Dissenting and Concurring Opinions on Denial of Rehearing En Banc filed April 4, 2002.

In The

Fourteenth Court of Appeals

NO. 14-98-01286-CV

SCHINDLER ELEVATOR CORPORATION, Appellant

V.

SCOTT ANDERSON AND DIANA ANDERSON, INDIVIDUALLY AND AS NEXT FRIENDS OF SCOTT "SCOOTER" ANDERSON, Appellees

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On Appeal from the 129th District Court
Harris County, Texas
Trial Court Cause No. 96-27569

D I S S E N T I N G O P I N I O N O N
D E N I A L O F R E H E A R I N G E N B A N C

Given the importance of the issues discussed below, I believe this case should be decided by the Court en banc rather than a panel of three visiting judges. Because a majority of the Court votes to deny the motion for rehearing en banc, I respectfully dissent.

The Punitive Problem

Punitive damages are warranted only when clear and convincing evidence shows malice or fraud.[1] The trial court ruled there was no such evidence in this case, and the plaintiffs do not appeal that ruling. Nonetheless, in all probability the panel's judgment includes them.

What happened in this case is quite clear— the jury included punitive damages in the guise of compensatory damages. Three facts make this plain:

1. ***The plaintiffs' counsel told them to do it***. On Schindler's motion, trial was bifurcated.[2] The jury's first verdict should have included only compensatory damages.[3] Compensatory damages are intended to make a plaintiff whole; punitive damages are intended to deter others, an "altogether different purpose."[4] But during his closing rebuttal (when Schindler's attorney could no longer respond), the Andersons' attorney urged the jury to award damages that would not just compensate his clients, but would "send a message" to the entire escalator industry:

> I'm convinced with your verdict when you reach the truth that you'll send a message loud and indubitably clear to the escalator industry they can't carry this charade on any more; it's been uncovered and they're going to make those escalators reasonably safe.
>
> * * * *
>
> Ladies and gentlemen, you are the jury. You are the conscience of this community, and as such, we beg you to send a declaration to the escalator industry. When you walk through that door of that jury room you will have an opportunity on behalf of all parents, all children everywhere, to talk directly to the board of directors of all the escalator companies in the world because, believe me, they're watching this trial. It

[1] *See* TEX. CIV. PRAC. & REM. CODE § 41.003.

[2] *See id.* § 41.009.

[3] *Id.* § 41.009(c)(2).

[4] *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 16 (Tex. 1994).

> is very unlikely that you will have the opportunity to serve mankind as much as you will have in this case, to do so much good for children. If your verdict is large enough they'll listen to it and they'll make changes.
>
> * * * *
>
> I beg you to write justly, be proud, and when you go home, all of you, this week or whenever it is, and your family asks you, what did you do in Court, you can look them in the eye and say, here's what I did in Court. I made this community and this world a safer place to live in because I helped make it safer for the little people.

2. ***The jurors said they did it***. Schindler attached to its motion for new trial two newspaper articles that referenced the following post-trial comments by jurors:

> "None of us had an idea there would be a punitive side. We thought what we were doing [in the first verdict] was sending a message to the industry," said juror Kevin Fletcher of Houston.[5]
>
> Jurors said after the 10-2 verdict they did not realize there would be a punitive damages phase and awarded the $17 million on May 21 to send Schindler a message. The next day, they awarded only $100,000 in punitive damages.[6]

3. ***The verdict shows they did it***. The jury returned a verdict of $16.97 million as compensatory damages, but only $100,000 as punitive damages. From beginning to end, the Andersons' case focused on showing negligence in an entire industry. Indeed, they had little choice—the safety side plates designed by their only liability expert to avoid accidents like this one had been rejected by not just Schindler but by all its competitors. Moreover, the appellees make no effort by cross-appeal to reinstate more than 60% of the "compensatory" damages awarded by the jury. Unless the jury confused compensatory and punitive damages, this verdict makes little sense.

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[5] Ron Nissimov, *Punitive damages set for escalator accident*, HOUSTON CHRONICLE, May 23, 1998, at 37A.

[6] Ron Nissimov, *Judge reduces award in child-injury case*, HOUSTON CHRONICLE, August 11, 1998, at 15A.

Revising the Standard of Review

The standard for reviewing a trial court's order of remittitur changed fifteen years ago. In 1987, Justice Kilgarlin writing for a majority of the Texas Supreme Court held in *Larson v. Cactus Utility Co.* that courts of appeals should thenceforth apply a factual-sufficiency standard of review.[7] An abuse-of-discretion review had been the previous standard, under "long-established precedent" and several unanimous Supreme Court opinions, as pointed out by Chief Justice John Hill (joined by Justice Raul Gonzalez) in dissent.[8]

This change put Texas out-of-step with most other states. At least thirty-nine of our sister states review a trial court's order of remittitur for abuse of discretion.[9] Only a handful

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[7] 730 S.W.2d 640, 641 (Tex. 1987).

[8] *Id.* at 642 (Hill, C.J., dissenting); *see Flanigan v. Carswell*, 324 S.W.2d 835, 840 (1959); *Wilson v. Freeman*, 108 Tex.121, 125, 185 S.W. 993, 994 (1916).

[9] *See Rainsville Bank v. Willingham,* 485 So. 2d 319, 325 (Ala. 1986); *International Bhd. of Elec. Workers, Local 1547 v. Alaska Util. Const., Inc.*, 976 P.2d 852, 857 (Alaska 1999); *Duncan v. State*, 754 P.2d 1160, 1166 (Ariz. Ct. App. 1988); *Neal v. Farmers Ins. Exch.*, 582 P.2d 980, 994 (Cal. 1978); *Walford v. Blinder, Robinson & Co., Inc.*, 793 P.2d 620, 627 (Colo. Ct. App. 1990); *Alfano v. Ins. Center of Torrington*, 525 A.2d 1338, 1342 (Conn. 1987); *Moffitt v. Carroll*, 640 A.2d 169, 176 n.2 (Del. 1994); *S & S Toyota, Inc. v. Kirby*, 649 So. 2d 916, 920 (Fla. Dist. Ct. App. 1995); *Lisle v. Willis*, 463 S.E.2d 108, 110 (Ga. 1995); *Toews v. Funk*, 924 P. 2d 217, 222 (Idaho Ct. App. 1994); *NC Illinois Trust Co. v. First Illini Bancorp, Inc.*, 752 N.E.2d 1167, 1178-79 (Ill. App. Ct. 2001); *Russell v. Neumann-Steadman*, 759 N.E.2d 234, 236 (Ind.Ct. App. 2001); *Lamb v. Newton-Livingston, Inc.*, 551 N.W.2d 333, 336 (Iowa Ct. App. 1996); *York v. InTrust Bank, N.A.*, 962 P.2d 405, 431 (Kan. 1998); *C. N. Brown Co. v. Gillen*, 569 A.2d 1206, 1209 (Me. 1990); *Franklin v. Gupta*, 567 A.2d 524, 533 (Md. Ct. Spec. App. 1990); *D'Annolfo v. Stoneham Housing Authority*, 378 N.E.2d 971, 979 (Mass. 1978); *Palenkas v. Beaumont Hospital*, 443 N.W.2d 354, 354 (Mich. 1989); *Lundman v. McKown*, 530 N.W.2d 807, 832 (Minn. Ct. App. 1995); *Alpha Gulf Coast, Inc.v. Jackson*, 801 So. 2d 709, 726 (Miss. 2001); *Moore v. Missouri-Nebraska Express, Inc.*, 892 S.W.2d 696, 713 (Mo. Ct. App. 1994); *Cartwright v. Equitable Life Assurance Society of the United States*, 914 P.2d 976, 998 (Mont. 1996); *Barbour v. Jenson Commercial Distributing Co.*, 323 N.W.2d 824, 827 (Neb. 1982); *Canterino v. The Mirage Casino-Hotel*, 16 P.3d 415, 417 (Nev. 2001); *Daigle v. City of Portsmouth*, 534 A.2d 689, 704 (N.H. 1987); *D'ercole Sales, Inc. v. Fruehauf Corp.*, 501 A.2d 990, 995 (N.J. Super Ct. App. Div. App. 1985); *Welken v. Conley*, 252 N.W.2d 311, 318-19 (N.D. 1977); *Betz v. Timken Mercy Medical Center*, 644 N.E.2d 1058, 1063 (Ohio Ct. App. 1994); *Strubhart v. Perry Memorial Hosp. Trust Authority*, 903 P.2d 263, 270-71 (Okla. 1995); *Oliver v. Burlington Northern,* Inc., 531 P.2d 272, 274 (Or. 1975);*Haines v. Raven Arms*, 652 A.2d 1280,1282 (Pa. 1995); *Rush v. Blanchard*, 426 S.E.2d 802, 806 (S.C. 1993); *Wangen v. Knudson*, 428 N.W.2d 242, 244-45 (S.D. 1988); *Stevenett v. Wal-Mart Stores, Inc.*, 977 P.2d 508, 517 (Utah Ct. App. 1999); *Brault v. Flynn*, 690 A.2d 1365, 1366 (Vt. 1996); *Shepard v. Capitol Foundry of Va., Inc.*, 554 S.E.2d 72, 75 (Va. 2001); *Miller v. Triplett*, 507 S.E.2d 714, 719-20 (W. Va. 1998); *Management Computer Services, Inc. v. Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67, 81 (Wis. 1996); *Texas West Oil & Gas Corp. v. Fitzgerald*, 726 P.2d 1056, 1064 (Wyo. 1986).

of states apply a different standard, usually due to a special statute or rule.[10] Federal appellate courts likewise follow the abuse-of-discretion standard of review.[11]

Factual-sufficiency review is appropriate when *appellate courts* grant remittitur.[12] As appellate judges, we know nothing about a trial except what appears in the written record. We cannot grant a new trial—remittitur's conjoined twin—for reasons that do not appear in the record.[13]

But *trial courts* can—they enjoy much broader discretion in granting a new trial.[14] They are also uniquely positioned to determine whether the jury's award was based on passion or prejudice rather than reason.[15] Trial judges may grant new trials:

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[10] *See Smith v. Hansen*, 914 S.W.2d 285, 290 (Ark. 1996)(applying de novo review to determine whether amount shocks conscience of appellate court); *Foster v. Cohen*, 742 So. 2d 47, 49 (La. App. 1999)(noting that under La. Code Civ. P. Art 2083(B), appellate court reviews jury's award rather than trial court's remittitur for abuse of discretion); *Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 976 P.2d 1, 9 (N.M. 1999)(holding that appellate court reviews trial court's specific findings for remittitur under a passion or prejudice standard); N.Y. C.P.L.R. 5501(c) (Consol. 2001) (requiring that remittitur be reviewed to determine whether award deviates materially from what would be reasonable compensation); *Long v. Mattingly*, 797 S.W.2d 889, 896 (Tenn. Ct. App. 1990)(applying three-step process for review of adjustment of damages verdict: reason for adjustment, amount of adjustment, and whether evidence preponderates against the adjustment); *Hayhurst v. LaFlamme*, 441 A.2d 544, 547 (R.I. 1982)(giving great weight to trial court's ruling on adequacy of jury's award when trial court has reviewed an additur motion from the prospective of a seventh juror); *Thompson v. Berta Enters., Inc.*, 864 P.2d 983, 989 (Wash. Ct. App. 1994)(de novo review).

[11] *Browning-Ferris Indus. of Vermont v. Kelco Disposal, Inc*, 492 U.S. 257, 278-79, 109 S. Ct. 2909, 2921-22 (1989).

[12] *Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986).

[13] *Guajardo v. Conwell*, 46 S.W.3d 862, 864 (Tex. 2001); *Melendez v. Exxon Corp.*, 998 S.W.2d 266, 274 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

[14] TEX. R. CIV. P. 320; *see Champion Intern. Corp. v. Twelfth Court of Appeals*, 762 S.W.2d 898, 899 (Tex. 1988).

[15] *Moriel*, 879 S.W.2d at 28.

- because of their own erroneous rulings, or because a member of the jury was inattentive;[16]

- because improper factors—such as bias, racism, or corruption—may have influenced the jury's award;[17]

- for no stated reason,[18] or even if a stated reason is wrong.[19]

Undoubtedly, the trial judge here could have granted a new trial because the jurors made a glaring mistake in answering the questions put to them. Because it would have been wasteful for all concerned to try this case twice, the trial judge properly gave the plaintiffs a choice between a new trial and a remittitur. As in every case reviewing remittitur on appeal, they indicated a preference for the latter.

When remittitur is based on weak evidence, it is reasonable to review it for factual sufficiency.[20] But if a remittitur is based on bias, corruption, unfairness, or any other reason *outside* the trial record, testing the evidence *within* the trial record for factual sufficiency is nonsense—the taint lies elsewhere.[21] Under the *Larson* rule, remittitur is not an option in such cases; if the problem lies outside the trial record, the remittitur will always be reversed

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[16] *See In re Bayerische Motoren Werke, AG,* 8 S.W.3d 326, 327 (Tex. 2000) (Hecht, J., dissenting from denial of motion for rehearing of denial of petition for mandamus).

[17] *Larson*, 730 S.W.2d at 642 (Hill, C.J., dissenting).

[18] *Johnson v. Fourth Court of Appeals,* 700 S.W.2d 916, 918 (Tex. 1985).

[19] *Kolfeldt v. Thoma*, 822 S.W.2d 366, 368 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).

[20] Factual sufficiency may again be appropriate when one judge hears the trial and a different judge orders the remittitur. *See Marathon Oil Co. v. Sterner*, 777 S.W.2d 128, 133 (Tex. App.—Houston [14th Dist.] 1989, no writ).

[21] Of course, in order to know which the trial judge did, there must be a statement of the reason. *See Bayerische Motoren*, 8 S.W.3d at 327 (Hecht, J., dissenting) (arguing that trial judges should state reason for granting a new trial).

on appeal. Trial judges facing this problem can only grant a new trial to undo the harm—even if the plaintiff would prefer remittitur.

The Panel's Predicament

The panel in this case upholds $3.5 million of the judgment—and adds more than $1 million to it—even though both probably include punitive damages. By faithfully applying a factual-sufficiency standard of review, the panel must turn a blind eye to what happened in this trial and after it:

1. ***Ignore what the plaintiffs' counsel said***. The argument by the Andersons' attorney invited error, but Schindler's counsel did not object. Schindler makes a plausible argument that it was trapped—an objection would have played into the plaintiffs' theory of an industry-wide conspiracy of silence that Schindler was trying to protect. But this Court has already held that "send a message" arguments are not incurable,[22] so an objection was required.

2. ***Ignore what the jurors said***. A juror cannot testify or submit an affidavit about any matter occurring during deliberations.[23] Thus, jurors may tell the newspapers about their mistakes, but not us.

3. ***Ignore the glaring disparity in the verdict***. The panel concludes that because factually sufficient evidence supports each element of damages, it also supports the entire verdict. Under *Larson*, there is little more that can be done. We *must* compare compensatory and punitive damages awards when we review the second; it is hard to see why we shouldn't do the same when we review the first.[24]

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[22] *See Gannett Outdoor Co. of Texas v. Kubeczka*, 710 S.W.2d 79, 87 (Tex. App.—Houston [14th Dist.]1986, no writ).

[23] TEX. R. CIV. P. 327; TEX. R. EVID. 606(b).

[24] *Moriel*, 879 S.W.2d at 29.

Measuring the Unmeasurable

A further problem with *Larson* is that when intangible damages are involved (as they are here), we lack the tools to conduct a meaningful review. Considering all the evidence in this case (as factual-sufficiency review requires),[25] we find that:

- on the one hand, Scooter Anderson is a happy child, has had a remarkable recovery, is currently active in many sports, is doing well at one of Houston's premiere private schools, and appears to have a bright future;
- on the other hand, he has undergone a harrowing injury, is still adjusting to the loss of a large part of his foot, occasionally has exaggerated fears for his safety and that of his family, and may have to undergo many more surgeries in the future.

Obviously, there was factually sufficient evidence that Scooter suffered pain, mental anguish, impairment, and disfigurement. But was there factually sufficient evidence that Scooter's future pain and mental anguish amounted to $1,000,000.00 rather than $304,878.28? Or that his future physical impairment amounted to $1,524,390.80 rather than some lower figure? That, of course, is difficult to say.

Two highly-respected academics have commented on this problem with *Larson*:

> In cases involving intangible damages, it will be difficult for appellate courts to point to specific testimony that demonstrates excessiveness (or inadequacy, for that matter). Nevertheless, common sense suggests that courts should have some authority to review excessive or inadequate damage awards. It would be unwise to permit a jury to make any award it thinks fit without limit, even though it is dealing with damages that resist exact calculation or quantification. . . . Without some kind of review, the system will produce radically inconsistent awards for the same kinds of injuries and will be destined to take on more of the aspects of a lottery than it already has.[26]

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[25] *Dow Chemical Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

[26] William Powers, Jr. and Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L.R. 515, 565-68 (1991).

Shortly after *Larson*, one of our sister courts took the position that awards for intangible damages were immune from factual-sufficiency review; once some mental anguish was shown, any damage award was factually sufficient.[27] The Texas Supreme Court rejected this approach, and demanded that appellate courts conduct a more meaningful review.[28]

But the Court did not suggest how.[29] Dean Powers and Professor Ratliff suggest judges should compare a jury's award with awards in similar cases.[30] Schindler urges us to do so, pointing us to cases involving larger injuries but smaller verdicts. Some of our sister courts have taken this approach.[31]

Putting aside the macabre prospect of comparing one plaintiff's misfortune to another's, there are numerous problems with applying this approach at the appellate level. Reported appellate opinions are not a representative sample of all verdicts in the state. No appellate record, much less any appellate opinion, can catalog all the facts that may distinguish one trial from another. And it seems problematic to limit one family's verdict by a verdict in a trial somewhere else in which they could not participate.

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[27] *See Brown v. Robinson*, 747 S.W.2d 24, 26 (Tex. App.—El Paso 1988, no writ).

[28] *Saenz v. Fidelity & Guaranty Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996).

[29] Indeed, the Court has never addressed *Larson* in the context of intangible damages; *Larson* itself concerned only the market value of corporate stock. *Larson*, 730 S.W.2d at 642. And without factual-sufficiency jurisdiction itself, the Court can hardly lead by example.

[30] *Another Look*, at 567.

[31] *See, e.g., Southwestern Bell Telephone Co. v. Garza*, 58 S.W.3d 214, 234-36 (Tex. App. —Corpus Christi 2001, no pet.) (refusing remittitur by comparing jury award of $300,000 for past mental anguish with other cases awarding $180,000 and $125,000); *Lee Lewis Const., Inc. v. Harrison*, 64 S.W.3d 1, 15-16 (Tex. App.—Amarillo 1999), *aff'd*, 45 Tex. Sup. Ct. J. 232, 2001 WL 1820039 (2001) (ordering remittitur for factual insufficiency after comparing $500,000 award for 4 seconds of anguish while worker plummeted to the ground with awards in other cases of $10,000 for 5 seconds of anguish before death by electrocution, $20,000 for less than a minute of anguish as plane fell to earth, $600,000 for fifteen minutes of suffering after being struck by a truck, $65,000 found excessive for anguish while drowning, and $40,000 found excessive by $30,000 for 10 minutes of anguish before death in fire).

But trial judges typically see more jury verdicts than we do, because many verdicts are never appealed. Because their jurisdiction is smaller, they can compare a jury's award with others locally, applying a community standard unfamiliar or unknown to us. They may also be privy to settlements in the vast majority of cases that are resolved before trial. And, as mentioned, they see the intangibles that may affect a verdict but never appear in the trial record.

Reviewing awards for intangible damages will never be easy, but trial judges have more tools at their disposal than we do. In this case, the jurors admitted making a mistake in their verdict, and an experienced trial judge reduced it by remittitur. Even the appellees do not challenge most of what he did. But on the three reductions they do challenge – all intangible damages – the panel uniformly disregards the remittitur and restores the numbers the jury (probably mistakenly) wrote. I hope the Texas Supreme Court will reconsider whether, at least as to intangible damages, some room ought to be left for a trial judge's discretion.

Considering the Constitution

As an intermediate appellate court, we cannot disregard *Larson* merely because it requires us to measure the intangible, or ignore what happened at trial. But there is more than one court above us. And that higher Court's precedent suggests factual-sufficiency review in this case may be an error of constitutional dimension.

In *Pacific Mutual Life Insurance Co. v. Haslip*,[32] the United States Supreme Court affirmed an Alabama general verdict containing both compensatory and punitive damages. Thus there appears to be nothing intrinsically unconstitutional in a combined award of compensatory and punitive damages, at least when the probable amount of punitive damages

[32] 499 U.S. 1, 111 S. Ct. 1032 (1991).

can be discerned.[33] But the Court approved the punitive damage award in that case based on three procedural protections:

- jury instructions limited the jury to punitive damages that would deter and punish rather than compensate, and informed them that imposition was not compulsory;
- post-verdict rules required the trial judge to state reasons for affirming or reducing the punitive award; and,
- detailed appellate review provided a definite and meaningful constraint on the jury's discretion in awarding punitive damages.[34]

Because of these procedural protections, the punitive damages awarded in that case did not "cross the line into the area of constitutional impropriety."[35]

But in this case, these procedural protections have each been thwarted. The jurors received proper instructions, but admitted they didn't follow them. Detailed appellate review is limited by the factual-sufficiency standard under *Larson*. Finally, although the trial judge stated no reasons for the remittitur, his across-the-board cut suggests something tainted all the damage awards (such as "sending a message"), not that the evidence supporting a few of them was weak. If, as appears likely, he ordered remittitur because punitive damages were awarded without the protections required by state and perhaps constitutional law,[36] factual-sufficiency review requires us to undo that result.

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[33] 499 U.S. at 6 n.2, 111 S. Ct. at 1032 n.2.

[34] 499 U.S. at 19-22, 111 S. Ct. at 1044-46.

[35] 499 U.S. at 24, 111 S. Ct. at 1046.

[36] Although the Texas Supreme Court has reserved the question whether these procedural safeguards are required by the United States or Texas Constitutions, it has nevertheless stated they are necessary to "ensure against excessive or otherwise inappropriate awards." *Moriel*, 879 S.W.2d at 29.

Conclusion

The parties have not addressed these constitutional questions. In its post-verdict motions and on appeal, Schindler never argues that punitive damages masquerading as compensatory damages are "unconstitutional." But it does claim they are "inappropriate," "unfair," "deplorable," "fundamental error," "out of synch," a "clear violation of Texas statutes," "extraordinarily improper," "incurable," "excessive," and "violated the public policy and legislative mandates underlying bifurcated trials and exemplary damages."

We must liberally construe Schindler's brief, and address all points to which it directed our attention.[37] In some circumstances, we must address constitutionality if it is obvious and apparent, even if the parties leave it unmentioned.[38] Thus, I would grant Schindler's motion for rehearing en banc to consider: (1) whether application of factual-sufficiency review in this case is unconstitutional; and, (2) whether Schindler has preserved any such claim.

/s/ Scott Brister
Chief Justice

Dissenting and Concurring Opinions on Denial of Motion for Rehearing En Banc filed April 4, 2002. (Frost, J. concurring. Yates, J. and Guzman, J. joining Frost, J. Edelman, J. concurring and Seymore, J. concurring.)

En Banc court consists of Chief Justice Brister, Justices Yates, Anderson, Hudson, Fowler, Edelman, Frost, Seymore and Guzman and Senior Justices Draughn, Sears and Lee.[39]

Publish — TEX. R. APP. P. 47.3(b).

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[37] TEX. R. APP. P. 38.1(e); *Stephenson v. LeBoeuf*, 16 S.W.3d 829, 843 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *see also Hellman v. Mateo*, 772 S.W.2d 64, 66 (Tex. 1989) (holding assertion of discovery rule preserved claim that Article 4590i's strict two-year statute of limitations was unconstitutional).

[38] *Smith v. Decker*, 312 S.W.2d 632, 636 (Tex. 1958); *Smith v. Costello*, 861 S.W.2d 56, 58 (Tex. App.—Fort Worth 1993), *writ withdrawn by agreement*, 884 S.W.2d 772 (Tex. 1994).

[39] Senior Justices Joe L. Draughn, Ross A. Sears and Norman R. Lee sitting by assignment.

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CONCURRING OPINION ON DENIAL OF REHEARING EN BANC

The dissenting opinion on motion for rehearing en banc raises issues far more fundamental than those which it addresses:

1. How important is it to our system of justice that decisions be reached in an impartial manner, *i.e.*, based on the issues, law, and evidence presented rather than other considerations?