



THORNTON LAW CHRONICLES

Thornton, Biechlin, Segrato, Reynolds & Guerra, L.C.

Winter 2011

SEASON'S GREETINGS FROM THE "BEST LAWYERS OF 2011"

It's the same old story, year in and year out--- it just seems that the firm of Thornton, Biechlin, Segrato, Reynolds & Guerra always has more than its fair share of lawyers selected for special honors and recognition--- including, for example, *SA Scene* magazine's annual "Best Lawyers of San Antonio" list. This year was no different, as the July 2011 issue of the magazine confirms.

Such recognition is by no means limited, of course, either to *SA Scene* or to our firm's San Antonio office. Robert R. "Rusty" Biechlin, who heads the firm's health law section, has been selected by "Best Lawyers in America" in the field of medical malpractice and personal injury defense as well as by Texas Monthly's "Texas Super Lawyers" in personal injury defense. Joseph

L. Segrato, who heads the firm's catastrophic injury section at our McAllen office, has been selected by "Best Lawyers in America" and by "Best Lawyers in Texas" in the field of personal injury defense. Robert L. Guerra, also in McAllen, who heads the firm's construction law section, has been selected by "Best Lawyers in America" and "Best Lawyers in Texas" in the fields of construction law and personal injury defense. Richard J. Reynolds, III, who heads the firm's professional liability section, was selected by "Best Lawyers in America" and by "Texas Super Lawyers" in the field of professional liability defense.

Still, no fewer than twelve lawyers in the

San Antonio office of the firm---more than half of all the lawyers in that office---made this exclusive list in a number of categories. Among San Antonio's "Best of 2011" are:

Robert R. Biechlin – medical malpractice defense; personal injury defense

Richard J. Reynolds, III – business litigation; professional liability: defense

Gerald L. Shiely – insurance coverage; insurance defense: commercial

Gerald R. Zwernemann – construction litigation; civil litigation defense

Scott F. Cline – real estate litigation; personal injury defense

Timothy K. Singley – workers' compensation

R. Sean Page – civil litigation defense; insurance defense: personal injury

Vaughan E. Waters – appellate; personal injury defense

Mary M. Strauss – insurance coverage; personal injury defense

W. Randall Hutton – workers' compensation

Michael H. Wallis – medical malpractice: defense; appellate

Bradley E. Bartlett – personal injury defense

The firm's record of achievement during this past year more than amply justifies these accolades, as demonstrated by just a few examples of the firm's unqualified victories:

- ***Holsinger v. Dean Word Company, Ltd.***, in the 438th Judicial District Court of Bexar County, Texas – a take-nothing jury verdict for the defense, in a case in which the plaintiff was suing the defendant road contractor for injuries arising out of an automobile accident

- ***Trevino v. State Farm***, in the 285th Judicial District Court of Bexar County, Texas – a take-nothing jury verdict for the defense in an uninsured/underinsured motorist case

- ***Garcia v. United States, et al.***, in the United States District Court for the Southern District of Texas (McAllen Division) – a dismissal of the firm's client, The Haggard Law Firm, for lack of *in personam* jurisdiction

- ***USPPS, Ltd. v. Avery Dennison Corporation, et al.***, in the United States District Court for the Western District of Texas (San Antonio Division) – a complete summary judgment on the defense of limitations for the firm's client, Renner Otto Boisselle & Sklar, LLP

- ***Gooden v. Specialty Property, Ltd., et al.***, in the 414th Judicial District Court of McClennan County, Texas – a complete summary judgment in a premises liability case

- ***Dronet v. Cody Pools, Inc.***, in the 201st Judicial District Court of Travis County, Texas – a complete summary judgment in a wrongful death case

- ***Luzanilla v. Roper Whitney of Rockford***, in the 45th Judicial District Court of Bexar County, Texas – a complete summary judgment in a product liability case

- *Mendez v. Kavanaugh*, in the 445th Judicial District Court of Cameron County, Texas – a complete summary judgment in a defamation case, based on qualified privilege
- *Smith v. Aramark*, in the 445th Judicial District Court of Cameron, Texas - a complete summary judgment on behalf of the firm’s client, Long Island Village Owners’ Association
- *Matosky v. Manning*, in the U.S. Fifth Circuit Court of Appeals – an affirmance by the U.S. Fifth Circuit of a summary judgment in a medical malpractice claim
- *Dietz v. Hill Country Restaurants, Inc.*, in the Fourth Court of Appeals of the State of Texas – an affirmance of a take-nothing summary judgment in a premises liability case

“The experience you want – the results you need”. We’re ready to deliver once again in 2012.

THE NEW RULE ON DISCRETIONARY INTERLOCUTORY APPEALS

by **Vaughan E. Waters**

If the nearly fifteen years since the advent of the “new” appellate rules in Texas have taught us anything about our state’s appellate procedure and practice, it is that what the Texas Legislature and the Texas Supreme Court giveth, they may taketh away---and vice versa. Case in point: the rules regarding discretionary, or “permissive”, appeals from interlocutory



orders.

Texas Civil Practice & Remedies Code §51.014 provides a “laundry list” of various interlocutory orders which---contrary to the general rule that only a final judgment is subject to appeal---may be appealed immediately when entered by a trial court. These include,

for example, orders certifying or refusing to certify a class action, orders granting or refusing a temporary injunction, orders granting or denying the special appearance of a defendant to contest personal jurisdiction, and orders denying all or part of the relief sought by a motion to dismiss a medical malpractice action for failure to provide a sufficient expert report. A handful of other codes add additional interlocutory orders that can be appealed.

In addition, for several years now, subsections (d) and (e) of this statute have provided that the trial court may allow for the appeal of any other interlocutory order provided the court and all parties agree that the order involves “a controlling question of law as to which there is a substantial ground for difference of opinion”, and that “an immediate appeal from the order may materially advance the ultimate termination of the litigation.” The full text of these subsections, as in effect until September 1st of this year, previously read as follows:

(d) A district court, county court at law, or county court may issue a written order for interlocutory appeal in a civil action not otherwise appealable under this section if:

(1) The parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion;

(2) An immediate appeal from the order may materially advance the ultimate termination of the litigation; and

(3) The parties agree to the order.

(e) An appeal under Subsection (d) does not stay proceedings in the trial court unless the parties agree and the trial court, the court of appeals, or a judge of the court of appeals orders a stay of the proceedings.

As written, this statutory authorization was not exactly a model of clarity and precision. “[A] court may issue *a written order for interlocutory appeal* in a civil action...if...the parties agree that *the order* involves a controlling question of law...” (emphasis added). It is not entirely clear whether this provision involves two separate orders (a substantive interlocutory order on a disputed point of law, followed by a second order authorizing appeal of the first order), or one order which presents a question of law and includes the court’s permission to appeal. In either event, *all* parties *and* the court had to agree that an interlocutory appeal was appropriate under the standards set forth, or it wouldn’t happen. That was always a significant weakness of the statute, since obviously the prevailing party and the non-prevailing party would tend to have different views and different incentives regarding whether the disputed order should get an immediate review and, possibly, be set aside.

In response to a “call to arms” on judicial efficiency delivered earlier this year by Governor Rick Perry, the Texas Legislature amended the

discretionary interlocutory appeal statute. The relevant subsections now read as follows:

(d) On a party's motion or on its own initiative, a trial court in a civil action may, by written order, permit an appeal from an order that is not otherwise appealable if:

(1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and

(2) An immediate appeal from the order may materially advance the ultimate termination of the litigation; and

(d-1) Subsection (d) does not apply to an action brought under the Family Code.

(e) An appeal under Subsection (d) does not stay proceedings in the trial court unless:

(1) the parties agree to a stay; or

(2) the trial or appellate court orders a stay of the proceedings pending appeal.

(f) An appellate court may accept an appeal permitted by Subsection (d) if the appealing party, not later than the 15th day after the date the trial court signs the order to be appealed, files in the court of appeals

having appellate jurisdiction over the action an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d). If the court of appeals accepts the appeal, the appeal is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal. The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal.

Rule 168, Tex. R. Civ. P. and Rule 28.3, Tex. R. App. P. are the Texas Supreme Court's newly adopted and revised "implementing" rules regarding the filing and perfection of an interlocutory appeal under the new version of the statute.

The new version applies to all civil actions (other than those under the Texas Family Code) filed *on or after* September 1, 2011, and features two fundamental changes from the older version. First, the new rule no longer requires unanimity; if *any* party is able to persuade the trial court---or, indeed, if the court determines on its own---that a particular interlocutory order meets the "controlling question of law" and "material advancement of the litigation" criteria, this is sufficient (at least at that stage). Second, however, the appealability of the order is now subject to a two-tiered review: in addition to the foregoing, the appellate court must agree to accept the appeal.

Under Rule 168, Tex. R. Civ. P. the trial court's permission to pursue an interlocutory appeal *must be stated in the order to be appealed*. This clarifies the above referenced ambiguity from the old version of the rule. If the order does not include such permission, however, it may be amended to include it. Within fifteen days of the date an order including the required language is entered, the appealing party must file an application for interlocutory appeal explaining why an appeal is warranted under §51.014(d). This petition is filed with the clerk of the appellate court having appellate jurisdiction over the action in which the order was issued.

In language not dissimilar to that governing petitions for review to the Texas Supreme Court, Rule 28.3, Tex. R. App. P. provides that the petition must include a table of contents, index of authorities, statement of the issues presented, statement of facts, and a "clear and concise" argument as to why the order to be appealed "involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal from the order may materially advance the ultimate termination of the litigation." The petition's statement of facts and argument are limited to fifteen pages. Any party opposing the petition may file a response or cross-petition within ten days thereafter (likewise limited to fifteen pages on the statement of facts and argument), and the appealing party may then file a reply within seven days thereafter (limited to eight pages). The petitioner must also file the standard docketing statement required by Rule 32.1, Tex. R. App. P. Ordinarily there will be no oral argument on the petition, but if the petition is granted, a notice of

appeal is deemed to have been filed on that date, and the appeal is governed by the rules applicable to any other accelerated appeal.

If applied correctly and reasonably, the new discretionary interlocutory appeal statute and the governing rules should hasten the ultimate disposition of a case---and lower litigation costs--by enabling the appellate courts to determine case-dispositive or potentially case-dispositive issues, before the case has to be tried by a jury and then driven along the conventional appellate route. Since the revision has only recently taken effect, however, time will tell whether the hoped-for efficiencies and savings are achieved.

THE "PARTICIPATION" RULE IN RESTRICTED APPEALS

by Vaughan E. Waters

The conventional appeal of a final judgment or other final order fully disposing of a case is subject to certain long-standing and well-understood timelines under the Texas Rules of Appellate Procedure, now governed by Rule 26. For example, under Rule 26.1(a), Tex. R. App. P. a notice of appeal must be filed within thirty days after the judgment is signed, except where, within that thirty-day period, any party files a motion for new trial, a motion to modify the judgment, or certain other

similar motions; in that case the notice must be filed within ninety days after the judgment is signed.

There has long been a separate appellate route, however, once known as an appeal by writ of error to the court of appeals, now known as a “restricted appeal”, which is governed by Rule 30. That rule provides, in pertinent part, as follows:

A party who did not participate--- either in person or through counsel---in the hearing that resulted in the judgment complained of and who did not timely file a post-judgment motion or request for findings of fact and conclusions of law, or a notice of appeal within the time permitted by Rule 26.1(a), may file a notice of appeal within the time permitted by Rule 26.1(c)...

That latter time is six months from the date the judgment was signed.

By its terms, though, the restricted appeal is available only to parties who did not “participate”, in person or through counsel, in the hearing resulting in the underlying judgment. The question then becomes: what constitutes “participation” within the meaning of the rules? This question is especially significant in cases in which a judgment or other final order was entered without a full-blown trial--- for example, by summary judgment.

The case of *Bowles v. Cook*, 894 S.W.2d 65 (Tex. App.-Houston [14th Dist.] 1995, no pet.) analyzed the existing case law on this issue and came to the conclusion that “participation” for purposes of a restricted appeal need not include the appellant’s actual attendance at the hearing on a motion for summary judgment. The

court reviewed earlier case law in which it was observed that “[a]n appellate court has no jurisdiction to entertain petitions for writ of error [now restricted appeals] where the appellant participated in the actual trial of the case.” *Bowles*, at 67 (citing *Stewart v. Texco Newspapers, Inc.*, 734 S.W.2d 175, 177 (Tex. App.-Houston [1st Dist.] 1987, no writ)). The *Bowles* court observed that “[a]lthough the ‘actual trial’ is ordinarily understood to mean the hearing in open court leading to rendition of judgment, what constitutes participation in a trial is a matter of degree.” *Id.* (citing, *inter alia*, *Stubbs v. Stubbs*, 685 S.W.2d 643, 644-645 (Tex. 1985)). .

The *Bowles* court relied primarily on the case of *Norman v. Dallas Cowboys Football Club*, 665 S.W.2d 137 (Tex. App.-Dallas 1983, no writ), for the proposition that “[t]aking part in all steps of a summary judgment proceeding other than appearing at the hearing on the motion is participation.” *Id.* (citing, *inter alia*, *Norman*, at 140). The court further relied on *Thacker v. Thacker*, 496 S.W.2d 291, 204 (Tex. Civ. App.-Amarillo 1973, no writ) for the proposition that “there is no right to present argument for or against a motion for summary judgment and...all party participation necessary in a summary judgment proceeding occurs prior to the date set for the hearing... ” *Id.*

Thus, a plaintiff’s avoidance of a summary judgment hearing--- whether tactical or otherwise---will not allow that plaintiff to avoid the Rule 26.1(a) timelines of 30/90 days. An appeal sought to be perfected

outside that timeline is subject to dismissal for lack of jurisdiction.

IN CONCLUSION...

by Vaughan E. Waters

Appellate practice does not readily lend itself to “Yes, Virginia, there is a Santa Claus” musings on the spirit of the season, and appellate court justices are not typically mistaken for Santa Claus (nor do they typically offer their rulings on briefing extension motions for inclusion in the official case reporters). There are exceptions to all these rules, however, and the Fourteenth Court of Appeals holding in the case of *Sears v. State*, 820 S.W.2d 262 (Tex. App.-Houston [14th Dist.] 1992) strikes this observer as a particularly appropriate one (which, after nineteen years, has not lost its ability to elicit a smile). It is reprinted here in its entirety for your edification.

Court of Appeals of Texas,
Houston (14th Dist.).

Richard SEARS, Appellant
v.
The STATE of Texas, Appellee

No. A14-91-00301-CR.
Jan. 2, 1992

Appeal from 339th District Court,
Harris County; Jimmy James,
Judge.

Kenneth P. Mingledorff, Houston,
for appellant.

Kimberly Aperauch Stelter, Houston,
for appellee.

Before J. CURTISS BROWN,
C.J., and SEARS and ELLIS, JJ.

ORDER
PER CURIAM.

On December 19, 1991, the State filed a motion to extend time to file State’s brief. In pertinent part, the motion read as follows:

T’was the weeks before Christmas
and for some odd reason, It’s also
appellate’s busiest season.

When I finish a brief I get more for
my trouble, And the reading of
records has my eyes seeing double.

Still Defense Counsels rush to file all
their briefs, With visions of dollars
their efforts will reap.

When what to my wondering eyes
should appear, But two weeks of
vacation, (I’ve saved it all year).

On Delta, on Southwest, on TWA,
I’m headed to Grandma’s---up, up
and away.

But wait, there’s one thing I’ve
forgotten to mention, I need *your*
permission to get an extension.

I’ve filed lots of briefs, and they’re
listed below, But I can’t file them all,
and I’ve got lots to go.

I hope that the new year will bring a
solution, “No more extensions” is
next year’s resolution,

I’ll be back on the second and ready
to write, until then, “Merry
Christmas, and to all a good night.”

Having considered the motion, the

Court ORDERS as follows:

In the weeks before Christmas the motions pile high. The judges plow through them with many a sigh.

The reasons are wondrous, incredible, and sly, But now and then one catches the eye.

A creative DA took pen in hand And rhymed us a reason. Heavens it's grand

To read something other than the usual

prose It's a real relief as any justice knows.

And besides it's the holiday and we're feeling kind, We'll help out anyone who's in a real bind.

So here's an extension in the appeal of Mr. Sears We wish for everyone the best of all years.

The brief is now due on 1-29; If you can't get it here, better drop us a line.

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