



**Fourth Court of Appeals**  
**San Antonio, Texas**

**DISSENTING OPINION**

No. 04-20-00590-CV

**NORTH CENTRAL BAPTIST HOSPITAL,**  
Appellant

v.

Stacy **CHAVEZ**, Individually and as Next Friend of Minor Children Chavez,  
Appellee

From the County Court at Law No. 10, Bexar County, Texas  
Trial Court No. 2020CV02938  
Honorable Gloria Saldaña, Judge Presiding

Opinion by: Irene Rios, Justice  
Dissenting Opinion by: Luz Elena D. Chapa, Justice

Sitting: Luz Elena D. Chapa, Justice  
Irene Rios, Justice  
Beth Watkins, Justice

Delivered and Filed: March 17, 2021

The majority assumes without deciding the Texas Supreme Court’s emergency orders regarding the COVID-19 state of disaster grant this court discretion to extend the deadline to file a notice of appeal beyond the period specified in Rule 26.3 of the Texas Rules of Appellate Procedure. Nevertheless, the majority declines to exercise its discretion to do so in this case because it concludes “appellant did not file a motion requesting an extension of the deadline,” appellant did not provide a “reasonable explanation” for the late filing, and appellant “was aware of the deadline[,] but consciously chose not to file the notice of appeal until after the trial court

heard the motion for new trial.” Because I disagree with each of these conclusions and believe we have discretion to, and should, extend the deadline to file the notice of appeal under the circumstances of this case, I dissent.

*Appellant Urged a Motion for Extension of Time*

Although the majority recognizes “appellant argues we should modify the deadline to file its notice of appeal,” it faults appellant for not filing “a motion requesting an extension of the deadline to file its notice of appeal” and asserts appellant only “vaguely argues” we should modify the deadline. To the extent the majority’s decision rests upon a distinction between an “argument” that “we should modify the deadline” and a “motion” “requesting an extension of the deadline,” the majority improperly elevates form over substance. *See Higgins v. Randall Cty. Sheriff’s Office*, 257 S.W.3d 684, 688-89 (Tex. 2008); *Verburgt v. Dornier*, 959 S.W.2d 615, 617 (Tex. 1997).

To the extent the majority relies upon a determination that appellant’s request for a modification of the deadline was not explicit or was insufficiently specific, I also disagree. In its response to our show cause order and appellee’s motion to dismiss, appellant first argued its notice of appeal was timely and explained why it believed the trial court’s actions resulted in an extension of the deadline to file the notice of appeal. Then, in a separately numbered paragraph, appellant stated:

9. Alternatively, **if the Court of Appeals finds that the Trial Court did not extend the deadline, the Court is authorized to do so** pursuant to the Texas Supreme Court’s Emergency Order. Given the significant confusion in the proceedings before the Trial Court that resulted from the operational changes implemented to respond to the COVID-19 pandemic, and in light of the longstanding public policy of adjudicating cases on the merits rather than on procedural technicalities, **justice will be served and prejudice to appellant will be avoided by modifying the deadline to file the Notice of Appeal.**

(emphasis added & footnote omitted). I have no difficulty understanding that in this paragraph appellant is asking this court to use the authority granted in the Texas Supreme Court’s emergency

orders to modify the deadline to file appellant's notice of appeal if we find the notice was not timely filed. If the pleading is ambiguous, the ambiguity should be resolved in favor of construing it as a motion for extension of time to file the notice of appeal. *See Hone v. Hanafin*, 104 S.W.3d 884, 888 (Tex. 2003) (we apply "liberal standard" in considering untimely appeal); *Verburgt*, 959 S.W.2d at 616 (stating policy in favor of disposing of appeals on merits and appellate courts should not dismiss appeal for procedural defect when any arguable interpretation of rules would preserve the appeal).

*Appellant Provided a Reasonable Explanation For Late Filing*

Under "ordinary" circumstances, this court will grant an express or implied motion for extension of time to file a notice of appeal that is filed within the fifteen-day grace period in Rule of Appellate Procedure 26.3 if a "reasonable explanation" is provided. *See Hone*, 104 S.W.3d at 886-87. In deciding whether appellant has provided a reasonable explanation, we apply a "liberal standard" under which "[a]ny conduct short of deliberate or intentional noncompliance qualifies as inadvertence, mistake or mischance" and is considered a reasonable explanation. *Id.* (quoting *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 670 (Tex. 1989)) (internal quotation marks omitted). Counsel's confusion about the law and even conduct that may be characterized as professional negligence can be a sufficiently reasonable explanation. *Hone*, 104 S.W.3d at 687; *Nat'l Union Fire Ins. Co. v. Ninth Court of Appeals*, 864 S.W.2d 58, 60 (Tex. 1993); *Garcia*, 774 S.W.2d at 670. Under the circumstances of the current public health emergency, the Texas Supreme Court has granted all Texas courts broad discretion to modify the deadlines in the rules of procedure. *See Haddad v. Tri-Cty. A/C & Heating, LLC*, No. 04-20-00407-CV, 2020 WL 7753988 (Tex. App.—San Antonio Dec. 30, 2020) (dissent to denial of motion for reconsideration en banc; mem. op.); *CBS Stations Grp. of Tex., LLC v. Burns*, No. 05-20-00700-CV, 2020 WL 7065827, at \*2 (Tex. App.—Dallas Dec. 3, 2020, no pet.) (mem. op.). *But see Haddad v. Tri-Cty.*

*A/C & Heating, LLC*, No. 04-20-00407-CV, 2020 WL 5802960, at \*1 n.1 (Tex. App.—San Antonio Sept. 30, 2020, no pet.) (mem. op.) (holding emergency orders do not authorize extension of deadlines for filing notice of appeal). I believe our discretion should be applied in the current circumstances at least as liberally, if not more, as in the “ordinary” circumstances.

Appellant’s response recites that after the July 28, 2020 judgment, appellant filed a timely motion for new trial, which extended the deadline under our rules for filing a notice of appeal. *See* TEX. R. APP. P. 26.1(a)(1). Appellant also recites that under normal circumstances, if not ruled on by the trial court, the motion would be overruled by operation of law seventy-five days after the judgment was signed. TEX. R. CIV. P. 329b(c). Appellant attached the record of the hearing on the motion for new trial. During the hearing, which was held more than seventy-five days after the judgment, the trial judge stated she was invoking the Texas Supreme Court’s emergency orders and exercising her discretion to extend the deadline for ruling on the motion for new trial because of the confusion in the trial court and clerk’s office resulting from the pandemic. Appellant’s response to the show cause order then states:

7. Because the Trial Court held a hearing on the original deadline to file the Notice of Appeal and, during that hearing, expressly extended the deadline for the Court to issue a decision on the Motion for New Trial pursuant to the Texas Supreme Court’s Emergency Order, the deadline to file the notice of appeal was also extended.

8. Accordingly, Appellant’s Notice of Appeal was timely filed on November 30, 2020, less than 30 days from the entry of the Trial Court’s final written order denying the Motion for New Trial on November 3, 2020.

The majority concludes appellant relies on “the fact of the pandemic, standing alone” as his explanation for the late filing. It also concludes that because the response reveals counsel was aware of the actual original deadline for filing the notice of appeal, his failure to file until after the trial court ruled on the motion for new trial was a “conscious or strategic decision” that constituted deliberate or intentional noncompliance. I again disagree.

As explained by the majority, appellant's stated understanding of the rules for calculating the deadline to file a notice of appeal is legally incorrect. The notice of appeal was filed thirty-five days after the deadline established by the Texas Rules of Appellate Procedure and was filed twenty days after the deadline for filing a motion for extension of time. But, however erroneous appellant's understanding of the rules may be, its response did provide an explanation. Appellant never suggests its notice of appeal should be deemed timely simply because there is a pandemic. And the response, which argues the notice was timely filed, clearly reflects that appellant did not intentionally disregard a known deadline. Rather, it reflects a mistaken understanding of the rules regarding the time to file a notice of appeal and an erroneous belief that the trial court's extension of the seventy-five day period for ruling on a motion for new trial further extended the deadline to file the notice of appeal until thirty days after the ruling on the motion. Appellant filed its notice of appeal before the date it believed was the deadline. I would conclude the late filing was the result of appellant's misunderstanding of the law coupled with delays in the trial court caused by the public health emergency. I would hold this is a "reasonable explanation" for the late filing under the Texas Supreme Court's jurisprudence. *See Garcia*, 774 S.W.2d at 670 ("[a]ny conduct short of deliberate or intentional noncompliance" even if it "can also be characterized as professional negligence" is a reasonable explanation).

*This Court Has Discretion to Extend the Deadline to File the Notice of Appeal*

Finally, for the reasons stated in the dissent to the denial of reconsideration en banc in *Haddad v. Tri-County A/C & Heating, LLC*, I would hold the Texas Supreme Court's COVID-19 emergency orders grant this court broad discretion to modify the deadline for filing a notice of appeal. No. 04-20-00407-CV, 2020 WL 7753988 (Tex. App.—San Antonio Dec. 30, 2020) (mem. op.). With exceptions not applicable here, the emergency orders grant "all courts in Texas" broad discretion, "[s]ubject only to constitutional limitations," to "modify or suspend any and all

deadlines and procedures, whether prescribed by statute, rule, or order.” TWENTY-SIXTH EMERGENCY ORDER REGARDING COVID-19 STATE OF DISASTER, 609 S.W.3d 135 (Tex. 2020); TWENTY-NINTH EMERGENCY ORDER REGARDING COVID-19 STATE OF DISASTER, Misc. Docket No. 20-9135 (Tex. Nov. 11, 2020); THIRTY-THIRD EMERGENCY ORDER REGARDING COVID-19 STATE OF DISASTER, Misc. Docket No. 21-9004 (Tex. Jan. 14, 2021). That was true when the notice of appeal was due, when it was filed, when appellant filed its request that we modify the deadline, and it is true now. Because appellant has asked us to modify the deadline for filing a notice of appeal and has provided a reasonable explanation for the late filing, I would exercise that discretion and grant appellant’s motion. I would extend the deadline to file the notice of appeal twenty days beyond the extension allowed by Texas Rule of Appellate Procedure 26.3, deny appellee’s motion to dismiss, and retain this appeal on the docket of the court so it may be decided on the merits.

Luz Elena D. Chapa, Justice