**Dissenting Opinion Filed May 22, 2020**

**In The**
**Court of Appeals**
**Fifth District of Texas at Dallas**

**No. 05-19-00162-CV**

**YOUVAL ZIVE, Appellant**
**V.**
**JEFFREY R. SANDBERG AND PALMER & MANUEL, P.L.L.C. F/K/A PALMER & MANUEL, L.L.P., Appellees**

**On Appeal from the 429th Judicial District Court**
**Collin County, Texas**
**Trial Court Cause No. 429-05242-2018**

# OPINION DISSENTING FROM DECISION NOT TO CONSIDER THIS CASE EN BANC

Opinion by Justice Schenck

My colleagues have done a thorough and fine job in setting a rule to govern this previously unencountered wrinkle in the *Hughes* tolling rule. I suggested en banc consideration and issue this separate opinion because I believe the Court's decision does not afford the parties the clear start that is essential to a fair and predictable application of the limitations bar in cases where some, but not all, of the claims and parties in a case continue through the appellate process. I believe the *Hughes* tolling rule can and should be read in such cases to end when the litigation is "fully concluded." The panel's contrary determination, though reasonable and

logical, will, in my opinion, be challenging for parties to track in practical operation, provoke further litigation, and ultimately deny parties on both sides of the case of the principal virtue of limitations rules—predictability. I believe a bright-line rule is necessary and, unlike the panel, would conclude the underlying claim is exhausted, or the litigation is otherwise finally concluded, when no party to the litigation is able to seek further, direct appellate relief. Accordingly, and for the reasons discussed below, I respectfully dissent from the Court's decision to deny en banc consideration.

## I. *Hughes* Gives Us a Two-Prong Standard, But Not an Answer

Statutes of limitations afford plaintiffs what the legislature deems an adequate time to present their claims and protect defendants and the courts from cases in which the search for truth may be seriously impaired by the loss of evidence. *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990). In legal malpractice cases, the legislature has settled on a two-year limitations bar. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a). The period chosen in this or any other like statute is to some degree, and by necessity, arbitrary. The legislature might just as easily have added or subtracted a day or week from the period with no just cause for complaint from either side. The period is not what is critical here, but rather, its amenability to ready calculation by practitioners of all backgrounds. To be sure, that predictability slips when concerns of fairness require a delay in the start of the period under calculation. As the panel notes, the supreme court in *Hughes v.*

*Mahaney & Higgins* adopted such a rule for legal malpractice claims arising from the prosecution or defense of a claim that results in litigation. 821 S.W.2d 154, 157 (Tex. 1991). Under that rule, the limitations statute for claims relating to the mishandling of litigation is tolled until all appeals on the underlying claim are "exhausted" or "the litigation is otherwise finally concluded." *Apex Tolling Co. v. Tolin*, 41 S.W.3d 118, 119 (Tex. 2001).

## II. When are Appeals Exhausted and Litigation "Finally Concluded"?

Determining when an underlying claim is "exhausted" or when "the litigation is otherwise finally concluded," especially in multi-party cases, is not easy for judges or lawyers, even those regularly plying the appellate trade. There are many variables at play that can affect that determination in the typical case in our appellate courts.

Assume, for example, that a lawyer represents clients A and B on a direct appeal to an intermediate appellate court. He asserts factual insufficiency and a purely legal issue, say, arbitration. In a reply brief and at oral argument, counsel adds an "argument" on the legal issue that was made below but not included in his opening brief—like estoppel to deny arbitration. The appellate court concludes the evidence is factually insufficient and remands the case for a new trial, rejecting counsel's legal arguments as waived, as appellate courts sometimes do. Both clients are unhappy at the prospect of trying a case twice that—they believe—should have been sent to arbitration at the outset. Client B presses forward in seeking review in

the Texas Supreme Court.[1] Client A meanwhile, wishing to avoid the cost of the petition or a retrial, hires separate counsel and settles the underlying case.

The supreme court grants client B's petition and hears argument during which the respondent urges the court not to consider counsel's estoppel argument, claiming it was waived at the intermediate court of appeals level. The supreme court concludes that estoppel is an "argument," not an "issue," and, as a result, may be raised at any time, and reverses on that basis. *See, e.g., Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761 (Tex. 2014). It is not difficult to imagine that the supreme court's opinion is issued more than two years after the court of appeals' decision, as many are, thus, raising the potential of one limitation period expiring before the other even starts.

Under our opinion in this case, clients A and B both have claims to pursue and the start of both periods will be tolled, though to different dates. Standing alone, that may not be cause for concern, though both will pursue the same claim, against the same party, and arising out of the same case. But, having multiple, potentially partially overlapping periods for the lawyer and parties to track is not the end of the

[1] As to client A, the time for joining in client B's petition for review clearly extends through the petition phase, at least until it is granted. Where the petition is granted and heard, the rules of appellate procedure would appear to be written broadly enough to permit client A to file a petition in response to a motion for rehearing. TEX. R. APP. P. 53.7(c). If the appellee files a motion for rehearing, then client A may file a petition within 45 days after the motion is overruled. If the appellee does not file a motion for rehearing, then client A would have to file a petition within 30 days after the last petition was filed, plus an additional 15 days to account for possible extensions under appellate rule 53.7(f). See *id.* 53.7(f).

problem. Calculating the start of the limitations clock for client A (or B, who was forced to a supreme court process he might have avoided) under this scenario (and many others) is not a task for the novice or the faint of heart, even if we imagine the litigation in isolation as to client A.

Under our rules, our mandate will not issue in a case until the supreme court has denied a petition for review in that case, or the time has expired for all parties to seek review. TEX. R. APP. P. 18.1. On remand, we are to comply with the supreme court's disposition of the case, and unless it parses its holding as to parties, we are obliged to conform our own mandate to that result. *See, e.g., Fletcher v. Blair*, 874 S.W.2d 83, 84 n.1 (Tex. App.—Austin 1994, writ denied) (conforming mandate as to non-petitioning unsuccessful appellee on remand). And, even if our mandate had issued earlier, despite the rules, we would still have the power to recall it, though our own case law does not speak to whether conforming our legal conclusion as to one party to the correct answer allows us to do the same for another party to the case. I believe we should be permitted to do so. *See, e.g., Estate of Lisle v. Comm'r*, 431 F.3d 439 (5th Cir. 2005) (recalling mandate as per hypothetical set out herein).[2]

[2] Recall that the limitations rules we establish will govern malpractice suits arising from representation in state and federal court and will provide the rule of decision in either system. *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). Thus, we should be cognizant of the finality concerns under at least these two sets of rules.

## III. Appeals are Exhausted When Appellate Remedies No Longer Exist

Of course, it hardly takes a robust imagination to bewilder the parties' ability to preserve their rights. Take this case. Here, we have a party who lost in the Texas Supreme Court and who did not petition for certiorari when another did. When was the claim fully concluded for appellate purposes? The panel picks the date the Texas Supreme Court denied his petition for review, citing *Hughes*. Of course, in *Hughes*, the aggrieved client-petitioner sought rehearing from the denial of his petition, and the court settled on the date of its denial, noting rehearing was "the last action of right" the petitioner "could take and did take." Thus, *Hughes* does not tell us directly whether the continuing availability of review comes into play and does not address whether continuing efforts by one or more of the parties in the United States Supreme Court would affect its finality analysis. Because it found the claim to be timely, as tolled by the pending appeal through at least that last act, the *Hughes* court had no occasion to reach that question.

In this case, Zive did not seek rehearing from the denial of his petition for review or certiorari. I do not believe that *Hughes* answers the question of whether the appeal is finally concluded or exhausted when the client retains appellate remedies, particularly where the case moves forward on petition for certiorari to the United States Supreme Court. The panel's answer is, again, plausible, but probes further into uncertain territory and, in all events, is contrary to my understanding that finality, as that term is commonly understood, includes the period during which the

judgment is still open to direct review, whether that available avenue for relief is invoked or not. *See, e.g.*, *Clay v. United States*, 537 U.S. 522, 527 (2003); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

The timing difference between the date a trial court enters a judgment or an appellate court issues an opinion and the last date by which either might still be reviewed, may or may not be critical in a particular case, but it often is so and even in the more routine single party appeal context. For most purposes, we regard a case as final, for appellate purposes, when no further review is procedurally available. For example, when the United States Supreme Court announces decisions affecting the rights of litigants, those decisions are generally applicable to all pending cases, regardless of whether the decision was anticipated by the trial court (or the court of appeals) when they rendered their respective judgments.[3] The question, as here, then becomes whether a case was final for appellate purposes when the Supreme Court's decision was handed down. *Linkletter v. Walker*, 381 U.S. 618, 623 n.4 (1965). The answer does not turn on the date of the issuing court's judgment, but on whether the party still had "direct appeal options" available. *See Ex parte Uribe*, No. 10-13-00012-CR, 2013 WL 4767525, at *1 (Tex. App.—Waco Sept. 5, 2013, pet. ref'd) (mem. op., not designated for publication). To my understanding, that would include

[3] Texas courts have long recognized the same vitality of cases pending at the time new legislation is enacted, drawing a bright line between cases where the right to prosecute the appeal "was not barred" and those where "the right to have the judgment reviewed in any manner had been lost by lapse of time." *First Nat'l Bank v. Preston Nat'l Bank*, 22 S.W. 579 (Tex. 1893); *see also In re J.J.*, 617 S.W.2d 188 (Tex. 1981).

a petition for review by certiorari to the United States Supreme Court. *See Clay*, 537 U.S. at 524.

The question of whether such a decision would apply *retroactively* to cases that had become final becomes the controlling question in cases raising collateral attacks, like habeas corpus or bill of review in a civil case, that, by definition, are no longer direct appeals. Because the case law distinguishing between direct and collateral attacks turns on the same concept of finality at issue here and is so well developed, I would look for the answer there. Accordingly, I would treat the appeal as final and exhausted for *Hughes* purposes as of the date the party's or parties' right to seek direct review expires.

Thus, if *Hughes* intends for the conclusion or exhaustion of the appeals process to include continuing (but unutilized) available remedies, as I believe it does, its tolling would include the period for seeking rehearing and certiorari.

## IV. In Multi-Party Cases, Parsing the Appeal as To Parties and Claims Would Invite as Much Confusion on Appeal as It Does in Trial Courts[4]

Regardless of whether we focus on the client's last act (or ruling thereon) as the panel does, or disregard lingering but unutilized appellate remedies of client A, where the case continues as to client B, treating the appeal as "otherwise finally

[4] The supreme court has gone to great lengths to clarify when a putatively final judgment is in fact "final" in the trial court, settling wisely on the notion that there should be only one of them and that it is the one, however captioned, that actually disposes of *all* parties and all claims. *E.g.*, *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200–06 (Tex. 2001).

concluded" invites needless complication and potential for confusion. For example, our rule in this case should still account for the possibility that client A was deemed a party in the United States Supreme Court, and was just as likely (or unlikely) to obtain relief by direct appeal as client B even though he is not filing the papers seeking it and neither lawyer was likely aware of it. The United States Supreme Court rules anticipate the same systemic quagmire as our own mandate provisions. They provide:

> All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be served as required by Rule 29 on all parties to the proceeding below. A party noted as no longer interested may remain a party by notifying the Clerk promptly, with service on the other parties, of an intention to remain a party.

U.S. SUP. CT. R. 12(6).

So, to calculate the start date if the case, for purposes of *Hughes*, continues as to one but not all parties, we (and the lawyers) would need to consult the clerk's office of the United States Supreme Court to see what it does not say. I believe that level of sleuthing ought not be required to calculate a deadline.

Where an appeal involving multiple parties continues, I would find that the claim is not exhausted unless there has either been a clear and irrevocable declaration that the absent party could not benefit from the result of further proceedings and the litigation (i.e., the entire case) has not "otherwise finally concluded," otherwise, not

until the proceeding comes to final rest with relief on direct review no longer available as to any of the parties to last judgment.[5] I believe the contrary rule undermines the seeming clarity of the start date specified by *Hughes* and its progeny. Accordingly, I dissent from denial of en banc consideration.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

Molberg, Pedersen, Reichek, and Carlyle, J.J., join this dissenting opinion

190162DF.P05

[5] This rule would be consistent with the concept of finality of judgments in the trial courts in state and federal courts alike. *See, e.g.*, *Farm Bur. Cty. Mut. Ins. v. Rogers*, 455 S.W.3d 161, 163 (Tex. 2015); *see also* FED. R. CIV. P. 54(b).