

COURT OF APPEALS OF TEXAS, FOURTH DISTRICT, SAN ANTONIO

David Gillespie and Michael O'Brien v. A.L. Hernden and Frederick R. Zlotucha

Gillespie v. Hernden · No. 04-15-00405-CV · Decided November 19, 2015

SUMMARY

This document is a combined litigation record in David Gillespie and Michael O'Brien v. A.L. Hernden and Frederick R. Zlotucha, arising from a dispute over attorney-client fee arrangements related to oil and gas interests. It includes the plaintiffs' motion to reconsider summary judgment and alternative motion for new trial, a notice of appeal, and subsequent orders from the Texas Fourth Court of Appeals concerning filing fees and the timeliness of the appeal. The underlying claims involve alleged breaches of fiduciary duty, unconscionable attorney-fee agreements, DTPA claims, and declaratory relief.

CASE DETAILS

COURT	Court of Appeals of Texas, Fourth District, San Antonio
WRITING FOR THE COURT	Karen Angelini
JURISDICTION	Texas
DECIDED	November 19, 2015
DOCKET	04-15-00405-CV
DISPOSITION	other
PROCEDURAL POSTURE	Appeal from a final judgment granting the defendants' combined no-evidence and traditional motions for summary judgment. The appellate court addressed the timeliness of the notice of appeal and granted an extension after determining that counsel's explanation for the late filing was reasonable.
STANDARD OF REVIEW	For a late notice of appeal filed within the applicable grace period, the court determines whether the appellant provided a reasonable explanation; any plausible circumstance showing that the failure was inadvertent, mistaken, or the result of mischance rather than deliberate or intentional noncompliance is sufficient.
PRECEDENTIAL VALUE	unclear

PARTIES

David Gillespie, Michael O'Brien v. A.L. Hernden, Frederick R. Zlotucha

TOPICS

appellate procedure

summary judgment

motion for new trial

unconscionability

contracts

PRACTICE AREAS

civil procedure

appellate procedure

contracts

commercial litigation

oil and gas

minerals

QUESTIONS PRESENTED

1. Whether a notice of appeal filed within the fifteen-day grace period but after the ordinary deadline may be treated as timely when the appellant provides a reasonable explanation for the delay.
2. Whether counsel's statement that competing professional deadlines caused an inadvertent failure to file the notice of appeal constitutes a reasonable explanation under Texas Rule of Appellate Procedure 26.3.
3. Whether the appeal should remain on the appellate docket after the late notice of appeal was accepted.

HOLDINGS

1. When a notice of appeal is filed within the fifteen-day grace period under Texas Rule of Appellate Procedure 26.3, a motion for extension is implied, but the appellant must provide a reasonable explanation for the late filing.
2. A plausible explanation that the failure to file was inadvertent, mistaken, or the result of mischance, rather than deliberate or intentional noncompliance, qualifies as a reasonable explanation.

KEY QUOTATIONS

“ “[A]ny plausible statement of circumstances indicating that failure to file . . . was not deliberate or intentional, but was the result of inadvert[e]nce, mistake, or mischance, [would] be accepted as a reasonable explanation.” ”

“Any conduct short of deliberate or intentional noncompliance qualifies as inadvertence, mistake or mischance, even if that conduct can also be characterized as professional negligence.”

FACTUAL BACKGROUND

The underlying dispute arose from attorney-client representation concerning an alleged partnership and oil and gas interests in McMullen County, Texas. Plaintiffs alleged that their attorneys breached fiduciary duties and entered into unreasonable or unconscionable fee arrangements involving interests in the claim or recovered property. The trial court rendered summary judgment for the defendants, and the plaintiffs sought appellate review.

PROCEDURAL HISTORY

The Bexar County district court entered final judgment on April 2, 2015, after granting summary judgment for A.L. Hernden and Frederick R. Zlotucha. David Gillespie filed a motion for new trial on May 1, 2015, and a notice of appeal on July 3, 2015, two days after the July 1 deadline. The Fourth Court of Appeals ordered an explanation for the late filing, accepted counsel's inadvertence caused by competing deadlines as reasonable, granted an extension, and retained the appeal on its docket. Michael O'Brien later filed an amended notice of appeal, and the defendants filed an alternative notice of cross-appeal.

DISPOSITION

other

CASES CITED

- Old Republic Ins. Co. v. Scott, 846 S.W.2d 832, 833 (Tex. 1993)
- Hoover Slovacek LLP v. Walton, 206 S.W.3d 557, 560, 562-63 (Tex. 2006)
- Lopez v. Munoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 868 (Tex. 2000)
- Anglo-Dutch Petroleum International, Inc. v. Greenberg Peden, P.C., 952 S.W.3d 445, 450 (Tex. 2011)
- Brown v. Green, 2009 WL 4573451, at *4 (Tex. App.—Houston [14th Dist.] 2009, no pet.)
- Walker v. Morgan, 2009 WL 3763779, at *2-*3 (Tex. App.—Beaumont 2009, no pet.)
- Levine v. Bayne, Snell & Krause, Ltd., 40 S.W.3d 92, 95-96 (Tex. 2001)
- Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 205 (Tex. 2002)
- Bocquet v. Herring, 972 S.W.2d 19, 21 (Tex. 1998)
- Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997)
- SkiRiver Dev., Inc. v. McCalla, 167 S.W.3d 121, 136 (Tex. App.—Waco 2005, pet. denied)
- Pony Express Courier Corp. v. Morris, 921 S.W.2d 817, 820-21 (Tex. App.—San Antonio 1996, no writ)
- Currey v. Lone Star Steel Co., 676 S.W.2d 205, 213 (Tex. App.—Fort Worth 1984, no writ)
- Southwestern Bell Tel. Co. v. DeLanney, 809 S.W.2d 493, 498-99 (Tex. 1991) (Gonzalez, J., concurring)
- Pearce v. Pearce, 824 S.W.2d 195, 199 (Tex. App.—El Paso 1991, writ denied)
- Curtis v. Comm'n for Lawyer Discipline, 20 S.W.3d 227, 233 (Tex. App.—Houston [14th Dist.] 2000, no pet.)
- Cardenas v. Ramsey County, 322 N.W.2d 191, 194 (Minn. 1982)
- Verburt v. Dorner, 959 S.W.2d 615, 617 (Tex. 1997)
- Garcia v. Kastner Farms, Inc., 774 S.W.2d 668, 670 (Tex. 1989)
- Dimotsis v. State Farm Lloyds, 966 S.W.2d 657, 657 (Tex. App.—San Antonio 1998, no pet.)

OPINION

PER CURIAM.

FILED IN 4th COURT OF APPEALS SAN ANTONIO, TEXAS 11/19/2015 3:54:26 PM KEITH E. HOTTLE Clerk 1 2 3 4 5 6 7 8 FILED 6/20/2014 2:43:57 PM Donna Kay McKinney Bexar

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PM Donna Kay McKinney Bexar County District Clerk Accepted By: Jode Sanchez CAUSE NO.
2013-CI-10278 DAVID GILLESPIE AND § IN THE DISTRICT COURT MICHAEL O'BRIEN §
§ § v. § 408th JUDICIAL DISTRICT § § A. L. HERNDEN AND § FREDERICK R. ZLOTUCHA
§ BEXAR COUNTY, TEXAS MOTION TO RECONSIDER SUMMARY JUDGMENT AND IN
THE ALTERNATIVE MOTION FOR NEW TRIAL TO THE HONORABLE JUDGE OF SAID
COURT: DAVID GILLESPIE and MICHAEL O'BRIEN, Plaintiffs, file this motion to reconsider
summary judgment, and in the alternative motion for new trial, pursuant to TEX. R. CIV.

P. 320 in support thereof show as follows: I. BACKGROUND FACTS OF THIS PROCEEDING
This is a breach of fiduciary duty, DTPA and declaratory judgment action, brought to review the
conduct of surrounding the applicability, legality and violations of fiduciary duty between lawyers
and clients in the context of an oil and gas contingency fee contract. A full and final judgment was
rendered against the Plaintiffs on April 2, 2015.

The trial court granted summary judgment against Plaintiffs, dismissing the entirety of their case
and denying their Motion for Rehearing of their Motion for Summary Judgment denied by the
court. 1 1026 II. PROCEDURAL TIMELINE The Order sought to be appealed from was finalized
on April 2, 2015, and thirty days (30) have not expired from its entry. Plaintiffs once again seek
redress in regards to the relationship with their former attorneys who acted outside of the bounds
of professional conduct and in contravention of their client's interest.

Old Republic Ins. Co. v. Scott, 846 S.W.2d 832, 833 (Tex. 1993). This motion is in accord with the
Rule 320 of the TEXAS RULES OF CIVIL PROCEDURE. III. AS A MATTER OF LAW
A.L.HERNDEN BREACHED FIDUCIARY DUTIES OWED TO PLAINTIFFS David Gillespie
and Michael O'Brien hired A.L.Hernden to be their attorney in a "dispute regarding an alleged
partnership involving Joe H. Amberson and the leasing of certain oil and gas interests in
McMullen County Texas." Mr. Hernden had a fiduciary relationship with both David Gillespie and
Michael O'Brien during the entirety of his representation of them.

The Supreme Court of Texas has explained the consequences of this fiduciary relationship which
exist between any lawyer, including Mr. Hernden, and his clients, as follows: "In Texas, we hold
attorneys to the highest standards of ethical conduct in their dealings with their clients.

The duty is highest when the attorney contracts with his or her client or otherwise takes a position
adverse to his or her clients' interest. As Justice Cardozo observed, '[a fiduciary] is held to
something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an
honor the most sensitive, is then the standard of behavior.' 2 1027 Accordingly, a lawyer must

conduct his or her business with inveterate honesty and loyalty, always keeping the clients' best interest in mind." *Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 560 (Tex.

2006), citing, *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 868 (Tex. 2000). Similarly, in *Anglo- Dutch Petroleum International, Inc. v. Greenberg Peden, P.C.*, 952 S.W.3d 445, 450 (Tex. 2011), the Supreme Court of Texas held that "Because a lawyer's fiduciary duty to a client covers contract negotiations between them, such contracts are closely scrutinized.

Part of the lawyer's duty is to inform the client of all material facts. And so that this responsibility is not a mere and meaningless formality, the lawyer must be clear." Among the things which a lawyer may do or fail to do, which constitute breaches of his fiduciary duties to his clients are failing to disclose a conflict of interest, improperly benefiting from representation of a client, and engaging in self-dealing.

Cases recognizing these breaches of fiduciary duty include *Brown v. Green*, 2009 W.L. 4573451 at *4 (Tex. App. – Houston [14th Dist.] 2009, no pet.), and *Walker v. Morgan*, 2009 W.L. 3763779 at *2-*3 (Tex. App. – Beaumont 2009, no pet.). Mr. Hernden breached his fiduciary duties to both David Gillespie and Michael O'Brien. Purportedly in consideration of Mr. Hernden's representation of David Gillespie and Michael O'Brien, the written contract: sells, transfers and assigns to the said attorney a FIFTY PER CENT (sic)(50%) interest, in and to this matter, claim, and any property obtained through such demand, and/or case, and any compromise, 3 1028 settlements, judgment, or recovery of any sort whatsoever and howsoever acquired relating thereto, that Client may recover or be entitled to by reason of said matter, claim, demand, and/or case. (italics added).

As a matter of law, this contract is unreasonable, unconscionable, and constitutes a breach of Mr. Hernden's fiduciary duty of full disclosure and his duty of loyalty to his clients. Clients such as David Gillespie and Michael O'Brien are very unlikely to know that an attorney is "prohibited from acquiring a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for a client." TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.08(h).

Additionally, Mr. Gillespie and Mr. O'Brien are very unlikely to know that a lawyer "shall not enter into a business transaction with the client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed in a manner which can be reasonably understood by the client; (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client consents in writing thereto." TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.08(a).

Mr. Gillespie's and Mr. O'Brien's contracts with Mr. Hernden are not contingent fee contracts permitted by TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.04. The

contracts purport to “sell[, transfer and assign” to Mr. Hernden a fifty percent interest for services rendered and to be rendered.

However there is no information on what representation had been 4 1029 rendered or was to be rendered. But more importantly, there is no information as to what constitutes a fifty percent interest in a “dispute regarding an alleged partnership involving Joe H. Amberson and the leasing of certain oil and gas interests in McMullen County Texas.” Based upon the contract alone, there is no way to understand the work to be done, define the method by which the ownership interest is to be determined, or even to establish what are the expenses to be deducted from the recovery.

Even if this were a valid contingent fee contract, the client cannot make a meaningful, well considered, or intelligent decision regarding whether the fee agreement is appropriate. In his February 24, 2014 deposition, when asked about the value of the fee being charged Mr. Hernden testifies, “[i]n my opinion what it was worth?

The day we got it, it was probably worth, at the most, \$3,000 a mineral acre. That makes it \$120,000.”¹ February 24, 2014 Deposition of A.L.Hernden, 10:25-11:2. However, when asked about the value of the fee contract at the conclusion of the representation Mr. Hernden testifies very differently: A. Well, I don’t really know what it’s worth today because, number one, the production seems to have gone way down.

I mean, you’ve got to know, Eagle Ford wells generally – and this is just a general rule, because it’s not a set rule. They produce 82 percent of their oil in the first year. So, the first year of a lease, you get a bunch of money. Then it goes down in the last 30 years. But at the last, it will be doing two or three barrels a day. So, right now, the last check we got was \$5,000, so I don’t know.

Maybe it’s going down, nosediving. I have no idea. But that’s a general rule, is 82 percent of the oil from an Eagle Ford well comes the first year. 1 This is also to say that on the day the contracts were signed, that Mr. Hernden had agreed to act as Mr. Gillespie’s and Mr. O’Brien’s attorney and provide representation in exchange for a fifty percent interest in a claim worth no more than \$120,000.

February 24, 2014 Deposition of A.L.Hernden, 11:10-12. 5 1030 Q. So you don’t know? A. I really don’t know. If I had to put a pencil to it, I would – I would say that it’s not worth nearly what you think it is, because – because of it being Eagle Ford, okay? But I – I could probably figure out – I could take you to some experts and let them decide what it’s worth.

February 24, 2014 Deposition of A.L.Hernden, 11:14-12:8. If at the present time Mr. Hernden cannot calculate the value of his interest, there is no possible way that he could be said to have complied with TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.08. By failing to comply with TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.08, Mr. Hernden breached the fiduciary duty which he owed to Mr. Gillespie and Mr. O’Brien.

As such, his contract with Mr. Gillespie and Mr. O'Brien is voidable. TEX. GOV'T CODE § 82.065. Moreover, through his testimony, Mr. Hernden admits that he spent no more than 100 hours on this matter. February 24, 2014 Deposition of A.L.Hernden, 25:20. Yet for this 100 hours worked, he has made \$225,000 and counting. February 24, 2014 Deposition of A.L.Hernden, 34:14-24.

In testimony, Mr. Hernden describes his contract like this: "Yeah, I got a Lotto ticket. I won a Lotto ticket for 100 hours worked, okay?" February 24, 2014 Deposition of A.L.Hernden, 33:20-21. There is no possible way that Mr. Hernden could be said to have complied with TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.04. By failing to comply with TEXAS DISCIPLINARY RULE OF PROFESSIONAL 6 1031 CONDUCT 1.04, Mr. Hernden breached the fiduciary duty which he owed to Mr. Gillespie and Mr. O'Brien.

Again, this makes his contract with Mr. Gillespie and Mr. O'Brien voidable. TEX. GOV'T CODE § 82.065.2 Mr. Hernden's breaches of fiduciary duty were clearly prejudicial and a cause of damage to Mr. Gillespie and Mr. O'Brien. Far more than the amount he originally contemplated, fifty percent of a claim worth no more than \$120,000, Mr. Hernden claimed an ownership interest of half the partnership attributable to Mr. Gillespie and Mr. O'Brien.

The breach of that fiduciary duty resulted in an improper benefit for Mr. Hernden because he received not a fee, but an ownership interest. The Supreme Court of Texas has repeatedly condemned lawyers who attempt to charge a contingent fee which exceeds the amount of money recovered by their clients.

The cases on this are *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 95 (Tex. 2001), and *Hoover Slovacek, L.L.P. v. Walton*, 206 S.W.3d 557, 563 (Tex. 2006). Charging a contingent fee which exceeds the client's recovery is an unconscionable fee and Mr. Hernden's contracts with Mr. Gillespie and Mr. O'Brien does so as a matter of law. Mr. Hernden's contracts claim a fifty percent interest, but charge all of the undefined costs and expenses of litigation to the clients.

It is a fifty fifty split, but the client bears all the costs and expenses. As 2 Although the Disciplinary Rules do not define standards of civil liability for attorneys, the Texas Supreme Court states that they are persuasive authority outside the context of disciplinary proceedings, and are applied rules of decision in disputes concerning attorney's fees.

Hoover Slovacek, L.L.P. v. Walton, 206 S.W.3d 557, 562 (Tex. 2006); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 205 (Tex. 2002); *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998); *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997). 7 1032 a matter of simple mathematics, Mr. Hernden's contracts with Mr. Gillespie and Mr. O'Brien attempt to charge a contingent fee which exceeds the amount of money recovered by Mr. Gillespie and Mr. O'Brien.

This is a violation of Mr. Hernden's fiduciary duty of loyalty and constituted self-dealing and an improper benefit to Mr. Hernden from his representation of Mr. Gillespie and Mr. O'Brien. IV. AS A MATTER OF LAW MR. ZLOTUCHA HAD NO RIGHT TO REPRESENT PLAINTIFFS At some point in September 2010, Fredrick R Zlotucha undertook representation of Mr. Gillespie and Mr. O'Brien.

Mr. Zlotucha has testified that he did not have a written agreement with either Mr. Gillespie or Mr. O'Brien. February 24, 2014 Deposition of F.R.Zlotucha, 12:21-25. Eventually, Mr. Zlotucha claimed to be entitled to one half of the fifty percent claimed by Mr. Hernden. TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.08 could not be more clear regarding the requirement of the written consent of the client prior to undertaking representation on a contingent fee like that argued in this case.

Specifically, TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.08(d) requires all contingent fee contracts to be in writing. Additionally, TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.08(f) requires written consent of the client for all fee divisions between attorneys. By failing to comply with TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.08, Both Mr. Hernden 8 1033 and Mr. Zlotucha breached the fiduciary duty which they owed to Mr. Gillespie and Mr. O'Brien.

Mr. Zlotucha tends to want to argue that the signatures of Mr. Gillespie and Mr. O'Brien on the "disbursement agreement," "payout," or "settlement sheet" constitute a consent to his representation. This is untrue. TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.08(f)(2) requires such consent to be prior to the association or referral. By Mr. Zlotucha's own testimony, this was not the case here.

Deposition of F.R.Zlotucha, 12:21-25. Moreover, by relying on the facially unreasonable and unconscionable contract between Mr. Hernden, and Mr. Gillespie and Mr. O'Brien, Mr. Zlotucha engaged in self dealing, and violated his fiduciary duty of full disclosure and his duty of loyalty to his clients. *Levine v. Bayne, Snell & Krause, Ltd.*, 40 S.W.3d 92, 95 (Tex.

2001); *Hoover Slovacek, L.L.P. v. Walton*, 206 S.W.3d 557, 563 (Tex. 2006). Under Texas law, a contingent fee contract for legal services must be in writing and signed by both the attorney and client. TEX. GOV'T CODE § 82.065. Without a written document Mr. Zlotucha cannot claim any entitlement to the property of Mr. Gillespie and Mr. O'Brien.

For Mr. Hernden and Mr. Zlotucha to claim that property is a breach of fiduciary duty. V. QUESTIONS OF FACT PRECLUDE DEFENDANTS' SUMMARY JUDGMENT The Texas Supreme Court has stated: whether a contract, including a fee agreement between attorney and client, is contrary to public policy and unconscionable at the time it 9 1034 is formed is a question of law. See, e.g., TEX. BUS. & COM.

CODE § 2.302 (courts may refuse to enforce contracts determined to be unconscionable as a matter of law); *SkiRiver Dev., Inc. v. McCalla*, 167 S.W.3d 121, 136 (Tex. App.--Waco 2005, pet. denied) ("The ultimate question of unconscionability of a contract is one of law, to be decided by the court."); *Pony Express Courier Corp. v. Morris*, 921 S.W.2d 817, 821 (Tex.

App.--San Antonio 1996, no writ) (distinguishing procedural and substantive aspects of unconscionability). *Hoover*, 206 S.W.3d at 562. However, in this case, there are fundamental questions as to the value of the services rendered, the value of the fee purportedly agreed to, and the circumstances surrounding its formation. By not considering these fundamental factual questions, a court is powerless in examining the ultimate legal question.

The term "unconscionability" describes a contract that is unfair because of its overall one-sidedness or the gross one-sidedness of one of its terms. *Currey v. Lone Star Steel, Co.*, 676 S.W.2d 205, 213 (Tex. App.--Fort Worth 1984, no writ); see also TEX. BUS. & COM. CODE ANN. § 17.45(5) (Vernon Supp. 1996) (describing unconscionable actions under the Texas Deceptive Trade Practices-- Consumer Protection Act); TEX. BUS. & COM.

CODE ANN. § 2.302 (Vernon 1994) (discussing unconscionable contracts under the Uniform Commercial Code). "Unconscionability" has no precise legal definition because it is not a concept but a determination to be made in light of a variety of facts. *Southwestern Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 498 (Tex. 1991)(Gonzalez, J., concurring) (citing 1 J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 4-3 at 203 (3d ed.

1988)); see also RESTATEMENT (SECOND) OF 10 1035 CONTRACTS § 208, comment a(1979) (including "weaknesses in the contracting process" and related public policy concerns). Although no single formula exists, proof of unconscionability begins with broad factual questions: (1) How did the parties arrive at the terms in controversy; and (2) Are there legitimate commercial reasons justifying the inclusion of the terms?

DeLanney, 809 S.W.2d at 498-99(Gonzalez, J., concurring). The first question, often described as the procedural aspect of unconscionability, is concerned with assent and focuses on the facts surrounding the bargaining process. *Id.* at 499; *Tri-Continental Leasing Corp.*, 710 S.W.2d at 609.

The second question, often described as the substantive aspect of unconscionability, is concerned with the fairness of the resulting agreement. *DeLanney*, 809 S.W.2d at 499 (Gonzalez, J., concurring); *Wade v. Austin*, 524 S.W.2d 79, 86 (Tex. Civ. App.--Texarkana 1975, no writ). Unconscionability involves both questions of law and fact. *Pony Express Courier*, 921 S.W.2d at 820.

In short, unconscionability must be determined on a case-by-case basis. *Pearce v. Pearce*, 824 S.W.2d 195, 199 (Tex. App.--El Paso 1991, writ denied). As the Texas Supreme Court concludes

“whether a particular fee amount or contingency percentage charged by the attorney is unconscionable under all relevant circumstances of the representation is an issue for the factfinder.

Hoover, 206 S.W.3d at 561-62, citing *Curtis v. Comm'n for Lawyer Discipline*, 20 S.W.3d 227, 233 (Tex. App.-- Houston [14th Dist.] 2000, no pet.) (concluding that the evidence was sufficient to 11 1036 support a finding that a contingent fee equaling more than half of the client's recovery was unconscionable). Lawyers have a duty, at the outset of the representation, to "inform a client of the basis or rate of the fee" and "the contract's implications for the client."

Levine, 40 S.W.3d at 96 (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 38(1), 18). "To impose the obligation of clarifying attorney client contracts upon the attorney 'is entirely reasonable, both because of [the attorney's] greater knowledge and experience with respect to fee arrangements and because of the trust [the] client has placed in [the attorney].'" Levine, 40 S.W.3d at 95 (quoting *Cardenas v. Ramsey County*, 322 N.W.2d 191, 194 (Minn.

1982)) (alterations in original). For these reasons, the "failure of the lawyer to give at the outset a clear and accurate explanation of how a fee was to be calculated" weighs in favor of a conclusion that the fee is unconscionable. TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.04 cmt. 8.

On its face, Mr. Hernden's contract is unconscionable and violates the fiduciary duties owed to Mr. Gillespie and Mr. O'Brien by: 1) acquiring a proprietary interest in the cause of action or subject matter of the litigation; 2) entering into a business transaction with the clients without any way to comply with TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.08(a); 3) being impermissibly vague regarding the work to be done, the method by which the ownership interest is to be determined, or what are the expenses to be deducted from a recovery; 12 1037 4) charging an unreasonable fee; and, 5) mathematically seeking a greater recovery than that awarded to the client.

Likewise, the fee taken by Mr. Zlotucha cannot be supported because he breached his fiduciary duties by: 1) attempting to collect a contingent fee where there is no written consent of the client which comports to the requirements of TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 1.08; 2) seeking a fee that is unreasonable; and 3) self dealing in claiming an interest acquired as a result of a facially unconscionable contract.

Each of these are factual issues making summary judgment in favor of Mr. Hernden and Mr. Zlotucha improper. WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that this Court grant this motion to reconsider summary judgment, and in the alternative motion for new trial, and such other and further relief, both general or special, to which they shows themselves justly entitled.

Respectfully submitted, GENE TOSCANO, INC. 846 Culebra, Ste. 104 San Antonio, TX 78201
TEL: (210) 732-6091 FAX: (210) 735-4167 By /s/ Andrew E. Toscano ANDREW E. TOSCANO
State Bar No. 00786832 ATTORNEYS FOR PLAINTIFFS 13 1038 CERTIFICATE OF SERVICE
I hereby certify that a true and correct copy of the foregoing instrument has been mailed to the all
defense attorneys of record on this 1st day of May, 2015: Mr. Richard A. Sparr, Jr. 1313 N. E.
Loop 410, Suite 100 San Antonio, Texas, 78209 SENT BY FACSIMILE TRANSMISSION TO:
(210) 828-5444 Mr. Frederick R. Zlotucha 222 Main Plaza East San Antonio, Texas 78205 SENT
BY FACSIMILE TRANSMISSION TO: (210) 227-8316 /s/ Andrew E. Toscano ANDREW E.
TOSCANO 14 1039 1045 1046 1047 1048 1049 1050 1051 1052 1053 FILED 7/3/2015 10:29:15
AM Donna Kay McKinney Bexar County District Clerk Accepted By: Consuelo Gomez CAUSE
NO. 2013-CI-10278 DAVID GILLESPIE AND § IN THE DISTRICT COURT MICHAEL
O'BRIEN § § v. § 408th JUDICIAL DISTRICT § A. L. HERNDEN AND § FREDERICK R.
ZLOTUCHA § BEXAR COUNTY, TEXAS NOTICE OF APPEAL TO THE HONORABLE
JUDGE OF SAID COURT: WHEREAS ON April 2, 2015, the Honorable Cathleen M. Stryker of
the 224th Judicial District Bexar Court, entered a Final Judgment in this cause.

Plaintiff, DAVID GILLESPIE wishes to appeal from said Final Judgment to the Court of Appeals
for the Fourth District of Texas in San Antonio, Texas. RESPECTFULLY SUBMITTED, GENE
TOSCANO, INC., BY: /s/ Andrew E. Toscano ANDREW E. TOSCANO SBN: 00786832 846
Culebra Road, Suite 104 San Antonio, Texas 78201 210/732-6091 tel 210/735-4167 fax
ATTORNEY PLAINTIFF 1043 CERTIFICATE OF SERVICE I hereby certify that a true and
correct copy of the above and foregoing has been sent by hand delivery to the following counsel of
record on this 3rd day of July, 2015: Mr. Richard A. Sparr, Jr. 1313 N. E. Loop 410, Suite 100 San
Antonio, Texas, 78209 SENT BY FACSIMILE TRANSMISSION TO: (210) 828-5444 Mr.
Frederick R. Zlotucha 222 Main Plaza East San Antonio, Texas 78205 SENT BY FACSIMILE
TRANSMISSION TO: (210) 227-8316 FOURTH COURT OF APPEALS Cardena-Reeves Justice
Center 300 Dolorosa Ste.

3200 San Antonio, Texas 78205 210-355-2762- fax /s/ Andrew E. Toscano ANDREW E.
TOSCANO 1044 FILE COPY COURT OF APPEALS SANDEE BRYAN MARION FOURTH
COURT OF APPEALS DISTRICT KEITH E. HOTTLE CHIEF JUSTICE CADENA-REEVES
JUSTICE CENTER CLERK OF COURT KAREN ANGELINI 300 DOLOROSA, SUITE 3200
MARIALYN BARNARD SAN ANTONIO, TEXAS 78205-3037 REBECA C. MARTINEZ
WWW.TXCOURTS.GOV/4THCOA.ASPX TELEPHONE PATRICIA O. ALVAREZ (210) 335-
2635 LUZ ELENA D. CHAPA JASON PULLIAM FACSIMILE NO. JUSTICES (210) 335-2762
July 6, 2015 Richard A. Sparr Jr. Andrew E. Toscano Sparr & Geerdes Gene Toscano Inc 1313 NE
Loop 410 Ste 100 846 Culebra Rd Ste 104 San Antonio, TX 78209-1529 San Antonio, TX 78201-
6244 * DELIVERED VIA E-MAIL * * DELIVERED VIA E-MAIL * Frederick R. Zlotucha Law
Office of Frederick R. Zlotucha 222 E Main Plz San Antonio, TX 78205-2717 * DELIVERED

VIA E-MAIL * RE: Court of Appeals Number: 04-15-00405-CV Trial Court Case Number: 2013-CI-10278 Style: David Gillespie and Michael O'Brien v. A.L.

Hernden and Frederick R. Zlotucha The copy of appellant's notice of appeal in the above styled and numbered cause has this date been filed or conditionally filed. The fee for filing appeals in this court from the district or county is \$195.00.

The fee must be paid at the time the notice of appeal is filed. In addition, this court charges an additional fee of \$10.00 for the filing of any motion. Any delay in remitting a filing fee will delay the processing of your appeal and the court's ruling on pending motions. See TEX. R. APP. P. 5. Our records do not reflect payment of the \$195.00 fee. Please remit the filing fee no later than July 16, 2015.

If the fee is not paid within the time allotted, the matter will be referred to the court, and the appeal is subject to being stricken by the court. See TEX. R. APP. P. 5. In accordance with TEX. R. APP. P. 32 and 4TH TEX. APP. (SAN ANTONIO) LOC. R. 5.2., a docketing statement must be filed with the notice of appeal. Our records do not contain a docketing statement for this appeal.

Please ensure that a docketing statement is immediately filed to ensure prompt processing of the appeal. The Appellant's docketing statement is due from attorney, Andrew E. Toscano. The docketing statement is to be filed with this court by July 16, 2015.

The appellate record generally must be filed in this court within 120 days after the date of judgment is signed if any party timely files: (1) a motion for new trial; (2) a motion to modify the judgment; (3) a motion to reinstate under TEXAS RULES OF CIVIL PROCEDURE 165a; or (4) a request for findings of fact and conclusions of law if required or if not required could properly be considered by the appellate court.

See TEX. R. APP. P. 35.1. Very truly yours, KEITH E. HOTTLE, CLERK

Luz Estrada Deputy Clerk, Ext. 53219 cc: Honorable Cathleen M. Stryker Donna Kay McKinney (DELIVERED VIA E-MAIL) Fourth Court of Appeals San Antonio, Texas July 28, 2015 No. 04-15-00405-CV David GILLESPIE and Michael O'Brien, Appellants v. A.L. HERNDEN and Frederick R. Zlotucha, Appellees From the 408th Judicial District Court, Bexar County, Texas Trial Court No. 2013-CI-10278 Honorable Cathleen M. Stryker, Judge Presiding ORDER To date, appellant David Gillespie has failed to pay the applicable filing fee in this appeal.

Texas Rule of Appellate Procedure 5 provides, A party who is not excused by statute or these rules from paying costs must pay— at the time an item is presented for filing—whatever fees are required by statute or Supreme Court order.

The appellate court may enforce this rule by any order that is just. TEX. R. APP. P. 5. We, therefore, ORDER appellant, within ten (10) days of the date of this order, to either (1) pay the applicable filing fee in this appeal or (2) provide written proof to this court that he is excused by statute or these rules from paying the filing fee. See TEX. R. APP.

P. 20.1 (providing that party who qualifies as indigent under Rule 20 may proceed without advance payment of costs). If appellant fails to respond within the time provided, this appeal will be dismissed. See TEX. R. APP. P. 42.3(c). _____ Karen Angelini, Justice IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 28th day of July, 2015. _____ Keith E. Hottle Clerk of Court A.L. s Fourth Court of Appeals San Antonio, Texas September 15, 2015 No. 04-15-00405-CV David GILLESPIE, Appellant v. A.L.

HERNDEN and Frederick R. Zlotoucha, Appellees From the 408th Judicial District Court, Bexar County, Texas Trial Court No. 2013-CI-10278 Honorable Cathleen M. Stryker, Judge Presiding ORDER The trial court signed a final judgment on April 2, 2015. Appellant David Gillespie filed a timely motion for new trial on May 1, 2015.

Therefore, the notice of appeal was due to be filed on July 1, 2015. See TEX. R. APP. P. 26.1(a). However, appellant filed a notice of appeal on July 3, 2015. A motion for extension of time to file the notice of appeal was due on July 16, 2015. See TEX. R. APP. P. 26.3.

Although appellant filed a notice of appeal within the fifteen-day grace period allowed by Rule 26.3, he did not file a motion for extension of time. A motion for extension of time is necessarily implied when an appellant, acting in good faith, files a notice of appeal beyond the time allowed by Texas Rule of Appellate Procedure 26.1 but within the fifteen-day grace period provided by Rule 26.3 for filing a motion for extension of time.

See *Verburt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997) (construing the predecessor to Rule 26). However, the appellant must offer a reasonable explanation for failing to file the notice of appeal in a timely manner. See *id.*; TEX. R. APP. P. 26.3, 10.5(b)(1)(C).

We, therefore, ORDER appellant to file, within fifteen days from the date of this order, a response presenting a reasonable explanation for failing to file the notice of appeal in a timely manner. If appellant fails to respond within the time provided, the appeal will be dismissed. See TEX. R. APP. P. 42.3(c). _____ Karen Angelini, Justice IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 15th day of September, 2015. _____ Keith E. Hottle Clerk of Court
ACCEPTED 04-15-00405-cv FOURTH COURT OF APPEALS SAN ANTONIO, TEXAS
9/30/2015 12:52:27 PM KEITH HOTTLE CLERK NO. 04-15-00405-CV FILED IN In the Court
of Appeals 4th COURT OF APPEALS SAN ANTONIO, TEXAS for the 09/30/2015 12:52:27 PM

Fourth District KEITH E. HOTTLE Clerk San Antonio, Texas DAVID GILLESPIE, Appellant V. A.L.

HERNDEN, Appellee On Appeal from the 408th Judicial District Court of Bexar County, Texas (Cause No. 2013-CI-10278, Hon. Cathleen M. Stryker, Presiding) APPELLEE'S MOTION FOR EXTENSION OF TIME TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS: 1. Appellant, David Gillespie, herewith files his response to this Court's Order of September 15, 2015. 2. Appellant filed its Notice of Appeal on July 3, 2015, two days after its due date of July 1, 2015.

The Clerk's record was filed on September 9, 2015. 3. Appellant advises the Court that due to a calendar error caused by the preparation of a response to Motion for Summary Judgment in the case styled Civil Action No. 5:14-CV-00733; John Gonzales vs. Robles and Sons, Inc., Robles Service Group, LLC, Vaughn Construction Company, Sunbelt Rentals Industrial Services, LLC and JLG Industries, Inc.; In the United States District Court Western District of Texas San Antonio Division, the hearing on Motion for Rulings in the case styled Cause No. 2012-CI-09903; John Joseph Carreon and John A. Polito vs. Greater San Antonio Transportation Company d/b/a Yellow Cab. in preparation for trial on July 6, 2015, and the final preparation of the documents in the case styled Cause No. 5:14-CV-00149; Candelario V. Gonzalez, et al. v. Cooper Tire and Rubber Company, et al, the Notice of Appeal was not filed timely.

Undersigned counsel because of his schedule, inadvertently failed to file the Notice but upon discovery immediately did so. 4. Appellee respectfully requests accept the Notice of Appeal that was filed within the 15 day grace period as timely and for general relief. 5. Appellee files this Motion for Extension of Time to File Appellant's Brief Notice of Appeal pursuant to Texas Rules of Appellate Procedure 26.3, 10.5(b)(1)(C), 38.6(d), and the Local Rules of Fourth Court of Appeals.

WHEREFORE, Appellant, by and through its undersigned Counsel, requests the Court consider this motion and extend the time for filing its Appellant's Notice of Appeal until July 3, 2015. Respectfully submitted, GENE TOSCANO, INC. 846 Culebra Road, Suite 104 San Antonio, Texas 78201-6244 Telephone: (210) 732-6091 Facsimile: (210) 735-4167 BY: /s/ Andrew E. Toscano ANDREW E. TOSCANO Attorney at Law State Bar No. 00786832 COUNSEL FOR APPELLANT CERTIFICATE OF SERVICE This is to certify that a true and correct copy of the above and foregoing has this day been served on the counsel below, in the means and by the manner indicated hereinafter: Mr. Richard A. Sparr, Jr. 1313 N. E. Loop 410, Suite 100 San Antonio, Texas, 78209 SENT BY FACSIMILE TRANSMISSION TO: (210) 828-5444 Mr. Frederick R. Zlotucha 222 Main Plaza East San Antonio, Texas 78205 SENT BY FACSIMILE TRANSMISSION TO: (210) 227-8316 FOURTH COURT OF APPEALS Cardena-Reeves Justice Center 300 Dolorosa Ste.

3200 San Antonio, Texas 78205 210-355-2762- fax Signed on September 30, 2015. /s/ Andrew E. Toscano Andrew E. Toscano Counsel for Appellee FILE COPY COURT OF APPEALS SANDEE BRYAN MARION FOURTH COURT OF APPEALS DISTRICT KEITH E. HOTTLE CHIEF JUSTICE CADENA-REEVES JUSTICE CENTER CLERK OF COURT KAREN ANGELINI 300 DOLOROSA, SUITE 3200 MARIALYN BARNARD SAN ANTONIO, TEXAS 78205-3037 REBECA C. MARTINEZ WWW.TXCOURTS.GOV/4THCOA.ASPX TELEPHONE PATRICIA O. ALVAREZ (210) 335-2635 LUZ ELENA D. CHAPA JASON PULLIAM FACSIMILE NO. JUSTICES (210) 335-2762 September 30, 2015 Richard A. Sparr Jr. Andrew E. Toscano Sparr & Geerdes Gene Toscano Inc 1313 NE Loop 410 Ste 100 846 Culebra Rd Ste 104 San Antonio, TX 78209-1529 San Antonio, TX 78201-6244 * DELIVERED VIA E-MAIL * * DELIVERED VIA E-MAIL * Frederick R. Zlotucha Law Office of Frederick R. Zlotucha 222 E Main Plz San Antonio, TX 78205-2717 * DELIVERED VIA E-MAIL * RE: Court of Appeals Number: 04-15-00405-CV Trial Court Case Number: 2013-CI-10278 Style: David Gillespie v. A.L.

Hernden and Frederick R. Zlotoucha The Appellant's Motion for Extension of Time to File Notice of Appeal has this date been received and filed in the above styled and numbered cause. Very truly yours, KEITH E. HOTTLE, CLERK _____ Luz Estrada Deputy Clerk, Ext. 53219 FILE COPY COURT OF APPEALS SANDEE BRYAN MARION FOURTH COURT OF APPEALS DISTRICT KEITH E. HOTTLE CHIEF JUSTICE CADENA-REEVES JUSTICE CENTER CLERK OF COURT KAREN ANGELINI 300 DOLOROSA, SUITE 3200 MARIALYN BARNARD SAN ANTONIO, TEXAS 78205-3037 REBECA C. MARTINEZ WWW.TXCOURTS.GOV/4THCOA.ASPX TELEPHONE PATRICIA O. ALVAREZ (210) 335-2635 LUZ ELENA D. CHAPA JASON PULLIAM FACSIMILE NO. JUSTICES (210) 335-2762 October 5, 2015 Richard A. Sparr Jr. Andrew E. Toscano Sparr & Geerdes Gene Toscano Inc 1313 NE Loop 410 Ste 100 846 Culebra Rd Ste 104 San Antonio, TX 78209-1529 San Antonio, TX 78201-6244 * DELIVERED VIA E-MAIL * * DELIVERED VIA E-MAIL * Frederick R. Zlotucha Law Office of Frederick R. Zlotucha 222 E Main Plz San Antonio, TX 78205-2717 * DELIVERED VIA E-MAIL * RE: Court of Appeals Number: 04-15-00405-CV Trial Court Case Number: 2013-CI-10278 Style: David Gillespie v. A.L.

Hernden and Frederick R. Zlotoucha Enclosed please find the order which the Honorable Court of Appeals has issued in reference to the above styled and numbered cause. If you should have any questions, please do not hesitate to contact me. Very truly yours, KEITH E. HOTTLE, CLERK _____ Luz Estrada Deputy Clerk, Ext. 53219 cc: Donna Kay McKinney (DELIVERED VIA E-MAIL) FILE COPY David GillespieAppellant/s A.L.

Fourth Court of Appeals San Antonio, Texas October 5, 2015 No. 04-15-00405-CV David GILLESPIE, Appellant v. A.L. HERNDEN and Frederick R. Zlotoucha, Appellees From the 408th Judicial District Court, Bexar County, Texas Trial Court No. 2013-CI-10278 Honorable Cathleen

M. Stryker, Judge Presiding ORDER On September 15, 2005, we ordered appellant to offer a reasonable explanation for filing a late notice of appeal.

See *Verburgt v. Dorner*, 959 S.W.2d 615, 617 (Tex. 1997). “[A]ny plausible statement of circumstances indicating that failure to file... was not deliberate or intentional, but was the result of inadvert[e]nce, mistake, or mischance, [would] be accepted as a reasonable explanation.” *Garcia v. Kastner Farms, Inc.*, 774 S.W.2d 668, 670 (Tex. 1989); see also *Dimotsis v. State Farm Lloyds*, 966 S.W.2d 657, 657 (Tex.

App.—San Antonio 1998, no pet.). Any conduct short of deliberate or intentional noncompliance qualifies as inadvertence, mistake or mischance, even if that conduct can also be characterized as professional negligence. *Garcia*, 774 S.W.2d at 670; *Dimotsis*, 966 S.W.2d at 657. Appellant timely responded to our order, stating that his counsel, in light of other deadlines in his law practice, inadvertently failed to timely file the notice of appeal.

The explanation is reasonable. We, therefore, grant the motion for extension of time to file the notice of appeal and ORDER this appeal retained on the court’s docket. We further ORDER that appellant’s brief is due on November 4, 2015. kaa _____ Karen Angelini, Justice FILE COPY IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said court on this 5th day of October, 2015. _____ Keith E. Hottle Clerk of Court ACCEPTED 04-15-00405-cv FOURTH COURT OF APPEALS SAN ANTONIO, TEXAS 10/21/2015 12:04:27 PM KEITH HOTTLE CLERK No. 04-15-00405-CV FILED IN _____ 4th COURT OF APPEALS SAN ANTONIO, TEXAS IN THE COURT OF APPEALS OF TEXAS 10/21/2015 12:04:27 PM FOURTH JUDICIAL DISTRICT KEITH E. HOTTLE SAN ANTONIO, TEXAS Clerk _____ DAVID GILLESPIE, Appellant, vs. A.L.

HERNDEN and FREDERICK R. ZLOTOUCHA, Appellees. _____ NOTICE OF APPEARANCE OF APPELLATE COUNSEL & APPELLANT’S UNOPPOSED MOTION FOR BRIEFING DEADLINE EXTENSION To the Honorable Court: Appellant David Gillespie asks this Court and all counsel of record to take notice that he has retained appellate counsel: Kimberly S. Keller, Keller Stolarczyk PLLC, 234 West Bandera Road, No. 120, Boerne, Texas 78006.

Appellant respectfully requests this Court grant him a 30-day briefing deadline extension.¹ Appellant’s brief is currently due on Appellant’s newly-retained appellate counsel has recently received the 1 appellate record and needs time to analyze the appellate record, research the November 4, 2015. If this Court grants this Motion, Appellant’s brief will be due on December 4, 2015.

Appellees are unopposed to this Motion. Respectfully submitted, KELLER STOLARCZYK, PLLC 234 West Bandera Road #120 Boerne, Texas 78006 Tele: 830.981.5000 Facs: 888.293.8580 /s/Kimberly S. Keller Kimberly S. Keller SBN: 24014182 kim@kellsto.com COUNSEL FOR APPELLANT legal issues presented by the trial court's ruling, and prepare and file a brief to this Court raising Appellant's issues on appeal.

2 CERTIFICATE OF CONFERENCE & SERVICE I conferred with opposing counsel, listed below, and was informed Appellees are unopposed to this Motion. Also, I certify that on October 21, 2015, I served this Motion on: Richard A. Sparr Jr. SPARR & GEERDES 1313 NE Loop 410, Suite 100 San Antonio, Texas 78209 Email: rsparr@sparrlaw.net Frederick R. Zlotucha LAW OFFICE OF FREDERICK R. ZLOTUCHA 222 E. Main Plaza San Antonio, Texas 78205 Counsel for Appellees /s/Kimberly S. Keller Kimberly S. Keller 3 FILE COPY Fourth Court of Appeals San Antonio, Texas October 21, 2015 No. 04-15-00405-CV David GILLESPIE, Appellant v. A.L.

A.L. HERNDEN and Frederick R. Zlotoucha, Appellee From the 408th Judicial District Court, Bexar County, Texas Trial Court No. 2013-CI-10278 Honorable Cathleen M. Stryker, Judge Presiding CORRECTED ORDER The Appellant's Motion for Extension of Time to File Brief has this date been received and filed in the above styled and numbered cause. Extension of time to file the Appellant's brief is this date GRANTED.

Time is extended to December 4, 2015. PER CURIAM ATTESTED TO: _____ KEITH E. HOTTLE CLERK OF COURT cc: Kimberly S. Keller Richard A. Sparr Jr. No. 120 Sparr & Geerdes Boerne, TX 78006-2805 1313 NE Loop 410 Ste 100 San Antonio, TX 78209-1529 Andrew E. Toscano Gene Toscano Inc Frederick R. Zlotucha 846 Culebra Rd Ste 104 Law Office of Frederick R. Zlotucha San Antonio, TX 78201-6244 222 E Main Plz San Antonio, TX 78205-2717 ACCEPTED 04-15-00405-cv FOURTH COURT OF APPEALS SAN ANTONIO, TEXAS 11/3/2015 12:11:03 PM KEITH HOTTLE CLERK No. 04-15-00405-CV FILED IN _____ 4th COURT OF APPEALS SAN ANTONIO, TEXAS IN THE COURT OF APPEALS OF TEXAS 11/3/2015 12:11:03 PM FOURTH JUDICIAL DISTRICT KEITH E. HOTTLE SAN ANTONIO, TEXAS Clerk _____ DAVID GILLESPIE, Appellant, vs. A.L.

HERNDEN and FREDERICK R. ZLOTOUCHA, Appellees. _____ AMENDED NOTICE OF APPEAL To the Honorable Court: Plaintiff below, Michael O'Brien, hereby gives notice that he intends to appeal the final judgment entered by the trial court (Hon. Cathleen M. Stryker, 224th District Court, Bexar County) on April 2, 2015.¹ This appeal will be taken to the Fourth District Court of Appeals in San Antonio, Texas.

An original notice of appeal was filed by Plaintiff below, David Gillespie, on July 3, 2015;² although ¹ This Amended Notice of Appeal is filed under Texas Rule of Appellate Procedure 25.1(g), which permits a litigant to file an amended notice of appeal to correct a “defect or omission” at “any time before the appellant’s brief is filed.” ² A copy of the original notice of appeal is attached to this Amended Notice of Appeal. the style on the notice contained both David Gillespie’s and Michael O’Brien’s names, O’Brien’s name was omitted, in oversight, within the body of the notice.

Gillespie and O’Brien now file this Amended Notice of Appeal to clarify that both Gillespie and O’Brien are appealing the trial court’s April 2, 2015 Final Judgment.³ Appellants respectfully request the Clerk of the Court to change the style of the appeal to reflect both Appellants, David Gillespie and Michael O’Brien, as appellants in this appeal. Respectfully submitted, KELLER STOLARCZYK, PLLC 234 West Bandera Road #120 Boerne, Texas 78006 Tele: 830.981.5000 Facs: 888.293.8580 /s/Kimberly S. Keller Kimberly S. Keller SBN: 24014182 kim@kellsto.com COUNSEL FOR APPELLANTS ³ Co-Appellants note that the Final Judgment rendered final an interlocutory order entered by the trial court on August 6, 2014, denying Appellants’ summary judgment motion.

Co-Appellants intend to appeal both rulings by the trial court. A copy of both the interlocutory order and final judgment are attached to this Amended Notice of Appeal. ² CERTIFICATE OF CONFERENCE & SERVICE I certify that on November 3, 2015, I served this Amended Notice of Appeal on: Richard A. Sparr Jr. SPARR & GEERDES 1313 NE Loop 410, Suite 100 San Antonio, Texas 78209 Email: rsparr@sparrlaw.net Frederick R. Zlotucha LAW OFFICE OF FREDERICK R. ZLOTUCHA 222 E. Main Plaza San Antonio, Texas 78205 Counsel for Appellees /s/Kimberly S. Keller Kimberly S. Keller ³ FILED 7/3/2015 10:29:15 AM Donna Kay McKinney Bexar County District Clerk Accepted By: Consuelo Gomez CAUSE NO. 2013-CI-10278 DAVID GILLESPIE AND § IN THE DISTRICT COURT MICHAEL O’BRIEN § § v. § 408th JUDICIAL DISTRICT § A. L. HERNDEN AND § FREDERICK R. ZLOTUCHA § BEXAR COUNTY, TEXAS NOTICE OF APPEAL TO THE HONORABLE JUDGE OF SAID COURT: WHEREAS ON April 2, 2015, the Honorable Cathleen M. Stryker of the 224th Judicial District Bexar Court, entered a Final Judgment in this cause.

Plaintiff, DAVID GILLESPIE wishes to appeal from said Final Judgment to the Court of Appeals for the Fourth District of Texas in San Antonio, Texas. RESPECTFULLY SUBMITTED, GENE TOSCANO, INC., BY: /s/ Andrew E. Toscano ANDREW E. TOSCANO SBN: 00786832 846 Culebra Road, Suite 104 San Antonio, Texas 78201 210/732-6091 tel 210/735-4167 fax ATTORNEY PLAINTIFF 1043 CERTIFICATE OF SERVICE I hereby certify that a true and correct copy of the above and foregoing has been sent by hand delivery to the following counsel of record on this 3rd day of July, 2015: Mr. Richard A. Sparr, Jr. 1313 N. E. Loop 410, Suite 100 San Antonio, Texas, 78209 SENT BY FACSIMILE TRANSMISSION TO: (210) 828-5444 Mr.

Frederick R. Zlotucha 222 Main Plaza East San Antonio, Texas 78205 SENT BY FACSIMILE TRANSMISSION TO: (210) 227-8316 FOURTH COURT OF APPEALS Cardena-Reeves Justice Center 300 Dolorosa Ste.

3200 San Antonio, Texas 78205 210-355-2762- fax /s/ Andrew E. Toscano ANDREW E. TOSCANO 1044 1022 1023 1024 1025 563 FILED 11/19/2015 2:00:19 PM Donna Kay McKinney Bexar County District Clerk Accepted By: Consuelo Gomez CAUSE NO. 2013-CI-10278 DAVID GILLESPIE § IN THE DISTRICT COURT MICHAEL O'BRIEN, § PLAINTIFFS, § § —VERSUS— § 408TH JUDICIAL DISTRICT § A.L.

HERNDEN AND § FREDERICK R. ZLOTUCHA, § DEFENDANTS. § BEXAR COUNTY, TEXAS ALTERNATIVE NOTICE OF CROSS APPEAL TO THE HONORABLE JUDGE OF SAID COURT: COME NOW A.L. Hernden and Frederick R. Zlotucha, Defendants, and hereby file their Alternative Notice of Cross Appeal of the Order Granting Defendants' Combined No Evidence and Traditional Motions for Summary Judgment and Final Judgment signed by the 408th Judicial District Court of Bexar County, the Honorable Cathy Stryker, presiding, on April 2, 2015.

Defendants A.L. Hernden and Frederick R. Zlotucha desire to appeal this case to the Court of Appeals for the Fourth Court of Appeals District of Texas in San Antonio. This notice of cross appeal is filed in the alternative because it is conditioned on the Fourth Court of Appeals' denial of the Opposed Motion to Strike Untimely "Amended" Notice of Appeal Filed Four Months After the Deadline that was filed with the Fourth Court of Appeals on November 19, 2015.

Defendants A.L. Hernden and Frederick R. Zlotucha file this Notice of Cross Appeal to preserve their ability to complain about the late-filed "amended" notice of appeal filed by Plaintiff Michael O'Brien on November 3, 2015. Respectfully submitted, /s/ Beth Watkins Beth Watkins State Bar No. 24037675 LAW OFFICE OF BETH WATKINS 926 Chulie Drive San Antonio, Texas 78216 (210) 225-6666—phone (210) 225-2300—fax Beth.Watkins@WatkinsAppeals.com Counsel for Defendants/ Cross Appellees A.L.

Hernden and Frederick R. Zlotucha CERTIFICATE OF SERVICE I hereby certify that, on November 19, 2015, I electronically served, via FileTime, my e- filing service provider, a true and correct copy of the above document on the following counsel of record: Ms. Kimberly S. Keller KELLER STOLARCZYK, PLLC 234 West Bandera Road #120 Boerne, Texas 78006 (830) 981-5000—phone (888) 293-8580—fax kim@kellsto.com Attorney for Appellant David Gillespie /s/ Beth Watkins Beth Watkins Counsel for Defendants A.L.

Hernden and Frederick R. Zlotucha