

Opinion issued October 8, 2009



In The
Court of Appeals
For The
First District of Texas

NO. 01-07-00810-CV

**SHOWBIZ MULTIMEDIA, LLC; SHOWBIZ MULTIMEDIA
ENTERTAINMENT, LLC; AND VINAY KARNA, Appellants**

V.

**MOUNTAIN STATES MORTGAGE CENTERS, INC.; REMINGTON
FINANCIAL GROUP, INC; AND MATTHEW McMANUS, Appellees**

**On Appeal from the 387th Judicial District Court
Fort Bend County, Texas
Trial Court Cause No. 04-CV-135299**

CONCURRING OPINION

The Majority Opinion is understandable in its dutiful obeisance to the per curiam opinion of the Texas Supreme Court in *Living Centers of Texas, Inc. v. Peñalver*, 256 S.W.3d 678 (Tex. 2008). Because I find the approach of the majority opinion of the Fourth Court of Appeals in *Living Centers of Texas, Inc. v. Peñalver*, 217 S.W.3d 44 (Tex. App.—San Antonio 2006), *rev'd*, 256 S.W.3d 678 (Tex. 2008) to be more sound, I respectfully concur.

The majority opinion of the Fourth Court of Appeals followed the prevailing standard of review and analyzed the claim of incurable error in jury argument by viewing the argument in light of the entire record. *Id.* at 51. The per curiam opinion of the Texas Supreme Court relied on the leading case of *Standard Fire Insurance Co. v. Reese*, 584 S.W.2d 835 (Tex. 1979) for several propositions. *See Peñalver*, 256 S.W.2d at 680–81. When it came to the standard of review, however, it ignored the standard of looking at the whole record and chose instead, without citing any authority, to expressly reject the general harmless error analysis. *Id.* at 681.

The problem that I see in rejecting a general harmless error analysis that includes viewing the complained-of argument in the context of the record of the trial as a whole is that it devolves into a question of whether the argument in isolation shocks the particular panel of justices making the

call. Accordingly, I urge the Texas Supreme Court to reconsider its per curiam opinion in *Peñalver* with a view toward returning this area of the law to its more objective precedent.

Tim Taft
Justice

Panel consists of Justices Bland, Sharp, and Taft. ¹

Justice Taft, concurring.

¹ The Honorable Tim Taft, retired Justice, Court of Appeals for the First District of Texas, participating by assignment in a case submitted prior to his retirement on May 31, 2009.