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RULE: AN AMENDED MOTION FOR NEW TRIAL FILED AFTER THE COURT OVERRULES A PRIOR ONE DOES NOT EXTEND THE PLENARY PERIOD

LESSON: BE CAREFUL ASKING FOR A NEW TRIAL IN A PRE-JUDGMENT MOTION FOR JNOV

***In re Brookshire Grocery Co.*, 2008 WL 53702, 51 Tex. Sup. Ct. J. 275 (Tex. 01/04/08 No. 05-0300)**.

In a 5-4 decision, the Supreme Court in this case continued a trap for those unwary practitioners who include an alternative request for a new trial in a motion for JNOV. The dissent characterized the outcome as follows:

> "Tricky procedural rules threaten substantive rights. Take this case in point."

(The court of appeals opinion in this case was reported on in the Spring 2005 issue of the Appellate Law Newsletter.)

Following a jury verdict for the plaintiff, but before judgment, the defendant filed a combined motion for judgment notwithstanding the verdict and, in the alternative, motion for new trial. The defendant's motion stated:

> In the event the court declines the relief requested in this motion and enters a judgment, [defendant] intends to file a more comprehensive motion for new trial raising all insufficiency and other complaints not addressed herein.

After a hearing, the trial court denied "the motions" and rendered judgment on the jury's verdict. Within 30 days after the judgment, the defendant filed a much more extensive motion for new trial. The trial court granted the second, more comprehensive, motion for new trial, but it did so after 30 days from the judgment and order overruling the first motion for new trial. The plaintiff sought mandamus relief from the court of appeals, arguing that the trial court lacked jurisdiction to grant the second motion for new trial because its plenary power had expired. The court of appeals agreed and granted the petition for mandamus. *In re Goss*, 160 S.W.3d 288 (Tex. App.–Texarkana 2005).

The defendant then petitioned the Supreme Court for mandamus relief from the court of appeals' decision, which relief the Supreme Court denied. The 5-member majority held that an amended new-trial motion filed after the trial court has ruled on a prior motion is not "timely" for purposes of extending the court's plenary power under Rule 329b(e). Consequently, the trial court's plenary power had expired, and it lacked jurisdiction to grant the second motion for new trial.

The plenary power period is established in subsection (e) of Rule 329b, which provides (emphasis added):

> (e) If a motion for new trial is timely filed by any party, the trial court, regardless of whether an appeal has been perfected, has

> plenary power to grant a new trial or to vacate, modify, correct, or reform the judgment until ***thirty days after all such timely-filed motions are overruled***, either by a written and signed order or by operation of law, whichever occurs first.

Subsection (b) of Rule 329b provides:

> (b) One or more amended motions for new trial may be filed without leave of court before any preceding motion for new trial filed by the movant is overruled and within thirty days after the judgment or other order complained of is signed.

"And" is conjunctive, so an amended motion for new trial is timely filed only before the court overrules a prior one. An amended motion filed afterward (1) need not be considered by the trial court and (2) does not extend the trial court's plenary power. A contrary interpretation would effectively substitute the word "or" for "and," so that a motion for new trial, filed after a preceding motion has been overruled, would extend the trial court's plenary power. The defendant's second motion for new trial was filed within the 30-day plenary period, and the trial court could have thus considered the grounds raised in it and granted a new trial on that basis or on its own motion; however, the court could only act while it had plenary power. Thus, the losing party may ask the trial court to reconsider its order denying a new trial—or the court may grant a new trial on its own initiative—so long as the court issues an order granting new trial within its period of plenary power.

Additionally, under Rule 329b, a trial court's plenary power to grant a new trial expires 30 days after it overrules a motion for new trial, only provided no other ***type*** of 329b motion (such as a motion to modify, correct, or reform the judgment) is "timely filed." Thus, a party whose motion for new trial is overruled within 30 days of judgment may still file a motion to modify, correct, or reform the judgment—provided it is filed within 30 days of judgment—and thereby extend the trial court's plenary power.

Justice Hecht authored the dissenting opinion, joined by Justices Wainwright, Brister, and Green. According to the dissent, subsection (b) of Rule 329b does not say that a second new-trial motion cannot be filed after the first one is overruled, ***provided*** leave of court is obtained (and it is filed within 30 days after the judgment). Rule 329b is thus susceptible to being construed to provide that any motion assailing a judgment that is allowed to be filed within 30 days of the judgment extends the 30-day period, regardless of whether any other motion has been filed or overruled. Nevertheless, the Court construes paragraph (b) to create an exception for one kind of post-trial motion–an amended motion for new trial filed after a first motion for new trial has been overruled. In the Court's view, overruling a motion for new trial does not preclude any other kind of motion assailing the judgment except a second motion for new trial. The Court's construction is certainly not required by the text of the Rule and conflicts with the Rule's implication that an amended motion for new trial can be filed with leave of court. This one obscure exception — not clearly required by the text and without practical justification or benefit — creates a trap for the unwary that can result in a significant loss of rights.

ORDER VACATING AN ORDER GRANTING A NEW TRIAL THAT IS SIGNED AFTER THE PLENARY-POWER PERIOD HAS EXPIRED IS VOID

Gallagher v Willows at Sherman Assisted Living & Memory Care, LP, 244 S.W.3d 646 (Tex. App.–Dallas 01/17/08).

The trial court granted defendant's motion for summary judgment. The plaintiff filed a motion for new trial, which was overruled by operation of law; but the trial court subsequently granted the motion within the 30-day plenary power period. The defendant then filed a "motion for new trial" that was in substance a motion for reconsideration. Six months after the order granting the plaintiff's motion for new trial, the trial court set aside that new-trial order and reinstated summary judgment in favor of the defendant. The plaintiff brought this appeal, which the Court of Appeals dismissed for lack of jurisdiction.

A trial court may not vacate an order granting a new trial outside the court's period of plenary power over the original judgment. *Porter v. Vick,* 888 S.W.2d 789, 789-90 (Tex.1994). An order vacating the order granting a new trial that is signed after the plenary-power period has expired is void. *Id.* at 789. Such an order is subject to correction by mandamus.

Despite the inefficiencies it creates in cases like this one, this rule protects the parties' rights to obtain complete appellate review by preventing the trial court from reinstating an old judgment when it is too late for the parties to appeal it. The simple way to avoid this problem if the trial court changes its mind is to obtain a new judgment–which can be based on the very same grounds as the original judgment.

DEFENDANT'S BELATED OFFER TO PAY PLAINTIFF'S TRIAL-LEVEL EXPENSES DID NOT ENTITLE IT TO A NEW TRIAL AFTER DEFAULT JUDGMENT

Hornell Brewing Co., Inc. v. Lara, ___ S.W.3d ___, 2008 WL 313701 (Tex. App.–Houston [14th Dist.] 02/05/2008).

Plaintiff alleged he was injured after ingesting broken glass while drinking a bottle of Defendant's tea. After settlement negotiations failed, Plaintiff sued Defendant for negligence, products liability, and breach of warranty. When Defendant failed to answer, Plaintiff obtained a default judgment. Defendant then filed a motion for new trial, explaining in affidavits that it never received notice of the suit. The trial court denied the motion, noting that Defendant's process for receipt of service was deliberately complex to allow Defendant to be able to claim lack of notice in situations like this. The trial court concluded that even though this conduct amounted to gross negligence and she suspected that Defendant deliberately failed to answer, she stopped short of actually finding that the failure to answer was intentional or the result of conscious indifference. The trial court concluded that Defendant was nevertheless not entitled to a new trial based on prejudice to Plaintiff because Defendant would not pay Plaintiff's expenses in obtaining the default judgment. Not only did Defendant not offer to pay, but it refused to pay, arguing that Plaintiff could have avoided the expense of a default judgment by contacting Defendant when it failed to answer the lawsuit.

In its appellate brief, Defendant for the first time offered to pay Plaintiff's fees and costs incurred in taking the default judgment. However, although some courts consider offers to pay default judgment expenses made for the first time on appeal, the Court of Appeals in this case held that the better practice is to assess whether the trial court abused its discretion based on the information available to the trial court at the time of the ruling. Despite implementing a complicated system for receiving service that the trial court found Defendant designed deliberately to make service more difficult, Defendant refused to pay for the expenses this system caused Plaintiff and instead attempted to impose a duty on Plaintiff to remind it to answer. In these circumstances, the trial court did not abuse its discretion in taking these factors into consideration and determining that Defendant was not entitled to a new trial.

A dissenting opinion was filed, noting that the Supreme Court has not held that a defendant must offer to pay reasonable expenses and indicate a willingness to go to trial immediately before a new trial may be granted. In fact, the Court had this to say about that:

> Although [an offer to pay and readiness to go to trial] may be important factors for the court to look to in determining whether it should grant a new trial, they should not be the sine qua non of granting the motion. *United Beef Producers v. Lookingbill,* 532 S.W.2d 598, 599 (Tex.1976).

In the dissent's view, failure to offer reimbursement should not in every instance preclude the granting of a new trial. The goal is to not injure the plaintiff or unduly delay him by granting the motion. According to the dissent, that goal was met in this case, and a new trial shuold have been granted.

WHERE THERE IS ERRONEOUS DAMAGE AWARD, APPELLATE

COURT SHOULD ORDINARILY REMAND AS TO ATTORNEY'S FEES

Bossier Chrysler-Dodge II Inc. v. Bryan Rauschenberg, 238 S.W.3d 376, 51 Tex. Sup. Ct. J. 106 (Tex. 11/02/07)

The issue is whether the case should be remanded for a new trial on attorney's fees. The court of appeals reduced the trial court's damage award by 87% but nevertheless affirmed the trial court's award of attorney's fees. The Supreme Court reversed that part of the court of appeals' judgment regarding attorney's fees, holding that the issue of attorney's fees should ordinarily be retried under these circumstances unless the appellate court is "reasonably certain that the jury was not significantly influenced" by the erroneous damage award," citing *Barker v. Eckman,* 213 S.W.3d 306 (Tex.2006).

"NET WORTH" FOR PURPOSES OF SETTING SUPERSEDEAS BOND AMOUNT IS THE JUDGMENT DEBTOR'S CURRENT ASSETS MINUS CURRENT LIABILITIES, NOT ITS MARKET VALUE

Enviropower, L.L.C. v Bear, Stearns & Co., Inc., ___ S.W.3d ___, 2008 WL 456491 (Tex. App.–Houston [1st Dist.] 02/21/08)(*En Banc* Order on Supersedeas Bond)

In this action to enforce a $1.6 million New York judgment, the Court of Appeals reviewed *en banc* the judgment debtor's motion challenging the trial court's order that set the supersedeas bond in the amount of $200,000. The trial court found that the judgment debtor's net worth was $8 million, based on a third party's offer to purchase the company. It was the potential gain from this sale upon which the trial court set the $200,000 supersedeas bond amount. The Court of Appeals held that the correct measure of a company's net worth for purposes of setting a supersedeas bond is the company's current assets minus current liabilities, not its market value.

Both CPRC §52.006(b) and TRAP Rule 24.2(a)(1) provide that the amount of a supersedeas bond must not exceed the lesser of 50% of the judgment debtor's net worth or $25 million. Neither Section 52.006(b) nor Rule 24.2(a)(1) define "net worth."

Enviropower, the judgment debtor, filed an affidavit in the trial court establishing its net worth as a *negative* $12,000,000. Bear Stearns, the judgment creditor, argued that the trial court should base its determination of Enviropower's net worth on its market value as determined by the $10,000,000 price a third party had agreed, subject to certain contingencies, to pay for Enviropower's stock. In short, the trial court implicitly agreed with Bear Stearns that the appropriate measure for determining a supersedeas bond was not EnviroPower's net worth, as determined by subtracting its assets from its liabilities, which the trial court found to be negative $12,000,000, but rather EnviroPower's "market value," which included projected revenues under the contingent purchase agreement.

The Court of Appeals held that the correct measure of a company's net worth for the purpose of setting a supersedeas bond under CPRC §52.006 and TRAP Rule 24 is the company's current assets minus current liabilities at the time the bond is set. The Court cited opinions by the Dallas and Fourteenth Courts of Appeal applying this as the correct measure of a company's net worth for purposes of setting and reducing a supersedeas bond. The First Court agreed with the following statement of the Fourteenth Court in *Ramco Oil & Gas, Ltd. v. AngloDutch (Tenge)*, 171 S.W.3d 905, 915 (Tex. App.–Houston [14th Dist.] 2005, no pet.):

> "[T]he trial court has the flexibility to take into account a number of factors that could affect the judgment debtor's ability to post bond or other security based on the facts and circumstances specific to the case. This inquiry, however, should not focus on the market capitalization of the company or its value as a whole but on the judgment debtor's actual ability to post the security required."

A dissenting opinion was filed. The dissent did not dispute the definition of "net worth" for purposes of calculating the amount of a supersedeas bond: net worth is generally measured as assets minus liabilities. Rather, the key issue for the dissent was what value should the trial court have placed on EnviroPower's assets, which are used to calculate net worth. Specifically, was the trial court required to accept the historic cost or book value of EnviroPower's permits as the value to be used in calculating net worth or could it consider evidence of the fair market value of these permits? When, as here, there has been a finding by the trial court that the judgment debtor's evidence does not state the true value of a company's assets used in calculating "net worth," the dissent would hold that the trial court can look to the concept of market value to determine the value of the company's assets. Accordingly, the dissent would have held that the trial court did not abuse its discretion in considering evidence regarding the fair market value of the permits in finding that EnviroPower had a positive net worth and in setting the bond amount.

INSURER'S NOTICE OF APPEAL IN NAME OF ITS INSURED IS A BONA FIDE ATTEMPT TO APPEAL

Warwick Towers Council of Co-Owners v. Park Warwick, L.P., 244 S.W.3d 838, 51 Tex. Sup. Ct. J. 380 (Tex. 01/02/08).

The question presented in this appeal was whether the insurer who was asserting subrogation rights waived the right to appeal by filing a notice of appeal in the name of its insured.

The appellant was actually the insurer St. Paul Fire & Marine Insurance Company, but the notice of appeal did not mention St. Paul. However, St. Paul filed its docketing statement which reflected that the appellant was "*Warwick Towers Council of Co-Owners by and through St. Paul Fire & Marine Insurance Company*," and all of St. Paul's appellate documents were styled as such. The court of appeals held that St. Paul's failure to name itself in the notice of appeal was jurisdictional and did not reach the merits based on what was essentially a misnomer. However, the Supreme Court disagreed.

The Supreme Court reiterated its repeated holding–

> that the factor which determines whether jurisdiction has been conferred on the appellate court is not the form or substance of the bond, certificate or affidavit, but whether the instrument "was filed in a bona fide attempt to invoke appellate court jurisdiction."

The Court, taking pause to explain the proper procedure after such a misnomer, continued "if the appellant timely files a document in a bona fide attempt to invoke the appellate court's jurisdiction, the court of appeals, on appellant's motion, must allow the appellant an opportunity to amend or refile the instrument . . . required to perfect the appeal." As noted by the Court, this holding was in accordance with its "consistent policy to apply the rules of procedure liberally to reach the merits of the appeal."

The parties in the *Inliner* case discussed below could have used some of that "consistent policy to apply the rules of procedure liberally to reach the merits of the appeal."

DEADLINE TO FILE NOTICE OF APPEAL IN AN AGREED INTERLOCUTORY APPEAL IS DETERMINED BY DATE OF CHALLENGED ORDER, NOT DATE ON WHICH TRIAL COURT ENTERED ORDER PERMITTING THE AGREED INTERLOCUTORY APPEAL

Inliner Americas, Inc., v. MaComb Funding Group, L.L.C., 244 S.W.3d 427 (Tex. App–Houston [14th Dist.] 10/16/07).

This case illustrates the appellate deadline conundrum created by the interplay of the statutes governing interlocutory appeals. The specific issue was whether, in an agreed interlocutory appeal, the deadline to file a notice of appeal is determined by the date of the challenged order or the date on which the trial court signed the order permitting the agreed interlocutory

appeal. The Court of Appeals held that it is the former.

On May 17, 2006, the trial court signed the interlocutory order. On October 25, 2006, the parties filed an agreed motion requesting permission from the trial court to appeal the interlocutory order. On November 27, 2006, the trial court granted the motion and entered an order permitting the interlocutory appeal. Appellants filed notice of appeal on December 1, 2006. The majority opinion of the Court of Appeals concluded that appellants' notice of appeal was due 20 days after the May 17, 2006 order was signed and that the notice of appeal was therefore not timely filed.

The agreed interlocutory appeal was taken pursuant to CPRC §51.014(d) which provides that a trial court may issue an order allowing an interlocutory appeal from an order not otherwise appealable where: (1) the parties agree that the order involves a controlling issue of law as to which there is a substantial ground for disagreement; (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and (3) the parties agree to the order.

Section 51.014 formerly contained a subsection (f) that provided as follows:

> (f) If application is made to the court of appeals that has appellate jurisdiction over the action not later than the 10th day after the date an interlocutory order under Subsection (d) is entered, the appellate court may permit an appeal to be taken from that order.

The repeal of subsection (f) changed the permissive nature of the appeal and removed the separate deadline for instituting a permissive interlocutory appeal, leaving only subsection (d) to govern agreed interlocutory appeals. In the absence of a separate deadline, these appeals are subject to the 20-day deadline governing accelerated appeals generally under TRAP Rule 26.1(b) ("[I]n an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed....").

The issue was which order triggered the 20-day deadline. The parties contended the deadline ran from the date of the written order permitting the appeal, rather than from the interlocutory order that is the subject of the appeal. The Court of Appeals disagreed and held that the deadline to file the notice of appeal in an agreed interlocutory appeal runs from the date of the challenged interlocutory order. Accordingly, because the appeal was untimely, the appeal was dismissed for lack of jurisdiction.

A dissenting opinion was filed. The dissent noted that appeals can be taken only from final judgments and appealable interlocutory orders. In this case, the partial summary judgment was not appealable until the trial court granted permission to appeal; therefore, the appellate timetable could not begin to run from the signing of an order not yet appealable. Thus, the 20-day deadline for filing the notice of appeal should run from the date of the written order permitting the appeal, and the notice of appeal in this case should have been held to be timely.

NO INTERLOCUTORY APPEAL FROM ORDER DENYING A RULE 202 DEPOSITION REQUEST WHERE MOVANT EITHER CONTEMPLATES OR IS ALREADY SUING THE PERSON HE WISHES TO DEPOSE

In Re Alexander, ___ S.W.3d ___, 2008 WL 659712 (Tex. App.–Houston [1st Dist.] 03/13/08).

Attorney represented Alexander during Alexander's 3-day criminal trial. Pursuant to a request filed under the authority of TRCP 202.1(b), Alexander attempted to depose the attorney to investigate a potential legal malpractice claim against the attorney. Without conducting a hearing, the trial court denied Alexander's request; and he appealed. The Court of Appeals dismissed the appeal for want of jurisdiction.

Rule 202 permits the taking of a deposition to either perpetuate testimony or obtain testimony for use in anticipation of suit or to investigate a potential claim or suit. The ruling of a trial court is a final appealable order only if the deposition sought is of a third party against whom suit is not contemplated. However, if the individual seeking the discovery either contemplates or is already suing the person he wishes

to depose, the trial court's ruling is interlocutory. In this case, the record clearly demonstrated that Alexander was seeking discovery from his former lawyer, against whom he intended to file a legal malpractice case. Accordingly, the order was interlocutory in nature. Because there is no statute authorizing interlocutory appeal from an order denying a deposition of a person against whom suit is contemplated, the Court of Appeals had no jurisdiction over this appeal.

NONSUIT ON APPEAL REQUIRED DISMISSAL

Houston Municipal Employees Pension System v. Ferrell, ___ S.W.3d ___, 2007 WL 4216604, 51 Tex. Sup. Ct. J. 154 (Tex. 11/30/07).

Former police officers and former police cadets brought an action for declaratory and injunctive relief against Houston Municipal Employees Pension System (HMEPS). HMEPS filed a motion to dismiss for want of jurisdiction, which the trial court denied. HMEPS brought an interlocutory appeal, but the court of appeals affirmed. HMEPS then petitioned the Supreme Court for review, and one of the plaintiffs (Craig Ferrell) took a voluntary non-suit without prejudice. The Supreme Court held that Ferrell had an absolute right to take a non-suit in the Supreme Court. Accordingly, the lower courts' judgments were vacated to the extent that they affected Ferrell's claims, and his claims were dismissed.

HMEPS argued that the Court was not required to accept Ferrell's non-suit, citing *Singleton v. Pennington.* 568 S.W.2d 382, 383-84 (Tex. Civ. App.–Dallas 1978), *rev'd on other grounds,* 606 S.W.2d 682 (Tex.1980). However, in *Singleton,* the plaintiff sought a non-suit after the court of appeals had issued an opinion in the plaintiff's favor and the defendant had filed a motion for rehearing. The court of appeals "had already reached a decision on the motion for rehearing and had completed the first draft of an opinion on that motion." As the court of appeals explained, dismissal of the cause at that stage of the proceedings would have left the court of appeals' original opinion outstanding without any indication of whether the court of appeals' views had changed. In this case, because the Supreme Court had jurisdiction over the claims of the other 29 plaintiffs, permitting Ferrell's non-suit did not change the fact that the court of appeals' opinion rightly survives. Citing its prior decision in *University of Texas Medical Branch at Galveston v. Estate of Blackmon,* 195 S.W.3d 98, 100 (Tex.2006), the Court held that Ferrell had an absolute right to take a non-suit in the Supreme Court.

APPEAL OF EXPIRED PROTECTIVE ORDER NOT MOOT UNDER "COLLATERAL CONSEQUENCES" EXCEPTION

Clements v Haskovec, ___ S.W.3d ___, 2008 WL 152450 (Tex. App.–Corpus Christi 01/17/08).

The trial court entered a family violence protective order against an elderly man prohibiting him from going within 200 feet or communicating with his elderly wife or their daughter and son-in-law. The man timely appealed, but the order expired during the pendency of the appeal. The Court of Appeals held that although an expired order is ordinarily moot, the appeal was live under the "collateral consequences" exception to the mootness doctrine.

The doctrine of mootness limits courts to deciding cases in which there is an actual controversy. The general rule is that a case becomes moot, and thus unreviewable, when it appears that a party seeks to obtain relief on some alleged controversy when in reality none exists. Texas law, however, recognizes a "collateral consequences" exception to the mootness doctrine, which is applied when prejudicial events have occurred and the effects continue "to stigmatize individuals long after the judgment has ceased to operate." It is only invoked under narrow circumstances when vacating the underlying judgment cannot cure adverse consequences suffered by the appellant.

Appeals of expired protective orders issued for family violence often fall into this "collateral consequences" exception because although such orders may ultimately expire, the stigma attached to them generally does not. The effects of a family violence protective order continue to stigmatize individuals long after the date of expiration. This stigma is not only a social burden; there are also attendant legal consequences to being the subject of such a protective order. The expiration of the protective order therefore did not render this appeal moot. The very fact that the order was issued had a potential impact on the appellant's legal rights, and the Court of Appeals was therefore obligated to consider his appeal.

MANDAMUS IS PROPER REMEDY FOR DENIAL OF A FORUM NON-CONVENIENS MOTION

In re Pirelli Tire, L.L.C., ___ S.W.3d ___, 2007 WL 3230166 (Tex. 11/02/07).

Mexican citizens, as relatives of a deceased Mexican citizen, brought this action against a tire manufacturer for strict products liability and negligent design and manufacture, alleging that the decedent died in a truck that rolled over on Mexican highway. The trial court denied the defendant tire manufacturer's motion to dismiss on grounds of forum non conveniens. The Supreme Court granted the tire manufacturer's petition for writ of mandamus. The Court concluded that the defendant had no adequate remedy by appeal, citing its holding in *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 138 (Tex.2004) (no adequate remedy by appeal when a trial court refuses to enforce a forum-selection clause).

MANDAMUS UNAVAILABLE FOR THE DENIAL OF A MOTION TO RECUSE, ABSENT UNUSUAL CIRCUMSTANCES

In re McKee, ___ S.W.3d ___, 2007 WL 4216661, 51 Tex. Sup. Ct. J. 164 (Tex. 11/ 30/ 07).

In the context of relator's legal malpractice suit against a law firm, relator filed a petition for writ of mandamus seeking to prohibit the presiding judge, who had initially voluntarily recused himself, from assigning the case to another judge to hear a subsequent recusal motion. The Supreme Court held that mandamus would not issue.

Mandamus is not available for the denial of a motion to recuse. *In re Union Pac. Res. Co.,* 969 S.W.2d 427, 428-29 (Tex.1998); *but cf.*TEX.R. CIV. P. 18a(f) ("If the [recusal] motion is denied, it may be reviewed for abuse of discretion on appeal from the final judgment."). Absent extraordinary circumstances, a presiding judge's order appointing a judge to hear a recusal motion is administrative–it simply transfers the power to decide the recusal motion to another judge. The Court saw no meaningful distinction between *In re Union Pacific Resources Co*. and the situation presented here. In the former case, the judge was alleged to have acted when he was required to recuse; whereas, in this case, the judge was alleged to have acted after he voluntarily recused. In either instance, the relator has an appellate remedy. The court noted that mandamus standards have evolved since *In re Union Pacific Resources Co.* and now include consideration of whether "any benefits to mandamus review are outweighed by the detriments." (citing *In re Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 136 (Tex.2004)). Here, there was no significant benefit to mandamus relief.

SUPREME COURT JURISDICTION OVER INTERLOCUTORY APPEAL REQUIRES A CONFLICT OR DISSENT

Allstate Insurance Co. v. Fleming, ___ S.W.3d ___, 2007 WL 4357597, 51 Tex. Sup. Ct. J. 231 (Tex. 12/14/07).

In *Mid-Century Insurance Co. v. Ademaj*, ___ S.W.3d ___ (Tex. 11/30/2007), the Supreme Court determined that Mid-Century Insurance Co., and others, had properly charged insureds a Texas Automobile Theft Prevention Authority fee. Fleming and others raised the same issue, in a suit against Allstate.

The trial court issued a partial summary judgment for the plaintiffs, and Allstate properly filed an

interlocutory appeal under CPRC §51.014(d). The court of appeals affirmed, and Allstate filed a petition for review in the Supreme Court. The Court initially granted the petition for review and requested briefing by the parties. The Court eventually withdrew its order granting the petition for review as improvidently granted and dismissed for want of jurisdiction.

Gov't Code §22.225(c) allows petitions for review from interlocutory appeals only when the court of appeals issued a dissenting opinion or when the court of appeals' decision conflicted with a prior decision of the Supreme Court or of another court of appeals. No dissenting opinion was filed in the court of appeals in this case, and after reviewing the parties' briefs and the relevant authorities, the Supreme Court determined that the requisite conflict did not exist.

[Also on December 14, 2007, the Supreme Court denied the petition for review in a similar case. *Liberty Mutual Insurance Co. v. Griesing*, ___ S.W.3d ___, 2007 WL 4357599, 51 Tex. Sup. Ct. J. 230 (Tex. 12/14/07).]

IN MED MAL CASE, INTERLOCUTORY APPEAL WAS NOT AVAILABLE FROM A DENIAL OF A MOTION TO DISMISS WHERE TRIAL COURT ALSO GRANTED AN EXTENSION OF TIME TO SERVE AN EXPERT REPORT

Ogletree v. Matthews, ___ S.W.3d ___, 2007 WL 4216606, 51 Tex. Sup. Ct. J. 165 (Tex. 11/30/07).

In this interlocutory appeal, the Supreme Court was faced with a procedural anomaly arising from the trial court's disposition of a case pursuant to the Medical Liability statute's expert report requirements. The Court started with the well-settled premise that absent a statutory provision authorizing an interlocutory appeal, a court possesses jurisdiction over final judgments only.

The expert report requirement, under CPRC §74.351(b) provides that, if as to a defendant health care provider, an expert report has not been served within 120 days, the court on motion of the affected party shall dismiss the claim and award fees and costs.

If a plaintiff files what is intended to be an "expert report" within the 120-day window and the defendant files an objection to the report within 21 days and files a motion to dismiss, the trial court must hold a hearing to determine whether the filing met the definition under §74.351(r)(6) and is therefore an "expert report" or whether the filing does not meet the definition and is therefore necessarily adjudged to be something less that an "expert report." An order which decides this question affirmatively is one which necessarily denies relief under §74.351(b).

An interlocutory appeal from a denial of the motion to dismiss is permitted by the medical malpractice statute. However, where the trial judge finds the submitted report deficient, the statute also affords the trial judge discretion to grant a 30-day extension of time to cure the deficiency.

In this case, the trial court denied the motion to dismiss ***and*** allowed plaintiff an extension of time to cure the report. In order for the trial court to have granted an extension it necessarily must have found that the report was deficient. Thus, it seems the court could have sustained the objection to the submission, because it was not an "expert report" as that term is defined, and reserved ruling on the motion to dismiss pending the plaintiff's opportunity to cure within 30 days.

Thus, the issue on appeal became whether an interlocutory appeal was available from a denial of a motion to dismiss, based on the failure to serve an expert report, when that denial was coupled with the grant of an extension of time to cure the deficiency in the submission purporting to constitute an expert report.

The Texas Supreme Court held, in relevant part, that the medical malpractice statute prohibits such an interlocutory appeal from the trial court's denial of the motion to dismiss where the trial court also granted an extension of time to serve an expert report. The Court found the order of denial to be inseparable from the order granting the extension. The Court reasoned that, " . . . if a defendant could separate an order granting an extension from an order denying the motion to dismiss when a report has been served, [Civ. Prac. &

Rem. Code] section 51.014(a)(9)'s ban on interlocutory appeals for extensions would be meaningless."

PLAINTIFF'S CLAIM WAS A PREMISES LIABILITY CLAIM IN A HEALTHCARE SETTING, NOT A HEALTHCARE LIABILITY CLAIM

Omaha Health Care Center, LLC v. Johnson, ___ S.W.3d ___, 2008 WL 339838 (Tex. App.–Texarkana 02/08/08).

This appeal arose from the trial court's denial of a motion to dismiss. Appellant had moved to dismiss the claim because, while it was not pled as a health care liability cause of action per se, Omaha Health Care advanced the position that the allegations in the petition sounded in medical negligence and the claim was therefore subject to the medical liability statute's expert report requirement.

The lawsuit was brought by the estate of a nursing home resident who died from a spider bite. The petition set forth a cause of action for premises liability arising from the alleged failure to maintain the safety of the premises by failing to prevent spider infestation. Plaintiff in the trial court did not intend to plead a health care liability claim and therefore did not file the report required by § 74.351(b). Following the expiration of 120 days, the defendant moved to dismiss for plaintiff's failure to serve the requisite report in a health care liability claim.

The issue before the Texarkana Court of Appeals was whether the allegations could be properly be construed as stating a health care liability claim. The Court of Appeals applied the analysis set forth in the Supreme Court's decision in *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005). In order to meet the definition of a "health care liability claim" the act or omission complained of must be an "inseparable part of the rendition of medical services."

The Court of Appeals reasoned that the claims, based on the facts as pled, were more akin to the examples given in *Diversicare* of claims which did ***not*** sound in health care liability. The Court explained that the claims did not stem from treatment or lack thereof. Rather, the claims arose from alleged departures from standards of safety in eradicating spiders on its premises and did "not implicate a medical duty to diagnose or treat" as the safety standard is not directly related to health care.

The Court of Appeals held the claims arising from the spider bite were not health care liability claims, but were merely "premises liability claims in a health care setting" and thus the estate was not required to file an expert report.