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TEXAS SUPREME COURT ADVISORY

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ORDERS AND OPINIONS ISSUED JANUARY 9, 2009

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[JANUARY 9 ORDERS](#) (in HTML)

[Decisions in cases \(motions, requests, etc.\) from January 1 through Wednesday](#) (PDF)

OPINIONS

05-0303

Thomas Graber and Hopkins & Sutter v. Richard L. Fuqua
from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg
For petitioners: Robert H. Mow Jr., Dallas
For respondent: Richard L. Fuqua, Houston
AFFIRMED, opinion by Justice Green:

The issue is whether a state court has subject-matter jurisdiction over a malicious-prosecution claim arising from an adversarial bankruptcy proceeding. Fuqua sued Graber and his law firm, Hopkins & Sutter, for malicious prosecution, claiming that Graber wrongfully brought fraud allegations against him in Fuqua's bankruptcy case. Fuqua won a directed verdict in the adversarial proceeding after the bankruptcy was discharged. The trial court granted Graber's jurisdictional plea that federal bankruptcy law preempted Fuqua's state court claim. The court of appeals reversed.

The Supreme Court HOLDS that federal bankruptcy law does not preempt the state malicious-prosecution claim. In the areas where Congress custom-built bankruptcy law, preemption is more likely because when Congress crafted new, unique provisions, it probably contemplated whether to exclude overlapping state law remedial schemes. But in the areas where Congress merely imported existing federal law without any significant change, preemption is improbable because such borrowing does not evidence an intent to change well-settled preemption law. Remedies for abuse of an adversary proceeding belong to the category of imported remedial schemes.

- Bankruptcy Rule 9011, like Federal Rule of Civil Procedure 11, addresses the signing of papers and representations to bankruptcy courts and provides standards for the imposition of sanctions upon both attorneys and parties. Because Rule 9011 is almost identical to Rule 11, courts often merge their substantive analysis of the rules. It is well settled that the Federal Rules of Civil Procedure, including Rule 11, do not preempt

malicious prosecution claims predicated on federal civil actions.

- Bankruptcy Code section 105(a) does not evidence Congress's intent to preempt malicious prosecution claims predicated on conduct in an adversary proceeding. Section 105(a) is another example of where, instead of custom-building a bankruptcy rule, Congress imported general federal law that does not preempt, and said nothing to change that result.

- Bankruptcy Code section 303 governs the use of involuntary petitions—a unique procedure that allows a person to initiate bankruptcy proceedings without the debtor's consent. If an involuntary petition is filed in bad faith and dismissed, section 303(i) allows the court to award costs, fees, and damages to the debtor. The involuntary petition process is a custom-built area of bankruptcy that Congress crafted anew. more likely that Congress considered the need to deter misuse of the unique involuntary petition process it created, and more likely that it intended section 303(i) to be the exclusive remedy. But the process of filing the initial bankruptcy petition is different from an adversary proceeding. By its own terms, section 303(i) applies only to the filing of an involuntary petition and cannot apply to the initiation of an adversary proceeding.

- Bankruptcy Code section 362(k) sanctions violations of the unique automatic stay, conduct that occurs outside of the bankruptcy proceedings, but it is another custom-built area of bankruptcy. Its sanctions are more likely to preempt related state claims, but the provision does not evidence a preemptive intent related to adversary proceedings because the two areas—regulating the conduct of persons outside the proceeding and regulating the conduct of litigants inside an adversary proceeding—are so unrelated that an intent to preempt in one cannot evidence an intent to preempt the other.

- Graber's argument that preemption is warranted by the risk of disrupting bankruptcy law uniformity fails for two reasons. Fuqua's lawsuit will not necessarily affect the law of bankruptcy, be it in Fuqua's particular case or in bankruptcy cases at large. By definition, Texas claims for malicious prosecution arise only after the underlying case reaches a final judgment and all appeals are exhausted. Adjudication of Fuqua's malicious prosecution claim will not affect federal bankruptcy law at large. The element of a malicious prosecution claim that most concerns preemption cases is probable cause, a determination that does not necessarily involve impermissibly interpreting federal bankruptcy law. State courts can determine that an adversary proceeding was brought without probable cause by interpreting *only state law*. Fuqua's situation illustrates this.

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Justice Wainwright DISSENTING, joined by Justices Brister, Medina and Willett:

Because federal law occupies the field of bankruptcy, and Congress created an analogue in the Bankruptcy Code to malicious prosecution of an involuntary Chapter 11 bankruptcy, but not for the voluntary Chapter 7 bankruptcy at issue here, the Court should not create a new claim for abuses in Chapter 7 bankruptcies that Congress saw fit not to create. Debtors have adequate recourse for abuse of the bankruptcy process in the Bankruptcy Code and rules.

[Wainwright dissent in HTML](#)

[Wainwright dissent in PDF](#)

05-0801

S. Murthy Badiga, M.D. v. Maricruz Lopez

from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg

For petitioner: Diana L. Faust, Dallas

For respondent: E. A. Villareal Jr., Edinburg

REVERSED AND REMANDED, opinion by Chief Justice Jefferson:

A principal issue in this medical-malpractice case is whether an interlocutory appeal can be taken from a trial court's refusal to dismiss the lawsuit because an expert report was not filed on time. In this case the expert report was served three and a half months after the 120-day deadline, after the trial court granted two extensions. To support the second motion, Lopez contended the report was late because of a clerical error, not indifference.

The case poses a statutory conflict between a provision that prohibits interlocutory appeals from orders denying dismissal when an extension is granted to cure a deficient expert report and a provision allowing such appeals when a dismissal motion is denied when an expert report is not filed on time. In this case the court of appeals dismissed the interlocutory appeal for want of jurisdiction.

The Supreme Court HOLDS that the medical-malpractice statute allows an interlocutory appeal from the denial of dismissal when no expert report was filed within time limits. The defendant has the right to an interlocutory appeal from an order that “denies all or part of the relief sought by a motion under Section 74.351(b), except that an appeal may not be taken from an order granting an extension under Section 74.351.” So under the Civil Practice and Remedies Code an interlocutory appeal is permitted for the denial of a motion to dismiss but not for the grant of an extension to cure a deficient report. Because no expert report was served within 120 days, this case differs from [Ogletree v. Mathews](#), in which a deficient expert report was served within the 120 day period. The purpose of the ban on interlocutory appeals for extensions is to allow plaintiffs the opportunity to cure defects in *existing* reports. If a defendant could immediately appeal the denial of his motion to dismiss, the court of appeals would be reviewing the report’s sufficiency while its deficiencies were presumably being cured in the trial court. These policy concerns do not arise when no report has been served within the 120-day deadline.

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Justice Brister DISSENTING, joined by Justice Medina:

The Court holds that an interlocutory appeal can be taken from an order granting an extension to cure a *missing* expert report. But the interlocutory-appeal statute makes no such distinction and simply says that “an appeal may not be taken from an order granting an extension.” In the plainest of terms, this statute applies to all extensions — right or wrong, deficient report or no report.

[Brister dissent in HTML](#)

[Brister dissent in PDF](#)

08-0238

In re International Profit Associates Inc., et al.

from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg

MANDAMUS RELIEF CONDITIONALLY GRANTED, per curiam opinion:

The issue is whether the trial court abused its discretion by refusing to enforce a forum-selection clause. In this case Tropicpak, a company that hired International Profits Associates and affiliated companies, sued IPA over business recommendations that included hiring an employee to help increase sales who then allegedly embezzled from Tropicpak. Tropicpak sued in Hidalgo County for negligent professional services; fraud or fraudulent inducement, or both; negligent misrepresentations; and breach of its duty of good faith and fair dealing. IPA moved to dismiss based on forum-selection clauses. The Supreme Court HOLDS the trial court abused its discretion by denying IPA’s jurisdictional plea.

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08-0524

In re Department of Family & Protective Services

from Harris County and the 1st District Court of Appeals, Houston

For relator: Sandra Hachem, Houston

For real party in interest: Douglas Ray York, Houston

MANDAMUS RELIEF DENIED, opinion by Justice Johnson:

The issues in this parental-rights termination case are (1) whether the trial court’s new-trial order after the statutory dismissal deadline vacated a termination order rendered before the deadline passed; (2) whether an

objection based on the trial court's failure to dismiss was waived because it came after the new-trial order; and (3) whether Family Code section 263.401(b) restrictions are jurisdictional. After ordering termination, the trial court granted a new trial and scheduled it beyond the one-year dismissal deadline but did not make the required findings to extend the deadline. The trial court denied the motion to dismiss and the court of appeals granted the mother's mandamus relief.

The Supreme Court HOLDS:

- Dismissal dates in the parental-termination statute are not jurisdictional. Family Code subsection 263.401(a) provides for what is called the "one-year dismissal date" and subsection 263.401(b) provides for a 180-day extension of that one-year dismissal date if the trial court finds that certain circumstances exist, but nothing in section 263.401 indicates that these deadlines are jurisdictional. The statute merely states that the trial court "shall dismiss the suit" and "may not retain the suit on the court's docket" when the deadlines expire. Section 263.402 provides that a party may waive its right to dismissal if the party "fails to make a timely motion to dismiss the suit or to make a motion requesting the court to render a final order before the deadline for dismissal." But subject-matter jurisdiction cannot be waived.

- The mother did not waive her right to dismissal by failing to request that the trial court render a final order before the one-year dismissal date of July 23, 2008, because the trial court *did* render such an order on July 10. It would make no sense to hold that the mother waived her right to dismissal when the trial court did exactly what she would have been required to request that it do to avoid waiver. Under the clear provisions of the Family Code, the trial court had no discretion to deny the mother's motion to dismiss the suit and abused its discretion in doing so.

- Both the written and oral orders terminating parental rights were vacated by the order granting a new trial. The order granting a new trial could be "unranked" or set aside, but if the trial court did so the original oral order and written judgment terminating the mother's rights would not be reinstated: The trial court would have to enter a new judgment.

- Because the children would remain in the state's custody despite its retaining them in violation of a statutory provision and it is unknown when the trial court would issue a final order subject to appeal, the mother has no adequate remedy by appeal.

Whether the state can refill the same suit, retain custody of the children and continue as before to seek termination of the mother's parental rights is a question simply not before the Court. Courts of appeals have not been unanimous in their decisions on the matter and the issue is important. But that does not justify addressing it when it has not been preserved, briefed or presented as an issue, and when no relief has been requested based on its resolution.

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Justice Hecht DISSENTING, joined by Justice Brister:

The girls at the heart of this termination proceeding are now 6 and 5 and have been in foster care for two and a half years. The Court orders them returned to their mother, but no evidence suggests that her situation has changed. No consideration is given to the children's best interests. As far as the Court knows, they are going back to the same living conditions that necessitated emergency intervention. So the mother recovers her daughters, not because they are now safe with her, but because of delays in these termination proceedings that she herself requested or agreed to.

[Hecht dissent in HTML](#)[Hecht dissent in HTML](#)

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Justice Brister DISSENTING, joined by Justices Hecht, O'Neill and Medina:

Surely no one — not even a mother fighting to keep her kids — can ask for a new trial and then demand dismissal because she got it. A final order was entered before the statutory one-year deadline in this case, but the mother asked the trial court to set it aside and give her a new trial and later a resetting after the deadline had passed. Having gotten what she wanted, she is not entitled to complain that the trial court should have turned

her down.

[Brister dissent in HTML](#)

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**ISSUE SUMMARY ON PETITION GRANTED
ORAL ARGUMENT IN TODAY'S ORDERS**

08-0272

Dealers Electric Supply Co. v. Scoggins Construction Co. Inc. and Bill Scoggins
from Hidalgo County and the 13th District Court of Appeals, Corpus Christi/Edinburg
Oral argument set February 3

The principal issue is whether the McGregor Act, prohibiting liens against a public building and providing for suit against principals and sureties over payment bonds, is an exclusive remedy to recover for credit extended to a subcontractor that abandoned an elementary school construction project.

[Briefs](#)

[Court of appeals opinion](#)