

Opinion issued November 2, 2021.



In The
Court of Appeals
For The
First District of Texas

NO. 01-20-00669-CV

HELEN MAYFIELD, Appellant

V.

RICHARD WORTHEN AND COMERICA BANK, Appellees

**On Appeal from the 157th District Court
Harris County, Texas
Trial Court Case No. 2019-70163**

MEMORANDUM OPINION

Appellant Helen Tyne Mayfield appeals the trial court's order granting summary judgment in favor of appellee Comerica Bank and denying her motion for summary judgment. She also attempts to appeal from an interlocutory order denying

her motion to dismiss appellee Richard Worthen's counterclaims, sanctioning Mayfield, and awarding Worthen his attorney's fees.

We affirm the trial court's final judgment as to Comerica Bank. We deny Mayfield's petition for permission to appeal the interlocutory order.

Background

Helen Tyne Mayfield ("Mayfield") met 81-year-old Richard Worthen ("Worthen") at a local community center where the two played bridge. After learning that Worthen's partner had died, Mayfield approached Worthen and offered to help him with some probate problems. According to Mayfield, Worthen signed a contract in which he agreed to pay her a flat fee of \$25,000 to act as his agent to assist him "in the release and distribution of his [partner's] 401k left to him on her death."¹ Mayfield contends she successfully negotiated a settlement between Worthen and a third party for almost \$700,000. After he received his settlement, Worthen gave Mayfield a check for \$25,000. According to Mayfield, appellee Comerica Bank ("Comerica") refused to cash or deposit the check and then defaced the check and refused to pay. Mayfield claims someone at Comerica told her the bank would not honor the check because Worthen had asked the bank to stop

¹ Mayfield was disbarred from the practice of law on July 31, 2012. *See* https://www.texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=230592.

payment. Mayfield sued Worthen and Comerica after Worthen allegedly refused to pay Mayfield for her services.

A. Worthen

Mayfield sued Worthen for breach of contract and quantum meruit. Worthen counterclaimed for violations of the Deceptive Trade Practices Act, statutory fraud, common law fraud, and fraudulent inducement. Mayfield filed special exceptions, moved to dismiss Worthen's counterclaims under Texas Rule of Civil Procedure 91a, and requested sanctions against Worthen under Rule 13. After a hearing, the trial court overruled Mayfield's special exceptions and denied her motions for dismissal and sanctions.

Mayfield filed another motion seeking dismissal of Worthen's counterclaims under Rule 91a and sanctions under Rule 13. Worthen moved to dismiss the Rule 91a motion, claiming the motion was untimely. He also requested that Mayfield be sanctioned for abuse of process and that he be awarded his attorney's fees. The trial court signed an order denying Mayfield's motion to dismiss and request for sanctions, sanctioning Mayfield \$500 for abuse of process, and awarding Worthen \$500 in attorney's fees. Mayfield filed a notice of appeal challenging the order.

B. Comerica

Mayfield sued Comerica under Texas Business and Commerce Code Section 4.402 for wrongful dishonor of a check. She alleged Comerica violated Section 4.402 by refusing to cash or deposit the \$25,000 check from Worthen.

Comerica filed a motion for summary judgment on Mayfield's claim, asserting her claim failed as a matter of law because only the drawer of a check (Worthen) has the right to assert a wrongful dishonor claim. Mayfield filed a response to Comerica's motion and a crossmotion for summary judgment. She also filed a motion for leave to file a third amended petition raising new claims against Comerica.

The trial court granted Comerica's motion for summary judgment and denied Mayfield's crossmotion for summary judgment.² The trial court then severed Mayfield's claims against Comerica into Cause No. 2019-70163A, styled *Helen Tyne Mayfield v. Comerica Bank*. Mayfield filed an amended notice of appeal.

Mayfield's Appeal Involving Worthen

Worthen asserts we lack jurisdiction over Mayfield's appeal of the trial court's interlocutory order denying Mayfield's Rule 91a motion to dismiss, sanctioning Mayfield for abuse of process, and awarding Worthen attorney's fees. Worthen

² The trial court did not grant Mayfield leave to file her third amended petition. Mayfield does not appear to complain on appeal about the motion for leave.

argues (1) Mayfield does not have a right to an interlocutory appeal of the June 26, 2020 order, and (2) Mayfield’s notice of appeal was late.

A. Standard of Review and Applicable Law

We review questions of appellate jurisdiction de novo. *See Tex. Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 635 (Tex. 2010); *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). This Court has civil appellate jurisdiction over final judgments and only those interlocutory orders specifically authorized as appealable by statute. *See* TEX. CIV. PRAC. & REM. CODE §§ 51.012, 51.014(a); *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). Generally, “[a] judgment is final for purposes of appeal if it disposes of all pending parties and claims in the record.” *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 674 (Tex. 2004) (quoting *Lehmann*, 39 S.W.3d at 195). Interlocutory orders may be appealed only if a statute expressly provides appellate jurisdiction. We must “strictly apply statutes granting interlocutory appeals because they are a narrow exception to the general rule that interlocutory orders are not immediately appealable.” *CMH Homes v. Perez*, 340 S.W.3d 444, 447–48 (Tex. 2011).

Section 51.014(a) of the Civil Practice and Remedies Code identifies when “[a] person may appeal from an interlocutory order of a district court, county court of law, statutory probate court, or county court.” TEX. CIV. PRAC. & REM. CODE § 51.014(a). A party need not secure judicial permission before filing an

interlocutory appeal under Section 51.014(a). Intermediate appellate courts have no discretion to decline to hear such appeals. *Id.* § 51.014(a); *Sabre Travel Int’l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 730 (Tex. 2019).

A party who does not have a right to an interlocutory appeal under Section 51.014(a) may seek approval to file a permissive interlocutory appeal under Section 51.014(d); TEX. R. CIV. P. 168. That section, which governs “permissive interlocutory appeals,” states:

On a party’s motion or on its own initiative, a trial court in a civil action may, by written order, permit an appeal from an order that is not otherwise appealable if:

- (1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and
- (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation.

TEX. CIV. PRAC. & REM. CODE § 51.014(d). “Because a permissive interlocutory appeal is not the norm, we strictly construe Section 51.014(d)’s requirements.” *Orion Marine Constr., Inc. v. Cepeda*, No. 01-18-00323-CV, 2018 WL 3059756, at *1 (Tex. App.—Houston [1st Dist.] June 21, 2018, no pet.) (mem. op.). The trial court’s order “must identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation.” TEX. R. CIV. P. 168.

Section 51.014 (f) further provides:

An appellate court may accept an appeal permitted by Subsection (d) if the appealing party, not later than the 15th day after the date the trial court signs the order to be appealed, files in the court of appeals having appellate jurisdiction over the action an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d). If the court of appeals accepts the appeal, the appeal is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal. The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal.

TEX. CIV. PRAC. & REM. CODE § 51.014(f). Thus, to summarize, to bring a permissive appeal: (1) “on a party’s motion or on its own initiative, the trial court must issue a written order that includes both an interlocutory order that is not otherwise appealable and a statement of the trial court’s permission to appeal th[e] order under Texas Civil Practice and Remedies Code section 51.014(d),” (2) “in this statement of permission, the trial court must identify the controlling question of law as to which there is a substantial ground for difference of opinion and must state why an immediate appeal may materially advance the ultimate termination of the litigation,” (3) after the trial court signs such an order, “the appellant must timely file a petition seeking permission from the court of appeals to appeal,” and (4) “the court of appeals must grant the petition for permission to appeal.” *Hebert v. JJT Const.*, 438 S.W.3d 139, 141 (Tex. App.—Houston [14th Dist.] 2014, no pet.).

A court of appeals has the discretion to accept or deny a permissive interlocutory appeal certified under Section 51.014(d). *Sabre Travel Int’l, Ltd.*, 567

S.W.3d at 731–32 (holding appellate court did not abuse its discretion by issuing one sentence opinion “declin[ing] acceptance of the appeal, citing authority for strictly construing the interlocutory appeals statute”).

B. Analysis

Mayfield does not dispute that there is no final judgment related to Worthen or that she does not have a right bring an interlocutory appeal under Section 51.014(a).³ Rather, Mayfield argues in her reply brief that she filed a permissive interlocutory appeal and that the trial court permitted her to do so under Section 51.014(d).

For Mayfield to bring a permissive appeal, the trial court first had to issue a written order authorizing Mayfield to file a permissive appeal, identifying both the controlling question of law on which there is a substantial ground for difference of opinion and the reasons why an immediate appeal may materially advance the ultimate termination of the litigation. TEX. CIV. PRAC. & REM. CODE § 51.014(d); TEX. R. CIV. P. 168. There is no such order in the appellate record.

Mayfield, who does not dispute the lack of a written order, contends the trial court judge “made the statement [granting Mayfield’s request for a permissive appeal] in open court and allegedly wrote down or made the denial of the immediate

³ Mayfield does not identify the statute purportedly authorizing her interlocutory appeal in her brief.

payment [of sanctions] because [the trial court judge] was allowing the interlocutory appeal in writing or on the docket sheet.” Mayfield is referring to the September 3, 2020 hearing on her motion to clarify the court’s previous orders, including the June 26, 2020 interlocutory order from which she seeks to appeal.

The transcript from the September 3, 2020 hearing does not reflect Mayfield asked the trial court for permission to file an interlocutory appeal of the June 26, 2020 order, or that the trial court understood Mayfield to be requesting such permission under Section 51.014(d). On the contrary, the trial court clarified Mayfield had already “made an attempt to appeal that order,” and there is nothing in the transcript that satisfies the requirements of Section 51.014(d). And even assuming without deciding that a docket entry could satisfy the requirements of Section 51.014(d), there is no docket entry in the record reflecting the trial court authorized Mayfield to file a permissive appeal. TEX. CIV. PRAC. & REM. CODE § 51.014(d); TEX. R. CIV. P. 168. Without a written order reflecting the trial court’s permission, no basis for filing a permissive appeal exists. *See Hebert*, 438 S.W.3d at 142 (discussing requirements of TEX. CIV. PRAC. & REM. CODE § 51.014(d) and TEX. R. CIV. P. 168).

Because Mayfield has not shown the trial court authorized her to file a permissive appeal under Section 51.014(d), we deny Mayfield’s petition for permission to appeal the June 26, 2020 interlocutory order.

Mayfield's Appeal Involving Comerica

Mayfield argues the trial court erred by granting Comerica's motion for summary judgment on her wrongful dishonor claim and denying her crossmotion for summary judgment on her claims against Mayfield for wrongful dishonor and breach of contract.

A. Standard of Review

We review a trial court's ruling on a motion for summary judgment de novo. *Tarr v. Timberwood Park Owners Assoc., Inc.*, 556 S.W.3d 274, 278 (Tex. 2018); *Texan Land & Cattle II, Ltd. v. ExxonMobil Pipeline Co.*, 579 S.W.3d 540, 542 (Tex. App.—Houston [14th Dist.] 2019, no pet.). To prevail on a traditional motion for summary judgment, the movant must show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). If the movant produces evidence that establishes his right to summary judgment, then the burden of proof shifts to the nonmovant to present evidence sufficient to raise a fact issue. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). If a summary judgment movant fails in his initial burden, the nonmovant need not respond. *See Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511–12 (Tex. 2014). We consider the evidence in the light most favorable to the nonmovant, indulging every reasonable inference and

resolving any doubts in the nonmovant's favor. *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

When both parties move for summary judgment on overlapping issues and the trial court grants one motion and denies the other, we consider the summary judgment evidence presented by both sides, determine all questions presented, and, if we determine the trial court erred, render the judgment the trial court should have rendered. *Tarr*, 556 S.W.3d at 278; *Texan Land & Cattle II*, 579 S.W.3d at 542.

B. Analysis

The Uniform Commercial Code (“UCC”) is a comprehensive set of laws governing commercial transactions. Its purpose is to achieve substantial uniformity of commercial laws across state lines for business activities and transactions. When reviewing a uniform act such as the UCC, we construe the act to effect its general purpose and to make uniform the law of the states that have enacted it. *See Equistar Chems., LP v. ClydeUnion DB, Ltd.*, 579 S.W.3d 505, 517 (Tex. App.—Houston [14th Dist.] 2019, pet. denied) (citing *1/2 Price Checks Cashed v. United Auto. Ins. Co.*, 344 S.W.3d 378, 391 & n.29 (Tex. 2011)); *see also* TEX. GOV'T CODE § 311.028 (“A uniform act included in a code shall be construed to effect its general purpose to make uniform the law of those states that enact it.”).

The Texas version of the UCC is codified in the Texas Business and Commerce Code. *See* TEX. BUS. & COM. CODE § 1.101 (“This title may be cited as

the Uniform Commercial Code.”). Opinions construing UCC provisions from courts in other jurisdictions are persuasive authority we can consider when interpreting similar provisions under the Texas UCC. *1/2 Price Checks Cashed*, 344 S.W.3d at 391 & n.29 (considering cases from other jurisdictions when interpreting Texas UCC).

Relevant to this appeal, Section 4.402 of the Texas Business and Commerce Code provides that

- (a) Except as otherwise provided by this chapter, a payor bank wrongfully dishonors an item if it dishonors an item that is properly payable, but a bank may dishonor an item that would create an overdraft unless it has agreed to pay the overdraft.
- (b) A payor bank is liable to its *customer* for damages proximately caused by the wrongful dishonor of an item. Liability is limited to actual damages proved and may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.
- (c) A payor bank’s determination of the *customer’s* account balance on which a decision to dishonor for insufficiency of available funds is based may be made at any time between the time the item is received by the payor bank and the time that the payor bank returns the item or gives notice in lieu of return, and no more than one determination need be made. If, at the election of the payor bank, a subsequent balance determination is made for the purpose of reevaluating the bank’s decision to dishonor the item, the account balance at that time is determinative of whether a dishonor for insufficiency of available funds is wrongful.

TEX. BUS. & COM. CODE § 4.402 (emphasis added). Under Section 4.402(b), a payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. The term “customer,” as used in Section 4.402, is defined as “a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank.” *Id.* § 4.104(a)(5). This definition applies “unless the context otherwise requires.” *Id.* § 4.104(a).

Mayfield argues her claims against Comerica are viable because she has an account with Comerica. She argues that because she has an account with Comerica, she is a “customer” and thus she has a viable cause of action against the bank under Section 4.402(b). She also argues she is a third-party beneficiary under Worthen’s contract with Comerica, which status gives her the right to sue Comerica.

The opinion in *Henry v. Bank of America Corporation*, No. C 09-00628 CRB, 2009 WL 10659499 (N.D. Cal., Apr. 17, 2009) is instructive. In that case, Sharon Henry (“Henry”), a Bank of America customer, tried to deposit a check from Kathleen Wilkinson (“Wilkinson”), drawn on Wilkinson’s account with Bank of America. *Henry*, 2009 WL 10659499, at *1. After Bank of America refused to honor the check, Henry sued Bank of America for wrongful dishonor of a payable item under California Commercial Code § 4.402, which is the equivalent of Texas UCC Section 4.402.

Henry argued she had a cause of action against Bank of America because aside from being the payee of a wrongfully dishonored check, she was also a customer of the payor bank. *Id.* at *3. Like Mayfield does here, Henry argued that a payee has a claim against a payor bank under Section 4.402 if the payee, like the drawer, is also a customer of the payor bank. *Id.* The court rejected Henry’s claim, holding there is no authority supporting the proposition that a payee customer can assert a claim against a bank for wrongful dishonor of a check. *Id.* The court explained

the reason for granting a cause of action to a drawer of a dishonored check is to give the [drawer] a remedy in the event that her bank fails to make good on its obligations to pay checks drawn by her . . . Granting a cause of action to a payee customer for wrongful dishonor would be irrelevant to this purpose and would abrogate the traditional rule that a check’s payee has no claim on the payor bank.⁴

Id.; see also *Nautilus Leasing Servs., Inc. v. Crocker Nat’l Bank*, 147 Cal App. 3d 1023, 1028 (1983) (“[A] drawee bank is not liable to a holder for failure to pay a check, because the check itself is not an assignment of the funds in the drawer’s bank account. The payee’s remedy is against the maker of the check, not against the payer bank.”).

We find the reasoning in *Henry* persuasive. As Comerica points out, the court’s opinion in *Henry* is consistent with other courts and commentaries. See *First*

⁴ Drawee is a legal term used to describe the party that has been directed by the drawer (the person who wrote the check or draft) to pay a certain sum of money to the payee (the person presenting the check or draft). In this case, Comerica is the drawee, Worthen the drawer, and Mayfield the payee.

Am. Nat'l Bank v. Commerce Union Bank, 692 S.W.2d 642, 646 (Tenn. Ct. App. 1985) (holding “payee of the check ... had no right to sue anyone on the dishonored check except the drawer”); *Outdoor Techs. Inc. v. Allfirst Fin. Inc.*, No. 99C-09-151-WTQ, 2000 WL 141275, at *4 (Del. Super. Ct. Jan. 24, 2000) (holding payee has no cause of action against payor bank for wrongful dishonor, including alleged third-party beneficiaries); *C & K Petroleum Prods., Inc. v. Equibank*, 839 F.2d 188, 191 (3rd Cir. 1988) (holding payee lacks standing to sue bank for improper dishonor of check because only drawer has standing to bring suit against bank for wrongful dishonor of its checks); *see also generally* 6C Anderson U.C.C. § 4-402:56 (3d. ed.) (“By the express provision of UCC § 4-402, the bank’s liability for wrongful dishonor runs only to the customer of the bank. By necessary implication, no wrongful dishonor liability runs from the bank to the payee of the dishonored instrument.”). Thus, consistent with *Henry*, we hold that although Mayfield has an account with Comerica, she does not qualify as a “customer” under Section 4.402 for purposes of a wrongful dishonor claim because Mayfield is the payee, not the drawer of the dishonored check. *See Henry*, 2009 WL 10659499, at *3.

Even if Mayfield were a third-party beneficiary to Worthen’s contract with Comerica, an issue we do not decide, Mayfield still would not have a cause of action against Comerica for wrongful dishonor of a check. The UCC precludes Mayfield’s claim against the bank under Section 4.402. One of the policy reasons behind this

section of the UCC is to “guide the relationship between a payor bank and its customers” by delineating the obligations and liabilities between these parties. It does not go any further. *See Outdoor Techs. Inc.*, 2000 WL 141275, at *4 (indicating provisions and policy of U.C.C., as supported by sections 4-402 and 3-408, is to guide scope of relationship between banks and customers); *see also Associated Home & RV Sales, Inc. v. Bank of Belen*, 2013-NMCA-018, ¶ 8, 294 P.3d 1276, 1279 (“Article 4 of the UCC sets up a liability scheme and set of defenses to guide the relationship between a payor bank and its customers.”). Mayfield cannot circumvent the provisions of Section 4.402 by asserting a common-law claim against the bank under a third-party beneficiary theory. *See Outdoor Techs. Inc.*, 2000 WL 141275, at *4 (“[Given the provisions and the policy of the UCC . . . that the bank is only liable ‘to its customer’ for wrongful dishonor, the UCC provisions override any third-party beneficiary claim.”). Mayfield’s only recourse is against Worthen.

Mayfield also argues Comerica is liable to her, individually, because she is Worthen’s agent and has his power of attorney. Even if that were so, the same result would ensue. “A power of attorney is a written instrument by which one person, the principal, appoints another person, the attorney-in-fact, as agent and confers on the attorney-in-fact the authority to perform specified acts on behalf of the principal.” *Comerica Bank-Tex. v. Tex. Commerce Bank Nat. Ass’n*, 2 S.W.3d 723, 725 (Tex. App.—Texarkana 1999, pet. denied). As Worthen’s agent, Mayfield would have

been acting on behalf of Worthen and therefore the bank's obligation would be to Worthen, not Mayfield in her individual capacity.

Mayfield also argues the trial court erred by denying her motion for summary judgment against Comerica on her breach of contract claim. Mayfield did not state a claim for breach of contract against Comerica in her live pleading and the court did not grant her leave to file her third amended petition stating a claim for breach of contract against the bank. The trial court thus did not err by denying Mayfield's crossmotion for summary judgment. *See Hartford Fire Ins. Co. v. C. Springs 300, Ltd.*, 287 S.W.3d 771, 779 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (“A trial court cannot enter judgment on a theory of recovery not sufficiently set forth in the pleadings or otherwise tried by consent.”).

We overrule Mayfield's issues challenging the trial court's order granting Comerica's motion for summary judgment and denying Mayfield's crossmotion for summary judgment.

Motion to Strike Jury Demand

Before moving for summary judgment, Comerica moved to strike Mayfield's jury demand. Comerica argued Mayfield had voluntarily, intentionally, and knowingly waived her right to a trial by jury because the Business and Personal Deposit Account Contract Mayfield signed when she opened an account with

Comerica contains a jury trial waiver. The trial court granted Comerica's motion to strike.

Mayfield argues the trial court erred by granting Comerica's motion to strike her jury demand. Because we have determined the trial court did not err in granting Comerica's motion for summary judgment, we need not address this issue. *See* TEX. R. APP. P. 47.1 (requiring appellate court to address only issues necessary to final disposition of appeal). Doing so would lead to an impermissible advisory opinion. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (courts have no jurisdiction to issue advisory opinions).

Mayfield's Other Appellate Issues

Mayfield also argues there are issues with the appellate record that require reversal and a new trial. She contends the court reporter did not record a March 13, 2020 hearing in this case, even though the reporter recorded other hearings that day.⁵ She also alleges the trial court judge or clerk violated the law by removing "exhibits from the Motions and the records" in an attempt "to obtain a favorable trial and appellate ruling on the part of the court or the parties."⁶ Mayfield does not identify any missing exhibits or records in this portion of her brief or provide any other

⁵ There is no reference to a March 13, 2020, hearing in the record.

⁶ Mayfield argues we "should investigate where the loss of the exhibits occurred and act accordingly" or "determine whether the loss of the record entitles [Mayfield] to a new trial." This court does not have the authority to "investigate" alleged criminal misconduct.

information about the hearing which would allow us to assess the harmfulness of any error, including whether it was an evidentiary hearing. Mayfield also does not explain how the lack of the hearing record or the alleged missing exhibits caused the rendition of an improper judgment or prevented her from properly presenting her case to this Court. *See* TEX. R. APP. P. 44.1(a) (“No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of: (1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the case to the court of appeals.”). Based on the record before us, we cannot say that any of the alleged errors Mayfield identified were harmful. *See id.* We overrule Mayfield’s remaining appellate issues.

Conclusion

We affirm the trial court’s final judgment as to Comerica Bank. We deny Mayfield’s petition for permission to appeal the June 26, 2020, interlocutory order.

Veronica Rivas-Molloy
Justice

Panel consists of Justices Hightower, Rivas-Molloy, and Guerra.