "proper inquiry is not whether the judge actually had jurisdiction, or even whether the court exceeded its jurisdictional authority, but whether the challenged actions were obviously taken outside of the scope of the judge's power." Judicial immunity is not, however, a bar to prospective injunctive relief against a judicial officer acting in his or her judicial capacity.

While normally documents outside of the pleadings will convert a 12(b)(6) motion to dismiss into one for summary judgment, federal courts can take judicial notice of matters of public record in deciding a motion to dismiss. Further, affidavits in the record that are not relied upon by the district court will not convert the motion to dismiss into a summary judgment proceeding.

Although a trial court is not required to submit findings of fact and conclusions of law when deciding a motion to dismiss, it must "explain its reasons in sufficient detail to allow [the court of appeals] to determine whether the district court correctly applied the proper legal rule." The appellate court's inability to "discern any basis for the district court's dismissal" of the claim for injunctive relief required remand for clarification by the trial court.

Finally, the court of appeals upheld the dismissal of certain constitutional claims which it found to be "conclusory and completely without factual support in the pleadings."

Jury Charge: Attorney-Client Relationship: Waiver of Defense

Banc One Capital Partners Corp. v. Kneipper, 67 F.3d 1187 (5th Cir. 1995)

This case involves an "all or nothing" private securities offering by FilmDallas, Inc.—the offering was to raise a minimum of $7.5 million or all of the money would be returned to the investors. Kneipper, a partner at Jones Day, was counsel to FilmDallas, as well as an officer and director of the company. After various investors committed to the project, Kneipper and others allegedly made certain misrepresentations and omitted material facts. The only dispute in this regard was whether the defendants owed a continuing obligation to the investors after they had committed to invest. The trial court's instruction on the issue defined "materiality" to exclude misrepresentations made after the investors initially committed.

- Even if the jury charge is in error, the court of appeals should not reverse unless the charge "as a whole leaves us with substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." Applying this standard, the court of appeals found reversible error in the court's limitation of evidence contained in the definition of "materiality."

- The court of appeals also found the conspiracy instruction to be defective because it was overly broad. Specifically, it failed to limit the jury solely to unlawful acts that were pled, proven, and submitted. Because the charge failed to define any other unlawful acts, there was danger that the jury "may have based their ... finding on acts with which they disagreed, whether unlawful or not."

- The investors could not sue Kneipper or Jones Day for legal malpractice as a result of an opinion letter issued in connection with the securities offering. Texas law requires privity of contract, and an attorney generally owes no professional duty to a third party or nonclient. The opinion letter was held not to evidence an intention by Jones Day to form an attorney-client relationship with the investors.

- The court refused to consider a res judicata defense that was not pled or even attempted until long after the deadline for amending pleadings had passed.

Mandate: Successive Appeals

Burroughs v. FFP Operating Partners, 70 F.3d 31 (5th Cir. 1995)

In a second appeal after remand, "the only issue for consideration is whether the court below reached its final decree in due pursuance of our previous opinion and mandate." The court of appeals may consult its prior opinion to ascertain compliance with its mandate, but will not reconsider issues decided by the prior panel.

Pleadings: Amendment: Plain Error: 12(b)(6) Dismissal

Robertson v. Plano City of Texas, 70 F.3d 21 (5th Cir. 1995)

Although leave to amend a pleading should be granted liberally, the court of appeals reviews its denial only for an abuse of discretion. Because the plaintiffs failed to raise the error in denying an amendment to their complaint until appeal, the court's review was limited to "plain error." This review is quite limited—if an appellant shows a clear or obvious error that affects his substantial rights, the appellate court "has discretion to correct errors that seriously affect fairness, integrity, or public reputation of judicial proceedings." Moreover, "[w]hen the nature of the claimed error is a question of fact, the possibility that such a finding could rise to the level of ... plain error is remote."

Rule 12(b)(6) dismissals are reviewed *de novo* and will be affirmed only "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Allegations in the complaint are taken as true. However, the court of appeals "cannot assume facts not alleged."

Removal: Dismissal of Non-Diverse Party

Elliott v. Tilton, 69 F.3d 35 (5th Cir. 1995)

Once again, the Robert Tilton case reappears. After the court of appeals in a prior opinion vacated the trial court's judgment for lack of diversity jurisdiction, the plaintiffs moved the court of appeals on rehearing to dismiss the Word of Faith World Outreach Center Church in order to correct the jurisdictional infirmity. This can be done on appeal, but in limited cases. In making this determination, the court must consider whether the dismissal at the appellate level will prejudice one of the parties. The Fifth Circuit remanded the issue to the district court, which it considered to be "in a far better position to weigh the contentions of the parties

concerning trial tactics and the impact the presence of the nondiverse party had on the remaining defendants."

Removal: Res Judicata: Amouut in Controversy: Snmmary Judgment: Fraud

S.W.S. Erectors, Inc. v. Infax, Inc., 72 F.3d 489 (5th Cir. 1996)

In this case, the defcndant originally filed a notice to remove on diversity grounds to the federal district court in Galveston. In support of the notice of removal, the defendant filed the affidavit of its attorney, who had allegedly spoken with the plaintiff's counsel and confirmed that the amount in controversy exceeded $100,000. The plaintiff immediately moved to remand on the basis that the action had been removed to the wrong federal district court. The districtcourt refused to transfer the case to the correct district and remanded to the state court based solely on the error in removal. The district court did not address whether the requisites for removal on the basis of diversity had been met. When the defendants subsequently deposed the plaintiff's president, he testified that the actual damages ranged between $70,000 and $80,000. Using this deposition transcript as an "other paper" for purposes of 28 U.S.C. § 1446(b), the defendant again removed the case on grounds of diversity. This time the case was removed to the proper district.

- The court of appeals affirmed the trial court's denial of the plaintiff's second motion to remand, finding that the original order of remand was not "res judicata" as to the propriety of removal based on divcrsity jurisdiction. "If the dcfendant raises a new factual basis [for removal], the new factual basis is not deemed adjudicated with the remand order and, therefore, is not barred by res judicata." The Galveston division's remand order did not address the propriety of removal on diversity grounds and therefore could not be res judicata on that point.

- The court of appeals noted in a footnote that the district judge in Galveston should have transferred the case to a correct division rather than remanded it to the statc court in the original removal. "Error in the vcnue of a removed action does not deprive the district court of subject matter jurisdiction requiring remand of the case."

- The plaintiff also contended that the second removal was untimely because the defendant had failed to rcmove the action until more than thirty days after the creation of its attorney's affidavit setting forth the basis for diversity jurisdiction. The court of appeals disagreed because the affidavit could not constitute an "other paper" under section 1446(b) since it was not generated voluntarily by the plaintiff. The affidavit was created by the defendant and was based on the defendant's subjective knowledge; it could not, therefore, be an "other paper" for purposes of starting the accrual period for removal. The transcript of deposition testimony was, on the other hand, an "other paper," which triggered the right to removal.

- The court of appeals also affirmed summary judgment on the merits of the plaintiff's fraud claim:

  > It is well established in the Fifth Circuit that an allegation of fraud does not create an impenetrable shield through which the sword of summary judgment cannot pierce. A fraud case can be wounded and killed like any other case; it receives no special privileges or protections in the battle for summary dismissal.

- When only inadmissible evidence is available to support a fraud claim, summary judgment is proper. A party cannot impeach its own deposition testimony by a countervailing affidavit in order to defeat summary judgment. Conversely, when an affidavit simply supplements, rather than contradicts, prior deposition testimony, the affidavit may be considered. In this case, because the court of appeals agreed that the plaintiff's president's affidavit contradicted his prior deposition testimony, the affidavit could not serve as competent summary judgment evidence.

Removal: Officer of the Court: "Arising Under" Jurisdictiou

Herron v. Continental Airlines, Inc., 73 F.3d 57 (5th Cir. 1996)

The plaintiff brought suit against a private proccss server and the party who had employed him to serve process in a prior federal case. The petition in this case was originally filed in state court and allcged only state law causes of action for apparent harassment by the process server. The defendants removed the case to federal court under 28 U.S.C. § 1442(a)(3), which permits removal when the defendant is an "officer of the courts of the United States, for any act under the color of office or in the performance of his duties...."

- Applying the "ordinary meaning" of the term "officer," the court of appeals held that the process server was not an officer of the court. In light of this holding, the Fifth Circuit determined that it did not need to addrcss whether he raised a federal defense. Both are required for removal jurisdiction under section 1442(a)(3).

- The court of appeals also rejected the defendants' alternative contention that the suit was one "arising under" federal laws so that removal could be based upon federal question jurisdiction. In doing so, the court rejected the defendant's argument that the claims arose under federal law because the tortious conduct allegedly occurred while the process server was serving process under the Federal Rules of Civil Procedure. Noting that "[n]ot every question of federal law emerging in a suit is proof that federal law is the basis of this suit," the appellate court recited that a claim "arises under" federal law when federal law "supplies an essential element of the claim." If it appears from thc complaint "that the construction of a federal statute will have an adverse effect on the right of recovery if the statute is construed in one way rather than another," then the claim is deemed to arise under federal law. (quoting *Eastern Air Lines, Inc. v. Flight Eng'rs Int'l Ass'n*, 340 F.2d 104, 105 (5th Cir.), *cert. denied*, 382 U.S. 811 (1965)).

Res Judicata: Review of Damages: Punitive Damages: Fraud: Evidence: Waiver of Motion in Limine

Heller Fin., Inc. v. Grammco Computer Sales, Inc., 71 F.3d 518 (5th Cir. 1996)

Under Texas law, the principle of res

continued ...

judicata applies only to adverse parties. Co-defendants are not considered adverse parties unless they assert cross-claims against each other. Although one co-defendant had originally filed a cross-claim—thus temporarily making the other co-defendant an adverse party—it subsequently non-suited the cross-claim and thus returned the parties to their position as mere co-defendants. As a result, res judicata did not bar subsequent claims by one co-defendant against the other. Although a reviewing court generally accords great discretion to a jury in awarding damages within the range shown by the evidence, "[i]n the infrequent circumstance where there is no rational basis for the jury's verdict, however, a trial court may impose the only damages award that reasonably can be drawn from the evidence." Under this reasoning, the court of appeals affirmed the trial court's effective additur of $3.7 million in damages based upon its finding that the only evidence of damages was testimony as to the balance due on the underlying debt.

The court of appeals also set aside the punitive damages award because it found that the fraud claim on which it was based was merely a recast of the breach of contract claim. Absent a separate and identifiable tort, Texas law does not permit the recovery of punitive damages. The court of appeals specifically found that the majority of Texas cases required proof of some damages beyond economic loss to the subject matter of the contract.

The court of appeals found no reversible error in the trial court's exclusion of evidence that the plaintiff failed to mitigate its damages and impaired collateral for the loan. Even if the trial court had erred in granting a motion in limine regarding this evidence, the record apparently reflected that the parties in fact introduced the evidence, and, as a result, its initial exclusion could not have "prejudiced a substantial right of the complaining party." Further, the exclusion of evidence that is irrelevant to the verdict does not require reversal on appeal.

Sanctions: Suspension of Attorney

United States v. Brown, 72 F.3d 25 (5th Cir. 1995)

An attorney representing a criminal defendant was sanctioned and suspended from practice by the District Court for the Western District of Louisiana. Essentially, the attorney accused the judge of denying his client a fair and impartial trial, but failed to offer specific evidentiary support despite a show cause hearing. The attorney pointed only to the numerous side bar conferences off the record and some comments made from the bench addressing his conduct unfavorably. The attorney said his claims were based upon his subjective belief and impression and did not give any specific examples. Although his challenge was to the court's appearance of partiality, not to the court's overall integrity, the sanctions were awarded under both the Louisiana Rules of Professional Conduct—pertaining to remarks made about a judge that are false or reckless—and the court's inherent powers.

The court of appeals set aside the sanctions award. Noting that suspension proceedings are "quasi-criminal," it held that any ambiguities in relevant disciplinary rules must be construed in favor of the attorney. "Attorneys should be free to challenge, in appropriate legal proceedings, a court's perceived partiality without the court misconstruing such a challenge as an assault on the integrity of the court."

Statutory Construction

Boyce v. Greenway (In re Greenway), 71 F.3d 1177 (5th Cir. 1996) (per curiam)

The language of the statute is the starting point in any statutory analysis: "There is, of course, no more persuasive evidence of a statute than the words by which the legislature undertook to give expression to its wishes" (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). Terms not specifically defined in a statute must be given their ordinary and plain meaning.

Summary Judgment: Appellate Review

Daigle v. Liberty Life Ins. Co., 70 F.3d 394 (5th Cir. 1995)

The appellate court will not review a pre-trial denial of motion for summary judgment when, on the basis of a subsequent full trial on the merits, a final judgment is entered adverse to the movant. "It makes no sense whatsoever to reverse a judgment on the verdict where the trial evidence was sufficient merely because at summary judgment it was not." (quoting *Black v. J.I. Case Co.*, 22 F.3d 568, 569-70 (5th Cir. 1994)).

Summary Judgment

Fowler v. Smith, 68 F.3d 124 (5th Cir. 1995)

A summary judgment must be based upon evidence that would be admissible at trial. However, a court need not disregard an entire piece of evidence simply because a portion of it is inadmissible.

12(b)(6) Dismissal: Reinstatement: Evidence

Bennett v. Pippin, 74 F.3d 578 (5th Cir. 1996)

The plaintiff sued the sheriff of Archer County, Texas, in both his individual and official capacities as sheriff of Archer County, Texas, pursuant to section 1983, alleging that he had raped the plaintiff in the course of a homicide investigation. Defense counsel filed motions to dismiss under rule 12(b)(6) on behalf of the sheriff both individually and in his official capacity. The district judge granted the motion to dismiss with regard to the sheriff in his official capacity, finding that the alleged rape was not shown to be pursuant to a policy or custom of Archer County. The case was eventually transferred to a different judge who ordered reinstatement of the lawsuit against the sheriff in his official capacity on the morning of trial. Since the action against the sheriff in his official capacity was effectively against Archer County, county officials argued on appeal that the reinstatement order violated its due process rights to notice, opportunity to be heard, and legal representation.

- The court of appeals first rejected the county's argument that the complaint failed to allege sufficient facts to support a claim against it. After a full trial on the merits, the sufficiency of allegations in the complaint is irrelevant. It is thus improper to complain about the denial of a 12(b)(6) motion after the plaintiff has prevailed at trial.
- Under rule 54(b), the district court had the power to reconsider and reverse its prior 12(b)(6) dismissal of the claims against the sheriff in his official capacity. Absent an express entry of judg-

ment with respect to the dismissed party under Rule 54(b), a 12(b)(6) dismissal does not terminate the action as to any party or claim. Rather, the 12(b)(6) dismissal holds the party or claim in abeyance until a final judgment is entered. A party dismissed under Rule 12(b)(6) can rely upon the dismissal and need not participate in discovery and trial preparation unless and until notified otherwise, "at which point it is entitled to a full and fair opportunity to assert the rights of a party." The court of appeals found in this case that "the precipitous manner in which the district court proceeded after its reversal" gave the county "an insufficient opportunity to assert its rights."

• Evidentiary rulings are reviewed for an abuse of discretion, and the court of appeals will reverse on the basis of evidentiary errors "only if they resulted in substantial prejudice" to one of the parties. The court of appeals specifically rejected the sheriff's argument that the district court erred in *sua sponte* preventing the defense from questioning the plaintiff about her post-rape sexual activity. Apparently, the sheriff wanted to introduce this testimony to show that the plaintiff had "suffered little psychological harm from the rape." The court appeared to agree with the trial court that this evidence would not be admissible under the exception in Federal Rule of Evidence 412(b)(2), but refused to consider the issue because the sheriff failed to lay the necessary predicate for this evidence outlined in Rule 412(c).

Waiver on Appeal

Hightower v. Texas Hosp. Ass'n, 73 F.3d 43 (5th Cir. 1996) (on petition for rehearing)

The failure to raise arguments until the motion for rehearing stage results in waiver because they are raised too late in the appellate process to be useful to the court.

Waiver of Defense

International Meat Traders v. H & M Food Sys., 70 F.3d 836 (5th Cir. 1995)

By waiting until the close of the evidence to raise an argument that the counter-claim was not being pursued in the name of the real party in interest, counter-defendant waived the defense. Raising this type of defense for the first time on motion for judgment as a matter of law "offends" Rule 17(a) of the Federal Rules of Civil Procedure, which decrees that "it is not to be used as a trial-by-ambush tactic."

Federal Criminal Appellate Update

by Sandra L. Morehead and Joel Androphy
BERG & ANDROPHY
Houston

Summary forfeiture cannot serve as punishment for double jeopardy purposes.

United States v. Clark, 67 F.3d 1154 (5th Cir. 1995)

Defendants were charged with drug offenses. Certain of their property was the subject of an administrative forfeiture, which defendants did not contest. After the forfeiture, the defendants asserted that any punishment in the criminal case would be double jeopardy. The Fifth Circuit held that an uncontested forfeiture can never serve as punishment for double jeopardy purposes.

Trial court not required to give defendant a copy of witness' pre-sentence report.

United States v. Sherlin, 67 F.3d 1208 (6th Cir. 1995)

After a co-conspirator testified, the defendant's attorney asked for a copy of the witness' pre-sentence report, to which the government objected. The trial court refused to order that the report be turned over. The Sixth Circuit affirmed, holding that no rule of criminal procedure requires a trial court to turn over documents to a defendant. The court further held that *Brady* did not apply because the purpose of *Brady* was to prohibit the prosecution from withholding evidence and did not place any burdens on the courts to provide evidence.

Employing accountant to prepare tax returns enougb to make defendant a "snpervisor" for sentenciug euhancement purposes.

United States v. Brinkworth, 68 F,3d 933 (2d Cir. 1995)

Defendant who was found guilty of tax evasion was given an upward adjustment to his sentence based on his role as a "supervisor". The defendant had hired an accountant to prepare his tax returns and, although the defendant provided the accountant with the information to use in the returns, the trial court found the accountant criminally responsible because he had reason to know the income figures were too low. The Second Circuit affirmed, holding that the defendant hired the accountant, supplied him with information and directed some of his activities; therefore, he exercised the requisite control over the accountant to be deemed a "supervisor".

Denial of request for short contiuuance is abuse of discretion.

United States v. Mejia, 69 F.3d 309 (9th Cir. 1995)

continued ...

... from the preceding page

Defendant began a suppression hearing in one court, and it was continued so that the testimony of one additional officer could be heard. Before the continuation of the hearing, the original judge became ill and the case was transferred to a second judge. The continuation of the hearing was on the Thursday before Memorial Day, and two of the officers involved in the search were unavailable, so the judge stated he would read the testimony they had provided before the first judge. The defendant asked for a continuance until the following Tuesday so that the officers could give live testimony, but the trial court refused. The Ninth Circuit reversed, holding that the trial court abused its discretion: the delay was not due to any lack of diligence by the defendant, and viewing the witnesses live would enable the trial court to make a more accurate determination of credibility.

A trial amendment which removes an element of a crime alleged in the indictment, even if tbat element is not required by the statute, is still improper.

United States v. Chancelliere, 69 F.3d 1116 (11th Cir. 1995)

The government charged the defendant with "knowingly and willfully" engaging in a money laundering transaction. After resting its case in chief, the government moved to strike the term "willfully" from the indictment. Over the defendant's objection, the trial court allowed the amendment and further charged the jury without the term "willfully" in the money laundering counts. The Eleventh Circuit reversed the money laundering convictions, holding that the amendment was material, especially in light of the fact that the defendant put on a "good faith" defense to show a lack of intent to defraud.

Prosecutor's reference in closing argument to defendant's failure to deny guilt when confronted by his daughter in jail was held to be an improper comment on the exercise of the Fifth Amendment right not to provide evidence.

Franklin v. Duncan, 70 F.3d 75 (9th Cir. 1995)

During a murder trail, a police officer testified that a defendant, when asked if he had committed the crime, responded by asking if they had spoken to his daughter. The defendant's daughter testified she went to visit him at the jail and asked him to explain, and he pointed to a sign which stated conversations in the jail might be monitored. In his closing argument, the prosecutor mentioned these failures of the defendant to protest his innocence when he had the opportunity as signs that he was in fact guilty. The jury was then given an instruction that his failure to deny guilt when given the opportunity could be evidence of guilt. The Ninth Circuit affirmed the district court's grant of habeas corpus, holding that both the prosecutor's comments and the jury instruction violated the defendant's right to remain silent.

Jeopardy does not apply wben government agrees to remand the case for dismissal because it believes the statute the defendant was convicted under was not valid.

United States v. Kirk, 70 F.3d 791 (5th Cir. 1995)

Defendant was found guilty of a firearms violation, and appealed. During the pendency of the appeal, the government determined that the statute under which he was convicted had been implicitly repealed. The government agreed to remand the case to the trial court and dismiss the conviction. The defendant then agreed to dismiss his appeal. The government then re-indicted the defendant under another statute. The Fifth Circuit held jeopardy did not apply because the case was dismissed by agreement rather than by a ruling by the appellate court.

Playing videotape at trial of child's interview with police, during wbicb no representative of defendant was present, violated defendant's right to confrontation.

Offor v. Scott, 72 F.3d 30 (5th Cir. 1995)

Defendant was charged with molesting a child. At his trial, the prosecution played a videotape taken of the child being interviewed by the police and demonstrating with anatomically correct dolls what she alleged had occurred. No representative of the defendant was present during the interview. The Fifth Circuit held that playing the videotape rather than calling the child to the stand violated the defendant's right to confront the witnesses against him. The Court further held that the defendant could not be required to call the child to the stand himself in order to cross-examine her.

Contributions Solicited

The *Appellate Advocate* solicits articles, book reviews and other contributions related to the practice of appellate advocacy.

Contributions should be limited to 3,000 words, and citations should be included in the body of text.

Exceptional articles printed in other forums will be considered, but articles written for this publication are given preference. For previously published articles, the author is responsible for providing the name and date of previous publication and permission to reprint.

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Did You Know?

The September, 1993 *Did you know?* mentioned the case of *Catt v. State*, 285 Ark. 334, 691 S.W.2d 120 (1985), a bogus April Fool's hoax written by Arkansas Supreme Court Justice George Rose Smith. The opinion was published, supposedly by accident. According to a recent Associated Press report, *Catt* was cited last year by an associate judge on the Delaware Superior Court in dismissing a robbery charge against a criminal defendant who has already been convicted of car theft in the same incident. Justice Smith, who died in 1992, is said to have commented, after his opinion was published, "What if *Catt* is cited by other courts? As far as I know, it is perfectly good law. Let 'er go!"

ABA Formal Ethics Opinion 94-386R (Oct. 15, 1995): Court Rules Control Cites to Opinions

Issue: Is it proper to cite an unpublished opinion when a rule of the forum court in a matter prohibits any reference to opinions that have been marked "Not for Publication" by the issuing courts?

Opiuion Summary: Rule 3.4(c) (Fairness to Opposing Party and Counsel) of the ABA Model Rules of Professional Conduct suggests that a lawyer must follow the specific rules of the forum in which the lawyer is appearing.

Like other procedural rules, court rules regarding citation of unpublished opinions "may be presumed, absent explicit indication to the contrary, to ... govern proceedings in the jurisdiction where they are issued, and not those in other jurisdictions.

Thus, in a forum tliat prohibits citing an unpublished opinion, "a lawyer who does so in tliat forum violates Rule 3.4."

On tlie other hand, "tliere is no violation if a lawyer cites an unpublished opinion from anotlier jurisdiction that does not liave such a ban, even if the opinion itself has been stamped by the issuing court 'Not for Publication,'" as long as the lawyer informs the forum court of the limitation.

— *Richard W. Orsinger*, San Antonio

In *Matter of J.B.K., Attorney, Relator*, No. 08-96-00064-CV (Tex.App.—El Paso March 15, 1996) (orig. proceeding), Chief Justice Richard Barajas mentioned the work of the Section's Appellate Lawyer's Creed Committee in adopting standards of ethics and professionalism in the appellate courts.

After submission of a case in which J.B.K. served as counsel for a party, he contacted a member of the court's staff with whom he was acquainted for the purpose of inquiring, among other things, as to his "chances" in the pendmg case and whether he should "settle" the case prior to the issuance of the opinion.

The court voiced support for the Appellate Lawyer's Creed, noting that the Chair of the Section has requested input from the courts, and that each court will be asked to adopt the Creed when it is complete. The Eighth District Court of Appeals declared its determination to be among the first to approve such innovative measures.

After finding that any attempt to solicit or receive information on the merits of a pending case from a staff member of an appellate court constitutions an impermissible *ex parte* communication witli cliambers in violation of TEX. R. APP. P. 6, and concluding that the Code of Judicial Conduct requires a judge wlio received information clearly establisliing that a lawyer lias committed a violation of the Texas Rules of Professional Conduct to take appropriate action, the court directed that a copy of its opinion be forwarded to the State Bar's Office of the General Counsel for investigation and any action it deems warranted.

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As a Service to the Appellate Practice and Advocacy Section

Section Launches Appellate Pro Bono *Program*

The Appellate Practice and Advocacy Section has formed a *Pro Bono* Committee. The committee will provide experienced appellate lawyers as counsel in pro bono cases that require appellate representation. As appellate lawyers, we are the best equipped to fill the need for this *pro bono* representation.

"Many *pro bono* efforts focus on obtaining representation or dispute resolutions in the trial court," said section chair Kevin Dubose. "However, if those cases need to be appealed, a different set of skills is required. The *Pro Bono* Committee will help find attorneys who have those skills and are willing to use them in *pro bono* cases."

The *Pro Bono* Committee accepts referrals of *pro bono* appeals from legal service organizations and individual attorneys. The committee also works with the Office of the General Counsel of the State Bar to provide volunteers, who serve as Special Counsel to the General Counsel's Office, to handle appeals in disciplinary cases.

The committee accepts appeals on a statewide basis and refers the cases to local volunteer appellate counsel.

Local *pro bono* committees also have been formed in Austin, Dallas, El Paso, and Houston. The committee now hopes to see *pro bono* committees formed in San Antonio and Fort Worth to complete the statewide network.

Volunteers are needed to help with appeals and original proceedings in both state and federal court. To volunteer, please complete and return the coupon conveniently provided below.

The *Pro Bono* Committee is chaired by Warren W. Harris of Houston. Committee members are Bruce Bennett of Austin, Richard Clarkson of Beaumont, Bruce Cobb of Beaumont, Denis Dennis of Odessa, Rob Gilbreath of Dallas, Steve Hughes of El Paso, Teresa R. Jones of Houston, Jeffrey H. Kobs of Fort Worth, Jeffery T. Nobles of Houston, Kathryn Logue O'Herrin of Waco, Julia Pendery of Dallas, Deborah Race of Tyler, and Steve Rogers of San Antonio.

To volunteer to handle a *pro bono* appeal, to refer a *pro bono* appeal, or for further information on the *Pro Bono* Committee, please contact Warren Harris at (713) 226-0630 or any committee member.

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Ed. Note: Don't mutilate your copy of The Appellate Advocate. *Make a photocopy of this page for your own use, and make additional copies for other appellate lawyers you know who might participate in the* pro bono *program.*

From the editor ...

The late Chief Justice Robert W. Calvert wrote in his autobiography, *Here Comes the Judge*, that only a complete overhaul of Article V of the Constitution could lay a predicate for meaningful judicial selection reform in Texas. In the early 1950s, the State Bar proposed a revision of Article V that would have provided for selection of appellate judicial candidates by a Nominating Commission, and appointment by the Governor subject to periodic retention elections.

Under this sweeping revision, the Supreme Court would have merged with the Court of Criminal Appeals, courts of civil appeals would have become courts of appeals with civil and criminal jurisdiction, and the Supreme Court would have been given broad powers to alter, abolish or merge appellate court and district court districts. Debated for several years, the proposal was finally defeated in a State Bar referendum by a two-to-one margin. 18 TEX. B.J. 65 (Feb. 1955).

In the early 1970s, Judge Calvert chaired the Chief Justice's Task Force for Court Improvement which, in December, 1972, produced two proposals for judicial selection reform in Texas. First, it proposed nonpartisan election of all State judges. Alternatively, it proposed merit selection of all appellate judges.

Both proposals were submitted to the State Bar membership in a February, 1973 referendum, along with a proposal to retain the existing system of partisan election of judges. The reform proposals received overwhelming support: 3,961 votes were for nonpartisan elections and 3,576 votes were for merit selection of appellate judges. Partisan election of judges received only 1,835 votes. 36 TEX. B.J. 277 (Apr. 1973). Sixty-one percent of the bar members participating in the referendum favored submitting both reform proposals to the voters. *Id.* Introduced in the Legislature, the reform proposals passed the Senate but died in the House. Nonpartisan election of judges was incorporated into the proposed 1975 constitution; a merit selection plan recommended by the Constitutional Revision Commission was eliminated during the Constitutional Convention.

The partisan election of judges is a nineteenth century anachronism. The literature comparing the various states' practices reveals that more than 60% of the states now employ some sort of judicial selection commission to aid the governor in appointing some or all state judges. Judges then generally run in periodic nonpartisan retention elections. Experience has shown, of course, that judicial selection commissions that are balanced politically work best.

Nonpartisan elections, the popular alternative to judicial selection commissions, suffer from the worst flaw that plagues partisan elections: the unseemly necessity of raising vast amounts of campaign money from lawyers or potential litigants. Only 13 states still elect all or most of their judges in partisan elections.

In 1995, the 74th Legislature once again took up the issue of judicial selection reform. A number of different bills, ranging from partisan election of appellate judges by districts to a system of merit selection commissions and retention elections, were introduced. One bill focused on improving the quality of judicial candidates by requiring them to be board certified in at least one of four areas of practice.

Only one bill, S.B. 313, passed either house. It provided for nonpartisan election of state judges. At the end of an elected term, the judge would be subject to a retention election. The Secretary of State would create and distribute a voter information pamphlet containing statements of the candidates' occupation, education, and biographical information, and information on previous governmental experience.

S.B. 313 passed the Senate but ran into opposition in the House, where some members wanted to retain partisan elections and some minority members felt it did not go far enough to ensure the selection of more minority judges. The House judicial affairs committee passed a substitute for S.B. 313, which retained partisan elections and provided that appellate judges were to be elected from single-member districts established by the Legislature. S.B. 313 was sent to House Calendars, but it did not reach the floor before the end of the session.

Two other bills, S.B. 77 and H.B. 810, would have utilized bipartisan judicial selection commissions to recommend candidates to the governor, with appointment to be followed by retention elections. The judicial selection commissions proposed in S.B. 77 would consist of 15 members per court; that in H.B. 810 would have only five members for all courts.

Last November, the Supreme Court established the Texas Commission on Judicial Efficiency to study and make recommendations to the Legislature on judicial selection, information technology, court funding and diversity of legal staff. Tom Luce of Dallas heads the Commission's Judicial Selection Task Force, which consists of 43 members, with six more *ex officio*.*

continued ...

*The members of the Judicial Selection Task Force are Tom Luce, Esq., Dallas (Chair); Ray Anderson, District Judge, Brownfield; Louis Beecherl, Dallas; Hugo Berlanga, State Representative, Corpus Christi; John Boyd, Court of Appeals Justice, Amarillo; George Scott Christian, Esq., Austin; Jim Coronado, County Court Criminal Magistrate, Austin; Henry Cuellar, State Representative, Laredo; Robert Duncan, State Representative, Lubbock; Mario Gallegos, State Senator, Houston; Roland Garcia, Esq., Houston; David Godbey, District Judge, Dallas; Lee Godfrey, Esq., Houston; Toby Goodman, State Representative, Arlington; John L. Hill, Esq., Houston; Leticia Hinojosa, County Court Judge, Edinburg; Ray Hunt, Dallas; Sam Isacharoff, Esq., Austin; Tommy Jacks, Esq., Austin; Tom James, Court of Appeals Justice, Dallas; Dwight Jefferson, District Judge, Houston; Dee J. Kelly, Esq., Fort Worth; Hugh Rice Kelly, Esq., Houston; and Ronald Krist, Esq., Houston.

Also, Alma L. Lopez, Court of Appeals Justice, San Antonio; Jim Lunz, San Antonio; Rene Oliveira, State Representative, Brownsville; Pat Oxford, Esq., Houston; Jerry Patterson, State Senator, Houston; Frumencio Reyes, Esq., Houston; Carroll Robinson, Esq., Houston; Marcos Ronquillo, Esq., Dallas; Louis Satterfield, Esq., Liberty; Bill Satterwhite, Dallas; Paul R. Shunatona, Esq., Dallas; Broadus Spivey, Esq., Austin; Mark Stiles, State Representative, Fannett; Richard Trabulsi, Esq. Houston; Royce West, State Senator, Dallas; Don R. Willett, Esq., Austin; Don R. Windle, Probate Judge, Denton; Michelle Wong, Esq. Dallas; and Sharolyn Wood, District Judge, Houston. *Ex officio* members are Thomas R. Phillips, Chief Justice; Mike McCormick, Presiding Judge; Nick Taylor, Esq., Texas Judicial Council, Midland; Jerry Benedict, Esq., Administrative Director, Office of Court Administration; and Ana Maria Pozo, Esq., Director, Texas Children's Justice Act Project.

From the editor ...

... from the preceding page

The task of the Judicial Selection Task Force is to report on the method for selecting and retaining judges that will best serve the people of Texas, with consideration given to reducing the influence of partisan politics and campaign contributions, shortening the judicial campaign season, and enhancing judicial diversity and quality.

Members of this Section have asked what they can do to promote the cause of judicial selection reform. The answer is to provide input to the Judicial Selection Task Force. The Task Force has conducted public hearings around the State. If you missed an opportunity to testify, the Task force will accept written testimony. Send written comments to:

Anthony Haley
General Council
Texas Commission on Judicial Efficiency
P.O. Box 12248
Austin, Texas 78711-2248
Telephone 512/463-1625
Facsimile 512/463-1648

Judge Calvert noted with hindsight that judicial reform is not for the short-winded. The system was broken when he took office in the early '50s, and it remained broken when he took up the chair of the Chief Justices's Task Force for Court Improvement two decades later. Now, 25 more years have elapsed, and the system still has not been repaired.

As one of the 13 states that elect their judges in partisan elections, Texas is clearly out of step with the majority — an argument that was used effectively during the last legislative session to pass such diverse legislationas the alimony bill and the concealed handgun act.

No group has a greater interest in how appellate judges are chosen than members of this Section. Inform yourself by obtaining summaries of the bills introduced in the last Legislature from Anthony Haley, and read the pro and con arguments on nonpartisan elections and merit selection in the old *Bar Journals*.

My own study convinces me that a nonpartisan merit selection commission for appellate judges, with retention elections, is the most promising way to go. You can draw you own conclusion. But whatever your opinion, I urge you to communicate it to the Judicial Selection Task Force and let your voice be heard.

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