IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 95-9198

TRANSFER OF CASE FROM
SIXTH COURT OF APPEALS

ORDERED:

The motion for rehearing of the request to transfer the following case now on the docket of the Court of Appeals for the Sixth Court of Appeals District, Texarkana, Texas, to the Court of Appeals for the Twelfth Court of Appeals District, Tyler, Texas, is overruled:

NUMBER	**STYLE OF CASE**
06-95-00026-CV	Susan Renae Miles, Et Al. v. Ford Motor Company and Douglas Stanley, Jr., d/b/a Doug Stanley Ford

As ordered by the Supreme Court of Texas, in chambers,

with the Seal thereof affixed at the City of Austin, this 22nd day of December, 1995.

JOHN T. ADAMS, CLERK
SUPREME COURT OF TEXAS

IN THE SUPREME COURT OF TEXAS

MISC. DOCKET NO. 95-9198

SUSAN RENAE MILES, INDIVIDUALLY AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS AND KENNETH MILES, APPELLANTS

v.

FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR. D/B/A DOUG STANLEY FORD, APPELLEES

ON MOTION TO TRANSFER APPEAL

PER CURIAM

The motion for rehearing of Ford Motor Company is overruled. The following opinion is substituted for the Court's September 14, 1995, per curiam opinion.

Judgments rendered by the Fourth Judicial District Court in Rusk County may be appealed to either the Sixth Court of Appeals in Texarkana or the Twelfth Court of Appeals in Tyler. *See* Tex. Gov't Code § 22.201(g), (m). Plaintiffs appealed a judgment from the Fourth Judicial District to the Sixth Court of Appeals, while defendant appealed the same judgment to the Twelfth Court of Appeals. In this administrative proceeding, defendant requests that we consolidate both appeals in the Twelfth Court of Appeals by transferring plaintiffs' appeal to that court. Because plaintiffs' appeal was the first to be perfected, we deny the motion to transfer.

Willie Searcy suffered severe and permanent injury from a collision while riding as a passenger in a Ford vehicle. Willie's family sued Ford Motor Company ("Ford") and Doug Stanley Ford ("Stanley"), the seller of the vehicle, in Rusk County, claiming product defect. Willie's mother asserted claims individually and as next friend of Willie, while Willie's brother and step-father asserted claims for loss of consortium. In January 1995, the trial court granted summary judgment for the defendants on the brother's and step-father's consortium claims. Plaintiffs immediately attempted to perfect an appeal from the summary judgment to the Sixth Court of Appeals, but the consortium claims had not been severed from the other portions of the case, and plaintiffs do not dispute that their appeal was premature. There is no indication in the record before us, however, that Ford moved to dismiss the premature appeal, or that the court of appeals took any action prior to the plaintiffs' filing of a timely appeal bond from the subsequent final judgment, as discussed below.

At trial, the jury found against Ford on all remaining claims, while returning findings exonerating Stanley from liability. The trial court rendered judgment against Ford on the verdict, signing a judgment on March 9, 1995, awarding actual damages of $27.8 million and punitive damages of $10 million. Later that same day, plaintiffs perfected an appeal to the Sixth Court of Appeals, challenging the trial court's summary judgment for Ford on the consortium claims and the take-nothing judgment on the jury's verdict for Stanley.[1]

On March 29, 1995, Ford perfected a separate appeal to the Twelfth Court of Appeals.

[1] Plaintiffs also filed a motion for partial new trial on March 9 challenging the jury findings in favor of Stanley, which the trial court denied that same day by written order.

Plaintiffs moved to dismiss this appeal, contending that the court at Texarkana had already acquired dominant jurisdiction over the entire appeal. That motion to dismiss is apparently still pending.

Ford subsequently filed a motion in the Sixth Court of Appeals to transfer plaintiffs' appeal to the Twelfth Court of Appeals. After notifying the parties that it had no statutory authority to transfer appeals, the Sixth Court forwarded Ford's motion to this Court, together with a letter indicating that it had no objection to the transfer.[2] The Sixth Court has abated the appeal pending our consideration of the motion to transfer.

Only the Supreme Court is authorized to transfer appellate cases. The statute provides:

> The supreme court may order cases transferred from one court of appeals to another at any time that, in the opinion of the supreme court, there is good cause for the transfer.

Tex. Gov't Code § 73.001. Although we typically exercise this authority to equalize the dockets of the courts of appeals, section 73.001 does not limit our transfer authority to that purpose. Under the jurisdictional scheme set out in the Government Code, the Sixth and Twelfth appellate districts overlap in six counties, including Rusk County. Tex. Gov't Code § 22.201(g), (m).[3]

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[2] The proper procedure for presenting a motion to transfer to this Court is as follows: The party requesting a transfer should file a copy of the motion to transfer in each of the two courts of appeals, asking that, when the motion is forwarded to the Supreme Court, each court of appeals advise the Supreme Court in writing whether it has any objection to the proposed transfer. Any briefs in favor of the proposed transfer should also be filed in each court of appeals and forwarded with the transfer motion. We will then have the motion, the briefs, and the comments of the two courts of appeals in determining whether to grant the motion to transfer.

[3] Even though the Constitution provides that "[t]he state shall be *divided* into courts of appeals districts," Tex. Const. art. V, § 6 (emphasis supplied), twenty-two counties are located in two appellate districts and one, Brazos County, is located in three. *See* Tex. Gov't Code § 22.201. The first appellate overlap, created in 1934, involved Hunt County. After that county was transferred from the Fifth District (Dallas) to the Sixth District (Texarkana) in 1927, it was also restored to the Fifth Court seven years later, thus placing it in two districts. Act of September 24, 1934, 43rd Leg., 3rd C.S., ch. 31, 1934 Gen. Laws 54.

The statute does not specify any procedure for allocating appeals from these counties between the two appellate courts, and thus appellants are free to elect either appellate route.[4] The parties do not dispute, however, that all challenges to the trial court's judgment should be heard together in one appellate proceeding. We must decide which court should retain jurisdiction under the circumstances of this case.

Ford contends that good cause exists to transfer the plaintiffs' appeal to defendant's chosen venue under section 73.001 because Ford's appeal is "primary." That is, Ford is appealing a judgment against it in excess of $37 million, while plaintiffs are appealing loss of consortium claims which, according to Ford, are worth at most a small percentage of that amount. Plaintiffs' other appellate complaint, Ford contends, could at best result in the extension of liability to another party, Stanley, but could not increase the damage award. *See generally Duncan v. Cessna*, 665 S.W.2d 414, 432 (Tex. 1984).

No further overlaps were created until 1963, when the seventeen-county Twelfth Court of Civil Appeals was established in Tyler. Nine of the counties comprising the new district were removed from their former districts, but the other eight were also left in their previous districts. Act of May 7, 1963, 58th Leg., R.S., ch. 198, § 2, 1963 Gen. Laws 539. Gregg, Hopkins, Panola, Rusk, Upshur and Wood Counties remained in the Sixth District as well as the Twelfth, while Kaufman and Van Zandt Counties remained in the Fifth District as well as the Twelfth. *Id.*

The final overlaps were created in 1967. Because of the population and litigation growth in the Houston area and the then constitutional limitation of appellate courts to three justices, the Legislature established an entirely new court, the Fourteenth Court of Appeals, covering the same counties as the existing First Court. Act of June 18, 1967, 60th Leg., R.S., ch. 728, § 2, 1967 Tex. Gen. Laws 1953. In addition to the thirteen counties already covered, the Legislature added Brazos County to both courts, while also leaving it in the Tenth District. Even though the people amended the Constitution in 1978 to allow larger appellate courts, the dual appellate court system in the state's most populous area remains.

[4] Appellants control the choice of forum except in the First and Fourteenth Districts, where cases have been randomly assigned since 1983, *see* Tex. Gov't Code § 22.202(h), and in Hopkins County, where criminal cases have been randomly divided between the Sixth and Twelfth Districts since 1993. *See* Tex. Gov't Code §§ 22.207(c), 22.213(d). When the original overlap was created in Hunt County, the Legislature provided that appeals were to go to different courts in different calendar halves of the year. Act of Sept. 24, 1934, 43rd Leg., 3rd C.S., ch. 31, § 2, 1934 Tex. Gen. Laws 54. Though never formally repealed, this procedure was abandoned and has not been replicated elsewhere.

Plaintiffs, on the other hand, respond simply that their venue selection should control because they were the first to perfect an appeal. We agree. The general common law rule in Texas is that "the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts." *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974); *Bailey v. Cherokee County Appraisal Dist.*, 862 S.W.2d 581, 586 (Tex. 1993); *Mower v. Boyer*, 811 S.W.2d 560, 563 n.2 (Tex. 1991). This rule is grounded on the principles of comity, convenience, and the need for an orderly procedure in resolving jurisdictional disputes. *See Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988).

Although the rule of dominant jurisdiction has most often been applied at the trial court level, the rationale underlying the rule also applies to appeals in those instances where the Legislature has not otherwise provided an allocation mechanism. Once the first appeal is perfected, the court of appeals acquires jurisdiction over the entire controversy. *See Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 482 (Tex. 1964). We have recognized that a court of appeals "will not be permitted to interfere with the previously attached jurisdiction of another court of co-ordinate power." *Morrow v. Corbin*, 62 S.W.2d 641, 645 (Tex. 1933). In *Ward v. Scarborough*, 236 S.W. 441 (Tex. Comm'n App. 1922, judgm't adopted), the court applied an analogous rule to uphold the court of appeals' dismissal of a writ of error appeal that had been filed after the opposing party had perfected an ordinary appeal from the same judgment. Even though the writ of error and ordinary appeal were both proper methods of challenging the judgment, and the appellant's writ of error raised different complaints from those raised in the ordinary appeal, the court concluded that the first to be filed should control:

> The right of the Scarboroughs and Ward, respectively, to select the proceeding by which the case should be carried to the Court of Civil Appeals for review was equal. Either had a right to invoke the speedier process of appeal, and, when so invoked, the other had no right to complain. Either had the right, the other remaining inactive, to adopt the slower process by writ of error. Their rights being equal, priority in making the election and acting thereon should prevail.

236 S.W. at 444.

In the trial court context, we have recognized three exceptions to the rule of dominant jurisdiction: 1) where a party has engaged in inequitable conduct that estops him or her from asserting prior active jurisdiction; 2) where there is a lack of persons to be joined if feasible, or the power to bring them before the court; and 3) where there is a lack of intent to prosecute the first proceeding. *See Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988). Ford argues that the third exception should apply here. It contends that plaintiffs filed their appeal as a pretext merely to establish venue in the Sixth Court of Appeals. Plaintiffs, however, have timely perfected their appeal, and there is no evidence that they do not intend to prosecute their appeal. Although plaintiffs prevailed on their most significant claims, they nonetheless have the right to appeal those matters on which they did not prevail. As noted in *Wood*, where the parties have an equal right of appeal, "priority in making the election and acting thereon should prevail." 236 S.W. at 444.

In the trial court context, we have at times indicated that the second-filed suit should be dismissed, *see Mower v. Boyer*, 811 S.W.2d 560, 563 n.2 (Tex. 1991); *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974); *Cleveland v. Ward*, 285 S.W. 1063 (Tex. 1926), while on at least one occasion we have indicated that it should merely be abated pending disposition of the first

suit. *See Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988). In the appellate context, we believe abatement is the more appropriate remedy. This will protect the second appellant's right to proceed in its chosen forum if at any time it becomes apparent that the appellant filed the first appeal merely as a sham, with no intent to prosecute the appeal. If for some reason the second appellant desires a transfer to protect a point of error that was not properly raised as a cross-point in the first appeal, the second appellant may make an appropriate motion to this Court.

Ford further argues that the common-law rule of dominant jurisdiction must yield to section 73.001, which vests this Court with statutory authority to transfer cases for good cause. We conclude, however, that in determining whether good cause exists under the circumstances presented here, the rule of dominant jurisdiction should control. As noted, this rule promotes comity among the courts of appeals and is straightforward in its application.

Ford finally argues that the appeal should be transferred to the Twelfth Court of Appeals because that court has previously decided two mandamus proceedings arising from this lawsuit. These mandamus actions, however, were distinct, original proceedings that have since been concluded. Although the Twelfth Court of Appeals may have some familiarity with the factual background of the case, this is not a sufficient reason to allow the filing of an original proceeding to control the venue for a later appeal from the trial court's final judgment. *Cf. Avis Rent A Car System, Inc. v. Advertising and Policy Committee of the Avis Rent A Car System*, 751 S.W.2d 257, 258 (Tex. App.--Houston [1st Dist.] 1988, no writ) (filing of original mandamus proceeding does not control venue of later appeal as between the First and Fourteenth appellate districts, as

such appeal must be assigned by lot). Further, the Twelfth Court of Appeals has submitted written comments to this Court in connection with the motion for transfer stating that it "does not have an 'invaluable knowledge base' of this litigation." The Twelfth Court notes that the earlier mandamus proceedings involved limited pre-trial discovery and procedural issues, and that the court lacks any knowledge of the proceedings during the thirteen day trial on the merits. Although this Court can consider prior familiarity with a case in deciding whether to order an exception to a docket equalization order, we decline to do so where both parties have an equal right under the law to proceed in the forum of their choice.

Before closing, we note that this question arises only because the Legislature has chosen to create overlaps in the State's appellate districts. We have been unable to find any other state in the union which has created geographically overlapping appellate districts. Most of the reasons which explain such overlaps, such as political expediency, local dissatisfaction with the existing judiciary, or an expanded base of potential judicial candidates, would at most justify the temporary creation of such districts, not permanent alignments.

On the other hand, the problems created by overlapping districts are manifest. Both the bench and bar in counties served by multiple courts are subjected to uncertainty from conflicting legal authority. Overlapping districts also create the potential for unfair forum shopping, allow voters of some counties to select a disproportionate number of justices, and create occasional jurisdictional conflicts like this one. The Court thus adheres to its view that overlaps in appellate districts are disfavored. *See* 1995 Report of the Supreme Court to the Legislature Regarding Appellate Courts ("The primary recommendation of the Court at this time is to eliminate the

current jurisdictional overlaps that occur between two or more Courts of Appeals in ten counties, and in one instance, in three counties."); 1993 Report of the Supreme Court to the Legislature Regarding Appellate Courts ("No county should be in more than one appellate district."); 1986 Report on the Reapportionment of the Courts of Appeals Districts as adopted by the Supreme Court of Texas and the Texas Judicial Council ("All current overlapping districts should be eliminated except for the 1st and 14th districts which are coterminous.").

For the foregoing reasons, the motion to transfer is denied.

OPINION DELIVERED: December 22, 1995

THE SUPREME COURT OF TEXAS

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September 27, 1995

Mr. Greg Smith
Ramey & flock
500 First Place
Tyler, Texas 75702

RE: Misc. Docket No. 95-9198 (your letter, September 25, 1995).

Dear Mr. Smith,

We received your motion for rehearing in the above on September 26, 1995 and forwarded it to the Court. As this is considered an administrative matter, there is no filing fee and thus we are returning the check you sent.

Sincerely,

SIGNED

John T. Adams
Clerk

Encl.

THE SUPREME COURT OF TEXAS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711
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December 22, 1995

The Honorable William J. Cornelius
Chief Justice
Court of Appeals for the Sixth District
Bi-State Justice Building
100 North State Line Avenue #20
Texarkana, Texas 75502

The Honorable Tom B. Ramey
Chief Justice
Court of Appeals for the Twelfth District
1517 West Front, Suite 354
Tyler, Texas 75702

RE: Misc. Docket No. 95-9198
Case No. 06-95-00025-CV, in the Court of Appeals for the Sixth District, Texarkana, Texas

STYLE: Susan Renae Miles, Individually, et al. v. Ford Motor Company, et al.

Dear Sirs:

The Supreme Court of Texas has today overruled the motion for rehearing of the request to transfer the above-referenced case from the Court of Appeals for the Sixth District to the Court of Appeals for the Twelfth District. Please find enclosed the order and per curiam opinion issued this day by this Court.

Should you have any questions, please contact the Clerk's office. Thank you for your attention to this matter.

Very truly yours,

Elizabeth A. Saunders

Elizabeth A. Saunders
Chief Deputy Clerk

Enclosures

cc: Ms. Tibby Thomas, Clerk
Ms. Cathy S. Lusk, Clerk
Mr. Mike Hatchell
Mr. Greg Smith
Mr. Thomas E. Fennell
Mr. John M. Thomas
Mr. Malcolm E. Wheeler
Mr. Richard Grainger
Mr. R. Jack Ayres, Jr.
Mr. J. Mark Mann
Mr. John R. Mercy
Office of Court Administration

GREG SMITH
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September 25, 1995

VIA FEDERAL EXPRESS

John T. Adams, Clerk
Supreme Court of Texas
201 W. 14th St., Room 104
Austin, TX 78701

RE: Misc. Docket No. 95-9198; Transfer of Case from Sixth Court of Appeals.

Dear Mr. Adams:

Here, for filing, are the original and 11 copies of Ford's motion for rehearing of the September 14 decision on Ford's request to transfer appeal. I am also enclosing the $10.00 filing fee.

Sincerely,

GREG SMITH

Enclosures

GS/tlh
supclerk.5

cc: Mr. R. Jack Ayres, Jr. (VIA C.M. RRR # Z 430 403 980)
LAW OFFICES OF R. JACK AYRES, JR., P.C.
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Dallas, TX 75244

Mr. J. Mark Mann (VIA C.M. RRR # Z 430 403 981)
WELLBORN, HOUSTON, ADKISON, MANN, SADLER & HILL
P.O. Box 1109
Henderson, TX 75653-1109

Mr. John R. Mercy (VIA C.M. RRR # Z 430 403 982)
ATCHLEY, RUSSELL, WALDROP & HLAVINKA, L.L.P.
P.O. Box 5517
Texarkana, TX 75505-5517

Misc. Docket No. 95-9198

IN THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

TRANSFER OF CASE FROM SIXTH COURT OF APPEALS

MOTION FOR REHEARING AND TO TRANSFER APPEAL

On September 14, this Court issued an order and opinion (1) denying Ford's request to transfer the Miles' appeal from Texarkana to Tyler, (2) announcing a first-to-file "dominant jurisdiction" test for appeals, and (3) suggesting that Ford's appeal, as the second-filed of two appeals from the same judgment, should be dismissed. Of these three rulings, Ford asks the court to rehear the last one. Ford thus accepts that its appellate complaints will be decided in Texarkana. Ford *cannot*, however, accede to the dismissal of its appeal.

I.
Scope of the Rehearing and Relief Requested

The issues raised in this motion are no small matters--the procedure that will apply in all future instances of overlapping appellate jurisdiction and, potentially, Ford's right to complain of a $40 million judgment both hang in the balance. With these stakes in mind, Ford asks the Court to:

- retract the suggestion that Ford's appeal be dismissed; and
- transfer Ford's appeal from Tyler to Texarkana, where it can then be consolidated with the Miles' appeal, or, alternatively, direct the Tyler Court to abate the Tyler proceedings while the Texarkana proceedings go forward.

II.
The Arguments that Compel a Rehearing

A. When Two Appeals are Perfected From the Same Judgment to Appellate Courts with Overlapping Districts, the Remedy is to Transfer (or, Alternatively, Abate) the Proceedings in One of the Courts, Not to Dismiss Them.

Dismissal, which risks important appellate rights, is neither a necessary nor an acceptable consequence when dual appeals are perfected to different courts. Transfer and abatement are adequate--and far safer--procedures for addressing "dominant" jurisdiction. Indeed, as the plaintiffs recognize, the nub of the dispute is venue selection, not jurisdiction. Transfer is, of course, the logical remedy to revise or consolidate venue. If not transfer, abatement

should be the next best remedy. The Tyler proceedings, being already abated, cannot possibly jeopardize or interfere with the Texarkana court's active jurisdiction.

B. A Dismissal Rule Jeopardizes Substantive Appellate Rights.

1. A dismissal rule invites sham appeals that can be used to deny valid appellate rights.

Because it is a predictable, risk-free means of manipulating appellate venue, a first-to-file test already encourages unscrupulous litigants to file sham appeals, the sole purpose of which is forum selection. A dismissal rule, however, raises the stakes beyond forum selection to the right of appeal itself.

Under a dismissal rule, the same litigants who would manipulate appellate venue also will perceive that they can eliminate their opponents' appellate rights altogether by dismissing their own insubstantial appeals or failing to secure the timely filing of an appellate record. After all, as soon as the later-filed appeals are dismissed, the appellate complaints that those appeals would have raised will have been relegated to the tenuous status of cross-points.

In the wrong hands, then, a dismissal rule could easily become a tool for subordinating the substantive appellate rights of earnest and unsuspecting litigants to the schemes of their adversaries, violating the due-process and due-course-of-law guarantees of the Texas and Federal Constitutions and

jeopardizing the right to an open appellate court. U.S. CONST. amend. XIV; TEX. CONST. ART. I, secs. 13 & 19; TEX. CONST. ART. V, § 5 . Even if a first-to-file test is worth risking, these consequences of a dismissal rule are not.

2. Even innocent behavior can cause the loss of valid appeals under a dismissal rule.

It gets worse. Under a dismissal rule, even innocent conduct can easily destroy valid appellate rights. This will occur, for example, whenever a jurisdictional defect in the first-filed appeal is detected after the second-filed appeal has been dismissed.

Perhaps worst of all, the most diligent appellant will be helpless to avoid the risks that a dismissal rule creates. Someone's appeal will be dismissed whenever two appeals from a single judgment are perfected to different courts. Yet, in the real world, it will be virtually impossible for a litigant to be assured, when preparing his cost bond, that his opponent will not first file a bond designating another court of appeals and win the perfection race. In other words, almost anyone appealing a judgment from any of the 22 counties that lie in multiple court-of-appeals districts will be risking mandatory dismissal--and won't know if his bond is a doomed second-filed bond until it is too late. A mandatory dismissal rule, then, plays a sort of Russian roulette with valid appeal rights.

C. There is no Logical Basis Upon Which to Justify Dismissing a Valid Appellate Proceeding in a Court of Jurisdiction.

1. The suggestion that one court's "dominant" jurisdiction might justify dismissing the valid, albeit inferior, proceedings of a coordinate court perpetuates an unfortunate mistake.

In stating that the second-filed appeal should be dismissed, the Court has adapted a position staked uncritically in *Curtis v. Gibb*, where the court twice agreed that a plea in abatement should have been granted, but each time and without explanation said that this meant the subordinate suit should have been dismissed. *Curtis*, 511 S.W.2d at 267, 268 (*e.g.*, "it was the clear duty of Judge Griggs to sustain the plea in abatement and to dismiss the mother's suit").

The *Curtis* statements are wrong. Even in the trial courts, a plea in abatement is the proper means to raise "dominant" jurisdiction:

> [W]hen a suit between the same parties involving the same subject matter is filed in one court and a later suit on the same demand between the same parties is filed in a court of co-ordinate jurisdiction, the proper procedure is for the plaintiff in the prior suit to file a plea in abatement in the second suit and secure a ruling on such plea.

Lancaster v. Lancaster, 291 S.W.2d 303, 305 (Tex. 1956); *see also Powers v. Temple Trust Co.*, 124 Tex. 440, 78 S.W.2d 951, 952 (1935).

The remedy that a plea in abatement authorizes is, naturally, abatement--not dismissal:

> [P]leas [in abatement and pleas to the jurisdiction] have different objectives, and different consequences flow from their sustention. . . . [A] plea to the jurisdiction, if sustained, would require a dismissal; a plea in abatement, if sustained, would require an abatement of the claim or cause of action until some obstacle to its further prosecution was removed, and a plea in bar, if sustained, would require a judgment that the claimant take nothing.

Texas Highway Dep't v. Jarrell, 418 S.W.2d 486, 488 (Tex. 1967), *citing Life Ass'n of America v. Goode*, 71 Tex. 90, 8 S.W. 639, 640 (1888). Accordingly, both before and after *Curtis*, this Court has found abatement--which ensures that only one court exercises *active* jurisdiction over a controversy--appropriate to cure the problem of overlapping jurisdiction. *See Lancaster*, 291 S.W.2d at 305-06; *see also Cleveland v. Ward*, 116 Tex. 1, 285 S.W. 1063, 1072 (1926)(once the pendency of a prior suit predicated on the same facts is pleaded and proven in the court of the second suit, "the subsequent suit is abated"); *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988).

Dismissal, in contrast, is a quite inappropriate cure. This much can be deduced from the common-sense meaning of "dominant" jurisdiction, which is a relational term. To say that one court has "dominant" jurisdiction is necessarily it imply that some other court also maintains its own, albeit subordinate, jurisdiction (which, of course, would no longer be subordinate if for any reason the "dominant" proceeding were to itself go away).

To justify dismissing the second-filed of two appeals, however, a finding of "dominant" jurisdiction would need to negate, not affirm, the second court's jurisdiction. Any other conclusion would contradict the established law. After all, nothing in the constitution, statutes or this Court's rules even suggests that valid appellate proceedings in a court of jurisdiction might properly be dismissed merely because another party with equal right had appealed to a coordinate forum. And, too many cases establish without qualification that jurisdiction lodges in a court of appeals immediately upon the filing of a proper cost bond.

Even if the second court's jurisdiction is inferior or inactive, it is jurisdiction nevertheless and prevents the outright dismissal of the proceedings in that court. *Cf. Blaylock v. Wilson*, 255 S.W. 217 (Tex. Civ. App.--Dallas 1924, no writ)(explaining the difference between appellate jurisdiction and active appellate jurisdiction). Dismissal thus should await the time when active proceedings in the one court actually moot the proceedings in the other, as would occur when the Texarkana Court decides the merits of the parties' appellate complaints or at least takes them under submission. *See Foust v. First Nat'l Bank*, 272 S.W. 290 (Tex. Civ. App.--Waco 1925, no writ). Dismissal is premature where, as here, the parties have not yet joined issue. (Although the Miles days ago filed a brief in Texarkana, Ford has not yet had the chance to respond.)

2. The reasons for getting the remedy right are all the more compelling in the appellate context.

Maybe the distinctions between abating and dismissing trial-court proceedings were unimportant in *Curtis* and therefore did not justify the effort to invoke the proper remedy. The choice between dismissing and abating an appeal, however, makes a big difference--and requires that the Court revise its opinion accordingly.

Trials and appeals are apples and oranges. For one thing, dismissals at the trial-court level can be and frequently are rendered without prejudice to a refiling of the same suit, constrained only by the relevant limitations period. If the first-filed suit goes away, barring limitations problems, the second suit can be refiled. Appeals are much different matters. Once the initial period for perfecting an appeal expires, another appeal can never be instituted.

3. The exceptions applied in the trial courts are inadequate and inappropriate to safeguard appellate rights.

It is wrong to take any comfort in the trial-court exceptions to the first-to-file test. However well they may function at the trial level, these exceptions are not a meaningful safeguard at the appellate level. If the second court is obliged to dismiss once it learns of the first-filed appeal, it will likely be deciding dismissal before either party has briefed the merits in either appeal--and maybe even before a record has been filed. How, at such

an early stage, can the appellant in the second suit expect to prove "inequitable conduct" or prove that "[the plaintiffs] do not intend to prosecute their appeal"? When would an exception for "a lack of persons to be joined if feasible" ever apply in an appellate context?

Rather than rely on illusory exceptions borrowed from the trial-court context, it would be far better to maintain the viability of the later-filed proceedings by transferring them or abating them--at least until the issues have been joined and a court of appeals has taken them under submission.

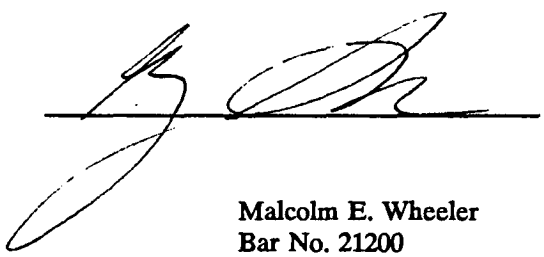
III.
Conclusion and Prayer

As lamentable as the problems created by permanently overlapping court-of-appeals districts are, fundamental fairness requires that the law protect litigants from the sometimes unforeseen and unpreventable dismissal of their properly perfected appeals. Whatever criteria the Court might adopt for guiding its use of the statutory power to transfer appeals, dismissal of a valid proceeding can never be a means for consolidating jurisdiction in a single appellate court. For the sake of all parties who ever will try their cases in a County that lies within more that one court-of-appeals district, the Court must revise its decision in this case.

WHEREFORE, PREMISES CONSIDERED, Ford prays that the Court would grant this motion and, having done so, would (1) retract the

suggestion that Ford's appeal be dismissed rather than abated and (2) either transfer the Tyler proceedings to the Texarkana Court or direct the Tyler Court to abate--but not dismiss--Ford's appeal. Of course, Ford also requests all other relief that this motion may authorize.

Respectfully submitted,



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ATTORNEYS FOR FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR.

CERTIFICATE OF SERVICE

On this 25th day of September, 1995, I forwarded a true copy of the above instrument, via the indicated method of service, to the following persons:

Mr. R. Jack Ayres, Jr. (Via Certified Mail - RRR # Z 430 403 980)
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4350 Beltway Dr.
Dallas, TX 75244

Mr. J. Mark Mann (Via Certified Mail - RRR # Z 430 403 981)
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GREG SMITH

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GARY L. TAYLOR
INVESTIGATOR

September 15, 1995

Mr. John T. Adams
Clerk, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Attention: Administrative Docket

Re: Administrative Docket No. 95-9180; In re No. 06-95-00026-CV, In the Court of Appeals for the Sixth Court of Appeals District of Texas, *Susan Renae Miles, et al. v. Ford Motor Company, et al.*

Dear Sir:

Enclosed please find the original and 12 copies of the Respondents' Supplemental Response.

Please return a copy to us with your file-mark on it in the enclosed stamped, self-addressed envelope.

By copy of this letter opposing counsel are being served with this document.

Respectfully submitted,

T. Randall Sandifer

TRS:clp
Enclosure
c:\wp50\ap-miles\clerk-su.lt3

cc: Mr. Gregory D. Smith **VIA CMRRR**
Mr. Richard Grainger **VIA CMRRR**
Mr. Thomas E. Fennell **VIA CMRRR**
Mr. John Mercy
Mr. Mark Mann

Administrative Docket #95-9198

IN THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

In Re

NO. 12-95-00068-CV

IN THE COURT OF APPEALS FOR THE

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

Ford Motor Company,
Appellant,

v.

Susan Renae Miles, et al.
Appellees.

&

No. 06-95-00026-CV

IN THE COURT OF APPEALS FOR THE

SIXTH COURT OF APPEALS DISTRICT OF TEXAS

Susan Renae Miles, et al.
Appellants,

v.

Ford Motor Company and Douglas Stanley, Jr., d/b/a Doug Stanley Ford,
Appellees.

RESPONDENTS' SUPPLEMENTAL RESPONSE

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ATTORNEYS FOR SUSAN RENAE MILES, ET AL., RESPONDENTS

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW, Susan Renae Miles, et al., Plaintiffs in the trial court, parties to the pending appeals and Respondents in this Administrative Proceeding, and subject to the previous Motions to Dismiss and/or Accelerate files this Supplemental Response.

I.

The Respondents will shortly file a Reply to the Response to the Motion to Accelerate Appeal previously filed by Ford Motor Company. This Supplemental Response in no way waives and expressly reserves any previous Motion(s) filed by Respondents.

II.

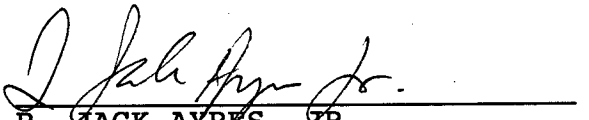
Subject to the foregoing, Respondents would show the Court that it is imperative that this case be forthwith decided by some Court of Appeals if any relief is to be ultimately efficacious to them.

III.

Respondents strongly believe that the Sixth Court of Appeals at Texarkana should decide this appeal while the Petitioner asserts that the Twelfth Court of Appeals at Tyler should decide the case. If, over the Respondents' objections, the Court finds that it should exercise its jurisdiction to transfer these appeals, Respondents respectfully suggest that this entire appeal could be sent to another Court of Appeals, neither Texarkana nor Tyler, for decision. Such a ruling would deny both sides their respective choices of forum and would thereby assure that neither receives actual or perceived advantage.

WHEREFORE, Respondents pray the Court to issue orders as may be appropriate.

LAW OFFICES OF
R. JACK AYRES, JR., P.C.



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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been delivered to Mr. Thomas E. Fennell, Mr. Richard Grainger, and Mr. Greggory Smith, Counsel for the Defendant Ford via certified mail, return receipt requested on this the 15th day of September, 1995.

T. Randall Sandifer

T. RANDALL SANDIFER

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September 1, 1995

Mr. John T. Adams, Clerk
Supreme Court of Texas
201 W. 14th St., Room 104
Austin, TX 78701

RE: Request to Transfer Appeal; No. 95-9198;
In the Supreme Court of Texas -- In re: No. 12-95-00068-CV; Ford Motor Company v. Susan Renae Miles, et al; In the 12th Court of Appeals District of Texas & No. 06-95-00026-CV; Susan Renae Miles, et al v. Ford Motor Company, et al; In the 6th Court of Appeals District of Texas.

Dear Mr. Adams:

Ford opposes the Miles' Motion to Dismiss from Administrative Docket.

The motion presents nothing new. Every substantive allegation that it contains is already debunked in either Ford's Request to Transfer Appeal or the documents that accompanied Ford's Request as a bound volume of "record excerpts" (*e.g.*, Ford's Response to the Miles' Motion to Dismiss Ford's Appeal [found at tab 8 of the record excerpts] and Ford's Motion to Abate the Miles' Appeal [found at tab 5 of the record excerpts]). Ford incorporates those documents by reference here.

One particularly inflammatory allegation in the Miles' motion--that Ford "hopes to prevent the timely receipt of desperately needed funds, thereby expediting the death of Willie Searcy"--is, however, so blatantly false that Ford must briefly comment:

- Willie's medical experts testified at trial that, with proper care, Willie could have a normal life expectancy.

- Willie's own treating doctors agree that Willie has always received good care that is appropriate for his condition.

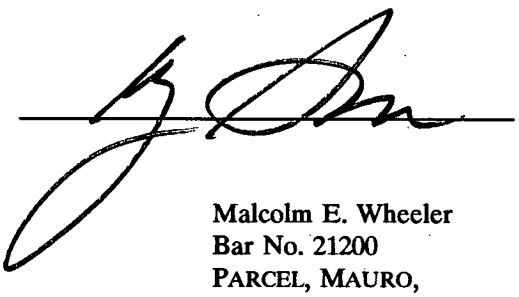
- When the Miles claimed a similar financial need, Ford offered to establish a trust fund for Willie as an alternate to a conventional supersedeas bond--but *the Miles* declined.

- Ford now understands that a couple of weeks ago Willie reentered public high school and, with the help of a nurse, he now attends regular classes on the school campus.

As proof of the former three matters, Ford encloses the response that it filed in the Sixth Court of Appeals, where the Miles once were claiming the same non-existent medical emergency.

Ford asks this Court to deny the Miles' Motion to Dismiss. Ford also reurges its request that this Court transfer the Miles' appeal (No. 06-95-00026-CV) from the Sixth Court of Appeals to the Twelfth Court of Appeals where it may be decided with Ford's pending appeal.

Respectfully submitted,



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ATTORNEYS FOR FORD MOTOR COMPANY
AND DOUGLAS STANLEY, JR.

GS/tlh
supclerk.4

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GARY L. TAYLOR
INVESTIGATOR

August 28, 1995

Mr. John T. Adams
Clerk, Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Attention: Administrative Docket

Re: Administrative Docket No. 95-9198; In re No. 06-95-00026-CV, In the Court of Appeals for the Sixth Court of Appeals District of Texas, *Susan Renae Miles, et al. v. Ford Motor Company, et al.*

Dear Sir:

Enclosed please find the original and 12 copies of the Motion to Dismiss From Administrative Docket or, Alternatively, Motion to Expedite.

Please return a copy to us with your file-mark on it in the enclosed stamped, self-addressed envelope.

By copy of this letter opposing counsel are being served with this Motion.

Respectfully submitted,

T. Randall Sandifer

TRS:clp
Enclosure
c:\wp50\ap-miles\clerk-su.lt3

cc: Mr. Gregory D. Smith **VIA CMRRR**
Mr. Richard Grainger **VIA CMRRR**
Mr. Thomas E. Fennell **VIA CMRRR**

Administrative Docket #95-9198

IN THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

In Re

NO. 12-95-00068-CV

IN THE COURT OF APPEALS FOR THE

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

Ford Motor Company,
Appellant,

v.

Susan Renae Miles, et al.
Appellees.

&

No. 06-95-00026-CV

IN THE COURT OF APPEALS FOR THE

SIXTH COURT OF APPEALS DISTRICT OF TEXAS

Susan Renae Miles, et al.
Appellants,

v.

Ford Motor Company and Douglas Stanley, Jr.,
d/b/a Doug Stanley Ford,
Appellees.

MOTION TO DISMISS FROM ADMINISTRATIVE DOCKET OR, ALTERNATIVELY, MOTION TO EXPEDITE

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ATTORNEYS FOR SUSAN RENAE MILES, ET AL., RESPONDENTS

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW, Susan Miles, et al., Plaintiffs in the trial court, parties to the pending appeals and Respondents in this administrative proceeding, and make and file their Motion to Dismiss from Administrative Docket or, Alternatively, Motion to Expedite and as grounds therefor would respectfully show that the Court should immediately dismiss this case from its Administrative Docket because it is both unnecessary and unauthorized. Alternatively, the Court should immediately decide this matter so that the appeal below can proceed.

I.

THE PRESENT "ADMINISTRATIVE PROCEEDING" IS UNNECESSARY

Factual Background. In order for the Court to understand Respondents' position in this case without resort to review of a rapidly accumulating and voluminous record, the following summary of relevant facts will hopefully be of assistance.

On March 9, 1995, the Plaintiffs recovered a judgment against Ford Motor Company in the 6th District Court of Rusk County, Texas. Although the judgment awarded Plaintiffs a substantial recovery, it also denied Plaintiffs certain relief to which they believe they are entitled.[1] Accordingly, when their Motion for New Trial was overruled, the Plaintiffs filed an Amended Appeal Bond perfecting

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[1] While in the trial court, Ford prosecuted two mandamus actions in the Twelfth Court of Appeals at Tyler. Legally, these prior mandamus actions do not affect the jurisdiction or venue of a subsequent appeal of the underlying case. Avis Rent A Car System, Inc. v. Advertising and Policy Committee, 751 S.W.2d 257, 258 (Tex.App.--Houston [1st Dist.] 1988, no writ).

their appeal to the Sixth Court of Appeals at Texarkana.[2] On April 5, 1995, Plaintiffs, as Appellants in the Texarkana Court of Appeals, promptly filed the Transcript and Statement of Facts. Shortly thereafter, Plaintiffs filed a Motion to Accelerate the Appeal.

Undaunted by the Plaintiffs' pending appeal in the Texarkana Court of Appeals, or by existing rules of substantive and procedural law, Ford filed its own appeal in the Twelfth Court of Appeals in Tyler seeking to relitigate the same matters that were pending in the Texarkana Court. Plaintiffs, as Appellees in the Tyler Court of Appeals, promptly filed a Motion to Dismiss Ford's appeal by reason of the previously pending appeal between the same parties concerning the same case in Texarkana. The Tyler Court of Appeals took the Plaintiffs' motion under advisement, but has never acted upon it.

Ford next filed a motion in the Texarkana Court of Appeals seeking to have the Texarkana Court of Appeals transfer its case to the Tyler Court of Appeals because of what it described as Plaintiffs' "forum shopping." The Texarkana Court of Appeals responded that it had no such authority but did stay proceedings in the Texarkana appeal until this Court could consider the matter.

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[2] At all times relevant to this suit, Section 22.201 of the Government Code provided specifically that an appeal from a civil case in Rusk County, Texas could be taken either to the Sixth Court of Appeals at Texarkana or to the Twelfth Court of Appeals at Tyler.

The Texarkana Court of Appeals entered its order on April 25, 1995, over 4 ½ months ago.

Thereafter, Ford, as Appellant in the Tyler Court failed to timely file its brief and requested an extension citing the pendency of this administrative proceeding and the press of other business as justifications for Ford's delay. In its papers requesting the extension, Ford also suggested that the Tyler Court of Appeals should consider entering a stay of those proceedings also. (Exhibit "A")

Discussion. Ford presents to this Court, under its "administrative" jurisdiction, agenda or docket, the question of whether or not the two appeals should be transferred or consolidated. Assuming this Court has jurisdiction to consider Ford's request, it is entirely unnecessary for the Court to do so. First, this controversy, which was created by Ford for delay can easily be resolved without involvement by this Court. The respective Courts of Appeals can resolve this matter by application of simple and well settled rules of substantive Texas law. They are: (1) any party, even these Plaintiffs, has a right to file and prosecute a good faith appeal in any case, even a case involving Ford; (2) the Legislature gave the Plaintiffs, as Appellants, the right to appeal from Rusk County to either the Texarkana or Tyler Courts of Appeals; (3) the Plaintiffs properly filed their appeal in the Texarkana Court of Appeals; and (4) The Texarkana Court of Appeals has acquired dominant and exclusive jurisdiction over the

appeal of the judgment in this case between these parties. If these rules are correctly applied, once this proceeding is dismissed, it follows that the Tyler Court of Appeals should promptly dismiss Ford's appeal pending before it. The Texarkana Court of Appeals should lift the stay order which has been imposed and proceed to hear and determine the appeal. There is absolutely no reason for the Supreme Court of Texas to be involved in this matter.

If the Court views its involvement as legally necessary, it is nonetheless now factually unnecessary. The linchpin of Ford's "judicial economy" argument before this Court is that the Tyler Court of Appeals somehow acquired certain special knowledge or information while hearing the two petitions for Writ of Mandamus in the underlying case and that, by virtue of such assumed knowledge, the Tyler Court of Appeals would be best equipped to handle the appeal with a minimum expenditure of legal resources. The Tyler Court of Appeals responded to this Court's request for information in this regard by letter of May 12, 1995. In that letter, the Chief Justice of the Tyler Court of Appeals unequivocally states that his Court of Appeals has no special expertise or knowledge about this case, whatsoever. (Exhibit "B") Moreover, Chief Justice Ramey states that if his Court were required to decide the appeal, it might be required to reevaluate the validity of its own decisions in the mandamus cases, a position it apparently regards as unseemly.

For the foregoing reasons, the Court should dismiss this administrative proceeding without further delay.

II.

THE PRESENT PROCEEDING IS UNAUTHORIZED

The Court should also dismiss this case because it is not authorized or permitted to exercise this type of jurisdiction under Texas law.

It is axiomatic that the jurisdiction of this Court is limited both by the Constitution and by the statutes enacted by the Legislature. Dunn v. Thompson, 88 Tex. 228, 30 S.W. 1046 (1895), Pope v. Ferguson, 445 S.W.2d 950 (Tex. 1969) cert. den'd, 397 U.S. 997 (1970). This grant of judicial authority is both exclusive and inclusive in the sense that this Court can exercise jurisdiction only when granted or created by the Constitution and then only in the manner provided by the Legislature. Standard Securities Service Company v. King, 161 Tex. 448, 341 S.W.2d 423 (1960); Cleveland v. Ward, 116 Tex. 1, 285 S.W. 1063 (1926). There are two possible grounds upon which the Court could potentially exercise jurisdiction of this case on its administrative docket. Neither is sufficient.

A. The Court has no "inherent" power to exercise jurisdiction in here. Every court, including the Supreme Court of Texas, has inherent power to perform certain basic functions intrinsic to the judicial branch of government. However, plaintiffs can locate no case in the history of Texas or of any other jurisdiction in which

the Supreme Court of the state determined that it had inherent power to supervise the activities of the Courts of Appeals in a manner neither discussed nor authorized by the rules of procedure or substantive law of that jurisdiction. Indeed this Court has consistently refused to engage in extraordinary, extra-legal "supervision" of the lower courts, no matter how compelling the circumstances. Pope v. Ferguson, supra. Even if this Court should wish to exercise its "inherent" power, presumably it would not do so in a manner neither recognized nor authorized by its own rules of appellate procedure. Otherwise, the Court would have "inherent" power to set aside or ignore its own rules and procedures whenever the perceived exigencies of a particular case might warrant or require. Humble Exploration Co. v. Browning, 690 S.W.2d 321, 325, 327, 328 (Tex. App.--Dallas 1982, writ ref'd n.r.e.); Reynolds v. Dallas County, 146 Tex. 372, 207 S.W.2d 362 (1948). The Court has no inherent power to judicially address the situation here presented.

B. The Court has no statutory basis to exercise jurisdiction. Ford suggests that Section 73.001 of the Texas Government Code, which gives the Chief Justice of this Court the power to transfer cases among the Courts of Appeals to equalize dockets, is sufficient to enable this Court to exercise administrative jurisdiction over a particular case such as this one. The briefs of the parties make abundantly clear that nothing in the legislative history of this statute or the previous interpretations remotely suggests that the

Legislature intended to create new authority for the Supreme Court to transfer a particular case, not to equalize dockets, but rather to provide a particular forum desired or intended by an individual litigant. The grant of authority to transfer cases to "equalize dockets" necessarily means what it says. This Court, for the purpose of equalizing dockets, may transfer cases from one court of appeals to another without regard to the specific identity or merits of any particular case. Obviously, the transfer sought here does not and is not intended to "equalize" any court's docket. Rather, it is nothing more than an effort by Ford to accomplish "administratively" what it cannot accomplish legally.

C. The existing procedure as applied to these Plaintiffs violates their rights to due course of law and due process of law. Intending no disrespect, being on the "Administrative" docket or agenda of this Court is something like shooting at both a moving and invisible target. There are no rules of law which govern this Court's "Administrative" docket. There are no rules of procedure whereby parties can know what is expected of them, what they can expect from the Court or within what time action is required or should be expected. Similarly, there is no precedent or body of substantive law to guide the parties or their counsel. Finally, there appear to be no standards whatsoever to guide, control or direct the Court itself. All proceedings on the Court's "administrative" docket are matters of private communication and the results are unpublished. No oral argument is available.

To make matters worse, when the "administrative" jurisdiction of this Court is superimposed upon the existing judicial mechanisms it is unclear whether this or any case is to be decided legally by the previously determined precedent of this Court, such as the case law of dominant jurisdiction[3] and the statutes[4], or whether the case should be decided "administratively" without regard to the substantive law. If standardless "administrative" discretion is to be substituted for the established procedural and substantive law of Texas, the rule of law is effectively annihilated. To allow or require a litigant to participate in such a proceeding is both a de facto and de jure violation of the most basic right to due process of law under the 14th Amendment of the United States Constitution and the right to due course of law under Article 1, Section 19 of the Texas Constitution.

A case which is controlled by dispositive rules of substantive law should not and constitutionally cannot be decided by this Court. Accordingly, this proceeding should be summarily dismissed.

III.

COMPELLING CIRCUMSTANCES REQUIRE RAPID DECISION

It is evident that Ford is using this proceeding to delay the decision of the appeals in both courts below. This is but a part of Ford's consistent effort to cause delay in this case whenever possible. In the process, Ford hopes to prevent the

---

[3] Cleveland v. Ward, supra

[4] Texas Government Code, Section 22.201

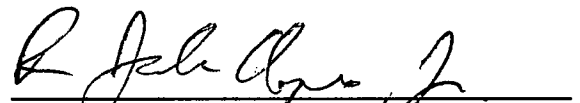
timely receipt of desperately needed funds, thereby expediting the death of Willie Searcy.

A 14 year old child lawfully determined by 11 members of the jury and the trial judge to be the victim of a defective product and gross negligence waits helplessly deprived of vital educational, medical and social needs. According to the undisputed evidence before this Court and both Courts of Appeals he will die if he does not receive the care he needs as it is required. He cannot receive that care until and unless the appeal of his case is decided. Ford cannot be legally harmed if a decision here is expedited. Indeed, if Ford is correct, its position can only be enhanced because it will more rapidly obtain a reversal of the trial court's judgment.

There are undoubtedly many important cases to be decided by the Justices of this Court. Some may involve greater issues of legal or constitutional import or larger amounts of money. It would, however, be difficult to imagine a case that could deserve priority for decision over this one. This Court should proceed to decide this matter at once so that justice delayed does not become justice forever denied to Willie Searcy and his family.

WHEREFORE, PREMISES CONSIDERED, Respondents pray that this motion be granted and for general relief.

LAW OFFICES OF
R. JACK AYRES, JR., P.C.



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ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been delivered to Mr. Thomas E. Fennell, Mr. Richard Grainger, and Mr. Greggory Smith, Counsel for the Defendant Ford via certified mail, return receipt requested on this the 29th day of August, 1995.

T. RANDALL SANDIFER

NO. 12-95-00068-CV

IN THE

COURT OF APPEALS

FOR THE

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

TYLER, TEXAS

Ford Motor Company

Appellant,

v.

Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors and Kenneth Miles,

Appellees.

MOTION TO EXTEND THE TIME FOR FILING APPELLANT'S BRIEF

TO THE HONORABLE COURT OF APPEALS:

Ford Motor Company asks the Court to extend the time for filing its brief thirty days to and including September 4. As grounds for this motion, Ford would show:

EXHIBIT A

1.
Information Required by Rule 73,
TEX. R. APP. P.

The following information serves as the basis for the requested relief:

(i) On March 9, 1995, the 4th Judicial District Court of Rusk County, Texas rendered judgment in its Cause No. 94-143, styled *Susan Renae Miles, Individually and as Next Friend of Willie Searcy, and Jermaine Searcy, Minors, and Kenneth Miles v. Ford Motor Company and Douglas Stanley, Jr., d/b/a Doug Stanley Ford.*

(ii) On April 10, 1995, Ford timely filed its motion for new trial. The motion was denied by the trial court on May 3, 1995.

(iii) Ford perfected its appeal by timely filing an appeal bond on March 29, 1995. (And, in responding to the trial court's order increasing the bond amount, Ford filed an amended bond on April 26.)

(iv) Twenty-five volumes of Transcript and two volumes of Supplemental Transcript were filed on April 11, 1995. The original Statement of Facts was filed on July 5, 1995. Four additional volumes of Supplemental Transcript were filed on July 6.

(v) Ford's brief is currently due to be filed August 5.

(vi) This is Ford's first request for an extension of its briefing deadline.

2.
Facts reasonably explaining the need for an extension of time

Ford's briefing deadline should be extended for the following reasons:

A. The Plaintiffs' Companion Appeal:

As the Court knows, the Miles are appealing the same case to the Sixth Court of Appeals. That Court has abated the Miles' appeal, until the Texas Supreme Court decides Ford's request to transfer it to this Court. (This Court has the inherent power to, on its own motion, order a similar abatement of Ford's appeal.)

However accomplished--whether by abating Ford's appeal or extending briefing deadlines--this Court can promote efficiency, orderly practice, and justice by temporarily deferring the briefing schedule. If the parties are permitted to know *before* filing their briefs (i) which court of appeals will decide this case and (ii) which parties will, for briefing purposes, be denominated appellants and cross-appellants, the outgrowth will be better advocacy on both sides.

B. The Magnitude of the Record:

The record in this case is substantial, comprising twenty-five volumes of transcript, six volumes of supplemental transcript, and nineteen volumes of statement of fact. Thirty days may be a sufficient time in which to brief cases involving less substantial records than ours. In *this* appeal, however, Ford's

counsel must dedicate more time to assimilating and analyzing the record than is feasible in the thirty days initially allotted for briefing.

C. The Rigors of Counsel's Schedules:

In the current briefing period, the attorneys primarily responsible for briefing Ford's appeal have been required to devote significant time to other pending trial-court and appellate matters, including:

i) No. C-3212-92-F; *Arcenio Barrera, et al v. Honda R&D Co., Ltd., et al*; In the 332nd Judicial District Court of Hidalgo County, Texas (post-verdict motions).

ii) No. 94-043; *Stephen Eugene Whitmire v. G.T.E. Southwest Incorporated*; In the District Court in and for Rusk County, Texas (post-verdict motions).

iii) No. 06-94-00131-CV; *Southland Lloyds Insurance Company, et al v. Charles M. Tomberlain, et al*; In the Sixth Court of Appeals District of Texas, Texarkana, Texas (appellees' brief).

iv) No. 2-94CV39; *Rickey J. Short, et al v. Blount, Inc., et al*; In the United States District Court for the Eastern District of Texas, Marshall Division (post-verdict motions).

v) No. C-14-95-360-CV; *Carol Arce, et al v. David Burrow, et al*; In the Fourteenth Court of Appeals District of Texas, Houston, Texas (appellants' brief).

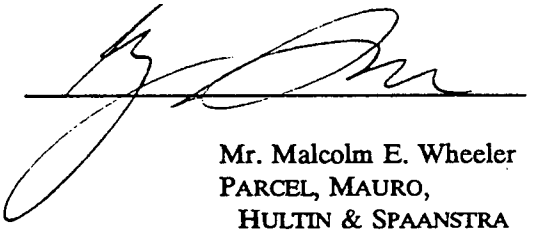
vi) No. 12-95-00027-CV; *Gene D. Rainey and Eloise Rainey v. Towmotor Corp., et al*; In the Twelfth Court of Appeals District of Texas, Tyler, Texas (appellees' brief).

3.

This motion is not urged solely for delay, but in the interest of justice.

WHEREFORE, PREMISES CONSIDERED, Ford prays that, if the Court does not abate this appeal on its own motion, it would grant this motion and extend the time for filing Ford's brief by thirty days, until September 4, 1995. Ford further prays for such other relief to which it may justly be entitled at law or in equity.

Respectfully submitted,



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ATTORNEYS FOR APPELLANT

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF SMITH §

BEFORE ME, the undersigned authority, on this day personally appeared GREG SMITH, known to me to be a credible person above the age of eighteen years, who, upon his oath stated that he is one of the attorneys for the appellant in the above-entitled and numbered cause, has read the above Motion and all factual statements in it are within his personal knowledge and are true and correct.

GREG SMITH

SUBSCRIBED AND SWORN TO BEFORE ME by GREG SMITH on the 28th day of July, 1995.

Notary Public in and for the
State of Texas

NOTARY PUBLIC STATE OF TEXAS
TERRI L. HARVEY
Notary Public
STATE OF TEXAS
My Comm. Exp. 12-5-95

CERTIFICATE OF SERVICE

On this 28th day of July, 1995, I forwarded a true copy of Ford's Motion to Extend the Time for Filing Appellant's Brief, via the indicated method of service, to the following persons:

Mr. R. Jack Ayres, Jr. (Via Certified Mail - RRR # P 104 528 344)
LAW OFFICES OF R. JACK AYRES, JR., P.C.
4350 Beltway Dr.
Dallas, TX 75244

Mr. J. Mark Mann (Via Certified Mail - RRR # P 104 528 345)
WELLBORN, HOUSTON, ADKISON, MANN, SADLER & HILL
P.O. Box 1109
Henderson, TX 75653

Mr. John R. Mercy (Via Certified Mail - RRR # P 104 528 346)
ATCHLEY, RUSSELL, WALDROP & HLAVINKA, L.L.P.
P.O. Box 5517
Texarkana, TX 75505-5517

GREG SMITH

Court of Appeals

Twelfth Court of Appeals District

TELEPHONE
(903) 593-8471

1517 WEST FRONT STREET
SUITE 354
TYLER, TEXAS 75702

May 12, 1995

The Supreme Court of Texas
P. O. Box 12248
Capitol Station
Austin, TX 78711

RE: Court of Appeals Number: 12-95-00068-CV
Trial Court Case Number: 94-143

Style: Ford Motor Company ("Ford") v. Susan Renae Miles, Individually and as Next Friend for Willie Searcy and Jermaine Searcy, Minors, and Kenneth Miles ("Plaintiffs")

Near the close of business on May 9, 1995 Ford filed with this court its Request to Transfer Appeal ("Transfer Request"). By this Transfer Request, Ford seeks to transfer cause no. 6-95-00026-CV from the Sixth Court of Appeals ("Sixth Court") to the Twelfth Court of Appeals ("Twelfth Court").

Pursuant to the statement made by Ford's counsel that the supreme court has invited both courts of appeals to make comments about the Transfer Request, we make these initial obersvations. A party who prevails in the trial court below may still initiate an appeal if he has a complaint about the trial. Moreover, under TEX. GOV'T CODE §22.201(g) and (m), if the judgment complained of was rendered in Rusk County, a party may perfect an appeal to either the Sixth Court or the Twelfth Court. Thus, we recognize that Plaintiffs' actions in perfecting an early appeal to the Sixth Court from a $39,000,000 judgment in their favor are not prohibited. They, however, also are an obvious attempt to forum shop.

Nevertheless, in responding to the invitation to comment, we express the following concerns:

I. **<u>If the Appeal is Transferred, the Twelfth Court May Be Placed in the Inappropriate Position of Having to Review the Correctness of Its Own Prior Holdings.</u>**

A. Cause no. 12-95-00021-CV, our second mandamus proceeding that involved the instant parties, dealt with the trial court's alleged abuse of discretion in entering an order of severance as to Intervenor Knight, the minor child's natural father. Ford asserts that this is the basis for Plaintiffs' appeal now pending before the Sixth Court. Thus, if the case is transferred, this court will be placed in the inappropriate position of having to decide the correctness of its own prior order on this issue.

EXHIBIT B

B. Cause no. 12-94-00239-CV, the first mandamus proceeding that involved the parties to the instant appeal, dealt with the scope of pretrial discovery and accelerated deadlines viewed in light of the parties' discovery requests, responses, objections and course of conduct. In the event such discovery issues are raised on appeal, it is not unforeseeable that the parties will complain about this court's holdings in that mandamus proceeding. For example, Ford may complain about this court's ruling that it had waived most of its privilege objections in the discovery stage by failing to timely assert them. Alternatively, Plaintiffs may complain about a variety of other holdings limiting Ford's burden of production. Once again, such complaints would place this court in the inappropriate position of having to decide the correctness of its own prior holdings.

II. **Despite the Prior Mandamus Proceedings, the Twelfth Court Does Not Have an "Invaluable Knowledge Base" of this Litigation.**

The extent of this court's knowledge concerning the instant appeal is as follows: (1) it was presented with a limited discovery dispute that involved Ford's failure to produce certain requested documents; and (2) it was presented with the limited question of whether the claim of the minor child's imprisoned father should be severed from the trial of the principal claims in the instant suit. This court was never presented with other pretrial issues nor does it have any knowledge of the proceedings during or after the 13-day trial on the merits. Furthermore, if the case is transferred, this court questions the propriety of the prior "knowledge base" it might have gained from previous proceedings in its consideration of the instant appeal.

If you desire additional comments or information, we would be pleased to respond.

Respectfully yours,

TOM B. RAMEY, JR.
Chief Justice

xc: Hon. Mike Hatchell
Hon. Gregory D Smith
Hon. Mark Mann
Hon. R. Jack Ayres, Jr.

Court of Appeals
Sixth Appellate District
State of Texas

CHIEF JUSTICE
WILLIAM J. CORNELIUS

JUSTICES
CHARLES BLEIL
BEN Z. GRANT

CLERK
TIBBY THOMAS

BI-STATE JUSTICE BUILDING
100 NORTH STATE LINE AVENUE #20
TEXARKANA, TEXAS 75502-5952
903/798-3046

May 18, 1995

The Supreme Court of Texas
Supreme Court Building
201 West 14th Street, Rm. 104
Austin, TX 78701

RE: Court of Appeals Number: 06-95-00026-CV
Trial Court Case Number: 94-143

Style: Susan Renae Miles, Individually, Et Al
v. Ford Motor Company, Et Al

Gentlemen:

In accordance with your written request, we are forwarding Appellees' Request to Transfer Appeal and Record Excerpts, and Appellants' Response to Appellees' Request to Transfer, along with this Court's comments regarding same in the referenced proceeding.

Respectfully yours,

Tibby Thomas

Tibby Thomas, Clerk

cc:(w/encl.)
Hon. John Mercy
Hon. R. Jack Ayres, Jr.
Hon. J. Mark Mann
Hon. Gregory D. Smith
Hon. Daniel Clark
Hon. Richard Grainger
Hon. Thomas Fennel
Hon. Joe Shumate

Misc Docket #95-9198

CHIEF JUSTICE
WILLIAM J. CORNELIUS

JUSTICES
CHARLES BLEIL
BEN Z. GRANT

Court of Appeals
State of Texas
Sixth District

CLERK
TIBBY THOMAS

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100 NORTH STATE LINE AVENUE #20
TEXARKANA, TEXAS 75501
903/798-3046

May 17, 1995

The Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

RE: No. 06-95-00026-CV Miles v. Ford Motor Company
Motion to Transfer

Gentlemen:

You have advised this Court in writing that we should comment on the motion to transfer the referenced proceeding to the Twelfth Court of Appeals in Tyler and advise if we have any objection to the requested transfer.

We have no objection to the proposed transfer. In fact, because the referenced appeal involves a relatively small portion of the entire controversy, and because the litigation has twice been before the Twelfth Court of Appeals, thus giving that Court some familiarity with the overall controversy, it appears to us that it would promote judicial efficiency and economy if the transfer is made.

Sincerely,

COURT OF APPEALS FOR THE
SIXTH APPELLATE DISTRICT

William J. Cornelius
Chief Justice

WJC/ljl

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May 17, 1995

VIA FEDERAL EXPRESS

Mr. John T. Adams, Clerk
Supreme Court of Texas
201 W. 14th St., Room 104
Austin, TX 78701

RE: No. 95-9198; In the Supreme Court of Texas -- In re: No. 12-95-00068-CV; Ford Motor Company v. Susan Renae Miles, et al; In the 12th Court of Appeals District of Texas & No. 06-95-00026-CV; Susan Renae Miles, et al v. Ford Motor Company, et al; In the 6th Court of Appeals District of Texas.

Dear Mr. Adams:

Ford has received a copy of Mr. Murto's May 15 letter, which forwards a copy of the Miles' motion to expedite their appeal. Not wishing to overburden the Court with briefs in regard to an administrative matter, Ford initiates this correspondence with reluctance. The inaccurate nature of the allegations in the Miles' motion to expedite, however, compels Ford to set the record straight. To this end, Ford provides the enclosed copy of the response that it filed in the Sixth Court of Appeals regarding the Miles' motion to expedite.

As Ford's response to the motion to expedite proves, nothing about this matter requires this Court to depart from its usual efficient administrative procedures. Willie Searcy is getting good medical care. In the upshot, while dispatch is commendable, there is not a shred of evidence that acting on the request to transfer in the due course of this Court's ordinary docket procedures might compromise Willie's care or jeopardize his health.

Thank you for your usual courtesy in attending to this matter.

Sincerely,

GREG SMITH

Enclosure

GS/tlh
supclerk.3

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P.O. Box 5517
Texarkana, TX 75505-5517

Misc. Docket No. 95-9190

NO. 06-95-00026-CV

IN THE

COURT OF APPEALS

FOR THE

SIXTH COURT OF APPEALS DISTRICT OF TEXAS

TEXARKANA, TEXAS

Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors and Kenneth Miles,

Appellants,

v.

Ford Motor Company and Douglas Stanley, Jr., d/b/a Doug Stanley Ford,

Appellees.

RESPONSE TO MOTION TO ACCELERATE APPEAL

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ATTORNEYS FOR APPELLEES

NO. 06-95-00026-CV

IN THE

COURT OF APPEALS

FOR THE

SIXTH COURT OF APPEALS DISTRICT OF TEXAS

TEXARKANA, TEXAS

Susan Renae Miles, Individually and as Next Friend of
Willie Searcy and Jermaine Searcy, Minors and
Kenneth Miles,

Appellants,

v.

Ford Motor Company and Douglas Stanley, Jr.,
d/b/a Doug Stanley Ford,

Appellees.

RESPONSE TO MOTION TO ACCELERATE APPEAL

We won't mince words. The Miles appellants are playing games with this Court. After all, they know Willie Searcy is getting good medical care. They know the trial court is yet to rule on dispositive post-verdict motions. They also know the record is incomplete and, when fully filed, will be formidable. They know, too, that Ford's appellate counsel (who did not try

this case) will require weeks to read and abstract the record. Still further, they know Ford has appealed to the Twelfth Court of Appeals. And, finally, they know there is not a whit of evidence that an ordinary appeal--in which the record could be completed and jurisdiction consolidated in a single appellate court *before* appellate briefing--would jeopardize Willie Searcy's health or compromise his care.

There should be no mistake. These matters, which the Miles know but refuse to admit, suggest three reasons to deny their motion: (1) the motion is not factually accurate; (2) this case is not an appropriate candidate for acceleration; and (3) Ford's appeal to a sister court and the trial court's continuing plenary jurisdiction render the motion premature. Let us explain.

A. Procedural Background:

This is a product liability case involving injuries to Willie Searcy, who is now a respirator-dependent quadriplegic. After a 13-day jury trial, the Rusk County District Court has entered judgment against Ford for over $39 million. The trial court has yet to rule on Ford's post-trial motions, and Ford has filed an appeal bond with the Twelfth Court of Appeals, which has twice reviewed issues in this case on Ford's mandamus petitions. Nevertheless, fearing appellate review by the court that already knows this case and that already sees through their tactics, the Miles have rushed to file an appeal in this

Court. Because the principal claimant, Willie Searcy, prevailed at trial, the Miles have resorted to artifice on appeal, challenging the dismissal of derivative consortium claims by secondary claimants. They have not, however, stopped there.

The Miles now blatantly seek to prevent informed appellate review. They openly woo this Court's sympathies, alleging that "the health, welfare and even the life . . . of Willie Searcy is at risk during the delay normally involved in the appellate process." (Motion to accelerate, ¶ 2.) To feign a basis for this dramatic thesis, they contend that, because they are "eligible for only modest forms of public assistance," they "will not be able to provide for the equipment and services Willie urgently requires" until they can execute on the judgment that they are appealing. (Motion to accelerate, ¶¶ 12, 15.) Not so.

B. The Motion to Accelerate is Factually Inaccurate:

The motion to accelerate rests on little more than warmed over versions of the same lies and half-truths that the Miles, last May, marshalled into an "expedited and preferential" trial setting so onerous that compliance with the resulting discovery schedule was a physical impossibility. Not only does much of the motion derive, verbatim, from the May 1994 motion to

expedite trial[1], but it calls on the same cast of paid--and non-treating--experts (Sink, Perez, and Dangel) to say just about exactly what they said last May.[2] That is, last year the Miles appellants and Dr. Sink were saying the same things about physical therapy and back-up generators that they are saying today; Nurse Perez was saying the same things about nutrition and the breakdown of Willie's skin; and, Dr. Dangel was saying the same things about depression and psychological services.

Far more important than the redundancy of the motion to accelerate, however, is the veracity of its allegations. The crisis in unmet medical needs that the Miles depict was false last May and it is false today, only now Ford has the evidence to prove it. Consider the facts:

> [Note: For brevity, this response does not belabor all of the Miles' factual inaccuracies. Those inaccuracies omitted from this response are, however, included in a table that accompanies this response as Appendix A. The deposition excerpts referenced in this response also are attached as Appendix B.]

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[1]*Cf.* ¶¶ 5, 7 and 10-12 of the motion to accelerate with the first three pages of the Miles' motion to expedite trial (Tr. vol. 1, p. 20).

[2]*Cf.* Sink, Perez and Dangel affidavits that accompany the motion to accelerate with the affidavits that were attached to the motion to expedite trial. These latter affidavits, which were omitted from the transcript, accompany this response as Appendix C.

i. Willie Searcy is Getting Good Care.

While Willie Searcy's injuries are catastrophic, the Miles' rehabilitation experts and the Miles' own sworn admissions reveal that Willie is in stable condition, his basic needs are being met, and he is receiving good care. (Kenneth Miles dep. at 113 [App. B, ex. 2]; Susan Miles, S.F. 1385 [App. B, ex. 5]; Karen Perez, S.F. 1348 [App. B, ex. 8], 1357; Jack Sink, S.F. 1203-04 [App. B, ex. 7].)

Willie has received extensive medical and rehabilitative care from the Methodist Hospital, the Dallas Rehabilitation Institute, and a number of doctors. He has a home teacher. (Kenneth Miles dep. at 110-11, 114 [App. B, ex. 2].) He gets 104 hours of professional home nursing care each week--about 15 hours each day. (*See* Affidavit of Susan Miles, attached to the Miles' motion to accelerate.)

If Willie has any critical unmet medical need, it would be news to the treating physicians who know his needs best. When asked in his January deposition if any of Willie's medical needs were wanting, Dr. John Milani, Willie's primary treating doctor at the Dallas Rehabilitation Institute[3], responded: "To my recollection, no." Dr. Milani also expressly debunked the Miles' claim of an urgent need for additional physical therapy. After explaining that Willie's mom and his attendants provide maintenance therapy,

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[3]Susan Miles dep., p. 77 (App. B, ex. 1).

like skin care and daily range of motion activities, Dr. Milani could not "recall any specific reason he would need physical therapy right now." (Milani dep., p. 30 [App,. B, ex. 3].) (Milani dep., p. 42 [App. B, ex. 3].) Willie's pulmonologist and urologist at the Dallas Rehabilitation Institute reported in August and December of 1994, respectively, that Willie was "doing very well" with no significant problems and was "doing fine." (Milani dep., pp. 26-28 and dep. exhibits 4 & 5 [App. B, ex. 3].) And, finally, the pneumobelt training that Nurse Perez says Willie needs but cannot get has already been attempted once, at the Dallas Rehabilitation Institute, and apparently paid by Medicaid. It was aborted not because of any funding problem, but because it caused Willie discomfort and his doctors decided he wasn't then ready for the training. (Milani dep., p. 30-31 [App. B, ex. 3].) No wonder the Miles didn't call a single treating physician at trial and no wonder that in the motion to accelerate they turned instead to paid experts like Nurse Perez and Dr. Sink--who has seen Willie only once.

In another effort to feign a crisis, the Miles invoke Dr. Sink's testimony that Willie would die if his medical care is "cut out." (Motion to accelerate at ¶ 7; S.F. 1193.) The problem with that approach is this: The evidence does not suggest even a remote possibility that Willie Searcy might anytime soon lose his current medical-care providers or the sources of payment for that care. Nor does the evidence suggest any change in circumstances that

now moots or impugns the Miles' deposition and trial testimony or the prior testimony of their own "life-plan" expert.

ii. Present Sources are Adequate to Pay for Willie's Interim Care.

Even though Willie Searcy's medical expenses through September 1994 have exceeded $500,000 (Jack Sink, S.F. 1156 [App. B. ex. 7]), the so-called "modest" public assistance already available, such as Medicaid's comprehensive care program (Linda Wickes dep., pp. 43-44 [App. B, ex. 4]), appears to have paid them all. As of July 1994, the Miles had spent only $600 on account of the accident (they bought Willie a computer) and had not been required to pay *any* medical expenses. (Susan Miles dep. at 68-69 [App. B, ex. 1]; Kenneth Miles dep. at 112-13, 115-16 [App. B., ex. 2].) And, despite their affidavits, there is no evidence that the Miles have since paid any of Willie's medical expenses or that they might be required to do so anytime soon. In the upshot, there is no evidence that relying on current sources of assistance during appeal will jeopardize Willie's health.

The "Life Care Plan" through which the Miles estimate Willie's annual expenses certainly fails to reveal any health-threatening crisis. Of the Plan's 16 items,[4] by far the largest is "home care": $330,000 a year for 136 hours a

[4]According to Jack Sink, the author of the "Life Care Plan," it "identif[ies] all of the service, the equipment the services, the supplies, everything that is required because of a disability. That includes medical, psychological, social, vocational, educational, whatever services that are needed, because a person

week of home nursing care. (Affidavit of Jack Sink, attachment.) There is no danger lurking in this item, however. Willie *already* gets 104 hours a week of professional home nursing care *free of charge*. (Affidavit of Susan Miles; Kenneth Miles dep. at 111-12 [App. B, ex. 2].) This is exactly what Willie's treating physician, Dr. Milani, and one of the nursing services that initially provided Willie's home care, Accucare Health Services, have routinely requested. (Letter from Dr. Milani to NHIC/CCP [App. B, ex. 9]; AccuCare Health Services File vol. 1, p. 43 [App. B, ex. 9].)

In contrast to Dr. Sink, Willie's treating physicians are encouraging his family to stay personally involved in Willie's care. (Milani dep., p. 42 [App. B, ex. 3].) To this end, Willie's mother and step-father are specially trained to, and do, provide quality home care for the remaining hours of the day. (Kenneth Miles dep. at 128-29 [App. B, ex. 2]; Karen Perez, S.F. 1348-49 [App. B, ex. 8].) In fact, according to one of their own experts, they are "giv[ing] [Willie] superb care." (Karen Perez, S.F. 1348 [App. B, ex. 8].) And, when asked at trial if he felt that "all the stuff" he does for Willie is "a burden or a problem," Kenneth Miles replied "No sir, I don't." (Kenneth Miles, S.F. 146 [App. B, ex. 6].)

The next largest item in the "Life Care Plan," about $55,000 a year, is for "potential" and unspecified complications--matters that might never

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has a disability." (Jack Sink, S.F. 1154 [App. B, ex. 7].)

materialize. As with home care, this item fails to give any reason to accelerate the Miles' appeal. Were any complication to arise during appeal, there is no evidence that Willie's current providers would refuse the necessary services or that the Miles' "modest" sources would not pay the resulting expenses, just as they have paid *all* expenses thus far.

After potential complications, the next largest "Life Care Plan" item is about $15,000 annually for respiratory equipment and supplies. Yet, Dr. Sink, the Plan's author, testified that this item includes *only* the respiratory equipment and supplies Willie already is getting. (S.F. 1172 [App. B, ex. 6].) The same is true for the estimated "drug/supply needs." (S.F. 1172 [App. B, ex. 6].)

The remaining 12 items in Dr. Sink's "Life Care Plan" total about $30,000 a year. (Affidavit of Jack Sink.) The Miles do not try to show which among these items already are covered, and just as well. Many, perhaps most, of these items (e.g., the costs of wheelchair equipment, routine medical care, etc.) already are covered by sources like Medicaid's comprehensive care program. (Linda Wickes dep., pp. 43-44 [App. B, ex. 4].) Whatever, if any, items remain must necessarily total substantially less than $30,000. As it turns out, this is an amount comfortably within the Miles' ability to secure, had they really thought it necessary for Willie's care.

iii. The Miles have Rejected Funds that Could Have Gone to Willie's Care.

Belying the true facts, the Miles twice have refused funds that could have gone to Willie's care, and when they did accept insurance funds, they didn't purchase medical care. A year ago, after the insurance carrier for Billy Camp, the driver of the car that crashed into Kenneth Miles' truck, interpleaded its $40,000 policy limit, the Miles disclaimed any interest in policy proceeds or in any recovery from the Camps. (*See* Interpleader papers, Appendix D.) Yet, only a day earlier[5], the Miles had cried "crisis" in their motion to expedite, claiming that an expedited trial was imperative because they couldn't find money to get Willie physical therapy:

> [Willie is] in immediate need of rehabilitative services, including physical therapy and occupational therapy, which he cannot and will not receive until he has funds sufficient to pay for such services. . . . [T]he failure to address these critical needs . . . could result not only in his inability to participate in this litigation, but in his death.

(Motion to expedite trial, p. 2 (Tr. vol. 1, p. 21); *cf.* motion to accelerate, ¶ 7.)

At almost the same time, the Miles received $24,800 from Kenneth Miles' underinsured-motorist coverage. How did they use these funds? They did *not* pay for the services and equipment that they were telling the Rusk

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[5]The Miles served their motion to expedite trial on April 25, 1994, and answered the insurance company's interpleader on April 26, 1994. (Tr. vol. 1, p. 24; Appendix D.)

County District Court were "urgently required." Instead, they paid some regular bills and applied the remainder to their "house note"! (Susan Miles, dep. at 14-15 [App. B, ex. 1].) (In a seeming contradiction with his wife's testimony, Kenneth Miles testified that $20,000 of this money was being held in trust for Willie. (Kenneth Miles dep. p. 127-28 [App. B., ex. 2].) In any event, had Willie's unmet needs been critical, these funds were available to meet them.)

Only weeks ago, Ford offered to deposit $49,000 per year in trust for Willie's needs during appeal, as an alternative to a supersedeas bond. This was 100% of the premium that Ford now will pay to bond the judgment. Under Ford's offer, the Miles never would have been obligated to repay these monies, *even if Ford won its appeal.* Nevertheless, the Miles rejected this offer--not because of any concern for the judgment's collectability--the Miles' lawyers freely disclaimed any such concern--but because $49,000 apparently was just not enough money to bother with. (*See* Affidavit of Greg Smith, Appendix E.) Had any alleged unmet needs threatened Willie Searcy's life, surely the Miles wouldn't have turned down insurance and supersedeas payments or applied the proceeds of their own insurance to their house note.

In the upshot, the facts not only fail to bear out any "emergency," but they pose telling questions about the Miles' true motives. After all, if the Miles were so concerned about concluding this suit expeditiously, why did they

choose a trial venue that was certain to prompt a venue appeal from any favorable judgment? (While they sued in Rusk County, the Miles all are from Dallas, the accident happened in Dallas, the truck involved in the accidence was bought in Dallas, and Ford's principal place of business in Texas is Dallas County.) If the Miles really needed money to secure critical care, why did they pass on three sources of funds? And, if the Miles really thought an appeal could jeopardize Willie Searcy's life, then why did they--the winners at trial--perfect their own appeal with such eagerness?

C. This Appeal is Not a Candidate for Acceleration:

Not only is there no affirmative reason to accelerate this appeal, there are practical reasons why acceleration is unthinkable.

While both a transcript and a statement of facts have been filed, neither is yet complete. (The District Clerk's file is 24 volumes and still growing.) What record that already is on file is formidable: The statement of facts from the trial is 19 volumes; to this, pretrial hearings will add another dozen or so volumes; the trial exhibits that shortly will be filed comprise another 70 volumes!

To adequately assimilate a record of this magnitude and to research and brief the relevant law will require time. In fact, to merely read, digest and abstract the statement of facts likely could consume all of an "accelerated"

briefing period. To accelerate despite these circumstances not only would erode the quality of the briefs and abridge their usefulness to the Court, but very well could prevent Ford altogether from making a proper presentation of its appellate points of error.

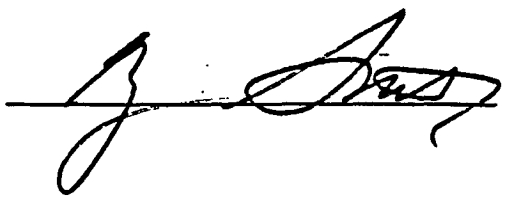
D. The Jurisdictional Facts Render Acceleration Impractical:

Ford has perfected an appeal to the Tyler court of appeals and a transcript now is on file there. Because the parties thus have filed appeals from the same judgment in different courts, this Court cannot now know if it will be the court that decides the appeal's merits. What is more, the district court's judgment isn't even final. Yet, if the Miles had their way, none of this would matter; they would file a brief ten days *before* the district court hears Ford's motion for new trial and Ford presumably would be required to brief its appeal days later. Informed review would be the first casualty of such a scenario and, surely, justice would fall victim as well.

CONCLUSION AND PRAYER

The Miles' motion to accelerate is baseless. The Court's normal--and efficient--procedures and the ordinary appellate timetable suffice for this appeal and they know it. Consequently, Ford and Doug Stanley Ford pray that the Court would refuse to accelerate this appeal. Ford and Doug Stanley Ford also pray for whatever other relief this response authorizes.

Respectfully submitted,



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ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

On this 18th day of April, 1995, I forwarded a true copy of the above instrument, via the indicated method of service, to the following persons:

Mr. R. Jack Ayres, Jr. (Via Certified Mail - RRR # P 373 113 041)
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Mr. J. Mark Mann (Via Certified Mail - RRR # P 373 113 042)
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P.O. Box 1109
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GREG SMITH

CAST OF CHARACTERS

NAME	DESCRIPTION
Willie Searcy	Injured plaintiff.
Susan Miles	Willie's mother/plaintiff.
Kenneth Miles	Willie's step-father/plaintiff.
Jermaine Searcy	Willie's brother/plaintiff.
Karen Perez	A licensed registered nurse. Plaintiff testifying/paid expert.
Jack Sink	An expert in the areas of rehabilitation/ life-care planning/and case management for severely injured persons. Plaintiff testifying/paid expert.
Richard F. Dangle	A licensed psychologist in the State of Texas. Plaintiff testifying/paid expert.
Dr. John Milani	Willie Searcy's primary doctor at Dallas Rehabilitation Institute. See depo of Susan Miles at pg. 77, lines 16-19. Not called by plaintiffs to testify but deposed by defendants.
Linda Wickes	A licensed registered nurse in the State of Texas. See depo of Linda Wickes at pp. 8-9 and 14. Willie Searcy's pediatric nursing supervisor at AccuCare Nursing Services. Not called to testify by plaintiffs but deposed by defendants.
AccuCare Health Services	Willie Searcy's initial in-home healthcare/nursing provider.

PLAINTIFFS POSITION	THE EVIDENCE
I. Willie Needs More Care ***4/5/95 Aff. of Susan Miles at p. 2***: ". . . we have been told that Willie requires twenty-four hours per day of skilled nursing care, we have only been able to obtain 104 hours of LVN coverage per week for Willie under the chronically disabled children's service program." ***4/6/95 Aff. of Jack M. Sink at pp. 2-3***: "it is my opinion that immediate attention to his current needs is of critical importance to his mental and physical health. The following areas are in need of immediate attention: . . . 9. Additional nursing services to provide 24-hour per day care at least five (5) days per week and eight (8) hours per day for two (2) days, . . ."	I. Willie is Receiving the Care Prescribed for Him ***1/9/95 Depo. of Dr. John Milani at p. 42***: Q. To your knowledge, have you made any recommendations to Willie's parents that he get some kind of care that you thought was necessary that you found he was not getting? A. To my recollection, no. Q. If a family is able to help out and take care of a patient, is it your preference to see the family involved in helping maintain the patient? A. Yes. A big part of our rehabilitation process is involving the family and family training. Q: And did Willie's parents go through that training? A: Yes. I can at least recall his mom a lot more than dad but, yes, there was family training involved. --- ***AccuCare Health Services file Volume I, Deposition on Written Questions, p. 35, letter from Dr. John Milani to NHIC/CCP (Comprehensive Care Program)***: "Once again it is time for recertification of skilled nursing hours for Willie Searcy. I am again writing for these hours to be continued at 104 per week. Willie has received consistent care and has remained out of the hospital. He has had bouts of pneumonia and UTI's, but has been able to remain at home due to his nursing care." (Letter from Dr. John Milani to Whom it May Concern.)

PLAINTIFFS POSITION	THE EVIDENCE
	1/6/95 Depo. of Linda Wickes at pp. 43-44: Q. How did you schedule? By the week? A. By the week. Q. And how many hours then would she (Ms. Miles) get by the -- A. She had a 104 hours a week via the CCP program. Q. How is that determined? Do you know? A. I send in all of this lovely paperwork, and CCP calls me and says, this is what you've got, and it's recertified every three months. Q. And do you file the paperwork for it to be recertified? A. Yes, ma'am. Q: Do you have any recommendations to CCP as to how many hours he ought to have? A: I put in my guide. I can ask for the moon. They will give me what they -- they have a guide to go by, and when they see this, they give X number of points for every skilled nursing thing that is required, skilled nursing duty that is required, and then they add up the points. The points equals some amount of hours, and they call me back and tell me what I get. I can give them a guide to go by, but they can throw that out the window. It doesn't make a difference. Q: What does CCP stand for? A: Comprehensive Care Program. Q: Now, what is that? A: It's a Medicaid-funded program to assist children who have -- who are medically fragile be able to stay at home. ----------

PLAINTIFFS POSITION	THE EVIDENCE
	AccuCare Health Services File Volume I, Deposition on Written Questions, p. 43: "AccuCare is requesting a continuation of his 104 hours of nursing care per week . . . . Willie has remained out of the hospital due to the care given by his family and his nurses." (Letter from Dr. John Milani, to Whom It May Concern.)

PLAINTIFFS POSITION	THE EVIDENCE
II. There is No Money to Provide Vitally Needed Equipment and Services ***4/5/95 Aff. of Susan Miles at p. 2:*** "We cannot afford a backup ventilator in the event that something goes wrong with our current ventilator. Nor can we afford an emergency generator to provide power to the ventilator in the event there is a power outage in our area."	II. Plaintiffs have Received and Declined Insurance Benefits Which Could Have Paid for the "Vital Equipment and Services" ***7/18/94 Depo. of Susan Miles at pp. 13-15:*** Q. Now, you got some money already from some settlements, is that right, concerning this accident? A. Yes. Q. And what's happened with that money. A. Basically, we have paid bills with it. Q. What kind of bills have you been paying with it. A. Well, I guess you could say our house note. . . . Q. Were you behind in your house note at the time? A. No. Q. All right. So you have just used it to pay your regular bills? A. Yes. ----------

PLAINTIFFS POSITION	THE EVIDENCE
	7/7/94 Depo of Kenneth Miles at pp. 127-28:
	Q. Now, you said you settled with State Farm. How much did you get in that settlement, please, sir, dollar amount?
	A. I received $15,700.
	Q. That's your part?
	A. $15,200.
	Q. Was there any attorneys' fees involved taken out of that?
	A. No.
	Q. So that was your part, $15,200?
	A. Yes.
	Q. Is that part of the trust fund, or is that money you received in your name?
	A. That's money received in my name.
	Q. How much did Willie receive?
	A. All that went to a trust fund. I think it was $20,000.
	Q. $20,000? How much did Jermaine receive?
	A. I believe $4,000.
	Q. And how much did your wife receive.
	A. My wife, she didn't receive - she received $3,700. That was for Boo - we call him Boo. That was for Willie's computer.

PLAINTIFFS POSITION	THE EVIDENCE
	***4/26/94 Answer to Interpleader*:** In Answer to the Interpleader action of State and County Mutual Insurance Company, the Miles declined any portion of the $40,000 in insurance benefits, available to them from Billy Camp's insurer, choosing to "make no claim" and "seek no affirmative relief of any kind." --- ***7/29/94 Hearing Transcript, Mark Mann statement in record at p. 23*:** "We have not settled with anybody. There is no anticipation of settling with anybody. In fact, there's an action, an interpleader action, in Dallas where the Camps have tendered money to the Miles family and it has been expressly denied that we want any part of that."

PLAINTIFFS POSITION	THE EVIDENCE
III. Willie Needs Physical Therapy in Order to Survive	III. Willie is Getting the Care He Needs and Does Not Need Physical Therapy at this Time
4/5/95 Aff. of Susan Miles at p. 3: "We have been told that Willie critically needs physical therapy to maintain his body in a generally healthful condition . . ." --- ***4/5/95 Aff. of Karen Perez at pp. 1-2***: "I have visited with Willie Searcy and his family and I believe it is critical that the following areas of Willie's care be addressed immediately . . . . Physical Therapy - Willie has been getting basic range of motion exercise by his caregivers, but needs physical therapy to prevent contracture and decreased mobility in his limbs	***1/9/95 Depo. of Dr. John Milani p. 30***: Q. Have you recommended to his parents that he receive some kind of physical therapy? A. To the best of my knowledge, there are some maintenance things that are recommended, but which are done by mom or attendants, such as skin care, helping him with getting up to the chair, daily range of motion and stretching activities. I do not recall any specific reason he would need physical therapy right now. . . . Q. What is your opinion right now as to Willie Searcy's condition? A. That he is likely to remain a ventilator dependent patient and that his condition as of the time that I last saw him was quite stable.
4/6/95 Aff. of Jack Sink at pp. 2-3: ". . . The following areas are in need of immediate attention: "7. . . . a program of physical therapy . . ."	***7/18/94 Depo. of Susan Miles at pp. 70-73***: A. Willie also needs therapy on his hands and his legs. The nurses do it, but it is not like an OT or a PT doing it, you know. We also do it. . . . Q. You didn't buy any of these things with any of the settlement money that you got prior to that? A. No. . . .

PLAINTIFFS POSITION	THE EVIDENCE
	A. . . . the reason why he needs his legs with therapy is to keep from blood clots because blood clots can kill you, so you want to keep the range of motion on his legs and his hands were kind of blood will flow through his body. Q. Is that what the nurses are doing now at home? A. Uh-uh, yes.

PLAINTIFFS POSITION	THE EVIDENCE
IV. Willie Needs a Program to Wean Him From His Ventilator ***4/6/95 Aff. of Jack Sink at p. 2:*** . . . The following areas are in need of immediate attention: 3. A program to try to wean Willie from the ventilator, even if he is not a candidate for ventilator independence, continued efforts to wean him would help prevent further atrophy of respiratory and accessory muscles.	IV. Ventilator Weaning Has Already Been Attempted But Was Not Successful ***1/9/95 Depo. of Dr. John Milani at pp. 30-31:*** Q. Have you ever tried to wean Willie off of a ventilator? A. Yes. Q. And what happened, or can you tell me about that experience. A. Yes. During the time he was at Dallas Rehab Institute some alterative ventilation methods were attempted. It seemed that Willie himself was not able to adjust very well to those trials at that point. He was able to be ventilated, but did not feel that he was willing to go so far as to get out the trach and to use other things exclusively. It seemed fit for safety's sake with him feeling this way, that he was better to be with the trach at that point.

PLAINTIFFS POSITION	THE EVIDENCE
V. Willie Needs Pneumobelt Training for a Two-Month Period ***4/5/95 Aff. of Karen Perez at p. 3***: "Since the trial, I have contacted four health care institutions in this region of the country that are qualified to provide pneumobelt training for Willie. He needs this two-month training to learn specialized breathing techniques that would permit him to breathe briefly in the absence or malfunction of ventilator equipment."	V. The Training Needed Can Be Provided in a 5-7 Day Admission at Dallas Rehab Institute ***1/9/95 Depo of Dr. John Milani at p. 32-33***: Q. If you tried to wean him from or to remove the trach, what would you do instead of having the trach in? A. That would need to be studied a bit, but in general it may involve a custom molded nasal mask or similar method at night, and a pneumo during the day. That would be a common set of alternative ventilation methods at any time at any rate. Q. Is that preferable? A. To being on the trach technique? Q. Yes. A. I think for the reasons related before this deposition, that it would be preferable. The main thing that needs to be considered at all times is the safety of the patient, so other concerns being equal, I believe it would be a preferable way for the long term. Q. Would he have to be hospitalized back at DRI to make that adjustment? A. That is probably the way it would be done, since it requires monitoring for the safety issues of good oxygenation of the blood, problems associated with fitting the mask, if the mask was chosen as being the best technique, various technical things that are best monitored closely for an admission. Q. Approximately how long would he be hospitalized then? A. Although that can vary, I would just give an estimate that over a 5-7 day admission, if he were really ready, that would be an appropriate length of time.

CAUSE NO. 94-143

SUSAN RENAE MILES, Individually and as Next Friend of WILLIE SEARCY and JERMAINE SEARCY, Minors, and KENNETH MILES,	§	IN THE DISTRICT COURT
Plaintiffs,	§	RUSK COUNTY, TEXAS
v.	§	
FORD MOTOR COMPANY and DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY FORD,	§	
Defendants.	§	4TH JUDICIAL DISTRICT

AFFIDAVIT OF KATHY A. LOVE

STATE OF TEXAS	§	
	§	ss.
COUNTY OF DALLAS	§	

Kathy A. Love, being first duly sworn under oath, deposes and states as follows:

1. I am over the age of eighteen, never been convicted of a felony, and am competent to testify about the matters set forth herein. This affidavit is based on personal knowledge.

2. I am a Legal Assistant at the law firm of Jones, Day, Reavis & Pogue and have been employed at the firm since 1988. I am the Legal Assistant handling the receipt, filing, maintenance, and organization of all materials received by Jones, Day, Reavis & Pogue attorneys representing Defendants in the action styled, Miles, et al. v. Ford Motor Co., Cause No. 94-143, District Court, Rusk County, Texas, 4th Judicial District. Therefore, I have knowledge of the receipt of all depositions, depositions on

written questions and transcripts of hearing and trial testimony by Jones, Day, Reavis & Pogue attorneys representing Defendants in this action.

3. Accordingly, attached to this affidavit are true and correct copies of the following list of exhibits taken from the files of Jones, Day, Reavis & Pogue in the referenced case:

Exhibit 1: Pages 13-15, 68-73, 75 and 85 of the Oral Deposition of Susan Renae Miles;

Exhibit 2: Pages 110-116, 127-129 and 133 of the Oral Deposition of Kenneth Miles;

Exhibit 3: Pages 1, 26-33, 42, 54 and deposition exhibits 4 and 5 of the Oral Deposition of Dr. John Milani;

Exhibit 4: Pages 1, 43-44 and 67 of the Oral Deposition of Linda Wickes;

Exhibit 5: Page 1385 from the Statement of Facts, Volume 10, the Trial Testimony of Susan Renae Miles;

Exhibit 6: Page 146 from the Statement of Facts, Volume 4, the Trial Testimony of Kenneth Miles;

Exhibit 7: Pages 1154, 1156, 1172, 1193 and 1203-1204 from the Statement of Facts, Volume 9, the Trial Testimony of Jack Sink;

Exhibit 8: Pages 1348-1349 and 1357, the Statement of Facts, Volume 10, the Trial Testimony of Karen Perez;

Exhibit 9: Pages 23 and 53 of a Hearing Transcript dated July 29, 1994; and

Exhibit 10: Pages 35, 43 and the Certification Page from a Deposition on Written Questions of the Records Custodian of AccuCare Health Services.

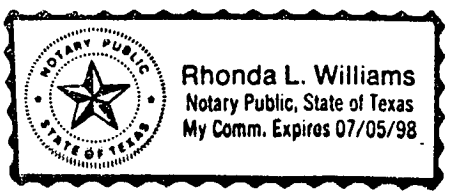
Further affiant sayeth not.

Kathy A. Love

SUBSCRIBED AND SWORN TO BEFORE ME, this 17th day of April, 1995.

Rhonda L. Williams
Notary Public, State of Texas

My Commission Expires:



SUSAN RENAE MILES -- 7/18/94

NO. 94-143

SUSAN RENAE MILES,	*	IN THE DISTRICT COURT
INDIVIDUALLY, AND AS NEXT	*	
FRIEND OF WILLIE SEARCY	*	
AND JERMAINE SEARCY,	*	
MINORS, AND KENNETH MILES,	*	
Plaintiffs,	*	OF RUSK COUNTY, TEXAS
VS.	*	
FORD MOTOR COMPANY, AND	*	
DOUGLAS STANLEY, JR.,	*	
D/B/A DOUG STANLEY FORD,	*	
Defendants.	*	4TH JUDICIAL DISTRICT

****

ORAL DEPOSITION OF

SUSAN RENAE MILES

JULY 18, 1994

****

On July 18, 1994 at 11:00 p.m., the Oral Deposition of **SUSAN RENAE MILES** was taken at the instance of the Defendants before James M. Shaw, RPR-CM, Certified Shorthand Reporter in and for the State of Texas, at the Law Offices of R. Jack Ayres, Jr., 4350 Beltway Drive, in the City of Dallas, County of Dallas, State of Texas, pursuant to Notice and the Texas Rules of Civil Procedure.

Q. Is that over there behind that -- There is a Whataburger or something there on Lemmon or El Chico.

A. No. It was a flower shop right by Sewell Cadillac.

Q. Right, I know where that is. And they have torn down the house there and y'all just own the lot?

A. Yes.

Q. And who owns that lot?

A. All of us together, the same as the way my father's house is.

Q. Your two brothers, your mother and you?

A. Yes.

Q. All right. And what else?

A. That's it, as far as -- The car that I have. I purchased a car.

Q. All right. And what kind of car is that?

A. It's a '93 Toyota Corolla.

Q. Now, did you buy that new?

A. No.

Q. You bought that used?

A. Yes.

Q. And where did you buy that?

A. Red Bird Toyota.

Q. And when did you buy that?

A. It was a mother's day present. Kenneth bought it, I will say, in May.

Q. Of '94?

A. Right.

Q. So after this accident had happened?

A. Yes.

Q. And who financed that automobile?

A. Red Bird Toyota.

Q. And who signed on it; did Kenneth or did you?

A. We both did.

Q. All right. And are there any other automobiles that you and Kenneth own?

A. The '92 Dodge van.

Q. Now, did he buy that from Doug Stanley?

A. Yes.

Q. And when did y'all buy that van?

A. In October of '93.

Q. Now, have you done any modifications to that van in order to carry Boo?

A. No.

Q. Now, you got some money already from some settlements, is that right, concerning this accident?

A. Yes.

Q. And what's happened with that money?

A. Basically, we have paid bills with it.

Q. What kind of bills have you been paying with it?

A. Well, I guess you could say our house note.

Q. So did you use that money to buy your new house?

A. No. We bought -- We already lived in the house before we got the money.

Q. You already lived there on Crepe Myrtle?

A. Yes.

Q. Were you behind in your house note at the time?

A. No.

Q. All right. So you have just used it to pay your regular bills?

A. Yes.

Q. Have you made any other large purchases with that money?

A. No.

Q. When did you buy the house then -- I'm sorry. When did you buy that house that you are living in now?

involved, everything is normally always sent to the attorney. And we don't worry about how it gets paid as long as it has been forwarded to an attorney.

Q. You don't know what has happened to your medical bills?

A. They have been forwarded to our attorney, like I said.

Q. Oh, from the hospital, I'm sorry.

A. Yes.

Q. Not just what you had. What about as far as the schooling that is being done for Boo now; who is paying for that?

A. Well, I'm not for sure. He is still a student of DISD, so DISD have homebound teachers that comes out to our house to take care of Willie.

Q. Is it the same teacher all the time?

A. Ms. Leach, uh-uh.

Q. That's not costing you any money?

A. No.

Q. What about then for the nurses?

A. The state pays for that.

Q. So up to date, you haven't had to pay for anything associated with this accident; is that correct?

A. Correct.

Q. Actually, up to date, as long as the schooling continued and the nurses continued and depending on what happened with the medical bills, you won't have to pay anything for this accident; is that correct?

A. Correct.

Q. Are there things that you think that you need that have not been provided for Willie up to date?

A. Yes.

Q. What are those things?

A. Well, we need a ramp at our home for Willie. He likes to go outside. We have to take the wheelchair, pick the wheelchair up, take it over the patio door and get him out. We also need a ramp in our van that we do not have. Willie needs a back-up generator. When the power goes out, we have to manually wheel Willie until the lights come back on.

Q. Have you had that problem before --

A. Yes, we have.

Q. -- with your lights going out?

A. Yes. But DRI has sent a letter to TU Electric to let them know there is a dependent child there and there is an emergency case, that when the

power does come out that we be the first to get the power back on. We also need a back-up ventilator. When that one goes out in the night, we are there with the nurses bagging him until the medical air supply gets out there with another ventilator.

Q. Have you had that happen before, too?

A. Yes.

Q. How many times has that happened?

A. About three. Willie also needs therapy on his hands and his legs. The nurses do it, but it is not like an OT or a PT doing it, you know. We also do it. He needs to be set up with his computer, the voice activated system. Just normally things that a child in his condition would need, he does not have because we don't have the money to supply that.

Q. You didn't buy any of these things with any of the settlement money that you got prior to that?

A. No -- Oh, we are in the process of getting a computer. We had a computer, but it wasn't programmed correctly, so I'm going through someone else to try to purchase a correct computer that Willie needs.

Q. Will it be voice activated?

A. Yes.

Q. Does Willie still read? You said he liked to read. Does he still read now that -- even though that he is in a wheelchair?

A. Oh, he does everything. It is just that we are his hands for him and his legs.

Q. When you said he is going to need therapy on his hands, does it look like maybe he will get use of some of his hands?

A. I don't know.

Q. Is that a possibility, though, with some help from therapy?

A. Well, it is always nice, like a doctor say, to keep his joints and the muscles activated in his hands and his legs, so really, I don't know. But I would like to see him get that, you know, the therapy on his hands and his legs.

Q. And maybe get use of his hands?

A. Well, we are not going to say to get use of his hands, but the reason why he needs his legs with therapy is to keep from blood clots because blood clots can kill you, so you want to keep the range of motion on his legs and his hands where kind of blood will flow through his body.

Q. Is that what the nurses are doing now at home?

A. Uh-uh, yes.

Q. Are you getting any kind of Social Security benefits for Willie?

A. Willie's Social Security varies. The more I work, the less he gets.

Q. So what is he getting now?

A. Well, he started out with 420, then they raised him $20, 446. He went to 211.

Q. Is that when you went back to work, he went to 211?

A. Well, even when I'm working, it fluctuates. Just say if I go in and I work maybe two days a week, that means he will be raised a little bit on his Social Security, you know, but I have been working a lot lately, so his Social Security is down to $58 a month.

Q. Does he get any type of psychiatric care?

A. No.

Q. Has anybody gotten any kind of psychiatric care after this accident, gone to see a psychiatrist?

A. Guy Bell at Dallas Rehab.

Q. Has that been it, just through the Rehab Center?

A. Well, we have had -- Randy has sent one

out. A Dr. Dangel has came out to visit with Boo.

Q. What about for you?

A. No, I haven't had any.

Q. You have also put a claim in for loss of earning capacity. As a mother of the boy, what would you have thought was going to happen to Boo?

A. You say I have put in a loss?

Q. Yes. You have asked to be compensated for him not being able to earn a living.

A. Right.

Q. What do you think was going to happen to Boo as far as having a career and making a living?

A. He is good at football and basketball, and I believed that he would have been a very good athlete at pro ball.

Q. But he is not big enough to play for the high school, is he?

A. No, but the teams that he does play for, he is very good. He is little, but he can really dribble those balls and run with the ball, so he would have, I believe, been a very good athlete.

Q. What were you doing on the date the accident happened?

A. I worked -- My mother does catering work, and I worked a wedding with her.

with him now?

A. He has an infection.

Q. And what kind of an infection?

A. A bladder infection.

Q. Do you know what caused that?

A. Well, he had a Foley catheter in last Tuesday and -- Well, they took the Foley catheter out last Tuesday and he hasn't been able to kick off. See, he is not able to go on his own and we have to cath him. Well, he is not being -- His urine is kind of accelerated inside of his body, and we have to go in and cath him to drain that urine. And Friday, we noticed blood that was in his urine.

Q. Does he go in and see any doctor on a regular basis?

A. He sees John Milani. That is his main doctor that he sees like every six months or when he is having some problems. He sees Dr. Fetner, that's his urologist, as far as his bladder and everything.

Q. How often does he see him?

A. About the same, unless we are having some problems and I have to call DRI.

Q. Has he had any trouble with any other kind of infections or illnesses, and let's say since January?

STATE OF TEXAS *

COUNTY OF DALLAS *

This is to certify that I, James M. Shaw, RPR-CM, Certified Shorthand Reporter, reported in shorthand the proceedings conducted at the time and place set forth in the caption hereof, and that the above and foregoing 85 pages contain a full, true and correct transcript of said proceedings.

Further certification requirements pursuant to Rules 205 and 206 will be certified to after they have occurred.

Given under my hand of office on this the 19th day of July, 1994.

James M. Shaw, Certified
Shorthand Reporter No. 1694
in and for the State of Texas.
Commission expires 12/31/94
Stanley, Harris, Rice
& Associates
3100 McKinnon, Suite 1000
Dallas, Texas 75201
Tel No. 214-720-4567

Original sent to T. Randall Sandifer on 7/19/94

NO. 94-143

SUSAN RENAE MILES, Individually and as Next Friend of WILLIE SEARCY and JERMAINE SEARCY, MINORS, and KENNETH MILES	)	IN THE DISTRICT COURT
VS.	)	OF RUSK COUNTY, TEXAS
FORD MOTOR COMPANY and DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY FORD	)	4TH JUDICIAL DISTRICT

DEPOSITION OF KENNETH MILES

ANSWERS AND ORAL DEPOSITION OF KENNETH MILES, a witness at the instance of the Defendant, taken in the above-styled and numbered cause on the 7th day of July, 1994, before Lisa Simon, Certified Shorthand Reporter in and for the State of Texas, in the offices of Law Office of R. Jack Ayres, Jr., P.C., located at 4350 Beltway Drive, in the City of Dallas, County of Dallas, State of Texas, in accordance with Notice to Take Oral Deposition and the Texas Rules of Civil Procedure.

ORIGINAL

A Willie, he said a few times -- he was talking about fireman all the time, and they turn around, they start talking about wanting to go to college to get -- he wants a scholarship to play pro football.

Q Anybody in your family ever play pro football?

A No.

Q Any pro sports of anybody in your family?

A No.

Q Who is Lee Skinner? Do you know him?

A Lee Skinner?

Q Uh-huh.

A That name don't ring a bell.

Q Who's Dwayne Pirtle? Do you know him?

A No, I don't.

Q You wouldn't have any personal knowledge of anything he would know about this accident?

A No.

Q Who is Ms. Myrtle Leach?

A Myrtle Leach is Willie's teacher.

Q Is she somebody that taught him before the accident?

A No. After the accident.

Q What does she teach him, at home now?

A At home.

Q Who has hired her?

A Someone from school, homebound teacher.

Q Is this something you have to pay for, or this is provided?

A It's provided.

Q Do you know Ms. Leach?

A Not personally I don't.

Q Do you have a good relationship with her?

A Yes.

Q What type of benefits do you receive to help you with the medical care that Willie has to have?

A Right now with an agency at Active Care.

Q What was that?

A The agency we with is Active Care.

Q What do they do for you?

A Nursing.

Q What type of nursing do they provide?

A Like during the week. You know, they come in at 11:00 to 7:00 or 8:00 o'clock in the evening.

Q Mostly daytime nursing care?

A Yes. And like on the weeknights, another nurse come in at 11:00 at night to 7:00 in the morning.

Q So he has full-time nursing care?

A Yes. Mostly in the morning I have him till the nurse come in.

Q From 7:00 to 11:00 in the morning you have him?

A Uh-huh.

Q So there's about four hours that you nurse him, and the rest of the time he has nursing care?

A Except on the weekends, me and my wife have him all day Saturday and all day Sunday. Nurse come in at night on the weekend.

Q This nursing, is it something that's provided? How do you get that? Is it paid for or what?

A I believe it's like with Medicaid.

Q Do you get any social security benefits?

A Willie do.

Q What does he get?

A I think it's 245 or 250, I believe, a month.

Q $250 per month?

A Uh-huh.

Q What other benefits do you or Willie get?

A That's it.

Q The nursing and 250 a month?

A Uh-huh.

Q What about your medical? Who pays for that?

A Right now for, you know, like his age, you know, like they have like a trust fund for kids to take care of the medical expense that we couldn't take care of.

Q Who set that up?

A I don't know who set it up. My wife knows more

about that information than I do.

Q So are Willie's medical needs being taken care of adequately now?

A Well, like I say, you know, really not everything that, you know, he should have. No.

Q Is he getting the basic needs?

A Yes.

Q Where is his trust fund administered, and who's the trustee?

A Like I say, my wife have that information; I don't.

Q You don't know?

A Huh-uh.

Q Okay. What other benefits do you get for Willie or does Willie get?

A That's it.

Q He's in a respirator; right?

A Yes. On a trach.

Q Who provides that or regulates that?

A Talking about the machine?

Q Yes.

A Air Supply.

Q Do you have to pay anything for that?

A No. It's also taken care of like, you know, everything else.

Q What about Dallas Rehabilitation Center? He's been there?

A Yes.

Q Who takes care of that bill?

A Still the children's funds.

Q What is it that the children's fund doesn't take care of? What is it he needs he doesn't get?

A One that he needs is a sip and puff wheelchair.

Q Sip and puff? Okay. Have you asked for that?

A Yes, we have.

Q Why --

A When we left the Dallas Rehab last year, he was available for one and we never heard -- they said they had one on order or whatever for him. And every time my wife get back with them, they give her the runaround. We just haven't received anything.

Q That's something that he needs and he's supposed to get, it's just on order?

A Right. Like I say, it's been over a year now and hadn't received it all this time here. Mostly we have to push him around.

Q How do you push him around?

A The wheelchair that they applied for him.

Q What else does he not have that you would like to see him have, medically I'm talking about?

A Well, he is getting the computer.

Q He has a computer?

A Yeah. But right now we have to order voice-activated for him, and we had to go through the Dallas Rehab to get that voice activator.

Q Does he have the voice activator now?

A No.

Q You're waiting for that?

A Yes.

Q Do you have to pay for that, or is it something --

A We have to pay for it.

Q How much is it?

A Right around 600 and something dollars.

Q Anything else he doesn't have that you feel like he needs?

A A page turner.

Q Have you applied for that?

A Well, no, my wife, she had talked to the people about it, but like I say, we just don't have the money to get those things. That's for, like I say, when he have school books or whatever, still he could have it set up on the page turner, when he get through he can operate it with his mouth and turn -- flip the page for him. Instead of somebody flipping it for him, he can do it on his own.

Q Do you know what the cost of that is?

A No. My wife, she know all about because she been looking around, checking around.

Q You haven't had to pay the bill at Methodist Hospital or the DRI bill; is that right?

A Huh-uh.

Q In interrogatories you answered it indicated that Willie gets $440 per month. You said 250.

A You say 400-something dollars a month?

Q Social security and disability income are approximately 440 per month.

A No. He don't get that much a month.

MR. SANDIFER: What's that interrogatory number?

MR. GRAINGER: 19.

Q And then he gets assistance from Medicaid from the Texas Rehabilitation Commission; is that correct?

A I guess so because like I say, my wife, she deal with all that there. I don't deal with all that there.

Q How's Willie getting along now?

A Well, it's up and down.

Q Tell me about the downs.

A Well, sometimes, like I say, you know, right now like heatwise we can't take him outside. If he want to look outside, we have to sit him in front of the patio door on the inside of the house so he can look out or whatever. Because if you sit him out, his fever go up too high. Like Monday,

when you have somebody sick in the hospital and hurt real bad, you know, you have your focus on him getting better, and you do have other concern because you can imagine what they're going through too.

Q Do you know why the driver of that car lost control of his car?

A No, I do not.

Q Or formed any opinion?

A Huh-uh.

Q Is there anything else about that conversation with the father of the driver of the Cougar that you remember?

A No.

Q Now, you said you settled with State Farm. How much did you get in that settlement, please, sir, dollar amount?

A I received 15,700.

Q That's your part?

A 15,200.

Q Was there any attorneys' fees involved taken out of that?

A No.

Q So that was your part, 15,200?

A Yes.

Q Is that part of the trust fund, or is that money

you received in your name?

A That's money received in my name.

Q How much did Willie receive?

A All that went to a trust fund. I think he was 20,000.

Q 20,000? How much did Jermaine receive?

A I believe 4,000.

Q And how much did your wife receive?

A My wife, she didn't receive -- she received 3700. That was for Boo -- we call him Boo. That was for Willie's computer.

Q Willie, you call Boo?

A Yeah.

Q Like B-o-o?

A Yeah.

Q Has your medical been paid?

A No.

Q Did anybody pay that?

A We hadn't heard any more from them. And my wife -- I hadn't or my wife hadn't called or found out anything yet.

Q Have you in your house there on Crepe Myrtle had to have any special construction for Willie or done anything special because of his condition?

A Well, for one thing, you know, all of us in the

household really know what to do for emergency with Willie.

Q You've been trained for that?

A Yes.

Q I'm talking about as far as the house itself. Have you had to do any special construction?

A No. Not at this time, we hadn't.

Q Is there anything that you need to do?

A Yes. We do, a whole lot.

Q What is that?

A For one thing we need a bigger room for him because the room him and Jermaine share together is a little small with everything that we have in there. And we need to modify the porch for the wheelchair to get the wheelchair in and out of the house.

Q What about vehicles -- any special vehicles you have?

A Well, I bought a van, but we hadn't had anything done to the van.

Q Do you have a lift on the back of the van?

A No.

Q No lift. What type van is that?

A It's a '92 Dodge conversion.

Q The house you moved to now, was it because of Willie you moved to this house on Crepe Myrtle, or what was the reason for the house?

CHANGE/CORRECTION SHEET

The witness, KENNETH MILES, states he wishes to make the following changes or corrections to his testimony as originally given:

PAGE	LINE	CHANGE	REASON

Signature of the Witness

STATE OF TEXAS)
COUNTY OF DALLAS)

SUBSCRIBED AND SWORN TO BY the said witness before me, the undersigned authority, on this the 15th day of AUGUST, A.D., 1994.

Ann B. Willard
NOTARY PUBLIC in and for the
State of Texas
County of Dallas
Commission expires: June 28, 1997

ANN B. WILLARD
MY COMMISSION EXPIRES
June 28, 1997

NO. 94-143

SUSAN RENAE MILES, Individually and as Next Friend of WILLIE SEARCY and JERMAINE SEARCY, Minors, and KENNETH MILES	*	IN THE DISTRICT COURT
VS	*	RUSK COUNTY, TEXAS
FORD MOTOR COMPANY and DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY FORD	*	4TH JUDICIAL DISTRICT

ORAL DEPOSITION OF
DR. JOHN MILANI

On the 9th day of January, 1995, at 10:15 a.m., the oral deposition of the above-named witness was taken at the instance of the Defendants before Tierney Burgett, Certified Shorthand Reporter in and for the State of Texas, at the office of the witness, 9705 Harry Hines Boulevard, Suite 200, in the City of Dallas, County of Dallas, State of Texas, pursuant to notice and the agreement as stated on the record herein.

ORIGINAL

TB

irritation sitting in his chair on the cushion that was to the extent it was a slightly broken down area over his coccyx, but very mild. Not an impression sore through the skin, for instance.

Q Now, did he come in just on a -- for a regular checkup? Is that the reason for the visit?

A It was. That was a planned approximate six-month visit.

Q And there wasn't anything in that visit that concerned you about Willie?

A In that visit?

Q As far as his condition was concerned?

A No. Generally he was doing quite well and had also seen the urologist on that day.

Q And what was he in to see the urologist about?

A I believe he was in for a routine urology appointment, since many of those are coordinated with spinal cord injury visits.

Q Do you have a copy of the urologist's report there?

A Yes.

Q And does -- did he treat him for anything at that time?

A The urologist stated that he was in for a

TB

routine check and did not treat him for anything specific.

Q Did he note anything in his report that gave him cause for concern?

A No. He specifically stated, quote, he is doing fine, end quote.

Q Can I get a copy of both of those last reports and have them marked as deposition exhibits then?

A Sure.

Q And I will have your last report marked as Deposition Exhibit Number 2 and then the urologist report as Deposition Exhibit 3.

MR. SANDIFER: You already have a 2.

Q I'll have your report marked as 3 and the urology report as 4.

A Sure. Do you want them now or afterwards?

Q We can do them afterwards if that's all right.

A Sure.

Q Do you have the report there from 8-3-94 from when he went to see the lung doctor?

A Yes.

Q And who is that doctor?

TB

A Dr. Joseph Viroslav, V-I-R-O-S-L-A-V, is the pulmonologist.

Q What did he treat him for, when Willie went into see him on August the 3rd?

A He specifically states that the patient seems to be doing very well and had no significant problems. He routinely changed his trach tube.

Q How often approximately do you have a trach tube replaced?

A I believe our pulmonologists generally recommend around three months. It varies among patients. He specifically states here that he would see him in two or three months for the repeat change.

Q So in other words, he's due to have one changed here pretty soon?

A That would be correct.

Q Let me go ahead, and if I can get a copy of that last report, and I will have that marked then as Deposition Exhibit Number 5.

Do you know when Willie was last in the hospital, was hospitalized?

A I believe I would know when he was last hospitalized here, and to the best of my knowledge that would be his last hospitalization, and from

TB

psychologic counseling.

Q Have you recommended to his parents that he receive some kind of physical therapy?

A To the best of my knowledge, there are some maintenance things that are recommended, but which are done by mom or attendants, such as skin care, helping him with getting up to the chair, daily range of motion and stretching activities. I do not recall any specific reason he would need physical therapy right now.

Q What about any kind of psychological counseling? Have you recommended that his parents get him some kind of psychological counseling?

A I do not recall any such recommendation.

Q What is your opinion right now as to Willie Searcy's condition?

A That he is likely to remain a ventilator dependent patient and that his condition as of the time that I last saw him was quite stable.

Q Have you ever tried to wean Willie off of a ventilator?

A Yes.

Q And what happened, or can you tell me about that experience.

A Yes. During the time he was at Dallas

Rehab Institute some alternative ventilation methods were attempted. It seemed that Willie himself was not able to adjust very well to those trials at that point. He was able to be ventilated, but did not feel that he was willing to go so far as to get out the trach and to use other things exclusively. It seemed fit for safety's sake with him feeling this way, that he was better to be with the trach at that point.

Q And that was more based on the fact that Willie didn't seem to feel comfortable with alternative methods; is that right?

A Yes. I'm not certain that at some time in the future that could not change.

Q Have you talked to him since that time about changing?

A I personally have not, that I recall, since the pulmonary doctors have been following him fairly steadily -- and I do not see specifically where either of the two pulmonary doctors who have seen him have brought that up again since. It may be the case that they have, but I do not see evidence for that. And, of course, on the most recent admission that I have a record of, he was in for a respiratory problem specifically with

pneumonia, so it would not have been thought of as a good idea at that time.

Q When was that, the date that he was in?

A That was the October 1993 admission to the pulmonary service at DRI.

Q If you tried to wean him from or to remove the trach, what would you do instead of having the trach in?

A That would need to be studied a bit, but in general it may involve a custom molded nasal mask or similar method at night, and a pneumo during the day. That would be a common set of alternative ventilation methods at any time at any rate.

Q Is that preferable?

A To being on the trach technique?

Q Yes.

A I think for the reasons related before this deposition, that it would be preferable. The main thing that needs to be considered at all times is the safety of the patient, so other concerns being equal, I believe it would be a preferable way for the long term.

Q Would he have to be hospitalized back at DRI to make that adjustment?

A That is probably the way that it would be

TB

done, since it requires monitoring for the safety issues of good oxygenation of the blood, problems associated with fitting the mask, if the mask was chosen as being the best technique, various technical things that are best monitored closely for an admission.

Q Approximately how long would he be hospitalized then?

A Although that can vary, I would just give an estimate that over a five to seven-day admission, if he were really ready, that would be an appropriate length of time.

Q One of the big things to determine whether or not this ought to be attempted is his state of mind about doing it?

A Definitely.

Q Have you ever prepared life care plans --

A Yes --

Q -- for people?

A -- I have.

Q Have you been asked to prepare one in this case, a life care plan?

A No.

Q Have you ever been asked to prepare a life care plan for Willie Searcy?

basis that he need to come back for that reason, if that's the question.

Q That's the question.

A No, I have not.

Q To your knowledge, have you made any recommendations to Willie's parents that he get some kind of care that you thought was necessary that you found he was not getting?

A To my recollection, no.

Q If a family is able to help out and take care of a patient, is it your preference to see the family involved in helping maintain the patient?

A Yes. A big part of our rehabilitation process is involving the family and family training.

Q And did Willie's parents go through that training?

A Yes. I can at least recall his mom a lot more than dad but, yes, there was a family training involved.

Q And without moving right up to the level of being a licensed nurse, is she qualified to take care of Willie, as far as you know?

A As far as I know, she is.

Q Do you know what kind of home care he's getting now?

STATE OF TEXAS)

COUNTY OF DALLAS)

This is to certify that I, Tierney Burgett, Certified Shorthand Reporter, reported in shorthand the proceedings conducted at the time and place set forth in the caption hereof and that the above and foregoing 52 pages contain a full, true and correct transcript of said proceedings

Further certification requirements pursuant to Rules 205 and 206 will be certified to after they have occurred.

Given under my hand on this the 10th day of January, 1995.

Tierney Burgett, Certified
Shorthand Reporter No. 588
in and for the State of Texas,
Stanley, Harris, Rice & Associates
3100 McKinnon, Suite 1000
Dallas, Texas 75201
214-720-4567

My commission expires 12-31-96

Original deposition sent to Margaret Keliher on 1-10-95

TB

20-95-92

7 FEB 1994 C&S: 100,000 Pseudomonas. We will put him on CARBENICILLIN 2 q.i.d x 7 days. CF/sb

11 FEB 1994 Given CARBENICILLIN 2 q.i.d. #6. CF/sb

25 FEB 1994 Placed on CIPRO pending culture results. CF/sb

03 JUNE 1994 Given AMPICILLIN for a STREPTOCOCCUS UTI. CF/ pm

18 JULY 1994 Will go on IC q 4 h for high residual. CF/sb

2 AUG 1994 **HDR CLINIC NOTE:**
Doing pretty good at home. He has had some recurrent infections.

CMG: Shows good capacity bladder, 300 cc and Grade 1 reflux, right side.

He had a Pseudomonas UTI about 6 months ago and Strep UTI more recently.

PLAN: We will increase his IC to q 4 h, with cath at 8:00, 12:00, 5:00, 8:00 and 12:00 midnight.
We will try him on AMPICILLIN/BACTRIM SUPP.
We encouraged the family to continue to cath him as an alternative to SP TUBE because of the problem with chronic pyelo. CF/sb

27 DEC 1994 **HDR CLINIC NOTE:**
In today for routine check. We got a culture. He is doing fine. He is on CIC with variable amounts--sometimes as low as 50 cc, high as 300-400 cc.

We will keep him on IC, culture q 3 months or whenever he shows signs of infection, and x-ray/SONO once yearly. CF/sb

REVIEWED BY
DR: F
DATE: 12/94

EXHIBIT NO. 4
T. BURGETT

v4

HEALTHSOUTH DALLAS
REHABILITATION INSTITUTE
9713 Harry Hines Blvd.
Dallas, Texas 75220-5441

Patient Name: SEARCY, WILLIE
Patient Number: 204892
Physician: Joseph Viroslav, M.D.
Admit Date:

8/3/94

OFFICE VISIT:

The patient seems to be doing very well. He had no significant difficulties and no respiratory problems. His tracheostomy was changed approximately 70 days back and was due for a change. He had no difficulties with the present tracheostomy.

His examination is basically unchanged. He is completely paralyzed and is a C1-2 quadriplegic. He is sitting in a chair without any problems and his chest is clear to auscultation and percussion when the ventilator is going. His vital signs are normal with a blood pressure of 80/60 and a pulse of 80/min, respiratory rate by ventilator 12/min and he is afebrile.

Without any difficulties, a #4 Portex non-fenestrated cuffless tracheostomy was replaced into the trachea after removal of the previous tube. No difficulties were encountered and no periods of apnea were observed during the procedure. The patient tolerated the procedure well and was discharged home in good condition and we will follow him in the next two to three months for repeat tracheostomy change.

Joseph Viroslav, M.D.

JV:efd50
D: 08-03-94
T: 08-18-94
H185034

M. Lane
EXHIBIT NO. 5
T. BURGETT

NO. 94-143

SUSAN RENAE MILES, Individually and as Next Friend of WILLIE SEARCY and JERMAINE SEARCY, Minors, and KENNETH MILES	*	IN THE DISTRICT COURT
VS	*	RUSK COUNTY, TEXAS
FORD MOTOR COMPANY and DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY FORD	*	4TH JUDICIAL DISTRICT

ORAL DEPOSITION OF

LINDA WICKES

ORIGINAL

On the 6th day of January, 1995, at 9:37 a.m., the oral deposition of the above-named witness was taken at the instance of the Defendants before Tierney Burgett, Certified Shorthand Reporter in and for the State of Texas, at the offices of Jones Day Reavis & Pogue, 2300 Trammell Crow Center, 2001 Ross Avenue, in the City of Dallas, County of Dallas, State of Texas, pursuant to notice and the agreement as stated on the record herein.

TB

see Boo?

A. On a 24-hour basis?

Q. On a 24-hour basis.

A. Two to three, just depending on the schedule. Mom had X number of hours that she could use at her disposal per week. Her schedule could change, so if she wanted around-the-clock, 24-hour nurses, she may have more nurses than if she only wanted eight hours in the morning and then eight hours at night to sleep. It really depends.

Q. How did you schedule? By the week?

A. By the week.

Q. And how many hours then would she get by the --

A. She had a 104 hours a week via the CCP program.

Q. How is that determined? Do you know?

A. I send in all of this lovely paperwork, and CCP calls me and says, this is what you've got, and it's recertified every three months.

Q. And do you file the paperwork for it to be recertified?

A. Yes, ma'am.

Q. Do you have any recommendations to CCP as to how many hours he ought to have?

A. I put in my guide. I can ask for the moon. They will give me what they -- they have a guide to go by, and when they see this, they give X number of points for every skilled nursing thing that is required, skilled nursing duty that is required, and then they add up the points. The points equals some amount of hours, and they call me back and tell me what I get. I can give them a guide to go by, but they can throw that out the window. It doesn't make a difference.

Q. What does CCP stands for?

A. Comprehensive Care Program.

Q. Now, what is that?

A. It's a Medicaid-funded program to assist children who have -- who are medically fragile be able to stay at home.

Q. Do you know what kind of qualifications those people have to make these determinations?

A. No. They don't allow us the guide. I wish they would.

Q. So what is that, 104 hours a week?

A. Yes, ma'am.

Q. Out of 168 hours a week? Is that what he gets out of a total week?

A. He has 104 hours.

STATE OF TEXAS)

COUNTY OF DALLAS)

This is to certify that I, Tierney Burgett, Certified Shorthand Reporter, reported in shorthand the proceedings conducted at the time and place set forth in the caption hereof and that the above and foregoing 64 pages contain a full, true and correct transcript of said proceedings

Further certification requirements pursuant to Rules 205 and 206 will be certified to after they have occurred.

Given under my hand on this the 9th day of January, 1995.

Tierney Burgett, Certified
Shorthand Reporter No. 588
in and for the State of Texas,
Stanley, Harris, Rice & Associates
3100 McKinnon, Suite 1000
Dallas, Texas 75201
214-720-4567

My commission expires 12-31-96

Original deposition sent to the witness on 1-9-95

NO. 94-143

SUSAN RENAE MILES, INDIVIDUALLY, AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS, AND KENNETH MILES	)	IN THE DISTRICT COURT
VS.	)	OF RUSK COUNTY, TEXAS
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., D/B/A DOUG STANLEY FORD	)	4TH JUDICIAL DISTRICT

STATEMENT OF FACTS
VOLUME 10 OF 19 VOLUMES

APPEARANCES

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FOR THE DEFENDANTS:

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Ms. Margaret Keliher
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(APPEARANCES CONTINUED ON NEXT PAGE)

APPEARANCES (Continued)

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HARPER & COLLINS
P.O. Box 629
Tyler, Texas 75710-0629

THE COURT: All right, we'll take our recess then. You may step down. Ladies and gentlemen of the jury, we'll take our morning recess at this time, and you'll be retired to the jury room in charge of the bailiff under all instructions heretofore given for a 20 minute recess. This trial's in recess for twenty minutes.

(Recess.)

THE COURT: All right, you may continue.

MR. AYRES: We pass the witness, Your Honor.

THE COURT: All right, you may cross-examine.

CROSS EXAMINATION

By Mr. Grainger:

Q. Mrs. Miles, you're to be commended for the job you've done and how you've handled your son, and I personally want to commend you for that. Y'all have done a wonderful job. And Willie is getting good care now, isn't he?

A. Yes.

Q. You had ridden in this Ranger before the accident, hadn't you, Mrs. Miles?

A. Yes, I have.

Q. And you'd sat on the passenger side, hadn't you?

A. Yes.

Q. And you'd used the same seat belt that Willie or Boo had used, hadn't you?

A. Yes.

THE STATE OF TEXAS)

COUNTY OF RUSK)

I, Terri Boling, Official Court Reporter in and for the 4th Judicial District Court of Rusk County, Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that the District Clerk was ordered by the Court to send the originals of all exhibits to the Court of Appeals in Texarkana, Texas, upon motion by Plaintiffs.

I further certify that the charges for the transcription of this record are $15,076, to be paid by the Defendant, Ford Motor Company.

WITNESS my hand, this the 20th day of March, 1995.

TERRI BOLING, C.S.R., R.P.R.
OFFICIAL COURT REPORTER
Rusk County Courthouse
Henderson, Texas 75652
Telephone No. (903) 657-0359

Certificate No. 1508
Expires 12/31/95

NO. 94-140

SUSAN RENAE MILES, INDIVIDUALLY, AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS, AND KENNETH MILES	)	IN THE DISTRICT COURT
VS.	)	OF RUSK COUNTY, TEXAS
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., D/B/A DOUG STANLEY FORD	)	4TH JUDICIAL DISTRICT

STATEMENT OF FACTS
JURY TRIAL
VOLUME 4 OF 19 VOLUMES

APPEARANCES

FOR THE PLAINTIFFS:

Mr. Mark Mann
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Mr. R. Jack Ayres, Jr.
Mr. T. Randall Sandifer
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Dallas, Texas 75244

FOR THE DEFENDANTS:

Mr. Richard Grainger
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Tyler, Texas 75710

Mr. Thomas Fennell
Ms. Margaret Kelliher
Mr. Mark R. Hall
JONES, DAY, REAVIS & POGUE
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201

(APPEARANCES CONTINUED ON NEXT PAGE)

burden to me, and I don't have no problem with it.
Q. And do you mean that?
A. I mean that.
Q. For all the stuff you do, you don't feel like he's a burden or a problem?
A. No, sir, I don't.
Q. Now, Mr. Miles, I want to ask you this question, if I can, and this is another private matter, but has the situation with Willie affected your relationship with your wife, if you understand what I mean?
A. Some, yes.
Q. Can you tell the ladies and gentlemen of the jury how it's affected your marriage?
A. Well, sometimes like I say, you know, it is a lot of pressure around it, but you have to learn how to deal with your pressure and your own feelings. And most of them -- everything right now is focused on Boo.
Q. Is this hard on your wife?
A. Yes, it is.
Q. Is your wife as happy and as cheerful as she used to be?
A. She have her days.
Q. Is she the same lady that she was before all this happened?
A. In some ways, yes.
Q. Is she different in some ways?

THE STATE OF TEXAS)

COUNTY OF RUSK)

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NO. 94-143

SUSAN RENAE MILES, INDIVIDUALLY, AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS, AND KENNETH MILES	)	IN THE DISTRICT COURT
VS.	)	
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., D/B/A DOUG STANLEY FORD	)	OF RUSK COUNTY, TEXAS
	)	4TH JUDICIAL DISTRICT

STATEMENT OF FACTS
VOLUME 9 OF 19 VOLUMES

APPEARANCES

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(APPEARANCES CONTINUED ON NEXT PAGE)

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P.O. Box 1915
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Mr. Greg Smith
RAMEY, FLOCK, JEFFUS, CRAWFORD,
HARPER & COLLINS
P.O. Box 629
Tyler, Texas 75710-0629

Dallas Rehabilitation Institute. I worked with Dr. Espy there on cases. I've also worked with the Fort Worth Rehabilitation Center with a physician -- I'm blocking out on his name, at the Fort Worth Rehab Hospital. And I've worked with a group out of Beaumont, Texas, as well. And I believe McAllen is another area. Several places in Texas, yes.

Q. The Dallas Rehab Institute that you've worked with, that's the same place that Willie was for a period of time; is that correct?

A. That is correct.

Q. Okay, and Dr. Espy is one of the doctors there that you worked with?

A. Dr. Espy is a physiatrist DRI, yes, sir.

Q. Now, you mentioned life care plans, and I'm sure none of us are familiar with life care plans. At least I wasn't, until I started working on cases. What is a life care plan?

A. A life care plan essentially is designed to identify all of the services, the equipment, the services, the supplies, everything that is required because of a disability. That includes medical, psychological, social, vocational, educational, whatever services that are needed, because a person has a disability. It does not include what a person may need in terms of clothing, unless they are special types of clothing a person needs. It would not necessarily include utilities, for example, for a house, that sort of thing,

A. Yes.
Q. Have I given those to you?
A. Yes, sir.
MR. GRAINGER: There's only a question about one that we need to resolve, and that's Accucare.
THE COURT: All right, I'll let y'all confer about that.
Q. Dr. Sink, now that we've got that worked out, let me show you what's marked as Plaintiffs' Exhibits 45, 46, 47, 48, and 48-A. Have you got those? You have a list of those, do you not?
A. I have a list of those, yes, sir.
Q. And the total of the medical expenses thus far, at least up through September of 1994, do you have a total of those?
A. I believe this shows $513,347.75.
Q. Okay. And is that for hospital care, doctors' care, physical therapy, medications, and nursing services through September of 1994?
A. Yes, sir.
Q. All right.
A. September 3, '94, is what I have.
Q. Okay. Of course, you're familiar with ongoing nursing services and expenses that Willie has on a day-to-day basis; is that right?
A. Yes, sir.

A. Aids for independent functioning are such things as the computer that he would need, and have it hooked up so that it could be utilized. He could turn his light on or off, if he wanted to. He could turn the T.V. set on or off. He could answer the phone. He could do any number of things, and those are basically things to make him as independent as possible, considering the fact that he cannot utilize his upper extremities for any purpose.

Q. Okay. Drugs, supply needs. That's probably pretty self-explanatory. Are those the medications that he will need for his particular problems?

A. I think I can quickly tell you that the drug supply and needs or respiratory equipment needs and supplies are those which he is already using on an annual basis. I added nothing nor did I subtract anything. Those come straight from the sources of the people who have been providing those drugs and supplies and the respiratory equipment and supplies.

Q. Therapeutic equipment needs, then?

A. Therapeutic equipment needs essentially would be for such things as a mat and a mat table, where he would do his -- someone to do his range-of-motion exercises on, and minimal, which basically do cost, but those are essentially just things to provide therapy on. I would assume that the therapist would come to the house. They would make sure that the nurses continued doing the therapy that needed to be done. It's just

and I think the only opinion I would give is the quality of his care. His life expectancy is directly related to the quality of his care. Cut out the care, he would be dead in a year or sooner. But his life expectancy is directly related to that quality of care. That's the only thing I would say.

Q. I guess that's true with all of us?

A. Oh, definitely true with us, but much more for him than it is for you or I.

Q. I understand. Now, you're familiar with a paper that has been written in connection with the Craig Institute in Englewood, Colorado, on the long term outlook for persons with high quadriplegia?

A. Yes, sir.

Q. In fact, I believe you cite it in your Life Care Plan, don't you?

A. Yes, sir. That's where I took the statistic, I think, for 22 days a year, which I said earlier certainly should change with the quality of care.

Q. And again, this is a very touchy subject to approach, but it's something that we have to talk about.

A. Yes, sir.

Q. The survival rates are very different between people that are ventilator-dependent quads and nonventilator-dependent quads; would that be a correct statement?

A. According to those statistics at that time. You do need

different things depending upon that. He likely could. Whether or not he would have, there's just too many variables. He, according to the psychological test that I saw, I think ended up, according to the psychologist, having average intelligence, and of course, that's certainly in adverse situations been tested now. His teacher indicated that he was in an accelerated program before the accident at school and was doing well. So, I don't -- you know, there's a possibility he could have gone to college and finished college. There's a possibility he could have gone to a vo-tech school and become a technician, which make about as good of money as college graduates do in many cases, if not more.

Q. Can you guarantee us one thing, that if he doesn't get proper care, that he won't live nine years?

A. Oh, I would guarantee that, yes.

Q. Thank you, sir.

MR. MANN: I pass the witness.

RECROSS EXAMINATION

By Mr. Grainger:

Q. He's getting a good level of care for what he's getting now, isn't he, sir?

A. He's getting -- the level of care, the nurses, what he's getting now are L.P.N.'s and for the care that he's getting, for the 65 percent of the time he's getting from his L.P.N.'s,

yes. And I'm not questioning the care his parents give him either. All I'm saying is, that's just an overwhelming burden for parents.

Q. Well, I would imagine, and I can appreciate that. And you know that firsthand. Dr. Sink, so the record will be clear what Mr. Zadoff said, let's look at it all here, since it was brought up. I asked him, my question on page -- or the question on page 82, line 18, and this is Dr. Zadoff. It says, "You specifically mention the figure of nine years there or longer, but how did you get the specific reference to nine years?" His answer was, "I went by the Whiteneck article, given that was the latest study of patients and, therefore, I went by" --

MR. MANN: Largest study.

Q. "That was the latest" --

MR. MANN: Largest. Largest.

Q. Largest, I'm sorry. "That was the largest study of patients and, therefore, I went by their information, thinking that would probably be the most accurate." Did I read that correctly?

A. You did, sir.

Q. (Reading:)

"Q. All right, that was the one reference to the third paragraph?

"A. Yes, sir."

THE STATE OF TEXAS)

COUNTY OF RUSK)

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OFFICIAL COURT REPORTER
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Henderson, Texas 75652
Telephone No. (903) 657-0359

Certificate No. 1508
Expires 12/31/95

NO. 94-143

SUSAN RENAE MILES, INDIVIDUALLY, AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS, AND KENNETH MILES	)	IN THE DISTRICT COURT
VS.	)	
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., D/B/A DOUG STANLEY FORD	)	OF RUSK COUNTY, TEXAS
	)	4TH JUDICIAL DISTRICT

STATEMENT OF FACTS
VOLUME 10 OF 19 VOLUMES

APPEARANCES

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Henderson, Texas 75653

Mr. Greg Smith
RAMEY, FLOCK, JEFFUS, CRAWFORD,
HARPER & COLLINS
P.O. Box 629
Tyler, Texas 75710-0629

psychologist?
A. No, sir.
Q. Did they show you the psychological assessment by Dr. Dangel?
A. No. I was aware that one had taken place, but I did not read the report.
Q. And I've heard you discuss the care that Willie gets now. Does he get good care now?
A. He gets good care now, yes.
Q. And he has both L.V.N. and R.N. and just attendant care now, does he not, at some times of the day?
A. He has predominantly L.V.N., R.N. care and parental care.
Q. And you don't mean to tell the jury that attendant care is something he shouldn't have, is it?
A. What I mean to tell the jury is that he needs skilled care that has been well-trained, so that they can problem-solve and prevent any additional major crisis occurring for him.
Q. That doesn't mean it has to be an R.N. or an L.V.N., does it?
A. In my opinion, it needs to be licensed professional care, yes.
Q. Mr. and Mrs. Miles are neither R.N.'s or L.V.N.'s, but don't they give him good care?
A. They give him superb care, but they have been trained and

have had to perform that function, and it's not really fair to them to have to do that.

Q. My point is though, couldn't just an attendant also be trained as they are, and not necessarily have to be an L.V.N. or R.N. and give Willie good care?

A. No, I don't believe that's true.

Q. Don't believe they can be trained like Kenneth and Susan Miles are?

A. No, because they have certain built-in levels of care as parents, and perceptions, and they know how to deal with those.

Q. An attendant could not be trained like that?

A. No, sir.

Q. The computer thing for Willie. He's already been fitted to that, is that -- I understand that's right?

A. We made a test model of it. It was just for demonstration purposes only. If we were able to purchase the equipment, we would have to go through a much finer tuning of that equipment.

Q. And that's something that appeared to work for him?

A. Yes, sir, it did.

Q. As far as life expectancy, you're not here as any expert -- you tell me if I'm wrong -- or hold yourself out as any expert on what the life expectancy is of a high quadriplegic person, are you, ma'am?

Q. Thank you.

MR. MANN: That's all I have, Your Honor.

RECROSS EXAMINATION

By Mr. Grainger:

Q. The care Willie is getting now is good care, isn't it?

A. Yes, it is.

Q. And he's been stable for a period, a good long period of time now, hasn't he?

A. For several months, yes.

Q. So you're not telling this jury that he's not getting good care now, because he is, isn't he?

A. He's getting good care.

MR. GRAINGER: Can I see the article that you showed her?

Q. I want you to look at this table, please, ma'am, and --

MR. GRAINGER: May I approach the witness?

THE COURT: Yes.

Q. And look at it carefully. How many people started out the study as ventilator dependent?

A. You're looking at the average, acute and initial?

Q. Yes, ma'am.

A. All right, these are not -- these are expenses on follow-up care here, and these are initial costs. That's not applicable.

Q. Let's go over here to the table that he had. Right here.

THE STATE OF TEXAS)

COUNTY OF RUSK)

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NO. 94-143

SUSAN RENAE MILES, INDIVIDUALLY AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS, AND KENNETH MILES	*	IN THE DISTRICT COURT
VS.	*	
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., D/B/A DOUG STANLEY FORD	*	OF RUSK COUNTY, TEXAS
	*	4TH JUDICIAL DISTRICT

HEARING HELD JULY 29, 1994

APPEARANCES

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MR. DICK GRAINGER
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FOR STATE FARM INSURANCE COMPANY:

MR. GREGORY W. NEELEY
FOR G.R. AKIN
AKIN, BUSH & NEELEY
3400 W. MARSHALL, SUITE 307
LONGVIEW, TEXAS 75604

dealership. We have not settled with anybody. There is no anticipation of settling with anybody. In fact, there's an action, an interpleader action, in Dallas where the Camps have tendered money to the Miles family and it has been expressly denied that we want any part of that.

So first of all, as far as being able to talk about defending their rights as to other parties being responsible for this accident, they're going to be able to do that by sole cause issues. They're going to plead sole cause. They've pled sole cause. They're going to be able to talk about the Camps and Miles and other people as being responsible for this accident. The reason they want some of these parties in here is strictly to prejudice the Plaintiff and delay the trial. That's the only reason.

THE COURT: You're talking about in this litigation?

MR. MANN: In this litigation.

THE COURT: All right.

MR. MANN: Now, first of all, I want to speak as to what Mr. Fennell has talked to the Court about because he's been less than up front with what he said to the court. Now, first of all, as far as

THE STATE OF TEXAS *

COUNTY OF RUSK *

I, Traci Smith, Certified Court Reporter in and for the State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

I further certify that the charges for the transcription of this record are $206.70 to be paid by the Defendants.

WITNESS my hand, this the 2nd day of August, 1994.

Traci Smith

TRACI SMITH, CSR
CERTIFICATE NO. 2306
CERTIFIED SHORTHAND REPORTER
AND NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

TYLER LAW CENTER
120 S. BROADWAY, SUITE 100
TYLER, TEXAS 75702

PLAINTIFF: SUSAN RENAE MILES, ET AL

VS

DEFENDANT: FORD MOTOR COMPANY, ET AL

CASE NUMBER: 94-143

RECORDS PERTAIN TO: WILLIE EDWARD SEARCY

RECORDS FROM: ACCUCARE HEALTH SERVICES
VOLUME I

DELIVER TO:

DISTRICT CLERK
RUSK COUNTY COURTHOUSE
115 NORTH MAIN STREET
FORT WORTH, TX 75652

TAXABLE COST: 1092.00

PAID FOR BY THOMAS FENNELL/MARK HALL

TX# TEXAS BAR NUMBER 06903600/08764600

ATTORNEY FOR

☐ PLAINTIFF ☑ DEFENDANT

No.94-143

SUSAN RENAE MILES, INDIVIDUALLY AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS AND KENNETH MILES	*	IN THE DISTRICT COURT OF
VS.	*	RUSK COUNTY, TEXAS
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY FORD	*	4TH JUDICIAL DISTRICT

CERTIFICATION PURSUANT TO 206

ORIGINAL

The witness was duly sworn by the officer.

That the transcript is a true record of the testimony given by the witness.

That $ 1092.00 is the charge for the preparation of the completed deposition transcript and any copies of exhibits, charged to THOMAS FENNELL/MARK HALL, representing the, DEFENDANT, FORD MOTOR COMPANY.

That the deposition transcript was submitted on a specified date to the witness or to the attorney of record for a party who was the witness for examination, signature and return to the officer by a specified date.

The deposition transcript of MEDICAL records from ACCUCARE HEALTH SERVICES pertaining to WILLIE EDWARD SEARCY (was)/was not returned to the deposition officer by the witness. That changes, if any made by the witness, to the transcript and otherwise, are attached hereto.

That the original deposition transcript, or a certified copy thereof, with copies of all exhibits, is in the possession and custody of the attorney or party who asked the first question appearing in the transcript for safekeeping and use at trial.

That a copy of this certificate was served to the above numbered court and to all parties and/or attorneys of record pursuant to T.R.C.P. 21a.

NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

My commission expires 10-7-96

Document Acquisition Services
1819 Firman, Suite 114
Richardson, TX 75081

MIKE S. UREMOVICH
NOTARY PUBLIC
STATE OF TEXAS
My Comm Exp. 10-7-96

NHIC/CCP
Attn: Dr. McKinney
P.O. Box 202977
Austin, Texas 78728

Re: Willie Searcy
Medicaid # 502714641

To Whom It May Concern:

Once again it is time for recertification of skilled nursing hours for Willie Searcy. I am again writing for these hours to be continued at 104 per week. Willie has received consistant care and has remained out of the hospital. He has had bouts of pneumonia and UTI's, but has been able to remain at home due to his nursing care.

The pneumo belt,as previously discussed, is still the ultimate goal in Willie's care, but progress has been slow. Presently, he only tolerates the belt for approximately 30 minutes three times a day.

Willie also has had an increase in muscle spasms. These spasms are painful and require communication with myself to facilitate proper medication administration.

Willie's condition is a life long one that will never improve. Continuing nursing care provides the opportunity to remain out of the hospital and in his own home.

Sincerely,

Dr. John Milini
9705 Harry Hines
Dallas, Texas 75220

Faxed TOCP 4/11/94 TOCP again

35

AccuCare™
health services inc.™

Re: Willie Searcy
Medicaid # 502714641

To Whom It May Concern:

Willie Searcy; as discussed previously, is a 15 year old ventilator dependent quadraplegic as a result of a motor vehicle accident. AccuCare is requesting a continuation of his 104 hours of nursing care per week.

Willie is still trached; but a pneumo belt has been added to his regime. This pneumo belt is attached to Willie and the ventilator. This requires keen assessment and emergency intervention. If Willie tolerates this belt, in the future he may have his tracheostomy removed. This is the ultimate goal in Willies' care. Presently this belt is only tolerated in small 30 minute to 1 hour increments, three times a day.

Frequent UTI's are still a problem in Willies' care. He has a leg bag and wears diapers. Frequent UA's and cultures are required. Infection control is imperative to his well being. Assisted coughing 8-10 times per day is required in his care along with vigorous suctioning. Airway maintenance is of primary importance in Willies' care.

Willie has remained out of the hospital due to the care given by his family and his nurses. If these hours are decreased or denied he, inevitably, will return to the hospital.

Sincerely,

Dr. John Milani'
9705 Harry Hines
Dallas, Tx 75220

UCCP 12/Pa(6)

43

NO. 06-95-00026-CV

IN THE

COURT OF APPEALS

FOR THE

SIXTH COURT OF APPEALS DISTRICT OF TEXAS

TEXARKANA, TEXAS

Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors and Kenneth Miles,

Appellants,

v.

Ford Motor Company and Douglas Stanley, Jr., d/b/a Doug Stanley Ford,

Appellees.

AFFIDAVIT

"My name is Greg Smith. I am an attorney with Ramey & Flock, P.C. and one of the attorneys representing Ford Motor Company in the appeal of the judgment in the Miles suit. I am over 21 years old; I have never been convicted of a felony or a crime involving moral turpitude and I am otherwise competent to swear this affidavit. Every fact stated in this affidavit is within my personal knowledge and every such fact is true.

"Attached are true and complete copies of the exhibits that were attached to the Miles' "Motion for Expedited and Preferential Trial Setting" and which were filed with the Rusk County District Court in its cause no. 94-143."

GREG SMITH

SWORN TO AND SUBSCRIBED before me by GREG SMITH on this the 17th day of April, 1995.

TERRI L. HARVEY
Notary Public
STATE OF TEXAS
My Comm. Exp. 12-5-95

NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

CAUSE NO. 94-143

SUSAN RENAE MILES, INDIVIDUALLY AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS AND KENNETH MILES	§	IN THE DISTRICT COURT
V.	§	RUSK COUNTY, TEXAS
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY FORD	§	4TH JUDICIAL DISTRICT

AFFIDAVIT OF JACK M. SINK

THE STATE OF GEORGIA §
§
COUNTY OF CLARKE §

ON THIS DAY BEFORE ME personally appeared JACK M. SINK, who, being by me first duly sworn, deposed and stated upon his oath the following:

"My name is JACK M. SINK. I am over the age of twenty-one (21) years and have never been convicted of a felony or any offense involving moral turpitude and am in all things qualified to make this Affidavit. I am in all things competent to give deposition testimony under the laws of the State of Texas and of the United States. The facts stated herein are within my personal knowledge and are true and correct".

"As is more fully shown in my Curriculum Vita, a copy of which I have attached to this affidavit, I am licensed and certified in

EXHIBIT 1

the area of rehabilitation and have extensive experience in rehabilitation consulting, life care planning and case management for severely injured persons."

"Based on my March 22, 1994 examination of Willie Searcy; review of nursing notes; discussion with his parents, his teacher and a licensed practical nurse providing care to him; and my evaluation of his living environment and family resources; it is my opinion that immediate attention to his current needs is of critical importance to his mental and physical health. The following areas are in need of immediate attention:

1. Evaluations of the cause(s) for the episodic loses of consciousness he has suffered and the pursuit of treatment recommended to prevent these episodes;
2. The purchase and installation of a back-up generator for his ventilator since any incident resulting in power failure and impairing availability of hospital care could result in his death; as well as purchase of a back up ventilator;
3. The purchase and installation of equipment necessary to lift him from his bed and place him in a supported upright position, which is essential to prevent injury to the care givers as well as to improving and maintaining his cardiovascular system;
4. The purchase of a wheelchair with seating designed for this patient so as to maintain his posture since his current wheelchair is not so designed and is in

considerable need of repair;

5. The purchase and installation of a power lift and appropriate seating devices for use in the van already owned by the parents because the current use of "make shift" devices for transportation of the child places him in an extremely compromising position which could potentially result in his death from even a minor accident;

6. The installation of a program of physical therapy and of occupational therapy evaluation and therapy are critical to prevent his physical deterioration and to provide guidance to present care givers;

7. Psychological therapy for treatment of what appears to be severe depression resulting from the drastic change in his life style, and to treat the very frequent and severe nightmares he is experiencing. (Willie is a mentally alert young man functioning at average or above intelligence with the ability to experience the same fears, depressions and feelings as before his injury, but he needs ongoing professional treatment to help him understand these fears); and

8. Additional nursing services to provide 24-hour per day care at least five (5) days per week and eight (8) hours per day for two (2) days, since Willie's mother, Susan Miles, has been forced to reduce her work hours due to the need to provide care and the stepfather, Ken Miles,

has been forced to change jobs, with a significant reduction of income, resulting in a severe compromise of the parents' abilities to provide for the family's needs."

"It is my opinion that Willie and his family have no source of funding adequate to meet these ongoing needs other than this litigation and that these needs will, therefore, not be met prior to the conclusion of the litigation. It is further my opinion, as noted above, that the need for these services is of such a critical nature that their absence is life-threatening to Willie. Further, it is my opinion that, while he is presently able to communicate with his attorneys and participate in this litigation, the conditions I have described above, if unaltered, could easily affect his mental and physical health to the extent that he would no longer be able to communicate or participate."

"Further, Affiant sayeth not."

Jack M. Sink

JACK M. SINK

SWORN TO AND SUBSCRIBED BY JACK M. SINK on this the 24th day of March, 1994, in witness of which I affix my hand and seal of office.

Theresa M. Clark

Notary Public, State of Georgia

Notary Public, Athens-Clarke County, Georgia
My Commission Expires May 26, 1995

VITA

Jack M. Sink, Ed.D., C.R.C., C.V.E.
Date of Revision: 6/15/1993

PERSONAL DATA

Business Address

Sink & Associates, Inc.
440 College Avenue, North
Suite 110
P.O. Box 1946
Athens, Georgia 30603
Phone: (706) 543-9272

Home Address

115 Sandstone Circle
Athens, Georgia 30603
Phone: (706) 549-7262

PROFESSIONAL DATA

Education

1970 Ed.D. - Auburn University
Auburn, Alabama
Administration & Supervision (major)
Rehabilitation (minor)

1961 M.S. - West Virginia University
Morgantown, West Virginia
Rehabilitation Counseling

1959 B.A. - West Virginia University
Morgantown, West Virginia
Chemistry

Licensure & Certification

Licensed Professional Counselor #000919
Certified Rehabilitation Counselor #12147
Certified Vocational Evaluator #1412
Registered Catastrophic Rehabilitation Provider #1459C
Certified Vocational Expert - Bureau of Hearings & Appeals,
Social Security Administration

Professional Experience

1988 to Present	President, Sink & Associates, Inc. (formerly Caldwell & Gannaway, Inc.). The firm provides a broad range of rehabilitation consulting services, including Life Care Planning, counseling, psychological evaluations, individual assessment, job placement, litigation support, loss of earnings capacity, rehabilitation research and industrial consultation in job analysis, pre-employment and promotional assessment.
1991 to Present	Professor Emeritus, Department of Counseling and Human Development Services, University of Georgia, Athens, Georgia. Responsibilities: teaching graduate courses in rehabilitation counseling, vocational evaluation, job analysis, career development, tests and measurements, and individual appraisal; advising doctoral students who are majoring in Rehabilitation Counseling, Community Counseling and Counseling Psychology and directing research studies of students.
1981 - 1991	Professor and Coordinator, Rehabilitation Counseling, Department of Counseling and Human Development Services, University of Georgia. Responsibilities included: teaching graduate courses in rehabilitation counseling, vocational evaluation, job analysis, career development, tests and measurements, and individual appraisal; advising master's and doctoral students who are majoring in Rehabilitation Counseling, Community Counseling and Counseling Psychology; directing research studies of students; planning and coordinating the teaching and service activities of 11 faculty and staff members; directing the activities of a vocational evaluation and vocational counseling center which serves 100 to 150 handicapped and 40 to 50 non-handicapped persons each year; and other research and service activities incumbent to the position.
1968 - 1990	Vice President of Pers-Tech, Inc. Pers-Tech, Inc. is a professional human resources corporation providing personnel assessment, job analysis, career counseling, placement, human resources consulting and temporary employment services.

1985 - 1987	President, Pers-Tech, Inc.
1978 - 1981	President, Vocational Services Bureau, Inc. A company incorporated in the State of Georgia to develop and sell written books and materials, micro-computer programs, and evaluation systems, as well as to provide training for professionals involved in private and public rehabilitation programs. Materials were, and continue to be, sold in all 50 states and training was provided in 36 states.
1979 - 1981	Associate Professor, Coordinator, Rehabilitation Counseling, Department of Counseling and Human Development, University of Georgia, Athens, Georgia.
1975 - 1979	Associate Professor, Rehabilitation Counseling, Department of Counseling and Human Development Services, University of Georgia, Athens, Georgia. Responsibilities included: teaching courses and directing student studies identified under present positions, as well as research and service activities.
1973 - 1975	Associate Professor and Program Director Staff Development Center for Offender Rehabilitation, Department of Counseling, University of Georgia, Athens, Georgia.
1970 - 1973	Director, Associate Professor, Rehabilitation & Special Education Programs, Auburn University, Auburn, Alabama. Planned and directed the education, research and service activities of undergraduate and graduate Rehabilitation and Special education Programs.
1967 - 1970	Assistant Professor & Director, Regional Training Programs for Vocational Evaluation and Facility Administration, Auburn University, Auburn, Alabama. Planned and directed in-service education and research programs for rehabilitation facilities personnel employed throughout the eight southeastern states. Also provided training and consultation to rehabilitation programs in 35 states.
1965 - 1967	State Supervisor - Facilities Specialist, South Carolina Department of Vocational Rehabilitation, Columbia, South Carolina.

1963 - 1965	Director, Evaluation and Training Center for the Mentally Retarded, Pineland Hospital and Training Center for the Mentally Retarded, South Carolina, Department of Vocational Rehabilitation, Columbia, South Carolina.
1962	Rehabilitation Counselor, South Carolina State Hospital, South Carolina Department of Vocational Rehabilitation, Columbia, South Carolina.
1961 - 1962	Director of Halfway Houses for mentally ill, West Virginia Division of Vocational Rehabilitation, Huntington, West Virginia.
1961 - 1962	Rehabilitation Counselor, West Virginia Division of Vocational Rehabilitation, Huntington, West Virginia.
1961	Vocational Evaluator, West Virginia Rehabilitation Center Institute, West Virginia.

Research Activities

A comparison of costs of certain rehabilitation services of private, non-profit and private, for profit agencies in Georgia. 1991 to Present

Development of information management system to compare functional limitations/assets and job performance. 1990 to Present

Assessment of the impact of certain physical and mental limitations on work performance. 1989 - 1990

1988 - 1986 - Georgia Center for Rehabilitation Technology. A comparison of functional capacities of persons with disabilities and the functional requirements for jobs in industry.

1988 - 1989 - A comparison of training time and production rates of industrial employees placed through testing and non-testing.

Research, Development, and Training Consultant - Career Systems Division of the Singer Company, 1969 - 1990. Results include the Vocational Evaluation System, the Physical Capacities System, and the Vocational Evaluation and Job Placement Service Center of Atlanta. Also served as Chairman of the Singer Research and Development Advisory Committee.

Department of the Army, 1973 - 1974. Designed and conducted research to assess alternate methods of assigning Military Occupational Specialists for new Army recruits.

Subsequent Injury Trust Fund (SITF) of Georgia - 1982. Assessed the need for changes in the SITF programs of Georgia. Recommendations for state law changes were presented to the State Legislature in 1983. Changes implemented by 1984 Legislature.

Georgia Board of Workers' Compensation. Researched the effects of certain demographic and service variables on cost, time and return to work, 1983 - 1987.

Grants

From 1974 to 1991 have received nearly $4,500,000 in contracts and grants for research, training and services from state, federal and private agencies.

Editorials

*Editor: Journal of Rehabilitation, (a quarterly journal with 33,000 distribution), April 1, 1978 - March 31, 1983.

Sink, J.M. & Field, T.F. (1978) Editorial: Adjustment Services-Emerging Needs. Journal of Rehabilitation, 44 (1), p.3

Sink, J.M. (1978) Editorial: Independent Living - A Vocational Rehabilitation Service. Journal of Rehabilitation, 44 (1), p.3

Sink, J.M. (1979) Editorial: When You Care Enough to Offer the Best Excuses. Journal of Rehabilitation, 45 (1), p.3

Sink, J.M. (1980) Editorial: Stop Flinching. Journal of Rehabilitation, 46 (1), p.8

Sink, J.M. (1980). Editorial: Journal of Rehabilitation, 46 (2), p.8

Sink, J.M. (1980) Editorial: Thoughts on the First Two Years. Journal of Rehabilitation, 46 (3), p.8

*The selection of the editorship for the Journal of Rehabilitation was through a national peer review process.

Refereed Journal Publications

Sink, J.M. (1971) Doing Can Be Teaching. Vocational Evaluation and Work Adjustment Bulletin, 4 (4), p.2-4

Sink, M.M. & Culligan, T. (1975) Behavior Disorders as Vocational Disabilities. Journal of Applied Rehabilitation Counseling, 6 (3) p.154-158

Sink, J.M. & Porter, T.L. (1978) Convergences and Divergences of the Rehabilitation Counselor and Vocational Evaluator. Journal of Applied Rehabilitation Counseling, 9 (1), p.5-20

Gannaway, T.W., & Sink, J.M. (1978) The Relationship Between the Vocational Evaluation System by Sinder and Employment Success in Occupational Groups. Vocational Evaluation and work Adjustment Bulletin, 11 (1), p.5-20

Sink, J.M. & Porter, T.L. (1978) Convergences and Divergences of the Rehabilitation Counselor and Vocational Evaluator. Vocational Evaluation and Work Adjustment Bulletin, 11 (1), p.5-20

Sink, J.M., Field, T.F. & Gannaway, T.W. (1978) History and Scope of Adjustment Services in Rehabilitation. Journal of Rehabilitation, 44 (3), p.14-145

Field, T.F., McCroskey, B.J., Sink, J.M., & Wattenbarger, W.W. (1978) The Role and Functions of the Vocational Expert in Judicial Hearings. Psychological Rehabilitation Journal, 2 (2), p.17-27

Sink, J.M., Field, T.F., & Raulerson, M.H. (1978) Vocational Evaluation Services for the Deaf and Hearing Impaired. State of the Art. American Annals of the Deaf, 122 (8), p.937-944

Sink, J.M. & Field, T.F. (1978) Adjustment Services: Issues and Trends. Journal of Rehabilitation, 44 (1), p.48-50

Field, T.F., Sink, J.M. & Cook, P. (1978) The Effects of I.Q., Age, and Disability on Performance on the JEVS System. Vocational Evaluation and Work Adjustment Bulletin, 11 (3), p.51-58

Sink, J.M. & King, W.M> (1978) The Vocational Specialist Preparation for Court Testimony - Fact or Fantasy? Vocational Evaluation and Work Adjustment Bulletin, 11 (3), p.51-58

Lewin, S.S., Ramseur, J.H., & Sink, J.M. (1979) The Role of Private Rehabilitation: Founder, Catalyst, Competitor. Journal of Rehabilitation, 45 (3), p.16-19

Porter, T.L., Rubin, S.E., & Sink, J.M. (1979). Essential Rehabilitation Counselor Diagnostic, Counseling and Placement Competencies. Journal of Applied Rehabilitation Counseling, 10 (3), p.156-162

Sink, J.M. & McCroskey, B.J. (1979) Improving the Quality and Effectiveness of Rehabilitation Facility Services Through Research. Vocational Evaluation and Work Adjustment Bulletin, 12 (2), p.24-27

Hammond, D. & Sink, J.M. (1980) Myths and Realities of Sexual Aging: Implications for Counseling. Counseling and Values, 24 (3) p.155-165

Gannaway, T.W. & Sink, J.M> (1979) An Analysis of Competencies for Counselors and Evaluators. Vocational Evaluation and Work Adjustment Bulletin, 12 (3), p.3-15

Gannaway, T.W., Sink, J.M>, & Becket, W.C. (1980) A Predictive Validity Study of a Job Sample Program With Handicapped and Disadvantaged Individuals. Vocational Guidance Quarterly, 29 (1), p.4-11

Sink, J.M. & Gannaway, T.W. (1981) Job Samples as a Catalyst for Job-Seeking Behaviors. Rehabilitation Counseling Bulletin, 25 (1), p.45-47

Sink, J.M. & Craft, D. (1981) Legislation Affecting Rehabilitation of Older People: Present and Future. Journal of Rehabilitation, 47 (4), p.85-89

Sink, J.M. & King, W.M. (1983) Evaluation Services in the Private Sector. Vocational Evaluation and Work Adjustment Bulletin, 16 (3)

Books

Sink, J.M., Couch, R.H., & Anderson, J.L. (1968) Work Oriented Rehabilitation Facility, Ideal Services Series, Vol. IV, State Department of Education, Tallahassee, Florida, 44 pgs.

Field, T.F. & Sink, J.M. (1979) VDARE Training Manual. Atlanta: Olde DeKalb Press, 160 pgs.

Field T.F. & Sink, J.M. (1979) VDARE Training Manual. (Rev. Ed.) Atlanta: Olde DeKalb Press, 165 pgs.

Field, T.F. & Sink, J.M. (1980). The Employer's Manual. Atlanta: Olde DeKalb Press, 183 pgs.

Field, T.F. & Sink, J.M. (1981). The Vocational Expert. (Rev. Ed.) The VDARE Service Bureau, 96 pgs.

Sink, J.M. & Field, T.F. (1981). Vocational Assessment Planning and Jobs. Athens: The VDARE Service Bureau, 214 pgs.

Monographs

Sink, J.M. (Ed) (1974) Adjustment Services Program. Division of Human Resources, 125 pgs.

Sink, J.M. (Ed) (1974) Vocational Evaluation Standards. Division of Vocational Rehabilitation, Georgia Department of Human Resources, 18 pgs.

Sink, J.M., Field, T.F. & Gannaway, T.W. (1974) The Effects of the Singer Vocational Evaluation System as an Occupational Information Catalyst. Singer, Career Systems Division, 38 pgs.

Sink, J.M., Page, R.C., Settles, R.B., & Field, T.F. (1978) Case Recording and Documentation in Rehabilitation Region IV. University of Georgia, 110 pgs.

Sink, J.M. (1978) Proceedings of the Region IV Facility Specialist Workshop. University of georgia, 56 pgs.

McCroskey, B.J., Wattenbarger, W., Field, T.F., & Sink, J.M. (1978) The Vocational Diagnostic and Assessment of Residual Employability (VDARE) Manual and Worksheet. Athens, Georgia: Monograph, Copy righted, 22 pgs.

Sink, J.M., Porter, T.F., Rubin, S., & Painter, L.C. (Eds. & Contributors) (1979) Competencies Relating to the Work of the Rehabilitation Counselor and Vocational Evaluator. University Press, Athens, Georgia.

Sink, J.M., Russell, L.A., Painter, L.C., & Porter T.F. (1980). Changing Role of the Vocational Rehabilitation Counselor, University of Georgia, 62 pgs.

Book Chapters

Sink, J.M. (1969) Evaluation, A Reason For Concern. In: Pruitt, W.A., & Pacinelli, R.H. (Eds) Work Evaluation in Rehabilitation. University of Wisconsin-Stout, MDC Press, 1969

Sink, J.M. (1971) Change - A Need for Vocational Evaluation. In: Pacinelli, R.H. (Ed) Research Utilization in Rehabilitation Facilities, Interpersonal Association of Rehabilitation Facilities, p.181-186

Sink, J.M. (1972) Vocational Evaluation of the Spinal Cord Injured Client. In: Phelps, W.R. (ED) Proceedings of a Seminar on Serving the Spinal Cord-Injured Client. West Virginia University, Morgantown, West Virginia, p.74-83

Sink, J.M. (1973) Adjustment Services, A Definition. In: Baker, R., & Mercer, F. (Eds) Proceedings of the Region IV Conference on Adjustment Services. Auburn, Alabama, p.11-13

Sink, J.M. & King, W.M. (1978) The Vocational Specialist's Preparation for Court Testimony - Fact or Fantasy? Career Newsletter, 3 (2)

Sink, J.M. & Craft, D.T. (1979) Historical Perspective Defining the Role and Function of the Adjustment Specialist, a Probable Impossibility. In: Work Adjustment Curriculum, Publication and Development of a Work Adjustment Curriculum, a Summary, Stout-State Vocational Rehabilitation Institute, University of Wisconsin-Stout, p.99-102

Sink, J.M. & Field, T.F. (1981) Vocational Assessment Planning and Jobs. Athens: The VDARE Service Bureau, 214 pgs.

Mitchell, M.E. & Sink, J.M. (1983) Process, Issues, and Needs in Private-For-Profit Rehabilitation. National Rehabilitation Center, Washington, D.C.

Sink, J.M. & Matkin, R.E. (1984) Insurance Rehabilitation: Service Application in Disability Competency Systems. Vocational Rehabilitation in the Courtroom. In: Matkin, Pro.Ed Inc., Austin, Texas, p.181-199

Brown, C.D., & Sink, J.M. (1986) Facility Based Services Purchased by State Vocational Rehabilitation Agencies. Vocational Evaluation and Work Adjustment Bulletin, 19, (3)

Sink, J.M., Gannaway, T.W., & Cottone, R.R. (1987) Psychological Testing vs. Assessment in Counseling and a Critical Response to Canon 7 - "Assessment". Journal of Applied Rehabilitation Counseling, 18 (4), p.35-37

Couch, R.H. Sink, J.M. & Goetz, J.P. (1988) A Qualitative Study of subcontracting Patterns and Practices Among Work Centers in the Southeast. Journal of Rehabilitation, 54 (1)

National Professional Organization Memberships

National Rehabilitation Association
National Rehabilitation Counselor Association
Vocational Evaluation and Work Adjustment Association
National Rehabilitation Administrators Association
Association of Educators of Rehabilitation Facility Personnel
National Council on Rehabilitation Education
National Rehabilitation Administration Association

Professional Organization Involvement

Elected Offices

Charter Chairman - HEW Region IV Facility Specialist Council, 1965

Charter Chairman - Association of Educators of Rehabilitation Facility Personnel (National), 1970

Secretary of Vocational Evaluation and Work Adjustment Association (VEWAA), 1970

Executive Committee Vocational Evaluation and Work Adjustment Association, 1970

Southeastern Regional Chairman - Council of Rehabilitation Counselor Educations, 1972

Board of Directors - Georgia Vocational Evaluation and Work Adjustment Association, 1975 - 1978

Board of Directors - Georgia Chapter of Administrative and Supervisory Association, 1975 - 1978

Board of Directors - Georgia Chapter of Administrative and Supervisory Practices Division, (GRA) 1975 - 1976

President-Elect - Vocational Evaluation and Work Adjustment Association, 1976

Chairman - National Consortium of Rehabilitation Educators and Researchers for Performance Based Education in Rehabilitation, 1976 - 1978

President - Vocational Evaluation and Work Adjustment Association, 1977

President-Elect - Georgia Rehabilitation Association, 1979

Publication Committee - Vocational Evaluation and Work Adjustment Association, 1979 - 1980

Professional Concerns Commission - National Rehabilitation Association, 1979 - 1980

Program Committee -Region IV National Rehabilitation Association, 1979 - 1980

Member - Board of Directors - Georgia Rehabilitation Association, 1979 - 1980

President - Georgia Rehabilitation Association, 1980

Immediate Past President - Georgia Rehabilitation Association, 1980 - 1981

Chairperson - Southeastern Regional Chapter NCRE, 1982 - 1984

Member - Board of Directors - Georgia Rehabilitation Administration Association

Selected Committee Appointments

President's Committee on Employment of the Handicapped, 1968 - 1973

Legislative Committee, Association of Educators of Rehabilitation Facility Personnel, Chairman, 1968 - 1973

Region IV Facility Specialist Awards Committee, Chairman, 1969

National Rehabilitation Association Awards Committee, 1970

Goodwill Industries of America National Research Committee, 1970 - 1974

Social and Rehabilitation Service, International Research Review Panel (Review Research related to Vocational Evaluation), 1970 - 1973

Commission on Accreditation of Rehabilitation Facilities (CARF), Advisory Committee, 1971 - 1973

International Association of Rehabilitation Facilities Education Committee, 1971 - 1975

HEW Welfare Reform National Task force, 1972

HEW/RSA Technical Assistance Panel, 1972 - 1980

Standards Review committee (CARF), 1974 -1980

Chair - Certification committee, VEWAA, 1975 - 1976

President's Committee, Employment of the Handicapped Pathways to Employment, 1976

Vocational Evaluation and Work Adjustment Association Executive Committee, 1976 - 1977

Peer Review Committee for HEW/RSA Training Grants, 1977

Awards Committee Chairman, Vocational Evaluation and Work Adjustment Association 1978

Nominations and Election committee, Chairman - Vocational Evaluation and Work Adjustment Association, 1978

National Rehabilitation Association, Editorial Committee, 1978 - 1979

Vocational Evaluation and Work Adjustment Association Publication Committee, 1979 - 1980

National Rehabilitation Association Professional Concerns Commission, 1979 - 1980

National Rehabilitation Association Awards Committee, 1980

Program Committee for International Seminar on Rehabilitation of the Industrially Injured, 1980 - 1981

Member, Advisory Committee to Assistant Secretary for Special Education and Rehabilitation, U.S. Office of Education, 1986 - 1989

Electronic Industries Foundation, Advisory Committee, 1983 - 1989

Member, Research Review Board - National Institute on Disability Research, 1988 - 1991

Member, Peer Review Committee, Rehabilitation Service Administration, U.S. Office of Education, 1981 - 1991

Georgia Center for Rehabilitation Technology - 1981 - present

Presentations

Date	Topic	Attendees
5/7/93	Preparation of and Courtroom Presentation of Damages - The Life Care Planner and the Economist	State Bar of Georgia "Proving Damages"
11/2/90	The Myths and the Realities Surrounding the Use of Life Care Plans	Atlanta Bar Association "The Prosecution and Defense of Claims for Big Damages in High Stakes Medical Malpractice Cases"
9/15/90	Use of Medical, Psychological, Educational and Vocational Records to Assess Post-Injury Employment and Earning Capacity: An Approach to Setting Reserves and/or Settlement Evaluation	State Bar of Georgia, Insurance Law Institute
5/11/90	Life Care Planning and and Assessment of Residual Employment for Persons with personal injury	Georgia Trial Lawyers Personal Injuries Seminar Atlanta, Georgia
5/9/90	Trends in Services for Persons with Severe Disabilities	Georgia Association of Rehabilitation Facilities Personnel, Annual Conference Atlanta, Georgia
4/5/90	Assessment of Functional Capacities for Persons with Severe Disabilities	Rehabilitation Consultants Atlanta, Georgia
11/9/89	Assessment of Damage Resulting from Personal Injury	New Hampshire Rehabilitation Counselors' Association Portsmouth, New Hampshire
11/9/89	Assessment of Independent Living Capacities and Needs for Persons with physical and mental disabilities	New Hampshire Rehabilitation Association Annual Conference Portsmouth, New Hampshire

Date	Topic	Attendees
10/7/89	Vocational Evaluation and Life Care Planning	Lawyers Information Exchange Atlanta, Georgia
6/20/89	Vocational Assessment in Personal Injury Claims	Vocational Evaluators from Eight Southeastern States Auburn, Alabama
6/5/89	Assessment of Functional Capacities for Persons with Disabilities	Public Sector Rehabilitation Counselors Warm Springs, Georgia
4/21/89	Skill Identification and Career Counseling for Outplacement Service for Displaced Workers	Private Sector Rehabilitation Consultants Annual Conference Savannah, Georgia
4/19/89	Written Vocational Evaluation Reports in Injury Damage Assessment	Vocational Evaluators from Eight Southeastern States Auburn, Alabama
3/11/89	Assessment of Residual Employability for Personal Injury Damages - Trends for the 90's	Vocational Evaluation & Work Adjustment Association National Forum St Louis, Missouri
11/19/88	Defending Damage Assessments for Personal Injury Rehabilitation	National Rehabilitation Association Annual Conference Reno, Nevada
11/12/87	Employability Assessment for Persons with Disabilities	Luncheon Speaker - Governor's Committee on Employment of the Handicapped Rome, Georgia
8/2/87	Trends in Vocational Assessment of Residual Employability	Annual Training Conference for the Georgia Division of Rehabilitation Carrollton, Georgia
6/4/87	Technology Uses and Validity in Vocational Assessment	National Association for Rehabilitation Technology Annual Conference Atlanta, Georgia

Date	Topic	Attendees
5/15/87 5/16/87	Developing Life Care Plans for Persons with Severe Disabilities (2 day workshop)	Private Sector Rehabilitation Consultants Atlanta, Georgia
3/12/87	Skills Assessment and Use - Outplacement for Displaced Workers	Bell South Career Counselors Atlanta, Georgia
3/5/87	Assessing Vocational Potential of Persons with Traumatic Brain Injury	National Association for Head Injury - Annual Conference Dallas, Texas
2/26/87	Job Analysis - Techniques and Uses	Public Sector Rehabilitation Counselors Atlanta, Georgia

Workshops

During 1984, 1985 and 1986, Dr. Sink conducted 54 two day workshops in 27 states. The topics were:

Assessment of the Industrially Injured for Residual Employability

Transferability of Skills - Conditions of Return to Work

Measuring Functional Capacities of Persons with Severe Disabilities

The workshops were attended by private and public sector rehabilitation consultants, attorneys and workers' compensation administration law judges.

The workshops were conducted in the following locations:

Atlanta, GA	Portland, OR	Portland, MA	Miami, FL
Eugene, OR	Seattle, WA	Syracuse, NY	Orlando, FL
Denver, CO	Buffalo, NY	Tampa, FL	Las Vegas, NV
Rochester, NY	Birmingham, AL	Reno, NV	Staunton, VA
Montgomery, AL	Portsmouth,NH	New Orleans, LA	Oklahoma City, OK
Tulsa, OK	Cleveland, OH	Louisville, KY	Columbus, OH
Dallas, TX	Nashville, TN	Houston, TX	Cincinnati, OH
Raleigh, NC	Tucson, AZ	Pittsburgh, PA	San Francisco, CA
San Diego, CA	Harrisburg, PA	Baltimore, MD	Los Angeles, CA
Chicago, IL	Newark, NJ	Boston, MA	Philadelphia, PA
Columbia, SC			
Little Rock, AR			

CAUSE NO. 94-143

SUSAN RENAE MILES, INDIVIDUALLY AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS AND KENNETH MILES	§	IN THE DISTRICT COURT
V.	§	RUSK COUNTY, TEXAS
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY FORD	§	4TH JUDICIAL DISTRICT

A F F I D A V I T

THE STATE OF TEXAS §

COUNTY OF DALLAS §

BEFORE ME, THE UNDERSIGNED AUTHORITY, on this day personally appeared Karen A. Perez, who, being by me first duly sworn, on oath deposed and stated as follows:

"My name is Karen A. Perez, R.N., C.R.R.N., C.I.R.S. I am over the age of 18 years, of sound mind, capable of making this Affidavit, and have personal knowledge of the facts herein stated.

My address is 10915 Garland Road, Suite 106, Dallas, Texas 75218. My phone number is (214) 328-3348. A true and correct copy of my Curriculum Vitae is attached hereto as Exhibit "1".

EXHIBIT 9

I have visited with Willie Searcy and his family and I believe it is critical that the following areas of Willie's care be addressed immediately:

Respiratory - Willie needs a back-up ventilator and a suction machine. He has one portable unit, but it is never wise to rely on one unit because the malfunction rate of equipment is too critical for a ventilator-dependent person.

Skin - Willie is beginning to demonstrate skin breakdown problems despite good nursing care to prevent it. He needs a very special air mattress for his bed to keep the pressure fluctuating beneath him. There are several models available that will provide the pressure relief he needs and fit his needs.

Physical Therapy - Willie has been getting basic range of motion exercise by his caregivers, but needs physical therapy treatments to prevent contractures and decreased mobility in his limbs. He would benefit by having home visits by a licensed physical therapist three times a week for a period of at least 6 months. To aid in the therapy, he needs an elevated exercise mat table that can be placed in the family dining room to provide a safe and spacious work surface so that all body areas can be exercised appropriately.

Psychological Counseling - Willie needs specific help now to alleviate his mounting depression, and to begin to learn to cope with his body's devastating injury. This young man has been trying to cope with his immobility and ventilator-

dependency the best way he knows how and has severely depleted his reserves. He needs now to work on getting stabilized in his acceptance. This can make the difference in his overall health.

He is having overwhelming nightmares and his appetite has dropped to a new low. If adjustment issues are not addressed and he begins to demonstrate nutritional depletion, then he will, in all likelihood, have to have a feeding tube reinserted. His skin breakdown problems are also related to the diminished food intake. It can become a vicious circle and will most assuredly lead to some rehospitalization issues for him.

Although I certainly have other concerns for Willie's ongoing care, these are the most serious at the present time and I believe that they need to be immediately addressed, if funding can be found, in order to prevent deterioration in his health and well-being which could be life threatening.

Further, Affiant sayeth not."

Karen A. Perez
KAREN A. PEREZ, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME by the aforesaid Karen A. Perez on this the 15th day of April, 1998, in witness of which I affix my seal of office.

Barbara J. Simpkins
Notary Public, State of Texas
BARBARA J. SIMPKINS
Notary's printed name

My commission expires: 1/6/98

BARBARA J. SIMPKINS NOTARY PUBLIC STATE OF TEXAS EXPIRES

KAREN A. PEREZ

10915 GARLAND ROAD, SUITE 106
DALLAS, TEXAS 75218
(214) 328-3348

EDUCATION:

1975	University of Kentucky--AAS, Nursing
1975	Licensed as RN in Kentucky
1978	Licensed as RN in Texas
1989	Certified Insurance Rehabilitation Specialist (CIRS)
1989	Certified Rehabilitation Registered Nurse (CRRN)
1993	Certified Case Manager (CCM)
1978-1993	Professional and technical courses in nursing, surgery, insurance cost management, rehabilitation and medical case management.

PROFESSIONAL EXPERIENCE:

10/89 to Present — Private practice in Life Care Planning and as Rehabilitation Nurse Consultant

Providing services for life care planning; rehabilitation assessments of catastrophically-injured clients (spinal cord, brain damage, developmental disabilities, burns, amputations, chronic illness); long term care placement evaluations; medical cost analyses and recommendations.

10/88 to 10/89 — Rehabilitation Alternatives, Inc.
Brinlee Creek Ranch
Dallas, Texas

Internal Case Manager

Medical case management of traumatically brain-injured clients during their post-acute transitional residential program at Brinlee Creek Ranch, Anna, Texas.

Liaison with rehabilitation case managers and insurance companies, families, treating physicians and attorneys.

8/87 to 10/88 — Medical Auditing Services
Dallas, Texas

Director

Operational and fiscal management of medical bill auditing services with 16 employees. Responsible for marketing and program development.

Education, training and supervision of staff audit RNs, clerical and data entry staff.

10/80 to 8/87 — Employers Insurance of Texas
Medical Services Claims Department
Dallas, Texas

6/85 to 8/87 Coordinator/Director-Cost Containment

Responsible for medical bill audit program; supervised all staff RNs, clerical support, data entry staff and eight audit vendor companies.

10/80 to 6/85 Staff Nurse Auditor

Responsible for review & audit of approximately 500 hospital bills per month in a seven-district area.

Maintained cost containment effort with staff rehabilitation nurses on catastrophic cases, and with adjusters on sub-catastrophic cases.

Training and education of all home office and district claims staff on cost containment for workers' compensation claims and group claims.

Participated in arbitration proceedings with health care providers through Texas Industrial Accident Board.

2/79 to 10/80 — Arlington Neurosurgical Association
Arlington, Texas

Private Neurosurgical RN

Provided surgical skills intra-operatively for all scheduled and emergency cases for two neurosurgeons.

Pre- and post-operative patient and family teaching. Development of continuity of care plans with families and physicians.

6/78 to 2/79 — Arlington Memorial Hospital
Arlington, Texas

Staff RN, Labor and Delivery

12/75 to 6/78 — 97th General Hospital, U.S. Army
Frankfurt, West Germany

Civilian Staff RN, Labor and Delivery

KAREN A. PEREZ

PROFESSIONAL ORGANIZATIONS

American Association of Neuroscience Nurses
Association of Rehabilitation Nurses
Texas Medical Auditors Association
American Association of Spinal Cord Injury Nurses
American Association of Legal Nurse Consultants
National Assoc of Rehab Professionals in the Private Sector (NARPPS)

COMMITTEE PARTICIPATION

Texas Hospital Association - Special Committee on Hospital Auditing and Documentation Guidelines, 1985 and 1986
Texas Medical Auditors Association - Dispute Resolution Forum, Chairperson, 1987 and 1988.

SPECIAL CONTINUING EDUCATIONAL COURSES

"Gaining the Competitive Edge: Horizons for the Advanced Practitioner"	NARPPS Chicago	4/94
"Toward the 21st Century: Challenges for Rehabilitation" Washington, D.C.		4/94
Annual Conference, Assoc of Legal Nurse Consultants	Houston	4/94
"Assessment & Treatment of Persons Requiring Tracheostomy Tubes and Ventilators"	Amelia Island, FL	1/94
Spinal Cord Injury Association Annual Conference	9/91, 9/92,	9/93
"Creating Housing Options for Persons with Traumatic Brain Injuries"	Dallas	6/93
"Rehabilitation Nursing '93"	New Orleans	5/93
"Nurses on Trial: Legal Liability Update" - UTA		4/93
"Applying Medical Case Management: AIDS"		8/92
"Legal Liability Update"	Univ of Texas @ Arlington	7/92
"Rehabilitation Assessment"		6/92
Rehabilitation Series, E. TX Med Ctr	5/92, 9/92, 10/92,	11/92
"Assessing Children for Rehabilitation"	Dallas Rehab Institute	3/92
"Multiple Sclerosis and The Mind"		1/92
"Contemporary Management of the Amputee" Workshop	Houston	10/91
"Specialty Services for the Rehab Patient"		9/91
"Caring, Coping and CARF"		9/91
"Neuroscience Nursing Programs" Neuroscience Nursing Council, Parkland Hospital	2/91, 3/91, 4/91,	4/92
"Exploring Epilepsy Treatment in the 1990's"		12/90, 12/91
"Psychiatric Nursing Assessments" Univ. of Texas @ Arlington, School of Nursing		6/90
"Long Term Discharge Planning" Conference	San Antonio	2/90
Annual Conferences, Assoc. of Rehab Nurses		11/89, 11/90
"Medical Case Management"	Managed Care Association,	1989, 1991
"Comprehensive Life Care Planning"	Rehab Trng Inst, Orlando	5/89
"Documenting Patient Care"	Rehab Institute of Chicago	1988
"Advances in Head Injury Rehab"	Dallas 1987, 1988,	1989
"Vocational Rehabilitation" Workshop	Houston	1987

PRESENTATIONS

"Life Care Planning",	Baylor Institute for Rehab, Dallas	July 1993
"Life Care Planning"	AALNC, Dallas	January 1993
"Life Care Planning"	SW Ins Assoc, Dallas	November 1991
"Life Care Planning" Seminar	St. Louis, Missouri	June 1991
"Life Care Planning and Attendant Care Training" Texas Employers Insurance, Rehab Nurses Conference		October 1990
"Arbitration From the Hospital Audit Viewpoint"	Midland	1987
"Documenting Patient Care in Hospital Bill Auditing for Workers' Comp Admission"	Texas Hospital Association	1985, 1986

CAUSE NO. 94-143

SUSAN RENAE MILES, INDIVIDUALLY AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS AND KENNETH MILES	§	IN THE DISTRICT COURT
V.	§	RUSK COUNTY, TEXAS
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY FORD	§	4TH JUDICIAL DISTRICT

AFFIDAVIT OF RICHARD F. DANGEL

THE STATE OF TEXAS §
§
COUNTY OF TARRANT §

ON THIS DAY BEFORE ME personally appeared RICHARD F. DANGEL, who, being by me first duly sworn, deposed and stated upon his oath the following:

"My name is RICHARD F. DANGEL, LMSW,ACP,Ph.D. I am over the age of twenty-one (21) years and have never been convicted of a felony or any offense involving moral turpitude and am in all things qualified to make this Affidavit. I am in all things competent to give deposition testimony under the laws of the State of Texas and of the United States. The facts stated herein are within my personal knowledge and are true and correct."

"I am licensed as a psychologist in the State of Texas and am a professor of Social Work at the University of Texas at Arlington.

EXHIBIT 3

I have extensive experience in working with children who have suffered from severe or catastrophic physical and emotional trauma."

"I conducted an interview with Willie "Boo" Searcy in March, 1994, at which time I found that he suffers almost nightly from severe nightmares about the wreck in which he was injured. As a result of these nightmares he is often fatigued during the day."

"Although I am arranging for psychological testing to be completed and to schedule subsequent interviews with Willie and his family, it is clear to me at this early point that Willie desperately needs intensive psychological services immediately. He is absolutely despondent over his situation and feels tremendous guilt over the burden he sees himself placing on his family."

"Willie is presently able to communicate with his attorneys and the other persons involved in this litigation and to participate in it. It is my opinion, however, that the failure to provide these psychological services to him could very quickly result in a loss of his ability to fully and completely participate."

"Further, Affiant sayeth not."

RICHARD F. DANGEL

SWORN TO AND SUBSCRIBED BY RICHARD F. DANGEL on this the 12th day of April, 1994, in witness of which I affix my hand and seal of office.

VANESSA GRIFFIS
Notary Public
STATE OF TEXAS

Notary Public, State of Texas

NO. 06-95-00026-CV

IN THE

COURT OF APPEALS

FOR THE

SIXTH COURT OF APPEALS DISTRICT OF TEXAS

TEXARKANA, TEXAS

Susan Renae Miles, Individually and as Next Friend of
Willie Searcy and Jermaine Searcy, Minors and
Kenneth Miles,

Appellants,

v.

Ford Motor Company and Douglas Stanley, Jr.,
d/b/a Doug Stanley Ford,

Appellees.

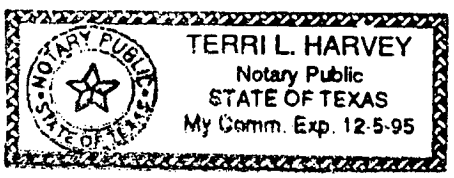
AFFIDAVIT

"My name is Greg Smith. I am an attorney with Ramey & Flock, P.C. and one of the attorneys representing Ford Motor Company in the appeal of the judgment in the Miles suit. I am over 21 years old; I have never been convicted of a felony or a crime involving moral turpitude and I am otherwise competent to swear this affidavit. Every fact stated in this affidavit is within my personal knowledge and every such fact is true.

"Attached are true copies of a petition for interpleader and the Miles' original answer to that petition. Both were filed in Cause No. 93-09866-L, in the 193rd District Court, Dallas County."

GREG SMITH

SWORN TO AND SUBSCRIBED before me by GREG SMITH on this the 17th day of April, 1995.



NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

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WIN.0290\POP_INTER\GAN

CAUSE NO. 93-09866

STATE & COUNTY MUTUAL FIRE INSURANCE COMPANY, Plaintiff/Interpleader	§	IN THE DISTRICT COURT OF
VS.	§	
SUSAN MILES, Individually And As Next Friend of WILLIE SEARCY and JERMAINE SEARCY, Minors	§	
VS.	§	
KENNETH WAYNE MILES	§	
VS.	§	
BILLY S. CAMP and SUE CAMP, Individually and As Next Friend of CHRISTOPHER LEE CAMP	§	DALLAS COUNTY, TEXAS
VS.	§	
TEDDY R. GATHRIGHT and S. JOYCE GATHRIGHT, Individually And As Next Friend of MEGAN MORAG BLYTHE "PAIGE" GATHRIGHT, a Minor	§	
VS.	§	
VIKI MERIMON, Individually And As Next Friend of DUSTIN MERIMON, a Minor	§	
VS.	§	
ESTATE OF DEMI SKYLYN MERIMON	§	
VS.	§	

UNNAMED FATHER OF DEMI SKYLYN MERIMON	§	
VS.	§	
CENTRAL STATE SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND	§	_____ JUDICIAL DISTRICT

PETITION FOR INTERPLEADER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, State & County Mutual Fire Insurance Company, hereinafter called Plaintiff/Interpleader, and complains of Susan Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors, hereinafter called Defendant "A"; Kenneth Wayne Miles, hereinafter called Defendant "B"; Billy S. Camp and Sue Camp, Individually and as Next Friend of Christopher Lee Camp, hereinafter called Defendant "C"; Teddy R. Gathright and S. Joyce Gathright, Individually and as Next Friend of Megan Morag Blythe "Paige" Gathright, a Minor, hereinafter called Defendant "D"; Viki Merimon, Individually and as Next Friend of Dustin Merimon, a Minor, hereinafter called Defendant "E"; Estate of Demi Skylyn Merimon, hereinafter called Defendant "F"; Unnamed Father of Demi Skylyn Merimon, hereinafter called Defendant "G"; and Central State Southeast and Southwest Areas Health and Welfare Fund, hereinafter called Defendant "H" and for cause of action would show the following:

I.

Susan Miles, Individually and as Next Friend of Willie Edward Searcy and Jermaine

Searcy, a Minor may be served by and through their attorney of record Jim Moore, Law Offices of Moore & Gunter, Regency Plaza, 3710 Rawlins, Suite 1310, LB 54, Dallas, Texas 75219.

Kenneth Wayne Miles may be served by and through his attorney of record Jim Moore, Law Offices of Moore & Gunter, Regency Plaza, 3710 Rawlins, Suite 1310, LB 54, Dallas, Texas 75219.

Billy S. Camp may be served at his residence at 1211 Lariat Circle, Red Oak, Texas 75154.

Sue Camp may be served at her residence at 1211 Lariat Circle, Red Oak, Texas 75154.

It is our understanding that Christopher Lee Camp is unable to accept service on his own behalf due to injuries received as a result of this accident. He may be served through his parents, Billy S. Camp and/or Sue Camp at his residence at 1211 Lariat Circle, Red Oak, Texas 75154.

Teddy R. Gathright and S. Joyce Gathright, Individually and as Next Friend of Megan Morag Blythe "Paige" Gathright, a Minor may be served at their residence at 301 Collins Street, Red Oak, Texas 75154.

Viki Merimon, Individually and as Next Friend of Dustin Merimon, a Minor may be served at 1211 Lariat Circle, Red Oak, Texas 75154.

Estate of Demi Skylyn Merimon may be served at _____.

Unnamed father of Demi Skylyn Merimon, Deceased may be served _____.

Central State Southeast and Southwest Areas Health and Welfare Fund may be served by and through their corporate representatives William J. Nellis, Attorney, Secretary to the Board of Trustees and/or Ronald J. Kubalanza, Executive Director at 9377 West Higgins Road,

Rosemont, Illinois 60018.

II.

Effective November 4, 1992, Plaintiff issued to Billy Camp, hereinafter called insured, a policy of automobile insurance in the sum of $20,000 each person/$40,000 each accident bodily injury; $15,000 each accident property damage payable to Defendant A and/or Defendant B and/or Defendant C and/or Defendant D and/or Defendant E and/or Defendant F and/or Defendant G and/or Defendant H as those persons and/or estates should be compensated in satisfaction of the obligation under the said policy.

III.

On April 3, 1993, a 1984, white, Mercury Cougar, 2 door, driven by Christopher Lee Camp collided with a 1988, red, Ford Ranger, resulting in the death of Defendant, Demi Skylyn Merimon and in personal injuries to Kenneth Wayne Miles, Willie Searcy, Jermaine Searcy, Christopher Lee Camp, Megan Morag Blythe "Paige" Gathright, and Dustin Merimon. Plaintiff/Interpleader further believes that Susan Miles, Billy S. Camp and Sue Camp, Teddy R. Gathright and S. Joyce Gathright, Viki Merimon, the Estate of Demi Skylyn Merimon, the unnamed father of Demi Skylyn Merimon and Central State Southeast and Southwest Areas Health and Welfare Fund may also have claims to assert against the insurance policy for damages.

IV.

Under State & County Mutual Fire Insurance Company policy #DTX 2170852, effective October 30, 1992 through October 30, 1993, benefits of the insurance policy limits became due under the said policy in the sum of $40,000.00.

V.

Defendant, Kenneth Wayne Miles claims said sum by reason of the fact that he suffered personal injuries in the automobile accident previously mentioned. Defendant, Willie Searcy claims said sum by reason of the fact that he suffered personal injuries in the automobile accident previously mentioned. Defendant, Jermaine Searcy claims said sum by reason of the fact that he suffered personal injuries in the automobile accident previously mentioned. Defendant, Christopher Lee Camp claims said sum by reason of the fact that he suffered personal injuries in the automobile accident previously mentioned. Defendant, Megan Morag Blythe "Paige" Gathright claims said sum by reason of the fact that he suffered personal injuries in the automobile accident previously mentioned. Dustin Merimon claims said sum by reason of the fact that he suffered personal injuries in the automobile accident previously mentioned. The Estate of Demi Skylyn Merimon claims said sum by reason of the fact that Demi Skylyn Merimon was fatally injured in the aforementioned accident. Defendants, Susan Miles, Viki Merimon, Unidentified Father, Billy S. Camp, Sue Camp, Teddy R. Gathright and S. Joyce Gathright may claim said sum by reason of the fact that they were personally related to the injured or deceased parties. Central State Southeast and Southwest Areas Health and Welfare fund may claim said sum by reason of the fact that they have paid benefits to one or more of the injured parties because of the aforementioned accident.

VI.

These claims are adverse and conflicting. Plaintiff is unable to decide the validity of any of the said claims or potential claims and Plaintiff is unable to decide to whom it should pay such sums and in what amount. With respect to the said sum, Plaintiff is in the position of an

innocent stakeholder faced with the possibility of multiple liability and costs incident thereto.

VII

Plaintiff neither has nor claimed any interest in said sum, and has been willing, at all times, to pay said sum to such person or estates as they are lawfully entitled thereto.

VIII.

Plaintiff has in no way colluded with any of the Defendants concerning the matters of this cause. Plaintiff is not in any manner indemnified by any of said Defendants. Plaintiff has filed this Petition In Interpleader of its free will to avoid multiple liability and unnecessary suits and the cost incident thereto.

IX.

Plaintiff has deposited the sum of $40,000.00 being the entire proceeds of said insurance policy, with the clerk of this Court on the filing of this Petition.

WHEREFORE, Plaintiff requests that Defendants be cited to appear and answer herein, interpleading their conflicting claims to the sum now deposited with the Court; and on final trial hereof, that Plaintiff have judgment as follows:

1. That Plaintiff be released and discharged from all liability to any Defendants on account of the matters relating to the described insurance proceeds;
2. That Plaintiff recover reasonable attorneys fees;
3. That Plaintiff have such other and further relief, at law or in equity, to which it shows itself justly entitled.

Respectfully submitted,

FLETCHER & SPRINGER, L.L.P.

RANDALL D. FIFE
STATE BAR NO. 06981800
4245 NORTH CENTRAL EXPRESSWAY
SUITE 300
DALLAS, TEXAS 75205
(214)520-0300
(214)520-0869 [FAX]

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

THIS WILL CERTIFY that a true and correct copy of the foregoing instrument has been mailed, telecopied or hand delivered to all attorneys of record in this cause of action on the 14th day of September, 1993.

RANDALL D. FIFE

CAUSE NO. 93-09866-L

STATE & COUNTY MUTUAL FIRE INSURANCE COMPANY Plaintiff/Interpleader	§	IN THE DISTRICT COURT
v.	§	DALLAS COUNTY, TEXAS
SUSAN MILES, ET AL.	§	193RD JUDICIAL DISTRICT

ORIGINAL ANSWER OF SUSAN MILES, INDIVIDUALLY AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS AND KENNETH WAYNE MILES, DEFENDANTS

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Susan Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, minors, referred to collectively as Defendant "A" in this action and Kenneth Wayne Miles, referred to as Defendant "B" in the above-entitled action and by of answer would respectfully show unto the Court as follows:

I.

Susan Miles would show that she is the natural mother of Willie Searcy and Jermaine Searcy and appears in this action as their representative and next friend.

II.

The Defendants deny generally the allegations of Plaintiff/Interpleader and demand strict proof thereof as required by law.

III.

These Defendants would show that they make no claim of any kind against the Plaintiff/Interpleader and seek no affirmative relief of any kind in this action.

WHEREFORE, PREMISES CONSIDERED, Susan Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, identified collectively as Defendant "A" in this action and Kenneth Wayne Miles, referred to as Defendant "B" in this action, pray that Plaintiff/Interpleader take nothing from these Defendants and that they go hence without day and for all other relief to which Defendants may show themselves justly entitled.

Respectfully submitted,

LAW OFFICES OF
R. JACK AYRES, JR.

By: T. Randall Sandifer

R. JACK AYRES, JR.
State Bar No. 01473000
THOMAS V. MURTO III
State Bar No. 14740500
T. RANDALL SANDIFER
State Bar No. 17619710

4350 Beltway Drive
Dallas, Texas 75244
(214) 991-2222
(Fax) (214) 386-0091

ATTORNEYS FOR DEFENDANTS
Susan Miles, Individually
as Next Friend of Willie Searcy
and Jermaine Searcy, and
Kenneth Wayne Miles

CERTIFICATE OF SERVICE

I hereby certify that a true and correct photocopy of the foregoing Answer has been forwarded to the following counsel of records via certified mail, return receipt requested, on this the 26th day of April, 1994:

John Withers, Esq.
Attorney at Law
Fletcher & Springer, L.L.P.
4245 N. Central Expressway, Suite 300
Dallas, Texas 75205

David F. Zwerner, Esq.
Attorney at Law
211 N. Record, Suite 450
Lock Box 15
Dallas, Texas 75202

David D. Kelton, Esq.
Attorney at Law
211 N. Record, Suite 450
Lock Box 15
Dallas, Texas 75202

T. Randall Sandifer

T. RANDALL SANDIFER

NO. 06-95-00026-CV

IN THE

COURT OF APPEALS

FOR THE

SIXTH COURT OF APPEALS DISTRICT OF TEXAS

TEXARKANA, TEXAS

Susan Renae Miles, Individually and as Next Friend of
Willie Searcy and Jermaine Searcy, Minors and
Kenneth Miles,

Appellants,

v.

Ford Motor Company and Douglas Stanley, Jr.,
d/b/a Doug Stanley Ford,

Appellees.

AFFIDAVIT

"My name is Greg Smith. I am an attorney with Ramey & Flock, P.C. and one of the attorneys representing Ford Motor Company in the appeal of the judgment in the Miles suit. I am over 21 years old; I have never been convicted of a felony or a crime involving moral turpitude and I am otherwise competent to swear this affidavit. Every fact stated in this affidavit is within my personal knowledge and every such fact is true.

"One of my responsibilities in appealing the judgment against Ford was to ensure that the judgment would be stayed during Ford's appeal. In that regard, I contacted Jamie Laurencelle with Marsh & McLennan, Inc. about securing a supersedeas bond for $46,500,000, the full amount of the judgment, costs, and a year's post-judgment interest. I also talked with the Miles' attorneys about an alternative to a traditional supersedeas bond. In fact, Tom Murto, of the Law Offices of R. Jack Ayres, Jr. and one of the Miles' lawyers, first broached the subject in one of our phone conversations. While my discussions about alternate supersedeas were initially with Tom Murto, I later also spoke on the subject with Randy Sandifer, also with the Law Offices of R. Jack Ayres, Jr. Both Messrs. Murto and Sandifer expressed interest in an alternate supersedeas in which Ford would pay the plaintiffs some percentage of the costs that Ford otherwise would pay a bonding company to furnish a supersedeas bond. I confirmed the initial discussions that I had with Mr. Sandifer in a letter to Mr. Sandifer dated March 22. I have attached a true copy of that letter to this affidavit as Exhibit 1.

"In the meantime, Marsh & McLennan already was processing my request for a supersedeas bond. To allow sufficient time to attempt an alternate supersedeas, on March 22 I requested that Ms. Laurencelle freeze Ford's bond application while the Miles' lawyers and I explored an alternate arrangement further. Ms. Laurencelle complied. I also requested that Ms.

Laurencelle provide me a quote on the bond premium, so the parties could use it as a frame of reference in our negotiations. Although Ms. Laurencelle at first thought the premium would be about $135,000 (and I passed this estimate along to either Mr. Sandifer or Mr. Murto), she provided me with a final quote of $49,000. I passed the final quote along to Mr. Sandifer and, at his request, secured from Ms. Laurencelle a written confirmation of the bond premium amount. I then provided Mr. Sandifer a copy of Ms. Laurencelle's letter. I have attached true copies of Ms. Laurencelle's letter and my transmittal letter to Mr. Sandifer to this affidavit as Exhibits 2 and 3.

"In keeping with our prior negotiations, on March 28 I wrote Mr. Murto to outline Ford's proposal to pay the plaintiffs $49,000 annually in trust for Willie Searcy's benefit in lieu of a supersedeas bond. (Mr. Sandifer had, in a phone conversation on March 22, confirmed that his clients agreed to the concept of a trust.) My March 28 letter accurately reflects Ford's proposal. I have attached to this affidavit a true copy of the proposal as Exhibit 4.

"On April 5, when I had received no response to Ford's proposal, I called Mr. Murto, who told me not only that his clients were rejecting Ford's proposal out of hand, but that further negotiations toward an alternate supersedeas would be fruitless and that I should secure a bond instead. While I cannot quote the precise words he used, Mr. Murto commented to the effect that $49,000 just was not enough to make alternate supersedeas worthwhile.

He also indicated--for the first time--that his clients might not be comfortable bypassing the security of a bond. Earlier in the supersedeas negotiations, however, Mr. Sandifer had explained that, given Ford's financial condition (a net worth of more than $ 17 billion), the plaintiffs knew the judgment was collectable. And, the negotiations that Mr. Sandifer, Mr. Murto and I had engaged for more than two weeks all had been based on the premise that any alternate supersedeas would be in lieu of formal security.

"Ford has since obtained and filed a supersedeas bond in the stated amount of $ 46,500,000. A copy is attached as Exhibit 5. The annual bond premium is $49,000."

GREG SMITH

SWORN TO AND SUBSCRIBED before me by GREG SMITH on this the 17th day of April, 1995.

TERRI L. HARVEY
Notary Public
STATE OF TEXAS
My Comm. Exp. 12-5-95

NOTARY PUBLIC IN AND FOR THE
STATE OF TEXAS

RAMEY
&FLOCK
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELLORS AT LAW
500 FIRST PLACE
TYLER, TEXAS 75702

GREG SMITH
BOARD CERTIFIED, CIVIL APPELLATE LAW,
TEXAS BOARD OF LEGAL SPECIALIZATION

Greg Smith

POST OFFICE BOX 629
TYLER, TEXAS 75710
AREA CODE 903
TELEPHONE 597-3301
TELECOPIER 597-2413

March 22, 1995

VIA TELECOPIER
NO. 214/386-0091 and
CM/RRR Z 111 954 121)

Mr. Randy Sandifer
Attorney at Law
4350 Beltway Drive
Dallas, TX 75244

Re: No. 94-143 - Susan Renae Miles, et al v. Ford Motor Company et al, 4th District Court of Rusk County, Texas

Dear Randy:

I am confirming that we have begun negotiations toward an alternate to a supersedeas bond. As I understand it, we are talking about a trust to fund enhanced interim medical care for Willie. The trust would be funded by some of the money that would otherwise have bought a supersedeas bond. (Tom Murto has represented to me that at least some of Willie's immediate medical needs are not being met because of a lack of funds.)

My real purpose in this letter is to confirm your promise yesterday, in a phone conversation, that if the parties began negotiating toward an alternate supersedeas, you and your clients would delay enforcement of the sanctions order against Ford until its motion for new trial is either ruled on or is overruled by operation of law. In this regard, I am including a proposed Rule 11 Agreement with the hard copy of this letter. In the meantime, if I am mistaken in any respect, let me know so I can go ahead and get a bond on at least the sanctions order.

Sincerely,

ORIGINAL SIGNED BY
GREGORY D. SMITH

GREG SMITH

GS:ssf
Enclosure

P.S. I also expect to get you written confirmation on the bond amount sometime today.

GS

00003.gs(ssf)

Is your RETURN ADDRESS completed on the reverse side?

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
Randy Sandefur

4a. Article Number
Z 111 954 121

4b. Service Type
☐ Registered ☐ Insured
☑ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery 3-23-95

5. Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)
Rules

6. Signature (Agent)
Daniel M.

PS Form 3811, December 1991 ☆U.S. GPO: 1993—352-714 DOMESTIC RETURN RECEIPT

Thank you for using Return Receipt Service.

Z 111 954 121

Receipt for Certified Mail
No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

UNITED STATES POSTAL SERVICE

Sent to R. Sandefur	
Street and No.	
P.O., State and ZIP Code	
Postage	$ .55
Certified Fee	1.10
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	1.10
Return Receipt Showing to Whom, Date, and Addressee's Address	
TOTAL Postage & Fees	$ 2.75
Postmark or Date 3/22/95	

KOSER MAR 22 1995

PS Form 3800, March 1993

Marsh & McLennan, Incorporated
One Woodward Avenue, Suite 1200
Detroit, Michigan 48226-3493
Telephone 313 965-5400
Facsimile 313 965-5309

March 22, 1995

MARSH & MCLENNAN

Mr. Greg Smith
Ramey & Flock
500 First Place
Tyler, Texas 75702

VIA FACSIMILE: (903)597-2413

SUBJECT: MILES VS. FORD MOTOR COMPANY
APPEAL BOND/$46,500,000

Dear Mr. Smith:

This will confirm our conversation of this morning in which you advised me of an alternate financial mechanism to be posted during the appeal in lieu of a bond. You indicated a trust fund might be set up in order for the plaintiff to receive additional medical benefits as medicaid is not covering all of his needs.

We did confirm with CNA that the annual premium for this bond would be $49,000 and not the estimated $135,000 Ford thought it might be. We hope this will aid in the decision to file a bond. We remain available to assist you and our mutual client Ford. I will await further instruction from you with respects to issuance of a bond. We have approval from CNA and can execute this bond immediately.

We await instruction to proceed.

Sincerely,

Jamie M. Laurencelle
Assistant Vice President

jml/am

c: John Mavis/FMC Legal Department

RAMEY
&FLOCK
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELLORS AT LAW
500 FIRST PLACE
TYLER, TEXAS 75702

GREG SMITH
BOARD CERTIFIED, CIVIL APPELLATE LAW,
TEXAS BOARD OF LEGAL SPECIALIZATION

POST OFFICE BOX 629
TYLER, TEXAS 75710
AREA CODE 903
TELEPHONE 597-3301
TELECOPIER 597-2413

FAX TRANSMITTAL SHEET

TO:	Randy Sandifer	C/M NO.: 3893-1
FAX NUMBER:	214-386-0091	
FROM:	Greg Smith	
DATE:	March 23, 1995	
SUBJECT:	Ford/Miles	
NO. OF PAGES:		

Randy, here's the written quote that I promised. Like I explained on the phone, Ford apparently has an incredibly good "loss ratio" that allows it to get a fantastic deal on bonds.

Despite the great deal on a bond, Ford still would like to work out the alternate supersedeas agreement, in the form of a trust for enhanced medical benefits for Willie. Let me know as soon as you can how you'd like to proceed.

Thanks for the Rule 11 Agreement.

GS

GS/tlh
sandifer.2

RAMEY
&FLOCK
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELLORS AT LAW
500 FIRST PLACE
TYLER, TEXAS 75702

GREG SMITH
BOARD CERTIFIED, CIVIL APPELLATE LAW,
TEXAS BOARD OF LEGAL SPECIALIZATION

POST OFFICE BOX 629
TYLER, TEXAS 75710
AREA CODE 903
TELEPHONE 597-3301
TELECOPIER 597-2413

March 28, 1995

VIA FAX # 214-386-0091 & CERTIFIED MAIL - RRR # P 373 113 021

Mr. Thomas V. Murto, III
LAW OFFICES OF R. JACK AYRES, JR.
4350 Beltway Dr.
Dallas, TX 75244

RE: No. 94-143; Susan Renae Miles, et al. v. Ford Motor Company, et al.; In the 4th Judicial District Court of Rusk County, Texas.

Dear Tom:

You have represented that at least some of Willie Searcy's immediate medical needs are not being met because of a lack of funds and that an alternate supersedeas arrangement could help meet those needs. (I had understood that Willie's necessary medical expenses were being paid by Medicaid. I could, however, be wrong.) Based on your representation of Willie's needs, here is Ford's suggestion for one alternative to traditional supersedeas:

- Ford would deposit $49,000 (the equivalent of a supersedeas bond premium) into a trust, the principle and interest of which would be used solely for (1) paying Willie Searcy's reasonable and necessary medical needs, if any, not now being paid and (2) trust administration fees.

- As with a bond, Ford would be obligated to place an additional $49,000 in the trust on the trust's anniversary date; Ford's obligation for annual payments into the trust would continue until all appellate proceedings had been exhausted.

- The benefits paid from the trust would be non-refundable--even if Ford wins its appeal. But, they also would reduce Ford's judgment liability were the case affirmed.

- You and your clients would agree to not execute or collect on the judgment or the March 16 "Order Imposing Sanctions" for the duration of the appeal, and Ford would be relieved of any obligation to post a bond or other security.

- You and your clients would agree in the alternate supersedeas documents not to use Ford's supersedeas payment against it, whether on appeal or retrial.

Of course, other material elements of the trust arrangement would have to be agreed. As a consequence, I don't intend this letter as a formal "offer." I do, however, seek both your approval of the concepts in this letter and your agreement to negotiate the remaining issues leading to a binding supersedeas agreement.

An arrangement like I've outlined makes imminent sense, for at least the following reasons: First, it satisfies the desire--that you expressed to me--that the supersedeas bond monies be put to Willie's benefit. Second, it recognizes what we all know--a bond premium would be a wasted expenditure. Just last week, Randy Sandifer explained to me your confidence in Ford's ability to satisfy any judgment that may remain against it after appeal.

Even though the judgment and sanctions order aren't subject to immediate execution, I need your response soon; if you reject the notion of an alternate supersedeas arrangement, I'll need to secure a bond. Please respond by Tuesday, April 4.

Sincerely,

GREG SMITH

GS/tlh
murto.3

cc: Mr. J. Mark Mann (VIA CERTIFIED MAIL - RRR # P 373 113 022)
WELLBORN, HOUSTON, ADKISON, MANN, SADLER & HILL
P.O. Box 1109
Henderson, TX 75653-1109

Ms. Linda J. Smith (VIA CERTIFIED MAIL - RRR # P 373 113 023)
Rusk County District Clerk
115 N. Main St.
Henderson, TX 75652

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
Mr. Thomas V. Murto, III
4350 Beltway Dr.
Dallas, TX 75244

4a. Article Number
P-373-113-021

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☒ Return Receipt for Merchandise

7. Date of Delivery
5-30-95

5. Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)

6. Signature (Agent)
Ann Willard

PS Form 3811, December 1991 ☆U.S. GPO: 1993—352-714 **DOMESTIC RETURN RECEIPT**

Is your RETURN ADDRESS completed on the reverse side?

Thank you for using Return Receipt Service.

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
Mr. J. Mark Mann
P.O. Box 1109
Henderson, TX 75653-1109

4a. Article Number
P-373-113-022

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☒ Return Receipt for Merchandise

7. Date of Delivery
MAR 29 1995

5. Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)

6. Signature (Agent)
Beverly Howard

PS Form 3811, December 1991 ☆U.S. GPO: 1993—352-714 **DOMESTIC RETURN RECEIPT**

Is your RETURN ADDRESS completed on the reverse side?

Thank you for using Return Receipt Service.

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
Ms. Linda J. Smith
115 N. Main St.
Henderson, TX 75652

4a. Article Number
P-373-113-023

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☒ Return Receipt for Merchandise

7. Date of Delivery
MAR 29 1995

5. Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)

6. Signature (Agent)
L. Castleman

PS Form 3811, December 1991 ☆U.S. GPO: 1993—352-714 **DOMESTIC RETURN RECEIPT**

Is your RETURN ADDRESS completed on the reverse side?

Thank you for using Return Receipt Service.

P 373 113 023

Receipt for Certified Mail
No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

Sent to Ms. Linda J. Smith	
Street and No. 115 N. Main St.	
P.O., State and ZIP Code Henderson, TX 75652	
Postage	$ .32
Certified Fee	1.10
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	1.10
Return Receipt Showing to Whom, Date, and Addressee's Address	
TOTAL Postage & Fees	$ 2.52
Postmark or Date	GS Ford 3893-1

RECEIVED MAR 28 1995 MAIN POST OFFICE TYLER TX

PS Form 3800, June 1991

P 373 113 021

Receipt for Certified Mail
No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

Sent to Mr. Thomas Wade Mucke, III	
Street and No. 4350 Beltway Dr.	
P.O., State and ZIP Code Dallas, TX 75244	
Postage	$ .32
Certified Fee	1.10
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	1.10
Return Receipt Showing to Whom, Date, and Addressee's Address	
TOTAL Postage & Fees	$ 2.52
Postmark or Date	GS Ford 3893-1

RECEIVED MAR 28 1995 MAIN POST OFFICE TYLER TX

PS Form 3800, June 1991

P 373 113 022

Receipt for Certified Mail
No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

Sent to Mr. J. Mark Mann	
Street and No. P.O. Box 1109	
P.O., State and ZIP Code Henderson, TX 75653-1109	
Postage	$ .32
Certified Fee	1.10
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	1.10
Return Receipt Showing to Whom, Date, and Addressee's Address	
TOTAL Postage & Fees	$ 2.52
Postmark or Date	GS Ford 3893-1

RECEIVED MAR 28 1995 MAIN POST OFFICE TYLER TX

PS Form 3800, June 1991

BOND NO.: 123851065

NO. 94-143

FILED
95 APR 13 PM 3:18
LINDA J. SMITH, DIST. CLK
RUSK COUNTY, TEXAS
BY _____ DEPUTY

SUSAN RENAE MILES, Individually and as Next Friend of WILLIE SEARCY, and JERMAINE SEARCY, Minors, and KENNETH MILES, Plaintiffs,	§	IN THE DISTRICT COURT
v.	§	OF RUSK COUNTY, TEXAS
FORD MOTOR COMPANY and DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY, FORD, Defendants.	§	4th JUDICIAL DISTRICT

SUPERSEDEAS BOND

Judgment was signed in the above cause during a regular term of the Court on the 9th day of March, 1995, in favor of Susan Renae Miles, individually and as next friend of Willie Searcy and Jermaine Searcy, minors, and Kenneth Miles, all of the plaintiffs, against Ford Motor Company, one of the defendants, in the following respects:

Actual Damages:

- $500,000 to Susan Renae Miles and Kenneth Miles jointly (medical care, additional support care and enhanced home environment and transportation costs)
- $500,000 to Susan Renae Miles individually (loss of companionship and society)

- $27,840,000 to Susan Renae Miles as next friend of Willie Searcy (pain and mental anguish, disfigurement, physical impairment, physical debilitation, medical care, additional support services and enhanced home environment and transportation costs, and loss of earning capacity)

- $250,000 to Susan Renae Miles as next friend of Jermaine Searcy (mental anguish)

- $250,000 to Kenneth Miles (mental anguish)

Punitive Damages:

- To Susan Renae Miles as next friend of Willie Searcy for $10,000,000 in punitive damages.

Pre-Judgment Interest:

- To Susan Renae Miles and Kenneth Miles, jointly, $47,945.20.
- To Susan Renae Miles individually, $47,945.20.
- To Susan Renae Miles as next friend of Willie Searcy, $2,669,588.70.
- To Susan Renae Miles as next friend of Jermaine Searcy, $23,972.60.
- To Kenneth Miles individually, $23,972.60.

The judgment further awarded against Ford Motor Company all costs of court expended or incurred on behalf of the plaintiffs. The judgment also awards post-judgment interest on all the above sums at the rate of 10% per year, compounded annually beginning March 9, 1995 until paid.

On Thursday, March 16, 1995 the Court also awarded plaintiffs $19,187.50 in monetary sanctions against Ford Motor Company, payable on or before March 27, 1995.

Ford Motor Company desires to appeal the March 9 judgment as well as the March 16 sanctions order to the Court of Appeals for either the Sixth or Twelfth Court of Appeals Districts of Texas, and, if necessary, to the Supreme Court of Texas. Ford Motor Company also desires to suspend execution of the March 9 judgment and the March 16 sanctions order pending determination of its appeal.

Consequently, we, Ford Motor Company, defendant-appellant, as principal, and the undersigned surety, a corporation duly licensed and authorized to carry on a surety business, acknowledge ourselves bound to pay the plaintiffs the maximum aggregate sum of $46,500,000, being at least 100% of the damages (actual and punitive), sanctions, pre-judgment interest, costs and post-judgment interest for a period of one year from March 9, 1995 at the rate of 10% per year, compounded annually, conditioned that Ford Motor Company shall prosecute its appeal with effect and, in the event the judgment of the Supreme Court or Court of Appeals shall be against it, Ford Motor Company shall perform its judgment, sentence or decree, and pay all such damages as the Court may award against it.

Dated this 6TH day of APRIL, 1995.

Principal: Ford Motor Company

By: Thomas J. DeZure

Its: Assistant Secretary

Address: The American Road, Room #1187

Dearborn, MI 48121

Surety: CONTINENTAL CASUALTY COMPANY

By: M. D. Hamilton

M. D. HAMILTON

Its: ATTORNEY-IN-FACT

Address: CNA PLAZA

CHICAGO, ILLINOIS 60685

COUNTERSIGNATURE:

BY Donald R. Gibson

Donald R. Gibson

Resident Agent

APPROVAL: Linda Smith

District Clerk

Rusk County Texas

Continental Casualty Company

CNA

For All the Commitments You Make®

AN ILLINOIS CORPORATION

POWER OF ATTORNEY APPOINTING INDIVIDUAL ATTORNEY-IN-FACT

Know All Men by these Presents, That CONTINENTAL CASUALTY COMPANY, a corporation duly organized and existing under the laws of the State of Illinois, and having its principal office in the City of Chicago, and State of Illinois, does hereby make, constitute and appoint Jamie Laurencelle, D. D. Tatum, D. H. Bryan, De. E. Prindle, M. D. Hamilton, Individually

of Detroit, Michigan

its true and lawful Attorney-in-fact with full power and authority hereby conferred to sign, seal and execute in its behalf bonds, undertakings and other obligatory instruments of similar nature

- In Unlimited Amounts -

and to bind CONTINENTAL CASUALTY COMPANY thereby as fully and to the same extent as if such instruments were signed by the duly authorized officers of CONTINENTAL CASUALTY COMPANY and all the acts of said Attorney, pursuant to the authority hereby given are hereby ratified and confirmed.

This Power of Attorney is made and executed pursuant to and by authority of the following By-Law duly adopted by the Board of Directors of the Company.

"Article IX—Execution of Documents

Section 3. Appointment of Attorney-in-fact. The Chairman of the Board of Directors, the President or any Executive, Senior or Group Vice President may, from time to time, appoint by written certificates attorneys-in-fact to act in behalf of the Company in the execution of policies of insurance, bonds, undertakings and other obligatory instruments of like nature. Such attorneys-in-fact, subject to the limitations set forth in their respective certificates of authority, shall have full power to bind the Company by their signature and execution of any such instruments and to attach the seal of the Company thereto. The Chairman of the Board of Directors, the President or any Executive, Senior or Group Vice President or the Board of Directors, may, at any time, revoke all power and authority previously given to any attorney-in-fact.

This Power of Attorney is signed and sealed by facsimile under and by the authority of the following Resolution adopted by the Board of Directors of the Company at a meeting duly called and held on the 17th day of February, 1993.

"Resolved, that the signature of the President or any Executive, Senior or Group Vice President and the seal of the Company may be affixed by facsimile on any power of attorney granted pursuant to Section 3 of Article IX of the By-Laws, and the signature of the Secretary or an Assistant Secretary and the seal of the Company may be affixed by facsimile to any certificate of any such power and any power or certificate bearing such facsimile signature and seal shall be valid and binding on the Company. Any such power so executed and sealed and certified by certificate so executed and sealed shall with respect to any bond or undertaking to which it is attached, continue to be valid and binding on the Company."

In Witness Whereof, CONTINENTAL CASUALTY COMPANY has caused these presents to be signed by its Group Vice President and its corporate seal to be hereto affixed on this 17th day of March, 1995.

CONTINENTAL CASUALTY COMPANY

M.C. Vonnahme Group Vice President

State of Illinois, County of Cook, ss:

On this 17th day of March, 1995, before me personally came M. C. Vonnahme, to me known, who, being by me duly sworn, did depose and say: that he resides in the Village of Darien, State of Illinois; that he is a Group Vice President of CONTINENTAL CASUALTY COMPANY, the corporation described in and which executed the above instrument; that he knows the seal of said Corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed pursuant to authority given by the Board of Directors of said corporation and that he signed his name thereto pursuant to like authority, and acknowledges same to be the act and deed of said corporation.

My Commission Expires October 19, 1998 Linda C. Dempsey Notary Public

CERTIFICATE

I Robert E. Ayo, Assistant Secretary of CONTINENTAL CASUALTY COMPANY, do hereby certify that the Power of Attorney herein above set forth is still in force, and further certify that Section 3 of Article IX of the By-Laws of the Company and the Resolution of the Board of Directors, set forth in said Power of Attorney are still in force. In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Company this 6TH day of APRIL, 1995.

Robert E. Ayo Assistant Secretary

E1-23142-B

IMPORTANT NOTICE

TO OBTAIN INFORMATION OR MAKE A COMPLAINT:
YOU MAY CONTACT THE TEXAS DEPARTMENT OF INSURANCE TO OBTAIN INFORMATION ON COMPANIES, COVERAGES, RIGHTS OR COMPLAINTS AT:

1-800-252-3439

YOU MAY WRITE THE TEXAS DEPARTMENT OF INSURANCE:

P. O. Box 149104
AUSTIN, TX 78714-9104
FAX #(512) 475-1771

PREMIUM OR CLAIM DISPUTES:

SHOULD YOU HAVE A DISPUTE CONCERNING YOUR PREMIUM OR ABOUT A CLAIM YOU SHOULD CONTACT THE AGENT OR COMPANY FIRST. IF THE DISPUTE IS NOT RESOLVED, YOU MAY CONTACT THE TEXAS DEPARTMENT OF INSURANCE.

ATTACH THIS NOTICE TO YOUR POLICY:

THIS NOTICE IS FOR INFORMATION ONLY AND DOES NOT BECOME A PART OR CONDITION OF THE ATTACHED DOCUMENT.

LAW OFFICES OF R. JACK AYRES, JR.
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS
4350 BELTWAY DRIVE
DALLAS, TEXAS 75244

R. JACK AYRES, JR. †‡*
THOMAS V. MURTO III *
T. RANDALL SANDIFER

† BOARD CERTIFIED - CIVIL TRIAL LAW
‡ BOARD CERTIFIED - PERSONAL INJURY TRIAL LAW
* BOARD CERTIFIED - CIVIL APPELLATE LAW
TEXAS BOARD OF LEGAL SPECIALIZATION

TELEPHONE
(214) 991-2222
TELECOPIER
(214) 386-0091

GARY L. TAYLOR
INVESTIGATOR

May 12, 1995

VIA HAND DELIVERY

Mr. John T. Adams
Clerk, Supreme Court of Texas
201 W. 14th Street, Room 104
Austin, Texas 78701

Re: No. 95-9198 ; In re No. 106-95-00026-CV,
In the Court of Appeals for the Sixth Court of Appeals District of Texas
and
No. 12-95-00068-CV,
In the Court of Appeals for the Twelfth Court of Appeals District of Texas

Dear Mr. Adams:

We are in a receipt of a request to transfer appeal by Ford Motor Company seeking to have the appeal of our clients, Susan Renae Miles, et al. to the Sixth Court of Appeals transferred to the Twelfth Court of Appeals. We are informed that Ford has filed its request with both the Sixth Court of Appeals and the Twelfth Court of Appeals. We are unsure of the proper procedure and timing for response. We are filing the Miles family response with both the Sixth and Twelfth Courts of Appeal for the consideration of those courts before making any comments on Ford's motion and for inclusion with the materials that those courts forward to this Court.

We are also taking the precaution of delivering to you directly the original and twelve copies of the response that we have filed with the Texarkana Court of Appeals. Please return one of the copies with your file mark on it to our messenger for our records. The response we are filing with the Twelfth Court of Appeals is identical to the response filed with the Sixth Court of Appeals except that each is captioned with respect to the case pending before that particular court. We are also enclosing a copy of the response we have filed with the Twelfth Court of Appeals so that you can confirm that it is identical with the exception of the caption.

Please note that as the result of the unusual nature of Ford's request, we are requesting oral argument.

If you have any questions or need any additional copies of these documents, please give me a call.

Very truly yours,

THOMAS V. MURTO III

TVM:clp
Enclosures
c:\wp50\ap-miles\sup-clk.ltr

cc: Mr. Gregory D. Smith **VIA CMRRR**
Mr. Richard Grainger **VIA CMRRR**
Mr. Thomas E. Fennell **VIA CMRRR**

NO. 95-9198

IN THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

In re

NO. 06-95-00026-CV

IN THE COURT OF APPEALS FOR THE

SIXTH COURT OF APPEALS DISTRICT OF TEXAS

Susan Renae Miles, et al.,

Appellants,

v.

Ford Motor Company and Douglas Stanley, Jr.,
d/b/a Doug Stanley Ford,

Appellees.

THE MILES RESPONSE TO FORD'S REQUEST FOR TRANSFER

ORAL ARGUMENT REQUESTED

John R. Mercy
Atchley, Russell, Waldrop
& Hlavinka, L.L.P.
1710 Moores Lane
P. O. Box 5517
Texarkana, Texas 75505-5517

J. Mark Mann
Wellborn, Houston,
Adkison, Mann, Sadler & Hill
300 W. Main Street
Henderson, Texas 75652

R. Jack Ayres, Jr.
Thomas V. Murto III
T. Randall Sandifer
Law Offices of
R. Jack Ayres, Jr., P.C.
4350 Beltway Drive
Dallas, Texas 75244

ATTORNEYS FOR SUSAN RENAE MILES, ET AL.

NO. _____

IN THE

SUPREME COURT OF TEXAS

In re

NO. 06-95-00026-CV

IN THE COURT OF APPEALS FOR THE

SIXTH COURT OF APPEALS DISTRICT OF TEXAS

Susan Renae Miles, et al.,

Appellants,

v.

Ford Motor Company and Douglas Stanley, Jr.,
d/b/a Doug Stanley Ford,

Appellees.

THE MILES RESPONSE TO FORD'S REQUEST FOR TRANSFER

ORAL ARGUMENT REQUESTED

TO THE HONORABLE SUPREME COURT OF TEXAS:

Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors and Kenneth Miles (the "Miles family"), Appellants in Cause No. 06-95-00026-CV in the Sixth Court of Appeals and Appellees in Cause No. 12-95-00068-CV in the Twelfth Court of

Appeals, file this response in opposition to the request of Ford Motor Company ("Ford") to transfer the Miles family's appeal from the Sixth Court of Appeals to the Twelfth Court of Appeals, and would respectfully show the Court the following:

I. Preliminary Statement

Ford asks this Court to use its administrative powers to transfer a properly perfected and prosecuted appeal by the Miles family from the Sixth Court of Appeals at Texarkana to Ford's choice of appellate courts, the Twelfth Court of Appeals at Tyler. Ford claims that it is entitled to such a transfer because it subsequently filed a "primary" appeal to the Twelfth Court of Appeals and because Ford had previously filed two mandamus proceedings relating to the underlying suit in that court. Ford's request is based upon its presupposition that it is entitled to more rights in the appellate process than the Miles family is. Ford imports into the judicial context the notorious but now bromidic commandment from Orwell's famous *Animal Farm*. "All animals are equal, but some animals are more equal than others." G. Orwell, *Animal Farm*, 123 (Signet Classic ed. 1946). To obtain the court it desires, Ford urges this Court to ignore constitutional limitations and to set aside well-established applicable law, by extralegally using its administrative powers to resolve judicial issues Ford intentionally created. Ford's request should be denied for the following reasons: (1) the Sixth Court of Appeals has dominant jurisdiction which is dispositive of the issues raised by Ford; (2) Section 73.001 of the Government Code is not intended to, does not and cannot supersede the law of dominant jurisdiction; (3) Ford's request does not promote judicial economy; and (4) the interests of justice and public policy favor denial of Ford's request.

II. Proceedings Below

The underlying lawsuit arose out of a two vehicle collision in which Willie Searcy ("Willie") sustained total quadriplegia, rendering him dependent upon a respirator for breathing. The Miles family sued Ford Motor Company ("Ford") and Doug Stanley, Jr., d/b/a Doug Stanley Ford ("Doug Stanley") in the Fourth Judicial District Court of Rusk County under theories of strict product liability, negligence, and breach of warranty. Prior to trial the defendants filed multiple motions for summary judgment on various grounds. They obtained a partial summary judgment on the consortium claims of Willie's stepfather, Kenneth Miles and brother, Jermaine Searcy. At the conclusion of the trial, the jury found favorably for the Miles family on all theories against Ford but not against the dealer, Doug Stanley, on any theory. The district court signed a judgment in accordance with the jury verdict. The Miles family filed a motion for partial new trial which the district court overruled. The Miles family had originally filed an appeal bond to appeal the partial summary judgment. After the trial district court overruled their motion for new trial, they filed an amended appeal bond appealing the entire judgment to the Sixth Court of Appeals in Texarkana on March 9, 1995. Tex. Gov't Code Ann. § 22.201(g) (Vernon 1988). Fully aware that the case had already been appealed to the Sixth Court of Appeals, Ford, but not Doug Stanley, filed on March 31, 1995 an appeal bond seeking to appeal the same judgment to the Twelfth Court of Appeals in Tyler. On April 5, 1995, a certified transcript and authenticated statement of facts was filed with the Sixth Court of Appeals. A certified transcript was not delivered to the Twelfth Court of Appeals until April 11, 1995.

On April 13, 1995, the Miles family filed with the Twelfth Court of Appeals a Motion to Dismiss Ford's appeal, which has not been acted upon by that court. About April 18, 1995, Ford

filed in the Sixth Court of Appeals a Motion to Abate the Appeal and Request for Transfer. On April 25, 1995 before receiving the response of the Miles family, the Sixth Court of Appeals issued an order abating the appeal of the Miles family pending action by the Supreme Court on a motion to transfer. In the letter to counsel forwarding the order, the clerk of that court stated that the Sixth Court of Appeals does not have authority to transfer an appeal and that the Appellees (Ford) should file their motion to transfer with this Court. The Miles family filed with the Sixth Court of Appeals, both a Response to Ford's Motion to Abate and Request for Transfer and a Motion to Reconsider, which was denied by that Court on May 8, 1995. (Copy attached as Exhibit A.)

III. The Sixth Court of Appeals Has Dominant Jurisdiction over the Entire Case.

Ford asks this Court to transfer the Miles family's appeal to the court of Ford's choice to resolve the problem of diverging appeals. Ford's concern is disingenuous. The problem of a potential conflict in jurisdiction between the two courts of appeals was intentionally created by Ford's gamesmanship in filing the second appeal after it knew the case had already been appealed to the Sixth Court of Appeals. Ford's gamesmanship is to no avail. The conflict of jurisdiction problem created by Ford is solved by the established law of dominant jurisdiction.

1. In Texas the First Court has Dominant Jurisdiction.

It is well established in Texas that where two tribunals have coordinate jurisdiction over a particular matter, the one which first acquires active jurisdiction shall retain its jurisdiction until the matter is disposed to the exclusion of other coordinate courts. *Cook v. Neill*, 352 S.W.2d 258, 262 (Tex. 1961); *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974). The application of the dominant jurisdiction rule is not limited to original proceedings. It applies with equal force to appellate

proceedings also. *Cook v. Neill*, 352 S.W.2d at 262. The first court of appeals that obtains active jurisdiction has exclusive plenary jurisdiction over the entire controversy. *Young v. DeGuerin*, 580 S.W.2d 171, 173 (Tex. Civ. App. - Houston [1st Dist.] 1979, no writ); *Ward v. Scarborough*, 223 S.W. 1107, 1112 (Tex. Civ. App. - Fort Worth 1920), *aff'd*, 236 S.W. 441 (Tex. Comm'n App. 1922, judgm't adopted). Texas is in accord with the general rule in the United States that even when an appellate review may be had in either of two different courts, if a cause has been brought before one court, it cannot be brought before a second court, while the first proceeding is pending. 4 C.J.S. *Appeal and Error*, § 20, at 82 (1993).

When an appeal is perfected to a court of appeals, it acquires plenary exclusive jurisdiction over the entire controversy (subject only to the right of the trial court to grant a new trial[1] or modify the judgment as permitted by Rule 329b, Tex. R. Civ. P.). *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 482 (Tex. 1964); *Man-Gas Transmission Co. v. Osborne Oil Co.*, 693 S.W.2d 576, 577 (Tex. App. - San Antonio 1985, no writ). The First Court of Civil Appeals, however, has held that the filing of the transcript rather than the perfection of the appeal was determinative of whether it or the Fourteenth Court of Civil Appeals had exclusive plenary jurisdiction over the controversy when the opposing parties simultaneously pursued appeals to those two courts. *Young v. DeGuerin*, 580 S.W.2d at 172-73. Under either the *Ammex* test or the *Young* test, the Sixth Court of Appeals has dominant jurisdiction of the underlying appeal.[2]

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1. The trial court denied Ford's motion for new trial on May 3, 1995. See Exhibit "B" attached.

2. A prior mandamus proceeding, on the other hand, does not establish dominant jurisdiction for a subsequent appeal from a final judgment. *Avis Rent A Car System, Inc. v. Advertising and Policy Committee*, 751 S.W.2d 257, 258 (Tex. App. - Houston [1st Dist.] 1988, no writ).

Because the Sixth Court of Appeals has dominant jurisdiction over the entire appeal, it has a mandatory duty to exercise that jurisdiction. *Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177, 179 (Tex. 1988). On the other hand, the Twelfth Court of Appeals, having had the pendency of the prior appeal called to its attention, should and must dismiss the second appeal. *Mower v. Boyer*, 811 S.W.2d 560, 563 n. 2 (Tex. 1991); *Ward v. Scarborough*, 223 S.W. at 1112-13. The application of the dominant jurisdiction rule results in only one effective appeal -- the first appeal, which in this case was brought by the Miles family to the Sixth Court of Appeals.

2. Ford's "Sham" Claims are Legally and Factually Wrong.

Ford claims that a "sham" exception to the dominant jurisdiction rule applies to this appeal because the Miles family appealed merely to obtain priority. First, Ford does not accurately state the recognized exception, as this Court explained it in *Curtis v. Gibbs*. A party may be estopped from asserting its prior action position only when the plaintiff in the prior suit (1) had filed suit merely to obtain priority, without a bona fide intention to prosecute the suit, or (2) had prevented its adversary from filing the subsequent suit more promptly by fraudulently representing that it would settle. 511 S.W.2d at 267. The Court went on to hold that absent proof of such facts, the party is not estopped from attacking the second proceeding on the dominant jurisdiction basis. 511 S.W.2d at 268.

Second, the "sham" exception has absolutely no application to the Miles appeal. The Miles family has perfected a *bona fide* appeal of the entire judgment denying recovery against Doug Stanley and of the summary judgment which denied Plaintiffs' consortium claims.[3] Plaintiffs were

[3] Ford similarly makes the vacuous claim that venue in the trial court was also a "sham." Ford now asks this Court to presume, without benefit of either law or the appellate record, that the Miles family's venue choice was forbidden and based upon that presumption to deny them

required to file a separate appeal to challenge the judgment denying any recovery against Doug Stanley, because Doug Stanley has not appealed the judgment. *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 446 (Tex. 1989); *McPherson Enterprises, Inc. v. Producers Cooperative Marketing Ass'n*, 827 S.W.2d 94, 96-97 (Tex. App. - Austin 1992, writ denied). Apparently, according to Ford, the Miles family was required to forego any appeal against Doug Stanley because it could not raise any issues against Doug Stanley by way of cross-points in Ford's appeal. *Id.* There is no allegation and certainly no proof that the Miles family has failed to prosecute its appeal; to the contrary, it is Ford that seeks to abate the appellate proceedings. Nor is there any allegation, let alone proof, that the Miles family prevented Ford from filing its appeal more promptly. Litigation is an adversarial process. *Public Utility Commission of Texas v. Cofer*, 754 S.W.2d 121, 124 (Tex. 1988) (A court has the power and duty to ensure that judicial proceedings remain truly adversary in nature.) The Miles family had an equal right to appeal from the judgment. *Ward v. Scarborough*, 236 S.W. 441, 444 (Tex. Comm'n App. 1922, judgm't adopted). They were entitled to appeal to the Sixth Court of Appeals. Tex. Gov't Code Ann. § 22.201(g) (Vernon 1988). The fact that they acted more

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their statutory choice of courts of appeals. In fact, after hearing Ford's claims on the merits, the trial court found against Ford. Venue was appropriate in Rusk County because Ford has an agency or representative in Premier Ford-Mercury, located in Henderson, Rusk County, Texas. The appellate record shows that Ford owns the majority of stock in Premier and controls its board of directors. Premier is empowered to and enters into contracts expressly incorporating warranties binding Ford while conducting the automobile business contemplated by its contract with Ford. *Allis-Chalmers Mfg. Co. v. Coplin*, 445 S.W.2d 627, 628 (Tex. Civ. App. - Texarkana 1969, no writ). In addition, Premier is delegated by Ford to conduct final inspections and to make correction of defects, if any, of Ford's products. *General Motors Corp. v. Ramsey*, 633 S.W.2d 646, 648 (Tex. App. - Waco 1982, writ dism'd). "The wrong [in venue selection the appellate courts] seek to correct is *not* a party properly seeking the most advantageous forum for the cause; that is no wrong at all. Rather, the wrong [the courts] seek to remedy is a party knowingly arguing invalid grounds to *effect* that purpose." *Maranatha Temple v. Enterprise Products Co.*, 833 S.W.2d 736, 741 (Tex. App. - Houston [1st Dist] 1992, writ denied) (court's emphasis).

diligently and promptly to protect their own rights than did Ford in no way estops them from asserting the dominant jurisdiction rule. Moreover, the denial of Ford's requested transfer will not prejudice its right to assign error to the court of appeals. Its right to file cross-assignments of error in its brief to the Sixth Court of Appeals immediately attached when the Miles family filed their amended appeal bond. *Donwerth v. Preston II Chrysler-Dodge, Inc.*, 775 S.W.2d 634, 639 (Tex. 1989); *Ward v. Scarborough*, 236 S.W. at 444.

IV. Section 73.001 of the Government Code Does Not Supersede the Dominant Jurisdiction Rule.

Realizing that it cannot prevail under the existing Texas law of dominant jurisdiction, Ford asserts that the dominant jurisdiction rule as a common law rule has somehow been superseded by § 73.001 of the Government Code. Section 73.001 provides that this Court has the authority to transfer cases from one court of appeals to another at any time that there is good cause for the transfer. Tex. Gov't Code Ann. § 73.001 (Vernon 1988). Ford misinterprets both the function and effect of this statute.

1. The Legislature Did Not Enact § 73.001 to Replace the Dominant Jurisdiction Rule for the Courts of Appeals.

There is no indication whatsoever that the Legislature enacted § 73.001 to replace the dominant jurisdiction rule or to address conflicts of jurisdiction between courts of appeals. Texas does not follow the rule that statutes in derogation of common law are to be strictly construed. Nevertheless, this Court has held that if a statute creates a liability unknown to the common law or deprives a person of a common law right, the statute will be strictly construed in the sense that it will

not be extended beyond its plain meaning or applied to cases not clearly within its purview. *Smith v. Sewell*, 858 S.W.2d 350, 354 (Tex. 1993).

Chapter 73 of the Government Code purports to be only the codification of Article 1738, Tex. Rev. Civ. Stat. Ann. (repealed).[4] Section 73.001 gives no indication of any intention to give this Court any new authority; in fact, it only slightly modified the second sentence of Art. 1738. Article 1738 was enacted in 1895 to require this Court to equalize the business on the dockets of the different courts of civil appeals by transferring cases from such courts with the greater number of cases on their dockets to those having a less amount of business. Law of Apr. 19, 1895, ch. 53, § 1, 1895 Tex. Gen. Laws, 79. Article 1738 was enacted less than two years after the state was first divided into five different supreme judicial districts with a court of civil appeals for each district. Law of May 13, 1893, ch. 116, 1893 Tex. Gen. Laws, 171. The Legislature considered the need for equalization an emergency item and made it the duty of this Court to equalize the business of the courts of civil appeals as soon as practicable and thereafter annually. Law of Apr. 19, 1895, ch. 53, § 2, 1895 Tex. Gen. Laws, 79-80. Thereafter, Art. 1738 was amended from time to time to specify the dates each year upon which this Court would equalize the dockets of the courts of civil appeals. The Legislature added the second sentence to Art. 1738 in 1941.[5] Act of June 10, 1941, ch. 476, § 1, 1941 Tex. Gen. Laws 762. The Legislature added the language of the second sentence because

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[4] The purpose of the Texas Government Code is to continue the program of a topic by topic revision of the state's general and permanent statute law without substantive change. Tex. Gov't Code Ann. § 1.001 (Vernon 1988). Consistent with that objective, the Code rearranges the statutes into a more logical order and restates the law in modern American English to make the law more understandable. *Id.*

[5] The added sentence read, "Said Court may, at any other time, order cases transferred from one Court of Civil Appeals to another, when, in the opinion of the Supreme Court, there is good cause for such transfer."

Art. 1738 permitted the transfer of cases only at intervals of approximately six months and it might be necessary to transfer cases at other times. *Id.*, § 2. The history of Art. 1738 makes it clear that the administrative power to transfer cases between the courts of civil appeals (and their successors, the courts of appeals) was given to this Court to remove impediments to the timely resolution by such courts of the cases on their dockets, the principal impediment being overburdened by a large number of cases.

The dominant jurisdiction rule obviates any need for this Court to administratively transfer cases in a situation such as this case. Because the first court already has obtained dominant jurisdiction over the entire matter until it is disposed of, it does not need the second appeal transferred to address assignments of error from the second group of appellants. Furthermore, because the second appeal should be dismissed, there is no need to transfer it in order to dispose of it. Therefore, there is no impediment to the first court of appeals disposing of the entire matter. A statute is presumed to have been enacted by the Legislature with complete knowledge of the existing law and in reference to it. *Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990). Under this principle, the Legislature would have known that the dominant jurisdiction rule resolved any potential conflicts of jurisdiction between the courts of appeals and there was no need to burden the Supreme Court with the task of resolving such disputes in the first instance. Therefore, it had no reason to impliedly repeal or to sweep the existing dominant jurisdiction determination within the scope of § 73.001. If the Legislature had so intended, it would presumably have directed the Court to prescribe the necessary rules of procedure to be followed as it has for appeals. Tex. Gov't Code Ann. § 22.001 & § 22.003 (Vernon 1988). Supplanting the dominant jurisdiction rule simply was

not within the purview of the statute. The Sixth Court of Appeals has dominant jurisdiction of the underlying appeal to the exclusion of the Twelfth Court of Appeals.

2. The Replacement of the Dominant Jurisdiction Rule With § 73.001 Would Be Unconstitutional.

It is extremely doubtful that the Texas Constitution would permit the Legislature to substitute an administrative decision under § 73.001 for a judicial determination of a particular case under the dominant jurisdiction rule. The Texas Constitution vests the "judicial power of this state" in the Supreme Court, the Courts of Appeals and other courts of the state. Tex. Const. art. V, § 1. "Judicial power" is the power of a court to determine, pronounce and effectuate a judgment between parties who bring a case before it. *Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641, 644 (1933). The judicial power is divided among the various courts of Texas by express grants of "jurisdiction" contained in the Constitution and valid statutes. *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979). The "jurisdiction" of a particular court is that portion of judicial power it has been authorized to exercise by the Constitution or by valid statutes. *Morrow v. Corbin*, 62 S.W.2d at 644. A matter of first consideration by any court, including the courts of appeals, is a determination of its own jurisdiction. *Lindsey v. Luckett*, 20 Tex. 516, 520 (1857); *White v. Schiwetz*, 793 S.W.2d 278, 281 (Tex. App. - Corpus Christi 1990, no writ). The determination and application of the dominant jurisdiction rule is a part of such jurisdiction determination by coordinate courts. In short, the resolution of the dominant jurisdiction issue is clearly an exercise of judicial power. *See Bailey v. Cherokee County Appraisal Dist.*, 862 S.W.2d 581, 586 (Tex. 1993); *Cleveland v. Ward*, 116 Tex. 1, 285 S.W. 1063, 1070-71 (1926).

This Court interprets and construes the sections of the Constitution defining the jurisdiction of the various Texas courts to harmonize them so that each court, whether trial or appellate, shall be permitted to exercise the power conferred upon it without conflict with the authority confided to another tribunal. *Morrow v. Corbin*, 62 S.W.2d at 645. This Court does not have general supervisory power over the courts of appeals. *City of Deer Park v. State*, 154 Tex. 174, 275 S.W.2d 77, 84 (1955). It exercises only two classes of jurisdiction over cases in the courts of Texas - original and appellate.[6] *Morrow v. Corbin*, 62 S.W.2d at 646. The Legislature cannot confer on this Court judicial power not authorized by the Constitution. *Id.*

The Legislature may confer certain additional powers on courts or judges that are not strictly judicial. *Brown v. Wheelock*, 75 Tex. 385, 12 S.W. 111, 112 (1889); *see also Nalle v. City of Austin*, 101 Tex. 48, 104 S.W. 1050, 1053 (1907). In § 73.001, the Legislature has conferred a separate administrative power on this Court because the power to transfer appeals is neither an appeal under Tex. Gov't Code Ann. § 22.001 nor an original proceeding under Tex. Gov't Code Ann. § 22.002. Black's Law Dictionary defines the term "administrative" as follows:

> Connotes of or pertains to administration, especially management, as by managing or conducting, directing, or superintending, the execution, application or conduct of persons or things. . . . Particularly, having the character of executive or ministerial action. . . . *In this sense, administrative functions or acts are distinguished from such as are judicial. . . .*

Black's Law Dictionary, 42 (5th ed., 1979) (citations omitted, emphasis added). Texas authority also distinguishes administrative authority from judicial authority. Administrative actions do not and cannot replace judicial actions in matters that are inherently judicial in nature. *Foree v. Crown*

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[6] The Texas Constitution article V, § 3-c also provides the Court with jurisdiction to answer certified questions from federal appellate courts. *Humana Hospital Corp. v. American Medical Systems*, 785 S.W.2d 144, 145 (Tex. 1990).

Central Petroleum Corp., 431 S.W.2d 312, 316 (Tex. 1968); *City of El Paso v. El Paso City Lines*, 227 S.W.2d 278, 285 (Tex. Civ. App.- El Paso 1949, writ ref'd n.r.e.); *Mauritz v. Schwind*, 101 S.W.2d 1085, 1090 (Tex. Civ. App. - Amarillo 1937, writ dism'd.)

This is not a situation involving undisputed facts regarding the workload of a court of appeals or some other impediment factually established at the court of appeals. In this administrative proceeding, Ford instead asks this Court to decide questions of fact and mixed questions of fact, law and mixed questions of fact and law -- i.e., whether the Miles family's appeal is a "sham"; whether Ford's appeal is "primary"; and whether the Twelfth Court of Appeals is already familiar with the issues on appeal and the record pertinent to them. This Court, however, has no jurisdiction to make fact findings except as may be necessary to determine its own jurisdiction. *Chicago, R.I. & G. Ry. Co. v. Harris*, 119 Tex. 65, 24 S.W.2d 385 (1930); *Depoyster v. Baker*, 89 Tex. 155, 34 S.W. 106, 108 (1896); Tex. Const. art. V, § 3. Therefore, it cannot make the factual determinations required by Ford's request. While the Legislature may have the authority to grant *administrative* power to this Court, it could not thereby expand this Court's *judicial* power so as to interfere with the jurisdiction confided to other courts. *See Morrow v. Corbin* 62 S.W.2d at 646-47. Furthermore, this Court will not assume "implied" or "inherent" jurisdiction that would intrude into another court's express jurisdiction. *See Eichelberger v. Eichelberger*, 582 S.W.2d at 399-400; *Pope v. Ferguson*, 445 S.W.2d 950, 952-54 (Tex. 1969).

This Court's determination of a dominant jurisdiction issue in an administrative proceeding in lieu of the courts of appeals' addressing the issue in the pending proceedings would also deprive the parties of their procedural rights in the judicial process. The rules provide appropriate procedures at both the trial court and court of appeals levels to address the dominant jurisdiction

issue. For example, each party can supplement the appellate record with affidavits to permit a court of appeals to ascertain facts necessary to the proper exercise of its jurisdiction. Tex. Gov't Code Ann. § 22.220(c) (Vernon 1988); *Jones v. Griege*, 803 S.W.2d 486, 488 (Tex. App. - Dallas 1991, no writ). In contrast, there are no rules or procedures for the litigants to access the Court's administrative process to litigate a dominant jurisdiction issue or Ford's contentions. To use this Court's administrative process as sought by Ford smacks of a star chamber proceeding.[7] There are no published rules or procedures to guide the Miles family. There are no accessible court decisions to provide precedent that would define the issues or ensure consistency of decisions. There are no provisions for evidentiary presentations to defend one's position. There is no provision to ensure knowledge of what matters have been presented to the Court. There is no provision for opinions to explain the grounds for any decision by the Court. Therefore, the use of the administrative process to resolve such issues would also deprive the litigants of their procedural rights. For these reasons, if § 73.001 were interpreted to allow this Court to administratively decide cases within the judicial jurisdiction of the courts of appeals, it would be unconstitutional.

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[7] Furthermore, what would be the effect of this Court determining in this administrative matter, that the Miles family's appeal was a "sham"? Would that ruling be the law of the case? If not and the court of appeals should rule for the Miles family on their points of error, how could the appeal be a "sham"? The courts of appeals already has authority to penalize an appellant for bringing a "sham" appeal. Tex. R. App. P. 84. The court of appeals makes such a determination as part of the determination of the appeal on the merits and includes it in its judgment. Ford asks this Court to disregard that procedure also in its rush to get out of the Sixth Court of Appeals.

V. Justice And Sound Public Policy Favor Denial of Ford's Request.

Even though § 73.001 does not replace the dominant jurisdiction rule, Ford would nonetheless invite this Court to exercise its discretionary authority to reward Ford for intentionally creating a conflict of jurisdiction between the courts of appeals by transferring the Miles family's appeal to Ford's choice of courts of appeals, the Twelfth Court of Appeals. The Court should decline the invitation.

1. No Administrative Grounds to Transfer Are Shown.

There is no evidence that the Sixth Court of Appeals is overburdened with cases so that some of its cases should be transferred to the Twelfth Court of Appeals. Nor is there any evidence of any other impediment to the Sixth Court of Appeals disposing of the entire appeal in an expeditious manner.

2. Ford's "Primacy" Argument Is Without Factual or Legal Basis.

Ford claims that it should be able to dictate the choice of appellate courts because its appeal is "primary" and the Miles family's appeal is only "derivative."[8] A similar legal contention that a party filing a second appeal was entitled to select the mode and court to hear its assignments of error by the trial court was directly presented to this Court in *Ward v. Scarborough*. Ward contended that the dismissal by Fort Worth Court of Civil Appeals of his appeal under the dominant jurisdiction rule denied him his rights under the Constitution and statutes to appeal by writ of error, particularly because the Scarboroughs had not included a statement of facts in the appellate record for their

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[8] As previously noted, the determination of which appeal is "primary" requires factual determinations. This Court has no jurisdiction to make fact findings except those necessary to determining its own jurisdiction. *See Chicago, R.I. & G. Ry. Co. v. Harris*, 24 S.W.2d at 385; Tex. Const. art. V, §3.

appeal, which was decided by the El Paso Court of Civil Appeals. 236 S.W. at 444. The Commission of Appeals rejected such arguments. It first noted that Ward's right to file cross-assignments of error immediately attached when the Scarboroughs perfected their appeal and that Ward had the right to perfect the record to show facts essential to his assignments of error. *Id.* The Commission then held:

> The right of the Scarboroughs and Ward, respectively, to select the proceeding by which the case should be carried to the Court of Civil Appeals for review was *equal.* Either had the right to invoke the speedier process of appeal, and, when so invoked, the other had no right to complain . . . . Their rights being equal, *priority in making the election and acting thereon should prevail.*

236 S.W. at 444 (emphasis added).

This principle is neutral, favoring neither plaintiff nor defendant, is easy to apply and is applicable to any type of lawsuit. The Legislature gave the Miles family, as the first party to act, the right to appeal to either the Sixth or Twelfth Court of Appeals. Tex. Gov't Code Ann. § 22.201 (g) and (m). Ford, however, desperately desires for the appeal in the underlying case not to be decided by the Sixth Court of Appeals. Therefore it rejects or fictionalizes the principle enunciated in *Ward v. Scarborough* that parties have equal rights of access to the appellate process. It claims that defendants who have had large judgments rendered against them are entitled to more rights in the appellate courts, than are plaintiffs. Ford cites no case recognizing one party's appeal to be "primary" to another party's appeal. *Ward v. Scarborough* gave that "priority" to the party that acted first. 236 S.W. at 444. In reality Ford proposes in place of the bright line rule of dominant jurisdiction to substitute an ad hoc determination in each case with no manageable factual or legal basis upon which the litigants or the courts could determine or predict which appeal was "primary." Not only is such a result manifestly unjust to the Miles family for diligently protecting the right

created and given to them by the Legislature to select the Sixth Court of Appeals, such a decision would be completely unmanageable from a public policy standpoint.

3. Ford's "Primacy" Appellate Test Would Encourage A Multiplicity of Appeals To Create Administrative Transfer.

Both the dominant jurisdiction rule and the principle that the parties' appellate rights are equal so that priority in making an election and acting thereon should prevail, discourage attempts to create conflicts of jurisdiction. Because nothing is gained by attempting to appeal to a different court of appeals, appellees have no incentive to attempt to create a conflict. In contrast, Ford's proposal would encourage the intentional filing of conflicting appeals, exactly as Ford has done, if the appellee preferred a different potential appellate forum. It would also abrogate the dominant jurisdiction rule for courts of appeals if this Court used its transfer power to allow appellees to dictate which court would hear appeals. This Court addressed such a position in a trial court context while applying the dominant jurisdiction rule in *Wyatt v. Shaw Plumbing Co.* "As long as the forum is a proper one, it is the plaintiff's privilege to choose the forum. . . . Defendants are simply not at liberty to decline to do battle in the forum chosen by the plaintiff." *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988) (citation omitted). The Court should apply the same principle to appeals.

4. Ford's "Primacy" Appellate Test Would Dramatically Increase The Workload Of This Court.

The first-in-time principle does not require this Court's involvement unless the courts below refuse to follow it. In contrast, Ford's proposal that this Court use its administrative power to transfer cases at the appellee's request adds an additional burden to this Court's workload. It is not even clear that such requests would necessarily be limited to appellees filing second appeals. The

dominant jurisdiction rule makes the second appeal superfluous; therefore, it should not trigger an administrative transfer. Thus, the existence of a second appeal is extraneous to Ford's claim that an appellee with the "primary" appeal is entitled to select the court that should hear the appeal. Therefore, every appellee from counties with overlapping court of appeals districts could immediately file requests for transfer. The Court would be burdened with an additional and unnecessary administrative workload.

5. Ford's "Primacy" Appellate Test Has No Viable Criteria For Implementation.

Excluding time in exercising appellate rights, there is no reliable method of establishing general criteria to determine which party has the "primary" appeal for all types of cases.[9] For example, what criteria would be used to determine who had the "primary" appeal in *Ward v. Scarborough*? In fact, Ford's suggestion is not even reasonable in the underlying case. The Miles family obtained a take-nothing judgment against Doug Stanley, the dealer. If, as the Miles family contends, that judgment was erroneous, their damage claims against Doug Stanley should be as large as their damage claims against Ford. Neither the possibility that the Miles family's possible future judgment against Doug Stanley might be joint and several nor the possibility that Doug Stanley might have a statutory right of indemnification against Ford is an issue in the appeal and does not make the Miles family's appeal "derivative" of Ford's appeal. There is no guarantee that Ford will not go bankrupt during the pendency of the lawsuit.[10] Further, Ford contended in the trial court that

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[9] Under Ford's brave new system, this Court would have to review the entire record and the briefs of the parties to effectively determine which appeal of the parties would be "primary." Otherwise, the Court would be relying merely on the parties' characterizations of their own appeals and the opposing parties appeals.

[10]In 1979 Chrysler Corporation, the third largest automobile manufacturer in the United States, had to seek relief rom the United States Government because of its impending

all Plaintiffs' claims against it are federally preempted by the National Traffic and Motor Vehicle Safety Act ("Safety Act"). Federal law could preempt a suit against Ford but certainly could not against Doug Stanley the dealer. In no respect can the Miles family's appeal against Doug Stanley be said to be "derivative" of Ford's appeal. Because Doug Stanley did not join Ford's appeal, the Miles family had to perfect its own appeal in order to present its assignments of error concerning Doug Stanley. In contrast, Ford's appeal could be said to be "derivative" of the Miles family's appeal procedurally because it did not have to appeal to raise its assignments of error. *Donwerth v. Preston II Chrysler - Dodge*, 775 S.W.2d, at 639; *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d, at 446.

6. Ford's "Primacy" Test Would Effectively Abolish Or Ignore Section 22.201(g) and (m) of the Government Code.

The adoption of such a rule would effectively destroy the very option created by the Legislature in Tex. Gov't Code § 22.201(g) &(m). If such a rule were adopted, the appellant would *not* have the choice to appeal to either the Sixth or Twelfth Courts of Appeals because its choice could be immediately undone by an administrative, non-judicial "transfer" at the behest of the appellee.

7. No Judicial Economy Issue is Presented.

Ford also claims that the transfer of the Miles family's appeal to the Twelfth Court of Appeals would promote "judicial economy" because Ford had previously filed two mandamus proceedings in that court relating to the underlying case. Under Texas law, the prior mandamus

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insolvency. L. Iacocca, *Iacocca*, 192-251 (Bantam Books 1984). Ford might argue that the Miles family is protected by the supersedeas bond it has filed. That bond would not protect the Miles family if Ford should obtain a reversal. In such a situation, the Miles family's claims against Doug Stanley could be critical.

proceedings do not give the Twelfth Court of Appeals dominant jurisdiction over the appeals from the final judgment. *Avis Rent A Car System v. Advertising and Policy Committee*, 751 S.W.2d at 258. Neither do the prior mandamus proceedings afford any significant judicial economy in the resolution of the appeal. The first mandamus proceeding concerned whether Ford was entitled to a limit on the discovery requests made by the Miles family. The Twelfth Court of Appeals held it was entitled to certain limitations. *Ford Motor Co. v. Ross*, 888 S.W.2d 879 (Tex. App.--Tyler 1994, orig. proceeding). The district court thereafter complied with the directions of the court of appeals. The second mandamus proceeding concerned whether the claims of Franklin Knight, the natural father of the minor plaintiffs, Willie and Jermaine Searcy, could be severed or had to be resolved at the same time as the appellees' claims were. The Twelfth Court of Appeals held that Knight's claims could not be severed but had to be presented in the same trial. (A copy of the court's order is attached as Exhibit C.) Knight subsequently dismissed with prejudice all of his claims against Ford and Doug Stanley. None of these issues will be the subject of the appeal. In fact, they were not presented in Ford's Motion for New Trial. Indeed, for those matters to have been heard in the original proceedings, they had to be matters for which there was no effective remedy by appeal. Conversely, the evidence on the merits and the issues presented to the jury were not part of the prior mandamus proceedings. Ford has wholly failed to show that the transfer of the Miles family's appeal to the Twelfth Court of Appeals would result in any judicial economy in the court's review of the issues on appeal.

On the other hand, Ford's gamesmanship has actually increased the appellate proceedings, to include the preparation of multiple transcripts for different courts, the motion to dismiss in the Twelfth Court of Appeals, the motion to abate in the Sixth Court of Appeals, and these proceedings.

Moreover, to legitimately decide Ford's claims such as the Miles family's appeal being a "sham" or Ford's appeal being "primary," this Court would need to review the briefs on the merits and very possibly the portions of the appellate record pertinent to the issues in the briefs. Ford's proposed means of resolving conflicts of jurisdiction will not promote judicial economy, but rather the very opposite effect.

8. Ford Wants A Result Not a Rule of Law.

The gist of Ford's request is that this Court should supplant the established law and procedures to accommodate an appellee that wants to control which court of appeals will decide an appeal. Years ago this Court held that it is the duty of the courts to follow the rules of law in their true spirit rather than individual notions of abstract justice. *See Duncan v. Magette*, 25 Tex. 245, 253 (1860); *Humble Exploration Co. v. Browning*, 690 S.W.2d 321, 328 (Tex. App. - Dallas 1985, writ ref'd n.r.e.) (en banc), *cert. denied*, 475 U.S. 1065 (1986). The dominant jurisdiction rule and the principles pronounced in *Ward v. Scarborough* were adopted precisely to resolve situations such as this case. The Court should reject Ford's request to eviscerate the established law by using its administrative authority to "transfer" the Miles family's appeal according to Ford's dictates.

VI. Conclusion

Ford's request is a blatant attempt to "forum shop" appellate courts. A transfer of the underlying appeal, when there is no impediment to the Sixth Court of Appeals' timely resolution of the entire matter, would deny the Miles family its statutory right to select that court of appeals. In addition, it would also reward Ford for intentionally attempting to create a conflict of jurisdiction between courts of appeals by perfecting an unnecessary appeal. To exercise this Court's transfer

authority, which was intended to avoid impediments such as an overburden of work to a court of appeals' timely resolution of cases, for the sole purpose of benefiting one particular party would be contrary to the Constitution and established law, would be wholly unfair, and would create a precedent leading to an additional unnecessary burden on this Court.

Therefore, the Miles family respectfully requests that this Court deny Ford's request in all respects and grant the Miles family any relief to which the Court might deem them entitled.

Respectfully submitted,

LAW OFFICES OF
R. JACK AYRES, JR.

By: Thomas V Murto III
R. Jack Ayres, Jr.
State Bar No. 01473000
Thomas V. Murto III
State Bar No. 14740500
T. Randall Sandifer
State Bar No. 17619710

4350 Beltway Drive
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(214) 991-2222
(FAX) (214) 386-0091

LAW OFFICES OF
WELLBORN, HOUSTON, ADKISON, MANN, SADLER & HILL
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Henderson, Texas 75653-1109
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Telecopier (903) 657-6108

ATCHLEY, RUSSELL, WALDROP
& HLAVINKA, L. L. P.
John R. Mercy
State Bar No. 13947200
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P. O. Box 5517
Texarkana, Texas 75505-5517
(903) 792-8246
Telecopier (903) 792-5801

ATTORNEYS FOR
SUSAN RENAE MILES, ET AL.

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, on this day personally appeared Thomas V. Murto III, who, being first duly sworn, stated that he is one of the attorneys for the Miles family herein and that he has read the foregoing Response to Ford's Request for Transfer, that the factual statements made therein are within his personal knowledge and are true and correct and that the attached documents are true and correct copies of the documents they purport to be.

Thomas V Murto III
Thomas V. Murto III

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public, on this 12th day of May, 1995, to certify which witness my hand and seal of office.

Ann B. Willard
Notary Public, State of Texas

ANN B. WILLARD
MY COMMISSION EXPIRES
June 28, 1997

Notary's Name Printed or Typed

My commission expires:
June 28, 1997

CERTIFICATE OF SERVICE

I hereby certify that a true and correct photocopy of the foregoing motion has been served to the following counsel of record on this the 12th day of May, 1995.

Mr. Gregory D. Smith
Ramey & Flock, P.C.
500 First City Place
100 East Ferguson
Tyler, Texas 75710

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Richard Grainger
Grainger, Howard, Davis & Ace
605 South Broadway
Tyler, Texas 75710

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Thomas E. Fennell
Jones, Day, Reavis & Pogue
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Thomas V. Murto III
THOMAS V. MURTO III

c:\wp50\ap-miles\resp-rq3.sup(clp)

Court of Appeals

Sixth Appellate District
State of Texas

CLERK
TIBBY THOMAS

BI-STATE JUSTICE BUILDING
100 NORTH STATE LINE AVENUE #20
TEXARKANA, TEXAS 75502-5952
903/798-3046

May 9, 1995

Hon. John R. Mercy
Atchley,Russell,Waldrop
P. O. Box 5517
Texarkana, TX 75505-5517

Hon. R. Jack Ayres, Jr.
Attorney at Law
4350 Beltway Drive
Dallas, TX 75244

Hon. J. Mark Mann
Attorney at Law
300 West Main Street
Henderson, TX 75652

Hon. Gregory D. Smith
Ramey & Flock
P. O. Box 629
Tyler, TX 75710

Hon. Daniel Clark
Clark,Brown,Morales
300 Monticello-Suite 700, L.B.8
Dallas, TX 75205-3440

Hon. Richard Grainger
Grainger,Howard,Davis,Ace
P. O. Box 491
Tyler, TX 75710

Hon. Thomas Fennell
Jones,Day,Reavis,Pogue
2001 Ross Avenue
Dallas, TX 75201

Hon. Joe Shumate
Shumate & Dean
210 N. Main
Henderson, TX 75653

RE: Court of Appeals Number: 06-95-00026-CV
Trial Court Case Number: 94-143

Style: Susan Renae Miles, Individually and As Next Friend of Willie Searcy and Jermaine Searcy, Minors, and Kenneth Miles
v. Ford Motor Company and Douglas Stanley, Jr., d/b/a Doug Stanley Ford

The Court entered its order this date in the referenced proceeding whereby Appellants' Motion to Reconsider Order of Abatement was **DENIED.**

Respectfully yours,

Tibby Thomas, Clerk

By Lynda Poore
Deputy

EXHIBIT A

CAUSE NO. 94-143

SUSAN RENAE MILES, INDIVIDUALLY AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS AND KENNETH MILES	§	IN THE DISTRICT COURT AND
V.	§	RUSK COUNTY, TEXAS
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY FORD	§	4TH JUDICIAL DISTRICT

ORDER DENYING FORD MOTOR COMPANY'S
MOTION FOR NEW TRIAL OR,
ALTERNATIVELY, TO MODIFY,
CORRECT OR REFORM THE COURT'S JUDGMENT

On the 3rd day of May, 1995, the Court considered Ford Motor Company's Motion for New Trial or, Alternatively, to Modify, Correct or Reform the Court's Judgment in the above-entitled and numbered cause. The motion was duly presented to the Court, and the Court is of the opinion that the Motion should be denied.

IT IS, THEREFORE, ORDERED that Ford Motor Company's Motion for New Trial or, Alternatively, to Modify, Correct or Reform the Court's Judgment in this cause be denied.

SIGNED THIS 3rd DAY OF MAY, 1995.

Donald R. Ross

DONALD R. ROSS, Judge Presiding
4TH JUDICIAL DISTRICT COURT
RUSK COUNTY, TEXAS

EXHIBIT B

CAUSE NO. 12-95-00021-CV

IN THE COURT OF APPEALS

FOR THE TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

FORD MOTOR COMPANY & DOUGLAS STANLEY, JR.	}	
VS.	}	ORIGINAL PROCEEDING
HON. DONALD R. ROSS, JUDGE	}	

ORDER

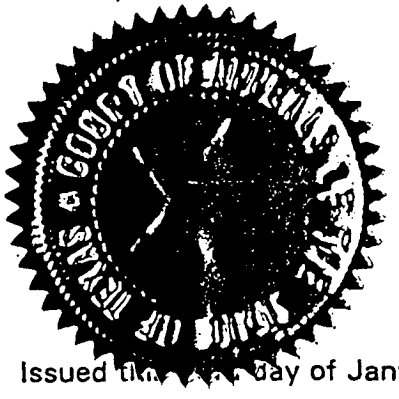
On this 23rd day of January 1995, came on to be heard Relator's Application for Emergency Relief, and the same having been considered, it is **ORDERED** that said application be, and hereby is, **denied.**

Relator's Motion For Leave To File Petition for Writ of Mandamus filed herein on January 20, 1995, having been duly considered, it is **ORDERED** that said motion be and the same is hereby **GRANTED**, and the Petition For Writ of Mandamus is hereby set for hearing on the 23rd day of January, 1995, at 2:00 o'clock p.m., in the courtroom of the Court in Tyler, Texas.

WITNESS the HONORABLE TOM B. RAMEY, JR., Chief Justice of the Court of Appeals, 12th Court of Appeals District of Texas, at Tyler.

EXHIBIT C

GIVEN UNDER MY HAND AND SEAL OF SAID COURT, at my office this 23rd day of January, A. D., 1995.



CAROLYN ALLEN, CLERK
12th Court of Appeals

Katrina McClenny
By: Katrina McClenny, Chief Deputy

Issued this [illegible] day of January, 1995.

CAROLYN ALLEN, CLERK
12th Court of Appeals

Katrina McClenny
By: Katrina McClenny, Chief Deputy

CAUSE NO. 12-95-00021-CV

IN THE COURT OF APPEALS

FOR THE TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

FORD MOTOR COMPANY & DOUGLAS STANLEY, JR.	}	
VS.	}	ORIGINAL PROCEEDING
HON. DONALD R. ROSS, JUDGE	}	

ORDER

ON THIS DAY came on to be heard the petition for writ of mandamus filed by FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., D/B/A DOUG STANLEY FORD, who are defendants in Cause No. 94-143, styled SUSAN RENAE MILES, INDIVIDUALLY AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS AND KENNETH MILES V. FORD MOTOR COMPANY, AND DOUGLAS STANLEY, JR. D/B/A DOUG STANLEY FORD, pending on the docket of the 4th Judicial District Court of Rusk County, Texas. Said petition for writ of mandamus, having been filed herein by leave of this Court on January 23, 1995, and the same having been duly considered together with oral argument, it is the opinion of this Court that the petition should be granted in part and denied in part.

IT IS THEREFORE CONSIDERED, ADJUDGED and ORDERED that the said petition for writ of mandamus be, and the same is hereby, granted as to Respondent's order of severance dated January 20, 1995, and that the trial court is hereby ORDERED to withdraw his ORDER SUSTAINING MOTION TO SEVER and reinstate Franklin Knight as a party. And because it is further the opinion of this Court that the trial judge will act promptly to vacate his order of

severance as directed by this Court before 10:00 a.m., January 24, 1995, no formal writ of mandamus will issue at this time.

IT IS FURTHER ADJUDGED, after considering Respondent's ORDER ON PRO SE INTERVENTION in accordance with the reasoning expressed in ***Byrd v. The Attorney General of Texas, Crime Victims Compensation Division***, 877 S.W.2d 566, 569 (Tex. App. - Beaumont 1994, no writ), that Respondent did not abuse his discretion in denying Intervenor's request for a bench warrant; THEREFORE IT IS FURTHER ORDERED that Relator's petition for writ of mandamus insofar as it seeks relief from the trial court's ORDER ON PRO SE INTERVENTION is hereby denied upon the condition that Respondent, the Honorable Donald Ross, enable Intervenor Knight to develop and offer into evidence his claim herein, if any, by deposition, telephonic conference, affidavit or other effective means, before Relators commence their case in chief. ***See Byrd.***, p.569. And because it is further the opinion of this Court that the trial judge will act timely in complying with this Court's directive, no formal writ of mandamus will issue at this time.

IT IS FURTHER ORDERED that each party pay their own costs incurred by reason of this proceeding.

WITNESS the HONORABLE TOM B. RAMEY, JR., Chief Justice of the Court of Appeals, 12th Court of Appeals District of Texas, at Tyler.

GIVEN UNDER MY HAND AND SEAL OF SAID COURT, at my office this 23rd day of January, A. D., 1995.

CAROLYN ALLEN, CLERK
12th Court of Appeals

Katrina McClenny
By: Katrina McClenny, Chief Deputy

No. 95-9198

IN THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

In Re

NO. 12-95-00068-CV

IN THE COURT OF APPEALS FOR THE

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

Ford Motor Company,
Appellant,

v.

Susan Renae Miles, et al
Appellees.

&

NO. 06-95-00026-CV

IN THE COURT OF APPEALS FOR THE

SIXTH COURT OF APPEALS DISTRICT OF TEXAS

Susan Renae Miles, et al
Appellants,

v.

Ford Motor Company and Douglas Stanley, Jr.,
d/b/a Doug Stanley Ford,
Appellees.

RECORD EXCERPTS

Mike Hatchell
Greg Smith
RAMEY & FLOCK, P.C.
P.O. Box 629
Tyler, Texas 75710

Thomas E. Fennell
JONES, DAY, REAVIS & POGUE
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John M. Thomas
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FORD MOTOR COMPANY
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Dearborn, MI 48126

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Richard Grainger
GRAINGER, HOWARD, DAVIS & ACE
P.O. Box 491
Tyler, Texas 75710

ATTORNEYS FOR FORD MOTOR COMPANY
AND DOUGLAS STANLEY, JR.

INDEX

1. Ford's appeal bonds to the Twelfth Court of Appeals;
2. The Miles' appeal bonds to the Sixth Court of Appeals;
3. Docketing notices from the Sixth and Twelfth Courts of Appeals;
4. The Twelfth Court of Appeals' opinions and orders from the prior mandamus proceedings;
5. Ford's motion to abate the Miles' appeal;
6. The Sixth Court of Appeals' order on Ford's motion to abate;
7. The Miles' motion to dismiss Ford's appeal;
8. Ford's response to the motion to dismiss; and
9. Affidavit Authenticating Record Excerpts.

FILED

95 MAR 31 PM 4:44

LINDA J. SMITH, DIST CLK
RUSK COUNTY, TEXAS

NO. 94-143

SUSAN RENAE MILES, Individually and as Next Friend of WILLIE SEARCY, and JERMAINE SEARCY, Minors, and KENNETH MILES, Plaintiffs,	§	IN THE DISTRICT COURT BY _____ DEPUTY
v.	§	OF RUSK COUNTY, TEXAS
FORD MOTOR COMPANY and DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY, FORD, Defendants.	§	4th JUDICIAL DISTRICT

APPEAL BOND

On the 9th day of March, 1995, the plaintiffs, Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors, and Kenneth Miles, recovered judgment against Ford Motor Company, in the sum of $29,340,000.00 in actual damages, plus $10,000,000.00 in exemplary damages, plus $2,813,424.30 in pre-judgment interest, plus post-judgment interest at 10% per year, compounded annually, and all costs of court. Ford Motor Company desires to appeal from this judgment (and all collateral, subsidiary and underlying orders and trial rulings) to the Court of Appeals for the Twelfth Court of Appeals District of Texas, sitting at Tyler, Texas. Some, but by no means all, of the underlying orders that Ford desires to appeal include: (1) the order on Ford's motion to transfer venue, (2) the order to

supplement the venue record, (3) the decision to deny leave to join third parties, (4) the decision to deny Ford use of a critical sled test, and (5) the March 16 "Order Imposing Sanctions."

NOW, THEREFORE, we, Ford Motor Company, as principal, and Mike Hatchell and R. Brian Craft, as sureties, acknowledge ourselves bound to pay to the clerk of the court the sum of one thousand dollars, conditioned that Ford Motor Company shall prosecute its appeal with effect and shall pay all the costs which have accrued in the trial court and the cost of the statement of facts and transcript.

WITNESS our hands this the 29th day of March, 1995.

FORD MOTOR COMPANY

BY: _____

GREG SMITH--Attorney-in-Fact
Bar No. 18600600

P.O. Box 629
Tyler, Texas 75710
(903) 597-3301
Fax: (903) 597-2413

MIKE HATCHELL - Surety
Bar No. 09219000

P.O. Box 629
Tyler, Texas 75710
(903) 597-3301
Fax: (903) 597-2413

R. BRIAN CRAFT - Surety
Bar No. 04972020

P.O. Box 629
Tyler, Texas 75710
(903) 597-3301
Fax: (903) 597-2413

Approved:
Linda Smith
District Clerk
Rusk County, Texas

CERTIFICATE OF SERVICE

I certify that I forwarded a true copy of the above document, via the indicated means, on the 29th day of March, 1995, to the following persons:

Mr. R. Jack Ayres, Jr. (Certified Mail - RRR # P 373 113 011)
LAW OFFICES OF R. JACK AYRES, JR.
4350 Beltway Drive
Dallas, Texas 75244

Mr. J. Mark Mann (Certified Mail - RRR # P 373 113 012)
WELLBORN, HOUSTON, ADKISON, MANN,
SADLER & HILL
P.O. Box 1109
Henderson, Texas 75653-1109

Greg Smith

FILED
95 APR 26 PM 4:40
LINDA J. SMITH DIST CLK
RUSK COUNTY, TEXAS
BY _____ DEPUTY

NO. 94-143

SUSAN RENAE MILES, Individually and as Next Friend of WILLIE SEARCY, and JERMAINE SEARCY, Minors, and KENNETH MILES, Plaintiffs,	§	IN THE DISTRICT COURT
v.	§	OF RUSK COUNTY, TEXAS
FORD MOTOR COMPANY and DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY, FORD, Defendants.	§	4th JUDICIAL DISTRICT

AMENDED APPEAL BOND

On the 9th day of March, 1995, the plaintiffs, Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors, and Kenneth Miles, recovered judgment against Ford Motor Company, in the sum of $29,340,000.00 in actual damages, plus $10,000,000.00 in exemplary damages, plus $2,813,424.30 in pre-judgment interest, plus post-judgment interest at 10% per year, compounded annually, and all costs of court. Ford Motor Company desires to appeal from this judgment (and all collateral, subsidiary and underlying orders and trial rulings) to the Court of Appeals for the Twelfth Court of Appeals District of Texas, sitting at Tyler, Texas. Some, but by no means all, of the underlying orders that Ford desires to appeal include: (1) the order on Ford's motion to transfer venue, (2) the order to

supplement the venue record, (3) the decision to deny leave to join third parties, (4) the decision to deny Ford use of a critical sled test, and (5) the March 16 "Order Imposing Sanctions."

NOW, THEREFORE, we, Ford Motor Company, as principal, and Mike Hatchell and R. Brian Craft, as sureties, acknowledge ourselves bound to pay to the clerk of the court the sum of three thousand five hundred dollars, conditioned that Ford Motor Company shall prosecute its appeal with effect and shall pay all the costs that have accrued in the trial court and the cost of the statement of facts and transcript.

This amended bond is intended to fully satisfy not only the initial bond requirements of TEX. R. APP. P. 41, but to satisfy the additional $2,500 bond requirement of the District Court's April 11 Order, as well.

WITNESS our hands this the 26th day of April, 1995.

FORD MOTOR COMPANY

BY: _____

GREG SMITH--Attorney-in-Fact
Bar No. 18600600

P.O. Box 629
Tyler, Texas 75710
(903) 597-3301
Fax: (903) 597-2413

MIKE HATCHELL - Surety
Bar No. 09219000

P.O. Box 629
Tyler, Texas 75710
(903) 597-3301
Fax: (903) 597-2413

DONALD W. COTHERN - Surety
Bar No. 04858550

P.O. Box 629
Tyler, Texas 75710
(903) 597-3301
Fax: (903) 597-2413

Approved this 26 day of April, 1995.

Rusk County District Clerk

CERTIFICATE OF SERVICE

I certify that I forwarded a true copy of the above document, via the indicated means, on the 26th day of April, 1995, to the following persons:

Mr. R. Jack Ayres, Jr. (Certified Mail - RRR # P 373 113 047)
LAW OFFICES OF R. JACK AYRES, JR.
4350 Beltway Drive
Dallas, Texas 75244

Mr. J. Mark Mann (Certified Mail - RRR # P 373 113 048)
WELLBORN, HOUSTON, ADKISON, MANN,
SADLER & HILL
P.O. Box 1109
Henderson, Texas 75653-1109

Greg Smith

CAUSE NO. 94-143

SUSAN RENAE MILES, INDIVIDUALLY AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS AND KENNETH MILES	§	IN THE DISTRICT COURT
V.	§	RUSK COUNTY, TEXAS
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY FORD	§	4TH JUDICIAL DISTRICT

FILED
95 FEB 10 PM 2:25
DEPUTY

APPEAL BOND

Plaintiffs, Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors and Kenneth Miles, under the authority of Tex. R. P. 40 and 46, file this appeal bond.

1. This Court granted partial summary judgment in this case on January 30, 1995 on the consortium claims of Jermaine Searcy and Kenneth Miles in favor of the Defendants and against the Plaintiffs.

2. Plaintiffs desire to appeal from this partial judgment upon its becoming final to the Court of Appeals for the Sixth Court of Appeals District.

3. Plaintiffs, Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors, and Kenneth Miles, as principals, acknowledge that they are bound to pay the Clerk of the Court $1,000.00.

4. R. Jack Ayres, Jr., as surety, whose post office address is 4350 Beltway Drive, Dallas, Texas 75244 and J. Mark Mann, as surety, whose post office address is 300 West Main Street,

Henderson, Texas 75652, attorneys for Plaintiffs, each owns non-exempt property in the State of Texas of at least $1,000.00 and each acknowledge themselves abound to pay the Clerk of the Court $1,000.00.

5. This Bond is conditioned that Plaintiffs will prosecute the appeal with effect and will pay all costs which have accrued in the trial court and the costs of the statement of facts and transcript.

SIGNED THIS 10th DAY OF FEBRUARY, 1995.

Principals

Susan Renae Miles

Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors

Kenneth Miles

Kenneth Miles

SURETY NO. 1

R. Jack Ayres, Jr.

SURETY NO. 2

J. Mark Mann

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF RUSK §

On this day, Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors, appeared before me the undersigned notary public, and after I administer an oath to her, upon her oath she stated that the facts in this document are within her personal knowledge and are true and correct.

Susan Renae Miles
SUSAN RENAE MILES, Individually and as Next Friend for Willie Searcy and Jermaine Searcy

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Texas, on this 9th day of February, 1995, to certify which witness my hand and seal of office.

Connie G. Williams
Notary Public, State of Texas
June 28, 1997

My commission expires:
June 28, 1997

Notary's Name Printed or Typed

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF RUSK §

On this day, Kenneth Miles appeared before me the undersigned notary public, and after I administer an oath to him, upon his oath he stated that the facts in this document are within his personal knowledge and are true and correct.

Kenneth Miles
KENNETH MILES

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Texas, on this 9th day of February, 1995, to certify which witness my hand and seal of office.

Ann B. Willard
Notary Public, State of Texas

ANN B. WILLARD
MY COMMISSION EXPIRES
June 28, 1997

~~Notary's Name Printed or Typed~~

My commission expires:
June 28 1997

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF RUSK §

On this day, R. Jack Ayres, Jr., appeared before me the undersigned notary public, and after I administer an oath to him, upon his oath he stated that the facts in this document are within his personal knowledge and are true and correct.

R. JACK AYRES, JR.

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Texas, on this 9th day of February, 1995, to certify which witness my hand and seal of office.

Notary Public, State of Texas

My commission expires:
April, 1996

Debbie Hawks
Notary's Name Printed or Typed

DEBBIE HAWKS
NOTARY PUBLIC
State of Texas
Comm. Exp. 04-20-96

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF RUSK §

On this day, J. Mark Mann, appeared before me the undersigned notary public, and after I administer an oath to him, upon his oath he stated that the facts in this document are within his personal knowledge and are true and correct.

J. MARK MANN

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Texas, on this 10th day of February, 1995, to certify which witness my hand and seal of office.

Notary Public, State of Texas

My commission expires:

8-3-96

Kim Isenhour
Notary's Name Printed or Typed

KIM ISENHOUR
Notary Public State of Texas
Comm. Exp. 8-3-96

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appeal Bond by Attorneys has been forwarded to the following counsel of record on this the 10th of February, 1995.

Richard Grainger
605 South Broadway
P. O. Box 491
Tyler, Texas 75710

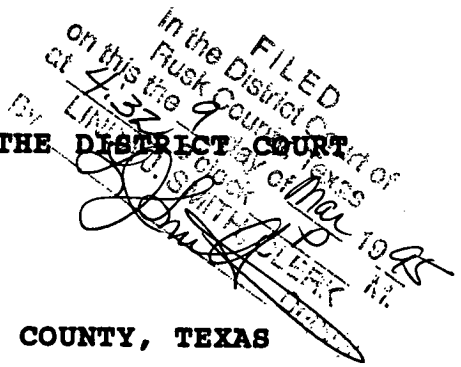
VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Thomas E. Fennell
Jones, Day, Reavis & Pogue
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

J. Mark Mann

CAUSE NO. 94-143



SUSAN RENAE MILES, INDIVIDUALLY AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS AND KENNETH MILES	§	IN THE DISTRICT COURT
V.	§	RUSK COUNTY, TEXAS
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY FORD	§	4TH JUDICIAL DISTRICT

AMENDED APPEAL BOND

Plaintiffs, Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors and Kenneth Miles, under the authority of Tex. R. P. 40 and 46, file this appeal bond.

1. This Court signed the judgment in this case on March 9, 1995.

2. Plaintiffs desire to appeal from the judgment to the Court of Appeals for the Sixth Court of Appeals District.

3. Plaintiffs, Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors, and Kenneth Miles, as principals, acknowledge that they are bound to pay the Clerk of the Court $1,000.00.

4. R. Jack Ayres, Jr., as surety, whose post office address is 4350 Beltway Drive, Dallas, Texas 75244 and J. Mark Mann, as surety, whose post office address is 300 West Main Street, Henderson, Texas 75652, attorneys for Plaintiffs, each owns non-exempt property in the State of Texas having a value of at least

$1,000.00 and each acknowledge themselves bound to pay the Clerk of the Court $1,000.00.

5. This Bond is conditioned that Plaintiffs will prosecute the appeal with effect and will pay all costs which have accrued in the trial court and the costs of the statement of facts and transcript.

SIGNED THIS 9th DAY OF MARCH, 1995.

Principals

Susan Renae Miles

Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors

Kenneth Miles

Kenneth Miles

SURETY NO. 1

R. Jack Ayres, Jr.

SURETY NO. 2

J. Mark Mann

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF RUSK §

On this day, Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors, appeared before me the undersigned notary public, and after I administer an oath to her, upon her oath she stated that the facts in this document are within her personal knowledge and are true and correct.

Susan Renae Miles
SUSAN RENAE MILES, Individually and as Next Friend for Willie Searcy and Jermaine Searcy

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Texas, on this 7th day of March, 1995, to certify which witness my hand and seal of office.

Ann B Willard
Notary Public, State of Texas

ANN B. WILLARD
MY COMMISSION EXPIRES
June 28, 1997

Notary's Name Printed or Typed

My commission expires:
6-28-97

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF RUSK §

On this day, Kenneth Miles appeared before me the undersigned notary public, and after I administer an oath to him, upon his oath he stated that the facts in this document are within his personal knowledge and are true and correct.

Kenneth Miles
KENNETH MILES

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Texas, on this 14th day of March, 1995, to certify which witness my hand and seal of office.

Ann B. Willard
Notary Public, State of Texas

ANN B. WILLARD
MY COMMISSION EXPIRES
June 28, 1997

Notary's Name Printed or Typed

My commission expires:
June 28, 1997

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF RUSK §

On this day, R. Jack Ayres, Jr., appeared before me the undersigned notary public, and after I administer an oath to him, upon his oath he stated that the facts in this document are within his personal knowledge and are true and correct.

R. JACK AYRES, JR.

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Texas, on this 9th day of March, 1995, to certify which witness my hand and seal of office.

Notary Public, State of Texas

My commission expires:

8-3-96

Kim Isenhour
Notary's Name Printed or Typed

KIM ISENHOUR
Notary Public State of Texas
Comm. Exp. 8-3-96

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF RUSK §

On this day, J. Mark Mann, appeared before me the undersigned notary public, and after I administer an oath to him, upon his oath he stated that the facts in this document are within his personal knowledge and are true and correct.

J. MARK MANN

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Texas, on this 9th day of March, 1995, to certify which witness my hand and seal of office.

Notary Public, State of Texas

My commission expires:

8-3-96

Kim Isenhour
Notary's Name Printed or Typed

KIM ISENHOUR
Notary Public State of Texas
Comm. Exp. 8-3-96

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Appeal Bond by Attorneys has been forwarded by hand delivery to the following counsel of record on this the 9th of March, 1995.

Richard Grainger
605 South Broadway
P. O. Box 491
Tyler, Texas 75710

Mr. Thomas E. Fennell
Jones, Day, Reavis & Pogue
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201

T. RANDALL SANDIFER

CAUSE NO. 94-143

SUSAN RENAE MILES, INDIVIDUALLY AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS AND KENNETH MILES	§	IN THE DISTRICT COURT AND
V.	§	RUSK COUNTY, TEXAS
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY FORD	§	4TH JUDICIAL DISTRICT

ADDITIONAL COST BOND

Plaintiffs, Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors and Kenneth Miles, file this additional cost bond.

1. Plaintiffs filed an Amended Appeal Bond to appeal the judgment in this case on March 9, 1995.

2. On April 11, 1995 the court ordered Plaintiffs to file an Additional Cost Bond in the amount of $2,500.00 on or before April 25, 1995.

3. Plaintiffs, Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors, and Kenneth Miles, as principals, acknowledge that they are bound to pay the Clerk of the Court an additional $2,500.00.

4. R. Jack Ayres, Jr., as surety, whose post office address is 4350 Beltway Drive, Dallas, Texas 75244 and J. Mark Mann, as surety, whose post office address is 300 West Main Street, Henderson, Texas 75652, attorneys for Plaintiffs, each owns non-exempt property in the State of

Texas having a value of at least $3,500.00 and each acknowledge themselves bound to pay the Clerk of the Court an additional $2,500.00.

5. This Bond is conditioned that Plaintiffs will prosecute the appeal with effect and will pay all costs which have accrued in the trial court and the costs of the statement of facts and transcript.

SIGNED THIS 21st DAY OF APRIL, 1995.

Principals

Susan Renae Miles, Individually
and as Next Friend of Willie
Searcy and Jermaine Searcy,
Minors

Kenneth Miles

SURETY NO. 1

R. Jack Ayres, Jr.

SURETY NO. 2

J. Mark Mann

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF DALLAS §

On this day, Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors, appeared before me the undersigned notary public, and after I administer an oath to her, upon her oath she stated that the facts in this document are within her personal knowledge and are true and correct.

Susan R. Miles

SUSAN RENAE MILES, Individually
and as Next Friend for Willie
Searcy and Jermaine Searcy

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Texas, on this 21 day of April, 1995, to certify which witness my hand and seal of office.

Ann B. Willard

Notary Public, State of Texas

ANN B. WILLARD
MY COMMISSION EXPIRES
June 28, 1997

Notary's Name Printed or Typed

My commission expires:

June 28, 1997

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF DALLAS §

On this day, Kenneth Miles appeared before me the undersigned notary public, and after I administer an oath to him, upon his oath he stated that the facts in this document are within his personal knowledge and are true and correct.

Kenneth Miles
KENNETH MILES

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Texas, on this 21 day of April, 1995, to certify which witness my hand and seal of office.

Ann B Willard
Notary Public, State of Texas

ANN B. WILLARD
MY COMMISSION EXPIRES
June 28, 1997

Notary's Name Printed or Typed

My commission expires:
June 28 1997

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF DALLAS §

On this day, R. Jack Ayres, Jr., appeared before me the undersigned notary public, and after I administer an oath to him, upon his oath he stated that the facts in this document are within his personal knowledge and are true and correct.

R. JACK AYRES, JR.

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Texas, on this 21st day of April, 1995, to certify which witness my hand and seal of office.

Notary Public, State of Texas

My commission expires:

April 1996

Debbie Hawks
Notary's Name Printed or Typed

DEBBIE HAWKS
NOTARY PUBLIC
State of Texas
Comm Exp. 04-26-96

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF RUSK §

On this day, J. Mark Mann, appeared before me the undersigned notary public, and after I administer an oath to him, upon his oath he stated that the facts in this document are within his personal knowledge and are true and correct.

J. MARK MANN

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Texas, on this 24th day of April, 1995, to certify which witness my hand and seal of office.

Notary Public, State of Texas

My commission expires:

09/09/97

MARY ANN WARD
Notary's Name Printed or Typed

MARY ANN WARD
Notary Public State of Texas
Comm. Exp. 9-9-97

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Additional Cost Bond by Attorneys has been forwarded by certified mail to the following counsel of record on this the 24th of April, 1995.

Mr. Gregory D. Smith
Ramey & Flock, P.C.
500 First City Place
100 East Ferguson
Tyler, Texas 75710

Mr. Richard Grainger
605 South Broadway
P. O. Box 491
Tyler, Texas 75710

Mr. Thomas E. Fennell
Jones, Day, Reavis & Pogue
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201

J. MARK MANN

RECEIVED APR 0 7 1995

Court of Appeals
Sixth Appellate District
State of Texas

CLERK
TIBBY THOMAS

BI-STATE JUSTICE BUILDING
100 NORTH STATE LINE AVENUE #20
TEXARKANA, TEXAS 75502-5952
903/798-3046

April 5, 1995

Hon. John R. Mercy
Atchley,Russell,Waldrop
P. O. Box 5517
Texarkana, TX 75505-5517

Hon. R. Jack Ayres, Jr.
Attorney at Law
4350 Beltway Drive
Dallas, TX 75244

Hon. J. Mark Mann
Attorney at Law
300 West Main Street
Henderson, TX 75652

Hon. Gregory D. Smith
Ramey & Flock
P. O. Box 629
Tyler, TX 75710

Hon. Daniel Clark
Clark,Brown,Morales
300 Monticello-Suite 700, L.B.8
Dallas, TX 75205-3440

Hon. Richard Grainger
Grainger,Howard,Davis,Ace
P. O. Box 491
Tyler, TX 75710

Hon. Thomas Fennell
Jones,Day,Reavis,Pogue
2001 Ross Avenue
Dallas, TX 75201

Hon. Joe Shumate
Shumate & Dean
210 N. Main
Henderson, TX 75653

RE: Court of Appeals Number: 06-95-00026-CV
Trial Court Case Number: 94-143

Style: Susan Renae Miles, Et Al v. Ford Motor Company, Et Al

The certified transcript, in twenty-five volumes, has this day been received, filed and docketed in this court as shown above.

The authenticated statement of facts, in nineteen volumes, has this day been filed.

PLEASE TAKE DUE NOTICE OF THE ATTACHED DIRECTIVES.

Respectfully yours,

Tibby Thomas, Clerk

By Lynda Poore
Deputy

Court of Appeals

Twelfth Court of Appeals District

1517 WEST FRONT STREET
SUITE 354
TYLER, TEXAS 75702

TELEPHONE
(903) 593-8471

April 18, 1995

Hon. Mike Hatchell
The Ramey Firm
500 First City Place
P. O. Box 629
Tyler, TX 75710

Hon Gregory D Smith
The Ramey Firm
500 First City Place
P. O. Box 629
Tyler, TX 75710

Hon. Mark Mann
Wellborn, Houston, Adkison & Mann
P. O. Box 1109
Henderson, TX 75652

Hon. R. Jack Ayres, Jr.
4350 Beltway Drive
Dallas, TX 75244

Re: Court of Appeals Number: 12-95-00068-CV
Trial Court Case Number: 94-143
Ford Motor Company, et al v. Miles, Susan Renae, et al

Filing fee paid on April 12, 1995
25 volumes of transcript filed as of April 11, 1995
2 volumes of supplemental transcript filed as of April 11, 1995

Dear Counsel:

The filing fee in the above cause has been paid on April 12, 1995.

The twenty-five (25) volumes of transcript received on April 11, 1995, in the above cause -- as acknowledged on the notice from this Court dated April 11, 1995 -- has been filed as of April 11, 1995.

The two (2) volumes of supplemental transcript received on April 11, 1995, in the above cause -- as acknowledged on the notice from this Court dated April 11, 1995 -- has been filed as of April 11, 1995.

Respectfully,

T. Marshall
Deputy Clerk

TM/tm

MH V
GS J

ORDER

October 25, 1994

NO. 12-94-00239-CV

FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR.,
D/B/A
DOUG STANALEY FORD,
Relators
V.
HONORABLE DONALD ROSS, JUDGE OF THE 4TH JUDICIAL DISTRICT COURT, RUSK, COUNTY,
Respondent

ORIGINAL PROCEEDING

On this day came on to be heard the application for Writ of Mandamus filed by Ford Motor Company and Douglas Stanley, Jr., d/b/a Doug Stanley Ford. Said application for writ of mandamus having been filed herein by leave of Court on September 23, 1994, and the same having been duly considered, because it is the opinion of this Court that the petition is meritorious, it is therefore CONSIDERED, ADJUDGED AND ORDERED that the petition for writ of mandamus be, and the same is, conditionally **granted.**

And because it is further the opinion of this Court that the trial judge will act promptly and within 30 days herefrom will: 1) vacate his Third Pretrial Order to exclude Ford's privilege objections under request numbers 2, 14 and 24; (2) vacate his September 9th Order Approving First and Second Reports of Discovery Master to the extent that the order holds that Ford has waived its privileges as to request numbers 2, 14 and 24, (3) vacate his Sixth Pretrial Order in its entirety, and in its stead, will enter a new order which comports with the scope of discovery as defined in this Court's opinion of even date, the writ will not issue unless the Honorable Donald Ross Judge of the 4th Judicial District Court, Rusk County, Texas fails to comply with this Court's order within thirty (30) days from the date of this order.

It is further ORDERED that Susan Renea Miles acting individually and as next friend of Willie Searcy & Jermaine Searcy, and Kenneth Miles, real parties in interest, pay all costs incurred by reason of this proceeding.

By per curiam opinion.

MH ✓
GS ✓

NO. 12-94-00239-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., D/B/A DOUG STANLEY FORD, RELATORS	§	
V.	§	*ORIGINAL PROCEEDING*
HONORABLE DONALD ROSS, JUDGE OF THE 4TH JUDICIAL DISTRICT COURT, RUSK COUNTY, RESPONDENT	§	

PER CURIAM

I. INTRODUCTION

This original mandamus proceeding arises out of a discovery dispute in a products liability suit. In the underlying lawsuit, the real parties in interest Susan Renae Miles (acting individually and as Next Friend of Willie Searcy and Jermaine Searcy) and Kenneth Miles ("Plaintiffs") sued Relators Ford Motor Company and Douglas Stanley, Jr. d/b/a Douglas Stanley Ford (hereinafter collectively"Ford"), for personal injuries that Willie Searcy suffered when the 1988 Ford Ranger pickup in which he was a passenger collided with another vehicle. As a result of the accident, young Searcy was rendered a ventilator-dependent quadriplegic. The accident occurred in April of 1993, and suit was filed on

to compel discovery that they were prepared to file if Ford did not cooperate. Ultimately, Plaintiffs filed their motion to compel discovery on Thursday, June 9, 1994 and obtained a Tuesday, June 14th, setting on the motion. Plaintiffs' 16-page motion to compel discovery was not addressed to Ford's responses over all, but sought relief from various objections Ford had lodged to specific discovery requests.

At the hearing on the motion to compel, Plaintiffs argued at length about Ford's history of discovery abuse in other cases, and its ability to ambush unwitting plaintiffs through its use of evasive discovery tactics. In response, Ford's New York counsel acknowledged to the court that "Plaintiffs are entitled to legitimate discovery, and that in a complex design case like this, that discovery will in fact be quite voluminous and massive." When Respondent asked Ford's counsel how long it would take Ford to produce the requested documents to Plaintiffs in Dallas, Ford's counsel responded:

> There are some documents that have arrived today and can be available for Plaintiffs today, a relatively small volume [approximately 7 boxes]. Others are in process and on the way. We're talking about days for that kind of material.

Counsel argued, however, that Plaintiffs had requested "hundreds of thousands of pages of test material", and those documents would be best produced at Ford's headquarters in Dearborn, Michigan. Ford's counsel further stated: "[I]f they have to be copied, that would be a substantial task and would require at a minimum -- I believe it would require weeks." Ford's counsel explained to the trial court that gathering the documents was not a complex process, but it would take some time especially since the case was less than three months old. He further stated that Ford was going to honor its October trial date. Ford's counsel then explained in great detail how its Reading Room in Dearborn, Michigan worked. He explained that Ford had gone to great expense to create this central location for categorizing, logging and storing its discoverable documents, crash tests, reports, etc. Counsel further cited the court to several Texas cases where courts had approved Reading Rooms as an acceptable cite for the production of documents. Stating that on an average, litigants only had to spend two or three days in the Reading Room, counsel urged the Court to require Plaintiffs to use the Reading Room for discovery in this case too.

With regard to its privileged documents, Ford's counsel stated:

Respondents pronouncements were subsequently memorialized on June 17th in the court's Third Pretrial Order. Ford now seek relief from that order.

B. FORD'S ATTEMPTS TO COMPLY WITH THE THIRD PRETRIAL ORDER

Subsequently, On June 21, 1994, counsel for the parties met in Dallas to discuss the scope of discovery. Although Ford believed that some inroads had been made on limiting scope, Plaintiffs refused to enter into Ford's proposed Rule 11 agreement. Thus, on July 1, 1994, Ford filed a motion to reconsider or modify the trial court's Third Pretrial Order, and Plaintiffs filed a motion for a protective order and for sanctions against Ford. On July 6th, the trial court heard Plaintiffs' motion; the parties reached an agreement on certain target dates for the completion of depositions, and the trial court carried the sanctions issue forward. On July 8th, Ford produced approximately 700,000 pages of documents. According to Ford, these documents were the ones that were responsive to Plaintiffs' requests based on its representations to Ford at their June 21st meeting. Ford represents that it took 149 people working over 6,400 hours to produce these documents at a cost to Ford of $355,000.

In addition to producing these documents, on July 8th Ford also supplemented its responses to Plaintiffs interrogatories and production requests with additional objections, *many of which asserted the attorney-client and work-product privileges for the first time.* On July 14th, Respondent conducted a hearing on this motion, a motion for protection, and a motion for extension. In lieu of entertaining these motions, the trial court appointed a special master to mediate the discovery disputes. At that hearing, Respondent stated: "The court is hopefully trying to get over what the court sees as an on going stalemate with regard to discovery, without placing blame on either side, and get past that so that we can try this case on its merits under the existing schedule." Thereafter, on July 15, 1994, Respondent signed an agreed order appointing Judge Paul S. Colley as Discovery Master "to oversee and report to this Court about discovery disputes and to attempt to settle any and all discovery disputes that arise between the parties and/or to report to this Court his suggestions and findings to assist this Court in making final rulings on discovery in this case."

Ford's counsel stated that the Third Pretrial Order made no reference to privilege. He further explained that, in Ford's view, because Plaintiffs discovery requests were inappropriately over-broad and vague, Ford's duty to assert objections on the basis of privilege was never triggered. In support of its argument, Ford counsel cited ***Loftin v. Martin***, 776 S.W.2d 145 (Tex. 1989). Additionally, Ford argued that Plaintiffs could not now complain that Ford had waived its privileges because Plaintiffs' motion to compel asserted many specific bases for complaint *but did not point out that Ford had failed to claim privilege and had thereby waived it.* According to Ford, it was Plaintiffs duty to *point out* that Ford had waived its privileges by failing to assert them.

Without reaching any decisions on the waiver of privilege or scope of discovery issues, Colley set a formal hearing date on the motion for protective order and motion to reconsider, and stated that he would review the documents presented to him for an in camera inspection and then notify the parties of his decision.

Subsequently, on August 2, 1994, The master issued his first report which recommended that certain of the documents submitted to him for in camera inspection be segregated out from discovery on the basis that they were privileged. This order is not challenged in Ford' mandamus petition.

2. THE AUGUST 22ND HEARING AND RESULTING REPORT:

At the commencement of this formal hearing, it was agreed that three issues were to be resolved: (1) obtain a ruling on the Plaintiffs' motion to have Ford produce certain expert documents that it had failed to produce under previous discovery requests; (2) obtain a ruling on Ford's motion to reconsider the trial court's Third Pretrial Order, and (3) obtain resolution of the issue of privilege presented by Ford Motor Company.

a. Arguments on The Scope of Discovery: In support of its motion to reconsider, Ford then tendered to the discovery master a notebook containing exhibits in the form of affidavits, supporting documents, deposition excerpts, case authorities, key correspondence and charts. By way of an opening statement, Ford's counsel stated that the parties had exchanged a series of letters in which Plaintiffs had ultimately designated 11 categories of documents that they wanted. Ford contended that the parties had reached substantial agreement on these

FORD'S COUNSEL: Yes. Well, its in the order, Your Honor, that is, its effects are.

THE MASTER: Let's just assume something here just a minute. Let's assume that Ford stumped their toe and failed to present evidence, failed to support their objections, and it would be tantamount to waiver, but irregardless [sic] of that, what you're saying in innate fairness, constitutional protection, that the Court is to step in and narrow the scope based on what these circumstances are now, because of the great amount of cost that Ford's going to be out.

FORD'S COUNSEL: What I'm saying, Your Honor, is that the Court has, under Code 21, Section 001, the authority, of course, to modify its orders and to do so when it's demonstrated that it's just to do so.

The master then stated that the court also had authority to modify discovery when what had been ordered would not benefit the plaintiff. Plaintiffs' counsel then interrupted asserting that "The fact is, is that we all agree it's a seat belt tension eliminator case at this point. I mean, that's what the Court needs to know. And so, I think we can agree with that." Ford's counsel then directed the master's attention to an exhibit which listed examples of irrelevant materials that Ford would be required to produce under the court's Third Pretrial Order.

After examining the chart of irrelevant information included under the Third Pretrial Order, the master stated that he had reviewed the discovery requests and the responses and: "There are some over-broad things. But no objection – that's the part that needs to be done over again." Plaintiffs counsel, however, argued that some of the items on the chart that Ford had listed as irrelevant might actually be relevant to the case. These comments led Ford to present what it perceived as the heart of the stalemate: Plaintiffs wanted Ford to determine what documents were relevant to the litigation and produce only those; however, if Ford made such a determination, Plaintiffs might disagree and later argue that Ford has committed a discovery abuse by failing to produce a document which Ford classified as irrelevant but which Plaintiffs believe was relevant. At the conclusion of its argument, Ford referred the master to the affidavits of Mr. Hrynik, Mr. Gray and Mr. Mavis with regard to the future burden that would be imposed on Ford if the court's third pretrial order were

discovery requests were overly broad, and consequently Ford had no duty to assert its privileges. Ford cited several cases in support of its position, which will be considered below.

After hearing Ford's argument the master reached the heart of the motion to reconsider when he engaged Ford's counsel in the following colloquy:

THE MASTER: So the Court's going to be the one that makes the decision of what is appropriate or inappropriate, right?

FORD'S COUNSEL: That's true, yes.

THE MASTER: How do you give him the evidence which he can base that on?

FORD'S COUNSEL: Well, you present that at a hearing.

THE MASTER: You have to have an objection.

FORD'S COUNSEL: Right.

THE MASTER: You have to allege overbroad.

FORD'S COUNSEL: Right.

THE MASTER: And you've got to prove it.

FORD'S COUNSEL: That's right.

THE MASTER: *And if you don't do either, and the request itself is not sufficient to satisfy him it's overbroad, and he overrules your objection, where are you?*

FORD'S COUNSEL: *Well, I guess the situation we have is, what if down the road in attempting to comply with that order, the party has produced hundreds of thousands of documents, maybe a million documents, maybe more, it's then determined, well, let's go back and determine whether really the scope of discovery is appropriate. We're back to the issue of was it appropriate discovery to begin with, such that the party's initial duty to plead and prove privilege was triggered?*

THE MASTER: *And actually you don't have, as a matter of right, you don't have a right to do that. You have to file a motion to reconsider, and*

that should have been produced by Ford itself. The hearing was concluded without the discovery master having made any recommendations from the bench.

In the master's second report, he overruled all objections made to the exhibits tendered by either side and he excepted from this report, his findings and recommendations in his first report as well as all documents that Ford had already produced. Thereafter, he concluded that Ford had waived all privilege objections set forth in its initial responses to Plaintiffs interrogatories and requests for production by failing to support its objections to requests for production with evidence and by failing to tender documents for an in camera inspection. He further found that "[e]xcept for the objection that some of the requests and interrogatories were overly broad or ambiguous I have concluded that Ford has waived all of such objections as heretofore stated." The report then stated that some of the interrogatories and requests were overbroad or ambiguous, and he made recommendations for limiting the scope of each of those requests and interrogatories.[10] Finally, the report recommended that in the event Respondent prepared another order dealing with the Plaintiffs' interrogatories and production requests, the new order should "make clear to the parties that only documents, or other tangible things within the scope of discovery as fixed by the Texas Rules of Civil Procedure 166b 2 must be produced by Ford." Ford, thereafter, filed an objection to this report.

D. THE SEPTEMBER 6TH HEARING: PRONOUNCEMENT OF RESPONDENT'S SIXTH PRETRIAL ORDER

The portion of the September 6th proceeding in the record before us[11] commences with Respondent's hearing on Plaintiffs' third motion to compel and motion for sanctions. In hearing this motion, Respondent entertained a variety of Plaintiffs' complaints about

---

[10] The discovery master recommended limiting the scope of interrogatory numbers 6 and 11, and limiting the scope of request numbers 1, 2, 16, 17, 19, 23, 24, and 25. The limitations imposed included limiting these items to light trucks and passenger cars designed or manufactured during the years 1970 - 1993. Additionally, the term "occupant restraint" found in interrogatory no. 2 was limited to "occupant restraint protection", and request no.'s 8, 16 and 17 were clarified to refer to *active* restraints for occupant protection.

[11] Only that portion of the hearing that transpired after recess was provided to this Court in conjunction with this mandamus proceeding.

He then *briefly* entertained Ford's objections to the Discovery Master's second report, and promptly overruled Ford's objections and adopted both reports. Moreover, Respondent declined to further limit the scope of discovery.

On September 9, 1994, in addition to signing the Sixth Pretrial Order, Respondent also signed an order approving the discovery master's first and second reports. With the exception of the items listed in the discovery master's first report, this order required Ford to produce to Plaintiffs by 5:00 p.m. on Thursday, September 8th, all documents previously tendered to the discovery master for in camera inspection, and to produce all other documents by 5:00 p.m. on Friday, September 16, 1994.

III. Commencement of the Mandamus Proceeding

On Monday, September 12, 1994, Ford filed the instant mandamus proceeding, a motion for emergency relief, and a motion respecting sealed documents. By way of its petition, Ford sought relief from Respondent's Third Pretrial Order, Sixth Pretrial Order and Order Approving First and Second Reports of Special Master and Compelling Production of Documents. Due to the voluminous record presented in conjunction with Ford's motion for leave to file its petition for writ of mandamus, and the narrow time constraints of the orders at issue, this Court promptly stayed further discovery without first granting Ford's motion for leave to file.[12] Thereafter, on September 23, 1994, having reviewed the record and reached the tentative opinion that Ford was entitled to mandamus relief, this Court granted Ford's motion for leave to file its petition for writ of mandamus and set oral arguments for October 5, 1994.

IV. The Prerequisites for Issuance of a Writ of Mandamus

Mandamus is an extraordinary remedy, and it will lie only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no adequate remedy at law. ***Walker v. Packer***, 827 S.W.2d 833, 841 (Tex. 1992, orig. proceeding); ***Johnson v. Fourth Court of Appeals***, 700 S.W.2d 916, 917 (Tex. 1985). While mandamus is a legal remedy, it is controlled by equitable principles. ***Rivercenter Assoc. v. Rivera***, 858 S.W.2d 366,

[12] After unsuccessfully seeking to modify this Court's stay, Plaintiffs sought mandamus relief from this Court's order at the Texas Supreme Court. That court overruled Plaintiffs' motion for leave to file their Petition.

1. THE THIRD PRETRIAL ORDER ISSUED JUNE 17TH

Respondent issued the Third Pretrial Order as a result of the June 14th hearing. The purpose of that hearing was to entertain Plaintiffs complaints concerning specific objections lodged by Ford in its May 23rd responses to Plaintiffs' requests for production and interrogatories. That hearing, as well as the discovery requests and responses that gave rise to it, were governed by TEX R. CIV. P. 166b(4) which provides in relevant part:

> Either an objection or a motion for protective order made by a party to discovery shall preserve that objection without further support or action by the party unless the objection or motion is set for hearing and determined by the court. Any party may at any reasonable time request a hearing on any objection [note that "objection" is singular] or motion for protective order...In objecting to an appropriate discovery request within the scope of paragraph 2, a party seeking to exclude any matter from discovery on the basis of any exemption or immunity from discovery, must specifically plead the particular exemption or immunity from discovery relied upon ***and*** at or prior to any hearing shall produce any evidence necessary to support such claim either in the form of affidavits served at least seven days before the hearing or by testimony. If the trial court determines that an in camera inspection and review by the court of some or all of the requested discovery is necessary, the objecting party must segregate and produce the discovery to the court in a sealed wrapper or by answers made in camera to deposition questions, to be transcribed and sealed in event the objection is sustained. **When a party seeks to exclude documents from discovery and the basis for objection is undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights, rather than a specific immunity or exemption, it is not necessary for the court to conduct an inspection and review of the particular discovery before ruling on the objection.**[13] After the date on which answers are to be served, objections are waived unless an extension of time has been obtained by agreement or order of the court or good cause is shown for the failure to object within such period. (emphasis added).

a. Ford's Initial Discovery Responses: The first sentence of Rule 166b(4) requires that a party responding to discovery either make an objection or motion for protective order in order to preserve its objection to discovery requests. In responding to Plaintiffs' discovery, Ford chose to make certain objections. Except for request numbers 2, 24, and

[13] Note that while this sentence relieves the court of the duty to conducting an in camera inspection of documents or discovery for these types of objections, it does not relieve the court of the duty to receive evidence in support of these types of objections.

for more time, and requested that Respondent allow production to take place at its Reading Room in Dearborn, Michigan. Additionally, it offered to provide the court with a log of privileged documents for its in camera inspection the next day. In making this offer, however, Ford emphasized that it did not believe its privileges had been joined as an issue in the hearing.

At this hearing, Ford did not make clear to the court the extent of the burden Plaintiffs' discovery was imposing on Ford. When Respondent asked Ford's counsel how long it would take Ford to produce the requested documents to Plaintiffs in Dallas, Ford's counsel responded:

> There are some documents that have arrived today and can be available for Plaintiffs today, a relatively small volume [approximately 7 boxes] . Others are in process and on the way. We're talking about days for that kind of material.

Counsel argued, however, that Plaintiffs had requested "hundreds of thousands of pages of test material". "[I]f they have to be copied, that would be a substantial task and would require at a minimum -- I believe it would require weeks." Ford's counsel informed the court that gathering the documents was not a complex process, but it would take some time.

d. Analysis: A trial court abuses its discretion if it *denies* discovery when no evidence has been presented in support of the responding party's objection. ***Weisel Enterprises, Inc. v. Curry***, 718 S.W.2d 56, 58 (Tex.1986, orig. proceeding); ***Hyundai Motor America v. O'Neill***, 839 S.W.2d 474 (Tex. App. - Dallas 1992, orig. proceeding). Because Ford presented no evidence in support of its objections, the trial court would have abused its discretion had it sustained Ford' objections for which evidence was required:

> **(1) Overbreadth Objections:** In most cases, courts have required some evidence of overbreadth. ***See Miller v. O'Neil***, 775 S.W.2d 56 at 59 (Tex. App. - Houston [1st Dist.] 1989) (stating "No evidence was presented showing that the request was over-broad as to the period from 1979 to 1987."); ***Mole v. Millard***, 762 S.W.2d 251 (Tex. App. - Houston [1st Dist.] 1988) (holding that no evidence in support of the "overbreadth" claim was introduced at the hearing, and the requests were not over-broad); *Also see Chamberlain v. Cherry*, 818 S.W.2d 201, 205 (Tex. App. - Amarillo

2. ORDER APPROVING FIRST AND SECOND REPORTS OF SPECIAL MASTER AND COMPELLING PRODUCTION OF DOCUMENTS

With regard to this Order, Ford complains that Respondent abused his discretion in adopting the discovery master's second report. That report essentially did two things: (1) It held that Ford had waived its right to assert any privileges; and (2) It imposed some additional limitations on the scope of discovery.

a. Did Ford Waive its Privileges?

As stated above, on May 23rd, Ford filed its initial responses to Plaintiffs' discovery requests. In those responses, Ford asserted objections on the basis of the attorney-client and/or attorney work product/anticipation of litigation privileges in responses to requests 2, 14, and 24. Additionally, on July 8, 1994, Ford filed its supplemental response to Plaintiffs' first request for production of documents. In that response, it asserted for the first time that information sought in request numbers 1, 3, 5, 15, 18, and 19 was privileged under certain specified privileges.

On July 15, all further discovery disputes were referred to a discovery master.[15] At the August 22nd hearing before the discovery master, Ford argued that many of its materials were protected from discovery on the basis of privilege. It argued that because many of Plaintiffs' discovery requests were overly broad, they were thus inappropriate and Ford had not had a duty to assert its privilege objections to them. Ford now makes this "appropriate request" argument to this Court. In support of its position, it cites to the dissent in ***Loftin v. Martin***, 776 S.W.2d 145 (Tex. 1989), and ***El Paso Housing Authority v. Rodriguez-Yepez***, 828 S.W.2d 499 (Tex. App. - El Paso 1992, writ denied). Ford also cites two cases that it claims deal with an analogous provision on experts. Those cases are ***Gutierrez v. Dallas Independent School Dist.***, 722 S.W.2d 530 (Tex. App. - Dallas 1986, rev'd on other grounds) and ***Lacy v. Ticor Title Insurance***, 794 S.W.2d 781 (Tex. App. - Dallas 1989, writ denied).

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[15] At the July hearing and before the issues of privilege and waiver were presented to the discovery master, Ford tendered certain documents to the master for in camera inspection. These documents were ones which Ford had withheld from the massive July 8th production on the premise that they were privileged, and thus, protected from discovery. Prior to ruling on the privilege issue, the master reviewed these documents, determined that some of them were protected from discovery, and made his recommendations on them in his first report. Those documents and that report are not at issue in this mandamus proceeding.

claims of privilege at subsequent proceedings before the special master." *Id.*, at p. 479.

The basis of the majority's finding of a subsequent waiver was: (1) Hyundai's admission in its response to re-written request no. 17 that *as reformed, request no. 17 was now appropriate* in scope, and (2) Hyundai's statements in its response that although it had found no documents that would satisfy plaintiffs request as interpreted by Hyundai it "asserts and reasserts its specific objections to producing any document protected from disclosure by the attorney-client privilege...*in the event that any such protected document, otherwise responsive to the request, may be located or generated.*" (emphasis added). The majority of the panel held that even under Hyundai's "appropriate request" theory, it had admitted appropriateness yet had failed to specifically plead its privileges as required under ***National Union Fire Insurance Co., v. Hoffman***,746 S.W.2d 305, 307 n.3 (Tex. App. - Dallas 1988, orig. proceeding)(holding that a conditional assertion of a privilege did not satisfy the specific pleading requirement of Rule 166b(4)). Consequently, we are left with little guidance on the issue other than that presented in the concurring and dissenting opinion. Similarly, the dissenting opinion in ***Loftin*** also addressed the issue of overbreadth objection in relation to a privilege objection.

Justice Kaplan, in his concurring and dissenting opinion in ***Hyundai***, stated that he would have preferred to adopt Hyundai's two-step approach to pleading and proving privileges where the initial request was inappropriate. Kaplan noted that even the trial court recognized the merits of this approach when it stated: "there cannot be an obligation on the respondent to a discovery request to assert burdensomeness and also itemize and produce a log of all privileged documents which might be asserted..."

With regard to the majority's conclusion that Hyundai had waived its privileges, the dissent further pointed out that ***National Union Fire Ins. Co.*** and other authorities relied upon by the majority were inapposite because those cases did not address the requirements for asserting a privilege to documents that "may be located or generated in the future." ***Hyundai***, at p. 484. As pointed out by Justice Kaplan:

> While the duty to supplement is ongoing, the opportunity to assert objections is not. A party must plead any privilege or exemption to discovery within thirty days after the request is served. Otherwise, the privilege is waived...Thus, the only effective way to preserve a claim of privilege for documents located or generated in the future is to object in the initial

discovery delays and trial by ambush, practices the Supreme Court has censured.[19] ***See Gee v. Liberty Mutual Fire Insurance Co.***, 765 S.W.2d 394, 396 (Tex.1989); ***Gutierrez v. Dallas Indep. School Dist.***, 729 S.W.2d 691, 693 (Tex.1987); ***Garcia v. Peeples***, 734 S.W.2d 343, 347 (Tex. 1987).

Applying this reasoning then to the instant case, we conclude that those initial privilege objections that Ford lodged in response to request numbers 2, 14 and 24 were preserved under Rule 166b(4). Moreover, since they have not been challenged by plaintiffs in a motion to compel, Ford has not yet been required to present evidence in support of them. However, those privilege objections that Ford asserted for the first time in its supplemental response to discovery of July 8th, i.e. responses to request numbers 1, 3, 5, 15, 18, and 19 were waived for failure to timely assert them. Thus, to the extent that Respondent adopted the master's report waiving the privileges asserted in Ford's responses to request number 2, 14 and 24, he committed an abuse of discretion.

b. The Scope of Discovery: As recently reiterated by the Waco Court of Appeals: "The permissible scope of discovery includes anything reasonably calculated to lead to the discovery of material evidence,' but overly broad requests, harassment, or disclosure of privileged information exceed that scope." ***Easter v. McDonald***, no. 10-94-047-CV (Tex. App. - Waco, May 1994, orig. proceeding) *citing* ***Jampole v. Touchy***, 673 S.W.2d 569, 573 (Tex.1984) (orig. proceeding). However, the broad scope of discovery into any non-privileged matter relevant or reasonably calculated to lead to the discovery of admissible evidence is tempered by the opposing party's interest in avoiding overly broad requests, harassment or disclosure of privileged information. ***Housing Authority of City of City of El Paso v. Rodriguez-Yepez***, 843 S.W.2d 475 (Tex. 1992); ***Axelson, Inc. v. McIlhany***, 798 S.W.2d 550 (Tex. 1990). The trial court's authority to control or prevent discovery is not absolute; it must be exercised in conjunction with the discovery rules and with due regard for the

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[19] Under Ford's argument, all the responding party would have to do is allege overbreadth, then wait until it felt the scope had been appropriately narrowed. Privileges could then be asserted at the eleventh hour. Although Ford relies upon the ***Rodriguez-Yepez*** case where the resisting party was not required to assert any exemption or privilege due to the nature of the interrogatory, that case is readily distinguishable on its facts. There, the propounding party requested information from the responding party, which was not merely over-broad or ambiguous, but was clearly outside the scope of permissible discovery under 166b(2).

> is relevant and what's not when there is no way the Court can do that, *because nobody knows what Ford has in their possession. They've got to make that decision and stand by their decision as being a reasonable decision that's supportable.* (emphasis added)

(7) at the August 22nd hearing before the discovery master, Plaintiffs made the following similar argument: "Defendants basically said that the Court's third pretrial order is so all-inclusive and broad that it requires them to produce things that are irrelevant. We don't agree. *We think the Court's third pretrial order requires them to produce things that are relevant to the litigation.*" (emphasis added); and (8) by correspondence dated August 2, 1994, Plaintiffs identified 11 categories of information that they felt were relevant to the litigation.[22]

The trial court thereafter took judicial notice of the record from the two hearings before the special master, and the evidence introduced at those hearings. After entertaining only brief arguments, Respondent overruled Ford's objections to the discovery master's second report and adopted the report.

It is only natural where the initial scope of discovery is extremely broad, that as the case develops, the issues will become more narrowly defined. Weighing the eight factors enumerated above against any modest benefit Plaintiffs might gain from the production of millions of pages of information before the accelerated trial date, we conclude that the law clearly mandated further limiting the scope of discovery so as to include only the non-privileged materials falling within the 11 categories of information designated by Plaintiffs in their letter of August 2nd (See "Appendix C") and to exclude those matters enumerated as irrelevant by Ford in "Exhibit 6" (See Appendix B). To the extent that a conflict may arise between matters designated in Appendices B and C, Appendix C shall take precedence over B.

Although Ford has shown itself entitled to the aforementioned relief from the originally charted scope of discovery, Ford itself will be bound by that newly defined scope. As a consequence, Ford will be prohibited from introducing into evidence any information that it did not produce to Plaintiffs as a result of the newly defined scope of discovery.

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[22] See "Appendix C".

APPENDIX A

CAUSE NO. 94-143

SUSAN RENAE MILES, ET AL.	§	IN THE DISTRICT COURT
	§	
	§	
V.	§	RUSK COUNTY, TEXAS
	§	
	§	
FORD MOTOR COMPANY, ET AL.	§	4TH JUDICIAL DISTRICT

SIXTH PRETRIAL ORDER

On ~~this~~ the 6th day of September, 1994 came on to be heard all pending motions of all parties and the parties appeared by and though their attorneys of record. The Plaintiffs announced ready for hearing on all motions but the Defendants, in connection with the Plaintiffs' Motion to Strike Exhibits and Testimony; to Compel, For Sanctions and Contempt, announced not ready and moved for a continuance or resetting of the motion. The Court found that this motion was originally set for pretrial hearing on Friday, September 2, 1994 and had been reset to this date in part to afford the Defendants sufficient notice of the proceedings consistant with a prompt hearing prior to a rapidly approaching trial setting. The Court, therefore, finds Defendants' further Motion for Continuance and/or Resetting to be without merit and the motion is hereby OVERRULED. The Court then proceeded to hear evidence on the Plaintiffs' Motion to Strike Exhibits and Testimony; to Compel, For Sanctions and Contempt and at the close of the evidence finds that the following order in connection with that motion should be entered:

3. Plaintiffs' Motion to Compel Production of Documents Concerning Communications by Ford, its agents, employees or representatives with government agencies, or representatives, including transcripts of conversations of Lee Iacocca, Henry Ford, II, and Richard M. Nixon, and any documents of contributions by Fords' officers or directors to the campaign of Richard M. Nixon or to the committee to Reelect the President during the period from 1970 through 1974 is also GRANTED. Defendants shall produce such documents.

4. Plaintiffs' Motion to Compel Production of Documents Relating to Sled Testing conducted by Ford in the cases of Martinez, Green, Newman, and Greer, which cases have been identified by Defendants to Plaintiffs in prior document production is GRANTED. Production shall be made on or before 5:00 p.m., Monday, September 12, 1994 at the offices of Plaintiffs' counsel in Dallas, Texas.

5. Plaintiffs' Motion to Compel Production of Transcripts and Exhibits of the testimony of expert witnesses called by Ford in other litigation involving the subject matter of this law suit is GRANTED. Defendants shall make complete production at the offices of Plaintiffs' counsel in Dallas, Texas by 5:00 p.m. on September 12, 1994.

6. Plaintiffs' Motion to Compel Production of Certain Automotive Safety Office Documents is GRANTED. Defendants shall produce the Automotive Safety Office Documents identified by their index, "Attachment 4", which were not previously produced, by delivery to the offices of Plaintiffs' counsel in Dallas, Texas no later than 5:00 p.m., September 12, 1994. Plaintiffs shall advise Defendants of the documents from this index which they have determined were not previously produced.

7. Plaintiffs' Motion to Designate Leon Robertson as an Expert or Rebuttal Witness or, Alternatively for Sanctions is DENIED.

8. Plaintiffs' Motion for Contempt and to Compel Production of Documents relating to similar claims and law suits against the Defendant Ford is GRANTED. The Court finds that the Defendant Ford Motor Company has in its possession documents relating to previous or pending claims or litigation arising out of the design, manufacture, sale or marketing of lap and/or shoulder belts which include a product feature variously described

11. Plaintiffs' Motion to Compel the Deposition of the witness R.E. Maugh and for relief in regard to production of witnesses by Ford is GRANTED. The Defendants are ordered to confer with Plaintiffs' counsel and to produce the witness R.E. Maugh with his complete file on this case at the offices of Plaintiffs' counsel in Dallas on a mutually agreed date during the period of September 12th through 16th, 1994. The Defendants are further ordered to confer with Plaintiffs' counsel and to produce any experts desired by Plaintiffs' counsel by agreement at a mutually convenient time. In the event the parties cannot agree upon a date within the existing scheduling order for Plaintiffs' deposition of expert witnesses, the Plaintiffs are hereby authorized and permitted to take such expert witnesses' deposition outside the time period specifically designated in the courts' Scheduling Order. If no agreement can be reached in regard to these depositions, further relief may be sought from the court by motion.

12. Defendants' Motion for Sanctions against the Plaintiffs is DENIED.

13. Plaintiffs' objections to the affidavit of the witness Gary L. Hayden, which was filed in this court on this date, are SUSTAINED. This affidavit is excluded from evidence for consideration by the court. The affidavit is, however, received for the purpose of a Bill of Exception as stated by the Defendants.

14. Plaintiffs' Motion to Compel Defendants to provide supplementation of Interrogatory No. 1, which required the Defendants to provide requested information for all persons with knowledge of relevant facts, is GRANTED. The Defendants shall provide full and complete responses to Interrogatory No. 1, including supplementation thereof in the form and manner previously described.

15. All other pending motions or claims for relief, however stated, not expressly granted herein are DENIED; provided, however, that the Court reserves further ruling upon the imposition of punishment for the Defendant's contempt and upon sanctions against the Defendants.

APPENDIX

MILES v. FORD

SAMPLES OF IRRELEVANT MATTERS COVERED BY PLAINTIFFS' DISCOVERY

SUBSTANCE OF REQUEST	IRRELEVANT MATTERS COVERED
INTERROGATORY NO. 5 "any and all analyses, . . . studies, tests . . . which relate to or reflect any and all hazards likely to be associated with the use of light trucks"	unintended acceleration
	failure of parking brake to hold
	tests regarding handling/stability of light trucks in rollover accidents
	effect of oversize tires on vehicle stability
	occupants riding in cargo bed of pickup
	carrying more passengers than designated seating positions in vans/pickup trucks
	analysis of side impact accidents involving pickup trucks
	incorrect tire pressure
	improper tire maintenance
	driving at excessive speed
	inadequate maintenance of brakes
	overloading of cargo
	improper positioning of cargo
	improper securing of cargo
	improper maintenance of headlamps
	use of improper bumper hitches
	improper towing
	flammability of floor covering
	improper latching of liftgate

EXHIBIT

SUBSTANCE OF REQUEST	IRRELEVANT MATTERS COVERED
REQUEST NO. 18 "All documents . . . relevant to the field use and/or accident experience of: (1) light trucks; (2) occupant restraint systems, and/or (3) vehicle seats in frontal impacts."	**all claim and lawsuit information involving light trucks regardless of model year and regardless of alleged defect**
	all warranty information involving light trucks regardless of model year
	injuries to unrestrained occupants riding in bed of pickup trucks
	allegations that pedestal type seat functioned in frontal collision
	front collision performance of light truck bumpers in 5 mph impacts
	front collision performance of light truck steering columns and steering wheels
	front collision performance of light truck fuel lines and other fuel system components
	front collision performance of light truck instrument panels and dashboards
	front collision performance of light truck windows and side glass
	front collision performance of rear seat lap belts
	front collision performance of rear seat lap-and-shoulder belts
	front collision performance of passive shoulder belts in any passenger car
	police reports regarding light truck frontal impacts involving unbelted drivers
	news articles reporting frontal collision of a Ford vehicle in which belt webbing allegedly broke
	TV videotapes showing scene of light truck frontal collision involving ejection of unbelted rear seat occupant
	medical records pertaining to broken toe incurred in a light truck frontal collision
	plaintiffs' expert testimony alleging front collision failure of van's removable rear seats

3. Documents related to the amount of slack found in belts and/or its effect.

4. Documents related to cervical spine, head or upper torso injury of or related to belt use.

5. Occupant kinematics in frontal collisions, including computer simulations or other data or testing.

6. Governmental restrictions, regulations or requirements regarding tension eliminator or other slack-inducing devices for the United States and other governments (would include Europe, Australia, Canada and other foreign countries).

7. Crash tests, simulations, computer or otherwise and similar materials concerning TE.

8. Other communications with government, not just communications with NTHSA related to restraints (excluding those related solely to air bags), such as the transcripts of visits by Ford and Iacoca with Nixon in which safety standards were discussed, and records of any connected or simultaneous contributions to the Committee to Re-elect the President.

9. Documents related to the comparison of costs regarding the development and use of belts with or without TE or similar features.

10. The effect of TE in angular collisions (in other words, to frontal left and right impacts).

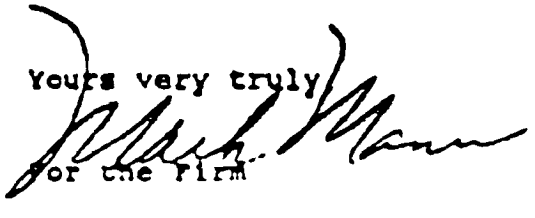
11. The combined problems of TE and seat back give-away or seat back collapse.

Certainly, this should prevent the production of "windshields in Brazil."

As we discussed with Gary Hayden, we would expect these documents to come in as soon as possible if they have not already been produced and would obviously want these documents before we start taking your expert's depositions.

Thank you for your attention.

Yours very truly,



for the Firm

JMM/ki

cc: Honorable Paul S. Colley

Court of Appeals

Twelfth Court of Appeals District

1517 WEST FRONT STREET
SUITE 354
TYLER, TEXAS 75702

TELEPHONE
(903) 593-8471

January 23, 1995

Hon Gregory D Smith
500 First City Place
P. O. Box 629
Tyler, TX 75710

Hon. Richard Grainger
605 South Broadway
P. O. Box 491
Tyler, TX 75710

Hon. Thomas E. Fennell
Jones, Day, Reavis & Pogue
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, TX 75201

Hon. Donald R. Ross
Judge, 4th District Court
Rusk County Courthouse
201 Main St.
Henderson, TX 75652

Hon. Mark Mann
Wellborn, Houston, Adkison & Mann
P. O. Box 1109
Henderson, TX 75652

Hon. R. Jack Ayres, Jr.
4350 Beltway Drive
Dallas, TX 75244

Mr. Franklin Knight
#656979
Ramsey II Unit
Rt. 4, Box 1200
Rosharon, TX 77583

RE: Court of Appeals Number: 12-95-00021-CV

Style: Ford Motor Company & Douglas Stanley, Jr., d/b/a Doug Stanley Ford
v. Ross, Hon. Donald R., Judge of the 4th District Court

Dear Counsel:

Enclosed are orders of this Court granting Relator's motion for leave to file petition for writ of mandamus, denying application for temporary emergency relief and granting in part and denying in part petition for writ of mandamus.

Respectfully yours,

CAROLYN ALLEN, CLERK

By: Katrina McClenny
Katrina McClenny, Chief Deputy

CAUSE NO. 12-95-00021-CV

IN THE COURT OF APPEALS

FOR THE TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

FORD MOTOR COMPANY & DOUGLAS STANLEY, JR.	}	
VS.	}	ORIGINAL PROCEEDING
HON. DONALD R. ROSS, JUDGE	}	

ORDER

On this 23rd day of January 1995, came on to be heard Relator's Application for Emergency Relief, and the same having been considered, it is **ORDERED** that said application be, and hereby is, **denied.**

Relator's Motion For Leave To File Petition for Writ of Mandamus filed herein on January 20, 1995, having been duly considered, it is **ORDERED** that said motion be and the same is hereby **GRANTED**, and the Petition For Writ of Mandamus is hereby set for hearing on the 23rd day of January, 1995, at 2:00 o'clock p.m., in the courtroom of the Court in Tyler, Texas.

WITNESS the HONORABLE TOM B. RAMEY, JR., Chief Justice of the Court of Appeals, 12th Court of Appeals District of Texas, at Tyler.

GIVEN UNDER MY HAND AND SEAL OF SAID COURT, at my office this 23rd day of January, A. D., 1995.

CAROLYN ALLEN, CLERK
12th Court of Appeals

Katrina McClenny
By: Katrina McClenny, Chief Deputy

Issued this the 23rd day of January, 1995.

CAROLYN ALLEN, CLERK
12th Court of Appeals

Katrina McClenny
By: Katrina McClenny, Chief Deputy

CAUSE NO. 12-95-00021-CV

IN THE COURT OF APPEALS

FOR THE TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

FORD MOTOR COMPANY & DOUGLAS STANLEY, JR.	}	
VS.	}	ORIGINAL PROCEEDING
HON. DONALD R. ROSS, JUDGE	}	

ORDER

ON THIS DAY came on to be heard the petition for writ of mandamus filed by FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., D/B/A DOUG STANLEY FORD, who are defendants in Cause No. 94-143, styled SUSAN RENAE MILES, INDIVIDUALLY AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS AND KENNETH MILES V. FORD MOTOR COMPANY, AND DOUGLAS STANLEY, JR. D/B/A DOUG STANLEY FORD, pending on the docket of the 4th Judicial District Court of Rusk County, Texas. Said petition for writ of mandamus, having been filed herein by leave of this Court on January 23, 1995, and the same having been duly considered together with oral argument, it is the opinion of this Court that the petition should be granted in part and denied in part.

IT IS THEREFORE CONSIDERED, ADJUDGED and ORDERED that the said petition for writ of mandamus be, and the same is hereby, granted as to Respondent's order of severance dated January 20, 1995, and that the trial court is hereby ORDERED to withdraw his ORDER SUSTAINING MOTION TO SEVER and reinstate Franklin Knight as a party. And because it is further the opinion of this Court that the trial judge will act promptly to vacate his order of

severance as directed by this Court before 10:00 a.m., January 24, 1995, no formal writ of mandamus will issue at this time.

IT IS FURTHER ADJUDGED, after considering Respondent's ORDER ON PRO SE INTERVENTION in accordance with the reasoning expressed in ***Byrd v. The Attorney General of Texas, Crime Victims Compensation Division***, 877 S.W.2d 566, 569 (Tex. App. - Beaumont 1994, no writ), that Respondent did not abuse his discretion in denying Intervenor's request for a bench warrant; THEREFORE IT IS FURTHER ORDERED that Relator's petition for writ of mandamus insofar as it seeks relief from the trial court's ORDER ON PRO SE INTERVENTION is hereby denied upon the condition that Respondent, the Honorable Donald Ross, enable Intervenor Knight to develop and offer into evidence his claim herein, if any, by deposition, telephonic conference, affidavit or other effective means, before Relators commence their case in chief. ***See Byrd.***, p.569. And because it is further the opinion of this Court that the trial judge will act timely in complying with this Court's directive, no formal writ of mandamus will issue at this time.

IT IS FURTHER ORDERED that each party pay their own costs incurred by reason of this proceeding.

WITNESS the HONORABLE TOM B. RAMEY, JR., Chief Justice of the Court of Appeals, 12th Court of Appeals District of Texas, at Tyler.

GIVEN UNDER MY HAND AND SEAL OF SAID COURT, at my office this 23rd day of January, A. D., 1995.

CAROLYN ALLEN, CLERK
12th Court of Appeals

Katrina McClenny
By: Katrina McClenny, Chief Deputy

NO. 06-95-00026-CV

IN THE

COURT OF APPEALS

FOR THE

SIXTH COURT OF APPEALS DISTRICT OF TEXAS

TEXARKANA, TEXAS

Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors and Kenneth Miles,

Appellants,

v.

Ford Motor Company and Douglas Stanley, Jr., d/b/a Doug Stanley Ford,

Appellees.

MOTION TO ABATE APPEAL AND REQUEST FOR TRANSFER

Ford asks the Court to temporarily abate this appeal to (i) allow the judgment appealed to become final and the plenary jurisdiction over that judgment to vest from the trial court to the courts of appeals and (ii) allow the supreme court to transfer this appeal to the Twelfth Court of Appeals, where it can be consolidated with Ford's own appeal. To facilitate the latter

occurrence, Ford also asks the Court to request a transfer of this appeal to the Twelfth Court of Appeals under the Texas Government Code's Section 73.001.

PROLOGUE

Before the merits of this motion can be understood, this Court should appreciate the unusual circumstances surrounding the Miles' appeal--circumstances directly attributable to the Miles' gamesmanship. For a start, the Miles were the hands down winners at trial, obtaining maybe the largest personal-injury judgment ever to come out of Rusk County (nearly $40 million). How did they celebrate their trial victory? They filed a premature appeal bond weeks *before* the trial court entered judgment. At the time, all they could find to "appeal" was a single summary-judgment denial of two novel consortium claims (brought by Willie Searcy's *step-father* and *brother*). In these circumstances, Ford cannot consider the Miles' appeal as anything but a sideshow intended to: (1) deny Ford's right to choose the site of its appeal--the real appeal in this case; and (ii) subject Ford to an unreasonably short briefing period and onerous constraints.

A. The Appeal Should be Abated Until the Trial Court Exhausts its Plenary Power.

The Court should abate this appeal because the underlying judgment remains subject to the district court's plenary power to modify or vacate it.

This Court's plenary appellate jurisdiction is confined to the review of *final* judgments. TEX. CIV. PRAC. & REM. CODE ANN. § 51.012. Besides the well-known requirement that a final judgment must encompass all parties and issues, "finality" also addresses the trial court's power to reexamine, alter, or vacate a judgment. A judgment that remains under a trial court's active review is, in this latter respect, interlocutory. This is a necessary corollary of the general rule that only one court may maintain plenary jurisdiction over a judgment at a given time. *See Doctors Hospital v. Fifth Court of Appeals*, 750 S.W.2d 177, 179 (Tex. 1988) (orig. proceeding).[1]

The March 9 judgment that spawned this appeal remains under the district court's active review: The district court will not hear Ford's motion for new trial until May 3.[2] The district court thus has not yet had its chance to rule on the factual sufficiency of the evidence or on any other of the

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[1]In *Doctors Hospital*, the supreme court held that its own plenary jurisdiction had not attached to points raised in an undecided motion for rehearing pending before the court of appeals and would attach only *after* the court of appeals decided those points. 750 S.W.2d at 179.

[2]If the motion for new trial is overruled by operation of law, the district court retains plenary jurisdiction until June 22.

grounds in Ford's new-trial motion. And, with the right ruling on even one of those grounds, the March 9 judgment and the matters that the plaintiffs are appealing never will become final. The March 9 judgment simply is not ripe for appellate scrutiny or for appellate briefing.

Even if the Court could now assume plenary jurisdiction, it would not be prudent to do so. It is neither efficient nor just to require the parties simultaneously to litigate on two levels--preparing appellate briefs and arguing trial-court motions that, given proper sequencing and the right rulings, might eliminate the need for appellate briefs altogether. Yet, absent abatement, the Miles' briefing deadline in this Court--and maybe even Ford's--will pass before the trial court relinquishes control over its judgment.

B. The Appeal Should be Abated Until Appellate Jurisdiction Over the March 9 Judgment Has Been Consolidated in One Court.

Ford has appealed the March 9 judgment to the Twelfth Court of Appeals and, on April 12, the Twelfth Court of Appeals filed a transcript and docketed Ford's appeal. (See the appeal bond and docketing notice attached to this motion.) The upshot, of course, is that whatever jurisdiction this Court may have over the March 9 judgment, it is shared with the Twelfth Court's equal jurisdiction over the same judgment--a conflict best resolved *before* proceeding any further in this Court.

C. The Court Should Request a Transfer of this Appeal.

Under the Government Code's provision that empowers the supreme court to freely transfer appeals for good cause, the proper means for resolving a stalemate between appellate courts with overlapping geographical jurisdiction is, quite simply, a request that the supreme court exercise its transfer power. TEX. GOV'T CODE § 73.001. In this case, the request should be for a transfer of this appeal to the Twelfth Court of Appeals, so as to honor (1) Ford's choice of appellate courts and (2) the Twelfth Court's prior jurisdiction--via two mandamus proceedings--over this controversy.

i. Ford's Appeal is Primary.

Justice and fair play require that Ford's choice of appeals court be controlling. For one thing, Ford's appeal is primary, while the Miles' appeal to this Court is derivative. The March 9 judgment embraces every liability theory submitted against Ford and Ford's appeal, in turn, assails every such theory. In contrast, the Miles appellants are contesting the summary-judgment denial of two peripheral consortium claims--claims that by nature derive from the personal injury claims that Ford is appealing. *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978); *Reagan v. Vaughn*, 804 S.W.2d 463, 464 n.1.

The only other issue that the Miles appellants might raise is Doug Stanley Ford's liability. Yet, in this products liability suit, Doug Stanley Ford

is a mere product seller and there is no evidence of independently culpable conduct on its part. As a consequence, any claim that Doug Stanley Ford would now be liable is itself a derivative claim, liability for which Doug Stanley would be entitled to full indemnity from Ford. *E.g., B&B Auto Supply v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 816-17 (Tex. 1980).

Ford's is the primary appeal in yet a second respect--the stakes involved. The March 9 judgment awards nearly $40 million in damages against Ford--every penny of which Ford's appeal places in issue. (Tr. 3486-89.) The consortium claims by Kenneth Miles, Willie Searcy's stepfather, and Willie's brother, Jermaine, involve a small fraction of this amount. Indeed, Willie's own mother was awarded just $500,000 on her consortium claim (Tr. 3250-74), scarcely over one percent of the amount at stake in Ford's appeal.

The Miles' attack on the judgment in favor of Doug Stanley doesn't raise the real stakes of their appeal because a successful appeal against Doug Stanley would not add a penny to the Miles' recovery. Stanley would merely become jointly liable with Ford. And, because the evidence proved that Ford's net worth is over four hundred times the judgment amount, collection of any judgment already is assured.

ii. The Tyler Court Already Knows This Case.

Ford's appeal to the Twelfth Court of Appeals promotes judicial economy. The Twelfth Court of Appeals already has an invaluable knowledge base from which to draw in reviewing the district court's actions, having already decided *two* mandamus proceedings in the Miles suit, both of which were fully briefed and argued orally and the first of which produced a detailed, published opinion. *Ford Motor Co. v. Ross*, 888 S.W.2d 879 (Tex. App.--Tyler 1994; orig. proceeding). Appeal to the Tyler court, then, will avoid wasted effort by this Court learning the general facts of the suit. If the prior mandamus proceedings do not immutably establish the Tyler court as the court to decide the entire controversy, they nevertheless establish a strong policy preference for a transfer of the Miles' appeal.

Finally, the Miles appellants had their choice of forum once before--and chose to sue in Rusk County even though they live in Dallas County, Mr. Miles bought his Ford truck in Dallas County, the crash that caused Willie Searcy's injuries also was is Dallas County, and Ford's principle place of business in Texas is Dallas County. Their pretextual appeal from their own landmark victory is more of the same blatant forum shopping.

D. The Proof.

Ford accompanies this motion with:

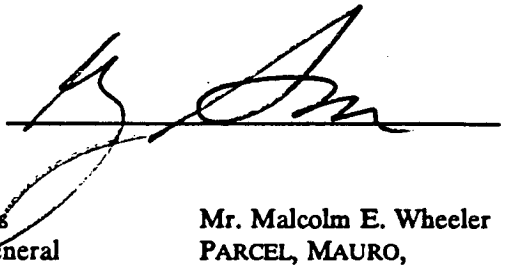
- Ford's appeal bond;
- the Twelfth Court of Appeals' notice of docketing Ford's appeal; and
- the opinions and judgments from the two prior mandamus proceedings.

CONCLUSION AND PRAYER

Absent a temporary abatement to allow the judgment below to become final and allow the parties' appeals to be consolidated, the parties will face overlapping, confusing and possibly contradictory, schedules in two appeals courts and the trial court. To go forward in these circumstances would be imprudent and, likely, would retard the interests of justice.

Ford therefore prays that the Court would (i) request that the supreme court transfer this appeal to the Twelfth Court of Appeals where it can be consolidated with Ford's appeal, (ii) undertake all other proper efforts to fairly and expeditiously resolve the current conflict in appellate jurisdiction, and (iii) abate this appeal until that conflict is resolved and until the trial court's plenary jurisdiction over the Miles suit judgment has expired, or until such other time as the Court might order. Of course, Ford also requests all other relief that this motion might authorize.

Respectfully submitted,



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ATTORNEYS FOR APPELLEES

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF SMITH §

BEFORE ME, the undersigned authority, on this day personally appeared GREG SMITH, known to me to be a credible person above the age of eighteen years, who, upon his oath stated that he is one of the attorneys for the appellees in the above-entitled and numbered cause, has read the above Motion and all factual statements in it are within his personal knowledge and are true and correct.

GREG SMITH

SUBSCRIBED AND SWORN TO BEFORE ME by GREG SMITH on the 17th day of April, 1995.

Notary Public in and for the
State of Texas

NOTARY PUBLIC STATE OF TEXAS
TERRI L. HARVEY
Notary Public
STATE OF TEXAS
My Comm. Exp. 12-5-95

CERTIFICATE OF SERVICE

On this 18th day of April, 1995, I forwarded a true copy of the above instrument, via the indicated method of service, to the following persons:

Mr. R. Jack Ayres, Jr. (Via Certified Mail - RRR # P 373 113 041)
LAW OFFICES OF R. JACK AYRES, JR., P.C.
4350 Beltway Dr.
Dallas, TX 75244

Mr. J. Mark Mann (Via Certified Mail - RRR # P 373 113 042)
WELLBORN, HOUSTON, ADKISON, MANN, SADLER & HILL
P.O. Box 1109
Henderson, TX 75653

GREG SMITH

Court of Appeals
Sixth Appellate District
State of Texas

BI-STATE JUSTICE BUILDING
100 NORTH STATE LINE AVENUE #20
TEXARKANA, TEXAS 75502-5952
903/798-3046

April 25, 1995

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Texarkana, TX 75505-5517

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2001 Ross Avenue
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Hon. Joe Shumate
Shumate & Dean
210 N. Main
Henderson, TX 75653

RE: Court of Appeals Number: 06-95-00026-CV
Trial Court Case Number: 94-143

Style: Susan Renae Miles, Individually and As Next Friend of Willie Searcy and Jermaine Searcy, Minors, and Kenneth Miles
v.
Ford Motor Company and Douglas Stanley, Jr., d/b/a Doug Stanley Ford

Dear Counsel:

The Court entered its order this date in the referenced proceeding whereby Appellants' Motion to Accelerate Appeal has been ordered **CARRIED WITH THE CASE**, to be disposed of upon final disposition of the cause.

The Court also entered its order this date in the referenced proceeding whereby Appellees' Motion to Abate Appeal was **GRANTED.**

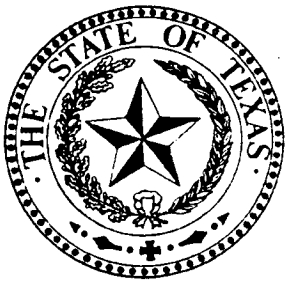
This Court does not have the authority to transfer an appeal to another court of appeals. Appellees should therefore file their motion to transfer with the Supreme Court.

Enclosed is this Court's Order rendered this date in the referenced proceeding.

Respectfully yours,

Tibby Thomas, Clerk

By Lynda Poore
Deputy



In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-95-00026-CV

SUSAN RENAE MILES, INDIVIDUALLY AND AS NEXT FRIEND
OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS
AND KENNETH MILES, Appellants

V.

FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR.
d/b/a DOUG STANLEY FORD, Appellees

On Appeal from the 4th Judicial District Court
Rusk County, Texas
Trial Court No. 94-143

ORDER

Ford Motor Company, appellee here, has filed a motion requesting, among other things, that we abate this appeal and request the Supreme Court to transfer it to the Twelfth Court of Appeals. Miles, the appellant in this cause, recovered a substantial judgment against Ford below, but is appealing the failure to recover less substantial claims for loss of consortium. Miles appealed to this Court before the judgment became final. At approximately the same time, Ford Motor Company perfected an appeal from the same judgment to the Twelfth Court of Appeals in Tyler. Ford requests that we abate the appeal pending action by the Supreme Court on a motion to transfer the complete appeal to the Twelfth Court of Appeals.

In the interest of judicial economy, we abate this appeal pending resolution of the motion to transfer. All appellate timetables are stayed pending the action of this matter by the Supreme Court.

It is so ordered.

BY THE COURT

April 25, 1995

No. _____

FORD MOTOR COMPANY,	§	IN THE COURT OF APPEALS
	§	
Appellant,	§	
	§	
V.	§	
	§	FOR THE TWELFTH APPELLATE DISTRICT
SUSAN RENAE MILES, INDIVIDUALLY AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SERACY, MINORS, AND KENNETH MILES,	§	
	§	
Appellees.	§	AT TYLER, TEXAS

APPELLEES' MOTION TO DISMISS

TO THE HONORABLE COURT OF APPEALS:

COME NOW Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors, and Kenneth Miles, Appellees herein and Plaintiffs below, (hereinafter the "Plaintiffs") and under the authority of Tex. R. App. P. 60(a)(1), file this Motion to Dismiss the Appeal of Ford Motor Company and in support thereof would show the Court the following:

I.

FORD PURSUES A SECOND APPEAL TO THIS COURT

On March 9, 1995, the 4th Judicial District Court of Rusk County, Texas signed the final judgment in the case styled *Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermanine Searcy, Minors, and Kenneth Miles v. Ford Motor Company and Douglas Stanley, Jr., d/b/a Doug Stanley Ford,* Cause No. 94-143. (A true and correct conformed copy of the judgment

is attached as Exhibit 1.) Immediately thereafter, the Plaintiffs filed a motion for new trial, which the District Court overruled. (True and correct copies of the Plaintiffs' motion and the court's order overruling the motion are attached as Exhibits 2 and 3 respectively.) Plaintiffs then filed an amended appeal bond on March 9, 1995 to appeal the judgment to the Court of Appeals for the Sixth Court of Appeals District in Texarkana. (A true and correct copy of the Plaintiffs' Amended Appeal Bond is attached as Exhibit 4.) Three weeks later, on March 29, 1995, Ford Motor Company filed an appeal bond in which it stated its desire to appeal from the judgment to this Court. (A true and correct copy of Ford's Appeal Bond is attached as Exhibit 5.) Plaintiffs filed a certified transcript and an authenticated statement of facts with the Sixth Court of Appeals on April 5, 1995. (A true and correct copy of a letter from the clerk of the Sixth Court of Appeals dated April 5, 1995 acknowledging the filing of the certified transcript and the authenticated statement of facts is attached as Exhibit 6.) Ford has not to date filed either a transcript or a statement of facts with this Court.[1] (See Affidavit of Thomas V. Murto III attached hereto as Exhibit 7.)

II.

THE SIXTH COURT OF APPEALS HAS ACQUIRED DOMINANT JURISDICTION OVER ALL APPEALS FROM *MILES V. FORD* JUDGMENT

A. A Court In Which Suit Is First Filed Obtains Dominant Jurisdiction.

By statute the Sixth Court of Appeals at Texarkana and this Court have concurrent potential jurisdiction over appeals of civil cases from Rusk County. Tex. Gov't. Code Ann. § 22.201(g) and

---

[1]Counsel for Plaintiffs have been informed that the District Clerk of Rusk County delivered a certified transcript to the Clerk of this Court on April 11, 1995, and that the Clerk of this Court received but did not file the transcript.

(m). The well established rule in Texas is that the court in which the suit or case is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts. *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974); *Bailey v. Cherokee County Appraisal Dist.* 862 S.W.2d 581, 586 (Tex. 1993); *Cleveland v. Ward*, 116 Tex. 1, 285 S.W. 1063, 1070-71, 1072 (1926). This rule is based upon the principles of comity, convenience and the necessity of an orderly procedure in the trial of contested issues. *Wyatt v. Shaw Plumbing Co.*, 760 S.W.2d 245, 248 (Tex. 1988). It requires that any subsequent suit be dismissed if a party to the subsequent suit timely calls the second court's attention to the pendency of the prior action. *Mower v. Boyer*, 811 S.W.2d 560, 563 n.2 (Tex. 1991).

B. The Dominant Jurisdiction Rule Also Applies to Appeals.

The dominant jurisdiction rule is not limited to trial courts. The Supreme Court has warned, "One Court of Civil Appeals or district court will not be permitted to interfere with the previously attached jurisdiction of another court of co-ordinate power." *Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641, 645 (1933). The Supreme Court applied this principle to the courts of civil appeals in *Long v. Martin*, 115 Tex. 519, 285 S.W. 1075 (1926). In *Long*, citing *Cleveland v. Ward*, the Supreme Court held that one court of civil appeals was without authority to exercise its statutory mandamus power when the issuance of a mandamus would involve the nullification or suspension of the orders of another appellate court. 285 S.W. at 1078.

In *Cook v. Neill*, the Supreme Court again held that the dominant jurisdiction rule applied not just in original proceedings but also to the exercise of appellate jurisdiction by tribunals with

coordinate jurisdiction over appeals from the creation, changing and modification of school districts by county school trustees. *Cook v. Neill*, 352 S.W.2d 258, 262 (Tex. 1961).

> [W]here two tribunals have coordinate jurisdiction over the subject matter the one which first acquires active jurisdiction shall retain its jurisdiction until the matter is disposed of without interference from the other tribunal.

Id. (emphasis added). The Supreme Court has even applied this rule to itself, citing *Cleveland v. Ward* and *Long v. Martin*. *Millikin v. Jefferey*, 117 Tex. 134, 299 S.W. 393 (1927). *See also Alexander v. Meredith*, 137 Tex. 44, 152 S.W.2d 732, 733 (1941).

C. A Court of Appeals Acquires Exclusive Jurisdiction Over the Entire Case When Appeal is Perfected.

When an "appeal is perfected" to a court of appeals, that court (subject to the right of a trial court to grant a motion for new trial) acquires plenary and "exclusive jurisdiction over the entire controversy." *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 482 (Tex. 1964) (emphasis added); *Man-Gas Transmission Co. v. Osborne Oil Co.*, 693 S.W.2d 576, 577 (Tex. App. - San Antonio 1985 no writ). The rule in *Ammex* rests upon the basic principle that one court should not interfere with another court's jurisdiction. "This principle is, of course, necessary to the orderly and efficient administration of justice." *Doctors Hospital Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177, 179 (Tex. 1988).

Under Rule 40, Tex. R. App. P., an appeal is perfected when the cost bond has been filed. Immediately upon the perfecting of an appeal, the jurisdiction of the court of appeals attaches. *Gordon v. Willson*, 101 Tex. 43, 104 S.W. 1043 1044 (1907). The timely filing of an appeal bond

by any of several proper appellants gives a court of appeals jurisdiction over the entire appeal. *Powell v. City of McKinney*, 711 S.W.2d 69 (Tex. App. - Dallas 1986, writ ref'd n.r.e.). The Plaintiffs filed their appeal bond to appeal the district court's judgment to the Texarkana Court of Appeals on March 9, 1995 - 20 days prior to Ford's filing its appeal bond seeking to appeal the same judgment to this Court. The Texarkana Court of Appeals therefore obtained dominant jurisdiction over the entire case to the exclusion of this Court. *See Cook v. Neill*, 352 S.W.2d at 262, *Curtis v. Gibbs*, 511 S.W.2d at 267; *Ammex Warehouse Co. V. Archer*, 381 S.W.2d at 482.

D. Other Courts of Appeals Have Used the Filing of the Transcript to Determine Dominant Jurisdiction.

Although the appellate rules clearly provide that an appeal is perfected by the filing of an appeal bond, the First Court of Civil Appeals has adopted a different test. It has held that when two parties sought to appeal the same judgment to it and the Fourteenth Court of Appeals which share the same geographic jurisdiction, the filing of the transcript rather than the perfecting of the appeal conferred exclusive plenary jurisdiction over the entire controversy. *Young v. DeGuerin*, 580 S.W.2d 171, 173 (Tex. Civ. App. - Houston [1st Dist.] 1979, no writ). The First Court of Civil Appeals based its decision upon its interpretation of *Texas State Board of Pharmacy v. Gibson's Discount Centers, Inc.* 539 S.W.2d 141 (Tex. 1976).

The issue in *Texas State Board of Pharmacy* was not really a question of dominant jurisdiction, however, but rather an appellant's right to elect between alternative appellate remedies. The Board had an option of appealing an injunction against it to the court of civil appeals or directly to the Supreme Court. It filed a notice of appeal, stating that it was appealing the judgment to the

Supreme Court. The Board took no action, however, to complete a direct appeal. Instead, it filed the appellate record with the court of civil appeals. The court of civil appeals dismissed for lack of jurisdiction. The Supreme Court noted that the rules do not require the appellate court to be named in either the appeal bond for cost or in the notice of appeal for those parties excused from filing an appeal bond. It held appellant's option remained open until the record was filed and the inclusion in the notice of appeal of the name of a particular appellate court did not confine the appeal to that court. 539 S.W.2d at 142.[2]

E. The Sixth Court of Appeals Has Dominant Jurisdiction Over This Appeal Under Each Test.

It does not matter which test this court applies, however, because all the tests vest dominant jurisdiction with the Sixth Court of Appeals. If the date that an appeal is perfected is used, the Plaintiffs filed their appeal bond to appeal the judgment to the Sixth Court of Appeals twenty days before Ford filed its appeal bond to appeal the same judgment to this Court. If the filing of the transcript is used, the certified transcript was filed with the Sixth Court of Appeals first. Even if the filing of the statement of facts were considered, an authenticated statement of facts was filed with the Sixth Court of Appeals first.

---

[2]When a party with a choice of alternative appellate routes files a bond or notice for one route but subsequently pursues the other route, the Supreme Court has repeatedly treated the matter as an election of remedies case, not as a dominant jurisdiction case. *Salvaggio v. Brazos County Water Control & Improvement District No. 1*, 598 S.W.2d 227, 228 (Tex. 1980); *Cook v. Neill*, 352 S.W.2d at 265-66.

A court of appeals is not vested with dominant jurisdiction, however, by the filing of a prior mandamus action. *Avis Rent A System, Inc. v. Advertising and Policy Committee*, 751 S.W.2d 257, 258 (Tex. App. - Houston [1st Dist.] 1988, no writ). Therefore, Ford's prior mandamus actions in this Court do not vest this Court with dominant jurisdiction over the appeals from the final judgment.

F. This Court Should Dismiss Ford's Appeal To It.

When the first court's jurisdiction has attached to a case, it acquires dominant jurisdiction to the exclusion of all other courts of coordinate power. *Curtis v. Gibbs*, 511 S.W.2d at 267; *Cleveland v. Ward*, 285 S.W. at 1071. Therefore, any subsequent suit involving the same parties and the same subject matter should be dismissed if a party to the subsequent suit timely calls the second court's attention to the prior suit. *Mower v. Boyer*, 811 S.W.2d at 563 n.2; *Curtis v. Gibbs*, 511 S.W.2d at 267.

III.

THIS COURT'S DISMISSAL OF FORD'S APPEAL WILL NOT DEPRIVE FORD OF AN APPELLATE REVIEW OF THE JUDGMENT.

The dismissal of Ford's appeal to this Court will not deprive Ford of its opportunity to have the district court's judgment reviewed. The rules have long contemplated that both sides may appeal the same judgment. When one side perfects its appeal from a judgment, the right of the other side to file cross-assignments of error immediately attaches. *Ward v. Scarborough*, 236 S.W. 441, 444 (Tex. Comm'n. App. 1922, judgment adopted); *Donwerth v. Preston II Chrysler - Dodge, Inc.*, 775 S.W.2d 634, 639 (Tex. 1989). An appellee also has the right to perfect the record to show the facts essential to a full and complete consideration of any issues it wishes to raise by cross-assignment.

Ward v. Scarborough, 236 S.W. at 444. The rights of the parties to select the proceedings by which the case should be reviewed on appeal are equal. When the first party selects a particular appellate process, the other has no right to complain, and priority in making the election and acting thereon prevails. *Ward v. Scarborough*, 236 S.W. at 444.

WHEREFORE, PREMISES CONSIDERED, Appellees, Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors, and Kenneth Miles respectfully ask this Court to grant this Motion and dismiss the appeal by Ford Motor Company to this Court.

Respectfully submitted,

LAW OFFICES OF
R. JACK AYRES, JR.

By: Thomas V. Murto III
R. Jack Ayres, Jr.
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Thomas V. Murto III
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ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct photocopy of the foregoing motion has been served to the following counsel of record on this the 12th day of April, 1995.

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VIA FEDERAL EXPRESS

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Grainger, Howard, Davis & Ace
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Tyler, Texas 75710

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Thomas E. Fennell
Jones, Day, Reavis & Pogue
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2001 Ross Avenue
Dallas, Texas 75201

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Thomas V. Murto III
THOMAS V. MURTO III

CAUSE NO. 94-143

SUSAN RENAE MILES, INDIVIDUALLY AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS AND KENNETH MILES	§	IN THE DISTRICT COURT
V.	§	RUSK COUNTY, TEXAS
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY FORD	§	4TH JUDICIAL DISTRICT

JUDGMENT

On the 20th day of January, 1995, came on for trial in the above-entitled and numbered cause. The Court having determined that it was vested with jurisdiction of the parties and the subject matter, and that venue was proper in Rusk County, Texas, heard the announcements of the parties. The Plaintiffs Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors, and Kenneth Miles, appeared in person and by their attorneys of record and announced ready for trial and the Defendants Ford Motor Company and Douglas Stanley, Jr. d/b/a Doug Stanley Ford, appeared by their attorneys of record and announced not ready for trial, and moved for a continuance, which was denied. A jury having been previously demanded, a jury of twelve qualified jurors was duly impaneled, and the case proceeded to trial. On Monday, January 23, 1995 the Court determined that one of the jurors had become ill and was unable to attend the trial and

EXHIBIT 1

FILED
In the District Court of
Rusk County, Texas
on this the 9th day of Dec 1995
at 4:25 o'clock P M.
LINDA J. SMITH, CLERK
By Deputy

ordered the case to be heard by the remaining eleven qualified jurors.

At the conclusion of the evidence, the Court submitted the questions of fact in the case to the jury. The Court's Charge and the verdict of the jury are incorporated for all purposes by reference. Following the jury's verdict, the bifurcated portion of the trial was conducted. At the conclusion of the evidence in the bifurcated portion, the Court submitted the questions of fact in that portion of the trial to the jury. The Court's Supplemental Charge and the supplemental verdict of the jury are incorporated for all purposes by reference.

After the jury returned its verdict and supplemental verdict, the Plaintiffs moved for judgment on the verdict and partially notwithstanding certain fact findings, Defendant Ford Motor Company moved for judgment notwithstanding the verdict, and Defendant Douglas Stanley, Jr., d/b/a Doug Stanley Ford moved for judgment. The Court having considered the motions of the parties finds that Plaintiffs' motion should be partially granted, that Ford Motor Company's motion should be denied and that Douglas Stanley, Jr.'s motion should be partially granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by that the Plaintiffs have and recover actual damages from Ford Motor Company in the following amounts:

1. Susan Renae Miles and Kenneth Miles, jointly $500,000

2.	Susan Renae Miles, Individually	$500,000
3.	Susan Renae Miles as Next Friend of Willie Searcy	$27,840,000
4.	Susan Renae Miles as Next Friend of Jermaine Searcy	$250,000
5.	Kenneth Miles, Individually	$250,000

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Susan Renae Miles as Next Friend of Willie Searcy have and recover from Ford Motor Company exemplary damages in the sum of $10,000,000.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs have and recover prejudgment interest from Ford Motor Company in the following amounts:

1.	Susan Renae Miles and Kenneth Miles, jointly	$47,945.20
2.	Susan Renae Miles, Individually	$47,945.20
3.	Susan Renae Miles as a Next Friend of Willie Searcy	$2,669,588.70
4.	Susan Renae Miles as Next Friend of Jermaine Searcy	$23,972.60
5.	Kenneth Miles, Individually	$23,972.60

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiffs should take nothing against Defendant Douglas Stanley, Jr., d/b/a Doug Stanley Ford and that Plaintiffs Susan Renae Miles as Next Friend for Jermaine Searcy and Kenneth Miles take nothing on their claims for loss of consortium.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this judgment, together with taxable court costs, shall bear interest, compounded annually, at 10 percent per year from the date of this judgment until paid. Douglas Stanley, Jr. shall recover his costs of court All costs of court expended or incurred in other

this cause are hereby taxed against Defendant Ford Motor Company. All writs and processes for the enforcement and collection of this judgment or the costs of court may issue as necessary. All other relief not expressly granted is denied.

Signed this 9th day of March, 1995, at 4:25, P.m.

S/ Donald R. Ross

DONALD R. ROSS, Judge
4th Judicial District Court
Rusk County, Texas

CAUSE NO. 94-143

SUSAN RENAE MILES, INDIVIDUALLY AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS AND KENNETH MILES	§	IN THE DISTRICT COURT
V.	§	RUSK COUNTY, TEXAS
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY FORD	§	4TH JUDICIAL DISTRICT

FILED
In the District Court of
Rusk County, Texas
on this the 2 day of May 95
at 2:20 o'clock P M
By LINDA A. SMITH, CLERK

PLAINTIFFS' MOTION FOR PARTIAL NEW TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

Susan Renae Miles, Individually and as next friend of Willie Searcy and Jermaine Searcy, minors and Kenneth Miles, Plaintiffs in the above-styled and numbered cause of action, move this Court to set aside the Judgment rendered on March 9, 1995 on behalf of Douglas Stanley, Jr., d/b/a Doug Stanley Ford and to order new trial against Douglas Stanley, Jr., d/b/a Doug Stanley Ford, and in support thereof respectfully show:

1. The failure of the jury to find that there was a design defect in the occupant restraint system of the truck at the time that it left the possession of Doug Stanley Ford that was a producing cause of the injuries to Willie Searcy, in response to question number one, was contrary to the overwhelming weight and preponderance of the evidence.

2. The failure of the jury to find that there was a manufacturing defect in the occupant restraint system of the truck

EXHIBIT 2

at the time that it left the possession of Doug Stanley Ford that was a producing cause of injuries to Willie Searcy, in response to question number two, was contrary to the overwhelming weight and preponderance of the evidence.

3. The failure of the jury to find that there was a marketing defect in the occupant restraint system of the truck at the time that it left the possession of Doug Stanley Ford that was a producing cause of injuries to Willie Searcy, in response to question number three, was contrary to the overwhelming weight and preponderance of the evidence.

4. The failure of the jury to find that there was negligence by Doug Stanley Ford that was a proximate cause of injuries to Willie Searcy, in response to question number four, was contrary to the overwhelming weight and preponderance of the evidence.

5. The failure of the jury to find that the occupant restraint system of the truck provided by Doug Stanley Ford was unfit for the ordinary purposes for which occupant restraint systems are used and that such unfit condition was the proximate cause of the injuries to Willie Searcy, in response to question number five, was contrary to the overwhelming weight and preponderance of the evidence.

6. The failure of the jury to find that Doug Stanley Ford breached an implied warranty of fitness for a particular purpose that was a proximate cause of injuries to Willie Searcy, in

response to question number six, was contrary to the overwhelming weight and preponderance of the evidence.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request the Court to set aside the Judgment in favor of Douglas Stanley, Jr., d/b/a Doug Stanley Ford in this cause and order a new trial against Douglas Stanley, Jr. d/b/a Doug Stanley Ford, and sever the claims against Douglas Stanley, Jr., d/b/a Doug Stanley Ford from the cause of action against Ford Motor Company.

Respectfully submitted,

LAW OFFICES OF
R. JACK AYRES, JR.

By: _____
R. Jack Ayres, Jr.
State Bar No. 01473000
T. Randall Sandifer
State Bar No. 17619710
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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Motion for New Trial has been forwarded to the following counsel of record on this the 9th of March, 1995.

Richard Grainger
605 South Broadway
P. O. Box 491
Tyler, Texas 75710

VIA HAND DELIVERY

Mr. Thomas E. Fennell
Jones, Day, Reavis & Pogue
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201

VIA HAND DELIVERY

T. Randall Sandifer

T. RANDALL SANDIFER

CAUSE NO. 94-143

SUSAN RENAE MILES, INDIVIDUALLY AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS AND KENNETH MILES	§	IN THE DISTRICT COURT
V.	§	RUSK COUNTY, TEXAS
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY FORD	§	4TH JUDICIAL DISTRICT

ORDER DENYING PLAINTIFFS' MOTION FOR PARTIAL NEW TRIAL

On the 9th day of March, 1995, the Court considered the Motion for New Trial duly filed on March 9, 1995 by Plaintiffs Susan Renae Miles, Individually and as next friend for Willie Searcy and Jermaine Searcy and Kenneth Miles, in the above-entitled and numbered cause. The motion was duly presented to the Court, and the Court is of the opinion that the Motion should be denied.

IT IS, THEREFORE, ORDERED that Plaintiffs' Motion for New Trial in this cause be denied and that a new trial against Douglas Stanley, Jr. d/b/a Doug Stanley Ford in this cause be denied.

SIGNED THIS 9th DAY OF MARCH, 1995, at 4:26 P.m.

FILED
In the District Court of
Rusk County, Texas
on this the 9 day of Mar 1995
at 4:28 o'clock P M.
LINDA J. SMITH, CLERK
By Judy Smith Deputy

Donald R. Ross
DONALD R. ROSS, Judge Presiding
4TH JUDICIAL DISTRICT COURT
RUSK COUNTY, TEXAS

EXHIBIT 3

CAUSE NO. 94-143

FILED
In the District Court of
Rusk County, Texas
on this the 1 day of May 1995
at 4:32 o'clock P.M.
By LINDA STARR, DEPUTY CLERK

SUSAN RENAE MILES, INDIVIDUALLY AND AS NEXT FRIEND OF WILLIE SEARCY AND JERMAINE SEARCY, MINORS AND KENNETH MILES	§	IN THE DISTRICT COURT
V.	§	RUSK COUNTY, TEXAS
FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY FORD	§	4TH JUDICIAL DISTRICT

AMENDED APPEAL BOND

Plaintiffs, Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors and Kenneth Miles, under the authority of Tex. R. P. 40 and 46, file this appeal bond.

1. This Court signed the judgment in this case on March 9, 1995.

2. Plaintiffs desire to appeal from the judgment to the Court of Appeals for the Sixth Court of Appeals District.

3. Plaintiffs, Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors, and Kenneth Miles, as principals, acknowledge that they are bound to pay the Clerk of the Court $1,000.00.

4. R. Jack Ayres, Jr., as surety, whose post office address is 4350 Beltway Drive, Dallas, Texas 75244 and J. Mark Mann, as surety, whose post office address is 300 West Main Street, Henderson, Texas 75652, attorneys for Plaintiffs, each owns non-exempt property in the State of Texas having a value of at least

EXHIBIT 4

$1,000.00 and each acknowledge themselves bound to pay the Clerk of the Court $1,000.00.

5. This Bond is conditioned that Plaintiffs will prosecute the appeal with effect and will pay all costs which have accrued in the trial court and the costs of the statement of facts and transcript.

SIGNED THIS 9th DAY OF MARCH, 1995.

Principals

Susan Renae Miles

Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors

Kenneth Miles

Kenneth Miles

SURETY NO. 1

R. Jack Ayres, Jr.

SURETY NO. 2

J. Mark Mann

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF RUSK §

On this day, Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors, appeared before me the undersigned notary public, and after I administer an oath to her, upon her oath she stated that the facts in this document are within her personal knowledge and are true and correct.

Susan Renae Miles
SUSAN RENAE MILES, Individually and as Next Friend for Willie Searcy and Jermaine Searcy

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Texas, on this 7th day of March, 1995, to certify which witness my hand and seal of office.

Ann B. Willard
Notary Public, State of Texas

ANN B. WILLARD
MY COMMISSION EXPIRES
June 28, 1997

Notary's Name Printed or Typed

My commission expires:
6-28-97

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF RUSK §

On this day, Kenneth Miles appeared before me the undersigned notary public, and after I administer an oath to him, upon his oath he stated that the facts in this document are within his personal knowledge and are true and correct.

Kenneth Miles
KENNETH MILES

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Texas, on this 14th day of March, 1995, to certify which witness my hand and seal of office.

Ann B. Willard
Notary Public, State of Texas

ANN B. WILLARD
MY COMMISSION EXPIRES
June 28, 1997

Notary's Name Printed or Typed

My commission expires:
June 28, 1997

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF RUSK §

On this day, R. Jack Ayres, Jr., appeared before me the undersigned notary public, and after I administer an oath to him, upon his oath he stated that the facts in this document are within his personal knowledge and are true and correct.

R. JACK AYRES, JR.

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Texas, on this 9th day of March, 1995, to certify which witness my hand and seal of office.

Notary Public, State of Texas

My commission expires:

8-3-96

Kim Isenhour
Notary's Name Printed or Typed

KIM ISENHOUR
Notary Public State of Texas
Comm. Exp. 8-3-96

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF RUSK §

On this day, J. Mark Mann, appeared before me the undersigned notary public, and after I administer an oath to him, upon his oath he stated that the facts in this document are within his personal knowledge and are true and correct.

J. MARK MANN

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public for the State of Texas, on this 9th day of March, 1995, to certify which witness my hand and seal of office.

Notary Public, State of Texas

My commission expires:

8-3-96

Kim Isenhour
Notary's Name Printed or Typed

KIM ISENHOUR
Notary Public State of Texas
Comm. Exp. 8-3-96

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Appeal Bond by Attorneys has been forwarded by hand delivery to the following counsel of record on this the 9th of March, 1995.

Richard Grainger
605 South Broadway
P. O. Box 491
Tyler, Texas 75710

Mr. Thomas E. Fennell
Jones, Day, Reavis & Pogue
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas 75201

T. Randall Sandifer

T. RANDALL SANDIFER

FILED

95 MAR 31 PM 4:44

LYNDA J. SMITH, DIST CLK
RUSK COUNTY, TEXAS

BY _____ DEPUTY

NO. 94-143

SUSAN RENAE MILES, Individually and as Next Friend of WILLIE SEARCY, and JERMAINE SEARCY, Minors, and KENNETH MILES, Plaintiffs,	§	IN THE DISTRICT COURT
v.	§	OF RUSK COUNTY, TEXAS
FORD MOTOR COMPANY and DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY, FORD, Defendants.	§	4th JUDICIAL DISTRICT

APPEAL BOND

On the 9th day of March, 1995, the plaintiffs, Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors, and Kenneth Miles, recovered judgment against Ford Motor Company, in the sum of $29,340,000.00 in actual damages, plus $10,000,000.00 in exemplary damages, plus $2,813,424.30 in pre-judgment interest, plus post-judgment interest at 10% per year, compounded annually, and all costs of court. Ford Motor Company desires to appeal from this judgment (and all collateral, subsidiary and underlying orders and trial rulings) to the Court of Appeals for the Twelfth Court of Appeals District of Texas, sitting at Tyler, Texas. Some, but by no means all, of the underlying orders that Ford desires to appeal include: (1) the order on Ford's motion to transfer venue, (2) the order to

EXHIBIT 5

supplement the venue record, (3) the decision to deny leave to join third parties, (4) the decision to deny Ford use of a critical sled test, and (5) the March 16 "Order Imposing Sanctions."

NOW, THEREFORE, we, Ford Motor Company, as principal, and Mike Hatchell and R. Brian Craft, as sureties, acknowledge ourselves bound to pay to the clerk of the court the sum of one thousand dollars, conditioned that Ford Motor Company shall prosecute its appeal with effect and shall pay all the costs which have accrued in the trial court and the cost of the statement of facts and transcript.

WITNESS our hands this the 29th day of March, 1995.

FORD MOTOR COMPANY

BY: _____

GREG SMITH--Attorney-in-Fact
Bar No. 18600600

P.O. Box 629
Tyler, Texas 75710
(903) 597-3301
Fax: (903) 597-2413

MIKE HATCHELL - Surety
Bar No. 09219000

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R. BRIAN CRAFT - Surety
Bar No. 04972020

P.O. Box 629
Tyler, Texas 75710
(903) 597-3301
Fax: (903) 597-2413

CERTIFICATE OF SERVICE

I certify that I forwarded a true copy of the above document, via the indicated means, on the 29th day of March, 1995, to the following persons:

Mr. R. Jack Ayres, Jr. (Certified Mail - RRR # P 373 113 011)
LAW OFFICES OF R. JACK AYRES, JR.
4350 Beltway Drive
Dallas, Texas 75244

Mr. J. Mark Mann (Certified Mail - RRR # P 373 113 012)
WELLBORN, HOUSTON, ADKISON, MANN,
SADLER & HILL
P.O. Box 1109
Henderson, Texas 75653-1109

Greg Smith

Court of Appeals
Sixth Appellate District
State of Texas

BI-STATE JUSTICE BUILDING
100 NORTH STATE LINE AVENUE #20
TEXARKANA, TEXAS 75502-5952
903/798-3046

April 5, 1995

Hon. John R. Mercy
Atchley,Russell,Waldrop
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Texarkana, TX 75505-5517

Hon. R. Jack Ayres, Jr.
Attorney at Law
4350 Beltway Drive
Dallas, TX 75244

Hon. J. Mark Mann
Attorney at Law
300 West Main Street
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Hon. Gregory D. Smith
Ramey & Flock
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Tyler, TX 75710

Hon. Daniel Clark
Clark,Brown,Morales
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Dallas, TX 75205-3440

Hon. Richard Grainger
Grainger,Howard,Davis,Ace
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Tyler, TX 75710

Hon. Thomas Fennell
Jones,Day,Reavis,Pogue
2001 Ross Avenue
Dallas, TX 75201

Hon. Joe Shumate
Shumate & Dean
210 N. Main
Henderson, TX 75653

RE: Court of Appeals Number: 06-95-00026-CV
Trial Court Case Number: 94-143

Style: Susan Renae Miles, Et Al v. Ford Motor Company, Et Al

The certified transcript, in twenty-five volumes, has this day been received, filed and docketed in this court as shown above.

The authenticated statement of facts, in nineteen volumes, has this day been filed.

PLEASE TAKE DUE NOTICE OF THE ATTACHED DIRECTIVES.

Respectfully yours,

Tibby Thomas, Clerk

By Lynda Poore
Deputy

EXHIBIT 16

NO. 94-143

SUSAN RENAE MILES, Individually and as Next Friend of WILLIE SEARCY, and JERMAINE SEARCY, Minors and KENNETH MILES, Plaintiffs,	§	IN THE DISTRICT COURT
v.	§	OF RUSK COUNTY, TEXAS
FORD MOTOR COMPANY and DOUGLAS STANLEY, JR., d/b/a DOUG STANLEY, FORD Defendants.	§	4TH JUDICIAL DISTRICT

STATE OF TEXAS *

COUNTY OF DALLAS *

AFFIDAVIT OF THOMAS V. MURTO III

BEFORE ME, the undersigned authority, on this day personally appeared Thomas V. Murto III, Jr., who, after being by me first duly sworn deposed and stated upon his oath the following:

"My name is Thomas V. Murto III. I am over the age of twenty one (21) years, have never been convicted of a felony or any offense involving mortal turpitude and am in all things competent to make this affidavit. I am in all things competent to give deposition testimony under the laws of the State of Texas and of

EXHIBIT 7

the United States. The facts stated herein are within my personal knowledge and are true and correct.

"I am an attorney admitted to practice in the State of Texas. I am one of the counsels for the Plaintiffs in the above styled and numbered cause of action. I have read the Motion to Dismiss and the facts stated therein are within my personal knowledge and are true and correct. The documents attached as Exhibits 1 through 6 are true and correct copies of the documents they purport to be.

"Ford Motor Company's pursuit of a separate appeal in the Twelfth Court of Appeals rather than in the Sixth Court of Appeals creates the likelihood of increased expenses, time and effort including duplicated efforts on behalf of both the parties and court personnel. It wastes judicial resources and creates the possibility of conflicting decisions by different courts of appeals where one court might affirm the judgment between the parties and the other court might reverse the same judgment."

Further affiant saith not.

Thomas V. Murto III

THOMAS V. MURTO III

SUBSCRIBED AND SWORN TO BEFORE ME, the undersigned authority, on this the 12th day of April, 1995.

Cynthia L. Pytlak
Notary Public, State of Texas
My Comm. Expires 03/16/96

Cynthia L. Pytlak

Notary Public
State of Texas
My Commission Expires:
3-16-96

NO. 12-95-00068-CV

IN THE

COURT OF APPEALS

FOR THE

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

TYLER, TEXAS

Ford Motor Company and Douglas Stanley, Jr.,
d/b/a Doug Stanley Ford,

Appellants,

v.

Susan Renae Miles, Individually and as Next Friend of
Willie Searcy and Jermaine Searcy, Minors and
Kenneth Miles,

Appellees.

RESPONSE TO MOTION TO DISMISS APPEAL

Mike Hatchell
Greg Smith
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Thomas E. Fennell
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Dearborn, MI 48126

Mr. Malcolm E. Wheeler
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GRAINGER, HOWARD, DAVIS & ACE
605 S. Broadway
P.O. Box 491
Tyler, Texas 75710

ATTORNEYS FOR APPELLANTS

NO. 12-95-00068-CV

IN THE

COURT OF APPEALS

FOR THE

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

TYLER, TEXAS

Ford Motor Company and Douglas Stanley, Jr.,
d/b/a Doug Stanley Ford,

Appellants,

v.

Susan Renae Miles, Individually and as Next Friend of
Willie Searcy and Jermaine Searcy, Minors and
Kenneth Miles,

Appellees.

RESPONSE TO MOTION TO DISMISS APPEAL

The Miles' motion to dismiss is grounded on a single, errant proposition: That the common-law "dominant jurisdiction" doctrine settles the jurisdictional disputes arising from dual appeals to appellate courts with overlapping geographical jurisdiction. While two appeals from the same judgment should not proceed simultaneously in different courts, dismissal via

the Miles' proposed rule of "dominant" appellate jurisdiction ar decidedly not the proper means by which to consolidate the parties' appeals. Transfer of the Miles' Texarkana appeal is. Quite simply, the Miles' tack is wrong for three reasons: First and foremost, the doctrine of dominant jurisdiction is a product of common law, and must therefore yield to the superior statutory remedy established in the Government Code's chapter 73--transfer (and consolidation). Second, the doctrine does not apply to ordinary appeals, but to filing of the initial suit. Finally, the doctrine has a "sham" exception that would have precluded the doctrine's application in this case. Let us explain.

A. Procedural Background:

As this Court already knows from prior mandamus proceedings[1], this is a product liability case involving injuries to Willie Searcy, who is now a respirator-dependent quadriplegic. After a 13-day jury trial, the Rusk County District Court entered judgment against Ford for over $ 39 million--apparently the largest personal injury judgment ever to come out of Rusk County. Fearing appellate review by this Court, which already knows this case and already sees through their tactics, the Miles rushed to file a premature appeal bond designating an appeal to the Sixth Court of Appeals. They were so

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[1]*Ford Motor Co. v. Ross*, 888 S.W.2d 879 (Tex. App.--Tyler 1994, orig. proceeding); *Ford Motor Co. v. Ross*, 12-95-00021-CV (Tex. App.--Tyler Feb. 14, 1995, orig. proceeding).

eager to establish priority that they filed their first bond *before* there even was any judgment to appeal. Because the principal claimant, Willie Searcy, prevailed at trial, the Miles had to invoke artifice to file such a bond, challenging the summary-judgment dismissal of derivative consortium claims by secondary claimants (Willie's step-father and brother).

True to its origin, the Miles' appeal remains a sideshow intended to deny Ford's right to choose its appellate forum. Ford has, by motion, asked the Texarkana Court to abate the Miles' appeal and to request the supreme court to transfer that appeal to this Court, where it can be consolidated with Ford's appeal--the real appeal in this case. (A copy of Ford's motion to abate and transfer is appended to this response.)

B. The Texas Supreme Court's Statutory Power to Transfer Appeals Governs this Situation.

1. Statutes supersede conflicting common law.

Where the legislature has not acted, it is up to the courts to fashion a common law. Where the remedy is established by statute, however, the common law must give way. *Pittman v. Time Secur*, 301 S.W.2d 521 (Tex. Civ. App.--San Antonio 1957, no writ); 67 TEX. JUR. 3D §159.

2. The Government Code's provision for transferring appeals supersedes the Miles' proposed "dominant jurisdiction" doctrine.

Here, there is no need of a common-law rule. As this Court knows from experience, Texas' Government Code vests the supreme court with broad power to freely transfer appeals:

> The supreme court may order cases transferred from one court of appeals to another at any time that, in the opinion of the supreme court, there is good cause for the transfer.

TEX. GOV'T CODE ANN. § 73.001. The proper means for resolving a stalemate between appellate courts with overlapping geographical jurisdiction is, quite simply, a request that the supreme court exercise this transfer power. *Id.*

The transfer provision of section 73.001 provides a ready and efficient remedy to the present jurisdictional stalemate. It not only eliminates the need to seek a common-law solution, but forbids such an effort because any common-law doctrine that otherwise might have applied--including the Miles' proposed appellate version of the dominant-jurisdiction doctrine--must yield to Section 73.001.

3. The Miles' appeal should be transferred to this Court.

In this case, the request should be for a transfer of the Miles' appeal to this Court, so as to honor (1) Ford's choice of appellate courts and (2) this Court's prior jurisdiction--via two mandamus proceedings--over the controversy

between the Miles and Ford.

a. Ford's Appeal is Primary.

Justice and fair play require that Ford's choice of appeals court be controlling. For one thing, Ford's appeal to this Court is primary, while the Miles' appeal is derivative. The March 9 judgment embraces every liability theory submitted against Ford and Ford's appeal, in turn, will assail every such theory. In contrast, the Miles are contesting the summary-judgment denial of two peripheral consortium claims--claims that by nature derive from the personal injury claims that Ford is appealing. *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978); *Reagan v. Vaughn*, 804 S.W.2d 463, 464 n.1 (Tex. 1990).

The only other issue that the Miles might raise is Doug Stanley Ford's liability. Yet, in this products liability suit, Doug Stanley Ford is a mere product seller and there is no evidence of independently culpable conduct on its part. As a consequence, any claim that Doug Stanley Ford would now be liable is itself a derivative claim, liability for which Doug Stanley would be entitled to full indemnity from Ford. *E.g., B&B Auto Supply v. Central Freight Lines, Inc.*, 603 S.W.2d 814, 816-17 (Tex. 1980).

Ford's is the primary appeal in yet a second respect--the stakes involved. The March 9 judgment awards nearly $40 million in damages against Ford--every penny of which Ford's appeal places in issue. (Tr. 3486-

89.) The consortium claims of Kenneth Miles (Willie Searcy's stepfather) and Willie's brother Jermaine involve a small fraction of this amount. Indeed, Willie's own mother (whose consortium loss should be the greatest) was awarded $500,000 on her consortium claim (Tr. 3250-74), which is a negligible sum in comparison with the total judgment against Ford--scarcely over one percent of the judgment.

The Miles' attack on the judgment in favor of Doug Stanley doesn't raise the real stakes of their appeal because a successful appeal against Doug Stanley would not add a penny to the Miles' recovery. Stanley would merely become jointly liable with Ford.[2] And, because the evidence proved that Ford's net worth is over four hundred times the judgment amount, collection of any judgment already is assured.

On the whole, the Miles' appeal is a blatant attempt to establish priority. To transfer Ford's appeal to Texarkana (or to dismiss it) would only encourage other successful plaintiffs to launch their own pretextual appeals from their own victories merely for the sake of priority.

b. This Court Already Knows the Miles' Suit.

Decision of both appeals in this Court promotes judicial economy.

---

[2]The Miles never claimed that Doug Stanley's conduct enhanced their damages or caused different damages and the court's charge, therefore, made no attempt to distinguish damages allegedly caused by Ford and damages allegedly caused by Doug Stanley.

This Court already has an invaluable knowledge base from which to draw in reviewing the district court's actions, having already decided *two* mandamus proceedings in the Miles suit, both of which were fully briefed and argued orally and the first of which produced a detailed, published opinion. *Ford Motor Co. v. Ross*, 888 S.W.2d 879 (Tex. App.--Tyler 1994; orig. proceeding). Transfer of Ford's appeal to the Texarkana court, then, would entail an added, unnecessary effort to learn the general facts of the suit. If the prior mandamus proceedings do not immutably establish this Court as the court to decide the entire controversy, they nevertheless establish a strong policy preference for a transfer of the Miles' appeal.

Finally, the Miles had their choice of forum once before--and chose to sue in Rusk County even though they live in Dallas County, Mr. Miles bought his Ford truck in Dallas County, the crash that caused Willie Searcy's injuries also was in Dallas County, and Ford's principle place of business in Texas is Dallas County.

C. The Dominant Jurisdiction Doctrine Does Not Apply to Appeals.

To be sure, Texas courts have long applied a "dominant jurisdiction" doctrine to decide which of two similar suits confers valid trial-court jurisdiction. And for good reason: Section 73.001, which concerns transfers between the courts of appeal, has no real trial-court analog. The "dominant

jurisdiction" concept, however, has never applied to dual *appeals* perfected to appellate courts with overlapping geographical jurisdiction, and with Section 73.001 available, it need never be applied in this context. In fact, outside the special situation presented by affirmative interference with another court's orders, the doctrine appears never to have been invoked to limit any court of appeals' jurisdiction, despite the Miles' contrary contention.

Of the Miles' authorities, not one was a situation to which the Government Code's transfer statute could have applied. Of the Miles' authorities, none authorized dismissal of a timely perfected appeal. Make no mistake. The Miles are asking this Court to now craft a *new* common law remedy.

1. Dominant jurisdiction principles apply only in case of separate and competing lawsuits; an appeal, however, is the mere continuation of an existing suit.

By definition, the doctrine of dominant jurisdiction deals only with the filing or commencing of an *original* suit in a court of *original* jurisdiction. *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974) ("The general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction . . ."); *V. D. Anderson Co. v. Young*, 128 Tex. 631, 101 S.W.2d 798, 800-01 (1937); *Cleveland v. Ward*, 285 S.W. 1063, 1070 (Tex. 1926).

The doctrine cannot, therefore, apply to appeals. An appeal is not an original, but an appellate, proceeding. What is more, an appeal does not

commence a suit, but merely continues the suit filed initially in the trial court:

> That the proceeding instituted in either method [appeal or writ of error] is but the continuation of the action or suit brought in the trial court, is the settled rule in this state."

T. T. Ry. Co. v. Jackson, 85 Tex. 608, 22 S.W. 1030, 1032 (1893); McDonald v. Ayres, 242 S.W. 192, 195 (Tex. Comm'n App. 1922, judgm't adopted).[3] Because the dominant jurisdiction rule applied in *Cleveland v. Ward* and its progeny concerns the battle between separate suits filed at separate times, it does not apply to the situation facing this Court and the Texarkana Court, which arises out of a single suit.

2. The Miles' cases do not apply.

To read the Miles' brief, you would think that a race to the courthouse is de rigueur when it comes to choosing between competing appeals-court designations in cases like this one. Such a conclusion would, however, be dead wrong--and the Miles must surely know it. After all, their cited cases do not even suggest that "dominant jurisdiction" concepts ever have been invoked in such a manner. None of the Miles' cases even involves appeals of the same judgment to different appeals courts with concurrent geographical jurisdiction.

---

[3]That there is only one suit is reflected in the facts that: the appellate court's mandate and the case are returned to the trial court; the judgment of the appellate court is carried out in the trial court; the appellate court's jurisdiction is circumscribed to the review of the record created in the trial court and it has no jurisdiction to receive evidence or issue any relief besides the relief that the trial court should have issued.

Rather, their cases generally concern direct interference by one court with another court's jurisdiction--a special situation that is not present here. Even at that, few of their cases involve the jurisdiction of a court of appeals at all. For example:

Morrow v. Corbin: *Morrow* struck down as unconstitutional a statute that had been intended to allow trial courts to, before trial, get an appellate court's advice as to any statute's constitutionality. 62 S.W.2d at 645-47 (construing former TEX. REV. CIV. STAT. ANN. art. 1851a). The supreme court in *Morrow* merely decided that former article 1851a impermissibly required appellate courts to "advise the district and county judges how to try their cases," which the court correctly held to be beyond the appellate function because it entailed: (i) an executive, rather than judicial, function, (ii) an impermissible attempt to delegate a non-delegable duty and, therefore, (iii) an interference with the trial court's jurisdiction. *Id.* Issues of overlapping geographical jurisdiction between appellate courts was the furthest thing from the *Morrow* court's mind.

Long v. Martin: This case involved a correct application of the principle against interference by one court of appeals with the prior orders of a coordinate court of appeals, and nothing more. (The Waco Court of Appeals had issued a mandamus order that would have annulled the Amarillo Court's prior writ of prohibition.) 285 S.W. at 1078. Like *Morrow*, *Long* has

nothing to do with overlapping geographical jurisdiction of two courts of appeal.

Cook v. Neill: *Cook* did not concern the courts of appeal at all, but rather concerned a jurisdictional dispute between an "appeal" from a school board's order to the district court and a prior appeal of the same order *by the same appellants* to the State Commissioner of Education. 352 S.W.2d at 260-61. As such, *Cook* is subject to three major distinctions from our case: It was controlled by the special provisions (in Article 2686) for de novo "appeals" from certain school board decisions. It was decided on "election" principles--the supreme court interpreted the *second* of the two appeals as a binding election that nullified the prior-filed appeal.[4] 352 S.W.2d at 266. And, most importantly, because it involved an appeal to a district court, *Cook* was never a candidate for a Section 73.001 transfer order.

Millikin v. Jeffrey: Like so many other of the Miles' authorities, *Millikin* applies the principle against direct interference by one court with the jurisdiction and orders of another court. In this case, the supreme court declined to interfere with the court of criminal appeals' habeas corpus jurisdiction over a criminal defendant. 299 S.W.2d at 396. As the supreme court characterized its decision, it vindicated the universal power of every

---

[4]Of course, Ford has done nothing to "elect" to appeal in Texarkana. Rather, Ford's every intent has been to prosecute its appeal to this Court.

court "to carry into effect its own judgments, sentences, and decrees, and prevent interference therewith." *Id.* Of course, Ford's appeal does not impugn the power of any court to effectuate its judgment. Although this Court and the Texarkana Court have docketed simultaneous appeals from the same judgment, neither has yet issued an order, much less had an order interfered with.

In the upshot, where the Miles' cases have upheld a restraint on a court of appeals' jurisdiction, it has been in the context of an actual interference with another court of appeals' jurisdiction. *E.g., Cleveland v. Ward*, 116 Tex. 1, 285 S.W. 1063 (1926). As contemplated in these cases, "interference" requires an affirmative act that impacts a court's ability to proceed to judgment, such as an order that effectively enjoins enforcement of another appellate court's judgment or (in a proceeding in rem) an order taking control over disputed property. *E.g., Ex Parte Renier*, 734 S.W.2d 349 (Tex. Cr. App.--1987); *State v. Giles*, 368 S.W.2d 943, 947 (Tex. 1963); *Abor v. Black*, 695 S.W.2d 564, 567 (Tex. 1985). These kinds of active interference with another court's orders always have been forbidden.

3. The Miles' proposed "dominant jurisdiction" rule would not authorize an appeal's dismissal.

The Miles' motion is unique in yet another respect. Dismissal never has been a proper remedy nor has a motion to dismiss been a proper means

to raise "dominant" jurisdiction. *Dolenz v. Continental Nat'l Bank*, 620 S.W.2d 572, 575 (Tex. 1981) (plea in abatement is the proper means to raise the existence of a prior pending suit). This is no time to change that settled rule.

D. The Miles Should, in Equity, be Estopped to Rely on Their Appeal to Establish "Dominant" Jurisdiction in Texarkana.

The trial-court doctrine of dominant jurisdiction has a sham exception and it would apply here. *Reed v. Reed*, 158 Tex. 298, 311 S.W.2d 628 (1958). In a typical application of "unclean hands" doctrine, the first-filed suit does not confer dominant jurisdiction where the plaintiff in the first suit has filed suit merely to obtain priority, or otherwise is "guilty of such inequitable conduct as will estop him from relying on that suit to abate a subsequent proceeding brought by his adversary." *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974); *see also Russell v. Taylor*, 121 Tex. 450, 49 S.W.2d 733 (Tex. Comm'n App. 1932, judgm't adopted) (suit solely to obtain priority); *Johnson v. Avery*, 414 S.W.2d 441, 442 (Tex. 1966); *V.D. Anderson Co. v. Young*, 101 S.W.2d 798 (Tex. 1937); *Parr v. Hamilton*, 437 S.W.2d 29, 30 (Tex. Civ. App.--Corpus Christi 1968, orig. proceeding). Everything about the Miles' appeal--from their eagerness to file it to the relative insignificance of the matters it raises--says that its sole purpose is to obtain priority and control the venue of Ford's appeal. The Miles won in the trial court, hands down. They appealed only because they knew that Ford would appeal. Their games should not be

rewarded.

CONCLUSION AND PRAYER

Dominant jurisdiction doctrine is not a means to resolve conflicts between the overlapping geographical jurisdiction of two courts of appeals. It never has been, and so long as section 73.001 remains effective, it never can be. What is more, dismissal never has been a remedy even in those other situations to which dominant jurisdiction doctrine has been applied. Transfer and consolidation, then, is the proper course in this case. Accordingly, Ford prays that this Court would deny the Miles' motion in all respects and, further, would instead request that the supreme court use its power, under the Government Code's section 73.001, to transfer the Miles' appeal to this Court. Of course, Ford also prays for whatever other relief this response authorizes.

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GREG SMITH

No. _____

IN THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

In Re

NO. 12-95-00068-CV

IN THE COURT OF APPEALS FOR THE

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

Ford Motor Company,

Appellant,

v.

Susan Renae Miles, et al,

Appellees.

&

NO. 06-95-00026-CV

IN THE COURT OF APPEALS FOR THE

SIXTH COURT OF APPEALS DISTRICT OF TEXAS

Susan Renae Miles, et al,

Appellants,

v.

Ford Motor Company and Douglas Stanley, Jr.,
d/b/a Doug Stanley Ford,

Appellees.

AFFIDAVIT

STATE OF TEXAS §

COUNTY OF SMITH §

BEFORE ME, the undersigned authority, on this day personally appeared Greg Smith, known to me to be a credible person above the age of eighteen years, who, upon his oath stated:

"My name is Greg Smith. I am an attorney with Ramey & Flock, P.C. in Tyler, Texas. I am over eighteen years old, have never been convicted of a felony or crime involving moral turpitude & I am otherwise competent to swear this affidavit. I have personal knowledge of the facts stated in this affidavit and, based on that knowledge, I can say and here pronounce that they are all true and correct.

"I have reviewed and am familiar with the documents that accompany this Affidavit as record excerpts to Ford's request to transfer appeal. These documents are all true copies of the corresponding original documents prepared in Cause No. 94-143 in the Fourth Judicial District Court of Rusk County, Texas, Cause Nos. 12-94-00239-CV, 12-95-00021-CV and 12-95-00068-CV in the Twelfth Court of Appeals District of Texas, and Cause No. 06-95-00026-CV in the Sixth Court of Appeals District of Texas, and are otherwise what they purport to be."

Greg Smith

SWORN TO AND SUBSCRIBED before me by Greg Smith on this 9th day of May, 1995.

NOTARY PUBLIC in and for the STATE OF TEXAS

TERRI L. HARVEY
Notary Public
STATE OF TEXAS
My Comm. Exp. 12-5-95

No. 95-9198

IN THE SUPREME COURT OF TEXAS

AUSTIN, TEXAS

In Re

NO. 12-95-00068-CV

IN THE COURT OF APPEALS FOR THE

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

Ford Motor Company,

Appellant,

v.

Susan Renae Miles, et al

Appellees.

&

NO. 06-95-00026-CV

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Appellees.

REQUEST TO TRANSFER APPEAL

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ATTORNEYS FOR FORD MOTOR COMPANY AND DOUGLAS STANLEY, JR.

No. _____

IN THE SUPREME COURT OF TEXAS

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IN THE COURT OF APPEALS FOR THE

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Appellants,

v.

Ford Motor Company and Douglas Stanley, Jr.,
d/b/a Doug Stanley Ford,

Appellees.

REQUEST TO TRANSFER APPEAL

At the invitation of the Sixth Court of Appeals[1], Ford Motor Company asks this Court to unite in one court of appeals two appeals from a single judgment. More precisely, Ford asks the Court to transfer the Sixth Court of Appeals' cause no. 06-95-

[1] *See* the Sixth Court of Appeals' April 25 order and the accompanying letter to counsel, both of which are included behind tab 6 of the record excerpts volume that accompanies this request.

00026-CV ("the Miles' appeal") to the Twelfth Court of Appeals, where Ford's appeal from the same judgment now pends.

A. The Factual and Procedural Background.

Susan Miles, her son Willie Searcy, and their immediate family ("the Miles") have secured a judgment of nearly $40 million against Ford in Rusk County. As this Court knows, the Sixth and Twelfth Courts of Appeals have overlapping geographical jurisdictions, and both have potential jurisdiction over appeals from Rusk County judgments. TEX. GOV'T CODE § 22.201 (g) & (m). The possibility for diverging appeals became reality in this case when Ford and the Miles appealed to the Twelfth and Sixth Courts of Appeals, respectively.

On Ford's motion, the Miles' appeal has been abated. Responding to a related entreaty, the Sixth Court has asked Ford to "file [its own] motion to transfer with the Supreme Court." (*See* April 25 letter from the Sixth Court of Appeals [Record Excerpts, tab 6]). This is Ford's attempt to fulfill that request.

B. This Court Should Transfer the Miles' Appeal.

1. This Court is Authorized to Transfer the Miles' Appeal.

Through the Government Code, the legislature has empowered this Court to transfer appeals for good cause. TEX. GOV'T CODE ANN. § 73.001. Such a transfer is necessary when a single judgment is appealed to different courts with overlapping

geographical jurisdiction[2], *id.*, as the Sixth Court of Appeals implicitly has acknowledged in this case. (*See* the Sixth Court's April 25 order and letter [Record Excerpts, tab 6]). In this instance, the Miles' appeal should be transferred from the Sixth to the Twelfth Court of Appeals. Let us explain why.

2. Ford's Appeal is the Primary Appeal.

Justice and fair play require that this Court enforce Ford's choice of appellate forum. For one thing, Ford's appeal is primary and concerns by far the most substantial claims. (*See* Sixth Court's April 25 order [Record Excerpts, tab 6]). This is a personal-injury suit focused on the catastrophic injuries of Willie Searcy, who is now a ventilator-dependent quadriplegic. Ford is appealing all awards against it, including the $27,840,000 in personal-injury damages and $10 million in punitive damages awarded to Willie Searcy. (Tr. 3486-89.)

---

[2]In the courts of appeals, the Miles have contended that the common law's prior-suit-pending doctrine provides the rule for resolving the current jurisdictional stalemate. That is, they say that their appeal bond, because it was filed first, fixes dominant jurisdiction in the Sixth Court of Appeals. They are wrong for three primary reasons: First, the prior-suit-pending doctrine, as common law, yields to the superior statutory remedy established in the Government Code's Chapter 73. *E.g., Pittman v. Time Securities*, 301 S.W.2d 521 (Tex. Civ. App.--San Antonio 1957, no writ). Accordingly, the doctrine never has been applied to any situation that this Court's transfer power could have remedied, much less to consolidate two appeals from a single judgment. Second, while an appeal continues an ongoing suit, the prior-suit-pending doctrine concerns priority between competing *original* suits in courts of *original* jurisdiction. *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974). Finally, the prior-suit-pending rule has a "sham" exception for suits filed merely to obtain priority. *Reed v. Reed*, 158 Tex. 298, 311 S.W.2d 628 (1958); *see also Russell v. Taylor*, 121 Tex. 450, 49 S.W.2d 733 (Tex. Comm'n App. 1932, judgm't adopted). That exception would apply here because everything about the Miles' appeal--from their eagerness to file it (they filed a bond before the trial court had entered judgment) to the relative insignificance of the matters it raises--brands their appeal as a transparent artifice designed to control the venue of Ford's appeal.

In contrast, the Miles are contesting the summary-judgment denial of two secondary consortium claims by Willie's step-father and brother--claims that by nature derive from the personal-injury claims that Ford is appealing. *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978); *Reagan v. Vaughn*, 804 S.W.2d 463, 464 n.1 (Tex. 1990). Moreover, those consortium claims involve a tiny fraction of the damages alleged. No reasonable jury ever could award Willie's step-father and his brother consortium damages amounting to more than a percent or two of the claims Ford is appealing when the jury that heard all the evidence valued Willie's own mother's consortium claim at scarcely one percent of the current judgment. (Tr. 3250-74.)

The only other matter that the Miles claim to appeal is the liability of Doug Stanley Ford, the dealer who sold Kenneth Miles his allegedly defective truck. Yet, Doug Stanley Ford is a mere product seller--there is no evidence of independently culpable conduct on its part. As a consequence, Doug Stanley Ford's liability would derive from Ford's liability and would require Ford, as manufacturer, to provide its dealer with common-law indemnity. *E.g., B & B Auto Supply v. Central Freight Lines, Inc.* 603 S.W.2d 814, 816-17 (Tex. 1980).

The appeal against Doug Stanley doesn't raise the stakes of the Miles' appeal because it cannot add a penny to their recovery; at most, Doug Stanley merely would *join* Ford in liability for the awards now assessed against Ford. All in all, then, the Miles' appeal against Doug Stanley will not change how much, if anything, they recover or where the money ultimately comes from. The Sixth Court of Appeals was right. The Miles' appeal concerns claims that are "less substantial" than the matters

addressed in Ford's appeal. (*See* Sixth Court's April 25 order [Record Excerpts, tab 6]).

3. The Miles' Appeal is a Pretext.

The Sixth Court was right again when, implicitly acknowledging the Miles' true motives, it noted that the Miles appealed prematurely. (*See* Sixth Court's April 25 order [Record Excerpts, tab 6]). Indeed, the Miles--beneficiaries of a record-setting personal-injury verdict--were so eager to establish priority that they filed an appeal bond nearly four weeks *before* there was any judgment to appeal. (Record Excerpts, tab 2.) And, as mentioned already, to file that bond the Miles had to challenge the summary-judgment denial of derivative consortium claims brought by secondary claimants. The timing and circumstances of the Miles' appeal thus reveal it for what it really is, a sham useful only to avoid review by the court that already knows this case.

4. The Tyler Court Already Knows this Case.

Transfer of the Miles' appeal to the Twelfth Court of Appeals will promote judicial economy. The Twelfth Court of Appeals already has an invaluable knowledge base from which to draw in reviewing the district court's actions, having already decided *two* mandamus proceedings arising out of this suit, both of which were fully briefed and argued orally and the first of which produced a detailed, published opinion. *Ford Motor Co. v. Ross*, 888 S.W.2d 879 (Tex. App.--Tyler 1994; orig. proceeding) (Record Excerpts, tab 4). Ford believes that these prior mandamus

proceedings immutably establish the Tyler court as the court to decide the entire controversy; at a minimum, they establish a strong policy preference for transferring the Miles' appeal from the Sixth to the Twelfth Court.

C. Ford Has Invited the Courts of Appeals to Comment.

To comport with Ford's understanding of the Supreme Court's preferred procedure, Ford has presented this request to both the Twelfth and Sixth Courts of Appeals with an invitation to append any comments they wish before forwarding the request to the Supreme Court to be decided on the administrative docket.

D. The Proof.

For the Court's benefit, Ford accompanies this request with a separate volume containing the following record excerpts:

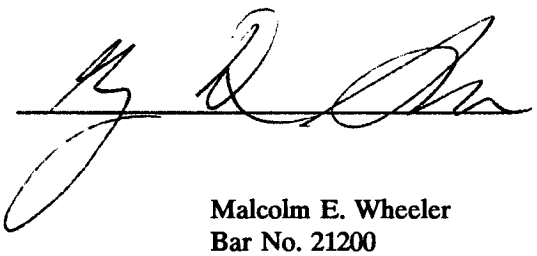
- Ford's appeal bonds to the Twelfth Court of Appeals;
- The Miles' appeal bonds to the Sixth Court of Appeals;
- Docketing notices from the Sixth and Twelfth Courts of Appeals;
- The Twelfth Court of Appeals' opinions and orders from the prior mandamus proceedings;
- Ford's motion to abate the Miles' appeal;
- The Sixth Court of Appeals' order on Ford's motion to abate;
- The Miles' motion to dismiss Ford's appeal; and
- Ford's response to the motion to dismiss.

CONCLUSION AND PRAYER

The Miles had their choice of forum once before, and chose to sue in Rusk County--even though all relevant contacts are with Dallas County. (The Miles live in Dallas County; Mr. Miles bought the allegedly defective truck in Dallas County; the crash that caused Willie Searcy's injuries was in Dallas County; and Ford's principle place of business in Texas is Dallas County.) The Miles' suit against Ford thus began with blatant--and Ford thinks forbidden--forum shopping and the Miles' appeal is more of the same. Such gamesmanship cannot be rewarded.

Ford accordingly prays that this Court would transfer the Miles' appeal (no. 06-95-00026-CV) from the Sixth Court of Appeals to the Twelfth Court of Appeals where it may be decided with Ford's pending appeal--the true appeal in this suit. Of course, Ford also seeks all other relief that this request might authorize.

Respectfully submitted,



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GREG SMITH

NO. 06-95-00026-CV

IN THE

COURT OF APPEALS

FOR THE

SIXTH COURT OF APPEALS DISTRICT OF TEXAS

TEXARKANA, TEXAS

Susan Renae Miles, Individually and as Next Friend of Willie Searcy and Jermaine Searcy, Minors and Kenneth Miles,

Appellants,

v.

Ford Motor Company and Douglas Stanley, Jr., d/b/a Doug Stanley Ford,

Appellees.

RESPONSE TO MOTION TO ACCELERATE APPEAL

We won't mince words. The Miles appellants are playing games with this Court. After all, they know Willie Searcy is getting good medical care. They know the trial court is yet to rule on dispositive post-verdict motions. They also know the record is incomplete and, when fully filed, will be formidable. They know, too, that Ford's appellate counsel (who did not try

this case) will require weeks to read and abstract the record. Still further, they know Ford has appealed to the Twelfth Court of Appeals. And, finally, they know there is not a whit of evidence that an ordinary appeal--in which the record could be completed and jurisdiction consolidated in a single appellate court *before* appellate briefing--would jeopardize Willie Searcy's health or compromise his care.

There should be no mistake. These matters, which the Miles know but refuse to admit, suggest three reasons to deny their motion: (1) the motion is not factually accurate; (2) this case is not an appropriate candidate for acceleration; and (3) Ford's appeal to a sister court and the trial court's continuing plenary jurisdiction render the motion premature. Let us explain.

A. Procedural Background:

This is a product liability case involving injuries to Willie Searcy, who is now a respirator-dependent quadriplegic. After a 13-day jury trial, the Rusk County District Court has entered judgment against Ford for over $39 million. The trial court has yet to rule on Ford's post-trial motions, and Ford has filed an appeal bond with the Twelfth Court of Appeals, which has twice reviewed issues in this case on Ford's mandamus petitions. Nevertheless, fearing appellate review by the court that already knows this case and that already sees through their tactics, the Miles have rushed to file an appeal in this

Court. Because the principal claimant, Willie Searcy, prevailed at trial, the Miles have resorted to artifice on appeal, challenging the dismissal of derivative consortium claims by secondary claimants. They have not, however, stopped there.

The Miles now blatantly seek to prevent informed appellate review. They openly woo this Court's sympathies, alleging that "the health, welfare and even the life . . . of Willie Searcy is at risk during the delay normally involved in the appellate process." (Motion to accelerate, ¶ 2.) To feign a basis for this dramatic thesis, they contend that, because they are "eligible for only modest forms of public assistance," they "will not be able to provide for the equipment and services Willie urgently requires" until they can execute on the judgment that they are appealing. (Motion to accelerate, ¶¶ 12, 15.) Not so.

B. The Motion to Accelerate is Factually Inaccurate:

The motion to accelerate rests on little more than warmed over versions of the same lies and half-truths that the Miles, last May, marshalled into an "expedited and preferential" trial setting so onerous that compliance with the resulting discovery schedule was a physical impossibility. Not only does much of the motion derive, verbatim, from the May 1994 motion to

expedite trial[1], but it calls on the same cast of paid--and non-treating--experts (Sink, Perez, and Dangel) to say just about exactly what they said last May.[2] That is, last year the Miles appellants and Dr. Sink were saying the same things about physical therapy and back-up generators that they are saying today; Nurse Perez was saying the same things about nutrition and the breakdown of Willie's skin; and, Dr. Dangel was saying the same things about depression and psychological services.

Far more important than the redundancy of the motion to accelerate, however, is the veracity of its allegations. The crisis in unmet medical needs that the Miles depict was false last May and it is false today, only now Ford has the evidence to prove it. Consider the facts:

> [Note: For brevity, this response does not belabor all of the Miles' factual inaccuracies. Those inaccuracies omitted from this response are, however, included in a table that accompanies this response as Appendix A. The deposition excerpts referenced in this response also are attached as Appendix B.]

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[1]*Cf.* ¶¶ 5, 7 and 10-12 of the motion to accelerate with the first three pages of the Miles' motion to expedite trial (Tr. vol. 1, p. 20).

[2]*Cf.* Sink, Perez and Dangel affidavits that accompany the motion to accelerate with the affidavits that were attached to the motion to expedite trial. These latter affidavits, which were omitted from the transcript, accompany this response as Appendix C.

i. Willie Searcy is Getting Good Care.

While Willie Searcy's injuries are catastrophic, the Miles' rehabilitation experts and the Miles' own sworn admissions reveal that Willie is in stable condition, his basic needs are being met, and he is receiving good care. (Kenneth Miles dep. at 113 [App. B, ex. 2]; Susan Miles, S.F. 1385 [App. B, ex. 5]; Karen Perez, S.F. 1348 [App. B, ex. 8], 1357; Jack Sink, S.F. 1203-04 [App. B, ex. 7].)

Willie has received extensive medical and rehabilitative care from the Methodist Hospital, the Dallas Rehabilitation Institute, and a number of doctors. He has a home teacher. (Kenneth Miles dep. at 110-11, 114 [App. B, ex. 2].) He gets 104 hours of professional home nursing care each week--about 15 hours each day. (*See* Affidavit of Susan Miles, attached to the Miles' motion to accelerate.)

If Willie has any critical unmet medical need, it would be news to the treating physicians who know his needs best. When asked in his January deposition if any of Willie's medical needs were wanting, Dr. John Milani, Willie's primary treating doctor at the Dallas Rehabilitation Institute[3], responded: "To my recollection, no." Dr. Milani also expressly debunked the Miles' claim of an urgent need for additional physical therapy. After explaining that Willie's mom and his attendants provide maintenance therapy,

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[3]Susan Miles dep., p. 77 (App. B, ex. 1).

like skin care and daily range of motion activities, Dr. Milani could not "recall any specific reason he would need physical therapy right now." (Milani dep., p. 30 [App,. B, ex. 3].) (Milani dep., p. 42 [App. B, ex. 3].) Willie's pulmonologist and urologist at the Dallas Rehabilitation Institute reported in August and December of 1994, respectively, that Willie was "doing very well" with no significant problems and was "doing fine." (Milani dep., pp. 26-28 and dep. exhibits 4 & 5 [App. B, ex. 3].) And, finally, the pneumobelt training that Nurse Perez says Willie needs but cannot get has already been attempted once, at the Dallas Rehabilitation Institute, and apparently paid by Medicaid. It was aborted not because of any funding problem, but because it caused Willie discomfort and his doctors decided he wasn't then ready for the training. (Milani dep., p. 30-31 [App. B, ex. 3].) No wonder the Miles didn't call a single treating physician at trial and no wonder that in the motion to accelerate they turned instead to paid experts like Nurse Perez and Dr. Sink--who has seen Willie only once.

In another effort to feign a crisis, the Miles invoke Dr. Sink's testimony that Willie would die if his medical care is "cut out." (Motion to accelerate at ¶ 7; S.F. 1193.) The problem with that approach is this: The evidence does not suggest even a remote possibility that Willie Searcy might anytime soon lose his current medical-care providers or the sources of payment for that care. Nor does the evidence suggest any change in circumstances that

now moots or impugns the Miles' deposition and trial testimony or the prior testimony of their own "life-plan" expert.

ii. Present Sources are Adequate to Pay for Willie's Interim Care.

Even though Willie Searcy's medical expenses through September 1994 have exceeded $500,000 (Jack Sink, S.F. 1156 [App. B. ex. 7]), the so-called "modest" public assistance already available, such as Medicaid's comprehensive care program (Linda Wickes dep., pp. 43-44 [App. B, ex. 4]), appears to have paid them all. As of July 1994, the Miles had spent only $600 on account of the accident (they bought Willie a computer) and had not been required to pay *any* medical expenses. (Susan Miles dep. at 68-69 [App. B, ex. 1]; Kenneth Miles dep. at 112-13, 115-16 [App. B., ex. 2].) And, despite their affidavits, there is no evidence that the Miles have since paid any of Willie's medical expenses or that they might be required to do so anytime soon. In the upshot, there is no evidence that relying on current sources of assistance during appeal will jeopardize Willie's health.

The "Life Care Plan" through which the Miles estimate Willie's annual expenses certainly fails to reveal any health-threatening crisis. Of the Plan's 16 items,[4] by far the largest is "home care": $330,000 a year for 136 hours a

[4]According to Jack Sink, the author of the "Life Care Plan," it "identif[ies] all of the service, the equipment the services, the supplies, everything that is required because of a disability. That includes medical, psychological, social, vocational, educational, whatever services that are needed, because a person

week of home nursing care. (Affidavit of Jack Sink, attachment.) There is no danger lurking in this item, however. Willie *already* gets 104 hours a week of professional home nursing care *free of charge*. (Affidavit of Susan Miles; Kenneth Miles dep. at 111-12 [App. B, ex. 2].) This is exactly what Willie's treating physician, Dr. Milani, and one of the nursing services that initially provided Willie's home care, Accucare Health Services, have routinely requested. (Letter from Dr. Milani to NHIC/CCP [App. B, ex. 9]; AccuCare Health Services File vol. 1, p. 43 [App. B, ex. 9].)

In contrast to Dr. Sink, Willie's treating physicians are encouraging his family to stay personally involved in Willie's care. (Milani dep., p. 42 [App. B, ex. 3].) To this end, Willie's mother and step-father are specially trained to, and do, provide quality home care for the remaining hours of the day. (Kenneth Miles dep. at 128-29 [App. B, ex. 2]; Karen Perez, S.F. 1348-49 [App. B, ex. 8].) In fact, according to one of their own experts, they are "giv[ing] [Willie] superb care." (Karen Perez, S.F. 1348 [App. B, ex. 8].) And, when asked at trial if he felt that "all the stuff" he does for Willie is "a burden or a problem," Kenneth Miles replied "No sir, I don't." (Kenneth Miles, S.F. 146 [App. B, ex. 6].)

The next largest item in the "Life Care Plan," about $55,000 a year, is for "potential" and unspecified complications--matters that might never

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has a disability." (Jack Sink, S.F. 1154 [App. B, ex. 7].)

materialize. As with home care, this item fails to give any reason to accelerate the Miles' appeal. Were any complication to arise during appeal, there is no evidence that Willie's current providers would refuse the necessary services or that the Miles' "modest" sources would not pay the resulting expenses, just as they have paid *all* expenses thus far.

After potential complications, the next largest "Life Care Plan" item is about $15,000 annually for respiratory equipment and supplies. Yet, Dr. Sink, the Plan's author, testified that this item includes *only* the respiratory equipment and supplies Willie already is getting. (S.F. 1172 [App. B, ex. 6].) The same is true for the estimated "drug/supply needs." (S.F. 1172 [App. B, ex. 6].)

The remaining 12 items in Dr. Sink's "Life Care Plan" total about $30,000 a year. (Affidavit of Jack Sink.) The Miles do not try to show which among these items already are covered, and just as well. Many, perhaps most, of these items (e.g., the costs of wheelchair equipment, routine medical care, etc.) already are covered by sources like Medicaid's comprehensive care program. (Linda Wickes dep., pp. 43-44 [App. B, ex. 4].) Whatever, if any, items remain must necessarily total substantially less than $30,000. As it turns out, this is an amount comfortably within the Miles' ability to secure, had they really thought it necessary for Willie's care.

iii. The Miles have Rejected Funds that Could Have Gone to Willie's Care.

Belying the true facts, the Miles twice have refused funds that could have gone to Willie's care, and when they did accept insurance funds, they didn't purchase medical care. A year ago, after the insurance carrier for Billy Camp, the driver of the car that crashed into Kenneth Miles' truck, interpleaded its $40,000 policy limit, the Miles disclaimed any interest in policy proceeds or in any recovery from the Camps. (*See* Interpleader papers, Appendix D.) Yet, only a day earlier[5], the Miles had cried "crisis" in their motion to expedite, claiming that an expedited trial was imperative because they couldn't find money to get Willie physical therapy:

> [Willie is] in immediate need of rehabilitative services, including physical therapy and occupational therapy, which he cannot and will not receive until he has funds sufficient to pay for such services. . . . [T]he failure to address these critical needs . . . could result not only in his inability to participate in this litigation, but in his death.

(Motion to expedite trial, p. 2 (Tr. vol. 1, p. 21); *cf.* motion to accelerate, ¶ 7.)

At almost the same time, the Miles received $24,800 from Kenneth Miles' underinsured-motorist coverage. How did they use these funds? They did *not* pay for the services and equipment that they were telling the Rusk

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[5]The Miles served their motion to expedite trial on April 25, 1994, and answered the insurance company's interpleader on April 26, 1994. (Tr. vol. 1, p. 24; Appendix D.)

County District Court were "urgently required." Instead, they paid some regular bills and applied the remainder to their "house note"! (Susan Miles, dep. at 14-15 [App. B, ex. 1].) (In a seeming contradiction with his wife's testimony, Kenneth Miles testified that $20,000 of this money was being held in trust for Willie. (Kenneth Miles dep. p. 127-28 [App. B., ex. 2].) In any event, had Willie's unmet needs been critical, these funds were available to meet them.)

Only weeks ago, Ford offered to deposit $49,000 per year in trust for Willie's needs during appeal, as an alternative to a supersedeas bond. This was 100% of the premium that Ford now will pay to bond the judgment. Under Ford's offer, the Miles never would have been obligated to repay these monies, *even if Ford won its appeal.* Nevertheless, the Miles rejected this offer--not because of any concern for the judgment's collectability--the Miles' lawyers freely disclaimed any such concern--but because $49,000 apparently was just not enough money to bother with. (*See* Affidavit of Greg Smith, Appendix E.) Had any alleged unmet needs threatened Willie Searcy's life, surely the Miles wouldn't have turned down insurance and supersedeas payments or applied the proceeds of their own insurance to their house note.

In the upshot, the facts not only fail to bear out any "emergency," but they pose telling questions about the Miles' true motives. After all, if the Miles were so concerned about concluding this suit expeditiously, why did they

choose a trial venue that was certain to prompt a venue appeal from any favorable judgment? (While they sued in Rusk County, the Miles all are from Dallas, the accident happened in Dallas, the truck involved in the accidence was bought in Dallas, and Ford's principal place of business in Texas is Dallas County.) If the Miles really needed money to secure critical care, why did they pass on three sources of funds? And, if the Miles really thought an appeal could jeopardize Willie Searcy's life, then why did they--the winners at trial--perfect their own appeal with such eagerness?

C. This Appeal is Not a Candidate for Acceleration:

Not only is there no affirmative reason to accelerate this appeal, there are practical reasons why acceleration is unthinkable.

While both a transcript and a statement of facts have been filed, neither is yet complete. (The District Clerk's file is 24 volumes and still growing.) What record that already is on file is formidable: The statement of facts from the trial is 19 volumes; to this, pretrial hearings will add another dozen or so volumes; the trial exhibits that shortly will be filed comprise another 70 volumes!

To adequately assimilate a record of this magnitude and to research and brief the relevant law will require time. In fact, to merely read, digest and abstract the statement of facts likely could consume all of an "accelerated"

briefing period. To accelerate despite these circumstances not only would erode the quality of the briefs and abridge their usefulness to the Court, but very well could prevent Ford altogether from making a proper presentation of its appellate points of error.

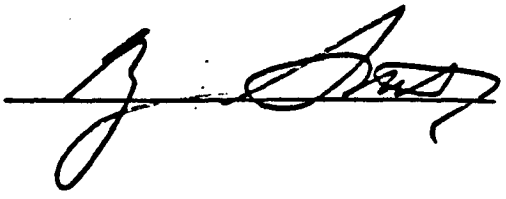
D. The Jurisdictional Facts Render Acceleration Impractical:

Ford has perfected an appeal to the Tyler court of appeals and a transcript now is on file there. Because the parties thus have filed appeals from the same judgment in different courts, this Court cannot now know if it will be the court that decides the appeal's merits. What is more, the district court's judgment isn't even final. Yet, if the Miles had their way, none of this would matter; they would file a brief ten days *before* the district court hears Ford's motion for new trial and Ford presumably would be required to brief its appeal days later. Informed review would be the first casualty of such a scenario and, surely, justice would fall victim as well.

CONCLUSION AND PRAYER

The Miles' motion to accelerate is baseless. The Court's normal--and efficient--procedures and the ordinary appellate timetable suffice for this appeal and they know it. Consequently, Ford and Doug Stanley Ford pray that the Court would refuse to accelerate this appeal. Ford and Doug Stanley Ford also pray for whatever other relief this response authorizes.

Respectfully submitted,



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