

NO. 08-0961

IN THE SUPREME COURT OF TEXAS

ESTATE OF MIGUEL ANGEL LUIS GONZALEZ Y VALLEJO,

Petitioner/Cross-Respondent,

vs.

MIGUEL ANGEL GONZALEZ GUILBOT, CARLOS A. GONZALEZ GUILBOT,
AND MARIA ROSA DEL ARENA DE GONZALEZ,

Respondents/Cross-Petitioners.

PETITIONER VALLEJO'S REPLY IN SUPPORT OF
ITS PETITION FOR REVIEW

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INTRODUCTION

Both Civil Practice and Remedies Code Section 30.016 and Government Code Section 25.00256 allow a judge who declines recusal after a “tertiary recusal motion” is filed to continue presiding over the case, but the definitions of “tertiary recusal motion” contained in the two sections are slightly different. Section 30.016(a)—which currently applies to actions in the State’s 436 district courts, more than 200 judicially active constitutional county courts, and 227 county courts at law, and which until recently also applied to actions in the State’s 18 statutory probate courts—defines “tertiary recusal motion” as “a third or subsequent motion for recusal . . . filed against *a* district court or statutory county court *judge* by the *same party* in a case.” (Emphasis added.) Section 25.00256(a), which applies to actions filed in the State’s 18 statutory probate courts after September 1, 2007, defines “tertiary recusal motion” as “a third or subsequent motion for recusal . . . filed in a case against *any* statutory probate court *judge* by the same party . . . regardless of whether that motion is filed against a different judge than the judge or judges against whom the previous motions for recusal . . . were filed.” (Emphasis added.)

The issue in this case is whether the definitions are meant to be the same, or whether, as the court of appeals held, a tertiary recusal motion governed by Section 30.016 is *only* the third recusal motion filed by the same party against *the same judge*. For the reasons given in Vallejo’s petition and this reply, the court of appeals’ construction of Section 30.016 is wrong and should be corrected by this Court.

ARGUMENT

I. The court of appeals’ nonsensical interpretation of “tertiary recusal motion” in Section 30.016(a) contravenes legislative intent and established canons of statutory construction.

Defendants’ main argument is that interpreting “tertiary recusal motion” to mean the same in Civil Practice and Remedies Code Section 30.016(a) as in the later-enacted and more-specific Government Code Section 25.00256(a) would be “presum[ing] that the Legislature engaged in a useless act.” Defs.’ Resp. at 4 n.1, 5; *see also id.* at 6. This argument fails for at least two reasons.

A. The Legislature enacted Section 25.00256(a) to correct the court of appeals’ decision in *Whatley*.

First, the legislative history of Civil Practice and Remedies Code Section 30.016 and Government Code Section 25.00256 strongly suggests that the Legislature’s redefining “tertiary” in Section 25.00256 was a direct response to the Fourteenth Court of Appeals’ misinterpretation of that term in *In re Whatley*, No. 14-05-01222-CV, 2006 WL 2257399 (Tex. App.—Houston [14th Dist.] Aug. 8, 2006, orig. proceeding) (mem. op.)—the sole case relied on by Defendants and the court of appeals in this case. *See* Defs’ Resp. at 7; *Gonzalez Guilbot v. Estate of Gonzalez y Vallejo*, 267 S.W.3d 556, 562-63 (Tex. App.—Houston [14th Dist.] 2008, pet. filed).

In 1999, the Legislature enacted Senate Bill 788, which added Section 30.016 to the Civil Practice and Remedies Code. Act of May 26, 1999, 76th Leg., R.S., ch. 608, § 1, 1999 Tex. Gen. Laws 3148-49 (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 30.016 (Vernon 2008)); Sen. Jurisprudence Comm., Bill Analysis, Tex.

S.B. 788, 76th Leg., R.S. (1999). Section 30.016(b) eliminates the “recuse or refer” rule¹ with respect to a “tertiary recusal motion” by authorizing a “judge who declines recusal after a tertiary recusal motion is filed” to “continue presid[ing] over the case,” “sign orders,” and “move the case to final disposition as though a tertiary recusal motion had not been filed.” TEX. CIV. PRAC. & REM. CODE § 30.016(b)(1)-(3). Section 30.016(a), in turn, defines “tertiary recusal motion” as “a third or subsequent motion for recusal . . . filed against *a* district court or statutory county court *judge* by the *same party* in a case.” *Id.* § 30.016(a) (emphasis added). According to a legislative analysis of Senate Bill 788, the bill was designed to prevent precisely what Defendants attempted to do here, “stall[]” cases by filing “numerous [recusal] motions”:

Currently, court cases can be stalled due to the filing of numerous motions. It is necessary to allow parties to file motions, while also moving the case along. S.B. 788 would stipulate that upon the third motion to recuse or disqualify *a judge*, the court shall automatically deny any subsequent motion.

Bill Analysis, Tex. S.B. 788 (emphasis added); *see also id.* (stating that Section 30.016 “[r]equires a court to automatically deny any subsequent motion, if a party has filed two motions for the recusal or disqualification of a district court judge in the same case”).

¹ See TEX. R. CIV. P. 18a(c) (requiring that a judge against whom a recusal motion has been filed “either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear [the] motion”); TEX. GOV’T CODE ANN. § 25.00255(f)(1)-(2) (Vernon Supp. 2008) (a statutory probate court judge against whom a recusal motion has been filed must “recuse himself or herself” or “request the assignment of a judge to hear the motion by forwarding the motion and opposing and concurring statements to the presiding judge of the statutory probate courts”).

Section 30.016(a) was first interpreted in *In re K.M.K.*, No. 04-02-0144-CV, 2002 WL 31760938 (Tex. App.—San Antonio Dec. 11, 2002, orig. proceeding [mand. denied]). Relying on the plain language of that section, the Fourth Court of Appeals held that the trial judge did not abuse his discretion by denying the third recusal motion total filed by the relator and then continuing to preside over the case. *See id.* at *1. In 2006, however, the Fourteenth Court of Appeals expressly rejected *K.M.K.* and construed Section 30.016 “to mean that the three or more recusal motions must have been filed by the same party against the same judge.” *Whatley*, 2006 WL 2257399, at *1. The Legislature enacted Section 25.00256 the next year. Act of May 28, 2007, 80th Leg., R.S., ch. 1297, § 1, 2007 Tex. Gen. Laws 4363-65 (codified at TEX. GOV’T CODE ANN. § 25.00256 (Vernon Supp. 2008)). Section 25.00256 is substantively identical to Section 30.016 except that Section 25.00256(a) defines “tertiary recusal motion” as “a third or subsequent motion . . . filed in a case against any statutory probate court judge by the same party . . . regardless of whether [the third] motion is filed against a different judge than the judge or judges against whom the previous motions for recusal . . . were filed.” TEX. GOV’T CODE § 25.00256(a).

Although the Legislature did not repeal or amend Section 30.016, it could not reasonably have intended that a tertiary recusal motion should mean one thing in county or district court and another in probate court. Thus, while Defendants are correct that the Legislature intended that Section 25.00256 “chang[e] the law,” Defs.’ Resp. at 5, it was the Fourteenth Court of Appeals’ erroneous *Whatley* decision that the Legislature intended to change.

B. The court of appeals’ interpretation of “tertiary” impermissibly adds words to Section 30.016(a) and would produce absurd results.

Second, the court of appeals’ strained construction of Section 30.016(a) violates well-established rules of statutory construction. For one thing, the court’s construction is only possible by replacing “a judge” with “*the same* judge,” thereby inserting words into the statute that simply are not there. *See* TEX. CIV. PRAC. & REM. CODE § 30.016(a) (“tertiary recusal motion” is third motion filed against “a district court or statutory county court judge by *the same* party in a case” (emphasis added)); *Lee v. City of Houston*, 807 S.W.2d 290, 294-95 (Tex. 1991) (“A court may not judicially amend a statute and add words that are not implicitly contained in the language of the statute.”). This manipulation of the statutory text is particularly egregious here, since rules of construction dictate that the Legislature’s use of “the same” to modify “party” in a different part of Section 30.016(a) implies that the omission of those words before “judge” was purposeful. *See Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 90 (Tex. 2001) (“Ordinarily when the Legislature has used a term in one section of a statute and excluded it in another, we will not imply the term where it has been excluded.”).

Defendants’ reliance on one version of *Webster’s Dictionary* for the proposition that “[t]he indefinite article ‘a’ can mean either ‘same’ or ‘any’” does not change this result. *See* Defs.’ Resp. at 4 (quoting WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 43 (1985)) (second alteration added). Just because an interpretation is grammatically possible does not mean that it is legally correct. Rather, the Court “must view [a] statute’s terms in context,” *Phillips v. Beaber*, 995 S.W.2d 655, 658 (Tex. 1999),

and nothing about the context of Section 30.016 supports the court of appeals' conclusion that the Legislature intended for "a judge" to mean "the same judge." Indeed, all indications are to the contrary. *See supra* pp. 2-3.

Moreover, accepting the court of appeals' illogical interpretation of Section 30.016 would have absurd consequences. *See, e.g., Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 629 (Tex. 1996) ("Courts should not read a statute to create . . . an absurd result."); *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 135 (Tex. 1994) (Hecht, J., concurring) ("[W]ords . . . will not be construed to cause a result the Legislature almost certainly could not have intended." (citing *Cramer v. Sheppard*, 167 S.W.2d 147, 155 (Tex. 1942))). If the court of appeals is correct, then Section 30.016 would almost never limit vexatious recusals in any district or county court. It is difficult to imagine even the most pugnacious of litigants filing *three* recusal motions against a single judge in the same case. The Court should simply "decline to foster an interpretation" of Section 30.016 "so obviously contrary to the legislature's intent." *Glyn-Jones*, 878 S.W.2d at 134.

II. Defendants' misguided waiver argument cannot cure the defects in their recusal motions or the court of appeals' inexplicable holding that a judge must "recuse or refer" a patently defective motion.

Defendants do not even bother to refute at least two of the defects in their recusal motions pointed out by Vallejo—that the motions were not timely filed and cited the wrong statutory authority—or address the near-consensus among courts of appeals that judges have no obligation to refer a facially defective recusal motion. *See* Defs.' Resp. at 10-15; *see also* Vallejo's Pet. at ix-x (listing cases). Instead, Defendants urge

that Vallejo somehow waived any argument regarding these defects by not “object[ing]” before, “or point[ing] [them] out in writing” to, Judge Herman. Defs.’ Resp. at 10; *see also id.* at 11-15.

But Vallejo had no realistic opportunity to object to, or present argument on, the defects in Defendants’ recusal motions because Defendants failed to attend the January 8, 2007, hearing on their motions or present any evidence or argument in support of them. *See* 1 RR 5-7. Defendants’ suggestion that Vallejo had some obligation to present argument in opposition to the motions, without Defendants even being present, after Judge Herman noticed some procedural defects *sua sponte* and summarily denied the motions based thereon blinks reality.

III. Defendants waived their baseless judicial-admission argument by failing to raise it in the court of appeals.

Finally, relying entirely on a single, vague footnote in Vallejo’s response to one of Defendants’ mandamus petitions, Defendants erroneously assert that Vallejo judicially admitted that Judge Herman lacked authority to rule on the motion to recuse filed against him. *See* Defs.’ Resp. at 7. In the first place, Defendants have waived this new argument by failing to raise it in their court of appeals’ brief. *See* Appellants’ Opening Brief on Appeal, *Gonzalez Guilbot v. Estate of Gonzalez y Vallejo*, 267 S.W.3d 556 (Tex. App.—Houston [14th Dist.], pet. filed) (No. 14-07-00047-CV); *In re K.A.F.*, 160 S.W.3d 923, 928 (Tex. 2005) (litigant “waived . . . arguments by failing to raise them in the court of appeals”).

Moreover, Defendants’ argument fails on its merits in at least three ways. As Defendants acknowledge, a judicial admission is an “[a]ssertion[] of fact . . . in the live pleadings of a party,” *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001), that is “clear, deliberate, and unequivocal.” *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners L.P.*, 146 S.W.3d 79, 95 (Tex. 2004). But the statement relied on by Defendants—that “Judge Herman undoubtedly should not have ruled on the motion to recuse Judge Herman himself”—is (1) a legal conclusion rather than an assertion of fact,² (2) not contained in Vallejo’s live pleading, and (3) not the kind of “clear, deliberate, and unequivocal” statement required to constitute a judicial admission.³

PRAYER

Petitioner/Cross-Respondent Vallejo respectfully requests that the Court grant both petitions for review and reverse the court of appeals’ judgment with respect to its holding that Judge Herman’s ruling on the motion to recuse filed against him voided the final judgment and sanctions order.

² See *French v. Gill*, 252 S.W.3d 748, 755 (Tex. App.—Texarkana 2008, pet. denied) (statement in federal complaint that joinder of certain defendants would destroy diversity of citizenship was “a legal statement or conclusion” and, therefore, did “not fit within the definition of a judicial admission”); *Gillespie v. Univ. of Tex. Health Science Ctr.*, No. 14-01-00201-CV, 2002 WL 1163002, at *3 (Tex. App.—Houston [14th Dist.] May 30, 2002, no pet.) (statement in petition that plaintiff lacked a legal remedy was not a judicial admission because it “concern[ed] a conclusion of law”).

³ Defendants also devote several pages to their “mootness” argument, but not one of the cases they cite supports their novel contention that Judge Herman’s unilateral actions following the court of appeals’ decision in this case somehow precludes Vallejo from seeking further review of that decision in this Court. See Defs.’ Resp. at 8-10.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 19, 2009, a copy of this Reply was served by certified mail on the following counsel of record:

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