

**Reversed and Remanded and Majority and Concurring Opinions filed  
January 12, 2016.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-15-00139-CV**

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**HOIST LIFTRUCK MFG., INC., Appellant**

**V.**

**CARRUTH-DOGGETT, INC. D/B/A TOYOTA LIFT OF HOUSTON AND  
TOYOTA LIFT OF SOUTH TEXAS, Appellee**

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**On Appeal from the 270th District Court  
Harris County, Texas  
Trial Court Cause No. 2014-59264**

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**C O N C U R R I N G   O P I N I O N**

Under this court's binding precedent, an appellant need not preserve error to complain on appeal of an injunction-order defect under Texas Rule of Civil Procedure 683. That should change.

**Strong Policy Considerations Underlying the Error-Preservation Rule**

The Supreme Court of Texas has recognized the strong policy considerations

supporting the preservation-of-error requirement.<sup>1</sup> A timely and specific complaint alerts the trial court and the adversary to the alleged error, giving both an opportunity to fix the problem and thereby avert the need to raise the issue on appeal.<sup>2</sup> Requiring error preservation avoids unfairness, gives deference to the trial court, and encourages the proper administration of justice by having the parties and the trial court focus the issues before they reach the appellate level.<sup>3</sup> In this way, the error-preservation rule fosters efficient resolution of disputes, saves time and money, and conserves judicial resources.<sup>4</sup> Requiring parties to preserve error also discourages “lying behind the log” and other forms of gamesmanship.<sup>5</sup> For these and other reasons, as a general policy matter, Texas appellate courts will not review non-jurisdictional complaints raised for the first time on appeal.<sup>6</sup> Yet, most Texas courts of appeals — including this one — do not apply the error-preservation rule to defects in temporary-injunction orders.

### **The Injunction-Order Exception**

Texas Rule of Civil Procedure 683, which governs the form and scope of injunctions and temporary restraining orders, requires the trial court to set forth the reasons for issuance in the temporary-injunction order.<sup>7</sup> The trial court in today’s case failed to do so. The appellant, who stood silent in the trial court, now points to the Rule 683 defect and argues that this court must dissolve the temporary

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<sup>1</sup> *See Mansions in the Forest, L.P. v. Montgomery County*, 365 S.W.3d 314, 317 (Tex. 2012) (per curiam).

<sup>2</sup> *See id.*

<sup>3</sup> *See id.*

<sup>4</sup> *See id.*

<sup>5</sup> *See id.*

<sup>6</sup> *See id.*

<sup>7</sup> Tex. R. Civ. P. 683.

injunction based on this defect.<sup>8</sup> The Supreme Court of Texas has not expressly addressed whether a party must preserve error in the trial court when a temporary-injunction order does not comply with Rule 683. But, nearly three decades ago, this court concluded a party need not preserve error to assert a Rule 683 defect on appeal.<sup>9</sup> Bound by this precedent,<sup>10</sup> the majority can hardly be faulted for not requiring error preservation in today's case.<sup>11</sup> Yet, the injunction-order exception to the error-preservation requirement itself is an easy target for criticism because it swells the time and expense of litigation for no apparent purpose. The need for change and the split of authority among the intermediate courts of appeals cries out for supreme-court review.

### **The Split of Authority in the Courts of Appeals**

Of the fourteen intermediate courts of appeals, the Eleventh is the only one that has not addressed the Rule 683 error-preservation issue. Like this court,<sup>12</sup> the First,<sup>13</sup> Second,<sup>14</sup> Fourth,<sup>15</sup> Fifth,<sup>16</sup> Sixth,<sup>17</sup> Eighth,<sup>18</sup> Ninth,<sup>19</sup> Tenth,<sup>20</sup> Twelfth,<sup>21</sup>

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<sup>8</sup> *See id.*

<sup>9</sup> *See Higginbotham v. Clues*, 730 S.W.2d 129, 129 (Tex. App.—Houston [14th Dist.] 1987, no writ).

<sup>10</sup> But for the *Higginbotham* precedent, this separate writing would be a dissenting opinion.

<sup>11</sup> Though the majority does not mention that the appellant failed to preserve error on this issue, the majority does not dispute it.

<sup>12</sup> *Higginbotham*, 730 S.W.2d at 129.

<sup>13</sup> *Courtland Place Historical Found. v. Doerner*, 768 S.W.2d 924, 926 (Tex. App.—Houston [1st Dist.] 1989, no writ).

<sup>14</sup> *Big D Props., Inc. v. Foster*, 2 S.W.3d 21, 23 (Tex. App.—Fort Worth 1999, no pet.).

<sup>15</sup> *Hopper v. Safeguard Bus. Sys., Inc.*, 787 S.W.2d 624, 626 (Tex. App.—San Antonio 1990, no writ).

<sup>16</sup> *Bayoud v. Bayoud*, 797 S.W.2d 304, 313 (Tex. App.—Dallas 1990, writ denied).

<sup>17</sup> *360 Degree Commc'ns. Co. v. Grundman*, 937 S.W.2d 574, 575 (Tex. App.—Texarkana 1996, no writ).

<sup>18</sup> *Fasken v. Darby*, 901 S.W.2d 591, 593 (Tex. App.—El Paso 1995, no writ).

and Thirteenth<sup>22</sup> hold that a party need not preserve error on a complaint that a temporary-injunction order does not comply with Rule 683. The other two, the Third<sup>23</sup> and the Seventh,<sup>24</sup> though representing the minority view, hold the sounder position — that a party must preserve error in the trial court to raise a Rule 683 defect on appeal.

In deciding the issue, virtually all of the courts of appeals rely on the Supreme Court of Texas’s decision in *InterFirst Bank San Felipe, N.A. v. Paz Construction Company*, a per curiam opinion in which the high court held that Rule 683’s requirements must be followed strictly and that a temporary-injunction order that does not comply is “subject to” being declared void and dissolved.<sup>25</sup> The *InterFirst* court declared the temporary-injunction order before it void and ordered the injunction dissolved.<sup>26</sup> The supreme court revisited the *InterFirst* holding in deciding *Qwest Communications Corporation v. AT & T Corporation*.<sup>27</sup> Noting that Rule 683’s requirements are procedural in nature, the supreme court reaffirmed that a temporary-injunction order with a Rule 683 defect is “subject to” being declared void and dissolved.<sup>28</sup> The *Qwest* court also noted that a trial court’s

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<sup>19</sup> *Int’l Bhd. of Elec. Workers Local Union 479 v. Becon Const. Co., Inc.*, 104 S.W.3d 239, 243 (Tex. App.—Beaumont 2003, no pet.).

<sup>20</sup> *Crenshaw v. Chapman*, 814 S.W.2d 400, 402 (Tex. App.—Waco 1991, no writ).

<sup>21</sup> *Evans v. Woods*, 34 S.W.3d 581, 583 (Tex. App.—Tyler 1999, no pet.).

<sup>22</sup> *Mann v. Aguirre*, No. 13-08-746-CV, 2010 WL 337161, at \*2 (Tex. App.—Corpus Christi Jan. 28, 2010, no pet.) (mem. op.).

<sup>23</sup> *See Emerson v. Fires Out, Inc.*, 735 S.W.2d 492, 493 (Tex. App.—Austin 1987, no writ).

<sup>24</sup> *Texas Tech Univ. Health Sciences Ctr. v. Rao*, 105 S.W.3d 763, 768 (Tex. App.—Amarillo 2003, pet. dismiss’d).

<sup>25</sup> 715 S.W.2d 640, 641 (Tex. 1986) (per curiam).

<sup>26</sup> *Id.*

<sup>27</sup> *See* 24 S.W.3d 334, 337 (Tex. 2000) (per curiam).

<sup>28</sup> *Id.*

failure to comply with Rule 683 does not deprive the appellate court of subject matter jurisdiction over an appeal from the temporary-injunction order.<sup>29</sup>

Notably, in neither *InterFirst* nor *Qwest* did the Supreme Court of Texas say it was addressing the issue of error preservation.<sup>30</sup> Yet, some courts of appeals — including this court — appear to read *InterFirst* as holding that temporary-injunction orders that do not meet Rule 683’s requirements are void ab initio and therefore deprive courts of subject-matter jurisdiction.<sup>31</sup> Interestingly, other courts of appeals cite the *InterFirst* case as a reason a party must preserve error, but they do not explain why *InterFirst* mandates that result.<sup>32</sup> In 1987, this court held a party need not preserve error, but did not explain that holding either.<sup>33</sup> The answer to the error-preservation quandary is rooted in the supreme court’s characterization and treatment of Rule 683 errors.

### **Characterization and Treatment of Rule 683 Errors**

By emphasizing that Rule 683 defects are procedural and not jurisdictional, the high court has signaled that complaints based on Rule 683 defects — like nearly every other non-jurisdictional error — must be preserved in the trial court.<sup>34</sup> It would be a blue-moon event for the Supreme Court of Texas to create an exception to the error-preservation requirement for a procedural defect.<sup>35</sup>

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<sup>29</sup> *Id.*

<sup>30</sup> See *Qwest Comm. Corp.*, 24 S.W.3d at 337; *InterFirst*, 715 S.W.2d 640–41.

<sup>31</sup> See *Helix Energy Sol. Grp., Inc. v. Howard*, 452 S.W.3d 40, 44–45 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Mann*, 2010 WL 337161, at \*2; *Becon*, 104 S.W.3d at 243; *Fasken*, 901 S.W.2d at 593.

<sup>32</sup> See *Evans*, 34 S.W.3d at 582–83; *Big D Props., Inc.*, 2 S.W.3d at 23.

<sup>33</sup> See *Higginbotham*, 730 S.W.2d at 129.

<sup>34</sup> See *Qwest Comm. Corp.*, 24 S.W.3d at 337–38.

<sup>35</sup> See *Mansions in the Forest, L.P. v. Montgomery County*, 365 S.W.3d 314, 316–18 (Tex. 2012) (per curiam) (holding that no exception should be made to the normal preservation-of-error

Although most courts of appeals seem to have concluded *InterFirst* holds that temporary-injunction orders that do not meet Rule 683's requirements must be declared void even absent error preservation, the true teaching of *InterFirst* and *Qwest* is that temporary-injunction orders that do not meet Rule 683's requirements are merely avoidable.<sup>36</sup> The distinction is critical.

The supreme court did not say that orders not meeting Rule 683's requirements are to be reversed or dissolved.<sup>37</sup> The high court used the phrase "subject to being declared void," rather than stating that defective temporary-injunction orders are void or void ab initio.<sup>38</sup> Most telling is the supreme court's crucial classification of a Rule 683 error as procedural and not jurisdictional.<sup>39</sup>

If the *InterFirst* court instead had characterized the Rule 683 defect as jurisdictional, it would make sense to read *InterFirst* as mandating that a party need not preserve error on the defect.<sup>40</sup> Likewise, if the *InterFirst* court had held the temporary-injunction order were void ab initio and subject to collateral attack, it would make sense to conclude that *InterFirst* absolves parties from preserving error in the trial court.<sup>41</sup> But, the *InterFirst* court did neither. *InterFirst* tells us

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requirements for a complaint that a purported affiant was "no affidavit at all" because the signatory did not swear to the statements in the "affidavit").

<sup>36</sup> See *id.*; *InterFirst*, 715 S.W.2d 640–41. See also, *Roccaforte v. Jefferson Cnty.*, 341 S.W.3d 919, 923 (Tex. 2011); *In the Interest of M.L.G.J.*, 14-14-00800-CV, 2015 WL 1402652, at \*3 (Tex. App.—Houston [14th Dist.] Mar. 24, 2015, no pet.) (mem. op) (noting errors that make a judgment avoidable are subject to waiver and must be preserved).

<sup>37</sup> See *Qwest Comm. Corp.*, 24 S.W.3d at 337–38; *InterFirst*, 715 S.W.2d 640–41.

<sup>38</sup> See *Qwest Comm. Corp.*, 24 S.W.3d at 337–38; *InterFirst*, 715 S.W.2d 640–41.

<sup>39</sup> See *Qwest Comm. Corp.*, 24 S.W.3d at 337–38; *State ex rel. Latty v. Owens*, 907 S.W.2d 484, 485 (Tex. 1995) (noting that "mere failure to follow proper procedure will not render a judgment void").

<sup>40</sup> See *City of Houston v. Rhule*, 417 S.W.3d 440, 442 (Tex. 2013).

<sup>41</sup> *State ex rel. Latty*, 907 S.W.2d at 485; *Gainous v. Gainous*, 219 S.W.3d 97, 105–06 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

that the defect is not jurisdictional and not subject to collateral attack.<sup>42</sup>

The courts of appeals that apply the no-preservation rule have not explained why they believe *InterFirst* mandates the conclusion that parties need not preserve error in the trial court.<sup>43</sup> By contrast, the courts of appeals that have reached the opposite conclusion have given sound reasons for requiring error preservation.

### **Rationale for Rejecting the Injunction-Order Exception to the Error-Preservation Rule**

When the Third Court of Appeals held that a party seeking to challenge a temporary-injunction order because it did not meet Rule 683's requirements must preserve error to raise that claim on appeal, the court noted that Rule 683 errors are procedural and characterized a Rule 683 error as a defect in the form of the judgment, echoing the supreme court's holdings in *Interfirst* and *Qwest*.<sup>44</sup> The Seventh Court of Appeals embraced the same reasoning.<sup>45</sup> And, both courts pointed to the core principles underlying the error-preservation requirement.<sup>46</sup>

Texas courts require parties to preserve error for appeal to give the trial court a chance to fix the problem first.<sup>47</sup> Requiring parties to preserve error benefits the judicial process by conserving judicial resources and promoting fairness.<sup>48</sup> Concluding that “principles of sound judicial administration support application of the waiver rule” in this context, the Third Court of Appeals noted that “[i]t serves

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<sup>42</sup> See *Qwest Comm. Corp.*, 24 S.W.3d at 337–38; *InterFirst*, 715 S.W.2d 640–41.

<sup>43</sup> See e.g. *Mann*, 2010 WL 337161, at \*2; *Becon*, 104 S.W.3d at 243; *Fasken*, 901 S.W.2d at 593; *Evans*, 34 S.W.3d at 582–83; *Big D Props., Inc.*, 2 S.W.3d at 23.

<sup>44</sup> See *Emerson*, 735 S.W.2d at 493.

<sup>45</sup> See *Texas Tech Univ. Health Sciences Ctr.*, 105 S.W.3d at 768.

<sup>46</sup> See *id.*; *Emerson*, 735 S.W.2d at 493.

<sup>47</sup> *Burbage v. Burbage*, 447 S.W.3d 249, 258 (Tex. 2014); *Mansions in the Forest, L.P.*, 365 S.W.3d at 317.

<sup>48</sup> *Burbage*, 447 S.W.3d at 258.

no good purpose to permit appellants to lie in wait and present this error in form for the first time on appeal.”<sup>49</sup> Upon proper request, the trial court easily could resolve the Rule 683 error, making appeal on that point unnecessary.<sup>50</sup> Applying the same rationale, the Seventh Court of Appeals noted that a Rule 683 challenge is a challenge in form and agreed there is no good purpose in allowing a party to wait to present the error for the first time on appeal.<sup>51</sup>

The logic for the error-preservation rule should apply with double force in expedited proceedings. Time constraints are more pressing, appellate resources are often strained, and efficiency is especially important. If courts do not incentivize parties to voice their complaints in the first instance, litigants and crafty lawyers almost certainly will succumb to the temptation to sit on their objections. Instead of viewing a Rule 683 error as a defect to be fixed at the first opportunity, they will view it as appellate insurance, and treat the defect as an ace in the pocket, to be tucked away and played as a trump card on appeal. It is time to declare that game over.

### **Conclusion**

There is no justification for the Rule 683 exception to the error-preservation requirement. The issue frequently arises in the courts of appeals,<sup>52</sup> yet it is a question that tends to evade high-court review. In the nearly three decades this issue has been percolating, the supreme court has had few chances to resolve the conflict that divides the state’s intermediate courts. Texas jurisprudence would benefit from a uniform rule that requires parties to temporary-injunction

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<sup>49</sup> *Emerson*, 735 S.W.2d at 494.

<sup>50</sup> *Id.*

<sup>51</sup> *See Texas Tech Univ. Health Sciences Ctr.*, 105 S.W.3d at 768.

<sup>52</sup> *See Helix Energy Sol. Grp., Inc.*, 452 S.W.3d at 45–48 & n.10 (Frost, C.J., concurring).



proceedings to preserve error in the trial court rather than one that permits them to wait until appeal to assert Rule 683 defects. Supreme-court precedent does not mandate absolving parties from error preservation in this context, and there is no good reason to do so.

/s/     Kem Thompson Frost  
          Chief Justice

Panel consists of Chief Justice Frost and Justices Jamison and Busby (Busby, J., majority).