

NO. 08-0961

IN THE SUPREME COURT OF TEXAS

MARIA DEL CARMEN GUILBOT SERROS DE GONZALEZ, INDIVIDUALLY
AND AS INDEPENDENT ADMINISTRATOR OF THE ESTATE OF MIGUEL
ANGEL LUIS GONZALEZ Y VALLEJO ET AL.,

Petitioners/Cross-Respondents,

vs.

MIGUEL ANGEL GONZALEZ GUILBOT ET AL.

Respondents/Cross-Petitioners.

PETITIONERS/CROSS-RESPONDENTS' BRIEF ON THE MERITS

Daryl L. Moore
State Bar No. 14324720
DARYL L. MOORE, P.C.
1005 Heights Boulevard
Houston, Texas 77008
Telephone: 713.529.0048
Facsimile: 713.529.2498

Thomas R. Phillips
State Bar No. 00000102
Martha G. Newton
State Bar No. 24046524
BAKER BOTTS L.L.P.
1500 San Jacinto Center
98 San Jacinto Boulevard
Austin, Texas 78701
Telephone: 512.322.2500
Facsimile: 512.322.2501

Attorneys for Petitioners/Cross-Respondents

IDENTITIES OF PARTIES AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 55.2(a), the following is a complete list of all parties to the trial court's final judgment and the names and addresses of all trial and appellate counsel:

Petitioners/Cross-Respondents:

Maria del Carmen Guilbot Serros de Gonzalez, individually and as independent administrator of the estate of Miguel Angel Luis Gonzalez y Vallejo; Luis Amadeo Gonzalez Guilbot; Jose Guillermo Gonzalez Guilbot; Carmen Isabel Gonzalez Guilbot de Uriarte; Gerardo Gonzalez Guilbot; Javier Gonzalez Guilbot; Madeira International Ltd.; Franceville International Ltd.; Arkhangel International Ltd.; L&T American Corporation; and TG Interamerica Corporation (hereinafter "Plaintiffs" or "Petitioners")

Appellate counsel for Petitioners/Cross-Respondents:

Thomas R. Phillips
Martha G. Newton
BAKER BOTTS L.L.P.
98 San Jacinto Blvd, Suite 1500
Austin, Texas 78701

Daryl L. Moore
DARYL L. MOORE, P.C.
1005 Heights Boulevard
Houston, Texas 77008

Trial counsel for Petitioners/Cross-Respondents:

Hector G. Longoria
HEARD, ROBINS, CLOUD & LUBEL, LLP
3800 Buffalo Speedway, 5th Floor
Houston, Texas 77098

Respondents/Cross-Petitioners:

Miguel Angel Gonzalez Guilbot, Carlos Alberto Gonzalez Guilbot, and Maria Rosa del Arena de Gonzalez (hereinafter "Defendants" or "Respondents")

Appellate counsel for Respondents/Cross-Petitioners:

Armando Lopez
8433 Katy Freeway, Suite 200
Houston, Texas 77024

Andy Taylor
ANDY TAYLOR & ASSOCIATES
405 Main Street, Suite 200
Houston, Texas 77002

Eric D. Nielsen
8433 Katy Freeway, Suite 250
Houston, Texas 77024

Former trial and appellate counsel for Respondents/Cross-Petitioners:

Andres P. Chaumont
15995 N. Barkers Landing Drive, Suite 285
Houston, Texas 77079

Other parties to the trial court's judgment (Defendants below) that are not parties to this appeal:

Corporacion St. John, S.A. de C.V.; Teacorp Mexico S.A. de C.V.; Broker Distribucion, S.A. de C.V.; Inmobiliaria Remi, S.A. de C.V.; Armonia Organica, S.A. de C.V.; Envasadora de Agua De; TLACote S.A. de C.V.; North Bay Trading Ltd.; Mama Lupe Inc.; and Royal Tea S.A. de C.V.

TABLE OF CONTENTS

IDENTITIES OF PARTIES AND COUNSEL i

INDEX OF AUTHORITIES v

STATEMENT OF THE CASE ix

STATEMENT OF JURISDICTION ix

ISSUES PRESENTED..... xii

STATEMENT OF FACTS 1

 I. The Gonzalez family and their businesses..... 1

 II. The underlying lawsuit..... 1

 III. Defendants try to avoid trial by removing the case to federal court..... 2

 IV. Defendants next attempt to delay trial with an avalanche of recusal motions..... 3

 V. Defendants appeal Judge Wood’s judgment and Judge Herman’s sanctions order..... 5

 VI. The Legislature clarifies the meaning of “tertiary recusal motion” with respect to motions filed against statutory probate judges but leaves Section 30.016 intact..... 8

SUMMARY OF THE ARGUMENT 9

ARGUMENT 10

 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..... 10

 A. The court of appeals’ interpretation of “tertiary” impermissibly adds words to Section 30.016(a) and produces absurd results..... 10

 B. The Legislature enacted Section 25.00256(a) to correct the court of appeals’ decision in *Whatley*..... 12

II. Defendants waived their right to complain about Judge Herman’s failure to refer the motion filed against him by filing a facially defective motion.....	14
PRAYER	17
CERTIFICATE OF SERVICE.....	19
INDEX TO APPENDIX	20

INDEX OF AUTHORITIES

Cases

<i>Barron v. State</i> , 108 S.W.3d 379 (Tex. App.—Tyler 2003, no pet.).....	xi, 14
<i>Barshop v. Medina County Underground Water Conservation Dist.</i> , 925 S.W.2d 618 (Tex. 1996).....	11
<i>Bridgestone/Firestone, Inc. v. Glyn-Jones</i> , 878 S.W.2d 132 (Tex. 1994).....	11, 12, 14
<i>Cramer v. Sheppard</i> , 167 S.W.2d 147 (Tex. 1942).....	11
<i>Gonzalez Guilbot v. Estate of Gonzalez y Vallejo</i> , 267 S.W.3d 556 (Tex. App.—Houston [14th Dist.] 2008, pet. filed)	ix, x, xi, 5, 6, 7, 8, 12, 14
<i>Gonzalez v. Guilbot</i> , 255 F. App'x 770 (5th Cir. 2007).....	2, 3
<i>Gulf Maritime Warehouse Co. v. Towers</i> , 858 S.W.2d 556 (Tex. App.—Beaumont 1993, writ denied)	14
<i>Hawkins v. Estate of Volkmann</i> , 898 S.W.2d 334 (Tex. App.—San Antonio 1994, writ denied).....	xi, 14
<i>In re K.M.K.</i> , No. 04-02-00144-CV, 2002 WL 31760938 (Tex. App.—San Antonio Dec. 11, 2002, pet. denied)	x, xiii, 13
<i>In re Norman</i> , 191 S.W.3d 858 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding)	8
<i>In re Whatley</i> , No. 14-05-01222-CV, 2006 WL 2257399 (Tex. App.—Houston [14th Dist.] Aug. 8, 2006, orig. proceeding) (mem. op.).....	7, 8, 12, 13
<i>Johnson v. Sepulveda</i> , 178 S.W.3d 117 (Tex. App.—Houston [14th Dist.] 2005, no pet.).....	15, 16, 17
<i>Lee v. City of Houston</i> , 807 S.W.2d 290 (Tex. 1991).....	11

<i>McElwee v. McElwee</i> , 911 S.W.2d 182 (Tex. App.—Houston [1st Dist.] 1995, writ denied).....	xi, 14
<i>Meritor Auto., Inc. v. Ruan Leasing Co.</i> , 44 S.W.3d 86 (Tex. 2001).....	11
<i>Pena v. Pena</i> , 986 S.W.2d 696 (Tex. App.—Corpus Christi 1998, pet. denied).....	14
<i>Quaestor Investments, Inc. v. State of Chiapas</i> , 997 S.W.2d 226 (Tex. 1999) (per curiam).....	xii, 5
<i>Spigener v. Wallis</i> , 80 S.W.3d 174 (Tex. App.—Waco 2002, no pet.).....	xi, 14
<i>Wirtz v. Mass. Mut. Life Ins. Co.</i> , 898 S.W.2d 414 (Tex. App.—Amarillo 1995, no writ).....	xi, 14, 17
<i>Wright v. Wright</i> , 867 S.W.2d 807 (Tex. App.—El Paso 1993, writ denied)	xii

Statutes

Act of May 18, 2007, 80th Leg., R.S., ch. 1297, § 1, 2007 Tex. Gen. Laws 4363-65 (codified at TEX. GOV'T CODE ANN. § 25.00256(a) (Vernon Supp. 2008)	8, 13
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).....	12
TEX. CIV. PRAC. & REM. CODE ANN. § 30.016 (Vernon 2008).....	<i>passim</i>
TEX. GOV'T CODE ANN. § 22.00255 (Vernon Supp. 2008)	<i>passim</i>
TEX. GOV'T CODE ANN. § 25.00256 (Vernon Supp. 2008).....	xi, 8, 12, 13, 14
TEX. GOV'T CODE ANN. § 22.001 (Vernon 2004)	x, xi, xii
TEX. PROB. CODE § 5(f).....	1
TEX. R. CIV. P. 18a	3, 4, 15, 16

Other Authorities

Sen. Jurisprudence Comm., Bill Analysis, Tex. S.B. 788, 76th Leg., R.S. (1999)	12, 20
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STATEMENT OF THE CASE

Nature of the case:

This case involves an intra-family dispute about the ownership and assets of several family businesses. *See* 1 CR 114, 121-27.¹ Petitioners, which include the Gonzalez-family matriarch and five of her nine children, brought contract and tort claims against two of the matriarch's children, other family members, and companies controlled by them. *See id.* at 114-36.

Trial court:

The Honorable Guy Herman, presiding judge of the statutory probate courts, signed the January 8, 2007 sanctions order at issue in this appeal. 1st CR 71. The Honorable Mike Wood, Probate Court No. 2, Harris County, Texas, signed the January 12, 2007 final judgment at issue in this appeal. 28 CR 6719.

Trial court's disposition:

After Judge Herman denied three motions to recuse filed by Defendants and assessed \$12,000 in sanctions against them for filing the frivolous motions, the case proceeded to a bench trial before Judge Wood, of which Defendants had notice but refused to attend. *See* 1st CR 63-72; 1 RR 5, 7, 13; 1 (of 26) RR. After hearing evidence and argument by Petitioners' counsel, Judge Wood rendered a final judgment on their affirmative claims against Defendants, awarding Petitioners damages and attorneys' fees and declaring their ownership interests in various family companies. *See id.* at 119-20; 28 CR 6719-6733.

¹ The clerk's record in this case consists of one volume marked "Transcript" and 28 volumes marked "Supplemental Transcript." References to the single "Transcript" volume are identified as "1st CR {page}." References to the 28 volumes of the "Supplemental Transcript" are "{volume} CR {page}."

The reporter's record consists of a transcript of the January 8, 2007, recusal hearing marked as "Reporter's Record" and "Volume 1 of 1 Volume(s)" and an additional 26 volumes relating to the January 8, 2007, trial on the merits marked as "Reporter's Record" and "Volume {number} of 26 Volumes." References to the January 8th hearing will be identified as "1 RR {page}." References to the trial on the merits will be "{volume} (of 26) RR {page}."

Parties in the court of appeals:

Three Defendants—Miguel Angel Gonzalez Guilbot, Carlos Alberto Gonzalez Guilbot, and Maria Rosa del Arenal de Gonzalez—who were the appellants in the court of appeals and are Respondents in this Court, appealed Judge Herman’s sanctions order and Judge Wood’s final judgment. 1st CR 85. The “Estate of Miguel Angel Luis Gonzalez y Vallejo” was incorrectly designated as the appellee in the court of appeals. *See Gonzalez Guilbot v. Estate of Gonzalez y Vallejo*, 267 S.W.3d 556, 558 (Tex. App.—Houston [14th Dist.] 2008, pet. filed). The appellees should have been Maria del Carmen Guilbot Serros de Gonzalez, individually and as independent administrator of the Estate of Gonzalez y Vallejo, and the other parties listed as Petitioners/Cross-Respondents in the Identities of Parties and Counsel, *supra* page i, all of whom were Plaintiffs in the trial court and were awarded money damages in the trial court’s final judgment. *See* 28 CR 6719-33.

Court of appeals:

The Fourteenth Court of Appeals at Houston. Justice Yates authored the court’s unanimous opinion and was joined by Justices Guzman and Brown.

Court of appeals’ disposition:

On September 30, 2008, the court of appeals reversed the trial court’s judgment and remanded for a new trial, holding that Judge Herman’s sanctions order and Judge Wood’s final judgment were void because they were rendered after Judge Herman impermissibly ruled on a motion to recuse filed against him. *Gonzalez Guilbot*, 267 S.W.3d at 563.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this case pursuant to Section 22.001(a)(2), (3), and (6) of the Texas Government Code. *See* TEX. GOV'T CODE ANN. § 22.001(a)(2)-(3), (6) (Vernon 2004). First, the Court has “conflicts” jurisdiction under Section 22.001(a)(2) because the court of appeals’ holding that a “tertiary recusal motion” within the meaning of Texas Civil Practice and Remedies Code Section 30.016 is a “third recusal motion . . . filed by the same party against *the same judge*,” *Gonzalez Guilbot*, 267 S.W.3d at 562 (emphasis added), directly conflicts with the holding of the Fourth Court of Appeals in *In re K.M.K.*, No. 04-02-00144-CV, 2002 WL 31760938, at *1 (Tex. App.—San Antonio Dec. 11, 2002, pet. denied) (not designated for publication), that a tertiary recusal motion is the third motion filed by the same party against *any* judge in a case. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 30.016(a) (Vernon 2008) (defining 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)); *id.* § 30.016(b) (providing that a “judge who declines recusal after a tertiary recusal motion is filed” may continue presiding over the case).

Second, the court of appeals’ misconstruction of Section 30.016(a) also gives the Court jurisdiction under Section 22.001(a)(3) and (a)(6). The meaning of tertiary recusal motion was “necessary” to the court of appeals’ “determination of the case,” TEX. GOV'T CODE § 22.001(a)(3); *see Gonzalez Guilbot*, 267 S.W.3d at 562-63,

and presents an issue “importan[t] to the jurisprudence of the state”:² although Section 30.016 no longer applies to recusal motions against statutory probate judges,³ it continues to govern recusal motions filed against judges in the state’s 436 district courts and 227 county courts at law. Whether—as the court of appeals apparently believes⁴—a party may avoid trial indefinitely by filing an endless number of recusal motions, so long as the party does not file more than two against a single judge, is an issue that should be resolved by this Court before the court of appeals’ opinion engenders further gamesmanship by litigants seeking to avoid trial.

Third, the court of appeals’ holding that, when presented with a facially defective motion, a judge must nonetheless either recuse himself or refer the motion to another judge for consideration, *Gonzalez Guilbot*, 267 S.W.3d at 563, directly conflicts with decisions by other courts of appeals in numerous cases, including *Barron v. State*, 108 S.W.3d 379, 382-83 (Tex. App.—Tyler 2003, no pet.); *Spigener v. Wallis*, 80 S.W.3d 174, 180-81 (Tex. App.—Waco 2002, no pet.); *Wirtz v. Mass. Mut. Life Ins. Co.*, 898 S.W.2d 414, 423 (Tex. App.—Amarillo 1995, no writ); *McElwee v. McElwee*, 911 S.W.2d 182, 185-86 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Hawkins v. Estate of Volkmann*, 898 S.W.2d 334, 343 (Tex. App.—San Antonio 1994, writ denied);

² TEX. GOV’T CODE § 22.001(a)(6).

³ See TEX. GOV’T CODE ANN. § 25.00256(a) (Vernon Supp. 2008) (effective Sept. 1, 2007) (defining a “tertiary recusal motion” filed against a statutory probate court judge as the third motion filed against “any statutory probate court judge by the same party”).

⁴ See *Gonzalez Guilbot*, 267 S.W.3d at 562.

Wright v. Wright, 867 S.W.2d 807, 811 (Tex. App.—El Paso 1993, writ denied). See TEX. GOV'T CODE § 22.001(a)(2).

Finally, Respondents' cross-petition itself presents an issue that is important to the jurisprudence of the state. See TEX. GOV'T CODE § 22.001(a)(6). Respondents' argument that the probate court never reacquired jurisdiction over the case because Petitioners' counsel hand-delivered Judge Rosenthal's remand order to the state court clerk's office—rather than the federal clerk's having mailed it, as contemplated by 28 U.S.C. Section 1447—presents an issue of first impression in Texas. Addressing this issue will give the Court an opportunity to clarify its statements in *Quaestor Investments, Inc. v. State of Chiapas*, 997 S.W.2d 226 (Tex. 1999) (per curiam), about when jurisdiction reattaches in state court after an unsuccessful attempt to remove a case to federal court.

ISSUES PRESENTED

Issue One

Whether the court of appeals erred in interpreting “tertiary recusal motion” within the meaning of Civil Practice and Remedies Code 30.016 to mean the third recusal motion filed by the same party against the same judge, where the court’s interpretation: (i) is contrary to the plain text of the statute; (ii) would lead to absurd results; (iii) is contradicted by the legislative history of Section 30.016 and a related statute; and (iv) creates a conflict with the Fourth Court of Appeals’ decision in *In re K.M.K.*, No. 04-02-00144-CV, 2002 WL 31760938 (Tex. App.—San Antonio Dec. 11, 2002, pet. denied).

Issue Two

Whether the court of appeals erred in refusing to recognize an exception to the referral rule for facially defective motions, in conflict with several other courts of appeals, where Defendants’ motion to recuse Judge Herman failed to meet the requirements of Government Code Section 25.00255.

STATEMENT OF FACTS

I. The Gonzalez family and their businesses.

This case involves an intra-family dispute over the ownership and control of several businesses formerly owned by Miguel Angel Luis Gonzalez y Vallejo (“Miguel Angel”), who is now deceased. Miguel Angel was married to the lead plaintiff in this case, Maria del Carmen Guilbot Serros de Gonzalez (“Maria”), and together they had nine children. 1 CR 190.

In 1960, Miguel Angel founded LAGG’S de Mexico, S.A., a company primarily engaged in the manufacturing, distribution, and marketing of herbal-tea products in Mexico. 1 CR 190.⁵ Over time, LAGG’S grew in size and scope, eventually controlling the majority of the Mexican tea market and spawning several other food-products companies in Mexico and the United States. *See* 1 CR 190-92.

II. The underlying lawsuit.

When Miguel Angel died in 2003, his will was probated in Harris County, Texas, where he was living at the time of his death. *See* 1 CR 184. In May 2004, Maria, individually and as independent administrator of Miguel Angel’s estate, filed a contract and tort suit in Probate Court No. 2⁶ against two of her sons, Carlos and Miguel, for stealing trademarks and other assets from various family businesses. 1 CR 33-54; 114-36. Other family members, individuals, and corporate entities were also named as

⁵ LAGG’S is an acronym for Miguel Angel’s first-born son, Luis Amadeo Gonzalez Guilbot Serros. 1 CR 190.

⁶ The suit was filed in Probate Court No. 2 as a suit “incident” to Miguel Angel’s estate. *See* 1 CR 189; TEX. PROB. CODE § 5(f) (“All courts exercising original probate jurisdiction shall have the power to hear all matters incident to an estate.”) (repealed 2009).

plaintiffs and defendants. *See id.* In June 2006, Judge Mike Wood determined that Defendants had produced forged stock certificates in discovery in order to claim majority ownership of certain family corporations. *See* 17 CR 4015-17. Judge Wood issued a sanctions order prohibiting Defendants from further claiming or disputing ownership of the corporations, *id.*, thereby resolving the main factual issue in the case in Plaintiffs' favor. *See* 1 CR 194-96. Defendants did not appeal that order.

III. Defendants try to avoid trial by removing the case to federal court.

On November 14, 2006, after several prior trial settings, Judge Wood set this case for trial on January 8, 2007. Shortly thereafter, Defendants commenced a series of tactics to avoid trial at all costs.

On November 21, 2006, Defendants removed the case to the United States District Court for the Southern District of Texas, alleging that there was complete diversity of citizenship between the parties. 1st CR 5; 28 CR 6640-41. On December 14, 2006, Judge Lee Rosenthal rejected their diversity arguments as both contrary to established precedent and as untimely raised, ordering them to pay Plaintiffs' attorneys' fees. 28 CR 6641-42. Additionally, to expedite the case's progress post-remand, Judge Rosenthal gave Plaintiffs' counsel a certified copy of the remand order to hand deliver to the probate court. 27 CR 6447.

Defendants then sought review of the remand order in the Fifth Circuit, complaining both about the remand procedure and the attorneys'-fees award. 28 CR 6681; *Gonzalez v. Guilbot*, 255 F. App'x 770, 771 (5th Cir. 2007). The Fifth Circuit rejected both complaints, holding: (1) that Defendants had waived any objection to the

remand procedure employed by Judge Rosenthal by not objecting in her court; (2) that the court “lack[ed] jurisdiction to review the particular certification and mailing procedures authorized by the district court” under 28 U.S.C. Section 1447; and (3) that Judge Rosenthal did not abuse her discretion in awarding attorneys’ fees to Plaintiffs because Defendants “had no objectively reasonable basis for removal,” and Judge Rosenthal’s “factual findings with respect to the amount of the fee award were not clearly erroneous.” *Gonzalez*, 255 F. App’x at 772.

IV. Defendants next attempt to delay trial with an avalanche of recusal motions.

Litigation of the underlying dispute continued in the probate court while Defendants appealed the remand order to the Fifth Circuit. On December 15, 2006, at 11:56 a.m., Plaintiffs’ counsel hand-delivered a certified copy of Judge Rosenthal’s remand order to the Harris County District Clerk’s office for filing. 28 CR 6774. Earlier that morning, Defendants’ counsel began a second front in the effort to avoid trial by filing a motion to recuse Judge Wood pursuant to Texas Rule of Civil Procedure 18a. 1st CR 7.

Judge Wood declined to recuse himself and, pursuant to Texas Government Code Section 25.00255(f)(2), forwarded the motion to Judge Guy Herman, presiding judge of the state’s statutory probate courts. 1st CR 11. Judge Herman appointed Judge Gladys Burwell, Galveston County probate judge, to hear the motion to recuse and set the hearing for December 29, 2006, at 2:00 p.m. 1st CR 44.

Just before that hearing, Defendants’ trial counsel, Andres P. Chaumont, simultaneously filed both a second motion to recuse against Judge Burwell, 1st CR 12,

and a third motion to recuse against Judge Herman, “in his capacity as administrative presiding judge and from hearing the previous motions to recuse.” 1st CR 18. Judge Herman reset all three motions for a January 8, 2007, hearing before himself. 1st CR 43; 1 RR 14. At that hearing, Defendants neither appeared nor offered any evidence in support of their recusal motions. 1 RR 5, 7. Instead, Mr. Chaumont sent a paralegal to observe. 1 RR 6.

Judge Herman first dismissed the motion to recuse Judge Burwell “for a procedural defect,” explaining that it “was not filed by Defendants” but rather “by the attorney for the Defendants . . . on his own behalf,” and that Texas law requires that motions to recuse be “filed by parties, not by attorneys.” 1 RR 5. Judge Herman next dismissed the motion to recuse against him for the same reason, 1 RR 5-6, further noting that both motions improperly invoked the recusal provisions in Texas Rule of Civil Procedure 18a rather than Government Code Section 22.00255, which governs recusal procedure in statutory probate courts. 1 RR 6. Finally, Judge Herman denied the motion to recuse Judge Wood because Defendants failed to appear and present any evidence or argument to support it. 1 RR 7, 13. After receiving testimony from Plaintiffs’ counsel, Judge Herman also awarded \$12,000 in sanctions jointly and severally against Defendants and Mr. Chaumont for their “frivolous pleading[s].” 1 RR 10-13; see 1st CR 71.

Later that day, Judge Wood held a bench trial, which Defendants likewise failed to attend. 1 (of 26) RR 22-23. Judge Wood signed a final judgment for Plaintiffs on January 12, 2007, awarding them damages and attorneys’ fees and declaring them to

be the sole or majority owners of the family businesses at issue in the lawsuit. 28 CR 6719-31.

V. Defendants appeal Judge Wood’s judgment and Judge Herman’s sanctions order.

Three Defendants—Miguel Angel Gonzalez Guilbot, Carlos Alberto Gonzalez Guilbot, and Maria Rosa del Arenal de Gonzalez—appealed both Judge Wood’s final judgment and Judge Herman’s sanctions order, alleging that each was void because: (1) Judge Rosenthal’s failure to direct the clerk to mail the remand order as directed by the federal removal statute prevented jurisdiction from transferring from federal to state court after remand; and (2) Section 25.00255(f) and Rule 18a(c) prohibited Judge Herman from ruling on the motion to recuse that Defendants filed against him, thereby rendering all subsequent orders void. *See Gonzalez Guilbot*, 267 S.W.3d at 558. Defendants did not challenge the merits of the trial court’s judgment.

The Fourteenth Court began by holding that “the post-remand jurisdictional transfer to the state court was complete at all relevant times.” *Id.* at 561. The court reasoned that the Fifth Circuit’s waiver holding was “the law of the case” because that court had “decided the exact issue [Defendants] raise[d] [in the court of appeals] under identical facts,” there was “no clear error” in the Fifth Circuit’s holding or any “other reason not to follow the Fifth Circuit’s rulings,” and the Fifth Circuit’s decision did “not conflict with Texas law.” *Id.* at 560. In support of its last conclusion, the court distinguished this Court’s decision in *Quaestor Investments, Inc. v. State of Chiapas*, 997 S.W.2d 226 (Tex. 1999) (per curiam), on the ground that “*Quaestor* did not address the

issue” before the court of appeals: “an alternative method of delivery to the state court with full knowledge of all parties and unequivocal, immediate receipt by the state court.” *Gonzalez Guilbot*, 267 S.W.3d at 560.

The court agreed with Defendants, however, that Judge Herman’s sanctions order and Judge Wood’s subsequent final judgment were void because Judge Herman had ruled on Defendants’ motion to recuse him rather than refer that motion to yet another judge. *Id.* at 561. The court concluded that under the general “recuse or refer” rule in Government Code Section 25.00255(f),⁷ a judge against whom a recusal motion has been filed “has only two options: grant the motion to recuse or refer the motion to another judge for a ruling.” *Id.* Thus, the court believed, Judge Herman violated this rule “when he ruled on his own motion to recuse” rather than referring the motion to the Chief Justice of the Texas Supreme Court pursuant to Government Code Section 74.057(a). *Id.* “Because Judge Herman did not have the power to rule on his own recusal motion,” the court reasoned, every “subsequent order[] [that] he entered [was] void,” including “Judge Herman’s sanctions order and his order denying the motion to recuse Judge Wood.” *Id.* Moreover, “[b]ecause Judge Herman’s order denying the motion to recuse Judge Wood

⁷ See TEX. GOV’T CODE ANN. § 25.00255(f) (Vernon Supp. 2008) (“Before further proceedings in a case in which a motion for the recusal or disqualification of a judge has been filed, the judge shall: (1) recuse himself or herself; or (2) 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 as provided by Subsection (h).”); TEX. R. CIV. P. 18a(c) (“Prior to any further proceedings in the case the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such a motion.”).

[was] void, a recusal motion was still pending against Judge Wood when he entered the final judgment, rendering [that] judgment void as well.” *Id.*

In order to reach this conclusion, the court also rejected the application of two exceptions to the referral rule urged by Plaintiffs. First, the court dismissed Plaintiffs’ argument that since the motion to recuse Judge Herman was the third recusal motion filed in the case, the exception for a “tertiary recusal motion” in Civil Practice and Remedies Code Section 30.016 applied, allowing Judge Herman to deny that motion and continue presiding over the case. *Id.* at 562. Section 30.016 allows a “judge who declines recusal after a tertiary recusal motion is filed” to “preside over the case,” “sign orders in the case,” and “move the case to final disposition as though a tertiary recusal motion had not been filed.” TEX. CIV. PRAC. & REM. CODE ANN. § 30.016(b)(1)-(3). It defines “‘tertiary recusal motion’ [as] a third or subsequent motion for recusal or disqualification filed against *a* district court or statutory county court *judge* by the *same party* in a case.” *Id.* § 30.016(a) (emphasis added)). Despite this clear statutory language, the court of appeals adhered to its previous decision in *In re Whatley*, No. 14-05-01222-CV, 2006 WL 2257399, at *1 (Tex. App.—Houston [14th Dist.] Aug. 8, 2006, orig. proceeding) (mem. op.), in which the court interpreted Section 30.016 as applying only to “a third recusal motion . . . filed by the same party against *the same judge*.” *Gonzalez Guilbot*, 267 S.W.3d at 562.

Second, the court rejected Plaintiffs’ contention that the exception to the referral rule for procedurally defective motions recognized by numerous other courts of appeals, *see supra* at viii-ix; *infra* at 14-15, applied to the motion to recuse Judge

Herman, based on its holding in a prior case that “[e]ven though a motion to recuse . . . be defective, the challenged judge must either recuse or refer the motion, so that another judge can determine the procedural adequacy and merits of the motion to recuse.” *Id.* at 563 (quoting *In re Norman*, 191 S.W.3d 858, 861 (Tex. App.—Houston [14th Dist.] 2006, orig. proceeding) (alteration in original)).

VI. The Legislature clarifies the meaning of “tertiary recusal motion” with respect to motions filed against statutory probate judges but leaves Section 30.016 intact.

In 2007, following the court of appeals’ initial misconstruction of “tertiary recusal motion” in *Whatley*, the Legislature enacted Government Code Section 25.00256,⁸ which is substantively identical to Civil Practice and Remedies Code Section 30.016 except that it 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). Despite this clarification for probate judges, however, the Legislature failed to make any changes to Section 30.016. Since that Section’s definition of “tertiary recusal motion” still governs actions in the State’s 436 district courts and 227 county courts at law, the court of appeals’ decisions in *Whatley* and this case will continue to have precedential effect in future cases involving multiple recusal motions filed against the judges of those courts.

⁸ Act of May 18, 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)). Since the statute did not become effective until September 1, 2007, it does not apply to this case.

SUMMARY OF THE ARGUMENT

Before Judge Herman denied the motion to recuse that Defendants filed against him and made further orders to move this case towards a disposition on the merits, Defendants had: (1) attempted to remove the case to federal court, more than one and a half years after the case was filed and mere weeks before the trial on the merits, even though there was no colorable basis for removal under federal law; (2) sought to delay trial further by appealing the federal district court's remand order to the Fifth Circuit, even though the appeal was clearly foreclosed by 28 U.S.C. Section 1447; and (3) systematically moved to recuse not only the trial judge assigned to the case but also every judge to whom that recusal motion was assigned for consideration. Notwithstanding this transparent gamesmanship—and Defendants' inexplicable failure to attend either the hearing on their motions to recuse or the trial on the merits—the court of appeals summarily reversed the trial court's judgment in Plaintiffs' favor based solely on Judge Herman's decision not to refer to yet another judge for consideration Defendants' third, patently defective recusal motion.

Although the court of appeals bases its holding on the familiar referral rule outlined in Government Code Section 25.00255(f), two exceptions to that rule recognized by other courts of appeals render it inapplicable on these facts. First, since Defendants' motion to recuse Judge Herman was the third recusal motion filed by Defendants in the case, the "tertiary recusal motion" exception to the referral rule contained in Civil Practice and Remedies Code Section 30.016 applied, allowing Judge Herman to deny the motion himself and move the case towards a final disposition. The court of appeals'

insistence that the exception only applies to the third motion filed by a party against *the same judge* is at odds with the clear text of Section 30.016, the obvious purpose of both that section and a related recusal statute, a decision of the Fourth Court of Appeals, and logic itself.

Second, under the exception for defective motions recognized by virtually every other Texas court of appeals, Defendants waived the right to complain about Judge Herman's failure to refer the motion filed against him (indeed, the referral rule was never triggered with respect to that motion) by virtue of the motion's failure to comply with the procedural requirements of Government Code Section 25.00255.

Taken together, the erroneous and even illogical interpretation of this State's recusal procedures by the court of appeals serves only to reward gamesmanship and endless delay. As set forth in greater detail below, a sound application of Texas law requires that the court of appeals' holding that Judge Herman's ruling on the motion for his own recusal voided the final judgment and sanctions order be reversed.

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.**
 - A. **The court of appeals' interpretation of "tertiary" impermissibly adds words to Section 30.016(a) and produces absurd results.**

First, 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.”).

Accepting the court of appeals’ illogical interpretation of Section 30.016 would also have absurd consequences in the orderly and just disposition of disputes before the court. *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 any party who fears the results of a trial and appeal can use seriatim motions for recusal to avoid having a day in court in any district or statutory county court in the State. Under the court of appeals’ view of the law, the initial motion to recuse will never even receive a hearing

until the entire roster of active and retired judges across the State has been exhausted—*twice*. This ridiculous reading of Section 30.016 is “so obviously contrary to the legislature’s intent,” *Glyn-Jones*, 878 S.W.2d at 134, that this Court should promptly and decisively correct it.

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

Second, 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 *Whatley*, 2006 WL 2257399, at *1—the sole case relied on by the court of appeals in this case. *See Gonzalez Guilbot*, 267 S.W.3d at 562-63.

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); *see* TEX. CIV. PRAC. & REM. CODE § 30.016(b)(1)-(3) (eliminating the referral rule 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”); *id.* § 30.016(a) (defining “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”). 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”).

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 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 18, 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 simply could not have intended that a tertiary recusal motion should mean one thing in county or district court and another in probate court. *See Glyn-Jones*, 878 S.W.2d at 135 (Hecht, J., concurring).

II. Defendants waived their right to complain about Judge Herman’s failure to refer the motion filed against him by filing a facially defective motion.

The court of appeals’ position that a judge must refer even a facially defective motion to another judge for consideration, *see Gonzalez Guilbot*, 267 S.W.3d at 563, is directly contrary to the unanimous position of other courts of appeals that the “procedural requirements for recusal . . . are mandatory and a party who fails to comply waives his right to complain of a judge’s failure to recuse himself.” *Pena v. Pena*, 986 S.W.2d 696, 701 (Tex. App.—Corpus Christi 1998, pet. denied) (listing cases); *see Barron*, 108 S.W.3d at 382; *Wirtz*, 898 S.W.2d at 423; *McElwee v. McElwee*, 911 S.W.2d at 186 (all same); *see also Gulf Maritime Warehouse Co. v. Towers*, 858 S.W.2d 556, 559 (Tex. App.—Beaumont 1993, writ denied) (“A most distinguishing factor between disqualification and recusal is that recusal may be waived if not raised by a proper motion.”).

As these courts have explained, the referral rule is “not activated,” *Hawkins*, 898 S.W.2d at 343, and simply “never come[s] into play,” *Spigener*, 80 S.W.3d

at 180 (quotation marks omitted) (alteration in original), when a litigant files a patently defective motion. Indeed, as the Fourteenth Court itself recognized on at least one occasion, the referral rule was “never triggered” where the appellant’s recusal motion was not presented to the judge three days after filing, was not properly verified, did “not state with particularity the grounds why the trial judge should not sit and [was] not made on personal knowledge or information and belief,” as required by Texas Rule of Civil Procedure 18a. *Johnson v. Sepulveda*, 178 S.W.3d 117, 119 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *see also id.* at 118 (“If a party fails to follow the mandatory requirements of Rule 18a, he waives the right to complain of a judge’s failure to recuse himself.”).

The exception to the referral rule recognized by these courts furthers the Legislature’s stated policy of “allow[ing] parties to file [recusal] motions while also moving the case along.” Bill Analysis, S.B. 788. The court of appeals’ new refusal to acknowledge this exception, by contrast, encourages even more gamesmanship by litigants. Under the court of appeals’ nonsensical view of the law, not only can a litigant delay trial indefinitely by filing an endless number of recusal motions, but those motions must be accorded full dignity regardless of whether they comply with the procedural rules mandated by Rule 18a and Government Code Section 25.00255. *See* TEX. R. CIV. P. 18a(a)-(b); TEX. GOV’T CODE ANN. § 25.00255(a)-(d) (both requiring that a recusal motion (1) be filed at least ten days before trial, (2) be verified, (3) state with particularity the grounds for recusal, (4) be made on personal knowledge or information or belief, (5) be served on all other parties, and (6) be presented to the judge within three days of

filing). The court of appeals' approach would allow litigants to sandbag opposing counsel and trial courts by filing patently defective and indefensible motions, refusing to participate in the hearing on those motions (or any subsequent proceeding), and then urging the trial court's failure to refer the motion as an automatic ground for reversal of an adverse judgment on appeal.

And that is precisely what happened here, since Defendants' motion to recuse Judge Herman does not come close to meeting the requirements of Section 25.00255. *See* 1st CR 18. Most seriously, the motion does not "state with particularity the alleged grounds for recusal." TEX. GOV'T CODE § 25.00255(b)(3). Rather, Defendants' motion contains nothing more than a vague and essentially incoherent diatribe regarding Judge Herman's actions in prior cases. *See* 1st CR 18-22. Moreover, Defendants wholly fail to explain how any of the actions complained of implicate the grounds for recusal enumerated in Texas Rule of Civil Procedure 18b with respect to *this case*. *Cf. id.* at 3 ("Counsel does not want to agree or disagree with the serious allegations leveled against Judge Herman [in other cases], and in fact would prefer not to have to inquire any further.").

The record also fails to show that Defendants served Plaintiffs with "notice" that they "expect[ed] the motion to be presented to the judge three days after the filing of the motion." Tex. GOV'T CODE § 25.00255(d)(2). *Cf. Johnson*, 178 S.W.3d at 119 (referral rule was "never triggered" where "[t]here [was] no evidence [that appellant] gave notice of expectancy of presentment to the judge three days after filing, and there [was] no evidence the judge was presented with the motion three days after filing");

Wirtz, 898 S.W.2d at 423 (holding that “Wirtz waived his right to complain that the judge failed to recuse himself” where “Wirtz’s motion was not verified, and neither the notice of the expectation of presentment, nor its presentment, to the judge three days after filing was evinced”).

Under the sound rule employed by the overwhelming majority of Texas courts, Defendants waived their motion to recuse Judge Herman by failing to comply with the requirements of Government Code Section 25.00255. Since the referral rule was “never triggered” with respect to that motion, *Johnson*, 178 S.W.3d at 119, Judge Herman did not err by denying it himself and moving the case to final disposition. His subsequent orders and Judge Wood’s final judgment were therefore valid, and the court of appeals erred by holding otherwise.

PRAYER

For these reasons, Petitioners respectfully ask the Court to grant their petition for review, 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, and render judgment for Petitioners in accordance with the trial court’s judgment.

Respectfully submitted,

BAKER BOTTS L.L.P.

By: _____

Thomas R. Phillips
State Bar No. 00000102
Martha G. Newton
State Bar No. 24046524
1500 San Jacinto Center
98 San Jacinto Boulevard
Austin, Texas 78701
Telephone: 512.322.2500
Facsimile: 512.322.2501

Daryl L. Moore
State Bar No. 14324720
DARYL L. MOORE, P.C.
1005 Heights Boulevard
Houston, Texas 77008
Telephone: 713.529.0048
Facsimile: 713.529.2498

ATTORNEYS FOR PETITIONERS/CROSS-
RESPONDENTS

CERTIFICATE OF SERVICE

I certify that on August 5, 2009, a true and correct copy of Petitioners/Cross-Respondents' Brief on the Merits was served by certified mail on the following counsel of record:

Armando Lopez
8433 Katy Freeway
Suite 200
Houston, Texas 77024-1936

Andy Taylor
ANDY TAYLOR & ASSOCIATES
405 Main Street
Suite 200
Houston, Texas 77002

Martha G. Newton

INDEX TO APPENDIX

- Appendix A Trial Court's Judgment (28 CR 6719-31)
- Appendix B Court of Appeals' Opinion
- Appendix C TEX. CIV. PRAC. & REM. CODE ANN. § 30.016 (Vernon 2008)
- Appendix D Sen. Jurisprudence Comm., Bill Analysis, Tex. S.B. 788, 76th Leg., R.S. (1999)
- Appendix E Verified Motion to Recuse Guy Herman in His Capacity as Administrative Presiding Judge and from Hearing the Previous Motions to Recuse (1st CR 18-33)