No. 06-0449

IN THE
SUPREME COURT OF TEXAS

IN RE TOYOTA MOTOR CORPORATION AND TOYOTA MOTOR SALES, U.S.A., INC.,

Relators.

Response To Petition For Writ Of Mandamus And Relators' Emergency Motion For Temporary Relief

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INTRODUCTION

Real Parties in Interest / Plaintiffs Yolanda Barahona and Wilfredo Barahona, individually and as next friends of Mark Anthony Barahona and Fabian Alexander Barahona, and Manuel Rivera and Norma Castro, individually and as next friends of Samuel Rivera (collectively "the Barahonas") respectfully file this Response to the Petition for Writ of Mandamus and Emergency Motion for Temporary Relief filed by Relators / Defendants Toyota Motor Corporation and Toyota Motor Sales U.S.A., Inc. (collectively "Toyota").

The Court should deny Toyota's petition and motion for temporary relief. The trial court did not abuse the wide discretion it enjoys to manage discovery by ordering a deposition on written questions, rather than an oral deposition, of two minors involved in the accident at issue in this case. The trial court was rightly concerned with the effect of oral depositions on the boys, who not surprisingly. are traumatized by the accident in which their brother and cousin was left a quadriplegic, and testimony from a psychiatrist supported the trial court's conclusion that a deposition on written questions would be far better for the boys while enabling Toyota to obtain necessary discovery. The trial court's conclusion is especially sound in light of the fact that there is ample other evidence in the case bearing on the subject Toyota wants to explore in the depositions – whether the

primary victim of the accident was properly wearing his seatbelt – including testimony from other witnesses, expert testimony, an interrogatory 'answer from one of the boys to be deposed, and whatever testimony the boys give in their deposition on written questions. Moreover, Toyota has an adequate appellate remedy even if the trial court's conclusion is deemed to be incorrect.

Toyota also seeks mandamus and emergency relief because the psychiatrist who testified at the hearing at which the trial court denied Toyota's request for an oral deposition was not designated by the Barahonas in advance. But Tex. R. Civ. I'. 193.6 does not require advance designation for ancillary discovery matters, and the Barahonas had good cause for non-designation, namely, the fact that only two and a half weeks elapsed between Toyota's service of deposition notices and the trial court's hearing – a compressed schedule required by the then-imminent trial setting. Moreover, Toyota was not prejudiced by the non-designation because it was able to and did cross-examine the psychiatrist at length during the discovery hearing.

Finally, Toyota seeks mandamus to pursue discovery from the psychiatrist that the trial court denied when the Barahonas asserted the medical provider privilege. In light of the additional time afforded by trial court's decision to continue the trial in this matter for an additional thirty days, as requested by Toyota, the Barahonas do not oppose this additional discovery and will waive the privilege.

STATEMENT OF FACTS

This lawsuit was instituted in 2003, and Toyota was added as a defendant a year ago. See Petition at 1. Toyota makes much of the fact that it was not originally included in the suit, claiming the Barahonas "belatedly" sued it, amended their complaint twice to refine their theories of defect, and in the process "changed their litigation strategy." See id. But it is hardly unusual or somehow suspect for parties to amend pleadings or add new claims or parties as complex litigation proceeds and as experts are retained and analyze the facts. Toyota does not claim it was added after the statute of limitations or in violation of applicable scheduling deadlines.

Despite being sued in June 2005, and despite now claiming that facts known by Mark Anthony Barahona ("Tony") and Samuel Rivera ("Samuel") are critical to its defense, Toyota did nothing to obtain testimony from the boys for several months, until February 2006. See id. at 2.[1] For their part, the Barahonas have made clear they will not call the boys as witnesses at trial. See Transcript of Hearing, March 13, 2006, Relators' Appendix, Tab J, at 20-21 ("We've also agreed that the plaintiffs are agreeing not to call Sam Rivera and Anthony Barahona as witnesses").

Toyota claims that the Barahonas' counsel represented at a March 13, 2006 hearing that the boys did not remember anything about the

[1] Toyota did not move to compel deposition testimony from the boys until February 28, 2006. See Toyota Motion to Compel Depositions, Relators' Appendix, Tab H. In that motion, Toyota states that it "requested" the depositions beforehand. See id. at 1-2.

accident, leading Toyota to forgo its request for deposition testimony in lieu of interrogatories, but the transcript of that hearing does not reflect that the Barahonas' counsel made such a representation. See id. at 3 n. 30 (citing Transcript of Hearing, March 13, 2006, Relators' Appendix, Tab J, at 20-21). In any event, Toyota served interrogatories seeking answers from Tony and ignored Samuel, despite now claiming his testimony is also essential. See id. In his interrogatory answers, Tony was asked to "state [his] recollection of the events that occurred on September 21, 2003," to which he replied:

> We went to my dad's office. Then we were going to my grandmothers. I was in the back seat on the passenger side, Alex was in the middle seat and Sam was in the front seat. Mother told us to put on our seat belts. We did. The last time I saw Alex he was in his seat belt with the shoulder strap across his chest. He was asleep. I went to sleep. I didn't notice anything else about how he was sitting and I don't remember anything else about the accident.

Answers to First set of Interrogatories and Request for Admissions of Yolanda Barahona, as Next Friend of Mark Anthony Barahona, Relators' Appendix, Tab K, at 3.

Following its receipt of Tony's interrogatory answers, Toyota claims it wanted to "further explore" the subject in depositions. Consequently, it noticed Tony's and Samuel's depositions on May 4, 2006, see Petition at 3, which the Barahonas moved to quash because Toyota had done nothing to confer with them regarding the place and time of the depositions. See

Plaintiffs' Motion to Quash, Relators' Appendix, Tab N. The matter was taken up at a hearing on May 22, 2006.

At the May 22 hearing, the Court heard testimony from Dr. Sherry Gaines, a psychiatrist whose practice includes treatment of children and 'adolescents, and whose work includes heading the Huntsville hospital's resident treatment center for children and adolescents with emotional disturbances. See Transcript of Hearing, May 22, 2006, Relators' -Appendix, Tab T, at 4-5. Dr. Gaines first examined Will and Yolanda Barahona, the parents of Tony and Alex, the boy rendered a quadriplegic: "I interviewed them the longest because I felt like they had information so probably I was with them for about two hours." Id. at 18. She then examined Tony and Samuel. See id. Regarding Tony, she testified:

> I diagnosed Tony with post-traumatic stress disorder. The three main criteria for post-traumatic stress disorder are, well, the main criteria is that you have to have been in a trauma that was life threatening, potentially, or very traumatic in another way, and then the three criteria beyond that are re-experiencing that trauma, avoidance and increased arousal and Tony meets [the] criteria for that diagnosis, so re-experiencing is a little bit hard for Tony because he's so shut down and doesn't really verbalize or show a lot in his play but he does show in his behavior the re-experiencing. The big one with Tony is the avoidance. He makes efforts to avoid thoughts, feelings or conversations associated with the trauma. This was apparent on my interview with him as well as the information that I got from his parents. Another area of avoidance is decreased interest and participation. He used to be real involved in extra curricular activities and sports and he no longer does that sort of thing and another role, [a] big one for Tony, is his restricted range of affect. He was very flat and doesn't show a lot of emotional expression throughout his interview. His mom indicates that he's not as intimate with her and the rest of the family. And another one for Tony is a

> sense of foreshortened future which is indicative of post traumatic stress disorder. He couldn't describe a family or a career which most 12 years old should be able to do. He couldn't even describe what he would like his school to be like for him so he had that criteria and the last criteria of increased arousal Tony displayed was sleep difficulty, decreased concentration, and his parents said irritability and anger – he slammed the doors and punched the walls and acted in a different way after the accident.

Id. at 7-8. Regarding Samuel, she testified:

> I also diagnosed Sammy with post-traumatic stress disorder. He's very verbal and was able to describe the re-experiencing well, and Yolanda and Will were able to describe that on Sammy's part. He has recurrent and intrusive recollections of the accident. He drives by the accident site frequently as a passenger – driving by frequently and has distress while driving by the accident site. He describes some physiological reactivity like if he sees a passenger in a car and someone gets close to their vehicle, he'll kind of involuntarily slam his foot on the floorboard as if to slam on an imaginary brake. He also has avoidance and decreased interest in activities. He's in a club at school but the club leader told Mrs. Barahona that he doesn't participate in any after-school activities or weekend activities because he said he needs to rush home and take care of Alex, and then the last criteria of increased arousal, Sammy has that with sleep disturbance and hypervigilance. He really has that in his care of Alex. He knows Alex's care better than the nurses. He knows how to suction him and catheterize him and he feels responsible and a caregiver for Alex.

Id. at 9-10.

Dr. Gaines testified that subjecting the boys to oral depositions would be harmful for the fairly obvious reasons that it would force them to relive an extremely traumatic experience, during which their brother and cousin was' rendered a quadriplegic and other members of the family were seriously injured, and deepen their impressions of survivor guilt. See id. at 10-11. She also questioned the reliability of any testimony they might

give, and explained that she had not questioned them much about what they remembered from the accidents:

> Q: When you met with Mark Anthony Barahona or Samuel Rivera, did you ask them of their remembrance of the accident and the events leading up to the accident:
>
> A: A little bit. I didn't pry too much because I thought that would be detrimental, number one reason; and number two, I didn't really think that given the fact that this was three years ago and given their ages and given all of the things that they have been through since then, I didn't really think the information would be valuable. Children have a problem remembering whether they have seen something or heard something, the literature calls it a source attribution error and I thought that would be a big problem with them knowing what they had seen and what they had heard and also the trauma can affect memory so I didn't think I'd get a lot of valuable memory from them anyway.

Id. at 25-26. Later in the hearing, she again testified about the dubious reliability of any testimony from the boys:

> I think there are a lot of factors that affect the reliability and in a negative way. The number one thing is just the huge trauma, whether they might have lost consciousness at the time of the accident, and the other is the age at the time of the accident and their ages now. The other is the time frame, the three years, and all the many different stories that they have heard since then. I think they would have a hard time distinguishing in what they heard or experienced. I think those are big factors that make their memories less reliable.

Id. at 32-33.

Finally, Dr. Gaines also testified that the procedure of depositions on written questions would be less detrimental to the boys:

> A. We just talked about the diagnosis and how much distress they are already in, and I feel like a setting like that would increase those symptoms, especially the

survivor guilt which they really both seem to have and the responsibility even though it's an illogical responsibility that they have, that that would be detrimental and also to have to relive the details of that accident would be detrimental for them.

Q: Dr. Gaines I want to talk about some alternative methods of Toyota getting the information that they apparently need in this case. Do you believe that some type of a less confrontational method of obtaining information other than a direct deposition should be looked at if needed?

A: If needed. I was also really careful in interviewing them on just my interview because I knew how affected they had been by the trauma. So I approached questions very gently in talking with them and kind of knew where to draw the line. I'm even worried about asking them too many questions myself even though I have training in that area. So I think it would be fragile – it would be difficult.

Q: Do you believe that specific written questions sent to them to be answered in private with their attorneys and parents there – you don't have the lights and cameras and attorneys present – would be the best method for Toyota to use if they need information from these two little kids?

A: It would certainly be better than a formal hearing with the lights and the oral questions.

Id. at 10-11; see also id. at 22-23 (referring to "whole atmosphere [of a deposition], like the attitude of the interviewer and how the questions are asked and what questions are asked rather than where you are"), 25, 27-28.

Following Dr. Gaines' testimony, the court held that the boys could be deposed by means of written questions, rather than orally. See id. at 33.[2]

[2] Comments made by the parties and the trial court at the May 22 hearing may have given rise to uncertainty as to how the depositions on written questions should proceed,

Toyota filed a petition for mandamus with the Tenth Court of Appeals, but that court denied the petition. See Petition at xv-xvi. Toyota repeatedly cites Judge Gray's "spirited dissent" from the Court's denial, see id. at xvi and Relators' Emergency Motion for Temporary Relief at 3-4, but that opinion that it is mainly directed to Toyota's complaint that the trial court denied its request for a thirty day continuance. See Relators' Motion, Exhibit 1. Because the trial court has now granted Toyota's wish for a thirty day delay in the trial, the issue of a continuance is not before this Court.

ARGUMENT

I. Standards for Mandamus Relief

Repeated decisions of this Court have made clear that mandamus is an "extraordinary remedy," to be used sparingly in cases of "manifest and urgent necessity" to correct clear abuses of discretion by the trial court. See *Walker v. Packer, 827* S.W.2d 833, 839-40 (Tex. 1992); *accord Able Supply Co.* v. *Moye,* 898 S.W.2d 766, 768 (Tex. 1995). Mandamus will not issue if the facts underlying the petition are disputed. See Dow *Chem.* Co. v. *Garcia, 909* S.W.2d 503,505 (Tex. 1995).

A trial court does not abuse its discretion unless it "'reaches a decision so arbitrary and unreasonable as to amount to a- clear and prejudicial error of law."' *Walker, 827* S.W.2d at 839 (quoting *Johnson v.*

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see, e.g., Transcript of Hearing, May 22, 2006, Relators' Appendix, Tab T, at 37, but the Barahonas assume they will occur according to the procedure set forth in Tex. R. Civ. P. 200.1 - 200.4.

Fourth *Court* of *Appeals,* 700 S.W.2d 916, 917 (Tex. 1985)). Importantly, this Court may not substitute its judgment for that exercised by the trial court. See id. (quoting *Flores* v. Fourth Court *of Appeals, 777* S.W.2d 38, 41-42 (Tex. 1989). "The relator must establish that the trial court could reasonably have reached only one decision. Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless it is shown to be arbitrary and unreasonable." *Id.* at 840 (citations omitted); *accord Liberty Nat'l Fire Ins. Co. v. Akin, 927* S.W.2d 627, 629 (Tex. 1996). In general, questions involving whether information is discoverable, and how discovery should be managed, fall well within the broad discretion of the trial court. See In *re CSX Corp.*, 124 S.W.3d 149,152 (Tex. *2003); Flores v. Fourth Court of Appeals, 777* S.W.2d 38, 41-42 (Tex. 1989). "[T]he system cannot afford immediate review of every discovery order in general." *Walker, 827* S.W.2d at 842.

Additionally, mandamus will not issue where the relator has an adequate remedy at law. CSX, 124 S.W.3d at 152. "Without this limitation, appellate courts would 'embroil themselves unnecessarily in incidental pre-trial rulings of the trial courts,' and mandamus 'would soon cease to be an extraordinary writ."' *Walker, 827* S.W.2d at 842 (quoting *Braden v. Downey,* 811 S.W.2d *922, 928* (Tex. 1991). In *Walker,* this Court posited three situations where an appellate remedy might be inadequate: (1) where the trial court's discovery ruling could not be cured, as when privilege information would be disclosed; (2) where the complaining "party's ability

to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error;" or (3) where the discovery cannot be made part of the appellate record, thus effectively preventing appellate review. 827 S.W.2d at 843-44.

II. Neither Mandamus Nor Temporary Relief Should Be Ordered With Regard to The Requested Oral Depositions

A. The Trial Court Did Not Abuse Its Discretion in Ordering Depositions on Written Ouestions

The trial court was perfectly within its discretion to balance the interests of two minors understandably traumatized by a severe accident during which another child in the family was nearly killed and was left a quadriplegic, and Toyota's interest in pursuing additional discovery about the circumstances of the accident.

First, it is worth noting that Toyota already has voluminous information about the facts Tony and Samuel would be questioned about, namely, how Alex was sitting and wearing his seatbelt immediately before the accident. Toyota asserts that the boys have "unique knowledge" about the events in question, Petition at 6, but that is simply untrue. Yolanda Barahona and two third party witnesses who reached the car immediately after the accident, Wiana Smith and Brian Hall, have been deposed on the subject. See Real Parties in Interest Appendix, Tabs 1-3. In addition, expert witnesses from both sides have examined the car and seatbelts and rendered opinions about who was belted in the back seat and how they were wearing their belts. See id., Tabs 4-6.

More importantly, Toyota has already obtained discovery on these questions, and will obtain more, from Tony *and Samuel*. First, Toyota served interrogatories on Tony. Although it now asserts that Samuel's knowledge is critical to the case, Toyota did not propound interrogatories to him. Tony's interrogatory answers addressed the question of how Alex was belted; thus Toyota already knows what Tony knows on that subject. Now, Toyota will be able to depose Tony and Alex on written questions. The Court did not foreclose Toyota from deposing the boys, it only exercised its basic power to supervise discovery to regulate the manner in which the deposition will occur. Thus, the question raised by Toyota's petition is not whether Toyota's need for information possessed by the boys outweighs their interest in mental well-being; Toyota already has that information and will get more through the deposition on written questions. The question here is only whether Toyota's interest in obtaining whatever additional information, if any, may be obtained in an oral deposition versus a written one outweighs the boys' interests.

Toyota has done nothing at all to establish that this additional quantum of information, if any, might be significant. It simply asserts, as an *ipse dixit,* that "[d]epositions on written questions do not provide Toyota with the opportunity to fully cross examine Tony and Samuel," Petition at 7, but even this is not fully correct, since the trial judge indicated he would probably permit follow up questioning from Toyota. See Transcript of Hearing, May 22, 2006, Relators' Appendix, Tab T at 37

(". ..and then I suspect what I'll then allow is after they have been answered and sent back to [Toyota's counsel] and so forth, then assuming they are going to have some follow up questions, they can submit those to me for ruling as to whether they can ask them").

Second, while Toyota understandably focuses its petition on its supposed need for the discovery, its failure to address the effect of oral depositions on the boys is striking. It is to be expected that Tony and Samuel would be deeply and seriously affected by the collision wherein their brother and cousin was horribly injured, and other family members suffered lesser but also serious harm. The testimony of Dr. Gaines merely substantiates what would otherwise be a matter of common sense: (1) that reliving the experience of the accident in the form of answering presumably adversarial questions from unfamiliar lawyers in the setting of an oral deposition, subject to videotaping, would be a traumatic and harmful experience; and (2) that there are reasons to doubt the reliability of their testimony in any case.

Toyota asserts cavalierly that "the very fact of [the psychiatrist's] interviews shows that the boys can be questioned about the accident without traumatizing them," Petition at 8, but this blithely assumes that cross examination by a seasoned litigator intent on ferreting out evidence supporting his client's case in a videotaped deposition is indistinguishable from an interview conducted by a specially trained, non-adversarial child psychiatrist. Indeed, Dr. Gaines testified that she herself treaded very

gingerly around the subject of the accident – treatment it is reasonable to expect Toyota's counsel will have little incentive to emulate. By the same token, Toyota borders on the offensive by suggesting that the situations of children exposed to the horrifying events of the Barahonas' accident can be analogized to the average adult deponent who may find having to testify in a standard civil case "annoying." Petition at 8 (quoting *In re Amaya, 34* S.W.3d at 357).

The trial court had ample discretion to limit discovery that presented an undue burden, harassment or an invasion of personal rights. See Tex. R. Civ. P. 192.6(b). And courts have long recognized that those suffering from the mental trauma of an injury or illness, especially minors, are due special solicitation. In *Maryland v. Craig, 497* U.S. 836 (1990), the Supreme Court recognized that the state's substantial interest in protecting minors suffering from the mental trauma of abuse justified restricting a criminal defendant's Sixth Amendment right to confront his accuser. Thus, the Court approved special and limiting procedures for cross examining minors that balanced their interest in minimizing further damage with the defendant's interest in eliciting information. See *id.* at 851-57. It can hardly be argued that Toyota's interests in pursuing more civil discovery than the substantial amount it already has on the seatbelt issue exceeds the interests of a criminal defendant on trial for his liberty.

In civil cases, too, trial judges have limited parties' deposition rights to protect fragile witnesses. For example, in *Schorr* v. *Briarwood Estates Ltd.*

Partnership, 178 F.R.D. 488 (N.D. Ohio 1998), the court circumscribed the subjects to be covered at the plaintiff's deposition in light of her post-traumatic stress disorder, the same condition experienced by the boys here. The court held that defendants could not depose the plaintiff about issues relating to the damages she sought or her PTSD, and limited the deposition in various other ways, such as dictating its time and place and ordering it to be overseen by a magistrate judge. See *id.* at 492. In *Frideres* v. *Schiltz*, 150 F.R.D. 153 (S.D. Iowa 1993), the court prohibited the deposition of a witness who suffered from gastrointestinal conditions that could be exacerbated by the stress of a deposition, resulting in serious injury or death. *See id.* at 157. In *Medlin v. Andrew*, 113 F.R.D. 650 (M.D.N.C. 1987), the court granted a thirty day stay of the plaintiff's deposition, on the advice of her psychiatrist who indicated that conducting the deposition would exacerbate the plaintiff's condition, and gave the plaintiff leave to seek a longer or permanent stay if substantiated by her doctors. See *id.* at *653.* In *In re McCorhill Pub., Inc.,* 91 B.R. 223 (S.D.N.Y., Bkrtcy. 1988), the court quashed the deposition of a creditor because his medical condition cast doubt on the reliability of any testimony he could give, and because the court found that a deposition could threaten his health or even survival. *Id.* at 224-25.

In this case, the trial court did not foreclose Toyota's ability to extract information from the boys. It merely limited the way in which the deposition will be conducted by restricting it to written questions, acting

on the testimony of a psychiatrist who testified that the setting of a deposition on written questions would be far more accommodating to their conditions. Of course, were this Court making the decision in the first instance, it might have balanced the factors differently and ordered oral depositions, instituted other safeguards or not, or prohibited any form of deposition altogether. Any of these might be reasonable decisions given the factors in play. But this Court should avoid second-guessing or substituting its judgment for that of the trial court when confronting discretionary questions of discovery management. *See Walker, 827* S.W.2d at 839. Otherwise, the trial court's discretion to oversee discovery would be denuded of its authority, and mandamus 'will come to resemble ordinary de *novo* appellate review. The record reflects more than adequate evidence supporting the trial court's decision.

B. Toyota Has An Adequate Appellate Remedy

Even if the trial court erred in ordering the deposition on written questions, Toyota has an adequate appellate remedy. None of the conditions supporting mandamus of discovery orders discussed in *Walker* is present here.

First, Toyota relies on the language in *Walker* suggesting that mandamus may be available to correct erroneous discovery rulings that prevent a party from "developing the merits of its case." Petition at 13. But the bar erected in *Walker* is high: mandamus may be available where a "party's ability to present a viable claim or defense at trial *is vitiated or*

severely compromised by the trial court's discovery error." *Walker, 827* S.W.2d at 843 (emphasis added). Here, as discussed above, Toyota has ample other discovery from multiple sources – including, most importantly, Tony and Samuel – on the question of how Alex was wearing his seatbelt. Moreover, the issue of seatbelt use, while important to the case, is only one of several subsidiary factual issues relating to liability. Toyota offers no evidence or argument whatsoever establishing that – even if Tony and Samuel suddenly contradict Tony's interrogatory answer, and even if the jury then disregards other evidence and accepts its theory of how Alex was wearing his seatbelt – Alex would not have sustained injuries anyway or that the car would not be found to have been defectively designed.

Toyota also claims that oral depositions must go forward in order to preserve the appellate record, citing *Tom L. Scott, Inc. v. McIlhany, 798* S.W.2d 556, 558 (Tex. 1990). See Petition at 14. But in Tom L. Scott, the question involved depositions of experts – not minors who would be harmed by the very act of undergoing the deposition. Here, the oral depositions themselves threaten damage. In these circumstances, to order them to go ahead anyway in the name of improving appellate review does not simply preserve the *status* quo for later consideration, it would vitiate the reason for limiting the discovery in the first place, akin to ordering the production of privileged documents. The damage, in that event, could not be undone. Moreover, the Court in *Walker* cautioned that, before granting

a mandamus to preserve an appellate record, the court must consider "the presence or lack of other discovery." 827 S.W.2d at 844. Here, there is ample other discovery bearing on the question at issue. An appellate court will also have testimony from Tony and Alex in the form of interrogatory answers and depositions on written questions. In light of this other discovery, it will hardly be "impossible to determine on appeal if the denial [was] harmful error." *Tom L.* Scott, 798 S.W.2d at 558 (emphasis added).

III. Prior Non-Designation of Dr. Gaines Does Not Warrant Mandamus or Temporary Relief

Toyota also complains about the trial court's allowing Dr. Gaines to testify without prior designation. See Petition at 9-10. The Tenth Court of Appeals properly rejected Toyota's position in this regard. Rule 196.3 speaks of the "effect on *trial*" of non-designation. The trial court correctly noted that the inquiry regarding the boys' depositions was "an ancillary matter having to do with a specific motion to quash [the] deposition – notice of deposition, not the case in chief... Were she to testify at trial on some issue, obviously that would be a totally different matter." Transcript of Hearing, May 22, 2006, Relators' Appendix, Tab T, at 12. In Monsanto Co. v. ***Davis,*** 25 S.W.3d 773 (Tex. App. – Waco 2000), on which the Tenth Court of Appeals correctly relied in this case, the court held that Rule 193.6 is not applicable to proceedings other than trials, such as class certification hearings. See ***id.*** at 785. Thus, the trial court did not err in denying Toyota's request to exclude Dr. Gaines' testimony on this ground.

Moreover, Rule 193.6 permits testimony without prior designation if the record supports good cause for, or lack of unfair prejudice from, the failure to designate. Both are present here. The trial court noted that Toyota was notified of Dr. Gaines "as soon as practical or practicable." Transcript of Hearing, May 22, 2006, Relators' Appendix, Tab T, at 12. Having earlier agreed to pursue discovery from Tony and Samuels by means of interrogatories, Toyota did not change course and revive its request to seek oral depositions until noticing them on May 4, 2006. See Petition at 3, Relators' Appendix at Tabs L and M. Dr. Gaines was retained and saw the Barahonas thereafter. The court held its hearing on the matter on May 22. Given this compressed schedule, a result of the impending trial then scheduled for June 12, 2006, the trial court did not abuse its discretion in holding that the Barahonas had good cause for not designating Dr. Gaines. In addition, the record reflects that Toyota was not prejudiced by the lack of prior notice. Toyota's counsel had ample opportunity to cross examine Dr. Gaines at the May 22 hearing and did so at length. See Transcript of Hearing, May 22, 2006, Relators' Appendix, Tab T, at 14-28. Any additional benefit Toyota might have gained from learning her views earlier would have been de *minimus,* especially given the lack of great complexity in her testimony. Toyota offers no reason to believe that some prior discovery from Dr. Gaines would have resulted in a different decision from the trial court.

In sum, the fact that Dr. Gaines was not disclosed to Toyota earlier does not justify granting the extraordinary temporary or permanent relief Toyota seeks.

III. Discovery from Dr. Gaines

Toyota also argues that it should be entitled to pursue discovery from Dr. Gaines, including her notes and recollections of her interviews with the family. See Petition at 10-13. In light of the postponement of the trial in this matter for thirty days, as Toyota requested, the Barahonas will not oppose this additional discovery.

CONCLUSION AND PRAYER

For the foregoing reasons, the Court should deny Toyota's petition and motion for temporary relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served on the following attorneys on June 5, 2006:

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CAUSE NO. 03-22,254

WILFRED0 BARAHONA, INDIVIDUALLY AND AS NEXT FRIEND OF FABIAN ALEXANDER BARAHONA, A MINOR;	§	IN THE DISTRICT COURT OF
vs.	§	WALKER COUNTY, TEXAS
JERROLD WILLIAM YOUNG, LEVINGE TRANSPORTATION, LLC, TOYOTA MOTOR CORPORATION, & TOYOTA MOTOR SALES, U.S.A., INC.	§	12th JUDICIAL DISTRICT

AFFIDAVIT

STATE OF TEXAS §
§
HARRIS COUNTY §

Before me, the undersigned notary, on this day personally appeared J. Hunter Craft, a person whose identity is known to me. After I administered the oath to him, upon his oath, he testified as follows:

1. "My name is J. Hunter Craft. I am a duly licensed attorney, and I represent Real Parties in Interest Wilfredo Barahona, Individually, and as Next Friend of Fabian Alexander Barahona, a minor, in this lawsuit. I am fully competent to make this affidavit;

2. "I have read this Response to Petition For Writ of Mandamus And Relators' Emergency Motion For Temporary Relief, and the facts stated in it are within my personal knowledge and are true and correct."

FURTHER AFFIANT SAYETH NOT

J. Hunter Craft

Sworn to and Subscribed before me by J. Hunter Craft on June 4, 2006.

MARIA G. SALAS
MY COMMISSION EXPIRES
March 16, 2009

Notary Public in and for the State of Texas

MARTIN J. SIEGEL

BIOGRAPHY

Martin J. Siegel was born and raised in Houston. He earned a B.A., Highest Honors, from The University of Texas at Austin in 1988, where he majored in the Plan II Liberal Arts Honors Program and graduated *Phi Beta Kappa.*

Siegel received his law degree, *Cum Laude*, from Harvard Law School in 1991. Following law school, he served as law clerk to the Honorable Irving R. Kaufman on the United States Court of Appeals for the Second Circuit in New York City.

From 1992 to 1994, Siegel was an associate in the Washington, DC office of Jenner & Block. At Jenner, he worked on appellate, commercial, intellectual property, and environmental matters. He assisted in the Supreme Court briefing for respondents in *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of America*, 508 U.S. 439 (1993); represented MCI in patent, antitrust and other matters; and helped develop the evidence for, draft and present a petition for post-conviction relief to the Maryland state trial court on behalf of death row inmate Kevin Wiggins. Although the court denied the petition, the U.S. Supreme Court eventually granted it in a decision vacating the death sentence and setting new standards for counsel in the sentencing phase of capital cases. *See Wiggins v. Smith*, 539 U.S. 510 (2003).

From 1995 to 2000, Siegel served as an Assistant United States Attorney in the Civil Division in the Southern District of New York, where his practice focused on bringing civil rights actions, defending statutes from constitutional challenge, and defending federal agencies and officers from suits based on government action. Civil rights cases brought by Siegel include a complaint under the Voting Rights Act following fraud in a Bronx school board vote, resulting in a new election; some of the first cases in the United States brought under the Freedom of Access to Clinic Entrances Act; an action based on discriminatory zoning in violation of the Americans with Disabilities Act; and an investigation of the New York City Parks Department for employment discrimination. In a case of first impression, Siegel successfully defended provisions of the 1996 immigration and welfare reform laws (invalidating local rules against disclosing the immigration status of aliens to federal law enforcement) from constitutional attack under the 10th Amendment brought by New York City. *See City of New York and Rudolph Giuliani v. United States and Janet Reno,* 179 F.3d 29 (2d Cir. 1999).

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In all, Siegel tried eight cases in federal district court and briefed and argued twelve appeals to the Second Circuit. He received the Department of Justice's Director's Award for Superior Performance as an Assistant United States Attorney in 1999 for the successful trial defense of the former chief of the CIA's Technical Services Division in a case involving the agency's experimentation with LSD in the early 1950s.

In 2000-01, Siegel was detailed to serve as Special Counsel on the minority staff of the Senate Judiciary Committee, where his responsibilities included drafting and analyzing legislation on election reform, the McCain-Feingold campaign finance bill, criminal justice, immigration and other issues.

From 2001-06, Siegel was a partner at Watts Law Firm in Houston, where he worked on commercial, franchise, patent, trade secret, false advertising, product liability and personal injury litigation. In 2002, he successfully represented Texas beer distributors against Anheuser-Busch after it wrongfully prevented a $60 million sale of their distributorship, achieving a highly favorable confidential settlement. In 2003, he helped represent the founder of a securities trading firm forced out of the business he founded before its sale for $150 million, winning a $43 million arbitral award. In 2005, he successfully represented Stabar Enterprises, a small Austin pet products company, in multiple lawsuits arising from a licensing dispute with one of the country's largest makers of animal products, securing the dismissal of a related suit against Stabar and a favorable confidential settlement that included the sale of the company's assets.

In 2006, Siegel successfully represented the Texas Democratic Party in its suit to prevent the Republican Party of Texas from replacing Tom DeLay on the general election ballot for Congress following DeLay's withdrawal as a candidate. Siegel wrote the Democratic Party's briefs in the Fifth Circuit on an expedited schedule and co-argued the appeal, resulting in a complete victory for TDP's position under the Constitution's Qualifications Clause and state election law and an order barring the replacement.

In 2007, Siegel opened the Law Offices of Martin J. Siegel to focus on appellate advocacy. He remains of counsel to Watts Law Firm.

In 2004 and 2007, *Texas Monthly* named Siegel a "Texas Super Lawyer Rising Star," an award given to lawyers under 40 chosen by other lawyers throughout the state.

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Siegel has written frequently on legal topics. In 2007, he was named to the Board of editors of Litigation, the magazine published by the ABA's Section on Litigation. Siegel's writings include:

- *Zealous Advocacy vs. Truth*, 33 LITIGATION 31 (Fall 2006);
- *The Myth of Dem, GOP Justice*, HOUSTON CHRONICLE, September 10, 2006, at E4;
- *We Don't Have Kings in Texas*, HOUSTON CHRONICLE, May 29, 2005, at E4;
- *Congressional Power over Presidential Elections: The Constitutionality of the Help America Vote Act Under Article II, Section 1*, 28 VERMONT L. REV. 373 (Winter 2004);
- *Bryant Case Tosses a Lifeline to the Laws Against Adultery*, LOS ANGELES TIMES, August 13, 2004, at B13;
- *Why Texas Republicans Should Love the Trial Lawyers*, HOUSTON CHRONICLE, April 20, 2003, at 4C; and
- *For Better or For Worse: Adultery, Crime and the Constitution*, 30 J. FAMILY L. 45 (1991-92).

Siegel has also served as an adjunct professor at the University of Houston Law Center, as a guest lecturer there and at business and graduate school classes at Princeton and UCLA, and as a speaker at CLE seminars and workshops in Houston and elsewhere.

APPELLATE AND BRIEF WRITING EXPERIENCE

Martin Siegel has an extensive background in appellate and trial-level briefing and argument cutting across a broad range of substantive and procedural areas, including constitutional law, commercial disputes, product liability, personal injury, federal preemption, consumer protection, jurisdiction, removal and remand, governmental immunities, employment law and others.

Siegel's experience began as a federal appellate law clerk and deepened over years of representation of corporate defendants, the United States and individual plaintiffs. He has briefed and argued appeals in the United States Courts of Appeals for the Second Circuit and Fifth Circuit, the Texas Supreme Court (briefed only), and several state appellate courts, and has assisted with briefs written for the United States Supreme Court.

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Some of Siegel's more significant cases include:

- *Texas Democratic Party v. Tina Benkiser, Chairwoman of the Republican Party of Texas.* The Texas Democratic Party sued the Republican Party of Texas to prevent it from substituting a new Congressional candidate for Tom DeLay after his withdrawal from the 2006 election. TDP argued that it was too late to substitute candidates, while RPT claimed replacement was permitted because DeLay had moved to Virginia and was therefore constitutionally ineligible to serve. Siegel handled most of the briefing in the district court, wrote the briefs for TDP in the Fifth Circuit on an expedited schedule and shared oral argument with the party's full-time counsel, obtaining a complete vindication of TDP's position that it had standing to bring the case and that DeLay's replacement would violate the Constitution's Qualifications Clause and state election law. *See* 459 F.3d 582 (5th Cir. 2006).

- *City of New York and Rudolph Giuliani v. United States and Janet Reno.* New York City challenged provisions of the 1996 welfare and immigration reform laws that invalidated local rules against disclosing the immigration status of aliens to federal law enforcement. In a case of first impression, the Second Circuit held that the federal provisions do not violate the Tenth Amendment's bars on interfering with state operations or conscripting state officials to carry out federal tasks. *See* 179 F.3d 29 (2d Cir. 1999). Siegel wrote the federal government's trial and appellate briefs and successfully argued the appeal in the Second Circuit.

- *Grigsby v. ProTrader Group Management LLC, et al.* In this arbitration, Grigsby claimed that the defendants violated securities laws and committed minority shareholder oppression by squeezing him out of the company he co-founded shortly before it was sold for $150 million. As part of the team representing Grigsby, Siegel briefed and argued summary judgment motions and other issues, including ratification, duties owed under the Texas Revised Partnership Act, the statute of limitations for 10b-5 claims under Sarbanes-Oxley, standards for recovery for shareholder oppression, and others. The arbitrators accepted Grigsby's legal positions and awarded him $43 million in compensation. Case No. AAA 70 180 00648 02.

- *Barahona v. Toyota Motor Corp., et al.* The plaintiff sued Toyota when his son was rendered a quadriplegic, alleging that the defective design of the Toyota

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Echo's seatback caused the injuries. Toyota twice filed writs of mandamus in the Court of Appeals and once in the Texas Supreme Court attacking various discovery and other rulings. Siegel wrote the plaintiff's responses, obtaining denials of Toyota's petitions. *See* 191 S.W. 3d 498 (Tex. App. – Waco 2006, mandamus denied, Case No. 06-0449, TX Sup. Ct., June 5, 2006). Siegel also briefed several *Daubert,* summary judgment and other motions, resulting in rulings favorable to the plaintiff.

- *Ayala v. Ford Motor Co.* In this wrongful death case, Ford argued that it complied with applicable federal safety standards and was therefore not liable under TEX. CIV. PRAC. & REM. CODE § 82.008(a). When the plaintiffs responded that Ford's inadequate disclosures to NHTSA rebutted the presumption of nonliability under § 82.008(b)(2), Ford replied that subsection (b)(2) is impliedly preempted under the reasoning in *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), a position the Sixth Circuit and other courts have adopted. Siegel handled the plaintiffs' briefing, and the district court agreed with the plaintiffs that federal law does not conflict with § 82.008(b)(2) and that *Buckman* preemption applies only to fraud-on-the-agency theories of liability, not traditional state product liability claims. Case No. 2-04CV-395 (E.D. Tex. 2005).

- *Rivera v. Heyman, Secretary, Smithsonian Institution, et al.* Siegel represented the Smithsonian in this employment discrimination case raising the novel question whether the Smithsonian, a unique and independent federal trust instrumentality dating to 1836, is subject to § 501 of the Rehabilitation Act, which covers only executive branch employees. Following Siegel's briefing and argument, the district court agreed with the government that the Smithsonian is not in the executive branch and therefore not subject to § 501. As a result of the case, Congress amended the Act to include the Smithsonian. On appeal, which Siegel also briefed and argued, the Second Circuit upheld the remainder of the district court's decision holding that the plaintiff had no additional remedy under § 504 of the Act – a question on which several circuit courts had split – or state and local civil rights laws. *See* 157 F.3d 101 (2d Cir. 1998).

- *Good Samaritan Hospital Regional Medical Center, et al. v. Shalala.* Three hospitals and Medicare providers sued HHS seeking to compel review of a decision not to reopen the hospitals' claims for reimbursement of various significant expenses. Siding with the government after Siegel's briefing and argument, the Second Circuit held that jurisdiction to undertake the requested review was lacking, and that challenged HHS regulations were permissible in

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light of the Medicare Act. The Second Circuit reached this conclusion despite Ninth Circuit precedent to the contrary. *See* 85 F.3d 1057 (1996).

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