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Supreme Court of Texas.

The Estate of Miguel Angel Luis Gonzalez Y Vallejo, Petitioner/Cross-Respondent,

v.

Miguel Angel Gonzalez Guilbot, Carlos Alberto Gonzalez Guilbot, and Maria Rosa Del Arenal De Gonzalez, Respondents/Cross-Petitioners.

No. 08-0961.

January 21, 2010.

Oral Argument

Appearances:Thomas R. Phillips, Baker Botts L.L.P., Austin, TX, for petitioner-cross-respondent.

Andy Taylor, Andy Taylor & Associates, Houston, TX, for respondents-cross-petitioners.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument now in 08-0961, Gonzalez vs. Gonzalez.

MARSHALL: May it please the Court, Mr. Phillips will present argument for the Petitioners. The Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF THOMAS R. PHILLIPS ON BEHALF OF THE PETITIONER

ATTORNEY THOMAS R. PHILLIPS: May it please this Honorable Court, this is a suit over the ownership of several family businesses engaged in food and beverage production and sales in the United States and Mexico. It was filed incident to an estate in probate court. After a lengthy discovery, the plaintiffs were able to prove that the defendants had intentionally forged the stock certificates upon which defendants base their claim of ownership of these companies. As a result, the presiding Judge, Mike Wood, issued death

penalty sanctions against the defendants and those are found at Tab 2 of the benchbook. When it became clear that the judge intended to proceed to trial on damages in a timely fashion, the defendants commenced a series of efforts to avoid their day in court. Notwithstanding those efforts, the judge conducted the trial on schedule and entered a final judgment on the 12th of January, 2007. Even though this case is an appeal from that judgment, the defendants do not lodge any complaint here about those death penalty sanctions nor any complaint about the actual terms of the judgment rendered against them, rather their appeal is confined to two discreet procedural matters. First, where the jurisdiction failed to revest in the state court after the unsuccessful removal, and whether the judgment was void because a recusal motion was pending against Judge Wood at the time of trial. The Court of Appeals rejected the first claim but accepted the second, and both parties petitioned to this Court. The threshold question is whether jurisdiction revested in the probate court after the federal judge, Lee Rosenthal, remanded their removal.

JUSTICE DAVID M. MEDINA: When does jurisdiction revest?

ATTORNEY THOMAS R. PHILLIPS: I think it revests when the parties, when the federal judge intends for the case to be over in federal court and all parties are aware of the fact that they are back in state court.

JUSTICE DAVID M. MEDINA: Is there a mailing requirement? Isn't there some language about a mailing requirement?

ATTORNEY THOMAS R. PHILLIPS: Tab 3 of your benchbook is the federal law, and in 28 USC 1447(c), the last two sentences say, “A certified copy of the order of remand shall be mailed by the clerk to the clerk of the state court. The state court may thereupon proceed with such case.” And some Courts have said, we think largely in dicta that this is the determinable jurisdictional event. Jurisdiction transfers only when that mailing occurs, and this Court indicated that in the case of your per curiam opinion in Quaestor vs. State of Chiapas. But Quaestor, like every federal case about this, it's not on point, it's just a statement that's made. And word “mail” is frequently used interchangeably with words like, “signed, sent, notify, certify, issue or file.” In the cases where this is actually the point in contention, it's whether or not it had to be sent certified copy by mail in order for the trial in state court to have been valid, the Court split six to one. Only one case has ever set a trial aside because there was not a certified mail copy, and there was a whole lot wrong with that case. It's State vs. Moore from the Missouri Court of Appeals. Briefly on the facts, a prisoner won a civil suit against the state for failing to give the prisoner any medical care. Judgment. As soon he got it, the state turned around and sued for the cost of his incarceration under a statute that Missouri has. The inmate removed that case to federal court, but the state trial court just ignored it and continued to hold hearings, erroneously put a note on its own docket sheet that the case had been remanded more than a week before the federal judge actually signed the remand order, and the Court tried the case two months before the remand order arrived from the federal court through mail. Every other case has held that this language is precatory, and it's not mandatory, and that holding makes sense. To say that the mail is the jurisdictional event and is the only way that that jurisdiction can transfer is quite awkward for a number of reasons. For instance, there will be times when a state court has jurisdiction but doesn't know it because the certified copy of the order is in transit. There will be other times when the state does not have jurisdiction, but it won't be able to tell it, and that's because our

own rule, 237(a) requires a plaintiff to get a certified copy of the remand order from the federal court and send it around to the other copies in order for an answer of the defendant, answer time to start to running if there's been no answer in the case. Neither the state court docket sheet nor the file itself is likely to show whether that order was filed by a party or received from a federal court by mail, much less show the date of the mailing in federal court. Indeed, in the Quaestor case themselves, the parties disagreed on the date of mailing and the date of receipt, and the State of Chiapas objected to any appellate consideration of the federal docket sheet on that issue because it was outside the appellate record. So we would urge this Court to take a practical view, a substance-over-form view of this issue, as indeed, and I will point out two courts that have done that, Johnson vs. Estelle, the Fifth Circuit, 625 Federal 2d 75 said, “The lack of” -- no, excuse me, wrong quote. And it's such a beautiful quote too.

CHIEF JUSTICE WALLACE B. JEFFERSON: We can find it.

ATTORNEY THOMAS R. PHILLIPS: Right. At any rate, the federal judge there inadvertently failed to sign a remand order until after the trial had been completed and the accused had had a sentence of 17 years. Judge Saar [Ph.] granted habeas corpus relief, but the Fifth Circuit reversed and said, “Substance must control form. We construe the announced action in open court with everyone present when coupled with the federal court backdating its order to be sufficient compliance with the statute to vest jurisdiction to proceed in Texas District Court.”

JUSTICE DAVID M. MEDINA: Are there similar statutes that have the language “shall be mailed,” and the Court has disregarded that language to have substance-over-form results?

ATTORNEY THOMAS R. PHILLIPS: I did not make a search of other federal statutes, but this statute controls bankruptcy removal, anything else. I could do that, but I think that the cases that have looked at this are pretty clear that this is, this is the normal way, it's what the clerk is supposed to do. But as Judge Reimer [Ph.] when she was on the district court said, “Logic indicates that it should be the action of the Court rather than the action of a clerk that should determine the vesting of jurisdiction.” And I will note that the ALS, federal jurisdiction -- well, the Rule 28 suggested amendments suggested getting away with this, doing away with this in order to remove the confusion that results from language about mailing. The second part of this case, now the Court of Appeals got this part of the case right, at least on the judgment, but then it erred, we believe in the second holding on recusal. It held that the judgment was void because a recusal motion was stilling pending against Judge Wood when he entered the final judgment. The Court concluded that Judge Guy Herman, the presiding judge of the Probate Courts then, could not rule on the recusal motion that the defendants had filed against him. And because his only options were either to grant that motion and recuse himself and refer that to Chief Justice Jefferson, or to grant the motion or else deny the motion and refer it to the Chief. Therefore the Court concluded Judge Herman's order overruling the motion against him and the original recusal motion against Judge Wood was void, therefore the motion against Judge Wood remained pending at trial and that made the judgment void. Now aside from the threshold fact that the Court of Appeals has conflated the concepts of “void” and “voidable,” we submit that this ruling was wrong for three different reasons. First, Judge Herman had the authority under the Tertiary Recusal Statute to act on the motion to recuse him, and once he did, then the authority to act on the motion to recuse Judge

Wood. Second, Judge Herman had no obligation to take any action on the recusal motion against him anyway because it did not meet the minimal requirements of the Government Code or Rule 18(a). And third, even if both of those are wrong, his ruling is not void but it is subject to normal abuse-of-discretion review on appeal, and because of the other lack of proof in this case and the lack of sufficiency in the allegations, any error he made was harmless. Let me go through those. The Tertiary Recusal Statute, 30.016 is found in Tab 13 of the benchbook we have provided. It says that after the same party in a case files three or more recusal motions, the judge against him -- "such motion has been filed shall continue to preside and sign orders as though the motion had not been filed." Since the defendants had already filed motions to recuse Judge Wood and Judge Burwell, Judge Herman had not merely a right but a duty to proceed and act on the motion against him and the other pending motions. The Court of Appeals gutted this statute for all practical purposes when it held that the section applied only when a third recusal motion has been filed by the same party against the same judge. We believe the Court of Appeals' error is apparent from the plain words of the text. The statute speaks of a motion against a judge made by the same party. If it had wanted to rule, to write the statute the way the Court of Appeals said, it could have easily and would have said, "A third motion filed by the same party against the same judge." We do concede, although nobody, no judge or no party has mentioned it until this moment, that under the terms of Section 30.016, Judge Herman should have gone ahead and ruled, but he also should have at the same time referred this motion to Chief Justice Jefferson for a determination by another judge of the motion against him. But that failure of Judge Herman in no way affects Judge Wood's right to sit and try the case, because under the statute Judge Herman was entitled to proceed as though no motion had been filed. He had full authority to deny the motion against Judge Wood. Once that was denied, Judge Wood had full authority to proceed with the trial. If error has even been preserved on this point and if the Court does not agree with our arguments that Judge Herman had no duty to rule on this motion anyway because it was so defective or his ruling is harmless error, whatever it was, then if the Court agrees with all that, it's very easy to abate this case for a few weeks, either now or when your opinion comes down, because Chief Justice Jefferson has already appointed Judge Polly Jackson Spencer of Bexar County to hear the motion against Judge Herman. At the request of the parties, she did not do that because of the opinion of the Fourteenth Court of Appeals that's right now the law in this case, that that would be an easy matter to cure.

JUSTICE DAVID M. MEDINA: I'm sure the answer is somewhere in the briefs or the record, but what's all this procedural maneuvering about and what's going to be the effect of this case if you prevail or if the other side prevails?

ATTORNEY THOMAS R. PHILLIPS: Well, if we prevail, if Judge Wood was entitled to try this case, then his judgment should be upheld because they've made no complaint about his finding that they made up these stock certificates. And I included that in the benchbook because it's interesting reading, and they have not made any complaint about the size of the judgment or the recitals therein. We don't mind if you want to tinker with that judgment, but they haven't made any complaints about. So their complaints -- they did not appear at either the recusal motion or the trial. They have taken the hard-line position that the trial court never got jurisdiction back from the federal court. And if you read their motions, and I included one of those in the benchbook, their theory was that since they appealed Judge Rosenthal's recusal order to the Fifth Circuit, he did not have -- there was no power to send that back to the state court and that it couldn't be mailed back and

therefore there was a hand delivery to try to get around that prohibition, and that's just simply wrong under the law. An appeal of a remand order by a district judge on lack of subject matter jurisdiction grounds is not appealable to the circuit, even though you can appeal the sanctions award which was appealed here, but that does not keep the state trial from proceeding. So we think that they have essentially thumbed their nose at the state courts, and that what happens here is if they're right on one or both of these theories, then this judgment is vacated and we go back for trial. If they're wrong on both theories, then the judgment is confirmed and that's the end of the case. If they --

JUSTICE DON R. WILLETT: Just to clarify, let me clarify one quick factual thing on the mailing. Here it was hand delivered only, it wasn't hand delivered and then later a mailed copy arrived? It was hand delivered in lieu of a mailed copy?

ATTORNEY THOMAS R. PHILLIPS: Well, the state court docket sheet is not in the record. Of course, they took the appeal to the Court of Appeals, it's not in there. If you want me to go outside the record, I can answer what I think is the answer to that question, but I'm not --

JUSTICE DON R. WILLETT: What do you think is the answer?

ATTORNEY THOMAS R. PHILLIPS: Pardon?

JUSTICE DON R. WILLETT: What do you think is the answer?

ATTORNEY THOMAS R. PHILLIPS: I think it was mailed in the normal course of business about two months later, but after Judge Woods had signed the judgment.

JUSTICE DON R. WILLETT: But the record shows hand delivery only?

ATTORNEY THOMAS R. PHILLIPS: Yes, as far as -- I mean --

JUSTICE DON R. WILLETT: What we have?

ATTORNEY THOMAS R. PHILLIPS: I mean the only one we know is in there, and I don't know if a clerk gets a second copy and something is already filed, if they just throw the second one away or, you know, I don't know. Anyway, the record we have, there is one copy and that's the one that was hand delivered.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Phillips. The Court is now ready to hear argument from the Cross-Petitioners and Respondents.

MARSHALL: May it please the Court. Mr. Taylor will present argument for the Respondents.

ORAL ARGUMENT OF ANDY TAYLOR ON BEHALF OF THE RESPONDENT

ATTORNEY ANDY TAYLOR: Mr. Chief Justice, may it please the Court, there are two issues that I would like to address this morning. First I'd like to talk about the recusal issue, and then second I'd like to talk about the remand issue. A quick summary of our position on the recusal issue is that first, the motion to recuse Judge Guy Herman was not defective, but rather was in compliance with the rule, 18(a). Second, even if this Court were to believe

that it's defective, that the referral of that defective motion should have been required under the terms of the rule, so that somebody else who is neutral and not subject to that motion can rule upon it. And third, that the Tertiary Rule does not apply. With respect to the first subpoint of recusal, I'd like to focus on the motion itself. I didn't really hear my very able opponent say this morning just exactly what's defective about the motion, nor did I see much in the brief. First, I would like to point out that Judge Herman himself articulated what he perceived to be procedurally defective. The only thing he said in the record, and it's transcribed and before you in this record, is that he felt that the recusal motion had been filed by the lawyer, Andy Chaumont in his individual capacity rather than in his capacity as attorney for the parties that he represented. That was the sole and exclusive basis upon which Judge Herman denied the motion. Now, that point has not been briefed in this Court, and I don't believe my opponents are even making that contention, that it was filed incorrectly in an individual capacity. You can look at the record and conclude that in fact that presumption by Judge Herman is wrong. Why? Well, his own order that he signed denying the motion states that it is a motion to recuse filed by the defendants, not filed by the lawyer in his individual capacity. So his own order belies the very statement that he made on the record. Second, the actual motion itself makes it clear that it's being filed in a representative capacity. The lawyer below, Mr. Chaumont, said that he was the undersigned counsel. In his certificate of service he signed it saying, “I'm signing as attorney for the defendants.” Also --

CHIEF JUSTICE WALLACE B. JEFFERSON: What's the basis for the motion to recuse against Herman?

ATTORNEY ANDY TAYLOR: The basis that's in the motion itself, which is in the record, is twofold. First, trial counsel was concerned that he learned from opposing counsel that there was going to be a hearing set before Judge Herman when there had not been any written notice of that fact. So he alleged, rightly or wrongly, that there was a concern of a possible ex parte communication, so that was number one. Number two, he said that in researching Judge Herman, he realized that Judge Herman in the Whatley case, which had similar facts and similar competing motions to recuse, had actually filed in his individual capacity with his own money as a lawyer not a judge, a motion defending the position that Judge Wood had taken. And so because of that concern, he felt that it was necessary in order to avoid the appearance of impropriety to have that issue resolved in a motion to recuse.

JUSTICE DAVID M. MEDINA: Are those grounds specifically laid out in a motion?

ATTORNEY ANDY TAYLOR: They are. Those grounds are very specifically laid out, and that is a good segueway to why the remainder of this motion is not procedurally defective. First of all, it has to be in writing. It was. It has to be verified. It was. It has to be specific as to what the grounds are, and I just articulated those in answer to the Chief Justice's question, so it was.

JUSTICE DAVID M. MEDINA: And personal knowledge?

ATTORNEY ANDY TAYLOR: It states personal knowledge in the affidavit, yes. The personal knowledge came from former trial counsel's conversation with opposing counsel and with his research, finding the motions that Judge Herman had filed in the Whatley case, and those motions were attached to the motion to recuse. So really the only thing that my opponents say is procedurally

defective about the motion is that it doesn't have notice of presentment, that it's intended to be given to the judge for ruling in three days. Well, I believe that that is not a correct argument for the following reasons. First of all, if you look at Rule 18(a) or its counterpart for statutory probate court judges in the Government Code, it doesn't envision that the notice of presentment averment has to be in the motion to recuse itself. It's a separate instrument. Under Rule 18(a) it uses the word, and I quote, "together with." In the Government Code it says that after you file the motion, you file a separate notice containing the presentment. So it doesn't cause the motion to recuse to be fatal by failing to include the notice of presentment in the motion itself, but even more fundamental than that, both the Government Code and Rule 18(a) have a disjunctive "or." And after it talks about the notice of presentment in the three-days requirement, it says, "or unless otherwise ordered by the Court." We have that here. If you look at Tab 6 of my opponent's benchbook, or if you look at the Clerk's Record, the first volume, page 43, you will see that there is a letter dated December 29th, 2006, from Judge Herman himself stating that all three motions to recuse, the motion against Judge Wood, Judge Burwell and Judge Herman himself are going to be set for hearing on January the 8th. Well, why does that matter? Well, that demonstrates that the argument of my opponents, that we're procedurally defective in not having presented the motion within three days, is not a good argument because the disjunctive "or" in the rule says "unless otherwise ordered by the Court." The very same day that the motion to recuse Judge Herman was filed, this judge said, "It's going to be otherwise ordered by the Court. It's going to be heard on the 8th," so that presentment argument we believe is not valid. So we have a motion to recuse that is not procedurally defective.

JUSTICE NATHAN L. HECHT: The Court of Appeals, of course, said it wouldn't matter if it were. Do you defend that rule?

ATTORNEY ANDY TAYLOR: We do, and that was exactly where I was headed next, Judge. Here's the thought from a policy perspective and from a textual perspective in Rule 18(a) why that makes sense. And we recognize that there's a split. Houston says this, not all the time, but most of the time. Dallas says this, Beaumont says this, Eastland says this, but there are some other cases that disagree. But here is the argument. First of all, when this Court promulgated Rule 18(a) in 1980, it used the word "shall." So once the motion is filed, it shall do something. What the cases say is you've got one of two options. You can either recuse or you can refer. You can't sit on the motion as Judge Benhall [Ph.] did in a couple of Dallas cases that got reversed. You can't sit on them and you can't rule on them. Well, okay, so there's a subtext here. What if the motion truly is procedurally defective, what do we do about that? We would argue for several reasons the better policy choice is to refer rather than rule and here goes. First, from a point of view of protecting each and every one of you from upholding the image and the reputation of the judicial branch of government and the canons of ethics, we always want to appear and in fact avoid any kind of allegation of impropriety. And so one prophylactic way of protecting the judge before whom this motion to recuse has been filed, is to say, "You know what? I don't care how defective this motion is, it's not good for the image of the judiciary to have that judge rule against the motion for procedural deficiencies. We're going to let somebody else do that." That's reason number one. Reason number two --

JUSTICE PAUL W. GREEN: But how often do you think that will happen? That is to say if you have a rule like that, then there will be a lot of motions to

recuse filed just to delay the system.

ATTORNEY ANDY TAYLOR: That's the concern. That's the other side of the argument is, wait a minute, if we have a prophylactic rule to protect the judiciary, are we going to have unscrupulous lawyers who are going to cheat and take advantage of this so-called loophole? Here's the answer. The answer is that the text of Rule 18(a) itself has sufficient safeguards to protect against that. Why? Well, if a lawyer and/or his client files a motion that is frivolous, at the last second, that's not valid, they're going to get tagged. They're going to get hit, not “may,” but the statute says “shall” get hit with joint and several liability for the costs incurred, fees incurred for a frivolous motion. So there's a safeguard there, and if you want to practice law in the State of Texas and have any kind of reputation at all, if you do that once or twice, then you're going to be not only in trouble reputation-wise, but in trouble monetary-wise. The other reason for it, Your Honor, is to say this. We want to have a rule that's easy to apply so that we don't spawn a lot of litigation. We're going to be fighting for decades over whether or not a motion really was defective, and if not, what was the result, and if so what should have happened. This rule is extremely easy to apply. If it's filed, it's referred. Now remember that we're not going to just ignore the fact that it's filed late -- and by the way, this motion against Herman was filed in compliance with the 10 days. We filed on December 29, the hearing was on January 8, so we also complied with that requirement. But if we filed it late or if we didn't have the right things in there, there is going to be a judge who is going to be able to umpire those types of things. And so it's not like we're just going to ignore somebody who files something that they shouldn't have filed. So we believe that the better rule, so that we don't spawn a bunch of litigation, so that the trial judges always know what to do and that we protect the integrity of the judiciary is to have the referral. Now, the third point on recusal.

JUSTICE DAVID M. MEDINA: Okay.

ATTORNEY ANDY TAYLOR: I'd like to talk about the Tertiary Rule. Your Honors, each should have a single sheet of paper, hopefully, in front of you, and that is a demonstrative aid to demonstrate why we believe that the Tertiary Rule, as it applied at the time of this case, would only work if it's filed by the same party against the same judge. First of all, the statute is the Civil Practice and Remedies Code. It's Section 30.016. If you notice I've got three things written on this document. At the top, if you notice, that's the version of the Civil Practice and Remedies Code that applied to the facts of this case, and I have highlighted in yellow the word “a,” the single letter A. Notice, although it's not highlighted or underlined, notice that the statute applied to statutory probate court judges as well as district and county judges. So that was the rule back when this case was handled. Now the middle part of the page shows how the rule was changed by the Texas Legislature effective September 1 of 2007. Notice now that the reference to statutory probate court judges is gone. The Legislature actually amended the Civil Practice and Remedies Code and stripped out any reference to statutory probate court judges. Also notice that the word “a” has changed to the word “any.” We think that's very significant for a couple of reasons. Number one, as we argued in our brief, Webster's Dictionary, when looking at reasonably susceptible interpretations of the word or term “a” says that both “same” or “any” are reasonable constructions to be given that word. Second, understand that Whatley was decided by the Houston Court of Appeals in August of 2006. What did Whatley say? Whatley looked at the Civil Practice and Remedies Code, the thing that's on the top of your sheet, and said, “We think that the only

way to interpret ‘a judge’ is to say that it means same party filing against the same judge.” So the Texas Legislature, when it went back into session in January of 2007, knew that a Court in Houston had interpreted their law as meaning the same judge rather than any judge. Well, what did the Legislature do? They amended the statute. They then affected the Government Code, they made it clear in the Government Code, which is as the bottom of your handout, that that's going to only apply to statutory probate court judges and it's only going to use the word “any” with it. So what does that mean? Well, we know that as you're trying to fathom what the Legislature meant by the words that it chose, that you have to presume the Legislature never does something for no reason, the doing of a useless thing. Second, the other canon of construction is, you shouldn't second guess the wisdom or the lack of wisdom of a particular enactment or amendment. When you apply those two judicial restraint canons of statutory construction to this case, we contend what that means is that the Legislature knowingly changed the law to tighten up recusal so that it wouldn't just be the same party against the same judge, but rather the same party against any judge if it's a probate court judge. So if our fact pattern occurred today, it would come out differently. So they have dealt with Whatley in the context of statutory probate court judges.

JUSTICE DAVID M. MEDINA: Well, you've got about five minutes here, and I want to hear your response on this jurisdiction revest in the state, and why it seems like your client took a position either going to be all in or all out?

ATTORNEY ANDY TAYLOR: Yes.

JUSTICE DAVID M. MEDINA: A pretty big risk.

ATTORNEY ANDY TAYLOR: I will address that right now, and thank you for that segueway. I'll say one last thing before I got there. I'm sure on rebuttal I might here about, well, it's silly to treat statutory probate court judges differently, but it's not because there's only 18 of them. You're going to run out of statutory court judges with only 18 because you've got hundreds of county and district court judges. Now going to your question about removal. First of all, I would point out that Congress has the power to create the right of removal and the procedure of remand. That's their power to do so. Second, I think your job, if I may say it that way, is to look at 1447 and ask what did Congress intend, because we want to be faithful to what it is that they require. Third, I think if you compare and contrast, Your Honor, 1447 with 1446, something important will jump out, and here it is. In 1446, Congress said the seminal event that has to occur for removal to be effectuated, not remand but removal, and in 1446 they said that it's the parties filing with the state court clerk and giving notice to all counsel that is the seminal event, not mailing, but notice by the party at the state court level. When you compare and contrast that with 1447(c), it says something quite different. It says that if you want to effectuate remand, that you actually have to have notice from the Court, not notice from the parties. In Quaestor this Court said very clearly, “We're not going to focus on what the state court or the state court clerk did or didn't do, that's not relevant to reacquiring jurisdiction. We're going to focus instead on what Congress said would actually retrigger it.” And what it says is it's got to be certified mail. So our argument is that the plain language of the statute requires it to be certified mail. The best case we believe that explains all of this is Spanair. That's the California Court of Appeals decision that we cited in our brief, and it's very similar, because three years from the remand order of the federal judge and the actual mailing by the federal clerk happened, and that's what's going to happen here if you rule in our favor

tomorrow. The federal clerk could simply send that remand order. There's no reason why it couldn't have happened, it should have happened. It's just that our opponents have chosen intentionally not to make it happen.

JUSTICE DON R. WILLETT: How should our interpretation of 1447(c) be affected, if at all, by our own 237(a) which says, “The plaintiff shall file certified copy of the remand order with the clerk.” It seems that under our state law or our state rule any method of delivery is acceptable if the copy, the certified copy is filed with the clerk. But how do we read those in tandem?

ATTORNEY ANDY TAYLOR: I'm glad you asked that question because I think this Court has already done in the per curiam and the Quaestor. Rule 237(a) was cited and argued there, and this Court in our view correctly said, “Look, this isn't a question of our state rules, this isn't a question of anything that the state court does.” The state court doesn't have to do anything, it's a question of what the federal court and the federal clerk does. I would also say, Your Honor, secondly that Rule 237(a) was in existence when you decided Quaestor, it's always been the case that under our local -- or state rules rather, that you're supposed to file those papers, but that doesn't have anything to do with whether the Federal Congressional enactment reacquires jurisdiction or not. So I think they're apples and oranges. Also I want to quickly say that the minority view in the federal courts, where they say, “Well, we're going to resolve all doubts in favor of remand,” there's no doubt if the text of the statute was ambiguous, then maybe, but the text is unambiguous. Remember, it was amended in 1948.

JUSTICE PAUL W. GREEN: But as a practical matter though, if the federal court signs an order divesting itself of jurisdiction, jurisdiction has to be somewhere. It's in state court then. You can't go back in federal court because jurisdiction has already been abandoned there. So it seems to me that maybe the parties don't know it yet, maybe the trial judge in state court doesn't know it yet, but that's the only place else to go. The matter of notice to the parties is, well, you're not in federal court anymore, you're in state court. So why would it matter? Notwithstanding the statute, but why would it matter how the notice is made available to the parties?

ATTORNEY ANDY TAYLOR: It's what I said earlier. There's two parts to your question. First of all, think about removal itself. Removal is not effective until we file with the clerk, even if everybody knows there's been a notice of removal, even if I've served opposing counsel, even if I filed it with the federal court. It's not effective until I actually file with the state court, and that's because Congress dictated under which circumstances you're going to have removal be effective. The same is true on the other side. When we're talking about remand, we have to comply with what Congress said is necessary to effectuate remand. I believe --

JUSTICE NATHAN L. HECHT: But just to put a very fine point on Justice Green's question, if a party needed relief between the time the U.S. District Judge signed the remand order and the clerk mailed it, where would he go?

ATTORNEY ANDY TAYLOR: Oh, we believe that it's the Mailbox Rule, Your Honor. What 1447(c) says is that “upon mailing.” My very able opponent said, “What about if it's in transit and you don't know about it.”

JUSTICE NATHAN L. HECHT: No, no, no. The judge signs the order, everybody is -- suppose people are there and they know it and the judge signs the order, but it's not mailed for maybe in this case months. And in the meantime

somebody needs relief on something. Where do they go?

ATTORNEY ANDY TAYLOR: Well, they're going to have to go back to the federal judge. The State Court hadn't --

JUSTICE NATHAN L. HECHT: But the judge signed a remand order.

ATTORNEY ANDY TAYLOR: Well, that's kind of the tension there between, well, does the federal judge, even though he or she has signed a remand order, still have jurisdiction or not. What 1447(c) says is that until it's mailed, the jurisdiction hasn't gone back to State Court, so.

JUSTICE NATHAN L. HECHT: Well, it actually says “thereupon,” --

ATTORNEY ANDY TAYLOR: Yes.

JUSTICE NATHAN L. HECHT: -- and you can't really tell whether “thereupon” -- what part of that paragraph “thereupon” refers to. I mean the closest antecedent is the mailing. That's obvious, but the “thereupon” interjects at least a kind of a doubt about what it means.

ATTORNEY ANDY TAYLOR: I don't agree that there's a doubt. I think that the text is clear and unambiguous for our argument, but I guess suffice it to say in summary, that we believe that there is a simple solution here. The federal clerk needs to mail the notice, then jurisdiction revests and then we start the clock back at the trial court. If you don't agree with that --

JUSTICE DALE WAINWRIGHT: [Inaudible] as it concerns jurisdiction, that the federal statute determines when state court gets jurisdiction again. Certainly the federal statutes determine when remand occurs and what happens on remand, but in terms of when a state court obtains jurisdiction, isn't that a state law matter?

ATTORNEY ANDY TAYLOR: I don't believe so, because you're interpreting federal law, and I think Quaestor answers that question. You have to decide, in my judgment, what did Congress say here and abide by it even if you think it's wrongheaded or misguided.

JUSTICE DALE WAINWRIGHT: You think Congress intended to tell state courts when they get jurisdiction back?

ATTORNEY ANDY TAYLOR: Yes, because of the '48 amendment. In 1948, 1447(c) was real clear. It said that upon the signing of the order, once the judge signs the order, immediately the state court jurisdiction has been reacquired. They changed that in 1948 and said, no, it's upon mailing. So we believe that the job here is to interpret what Congress intended because Congress has the power to decide when remand is effectuated. Just like removal is effectuated. And under these facts, it's never happened. If you disagree with that, then on recusal, we still believe that there was error there. The Tertiary Rule doesn't apply, and so the case needs to be remanded back. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

JUSTICE DON R. WILLETT: What do you make of Mr. Taylor's first recusal point, which is the motion to recuse Judge Herman wasn't defective at all?

REBUTTAL ARGUMENT OF THOMAS R. PHILLIPS ON BEHALF OF PETITIONER

ATTORNEY THOMAS R. PHILLIPS: Well, I think it was defective for at least two reasons. Well, really one reason. It just does not make an allegation that, if that's all there was in the verification, if it was stated that would give any grounds for this judge being biased or prejudiced.

CHIEF JUSTICE WALLACE B. JEFFERSON: How about ex parte communication?

ATTORNEY THOMAS R. PHILLIPS: Well, it doesn't say who did the ex parte. Now that's fairly technical, but it just says our opponents knew this, so somehow something happened. But it doesn't say that the clerk didn't already know it and told the opponents or that they called the clerk and the clerk didn't know it. It doesn't say that Judge Herman communicated this to the other side, rather than to another judge who then improperly told the other party. It's all in the passive tense and vague. Now it might be able -- maybe -- to be proved up, I mean you could get to that point, but they didn't choose to show up to these properly noticed recusal hearings, so there is no proof there. But we think on its face you've got to say the judge did something wrong, or here's why we think they did, not just that there was -- the other side knew something and we didn't know it. There's no investigation of whether the clerk had that information and it was just as arises in another part of this case in transit.

JUSTICE NATHAN L. HECHT: Isn't it a better rule that if anything resembling a motion to recuse is filed, that stops the proceeding and you go get that resolved?

ATTORNEY THOMAS R. PHILLIPS: The cases are in conflict, Your Honor. And I've included at Tab 16 the best six cases for us with quotes that the recusal motion has got to state the grounds with particularity. But I admit, as Mr. Taylor admitted, cases are all over the lot on this and Courts are all over the lot on this, and it's a very important reason for this Court to write on this case, is to resolve that.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, you think about what I would think would be a very rare case of the judge who is biased toward one party or the other, and isn't there at least the possibility that judge would say, “I see your motion, I don't think you have stated with particularity, and so I am denying it and summary judgment hearings can go forward. I read the motion, you lose”?

ATTORNEY THOMAS R. PHILLIPS: Well, that is a possibility under this rule, but there is an answer of course, and that's appeal, and I was going to -- one of the things I'm glad that we got to bring up is at Tab 15 of our benchbook is the Union Pacific Resources case, a unanimous opinion of this Court in 1998, and let me read from head notes 3 and 4. “The erroneous denial of a recusal motion does not void or nullify the presiding judge's subsequent acts. While a judgment rendered in such circumstances may be reversed on appeal, it is not fundamental error and it can be waived if not raised by a proper motion. If the Appellate Court determines that the judge presiding over the recusal hearing abused his or her discretion in denying the motion and the trial court should have been recused, the appellate court can reverse the trial court's judgment and remand for a new trial before a different judge.” So first of all, we think Judge Herman had a duty under 30.016 to proceed with this case and rule on it, which moots the issue of whether or not it was technically defective or not as a recusal motion. If that's wrong, then we believe it was technically defective because of the ex parte, and then the

other allegation is just that Judge Herman had appeared in a wholly unrelated case and essentially knew these other judges. If that's the standard, truly almost every judge, certainly in a small community like the probate courts, every judge is going to be recused. But if that's wrong, then the third point is we believe you have to review Judge Herman's ruling for whether or not there's an abuse of discretion. And that doesn't mean that we made the right points in response to their motion, it doesn't mean that Judge Herman, when he articulated his rulings, gave the right rulings. You have to look at any conceivable grounds that this ruling could be upheld, and when they didn't put on any proof and they make only these vague allegations, it's pretty clear that Judge Herman did not abuse his discretion in overruling this motion as the --

JUSTICE DON R. WILLETT: What about Mr. Taylor's point that it's not silly to treat the statutory probate judges differently because there are so few of them?

ATTORNEY THOMAS R. PHILLIPS: Well, that kind of confounded me, because you would run out of statutory probate judges eventually. There are 18 of them, so on your 37th motion you would be stuck with a judge if you interpreted the 30.016 as Mr. Taylor does. If 30.016 meant then and still means now what he says it does, which is it's got to be three motions against the same judge, you literally -- a party could file hundreds, many hundreds, close to a thousand recusal motions -- no I guess more than that if you take county and district judges together, you're talking about well over a thousand recusal motions before you would ever have to have a judge. And that's just an illogical reading of that statute. I think it's fairly illogical as to probate courts, but now that's been fixed. It's totally illogical at the district level. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, the cause is submitted and the Court will take a brief recess.

MARSHALL: All rise.

[End of proceedings.]

The Estate of Miguel Angel Luis Gonzalez Y Vallejo, Petitioner/Cross-Respondent, v. Miguel Angel Gonzalez Guilbot, Carlos Alberto Gonzalez Guilbot, and Maria Rosa Del Arenal De Gonzalez, Respondents/Cross-Petitioners.
2010 WL 412053 (Tex.) (Oral Argument)

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