Opinion issued December 19, 2008

In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00199-CV

RAYMON POLAND, INDIVIDUALLY AND AS INDEPENDENT ADMINISTRATOR OF THE ESTATE OF JESSIE POLAND, ROBERT MARTIN, AND FRANK MARTIN, Appellants

V.

DAVID OTT, Appellee

On Appeal from 152nd District Court
Harris County, Texas
Trial Court Cause No. 2006-38894(c)

OPINION DISSENTING FROM THE DENIAL OF EN BANC CONSIDERATION

In its opinion, the panel erroneously concludes that appellants, Raymon Poland,

Individually and as Independent Administrator of the Estate of Jessie Poland, Robert Martin, and Frank Martin ("the Polands"), untimely served their medical liability expert report on appellee, Dr. David Ott, MD. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875 [hereinafter "former section 74.351(a)"] (amended 2005) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(a) (Vernon Supp. 2008)).

In fact, the Polands, on July 29, 2005, had, upon request, mailed their expert's report to Gary McLeod of APMC Insurance Services ("APMC"), Dr. Ott's insurance carrier. It is undisputed that the Polands' attorneys served the expert report on APMC, and Dr. Ott in no way denies the fact that McLeod actually received the report.

Regardless, the panel reasons that because the Polands did not, after filing their health care liability claims in court, serve another copy of the expert report directly on Dr. Ott or his attorneys, the Polands' claims for the wrongful death of Mrs. Poland must be dismissed with prejudice and the Polands must pay the attorneys' fees of Dr. Ott. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b). In doing so, the panel misinterprets the plain language of former section 74.351(a), disregards the legislative purposes of the statute, misunderstands the fundamental purpose of rule 21a, and misapplies the rule, resulting in a serious error, requiring en banc consideration of the case. *See* TEX. R. APP. P. 41.2(c).

Factual and Procedural Background

The pertinent facts of the case are straightforward and undisputed. St. Luke's Episcopal Hospital ("St. Luke's"), on August 11, 2003, admitted Mrs. Poland for elective mitral valve[1] replacement surgery. Although Mrs. Poland had been taking Coumadin for mitral valve regurgitation, she stopped taking Coumadin on August 9, 2003 in preparation for the surgery. Dr. Ott, the attending cardiac surgeon, performed the surgery on August 12, 2003. Due to bleeding complications that occurred during the surgery, Mrs. Poland was twice taken back into surgery, and she died as a result of the complications on August 20, 2003.

Thereafter, the Polands' attorneys complied with the notice provision of chapter 74 of the Texas Civil Practice and Remedies Code.[2] Having received the Polands' notice (presumably from Dr. Ott), McLeod, on July 13, 2005, wrote a letter to the Polands' attorney informing them that their notice had been referred to APMC "for response, as we are [Dr. Ott's] professional liability carrier. We will be

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[1] The mitral valve is "[a] valve of the heart, composed of two triangular flaps, that is located between the left atrium and left ventricle and regulates blood flow between these chambers." THE AMERICAN HERITAGE MEDICAL DICTIONARY 523 (2d ed. 2002).

[2] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.051(a) (Vernon 2005) ("Any person or his authorized agent asserting a health care liability claim shall give written notice of such claim by certified mail, return receipt requested, to each physician or health care provider against whom such claim is being made at least 60 days before the filing of a suit in any court of this state based upon a health care liability claim. . . .").

investigating this case on behalf of Dr. Ott." McLeod also requested the Polands' "medical expert's specific criticisms of our member's care so that we might share those concerns with David Alan Ott, M.D." Fulfilling McLeod's request, the Polands' attorneys, on July 29, 2005, mailed him "the information you requested regarding the opinion of our *expert witness*," enclosing their expert report, written by Dr. Dennis Moritz, M.D., a Board Certified Cardiac Surgeon. (Emphasis Added). Attached to Dr. Moritz's report was his lengthy curriculum vitae.

In sum, Dr. Moritz, in his expert report, stated that the pertinent standard of care in regard to surgery on a patient on Coumadin "is to stop the Coumadin and allow the coagulation profile to return to normal." He also stated, "Performing any elective surgery on a fully anticoagulated patient is a breach of the standard of care. This is particularly true for operations such as heart surgery in which bleeding is always a potential hazard." Dr. Moritz noted that it "is essential to check the [Prothrombin Time ("PT") and International Normalized Ratio ("INR")] before surgery and defer surgery until it returns to near normal," and that Mrs. Poland's PT/INR "was not only elevated, but was well above the therapeutic range at the time of admission." He emphasized that "[t]he dangerous [PT/INR] level was confirmed . . . , but the operation proceeded nonetheless. The attending surgeon, Dr. Ott, as well as the Anesthesiologists involved should have seen these levels on INR and immediately cancelled the case." Dr. Moritz concluded,

> It is my opinion based on a reasonable degree of medical probability that proceeding with this operation in a patient who was fully anticoagulated with Coumadin led to bleeding, multiple transfusions of blood products, multiple organ failure, and finally death.
>
> The principle of not doing elective surgery on a fully anticoagulated patient is so basic to surgical principles, that I feel this breach of the standard of care must also reflect a serious system failure at this hospital. Many people had knowledge, or should have had knowledge of Mrs. Poland's PT/INR. Any of these could have and should have initiated action to cancel the case. This failure resulted in Mrs. Poland's death.

On October 24, 2005, the Polands filed their original petition, alleging, as noted by the panel,

> that, at the time of surgery, [Mrs.] Poland's blood contained a level of Coumadin that the health-care providers should have known rendered her blood fully anti-coagulated and, thus, rendered surgery dangerous. The surgery was nonetheless performed; Mrs. Poland bled internally; and she died several days later of multi-system organ failure.

Poland v. Ott, No. 01-07-00199-CV, 2008 WL _____, at *__ (Tex. App.—Houston [1st Dist.] Dec. 19, 2008, no pet. h.).

Subsequently, Dr. Ott moved to dismiss the Polands' health care liability claims on the ground that the Polands had failed to timely serve him or his attorneys with Dr. Moritz's expert report. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875 (amended 2005); TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b). Concluding that the Polands untimely served Dr. Ott with Dr. Moritz's expert report, the trial court entered its October 30, 2006 interlocutory order granting Dr. Ott's motion to dismiss the Polands' health care liability claims

against him.

Section 74.351(a)

In their sole issue concerning Dr. Ott, the Polands argue that the trial court erred in dismissing their health care liability claims against Dr. Ott on the ground that they did not comply with former section 74.351(a) because they, in fact, timely "served [their expert's] report on Dr. Ott's designated representative and duly authorized agent, his insurance carrier, who initiated contact with [the Polands'] counsel and requested the report be sent to him so that he could share those concerns with Dr. David Ott." The Polands assert that they "satisfied the spirit of [former] section 74.351(a) by serving the report on Dr. Ott's designated representative instead of serving it upon Dr. Ott's attorneys because Dr. Ott's designated representative and duly authorized agent requested that the report be served upon the insurance carrier."

In fact, the trial court, during the hearing on Dr. Ott's motion to dismiss, asked all of the defendants present, "[W]ho got the report beforehand?" Counsel for Dr. Ott answered:

> Dr. Ott received it through—*he was served with it* through his carrier, presuit notification.

(Emphasis added.)

Dr. Ott argues that the trial court did not err in dismissing the Polands' health care liability claims because the Polands "did not satisfy the requirements of [section] 74.351 by mailing Dr. Ott's insurance carrier an unsigned expert report prior to filing

their health care liability claim." Dr. Ott does not claim that he and his attorneys did not actually receive the report. Rather, he emphasizes that section 74.351 "provides that the expert report must be served upon the party or the party's attorney. It does not indicate that the report may be mailed to the party's insurance carrier or any agent of the party." Thus, Dr. Ott asserts that neither "service" on his "insurance adjuster" nor "pre-suit service" can "satisfy" the requirements of section 74.351.

The panel, without determining whether the Polands' service of their expert report on McLeod at APMC was effective, holds:

> [P]rovision of an expert report before a health-care-liability claim is filed in court against the physician or health-care provider does not meet former section 74.351(a)'s service requirements.

Poland, No. 01-07-00199-CV, 2008 WL _____, at *__. The panel reasons:

> The plain language of former section 74.351(a) and [Texas Rule of Civil Procedure] 21a, which it implicitly incorporates by use of the term "serve," simply does not contemplate "service" of the expert's report and [curriculum vitae] on a physician or health-care provider until after a claim has been filed in court against that person or entity.

See id. The panel's erroneous holding and reasoning is based on another panel's holding in *University of Texas Health Science Center at Houston v. Gutierrez*, 237 S.W.3d 869, 873 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). In *Gutierrez*, this Court held that:

> Given the express legislative intent of Chapter 74 and the intentional legislative act of replacing the word "furnish" with "serve" in section 74.351(a), we determine that *proper service under rule 21a must occur* to effectuate the intent of Chapter 74 as a whole, and section 74.351(a)

specifically.[3]

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[3] In reaching this holding, the panel in *University of Texas Health Science Center at Houston v. Gutierrez* relied in large part on *Herrera v. Seton Northwest Hospital*, 212 S.W.3d 452, 459 (Tex. App.—Austin 2006, no pet.). *University of Texas Health Science Center at Houston v. Gutierrez*, 237 S.W.3d 869, 872–73 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Unfortunately, the reliance upon *Herrera*, which is substantively distinguishable, by both the panel in *Gutierrez* and the panel here is misplaced.

In *Herrera*, Herrera's attorneys claimed that they had timely sent, by regular mail, a copy of Herrera's medical liability expert report to the defendant doctor and hospital. *Herrera*, 212 S.W.3d at 456. Significantly, both the doctor and the hospital alleged that they did not receive the report until Herrera's attorneys subsequently sent them, outside of section 74.351(a)'s deadline, the report by facsimile transmission. *Id*. Herrera argued that under the "mailbox rule" in Texas Rule of Civil Procedure 5, he "constructively delivered" the report to the defendants when he placed it into the control of the United States Postal Service. *Id*. The Austin Court of Appeals concluded that Herrera's reliance upon rule 5 was misplaced because it concerns the filing of documents with a court clerk, not service on a party. *Id.* at 458 (citing TEX. R. CIV. P. 5). The court also concluded that the Legislature intended for health care liability claimants to comply with rule 21a "to fulfill the requirements of section 74.351(a)." *Id*. at 459. However, in doing so, the court noted that a "party who accomplishes service under rule 21a is entitled to a presumption of delivery":

> A certificate by a party or an attorney of record, or the return of the officer, or the affidavit of any other person showing service of a notice *shall be prima facie evidence of the fact of service*.

Id. (quoting TEX. R. CIV. P. 21a) (emphasis added).

The Austin Court of Appeals did not hold, as did this Court in *Gutierrez*, that proper service under rule 21a "*must occur* to effectuate the intent of Chapter 74 as a whole, and section 74.351 specifically," even if the defendant health care provider has admitted to actually having received an expert report. *See Gutierrez*, 237 S.W.3d at 873 (emphasis added). Rather, the Austin Court of Appeals merely held that Herrera "was not entitled to any presumption of delivery." 212 S.W.3d at 460. It noted that section 74.351(a) "contemplates service to parties consistent with the rules of civil procedure" and that Herrera did not "use any method of service authorized by rule 21a to deliver copies of his expert report and curriculum vitae." *Id*. Thus, the Austin Court of Appeals concluded that "Herrera [had] failed to prove compliance with the statutory deadline." *Id*. Given that the defendant doctor and hospital actually denied

Id. (emphasis added). The panel concedes:

> We reach this conclusion despite the fact that, as the [Polands] note, the section requires service "*not later than*" 120 days after a claim is filed, *rather than requiring service within 120 days after the claim is filed*.

Poland, No. 01-07-00199-CV, 2008 WL _____, at *__ (emphasis added).

Although Dr. Ott and the panel state that the "plain language" of former section 74.351(a) actually requires that a medical liability expert report be served only after the filing of a lawsuit asserting a health care liability claim, nothing in the plain language of the statute so states. Former section 74.351(a) provides:

> In a health care liability claim, a claimant shall, *not later than* the 120th day after the date the claim was filed, serve on each party or the party's attorney one or more expert reports, with a curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted. The date for serving the report may be extended by written agreement of the affected parties.

See Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875 (amended 2005) (emphasis added). Thus, as conceded by the panel, former section 74.351(a) actually requires service "'*not later than*' 120 days after a claim is filed," not "*within 120 days* after the claim is filed." (Emphasis added.)

The Texas Supreme Court has explained,

> When interpreting statutes, we try to give effect to legislative intent. "Legislative intent remains the polestar of statutory construction." However, it is a cardinal law in Texas that a court construes a statute,

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receiving the report mailed by Herrera's attorneys, the court's conclusion makes sense.

> "first by looking to the plain and common meaning of the statute's words." If the meaning of the statutory language is unambiguous, we adopt, with few exceptions, the interpretation supported by the plain meaning of the provision's words and terms. Further, if a statute is unambiguous, rules of construction or other extrinsic aids cannot be used to create an ambiguity.

Fitzgerald v. Advanced Spine Fixation, Sys., Inc., 996 S.W.2d 864, 865–66 (Tex. 1999) (citations omitted).

Here, the panel turns to Texas Rule of Civil Procedure 21a and creates such an ambiguity. *See* TEX. R. CIV. P. 21a. Rather than focus on the plain and common meaning of the word "serve," the panel reasons that former section 74.351(a) "implicitly incorporates" rule 21a, which does not, in the words of the panel, "contemplate 'service'" of any pleading, plea, motion, or other form of request required to be served under rule 21 until after a claim has been filed in a court. The panel also notes that each defendant whose conduct is implicated in an expert's report "must file and serve any objection to the sufficiency of the report not later than the 21st day after the date it was served, failing which all objections are waived." Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875 (amended 2005). Thus, the panel concludes that delivery of an expert report to a defendant physician or health care provider "before a health-care-liability claim is filed in court against the physician or health-care provider does not meet former section 74.351(a)'s service requirements." *Poland*, No. 01-07-00199-CV, 2008 WL _____, at *__ .

The word "serve," as a verb, is defined simply as to "make legal delivery of (a notice or process)" and to "present (a person) with a notice or process as required by law." BLACK'S LAW DICTIONARY 1372 (7th ed. 1999). Thus, all that former section 74.351(a) requires is that a health care liability claimant "deliver" or "present" each party or their attorney with an expert report and curriculum vitae of each expert listed in the report for each physician or health care provider against whom a liability claim is asserted by the hard-and-fast deadline. *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 847, 875 (amended 2005). Only if a defendant physician or health care provider "has not been served" with an expert report by the deadline, "shall" a trial court then order the claim dismissed with prejudice and award attorney's fees and costs to the pertinent defendants. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(b).

Rule 21a does not define the word "serve," which, as noted above, simply means to "deliver"; rather, it provides:

> Every notice required by these rules, and every pleading, plea, motion or other form of request required to be served under Rule 21, other than the citation to be served by the filing of a cause of action and except as otherwise expressly provided in these rules, *may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record*, as the case may be, either [1] in person or by agent or by courier receipted delivery or [2] by certified or registered mail, to the party's last known address, or [3] by telephonic document transfer to the recipient's current telecopier number, or [4] by such other manner as the court in its discretion may direct.

TEX. R. CIV. P. 21a (emphasis added). The plain purpose of rule 21a is to ensure that

parties receive, by delivery, "notice" and "every pleading, plea, motion or other form of request required to be served under Rule 21." *Id*. It clearly gives trial courts discretion to direct other methods of delivery. *Id*. More importantly, as explained by the Fort Worth Court of Appeals:

> The purpose of the rules relating to service and notice is to make reasonably certain that all parties to a suit are notified as to the date and time the court has set their matter down for hearing and determination. This is in order that the parties, individually or by counsel may appear, and present their side of the case and to take such action as is deemed appropriate to protect their interest. Thus, *service and notice in a technical sense is incidental where the main purpose of obtaining the appearance of all parties and their participation is accomplished*.

Hill v. W. E. Brittain, Inc., 405 S.W.2d 803, 807 (Tex. App.—Fort Worth 1966, no writ) (emphasis added).

In *Hill*, although the Hills did not deny that they were actually "served with" a copy of a motion for judgment not withstanding the verdict and notice of a hearing on the motion, they complained because it was not sent to them "by registered mail as provided by Rule 21a." *Id*. The court concluded that "prima facie evidence of service" and the appearance and participation of the Hills at the hearing demonstrated that the Brittain's notice by mail was adequate. *Id*. The court explained that the Hills "were in no way prejudiced." *Id*. Moreover, the Hills made "no showing that they were denied any rights or privileges or that had service been proper, assuming it was not, that a different result would have obtained." *Id*. In sum, nothing suggested that the Hills "could or would have made a better showing or presented a stronger case

had they received notice by registered or certified mail rather than by regular mail." *Id*.

Here, likewise, although Dr. Ott complains that neither he nor his attorneys received the Polands' expert report directly from the Polands after they had filed their lawsuit, the Polands' service of the expert report upon Dr. Ott's insurance carrier prior to the filing of their lawsuit, as requested by McLeod, was adequate. Dr. Ott makes no showing of any prejudice. In fact, APMC is presumably fulfilling its duty to defend him.

Relying on rule 21a to fault the Polands for not serving yet another copy of their expert report on Dr. Ott after filing suit not only results in a miscarriage of justice, but actually goes against the very purpose of our rules of civil procedure upon which the panel relies to reach its holding. We are to "liberally" construe the rules because "[t]he proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established rules of substantive law." TEX. R. CIV. P. 1. The general commentary to rule 1 expressly warns:

> Any procedural device or rule therefore, which impedes the investigation or the evaluation of the facts or the awarding of the just consequences thereon, is incompatible with an ideal procedure. No mere rule of procedural form or courtesy should be allowed to delay or control the disposition of the litigation upon its merits.
>
> No judgment should ever be rendered in the trial court which is based upon mere procedural technicalities . . . . There is no vested right in

> rules of procedure; much less is there any vested right in procedural errors.

TEX. R. CIV. P. 1-General Commentary-1966 (Vernon 2003). This is especially true when a litigant like Dr. Ott has not shown any prejudice due to receiving the expert report pre-suit.

Nothing in former section 74.351(a) precludes a claimant from serving an implicated physician or health care provider with her expert report and curriculum vitae along with an original petition or prior to the actual filing of such a claim in court in an effort to reach a settlement. When a claimant does serve her expert report on an implicated physician or health care provider along with the filing of her health care liability claims prior to filing those claims in court, then a defendant certainly can object to the report not later than 21 days after being served with the petition. Here, regardless, the plain language of former section 74.351(a) simply does not render untimely the Polands' delivery of their expert's report on APMC upon its request. It certainly does not evidence a legislative intent that a claimant's failure to serve yet another copy of the same expert report after the filing of a claim requires that the trial court dismiss the claim.

The purpose behind the Legislature's requirement of "early expert reports" is not to create a "gotcha"; it is to "stem frivolous suits against health care providers." *Lewis v. Funderburk*, 253 S.W.3d 204, 205 (Tex. 2008). As recently noted by our sister court, in enacting Chapter 74, the Legislature sought to "'(1) reduce excessive

frequency and severity of health care liability claims through reasonable improvements and modifications in Texas insurance, tort, and medical practice systems;' and '(2) decrease the cost of those claims and ensure that awards are rationally related to actual damages.'" *Mokkala v. Mead*, 178 S.W.3d 66, 74 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (quoting Act of June 2, 2003, 78th Leg., R.S. ch. 204, § 10.11(b), 2003 Tex. Gen. Laws 847, 884). In presenting House Bill 4, which included the pertinent language in section 74.351, Representative Joe Nixon, Chair of the House Committee on Civil Practices, explained,

> House Bill 4 . . . is designed to *promote fairness and efficiency* in civil lawsuits, *protect Texas citizens and Texas courts from abusive litigation tactics*, remove incentives in the system that are causing unwarranted delay and expense. House Bill 4—its purpose is to restore the needed balance in our court system so that it can operate more efficiently and more fairly and less costly.

Id. (citing *Hearings on Tex. H.B. 4 Before the House Comm. on Civil Practices*, 78th Leg., R.S. 1 (Feb. 26, 2003) (statement of Rep. Nixon) (transcript available from Capitol Research Services, Austin, Texas)) (emphasis added). Representative Nixon emphasized that "the hard reality is we just need to make a *hard and fast deadline, like we do on statue [sic] of limitations*—as we do on other requirements." *Id*. (citing Debate on Tex. H.B. 4 on the Floor of the House, 78th Leg., R.S. 317 (March 19, 2003) (statement of Rep. Nixon) (transcript available from Capitol Research Services, Austin, Texas)) (emphasis added)).

Here, not only did the Polands meet former section 74.351(a)'s deadline, they,

by providing, upon the direct request of McLeod, APMC with the expert report of Dr. Moritz prior to filing their health care liability claims, essentially placed all of their cards on the table to effectuate an early settlement of the case. As noted by the trial court when addressing the Polands' attorneys at the hearing on the motion to dismiss:

> What I will do is I will issue an order one way or the other. . . . Because this issue needs to be decided. Because lawyers usually don't do what you have done. And *I feel like plaintiffs were attempting to do what the statute attempts to require of them*. And usually the case is plaintiffs are trying to do the least, and defendants file a motion to dismiss in that situation.

(Emphasis added.)

Dismissing the Polands' claims with prejudice and making them pay the attorney's fees of Dr. Ott under these circumstances constitutes a misapplication of former section 74.351(a). In doing so, the panel misinterprets the plain language of the statute and goes against its purpose to stem frivolous lawsuits against health care providers while promoting fairness and efficiency in such lawsuits.

Certainly, a health care liability claimant's certification of compliance with rule 21a in delivering an expert report to a defendant doctor or health care provider would entitle the claimant to "a presumption of delivery" of the report. However, the bottom line is that the claimant need not rely on such "a presumption of delivery" after the defendant's attorney acknowledges that the defendant "was served with it."[4]

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[4] As noted above, when the trial court, during the hearing on Dr. Ott's motion to dismiss, asked all of the defendants present, "[W]ho got the report beforehand?"

Accordingly, this panel's statement in the instant case that former section 74.351(a) implicitly incorporates the requirements of rule 21a and the panel's statement in *Gutierrez* that "proper service under rule 21a must occur to effectuate the intent of Chapter 74 as a whole, and section 74.351 specifically" are in serious error. *See Poland*, No. 01-07-00199-CV, 2008 WL _____, at *__ ; *Gutierrez*, 237 S.W.3d at 873.

Counsel for Dr. Ott answered:

> Dr. Ott received it through—*he was served with it* through his carrier, presuit notification.

(Emphasis added.) Again, this fulfilled the direct request of Dr. Ott's insurance carrier, which, presumably, had a duty to defend him.

Conclusion

In sum, the En Banc Court should hold that the Polands timely served Dr. Ott with the health care liability expert report of Dr. Moritz, sustain their sole issue, and remand the case to the trial court for further proceedings. Moreover, the En Banc Court should overrule this Court's holding in *Gutierrez* that "proper service under rule 21a must occur to effectuate the intent of Chapter 74 as a whole, and section 74.351 specifically." *Gutierrez*, 237 S.W.3d at 873. Accordingly, I respectfully dissent from the denial of en banc consideration of the case.

Terry Jennings
Justice

Panel consists of Justices Taft, Keyes, and Alcala.

Appellants moved for rehearing to the panel and for en banc reconsideration to the Court. *See* TEX. R. APP. P. 49.1, 49.7.

The panel denied the motion for rehearing addressed to it, leaving pending the motion for en banc reconsideration, which maintained the Court's plenary power over the case. *See* TEX. R. APP. P. 19.1, 49.3.

During the pendency of the motion for en banc reconsideration, the Court *sua sponte* withdrew its opinion and judgment issued January 31, 2008, thus rendering moot the motion for en banc reconsideration. *Cf. Brookshire Brothers, Inc. v. Smith*, 176 S.W.3d 30, 41 n.4 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (op. on reh'g).

After the Court's withdrawal of its January 31, 2008 opinion and judgment, during the pendency of the Court's plenary power over the case, and before another opinion and judgment had issued in the case, en banc consideration was requested from within

the Court. *See* TEX. R. APP. P. 41.2(c).

Chief Justice Radack and Justices Taft, Nuchia, Jennings, Keyes, Alcala, Hanks, Higley, and Bland, participated in the vote to determine en banc consideration.

A majority of the Justices of the Court voted to deny en banc consideration. *See id.*

Justice Taft, concurring in the denial of en banc consideration. *See* TEX. R. APP. P. 47.5.

Justice Jennings, joined by Justice Bland, dissenting from the denial of en banc consideration. *See id.*