

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 ET AL.

Respondents/Cross-Petitioners.

PETITIONER/CROSS-RESPONDENT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

In a desperate attempt to distract this Court from the court of appeals' (1) illogical construction of Civil Practice and Remedies Code Section 30.016(a), and (2) unwarranted refusal to join virtually every other court of appeals in recognizing an exception to the referral rule for patently defective motions, Respondents/Cross-Petitioners ("Defendants") assault the Court with a variety of nonsensical, mostly contrived reasons why the Court might lack jurisdiction over Plaintiffs' appeal.¹ When Defendants do finally address the substantive issues in this case, they continue their avoidance strategy.

For example, rather than confront the unambiguous definition of "tertiary recusal motion" in Section 30.016(a), which applies to this case, Defendants focus their arguments on the definition of that term in later-enacted Government Code Section 25.00256(a), which does not. They likewise fail to articulate a single, cogent reason why the Legislature might have intended that the meaning of tertiary recusal motion be different in different courts, instead merely repeating the mantra that slight variation in the two definitions equates to a substantive difference.

Defendants' attempt to justify the court of appeals' alternative holding that Judge Herman was required to refer the facially defective recusal motion that Defendants

¹ Petitioners/Cross-Respondents have, in various filings, referred to themselves inconsistently, with some references being to the "Estate," some to "Vallejo," and some to "Plaintiffs." *See infra* Part I.B.; Pls.' Merits Br. at i; Defs.' Mot. to Strike; Pls.' Resp. to Mot. to Strike. For the sake of consistency with their merits and response briefs, Petitioners/Cross-Respondents will continue to refer to themselves as "Plaintiffs" herein, and to their previous filings as "Pls.' ____," regardless of whether the title of the particular filing reflects that it was filed on behalf of Plaintiffs, Vallejo, or the Estate. However, Plaintiffs have retained the caption on the cover of their brief that is reflected on the Court's website and used by Defendants/Respondents.

filed against him is even weaker. Not once do they acknowledge the numerous other courts of appeals that have made directly opposite holdings. Instead of trying to distinguish these decisions, they merely regurgitate one previous opinion of the Fourteenth Court of Appeals and assert various irrational waiver arguments.

But these efforts at obfuscation are to no avail. Nothing in Defendants' brief rehabilitates or minimizes the impact of the court of appeals' ridiculous misreading of Section 30.016(a) or vindicates its holding that even a patently defective motion must be referred to another judge for consideration. For the reasons given in Plaintiffs' merits brief and below, this Court should grant this petition and reverse the judgment of the court of appeals.

ARGUMENT

I. Defendants' jurisdictional arguments are baseless.

A. **At a minimum, the hand-delivery issue raised by Defendants' petition gives the Court statutory appellate jurisdiction over the entire case.**

Defendants' first launch a woefully misguided attack on the Court's statutory appellate jurisdiction over this case, arguing primarily that the court of appeals' conflict with *In re K.M.K.*, No. 04-02-00144-CV, 2002 WL 31760938 (Tex. App.—San Antonio Dec. 11, 2002, orig. proceeding [mand. denied]), does not give rise to appellate jurisdiction under Section 22.001(a)(2) of the Texas Government Code because *K.M.K.* is unpublished. *See* Defs.' Resp. Br. at xvii-xix, 9-11.² But whether this conflict would

² *See* TEX. GOV'T CODE ANN. § 22.001(a)(2) (Vernon 2004) (providing for Supreme Court jurisdiction over "a case in which one of the courts of appeals holds differently from a prior decision of another court of appeals or of the supreme court on a question of law material to a decision of the case").

alone be sufficient for jurisdiction is irrelevant in light of the numerous other bases for appellate jurisdiction urged by Plaintiffs. *See* Pls.’ Merits Br. at ix-xi.

For starters, both parties agree that the hand-delivery issue raised in Defendants’ own petition is “importan[t] to the jurisprudence of the state,” TEX. GOV’T CODE ANN. § 22.001(a)(6) (Vernon 2004),³ and as the Court has “repeatedly recognized, if [its] jurisdiction is properly invoked on one issue, [the Court] acquire[s] jurisdiction of the *entire case*.” *Brown v. Todd*, 53 S.W.3d 297, 301 (Tex. 2001) (emphasis added) (holding that even though “[t]he Court would not have [had] jurisdiction over the City’s appeal if Hotze had not also appealed,” the Court could exercise jurisdiction over City’s appeal under the “well-established extended jurisdiction doctrine”). Additionally, Defendants implicitly concede that the Court has jurisdiction over Plaintiffs’ appeal by failing to address two bases for appellate jurisdiction urged by Plaintiffs: (1) that the “case involve[s] the construction . . . of a statute”—Texas Civil Practice and Remedies Code Section 30.016—“necessary to a determination of the case,” TEX. GOV’T CODE § 22.001(a)(3); and (2) that the court of appeals’ holding that the referral rule applies to even facially defective motions directly conflicts with several published decisions of other courts of appeals, *id.* § 22.001(a)(2), (e). *See* Pls.’ Merits Br. at ix-xi (collecting cases).

³ Compare Defs.’ Merits Br. at xiv, *with* Pls.’ Merits Br. at xi.

B. Plaintiffs’ misdesignation of the Estate as appellee and petitioner is a harmless procedural defect that does not implicate the Court’s jurisdiction.

Defendants argue in their response brief, a motion to strike and dismiss (filed without leave of Court), and a reply in support of that motion that the Court lacks “jurisdiction” over Plaintiffs’ petition because, following Defendants’ lead, Plaintiffs mistakenly named the “Estate of Miguel Angel Luis Gonzalez y Vallejo” as the appellee in the caption of their briefs to the court of appeals and in their petition-related briefing to this Court, naming themselves only in a note to the Identity of Parties and Counsel. *See* Appellants’ Ct. App. Br. (cover); Ct. App. Br. for Appellee at i n.3; Defs.’ Resp. Br. at xvi, 5-6; Mot. to Strike; Reply in Supp. of Mot. to Strike. Defendants vacillate between asserting that this is a defect of personal, subject matter, or appellate jurisdiction⁴ and, when characterizing the issue as one of standing, whether it is the Estate or Plaintiffs that lack standing to maintain this appeal. *Compare* Mot. to Strike at 5 ¶ 14 (“The Estate of Vallejo, as a matter of law, lacks standing to litigate this appeal.”), *with* Reply in Supp. of Mot. to Strike at 4 ¶ 6 (“Maria et al. are not the ‘proper’ parties to this appeal. They have no standing here.”), *and id.* at 9 ¶ 25 (“There is no question that [Maria] had standing and the capacity to participate in the appeal.”).

Whatever theory Defendants are asserting as to jurisdiction, it is wrong.

Although there are several ways of approaching this issue, each inevitably leads to the

⁴ *Compare* Defs.’ Resp. Br. at xvi (“[A] court may not enter a judgment if it lacks jurisdiction *over a party*.” (emphasis added)), *with* Mot. to Strike at 5 ¶ 15 (“The lack of standing may be raised at any time during the litigation because subject matter jurisdiction is an issue that may be raised for the first time on appeal.”), *and id.* at 4 ¶ 12 (“Appellate jurisdiction cannot be created by consent, by stipulation of the parties, or by the waiver of either the court or the parties.”).

same result—Plaintiffs’ harmless mistake does not prevent them from seeking review of the court of appeals’ decision in this Court.

First, as explained in Plaintiffs’ response to Defendants’ motion to strike and Plaintiffs’ motion to substitute themselves as Petitioners/Cross-Respondents, the Court should view Defendants’ challenge to the Estate’s participation in this appeal as an issue of the Estate’s *capacity*, which challenge Defendants waived by failing to raise it until Plaintiffs themselves pointed out the defect in their merits brief to this Court. *See* Pls.’ Resp. to Mot. to Strike and Pls.’ Mot. to Sub. (filed Sept. 8, 2009).

Alternatively, the Court could characterize Plaintiffs’ mistake as a misnomer or a procedural defect akin to a misnomer. As the Court recently explained, “[a] misnomer occurs when a party misnames itself or another party, but the correct parties are involved.” *In re Greater Houston Orthopaedic Specialists, Inc.*, __S.W.3d__, No. 08-0820, 2009 WL 2666755, at *1-2 (Tex. Aug. 28, 2009). “Courts generally allow parties to correct a misnomer so long as it is not misleading,” and in cases in which “the plaintiff misnames itself, the rationale for flexibility in the typical misnomer case—in which a plaintiff misnames the defendant—applies with even greater force” because there is a reduced risk of prejudice to the opposing party. *Id.* at *1-2 (holding that nonsuit purportedly filed by Orthopaedic Specialists, L.L.P. instead of plaintiff Greater Houston Orthopaedic Specialists was effective because at the “stage in the litigation” at which the nonsuit was filed, “there [was] no risk that [defendants] would not know that GHOS, the sole plaintiff, . . . was the entity that had filed the nonsuit”).

Indeed, this Court has previously held that a misnomer in a petition for review does not impair a petitioner's right to substantive relief in this Court. In *Motor Vehicle Board of the Texas Department of Transportation v. El Paso Independent Automobile Dealers Association*, this Court rejected the respondent's argument that the Motor Vehicle Board lacked "standing to bring [a] petition for review because the appeal was filed in the name of the Motor Vehicle *Division* rather than the Motor Vehicle Board." 1 S.W.3d 108, 111 (Tex. 1999). The Court reasoned that "[a]t most," the case "present[ed] a case of misnomer that [did] not affect the Board's standing"; that the Court's "policy has been to construe the Rules of Appellate Procedure liberally, so that decisions turn on substance rather than procedural technicality"; and that the respondent had not "point[ed] to [any] confusion wrought by the Board's petition," and none was "apparent from the record." *Id.* at 111-12.

In reaching that result, the Court also relied on *El Paso Central Appraisal District v. Montrose Partners*, 754 S.W.2d 797, 799 (Tex. App.—El Paso 1988, writ denied) (op. on reh'g), in which the Eighth Court of Appeals considered a motion to dismiss based on the notice of appeal's having been filed solely on behalf of the "Chief Appraiser of the El Paso Central Appraisal District," who had not been a party to the trial court proceedings, rather than on behalf of the actual appraisal district, which had. *See Motor Vehicle Board*, 1 S.W.3d at 111-12. "[F]ind[ing] substantial compliance" with the rules of appellate procedure, the court denied the motion because "the chief appraiser and the [district's] interests . . . [were] so intertwined[] [that] they essentially produce[d] an alter ego relationship." *El Paso Cent. Appraisal Dist.*, 754 S.W.2d at 799.

Texas courts have also relied on the equitable principles underlying the misnomer doctrine to prevent a harmless procedural defect from depriving a party of a substantive right in other cases “not technically [involving] a misnomer.” *Dueitt v. Dueitt*, 802 S.W.2d 859, 861-62 (Tex. App.—Houston [1st Dist.] 1991, no pet.) (where trial court’s judgment was rendered against plaintiff estate, granting estate’s motion to substitute executor as plaintiff-appellant and reforming trial court judgment to reflect same because “the purpose of the suit and the nature of the claim asserted by the plaintiff [were] clearly reflected by the pleadings, which the personal representative effectively adopted” through affidavit attesting to personal knowledge of facts); *see Price v. Estate of Anderson*, 522 S.W.2d 690, 692 (Tex. 1975) (holding that while plaintiff’s initially naming decedent’s estate as the sole defendant before later adding estate’s administrator did not present “a true misnomer case,” statute of limitations was nonetheless interrupted by suit against estate because “[t]he purpose of the suit and the nature of the claim asserted were clear from the outset, . . . [administrator] “answered for the ‘estate’ and participated in all proceedings affecting the case,” and administrator “was at all times fully cognizant of the facts and could not have been misled as to the basis of the suit”).

Finally, even if the Court were to accept Defendants’ assertion that Plaintiffs did not participate in the court of appeals proceeding, *see* Mot. to Strike at 2 ¶ 4, the Court could nonetheless allow them to participate in this appeal under the “doctrine of virtual representation.” *Motor Vehicle Board*, 1 S.W.3d at 110. For the doctrine to apply, a petitioner must show that “(1) it is bound by the judgment; (2) its privity of

estate, title, or interest appears from the record; and (3) there is an identity of interest between the [petitioner] and a party to the judgment.” *Id.*

Any one of these doctrines or lines of case law can be applied squarely here. In this case, it was Plaintiffs—not the Estate—who recovered under the trial court’s judgment. *See* 28 CR 6719-30. Plaintiffs, who were *appellees* in the court of appeals, described themselves in their briefing to that court as “persons aligned with the estate.” Ct. App. Br. for Appellee at i n.3; *cf. El Paso Cent. Appraisal Dist.*, 754 S.W.2d at 799 (refusing to dismiss appeal filed by misnamed *appellant* where interests of named and proper appellants were “so intertwined” that “they essentially produce[d] an alter ego relationship”).

There is no question that throughout the court of appeals’ proceeding and in the parties’ petition-related briefing, all parties have referenced the Estate as shorthand for Plaintiffs. *See Gonzalez Guilbot v. Estate of Gonzalez y Vallejo*, 267 S.W.3d 556, 558 (Tex. App.—Houston [14th Dist.] 2008, pet. filed) (noting that Defendants were appealing a judgment awarding damages “to various parties, including appellee the Estate of Miguel Luis Gonzalez y Vallejo”). Defendants initiated the misnomer by captioning their appeal as “*In Re: The Estate of Miguel Angel Luis Gonzalez y Vallejo v. Miguel Angel Gonzalez et al.*,” Appellants’ Ct. App. Br. (cover), and did not complain about the misnomer until Plaintiffs themselves pointed it out in their merits brief to this Court. *See* Pls.’ Merits Br. at i (filed Aug. 5, 2009); Defs.’ Resp. Br. at xvi, 5-6 (filed Aug. 25, 2009); Mot. to Strike (filed Aug. 31, 2009). And Defendants have not claimed any prejudice or disadvantage as a result of the misnomer, nor could they. *Cf. Greater*

Houston Orthopaedic Specialists, Inc., 2009 WL 2666775, at *2 (holding nonsuit effective where there was “no risk” that defendants would not know who filed it); *Motor Vehicle Board*, 1 S.W.3d at 112 (excusing misnomer in petition for review where respondent had not “point[ed] to [any] confusion wrought by the Board’s petition” and none was “apparent from the record”); *El Paso Cent. Appraisal Dist.*, 754 S.W.2d at 799 (“Appellee was not disadvantaged or misled in any manner, as its brief and motion to dismiss were filed on the same day.”).

In sum, regardless of whether the Court views Plaintiffs’ misdesignation of the Estate as appellee below and Petitioner/Cross-Respondent in this Court in terms of the Estate’s capacity, as a misnomer, or as something else entirely, it is a “harmless procedural defect,” *Verburgt v. Dorner*, 959 S.W.2d 615, 616 (Tex. 1997), that does not implicate any kind of jurisdiction and can be easily corrected. The Court should therefore deny Defendants’ motion to strike and dismiss and either retain the Estate as the Petitioner/Cross-Respondent or exercise its discretion to substitute Plaintiffs as Petitioners/Cross-Respondents under Texas Rule of Appellate Procedure 7.1(b). *See* TEX. R. APP. P. 7.1(b) (“If substitution of a party in the appellate court is necessary for a reason other than death, the appellate court may order substitution on any party’s motion at any time.”); *id.* R. 44.3 (appellate courts must not “dismiss an appeal for formal defects or irregularities in appellate procedure without allowing a reasonable time to correct or amend the defects or irregularities”); *Verburgt*, 959 S.W.2d at 616 (“This Court has never wavered from the principle that appellate courts should not dismiss an appeal for a

procedural defect whenever any arguable interpretation of the Rules of Appellate Procedure would preserve the appeal.”).

C. This case is not moot.

Defendants’ final jurisdictional theory is perhaps the most absurd. Relying on documents outside of the appellate record, Defendants argue that Plaintiffs’ appeal to this Court has been rendered moot by events initiated by Judge Guy Herman two days after the court of appeals issued its September 30, 2008, decision, namely:

- Judge Herman’s October 2, 2008, letter to Chief Justice Jefferson requesting the appointment of a judge to hear the recusal motion filed against Judge Herman, *see* Defs.’ Resp. to Pls.’ Pet. Rev, App. B;
- Chief Justice Jefferson’s October 17, 2008, appointment of the Honorable Polly Jackson Spencer, Bexar County Probate Court No. 1, to hear the motion, *id.* App. C; and
- Correspondence between Judge Spencer and counsel reflecting that Judge Spencer’s appointment remains in effect pending the Court’s disposition of this appeal, *id.* App. D-F.

This final attempt to dissuade this Court from reviewing the merits of the court of appeals’ decision fails for several reasons.⁵

First, Defendants cite no authority to support their novel contention that a trial court’s unilateral actions following a court of appeals decision can preclude a party from seeking further review of that decision in this Court. To the extent Defendants are

⁵ Defendants incorrectly state that Plaintiffs “refuse[d] to argue or brief” Defendants’ mootness argument in their reply in support of their petition for review and argue that, therefore, Plaintiffs have “waived this issue.” Defs.’ Resp. Br. at 6. Indeed, Plaintiffs *did* address Defendants’ mootness theory in their previous reply. *See* Pls.’ Reply in Support of Pet. Rev. at 8 n.3. But since mootness is an aspect of subject-matter jurisdiction, which a party can raise (or a court can consider *sua sponte*) at any stage of a proceeding, *see, e.g., In re Dep’t of Family & Protective Servs.*, 273 S.W.3d 637, 642 (Tex. 2009), it is doubtful that a party could waive the right to *respond* to a mootness argument in any event.

arguing that Judge Herman's October 2nd letter should somehow be construed as a *sua sponte* order reversing his January 8, 2007, ruling on the motion to recuse filed against him, 1st CR 63, he lacked jurisdiction to take such action. As even Defendants' own former counsel recognized in subsequent correspondence with Judge Spencer, at the time of Judge Herman's letter, the "Mandate from the Fourteenth Court of Appeals ha[d] not issued . . . returning jurisdiction to the Trial Court subsequent to the Appeal." Defs.' Resp. to Pls.' Pet. Rev, App. E (Nov. 14, 2008 Letter from Andres Chaumont to Judge Spencer).

In any event, Judge Herman's October 2nd letter merely shows that he was trying to "mo[v]e [the case] forward" in response to the court of appeals' decision. *See id.* App. B at 1 ("*According to the 14th Court of Appeals*, I inappropriately heard a motion to recuse me in my administrative capacity." (emphasis added)); *id.* App. B at 2 ("[T]he efficient administration of justice requires that this case more [sic] forward—nearly four and one-half years after the underlying case was filed in Harris County in December 2003."). Neither Judge Herman nor Chief Justice Jefferson could have known that Plaintiffs intended to seek review of the court of appeals' decision in this Court since their petition for review was not due for more than 40 days thereafter. *See* TEX. R. APP. P. 53.7(a). And once Plaintiffs' counsel did initiate proceedings in this Court, both Judge Spencer and Defendants' then-counsel recognized the need to postpone a hearing on Defendants' motion to recuse Judge Herman until the proceedings in this Court had run their course. *See* Defs.' Resp. to Pls.' Pet. Rev, App. D2 (Nov. 18, 2008 Letter from Judge Spencer to Counsel) ("It is my understanding that a Motion for Extension of Time

to File a Petition for Review has been filed with the Texas Supreme Court. Accordingly, it seems appropriate to postpone the hearing on the Motion to Recuse.”); *id.* App. E (“I . . . respectfully suggest that the setting of the hearings at this time might be premature, given that Mr. Daryl Moore has filed with the Texas Supreme Court a Motion for Extension of Time to file a Petition for Review on the part of the Apellee-Plaintiffs in this cause . . .”).

Finally, Defendants do not even attempt to explain how, as a result of these events, there has “cease[d] to be a controversy,” Defs.’ Resp. Br. at 7, between the parties over the propriety of Judge Herman’s ruling on the motion to recuse him. *See id.* at xvii, 6-8. To the contrary, a very real controversy remains. The court of appeals’ conclusion that the motion filed against Judge Herman was not a “tertiary recusal motion” within the meaning of Texas Civil Practice and Remedies Code Section 30.016(a) and (b) is based on a transmogrification of the statutory text that invites abuse of the recusal rules in district and county courts state-wide and rewards Defendants’ bad litigation conduct below. *See* Pls.’ Merits Br. at 9-10. The court of appeals’ additional holding that the referral rule applies to even facially defective motions increases this risk of abuse and conflicts with decisions by several other courts of appeals. The Court should brush aside Defendants’ nonsensical jurisdictional arguments and address the significant issues raised on the merits by both sides.

II. None of Defendants’ statutory construction arguments can overcome the plain wording of Section 30.016(a) or the anomalous results created by the court of appeals’ decision.

Unable to explain why the Legislature might have wanted to arm litigants with the ability to file a seemingly limitless number of recusal motions in the state’s 436 district and 227 statutory county courts but only three recusal motions in the state’s 18 statutory probate courts,⁶ Defendants cling to various maxims and interpretive aids in support of their argument that the Legislature’s 2007 enactment of Government Code Section 25.00256 was intended to achieve just this result. *See* Defs.’ Resp. Br. at 11-15.⁷ Yet each of their statutory construction arguments suffers from the same fundamental flaw: the statute to be construed in this case is Civil Practice and Remedies Code Section 30.016(a)—not Section 25.00256(a)⁸—and “if a statute is unambiguous,” as Section 30.016(a) is here, then “rules of construction” never come into play. *Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 865-66 (Tex. 1999) (“[I]f a statute is unambiguous, rules of construction or other extrinsic aids cannot be used to create ambiguity.”). “[I]t is a cardinal law in Texas that a court construes a statute, ‘first, by

⁶ Defendants’ unsupported assertion that the “impetus” for Section 25.00256 was the bad “conduct of probate court judges,” Defs.’ Resp. Br. at 11, makes no sense in light of their theory that the Legislature intended for *fewer* recusal motions to be filed against statutory probate court judges than against district and statutory county court judges.

⁷ Compare TEX. CIV. PRAC. & REM. CODE ANN. § 30.016(a)-(b) (Vernon 2008) (providing an exception to the referral rule for a “tertiary recusal motion” filed against a district or statutory county court judge and defining tertiary recusal motion as the third recusal motion “filed against a district court or statutory county court judge by the same party in a case”); TEX. GOV’T CODE ANN. § 25.00256(a)-(b) (Vernon Supp. 2008) (providing an exception to the referral rule for a “tertiary recusal motion” filed in statutory probate court and defining tertiary recusal motion as the third recusal motion filed by the same party against “any statutory probate court judge . . . regardless of whether that motion is filed against a different judge than the judge or judges against whom the previous motions . . . were filed”).

⁸ See Pls.’ Merits Br. at x & n.3; *Gonzalez Guilbot*, 267 S.W.3d at 562 n.3.

looking to the plain and common meaning of the statute’s words,” *id.* at 865 (quoting *Liberty Mut. Ins. Co. v. Garrison Contractors*, 966 S.W.2d 482, 484 (Tex. 1998)), and Defendants simply have no answer for the clear, unambiguous language of Section 30.016(a). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 30.016(a) (Vernon 2008) (defining “tertiary recusal motion” as “a third or subsequent motion for recusal or disqualification filed against a district court or statutory county court judge against the same party in a case” (emphasis added)).

In their only effort to address it, Defendants feebly argue that because some version of *Webster’s Dictionary* apparently defines “a” as meaning “either ‘same’ or ‘any,’” “a court . . . could reasonably interpret that the Legislature’s intent was that the judge come from the ‘same’ statutory probate court rather than ‘any’ statutory probate court.” Defs.’ Resp. Br. at 13. No statement could be more out of touch with this Court’s jurisprudence or common sense.

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. Baeber*, 995 S.W.2d 655, 658 (Tex. 1999), and nothing about the context of Section 30.016 supports Defendants’ argument and the court of appeals’ conclusion that the Legislature intended for “a judge” to mean “the same judge.” Indeed, it suggests otherwise—under well-established law, 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.”).

Furthermore, none of the legal authorities Defendants cite in support of their statutory interpretation arguments are even on point. Defendants rely solely on *Liberty Mutual Insurance Company v. Garrison Contractors, Inc.*, 966 S.W.2d 482 (Tex. 1998), for the proposition that “the Texas Legislature’s subsequent enlargement by amendment of a statutory term supports the conclusion that the Legislature itself felt such a change was necessary.” Defs.’ Resp. Br. at 14. *Garrison Contractors* simply does not help Defendants, however.

The issue there was whether an insurance company employee was a “person” within the meaning of former Article 21.21 of the Insurance Code, or whether, as the petitioners claimed, the definition of person only “reache[d] business entities.” *Id.* at 484-85. The Court held that an insurance company employee was indeed a person, relying in part on the Legislature’s previously having amended Article 21.21, which “had formerly provided a cause of action for unfair or deceptive insurance practices against the company or companies engaging in such acts or practices,” to “provide a cause of action against a person or person engaging in unfair or deceptive practices.” *Id.* at 485 (emphasis and internal quotation marks omitted). The Court also reasoned, however, that the definition of person proposed by the petitioners “would create anomalous results” because “[a]n independent agent would be subject to suit under . . . Article 21.21 . . . for misrepresenting a policy’s terms, while an employee-agent would not,” and that such

results would be “contrary to the Legislature’s intent to comprehensively regulate and prohibit deceptive insurance practices.” *Id.* at 485-86.

Here, it is Defendants’ and the court of appeals’ reading of Section 30.016(a) that “would create anomalous results” contrary to Legislative intent, *id.*, while rendering Section 30.016 “useless” and “meaningless,” *see* Defs.’ Resp. Br. at 12, 15, in the process. Under their view, Civil Practice and Remedies Code Section 30.016(b) would almost never limit vexatious recusals in any district or statutory county court because it is difficult to imagine even the most pugnacious of litigants filing *three* recusal motions against the same judge. At the same time, litigants could use seriatim recusal motions to delay trial in these courts indefinitely, just as Defendants tried to do in this case. Such an absurd result is clearly contrary to the Legislature’s express concern that under pre-Section 30.016 law, “court cases [could] be stalled due to the filing of numerous [recusal] motions,”⁹ and should not be countenanced by this 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))).

⁹ Sen. Jurisprudence Comm., Bill Analysis, Tex. S.B. 788, 76th Leg., R.S. (1999); 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)).

Similarly, Defendants point to Government Code Section 311.026(a)¹⁰ for the proposition that “conflicting general and special provisions shall be construed in such a manner so as to give effect to both provisions.” Defs.’ Resp. Br. at 15. But Civil Practice and Remedies Code Section 30.016(a) and Government Code Section 25.00256(a) do not conflict. Section 30.016(a) clearly defines tertiary recusal motion as the third motion filed by a party against “a . . . judge.” TEX. CIV. PRAC. & REM. CODE § 30.016(a) (emphasis added). Responding to the court of appeals’ misconstruction of Section 30.016(a) in *In re Whatley*, No. 14-05-01222 (Tex. App.—Houston [14th Dist.] Aug. 8, 2006, orig. proceeding) (supp. mom. op. on reh’g),¹¹ the Legislature merely made this same definition even clearer in Section 25.00256(a).

Finally, in a desperate attempt to minimize the impact of the court of appeals’ dangerous construction of Section 30.016(a), and despite admitting that Section 30.016 continues to apply to recusal motions against district and statutory county court judges, Defs.’ Resp. Br. at 11, Defendants assert—without any explanation—that the court of appeals’ decisions in this case and *Whatley* are no longer good authority with respect to the meaning of that statute. *See id.* at 12-13. To the contrary, these decisions by the Fourteenth Court of Appeals are two of the only three by any court on the meaning of a tertiary recusal motion that is governed by Section 30.016(a), and the court purported to base its construction of that term on the statutory text rather than the kind of judge against whom a recusal motion is filed. *See Whatley*, 2006 WL 2257399, at *1

¹⁰ See TEX. GOV’T CODE ANN. § 311.026(a) (Vernon 2005) (“If a general provision conflicts with a special or local provision, the provisions shall be construed, if possible, so that effect is given to both.”).

¹¹ See Pls.’ Merits Br. at 12-14.

(explaining that its “constru[ction] [of Section 30.016(a)] to mean that the three or more recusal motions must have been filed by the same party against the same judge” is “based on the statutory language which plainly states that a tertiary motion is the third recusal motion filed by the same party against a trial judge, sitting either in district court, statutory probate court, or statutory county court”); *Gonzalez Guilbot*, 267 S.W.3d at 562-63 (following *Whatley*). Unless corrected by this Court, these decisions will therefore continue to engender gamesmanship in the overwhelming majority of the state’s trial courts.

III. Defendants’ misguided arguments cannot cure the defects in their motion to recuse Judge Herman or the court of appeals’ inexplicable holding that a judge must “recuse or refer” a patently defective motion.

Continuing their pattern of avoiding the merits of this case, Defendants do not even address the unanimous position of other courts of appeals that the referral rule does not apply to facially defective motions, *see* Pls.’ Merits Br. at x-xi, 14, instead defending the court of appeals’ contrary holding on the ground that “it had previously held” the same thing in *In re Norman*, 191 S.W.3d 858, 861 (Tex. App.—Houston 2006, orig. proceeding), and by advancing a number of puzzling waiver arguments. *See* Defs.’ Resp. Br. at 17-21.

In *Norman*, the court of appeals justified its decision on the ground that judges must “avoid[] even the appearance of impropriety.” *Norman*, 191 S.W.3d at 861. But this court-dictated goal, though worthy, must take a back seat to the Legislature’s stated policy of “allow[ing] parties to file [recusal] motions, while also moving the case along.” Bill Analysis, S.B. 788. Moreover, any esoteric way in which the public’s

perception of the judiciary might be enhanced by requiring referral of patently defective motions is far outweighed by the real, tangible cost to the system that would result from making it *even easier* for litigants to delay trial indefinitely by filing seriatim recusal motions. *See* Pls.’ Merits Br. at 15-16.

Defendants’ waiver arguments fare no better. They apparently do not dispute that the record fails to show that Defendants served Plaintiffs with “notice” that they “expect[ed] the motion to be presented to the judge” within three days of filing, as required by Government Code Section 25.00255(d)(2),¹² instead arguing solely—and incorrectly—that Plaintiffs “never presented” this complaint “to the 14th Court of Appeals for consideration.” Defs.’ Resp. Br. at 17; *cf.* Ct. App. Br. for Appellee at 30 (“Appellants’ counsel’s motion to recuse contains no notice relating to presentment of the motion.”).

In an ironic twist, Defendants also complain that Plaintiffs “failed to . . . object . . . to Judge Herman that there was anything procedurally defective with the motion to recuse” but rather “merely listened [at the January 8, 2007, hearing on Defendants’ recusal motions] as Judge Herman made statements on the record as to why he was denying the motion to recuse himself.” Defs.’ Resp. Br. at 20. Yet Plaintiffs had no realistic opportunity to object to, or present argument on, the defects in Defendants’ recusal motions for the simple reason that *Defendants failed to attend the hearing* on their

¹² *See* TEX. GOV’T CODE ANN. § 25.00255(d)(2) (Vernon Supp. 2008) (“A party filing a motion for recusal or disqualification shall serve on all other parties or their counsel: . . . (2) notice that the movant expects the motion to be presented to the judge three days after the filing of the motion unless the judge orders otherwise.”); Pls.’ Merits Br. at 16-17.

motions or present any evidence or argument in support of them. *See* 1 RR 5-7. Defendants' suggestion that Plaintiffs 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.

IV. 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 Plaintiffs' response to one of the mandamus petitions previously filed by Defendants in this case, Defendants erroneously assert that Plaintiffs judicially admitted that Judge Herman lacked authority to rule on the motion to recuse filed against him. *See* Defs.' Resp. Br. at 16-17. In the first place, Defendants have waived this new argument by failing to raise it in their court of appeals' brief. *See* Appellants' Ct. App. Br.; *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, Defs.' Resp. Br. at 16, 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) (quoting *Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983)), 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,¹³ (2) not contained in Plaintiffs’ live pleading, and (3) not the kind of “clear, deliberate, and unequivocal” statement required to constitute a judicial admission.

PRAYER

For these reasons and those given in their merits brief, Plaintiffs/Petitioners respectfully urge the Court to grant both petitions for review and, either by per curiam opinion or a signed opinion after oral argument, (i) deny Defendants’ motion to strike and dismiss, (ii) 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 (iii) render judgment for Plaintiffs in accordance with the trial court’s judgment. Plaintiffs also request any further relief to which they may be entitled.

¹³ 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”).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 5, 2009, a true and correct copy of Petitioner/Cross-Respondent's Reply Brief on the Merits was served by certified mail on the following counsel of record:

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