

# NO. 08-0961

MARIA DEL CARMEN GUILBOT SERROS DE GONZALEZ, ET AL.,  
*Petitioners,*

V.

MIGUEL ANGEL GONZALEZ GUILBOT, CARLOS A. GONZALEZ GUILBOT,  
AND MARIA ROSA DEL ARENAL DE GONZALEZ,  
*Respondents.*

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## RESPONDENTS' MOTION FOR REHEARING

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Respondents ask for a rehearing for the Court to Modify, Amend or Correct its June 11<sup>th</sup> 2010 Opinion to include the express language of Civil Practice and Remedies Code, section 30.016(d), because the Opinion, as presently written, has the effect of potentially denying Respondents the right to review by appeal the possible denial of their motion to recuse Judge Guy Herman, which is a statutory right under CPRC 30.016(d).

### Issue Presented

#### **The Opinion of the Court Should Be Modified To Comply With Civil Practice and Remedies Code, § 30.016(d)**

At Section III of its Opinion (pp.14-15), addressing the issue of a tertiary recusal motion, the Court found that, pursuant to section 30.016(a), a tertiary recusal motion is a third motion filed by the same party against any judge. Having so found, the Opinion then states as follows:

Accordingly, we affirm the court of appeals' judgment in part, reverse it in part, and remand to the court of appeals. The court of appeals shall abate pending a ruling on the motion to recuse Judge Herman. *If the motion is denied, the court of appeals shall affirm the trial court's judgment.* If the motion is granted, the court of appeals shall reverse the trial court's judgment and remand to that court for further proceedings consistent with this opinion. (Emphasis added).

Should Respondents' motion to recuse Judge Herman be denied, the Court's Opinion effectively denies Respondents the right to appeal the denial, in contravention of section 30.016(d). Accordingly, Respondents ask the Court to modify, amend or correct its Opinion to include subsection (d) to conform to the requirements of the applicable section of the recusal statute.<sup>1/</sup>

### **Argument & Authorities**

Respondents believe it is not the Court's intention to deny them the substantive right of appeal in connection with the pending ruling on the motion to recuse Judge Herman ordered by this Court. Rather, Respondents believe that by oversight or unconscious omission, the Court ordered the appellate court to *affirm* the trial court's judgment should the recusal motion be denied, thus, summarily denying Respondents the right to appellate review of a denial.

While Respondents believe such is not the intent of the Court, out of an abundance of caution, Respondents file this motion respectfully reminding the Court that the legislative grant of rule-making authority does not permit the Court to "abridge, enlarge, or modify the substantive rights of a litigant." Gov't Code § 22.004;

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<sup>1/</sup> Of course, if the motion to recuse Judge Herman is granted, it cannot be reviewed by appeal or otherwise.

Tex.R.Civ.P. 2, 814; *Kennedy v. Hyde*, 682 S.W.2d 525, 529 (Tex.1984). When a rule of procedure conflicts with a statutory enactment, the statute prevails. *In re K.C.A.*, 36 S.W.3d 501, 503 (Tex.2000); *Johnstone v. State*, 22 S.W.3d 408, 409 (Tex.2000).

The statutory enactment at issue in this case is section 30.016(d), which states: “*The denial of a tertiary recusal motion is only reviewable on appeal from final judgment.*” Because the Court’s Judgment remands the case to the court of appeals for “*further proceedings consistent with this Court’s opinion,*” the Court’s Opinion and Judgment do not allow the Fourteenth Court of Appeals any option, other than to affirm the trial court’s judgment, should Respondents’ motion to recuse Judge Herman be denied without the right to appeal the denial of the motion (if, in fact, it is denied), which is a statutory right that appears in the plain text of the statute.

Should the Court deny Respondents a fundamental right expressly provided by statute, it would also deprive Respondents of their constitutional rights to due process. Moreover, the Fourteenth Court of Appeals, in its decision in *Whatley v. Walker*, 302 S.W.3d 314 327 (Tex.App.–Houston [14<sup>th</sup> Dist.] 2009, pet. denied), acknowledged that, although a judge facing a tertiary recusal motion is allowed to preside over the case and sign orders, the denial of the recusal motion is ultimately reviewable on appeal. As was the case in *Whatley*, the tertiary motion was finally sustained after the judgment was signed.

This motion is filed within the 15-day period as required by Tex.R.App.P. 64.1.

## Prayer

For these reasons, Respondents ask for a rehearing on this matter for the Court to modify, amend or correct its June 11<sup>th</sup> 2010 Opinion to conform with the requirements of section 30.016(d), Civil Practice and Remedies Code, thus, insuring that Respondents' due process and fundamental right of appeal are not abridged or modified, but are, rather, protected by allowing them the rights codified at CPRC 30.016(d), i.e., the ability to appeal the denial of the motion to recuse Judge Guy Herman, should it be denied.

Respectfully submitted,

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