

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 01- 9089

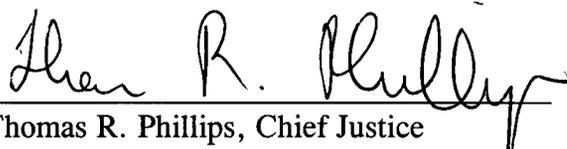
**TRANSFER OF CASE FROM SIXTH
TO FOURTEENTH COURT OF APPEALS**

ORDERED:

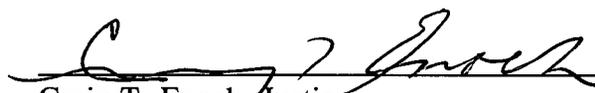
Cause No. 06-01-00060-CV, *HRN, Inc et al. v. Shell Oil Company et al.*, is transferred from the Court of Appeals for the Sixth Court of Appeals District, Texarkana, Texas, to the Court of Appeals for the Fourteenth Court of Appeals District, Houston, Texas.

The Sixth Court of Appeals will make the necessary orders for the transfer of said case as directed hereby, and will cause the Clerk of that Court to transfer the original transcript and all filed papers in the case, and certify all Orders made, to the Fourteenth Court of Appeals. Upon completion of the transfer, the Sixth Court of Appeals shall provide notice of the transfer to the Supreme Court and the State Office of Court Administration.

SIGNED this 6th day of June, 2001.


Thomas R. Phillips, Chief Justice


Nathan L. Hecht, Justice


Craig T. Enoch, Justice

Priscilla R. Owen

Priscilla R. Owen, Justice

James A. Baker

James A. Baker, Justice

Greg Abbott, Justice

Deborah G. Hankinson

Deborah G. Hankinson, Justice

Harriet O'Neill

Harriet O'Neill, Justice

Wallace B. Jefferson

Wallace B. Jefferson, Justice



The Supreme Court of Texas

CHIEF JUSTICE
THOMAS R. PHILLIPS

201 West 14th Street Post Office Box 12248 Austin TX 78711
Telephone: 512/463-1312 Facsimile: 512/463-1365

CLERK
JOHN T. ADAMS

JUSTICES
NATHAN L. HECHT
CRAIG T. ENOCH
PRISCILLA R. OWEN
JAMES A. BAKER
GREG ABBOTT
DEBORAH G. HANKINSON
HARRIET O'NEILL
WALLACE B. JEFFERSON

EXECUTIVE ASSISTANT
WILLIAM L. WILLIS

DEPUTY EXECUTIVE ASST
JIM HUTCHESON

ADMINISTRATIVE
ASSISTANT
NADINE SCHNEIDER

June 6, 2001

Ms. Linda Rogers, Clerk
Sixth Court of Appeals
100 N. State Line Ave., #20
Texarkana, Texas 75501

Dear Ms. Rogers,

Enclosed is a copy of an order of The Supreme Court of Texas of this date concerning a case to be transferred from your court to the Fourteenth Court of Appeals.

Sincerely,

A handwritten signature in black ink, appearing to be "John T. Adams", written over a printed name and title.

John T. Adams
Clerk

Encl.

cc: Mr. Ed Wells, Clerk
Fourteenth Court of Appeals

Justices

LESLIE BROCK YATES
JOHN S. ANDERSON
J. HARVEY HUDSON
WANDA MCKEE FOWLER
RICHARD H. EDELMAN
DON WITTIG
KEM THOMPSON FROST
CHARLES W. SEYMORE



Fourteenth Court of Appeals

1307 San Jacinto, 11th Floor
Houston, Texas 77002

Chief Justice

PAUL C. MURPHY

Clerk

MARY JANE GAY
Phone 713/655-2800
Facsimile 713/650-8550

May 21, 2001

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

RE: No. 14-01-00317-CV; *John Merritt, John George, and Rex Gordon v. Shell Oil Company*

No. 06-01-00060-CV; *HRN, Inc., et al. v. Shell Oil Company, et al.*

Dear Sir:

Appellees have requested that the Texas Supreme Court transfer appeal number 06-01-00060-CV from the Sixth Court of Appeals to the Fourteenth Court of Appeals so that it may be consolidated with our pending appeal number 14-01-00317-CV, which arises out of the same underlying dispute, is based on the same facts, and involves the same parties. Appellants oppose this motion and have also filed a motion to transfer.

Appellants have requested that the Texas Supreme Court transfer appeal number 14-01-00317-CV from the Fourteenth Court of Appeals to the Sixth Court of Appeals so that it may be consolidated with their pending appeal number 06-01-00060-CV, which arises out of the same underlying dispute, is based on the same facts, and involves the same parties.

The original motions to transfer are enclosed. Please present them to the Supreme Court for consideration. The Fourteenth Court of Appeals has no objection to either proposed transfer.

Sincerely,

A handwritten signature in black ink that reads "Ed Wells".

ED WELLS, CLERK

lr:me



Court of Appeals
State of Texas
Sixth Appellate District

CHIEF JUSTICE
WILLIAM J. CORNELIUS

JUSTICES
BEN Z. GRANT
DONALD R. ROSS

May 15, 2001

CLERK
LINDA ROGERS

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

Re: Cause No. 06-01-00060-CV
H.R.N., Inc., et al Appellants v. Shell Oil Company, et al Appellees

Gentlemen:

The referenced case is an appeal now pending in the Sixth Court of Appeals as a transfer case from the Fourteenth Court of Appeals under a transfer order issued by the Supreme Court. Shell Oil Company has filed a motion in this court to transfer this case back to the Fourteenth Court of Appeals to be consolidated with another related case pending in that court. I enclose a copy of the Motion to Transfer.

It is my opinion that the Motion to Transfer should be granted pursuant to the provisions of the Supreme Court's Policies for Transfer of Cases between the Courts of Appeals, particularly Section 1.03 of the policies relating to companion cases.

For the reasons stated I recommend that the Motion to Transfer the referenced cause be granted and that the appeal be transferred back to the Fourteenth Court of Appeals.

If I may assist you further in this or any other regard please advise.

Sincerely,

William J. Cornelius
Chief Justice

WJC/scm
Enclosures

IN THE SUPREME COURT OF TEXAS

HRN, INC. ET AL.,
Appellants,

vs.

SHELL OIL COMPANY ET AL.,
Appellees.

Now Pending as Cause No. 06-01-00060-CV in the Sixth Court of Appeals

On Appeal from Cause No. 1999-28202
in the 234th District Court of Harris County, Texas

Appellees' response to appellants' motion to request transfer and appellees' reply in further support of consolidation of related cases in the Fourteenth Court of Appeals

Appellees, Shell Oil Company and its successor companies, recently requested transfer of the *HRN* case (06-01-00060-CV) from the Sixth Court of Appeals to the Fourteenth Court of Appeals for consolidation with the earlier-filed *Merritt* case (14-01-00317-CV). The Sixth Court has stated that it has no objection to having *HRN* transferred to the Fourteenth Court. Ex. A. Appellants have responded by conceding that the cases are related and should be heard together. However, Appellants have filed a cross-motion to transfer the *Merritt* case from the Fourteenth Court to the Sixth Court instead. There is no basis for Appellants' proposed procedure.

As Appellants themselves acknowledge, *Merritt* and *HRN* are factually similar and present overlapping issues of law. Appellants first perfected their appeal in

Merritt, and the case was assigned to the Fourteenth Court. Thereafter, Appellants perfected their appeal in *HRN*, which was originally assigned to the First Court of Appeals. While awaiting completion of the clerk's record in both cases, counsel for the parties had begun informal discussions on coordinating these related appeals. Before any agreement was reached, however, the Texas Supreme Court issued a docket equalization order transferring *HRN* from the First Court to the Sixth Court. Ex. B.

Since all parties agree these cases are related, Appellees filed motions seeking transfer of *HRN* to the Fourteenth Court for consolidation with *Merritt*, the earlier-filed case. In response, Appellants have proposed transferring *Merritt* to the Sixth Court instead. However, *HRN* is only pending in the Sixth Court as a result of the Supreme Court's standard transfer order. That order provides that where a case subject to transfer has an earlier-filed companion pending in the original court, both cases should remain in the original court. Ex. B at 1.

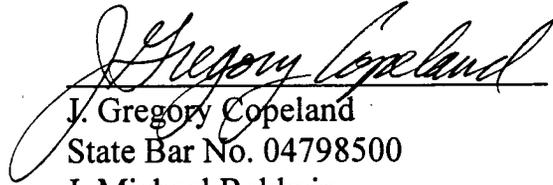
Although this provision of the transfer order does not directly govern the instant situation, the structure of the order makes clear that, in transferring related cases, preference is given to the court where the earlier-filed case is pending. Indeed, such a "first-filed" standard is commonly used in transferring related cases between local trial courts because it is the most objective criterion available. The Sixth Court, although it slightly misstated the procedural history of these cases, likewise relied on the "first-filed" principle in stating that it has no objection to the transfer of *HRN* to the court where *Merritt* is pending.

Since *Merritt* is both the earlier-filed case and the earlier-filed appeal, there is no basis for transferring *Merritt* to follow *HRN*. Rather, under the transfer scheme contemplated by the Supreme Court's order, these cases should be consolidated in the Fourteenth Court, where the first case was filed.

Accordingly, Appellees respectfully request that this Court transfer the *HRN* case (cause number 06-01-00060-CV) from the Sixth Court of Appeals to the Fourteenth Court of Appeal for consolidation with the *Merritt* case (cause number 14-01099317-CV).

Respectfully submitted,

BAKER BOTTS L.L.P.



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State Bar No. 04798500

J. Michael Baldwin
State Bar No. 01625300

Richard A. Brooks
State Bar No. 03072700

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ATTORNEYS FOR APELLEES SHELL OIL
COMPANY, MOTIVA ENTERPRISES LLC,
EQUILON ENTERPRISES LLC, AND
EQUIVA SERVICES LLC

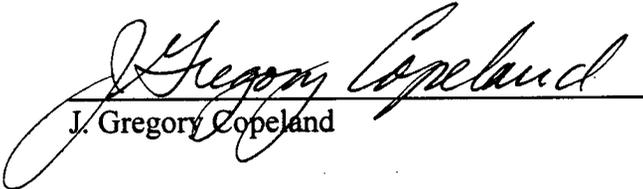
CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2001, a true and correct copy of the above and foregoing was served on all counsel of record by certified mail as follows:

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J. Gregory Copeland

NO. 06-01-00060-CV

IN THE COURT OF APPEALS
FOR THE SIXTH JUDICIAL DISTRICT OF TEXAS
TEXARKANA, TEXAS

HRN, INC. ET AL.,
Appellants,

vs.

SHELL OIL COMPANY ET AL.,
Appellees.

On Appeal from Cause No. 1999-28202
in the 234th District Court of Harris County, Texas

**Appellees' motion to request transfer of cause number 06-01-00060-CV
from the Sixth Court of Appeals to the Fourteenth Court of Appeals for
consolidation with cause number 14-01-00317-CV**

Under the procedure established by the Texas Supreme Court,¹ Appellees Shell Oil Company et al. (collectively "Shell") respectfully ask this Court to request the transfer of cause number 06-01-00060-CV to the Fourteenth Court of Appeals, in which cause number 14-01-00317-CV is pending, for consolidation of the two appeals. Shell

¹ The Supreme Court established the procedure for requesting transfers between courts of appeals in *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 137 n.2 (Tex. 1995). A copy of this opinion is attached as Exhibit 1.

has simultaneously requested the Fourteenth Court of Appeals to request transfer of cause number 06-01-00060-CV from this Court. A copy of Shell's motion addressed to the Fourteenth Court of Appeals is attached as Exhibit 2. Under the procedure adopted in *Miles*, Shell asks that this Court forward this motion to the Texas Supreme Court accompanied by a written statement from the Court on whether it objects to the proposed transfer.

Shell requests transfer and consolidation because the two appeals are largely based on the same facts, involve many of the same parties and lawyers, and arise out of nearly contemporaneous summary judgments entered by the same trial court.

Appellants in both cases are independent lessee-dealers who operate or have operated Shell-branded service stations. Three lessee-dealers originally brought the *Merritt* case (cause number 14-01-00317-CV) in Harris County in 1998, alleging that Shell Oil Company had committed breach of contract, fraud, negligent misrepresentation, and DTPA violations in connection with Shell's Variable Rent Program ("VRP"). In 1999, a second group of lessee-dealers brought the *HRN* case (cause number 06-01-00060-CV) in Harris County against Shell and its successor companies. Like the *Merritt* plaintiffs, the *HRN* plaintiffs alleged breach of contract, fraud, and negligent misrepresentation in connection with Shell's VRP. The *HRN* plaintiffs also alleged that Shell fraudulently induced them to become dealers through the VRP and that Shell's gasoline pricing violated Section 2.305 of the Uniform Commercial Code.

Plaintiffs in both *Merritt* and *HRN* are represented by the same counsel. In light of their commonalities, both cases were assigned to the 234th District Court, where

the trial judge ordered that they be coordinated for purposes of trial, though not necessarily consolidated.² Shell moved for summary judgment in both cases, asserting the same grounds on the overlapping VRP-related claims. The parties' briefs on these claims in the two cases were virtually identical. *HRN* was argued first, and plaintiffs' counsel advised that they would not appear at the *Merritt* summary judgment hearing because the issues were "substantially the same" as those raised in *HRN* and re-argument would "not be a wise use of judicial resources."³ The trial court entered summary judgment in *Merritt* on December 12, 2000, and in *HRN* on December 14, 2000. Both groups of plaintiffs appealed, giving rise to these separate actions pending in two different courts of appeals. The record is not yet complete in either appeal.

It is in the interest of judicial economy for these related cases to be briefed together and heard by the same court. Both of these appeals are in their preliminary stages. Neither side has yet submitted its brief in either case. Shell therefore requests transfer of the *HRN* case (cause number 06-01-00060-CV) from the Sixth Court of Appeals to the Fourteenth Court of Appeals, where the earlier-filed case and appeal is pending. Accordingly, under *Miles*, Shell asks this court to forward this motion to the Supreme Court of Texas with a written statement on whether this court has any objection to the transfer. If the Supreme Court approves the transfer, Shell has asked the

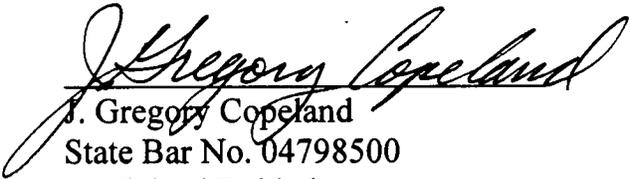
² Ex. 3 (Tr. of 9/11/00 Hearing at 22-23). The tape recording of this hearing was filed as part of the Recorder's Record in the *HRN* appeal.

³ Ex. 4 (Letter of 12/11/00 from Anthony E. Farah to J. Gregory Copeland).

Fourteenth Court of Appeals to consolidate *HRN* into *Merritt* (cause number 14-01-000317-CV).

Respectfully submitted,

BAKER BOTTS L.L.P.



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J. Michael Baldwin
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ATTORNEYS FOR APPELLEES SHELL OIL
COMPANY, MOTIVA ENTERPRISES LLC,
EQUILON ENTERPRISES LLC, AND
EQUIVA SERVICES LLC

CERTIFICATE OF CONFERENCE

I certify that on May 7, 2001, my associate David Rodi conferred with Sylvia Davidow, appellant's counsel, who indicated that appellants are opposed to this motion.


J. Gregory Copeland

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2001, a true and correct copy of the above and foregoing was served on all counsel of record by certified mail as follows:

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Houston, Texas 77056


J. Gregory Copeland

Susan Renae MILES, Individually and as
Next Friend of Willie Searcy and Jer-
maine Searcy, Minors and Kenneth
Miles, Appellants,

v.

FORD MOTOR COMPANY and Douglas
Stanley, Jr. d/b/a Doug Stanley
Ford, Appellees.

No. 95-9198.

Supreme Court of Texas.

Dec. 22, 1995.

Family of motorist who suffered severe injuries in automobile accident brought products liability action against manufacturer of vehicle in which motorist was riding and seller of automobile, and after summary judgment was granted to manufacturer on consortium claims by motorist's brother and step-father, the Fourth Judicial District Court, Rusk County, entered judgment on jury verdict awarding over \$37 million to plaintiffs. Family perfected appeal to Sixth Court of Appeals challenging summary judgment on consortium claims and take-nothing judgment against seller. Manufacturer subsequently perfected appeal to Twelfth Court of Appeals, to which appeal from district court was also permissible, and then filed motion in Sixth Court of Appeals seeking transfer of family's appeal to Twelfth Court of Appeals. The Supreme Court held that: (1) "dominant jurisdiction" rule is applicable at appellate level; (2) Sixth Court of Appeals would be allowed to retain jurisdiction as Court of Appeals in which appeal was first perfected; and (3) abatement rather than dismissal of manufacturer's appeal to Twelfth Court of Appeals was appropriate remedy to protect manufacturer's rights.

Motion for rehearing overruled, and motion to transfer appeal denied.

1. Courts ⇌487(1)

Under proper procedure for presenting to Supreme Court motion to transfer appel-

late case in which appeal has been brought in two Courts of Appeals, party requesting transfer should file copy of motion to transfer in each of two Courts asking that, when motion is forwarded to Supreme Court, each Court of Appeals advise Supreme Court in writing whether it has any objection to proposed transfer, and any briefs in favor of proposed transfer should be filed in each Court of Appeals and forwarded with transfer motion. V.T.C.A., Government Code § 73.001.

2. Courts ⇌483

Only Supreme Court is authorized to transfer appellate cases, and although authority is typically exercised to equalize dockets of Courts of Appeals, statute does not limit Supreme Court's transfer authority to that purpose. V.T.C.A., Government Code § 73.001.

3. Abatement and Revival ⇌8(2)

Courts ⇌475(1)

Court of Appeals in which plaintiff who prevailed in products liability action first perfected appeal was allowed to retain jurisdiction over appeal, and second appeal filed in separate court of appeals by manufacturer was abated and not transferred, even though manufacturer was appealing adverse judgment of over \$37 million and plaintiff was appealing loss of consortium claim worth small percentage of judgment; dominant jurisdiction rule applied to appellate level, and abatement rather than dismissal of appeal would protect manufacturer's rights. V.T.C.A., Government Code § 73.001.

4. Courts ⇌475(1)

General common law rule is that court in which suit is first filed acquires "dominant jurisdiction" to exclusion of other coordinate courts; rule is grounded on principles of comity, convenience, and need for orderly procedure in resolving judicial disputes.

See publication Words and Phrases for other judicial constructions and definitions.

5. Courts ⇌475(1)

Although rule of dominant jurisdiction, under which court in which suit is first filed acquires jurisdiction to exclusion of other

coordinate courts, is most often applied at trial court level, rationale also applies to appeals in those instances where Legislature has not otherwise provided allocation mechanism, and once first appeal is perfected, Court of Appeals acquires jurisdiction over entire controversy.

6. Courts ⇌475(1)

In trial court context, exceptions to rule of dominant jurisdiction apply where party has engaged in inequitable conduct which estops him or her from asserting prior active jurisdiction, where there is lack of persons to be joined if feasible or power to bring them before court, and where there is lack of intent to prosecute first proceeding.

7. Courts ⇌475(1)

Where parties have equal right of appeal, priority in making election and acting thereon under dominant jurisdiction rule should prevail in determining which court will have jurisdiction over appeal.

8. Abatement and Revival ⇌6

Abatement of second-filed appeal is appropriate remedy where appeals from judgment of trial court are filed in multiple courts of appeals and first-filed appeal is given priority under dominant jurisdiction rule; abatement will protect second appellant's right to proceed in chosen forum if at any time it becomes apparent that first appeal was merely a sham, and if second appellant desires to transfer to protect point of error not properly raised as cross-point in first appeal, second appellant may make appropriate motion to Supreme Court.

9. Courts ⇌475(1)

Fact that Court of Appeals in which second appeal was filed may have some familiarity with factual background of case based on earlier original proceedings is not sufficient reason to allow filing of original proceeding to control venue of later appeal from trial court's final judgment over venue selected by party to initially appeal.

10. Courts ⇌475(1)

Although Supreme Court can consider prior familiarity with case in deciding whether to order exception to docket equalization

order, Court declines to do so where both parties have equal right under law to proceed in forum of their choice. V.T.C.A., Government Code § 73.001.

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. 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.

[1] 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

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.
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,

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.

[2] 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 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

1934, 43rd Leg., 3rd C.S., ch. 31, 1934 Gen.Laws 54.

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

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).

[3, 4] 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).

[5] 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. Arch-*

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

er, 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 coordinate power." *Morrow v. Corbin*, 122 Tex. 553, 62 S.W.2d 641, 645 (1933). In *Ward v. Scarborough*, 236 S.W. 441 (Tex. Comm'n App.1922, judgment 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 Scarborougs 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.

[6, 7] 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

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.

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.

[8] 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*, 116 Tex. 1, 285 S.W. 1063 (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.

[9,10] 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. Al-

though 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.



Bill CHENAULT et al., Relators,

v.

The Honorable Tom PHILLIPS, Dan Morales, John T. Adams, and Martha Whitehead, In Their Official Capacities, Respondents.

No. 95-0865.

Supreme Court of Texas.

Jan. 11, 1996.

Attorneys filed original petition in Supreme Court seeking declaration that attorney occupation tax was unconstitutional, injunction against officials responsible for collecting tax, and writs prohibiting enforcement of tax. The Supreme Court held that action to challenge constitutionality of attorney occupation tax was not with-

in original jurisdiction granted to Supreme Court.

Denied.

1. Courts ⇌1

Supreme Court does not have jurisdiction to decide any case absent express constitutional or statutory grant.

2. Declaratory Judgment ⇌273

Request for declaratory relief alone does not establish jurisdiction in Supreme Court.

3. Injunction ⇌110

Prohibition ⇌16

Supreme Court may not consider merits of requests for injunctions or writs of prohibition in case not otherwise properly before Court. Rules App.Proc., Rules 121, 122.

4. Mandamus ⇌1, 3(2.1)

"Mandamus" is extraordinary remedy and generally is not available from any court in state when party has adequate legal remedy.

See publication Words and Phrases for other judicial constructions and definitions.

5. Mandamus ⇌3(4), 4(3)

Attorneys were not entitled to writ of mandamus from Supreme Court in their action to challenge constitutionality of attorney occupation tax, as attorneys could file their challenge to tax in district court and appeal any adverse ruling through ordinary appellate process. V.T.C.A., Tax Code §§ 191.141-191.145; Rules App.Proc., Rules 121, 122.

6. Mandamus ⇌1

Supreme Court will not issue original writ of mandamus absent compelling reason. Rules App.Proc., Rule 121(a).

7. Mandamus ⇌112.1

Neither Supreme Court's need to protect its role as ultimate supervisory authority over state bar, presence of state officers as necessary parties in attorneys' action, nor statewide importance of issues in action presented compelling reason for Supreme Court to issue mandamus in attorneys' action to challenge constitutionality of attorney occu-

REPORTERS' RECORD
VOLUME 1 OF 1 VOLUME
TRIAL COURT CAUSE NO. 99-28202

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HRN, INC., ET AL.)	IN THE DISTRICT COURT OF
)	
Plaintiff,)	
)	
V.)	HARRIS COUNTY, T E X A S
)	
SHELL OIL COMPANY,)	
MOTIVA ENTERPRISES LLC,)	
EQUILON ENTERPRISES LLC)	
AND EQUIVA SERVICES LLC)	
)	
Defendant.)	234TH JUDICIAL DISTRICT

	HEARING	ORIGINAL
ORIGINAL	SEPTEMBER 11, 2000	

On the 11th day of September, 2000 the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Scott Brister, Judge presiding, held in Houston, Harris County, Texas:

Proceedings reported by audio recording method.

1 after the jury comes back, we will set up further trial
2 plans for the next one.

3 MR. SHEEHY: I understand. Let me
4 complicate it just a little bit further. That in the
5 related case, the three plaintiffs who I think are the
6 only Houston plaintiffs -- and again, I apologize.
7 That's just off the top of my head. The only claim they
8 raise are the variable rent program, which Your Honor
9 has granted a summary judgment on in this case. So I
10 think I can assure you that another motion is going to
11 be filed in the very near future.

12 THE COURT: Sure. Sure.

13 MR. SHEEHY: That's point number one.
14 Point number two is, is Your Honor planning on, and I
15 just ask this as a question of information, of
16 consolidating the Merritt case into this case, so we
17 have just the one case dealing with it that way.

18 THE COURT: Well --

19 MR. O'BRIEN: I mean, there is the
20 possibility -- I don't care how you want to handle it --
21 but that Richard and I go talk to Judge Donovan. The
22 reason you got these was only because he thought one of
23 the lawyers who was involved in the case --

24 THE COURT: Right.

25 MR. O'BRIEN: -- caused a recusal problem

1 for him because of some land deal. That impediment
2 appears to be removed.

3 THE COURT: That's fine. At this point,
4 y'all need to talk with Judge Davidson about that.

5 MR. O'BRIEN: Exactly.

6 THE COURT: I wouldn't advise you to go
7 talk with Donovan about it, but talk to Davidson about
8 it.

9 MR. O'BRIEN: Judge Donovan. All right.

10 THE COURT: I'm not going to consolidate
11 it until that clears up. I'm not convinced it needs to
12 be consolidated even if I'm going to try them together.
13 I'm a little unclear about where all those rules are on
14 consolidation and separate trials. But, you know, if
15 there are some Houston plaintiffs, I will expect, and
16 it's still in my Court, I will expect to try them with
17 the Houston plaintiffs in November. Okay?

18 MR. O'BRIEN: Okay. Judge, let me read
19 the transcript and then what I'll do is, without
20 interrupting --

21 THE COURT: It does look like he's
22 correct.

23 MR. O'BRIEN: I just would like to read
24 it.

25 THE COURT: But again, if they, you know,

1 TRANSCRIBER'S CERTIFICATION OF TAPE RECORDING

2
3 I certify that the foregoing is a true and
4 correct transcription, to the best of my ability, of the
5 tape recording of the proceedings held as provided to me
6 by the 234th Judicial District in the above matter.

7 I further certify that I am neither counsel
8 for, related to, nor employed by any of the parties or
9 attorneys in the action in which this hearing was taken,
10 and further that I am not financially or otherwise
11 interested in the outcome of the action.

12 I further certify that the transcription fee of
13 \$ _____ was paid/will be paid in full by _____.

14
15
16 Sarah S. Hurst
Signature of Transcriber

9-28-00
Date

17
18 Sarah S. Hurst
19 2777 Allen Parkway, Suite 600
Houston, Texas 77019
20 (713) 522-5080
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23
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ANTHONY E. FARAH

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December 11, 2000

Via FAX Transmittal (713) 229-2701

Mr. J. Gregory Copeland
BAKER & BOTTS, L.L.P.
One Shell Plaza
910 Louisiana
Houston, Texas 77002-4995

Re: No. 98-12653 *John Merritt, et al. v. Shell Oil Co.*; In the 234th Judicial
District Court of Harris County, Texas

No. 1999-28202; *HRN, Inc., et al. v. Shell Oil Co., et al.*; In the 234th
Judicial District Court of Harris County, Texas

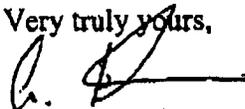
Dear Mr. Copeland:

Please be advised that the *Merritt* intervenors will withdraw their opposition to Defendant's motion to strike the amended plea in intervention. Accordingly, we will forward to you, in acceptable form, an agreed order this afternoon.

With regard to the *Merritt* plaintiffs, their opposition to Defendant's motion for summary judgment raises substantially the same issues already before the Court in *HRN*. As re-argument of these issues will not be a wise use of judicial resources, the *Merritt* plaintiffs will not make an appearance at the hearing.

Thank you for your attention to this matter. Should you have any questions, do not hesitate to contact me at the number above.

Very truly yours,



Anthony E. Farah

AEF:

HRN1541.Copeland aef 12.11.0

IN THE SUPREME COURT OF TEXAS

HRN, INC., *ET AL.*,
Appellants,

vs.

SHELL OIL COMPANY, *ET AL.*,
Appellees.

On Appeal from Cause No. 1999-28202
in the 234th District Court of Harris County, Texas

Appellants' Opposition to Appellees' Motion to Request Transfer

I. INTRODUCTION

On March 13, 2001, Appellants perfected an appeal of this case to the First Court of Appeals. In accord with this Court's Order dated March 30, 2001, the appeal was ordered transferred to the Sixth Court of Appeals. The transfer was made for good cause. *See* TEX. GOVT. CODE ANN. § 73.001 (Vernon 1999).

Appellees now request the Sixth Court of Appeals to ignore this Court's finding of good cause and transfer the appeal yet again to the Fourteenth Court of Appeals. It urges that the appeal should be consolidated with a pending appeal, *Merritt, et al. v. Shell Oil Company* (No. 14-01-00317CV). Concurrently with this opposition, Appellants have also filed a motion with the Sixth Court of Appeals, requesting *Merritt's* transfer to the

Sixth Court for consolidation with *HRN*. Appellants have also filed their opposition and their own motion to request transfer of *Merritt* with the Fourteenth Court of Appeals.

Under the appropriate legal standard, this Court's decision to transfer *HRN* to the Sixth Court of Appeals should not be disturbed. This Court typically exercises its authority to transfer cases to equalize dockets of the courts of appeals. *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 137 (Tex. 1995). Nothing in this Court's order or in Appellees' motion suggests that this is anything but the typical case. For the reasons set forth below, Appellees' motion is without merit and should be denied.

II. APPELLATE TRANSFER STANDARD

"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 (emphasis added). Generally this Court exercises its authority to transfer cases only to equalize dockets of the courts of appeals. *Miles*, 914 S.W.2d at 137. Indeed, the "overarching goal of the transfer system is and always has been" equalization. *American Nat'l Ins. Co. v. IBM Corp.*, 933 S.W.2d 685, 692 (Tex. App.—San Antonio 1996, writ denied) (Duncan, J. concurring and dissenting).

III. ARGUMENT

This Court's order transferring the present appeal to the Sixth Court of Appeals should not be disturbed. On March 30, 2001, this Court ordered that on or after April 9, 2001, the first twenty appeals in the First Court of Appeals be transferred to the Sixth Court of Appeals. *See* Ex. "A." This Court's order is impartial—on its face, the transfers

are based entirely on docket equalization. Thus, neither the transfer order nor Appellees' motion identifies any reason to disturb this Court's finding of good cause for transfer.

A review of the March 2001 statistics from the Texas Office of Court Administration confirms that this Court ordered the transfer for docket equalization purposes. For example, while the present case was pending in the First Court of Appeals, the court averaged 129.8 cases per justice, while the Sixth Court of Appeals averaged 93.7. *See Ex. "B"* at 1. In the same month, 138 new cases were filed or added in the First Court of Appeals compared to thirty-three cases in the Sixth Court of Appeals. *See id.* at 2. Even more striking is the disparity between the Sixth Court of Appeals and the First Court of Appeals in the age of cases. In March 2001, the First Court of Appeals had 182 cases pending for more than twelve months; the Sixth Court of Appeals had thirty.

Based on the March 2001 statistics, transferring *HRN* to the Fourteenth Court of Appeals would not only upset this Court's equalization attempts, but actually result in a greater burden on the Fourteenth Court of Appeals than originally would have been imposed on the First Court of Appeals. In March 2001, the First Court of Appeals averaged 129.8 cases per justice while the Fourteenth Court of Appeals averaged 159.8.

IV. CONCLUSION

"[T]he sole purpose of [] transfer is docket equalization[.]" *American Nat'l Ins. Co.*, 933 S.W.2d at 694. The statistics overwhelmingly demonstrate that the Sixth Court of Appeals is more aptly suited to hear this appeal, as well as *Merritt*, the related appeal. Accordingly, Appellees' motion is without merit and should be denied.

Respectfully submitted,

FLEMING & ASSOCIATES, L.L.P.

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Sylvia Davidow

State Bar No. 05430551

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Fax No.: (713) 222-0888

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **Appellants' Opposition to Appellees' Motion to Request Transfer** was served as described on the 16 day of May, 2001 to all counsel of record shown below:

By COURIER SERVICE

Mr. J. Gregory Copeland
Mr. J. Michael Baldwin
Mr. Richard A. Brooks
Mr. David M. Rodi
Baker & Botts, L.L.P.
910 Louisiana
Houston, TX 77002

Ms. Anne Spiegel
Senior Litigation Counsel
Equiva Services L.L.C.
910 Louisiana
Houston, TX 77002



Anthony E. Farah

IN THE SUPREME COURT OF TEXASMisc. Docket No. 00- 9037

**TRANSFER OF CASES FROM
COURTS OF APPEALS**

ORDERED:**I.**

The first 25 cases, except as otherwise provided by this Order, which are filed in the Court of Appeals for the Fifth Court of Appeals District, Dallas, Texas, on or after April 4, 2001, are transferred to the Court of Appeals for the Eleventh Court of Appeals District, Eastland, Texas.

II.

The first 20 cases, except as otherwise provided by this Order, which are filed in the Court of Appeals for the First Court of Appeals District, Houston, Texas, on or after April 9, 2001, are transferred to the Court of Appeals for the Sixth Court of Appeals District, Texarkana, Texas.

III.

The first 20 cases, except as otherwise provided by this Order, which are filed in the Court of Appeals for the Ninth Court of Appeals District, Beaumont, Texas, on or after April 5, 2001, are transferred to the Court of Appeals for the Thirteenth Court of Appeals District, Corpus Christi, Texas.

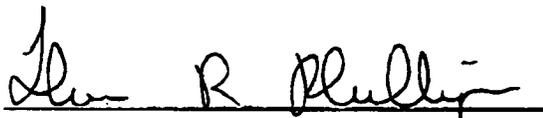
For purposes of determining the effective date of transfers pursuant to this order, "filed" in a court of appeals means the receipt of notice of appeal by the court of appeals.

In effectuating this Order, companion cases shall either all be transferred, or shall all be retained by the Court in which filed, as determined by the Chief Justice of the transferring Court, provided that cases which are companions to any case filed before the respective operative dates of transfer specified above, shall be retained by the Court in which originally filed.

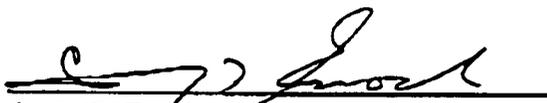
It is specifically provided that the cases ordered transferred by this Order shall, in each instance, not include original proceedings, appeals from interlocutory orders, appeals from denial of writs of habeas corpus, extradition, bond cases, and those cases which in the opinion of the Chief Justice of the transferring Court contain extraordinary circumstances or in which emergency action may be required.

The transferring Court of Appeals will make the necessary orders for the transfer of said cases as directed hereby, and will cause the Clerk of that Court to transfer the original transcript and all filed papers in each case, and certify all Orders made, to the Court of Appeals to which the cases are transferred. Upon completion of the transfer of the requisite number of cases ordered transferred, the transferring Court shall submit a list of the cases transferred, identified by style and number, to the Supreme Court and the State Office of Court Administration.

SIGNED this 30th day of March, 2001.

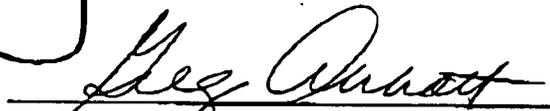

Thomas R. Phillips, Chief Justice

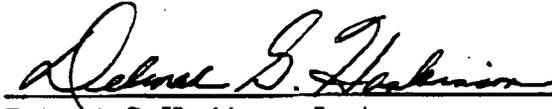

Nathan L. Hecht, Justice


Craig T. Enoch, Justice

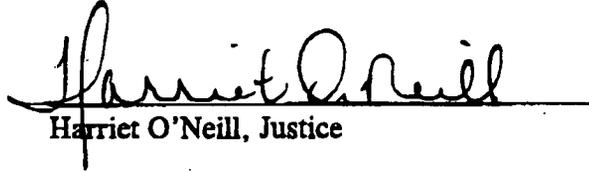

Priscilla R. Owen, Justice


James A. Baker, Justice


Greg Abbott, Justice



Deborah G. Hankinson, Justice



Harriet O'Neill, Justice

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Misc. Docket No. 01-9037

Page 3 of 3

**THE SUPREME COURT OF TEXAS****CHIEF JUSTICE**
THOMAS R. PHILLIPS

POST OFFICE BOX 12248 AUSTIN, TEXAS 78711

TEL: (512) 463-1312

FAX: (512) 463-1365

JUSTICES
NATHAN L. HECHT
CRAIG T. ENOCH
PRISCILLA R. OWEN
JAMES A. BAKER
GREG ABBOTT
DEBORAH G. HANKINSON
HARRIET O'NEILL
ALBERTO R. GONZALES

March 30, 2001

CLERK
JOHN T. ADAMS**EXECUTIVE ASST**
WILLIAM L. WILLIS**DEPUTY EXECUTIVE ASST**
JIM HUTCHESON**ADMINISTRATIVE ASST**
NADINE SCHNEIDERMs. Margie Thompson, Clerk
First Court of Appeals
1307 San Jacinto, 10th Floor
Houston, Texas 77002Ms. Carol Anne Flores, Clerk
Ninth Court of Appeals
1001 Pearl Street, Ste. 310
Beaumont, Texas 77701Ms. Lisa Matz, Clerk
Fifth Court of Appeals
600 Commerce, 2nd Floor
Dallas, Texas 75202-4658

Enclosed is a copy of an order of The Supreme Court of Texas of this date concerning cases to be transferred from your courts to various other courts of appeals.

Sincerely,

SIGNEDJohn T. Adams
Clerk

Encl.

cc: Clerks of the:
Sixth Court of Appeals
Eleventh Court of Appeals
Thirteenth Court of Appeals

SUMMARY STATUS OF PENDING CASES
MONTH OF: March 2001

COURT.....	Number of Justices	TOTAL CASES PENDING				CHANGE NEEDED TO EQUALIZE DOCKETS			READY FOR SUBMISSION <i>(At Issue)</i>			NOT READY FOR SUBMISSION			SET FOR SUBMISSION			SUBMITTED <i>(Awaiting Opinions)</i>		
		CIV	CRIM	TOTAL	AVG PER JUSTICE*	CIV	CRIM	TOTAL	CIV	CRIM	TOTAL	CIV	CRIM	TOTAL	CIV	CRIM	TOTAL	CIV	CRIM	TOTAL
1st/Houston.....	9	476	692	1,168	129.8	(49)	(39)	(88)	106	146	252	264	422	686	43	62	105	63	62	125
2nd/Fort Worth.....	7	313	540	853	121.9	19	(32)	(13)	6	31	37	156	312	468	41	74	115	110	123	233
3rd/Austin.....	6	239	224	463	77.2	46	211	257	3	6	9	132	150	282	43	44	87	61	24	85
4th/San Antonio.....	7	286	417	703	100.4	46	91	137	14	29	43	182	267	449	40	76	116	50	45	95
5th/Dallas.....	13	625	1,099	1,724	132.6	(8)	(156)	(164)	38	64	102	252	658	910	145	243	388	190	134	324
6th/Texarkana.....	3	101	180	281	93.7	41	38	79	29	39	68	53	130	183	16	5	21	3	6	9
7th/Amarillo.....	4	137	276	413	103.3	53	14	67	40	93	133	70	150	220	6	9	15	21	24	45
8th/El Paso.....	4	222	325	547	136.8	(32)	(35)	(67)	25	16	41	100	194	294	27	32	59	70	83	153
9th/Beaumont.....	3	106	180	286	95.3	36	38	74	6	14	20	72	152	224	8	1	9	20	13	33
10th/Waco.....	3	186	211	397	132.3	(44)	7	(37)	32	25	57	83	102	185	12	8	20	59	76	135
11th/Eastland.....	3	102	222	324	108.0	40	(4)	36	8	25	33	52	144	196	28	48	76	14	5	19
12th/Tyler.....	3	85	168	253	84.3	57	50	107	21	34	55	54	118	172	3	4	7	7	12	19
13th/Corpus Christi...	6	378	373	751	125.2	(93)	62	(31)	97	153	250	129	132	261	48	41	89	104	47	151
14th/Houston.....	9	542	896	1,438	159.8	(115)	(243)	(358)	128	248	376	239	405	644	71	85	156	104	158	262
TOTALS	80	3,798	5,803	9,601					553	923	1,476	1,838	3,336	5,174	531	732	1,263	876	812	1,688
AVG PER JUSTICE*		47.5	72.5	120.0																

* Average calculated on number of active justices on court.

ACTIVITY SUMMARY
MONTH OF: March 2001

COURT.....	Number of Justices	----- CASES FILED OR ADDED -----								NET CASES TRANSFERRED THIS FISCAL YEAR			----- CASES DISPOSED -----							
		THIS MONTH				FISCAL YEAR TO DATE				CIV	CRIM	TOTAL	THIS MONTH				FISCAL YEAR TO DATE			
		CIV	CRIM	TOTAL	AVG PER JUSTICE*	CIV	CRIM	TOTAL	AVG PER JUSTICE*				CIV	CRIM	TOTAL	AVG PER JUSTICE*	CIV	CRIM	TOTAL	AVG PER JUSTICE*
1st/Houston.....	9	40	98	138	15.3	356	579	935	103.9	(37)	(71)	(108)	48	115	163	18.1	301	632	933	103.7
2nd/Fort Worth.....	7	35	43	78	11.1	257	330	587	83.9	(1)	0	(1)	48	50	98	14.0	212	265	477	68.1
3rd/Austin.....	6	48	29	77	12.8	253	182	435	72.5	0	(1)	(1)	42	27	69	11.5	258	184	442	73.7
4th/San Antonio.....	7	36	25	61	8.7	280	247	527	75.3	2	34	36	43	52	95	13.6	272	296	568	81.1
5th/Dallas.....	13	68	141	209	16.1	459	1,088	1,547	119.0	(72)	(165)	(237)	87	104	191	14.7	446	955	1,401	107.8
6th/Texarkana.....	3	13	20	33	11.0	68	86	154	51.3	34	41	75	15	29	44	14.7	106	163	269	89.7
7th/Amarillo.....	4	23	24	47	11.8	139	272	411	102.8	13	57	70	22	39	61	15.3	149	214	363	90.8
8th/El Paso.....	4	13	18	31	7.8	117	125	242	60.5	30	63	93	25	34	59	14.8	139	174	313	78.3
9th/Beaumont.....	3	30	24	54	18.0	164	162	326	108.7	(39)	(46)	(85)	15	11	26	8.7	131	119	250	83.3
10th/Waco.....	3	18	17	35	11.7	113	82	195	65.0	20	31	51	16	18	34	11.3	98	122	220	73.3
11th/Eastland.....	3	10	14	24	8.0	52	96	148	49.3	30	80	110	8	18	26	8.7	83	159	242	80.7
12th/Tyler.....	3	13	25	38	12.7	108	111	219	73.0	0	(2)	(2)	14	13	27	9.0	110	103	213	71.0
13th/Corpus Christi..	6	40	23	63	10.5	226	196	422	70.3	38	39	77	36	30	66	11.0	210	190	400	66.7
14th/Houston.....	9	68	72	140	15.6	372	499	871	96.8	(33)	(88)	(121)	69	100	169	18.8	364	506	870	96.7
TOTALS	80	455	573	1,028		2,964	4,055	7,019					488	640	1,128		2,879	4,082	6,961	
STATEWIDE AVERAGE					12.9				87.7							14.1				87.0

* Average calculated on number of active justices on court.

AGE OF PENDING CASES
MONTH OF: March 2001

----- PENDING CASES -----

----- SUBMITTED CASES -----

COURT.....	Number of Justices	TOTAL CASES				0 - 6 MONTHS			6 - 12 MONTHS			12 - 24 MONTHS			OVER 24 MONTHS			6-12 MONTHS			OVER 12 MONTHS		
		CIV	CRIM	TOTAL	AVG PER JUSTICE*	CIV	CRIM	TOTAL	CIV	CRIM	TOTAL	CIV	CRIM	TOTAL	CIV	CRIM	TOTAL	CIV	CRIM	TOTAL	CIV	CRIM	TOTAL
1st/Houston.....	9	476	692	1,168	129.8	212	348	560	145	233	378	86	96	182	33	15	48				0		0
2nd/Fort Worth.....	7	313	540	853	121.9	152	214	366	122	212	334	35	105	140	4	9	13				0		0
3rd/Austin.....	6	239	224	463	77.2	152	135	287	73	67	140	13	22	35	1	0	1				0		0
4th/San Antonio.....	7	286	418	704	100.6	171	198	369	81	156	237	30	61	91	4	3	7				0		0
5th/Dallas.....	13	625	1,099	1,724	132.6	278	665	903	165	336	501	95	88	183	127	10	137				0		0
6th/Texasarkana.....	3	101	180	281	93.7	66	91	157	29	65	94	6	24	30	0	0	0				0		0
7th/Amarillo.....	4	137	276	413	103.3	65	114	179	49	85	134	20	66	86	3	11	14				0		0
8th/El Paso.....	4	221	325	547	136.8	90	126	216	82	94	176	49	97	146	1	8	9				0		0
9th/Beaumont.....	3	106	180	286	95.3	67	95	162	27	69	96	12	15	27	0	1	1				0		0
10th/Waco.....	3	186	211	397	132.3	86	83	169	50	61	111	46	63	109	4	4	8				0		0
11th/Eastland.....	3	102	222	324	108.0	59	105	164	36	98	134	6	18	24	1	1	2				0		0
12th/Tyler.....	3	85	169	254	84.7	59	74	133	20	67	87	6	28	34	0	0	0				0		0
13th/Corpus Christi.....	6	378	373	751	125.2	170	158	328	96	124	220	108	90	198	4	1	5				0		0
14th/Houston.....	9	542	896	1,438	159.8	220	311	531	133	293	426	143	221	364	46	71	117				0		0
TOTALS	80	3,798	5,805	9,603		1,807	2,717	4,524	1,108	1,960	3,068	655	994	1,649	228	134	362	0	0	0	0	0	0
AVG PER JUSTICE*		47.5	72.6	120.0																			

* Average calculated on number of active justices on court.

AVERAGE TIME TO DISPOSITION

- In Months -

MONTH OF: March 2001

COURT.....	Number of Justices	----- March 2001 -----						--- September 1, 2000 - March 31, 2001 ---					
		FILING TO DISPOSITION			SUBMISSION TO DISPOSITION			FILING TO DISPOSITION			SUBMISSION TO DISPOSITION		
		CIV	CRIM	TOTAL	CIV	CRIM	TOTAL	CIV	CRIM	TOTAL	CIV	CRIM	TOTAL
1st/Houston.....	9	11.4	10.4	10.7	0.9	0.5	0.6	10.4	9.8	10.0	1.0	0.7	0.8
2nd/Fort Worth.....	7	8.4	14.1	11.3	5.5	7.3	6.4	7.4	11.8	9.8	5.3	4.5	4.8
3rd/Austin.....	6	6.3	8.4	7.1	1.4	1.7	1.5	6.6	8.6	7.4	1.7	1.7	1.7
4th/San Antonio.....	7	8.6	11.0	9.9	3.6	2.6	3.0	7.6	10.9	9.4	2.3	1.7	1.9
5th/Dallas.....	13	10.9	8.5	9.6	1.4	1.5	1.5	12.3	8.6	9.8	2.0	1.3	1.5
6th/Texarkana.....	3	6.2	7.5	7.1	0.9	0.1	0.3	7.8	9.1	8.6	1.4	0.2	0.6
7th/Amarillo.....	4	7.2	9.0	8.4	2.1	2.2	2.2	6.5	7.2	6.9	2.8	1.6	2.0
8th/El Paso.....	4	9.8	12.3	11.2	3.2	1.9	2.4	10.0	13.9	12.2	2.7	2.8	2.7
9th/Beaumont.....	3	4.8	8.5	6.4	1.3	0.4	0.8	5.2	7.2	6.2	2.3	1.0	1.6
10th/Waco.....	3	14.7	13.2	13.9	8.6	5.5	7.0	9.5	10.8	10.3	6.5	6.0	6.2
11th/Eastland.....	3	14.2	7.4	9.5	3.8	0.7	1.6	10.7	10.2	10.4	2.1	0.7	1.2
12th/Tyler.....	3	4.8	8.0	6.4	2.1	1.4	1.6	5.8	9.0	7.4	1.8	1.8	1.8
13th/Corpus Christi.....	6	11.0	10.6	10.9	5.9	2.2	4.3	9.9	10.4	10.1	5.8	1.8	3.8
14th/Houston.....	9	10.9	17.3	14.7	1.4	1.6	1.5	10.4	14.9	13.0	1.7	1.2	1.4

EQUALIZATION SUMMARY

MONTH OF: March 2001

COURT.....	CURRENT MONTH			CHANGE NEEDED TO EQUALIZE BASED ON PENDING CASES			CASES FILED OR ADDED April 1, 2000 - March 31, 2001				CHANGE NEEDED TO EQUALIZE BASED ON CASES FILED			VARIANCE: BASED ON PENDING CASES BASED ON FILED		
	CRIM	TOTAL	AVG PER JUSTICE*	CIV	CRIM	TOTAL	CIV	CRIM	TOTAL	AVG PER JUSTICE*	CIV	CRIM	TOTAL	CIV	CRIM	TOTAL
1st/Houston.....	822	1353	150.33	(98.10)	(146.66)	(244.76)	644	1090	1734	192.67	(67.78)	(303.40)	(371.18)	(30.33)	156.74	126.41
2nd/Fort Worth.....	540	853	121.86	23.70	(14.74)	8.96	445	532	977	139.57	3.18	79.80	82.98	20.52	(94.54)	(74.01)
3rd/Austin.....	227	466	77.67	49.60	223.23	272.83	469	345	814	135.67	(84.85)	179.40	94.55	134.45	43.82	178.28
4th/San Antonio.....	376	659	94.14	53.70	149.26	202.96	438	439	877	125.29	10.18	172.80	182.98	43.52	(23.54)	19.99
5th/Dallas.....	1352	2084	160.31	(106.70)	(376.51)	(483.21)	786	1910	2696	207.38	46.33	(773.80)	(727.48)	(153.03)	397.29	244.26
6th/Texarkana.....	139	206	68.67	77.30	86.11	163.41	117	147	264	88.00	75.08	115.20	190.28	2.22	(29.09)	(26.86)
7th/Amarillo.....	276	413	103.25	55.40	24.15	79.55	218	238	456	114.00	38.10	111.60	149.70	17.30	(87.45)	(70.15)
8th/El Paso.....	240	424	106.00	8.40	60.15	68.55	232	191	423	105.75	24.10	158.60	182.70	(15.70)	(98.45)	(114.15)
9th/Beaumont.....	180	286	95.33	38.30	45.11	83.41	266	313	579	193.00	(73.93)	(50.80)	(124.73)	112.23	95.91	208.14
10th/Waco.....	211	397	132.33	(41.70)	14.11	(27.59)	180	127	307	102.33	12.08	135.20	147.28	(53.78)	(121.09)	(174.86)
11th/Eastland.....	77	124	41.33	97.30	148.11	245.41	93	169	262	87.33	99.08	93.20	192.28	(1.78)	54.91	53.14
12th/Tyler.....	168	253	84.33	59.30	57.11	116.41	189	209	398	132.67	3.08	53.20	56.28	56.23	3.91	60.14
13th/Corpus Christi.....	343	693	115.50	(61.40)	107.23	45.83	386	348	734	122.33	(1.85)	176.40	174.55	(59.55)	(69.18)	(128.73)
14th/Houston.....	1052	1640	182.22	(155.10)	(376.66)	(531.76)	659	934	1593	177.00	(82.78)	(147.40)	(230.18)	(72.33)	(229.26)	(301.59)
TOTALS	6003	9851					5122	6992	12114							
AVG PER JUSTICE*	75.04	123.14					64.03	87.40	151.43							

* Average calculated on number of active justices on court.

ACTIVITY SUMMARY MONTH OF: March 2001

COURT.....	Number of Justices	NEW CASES FILED										CASES DISPOSED										ADDED LESS DISPOSED					
		THIS MONTH					April 1, 2000 - March 31, 2001					THIS MONTH					April 1, 2000 - March 31, 2001					April 1, 2000 - March 31, 2001					
		CIV		CRIM		TOTAL	AVG/		CIV		CRIM		TOTAL	AVG/		CIV		CRIM		TOTAL	AVG/		CIV		CRIM		TOTAL
1st/Houston.....	9	38	88	126	14.0	2.4	570	831	1,401	155.7	20.1	48	115	163	18.1	4.0	595	1064	1,659	184.3	22.4	(25)	(233)	(258)	(28.7)	(2.3)	
2nd/Fort Worth.....	7	34	41	75	10.7	(0.8)	441	531	972	138.9	3.3	48	50	98	14.0	(0.1)	388	542	930	132.9	(29.0)	53	(11)	42	6.0	32.4	
3rd/Austin.....	6	45	28	73	12.2	0.6	435	311	746	124.3	(11.2)	42	27	69	11.5	(2.6)	467	389	856	142.7	(19.2)	(32)	(78)	(110)	(18.3)	8.0	
4th/San Antonio.....	7	35	18	53	7.6	(4.0)	428	429	857	122.4	(13.1)	43	52	95	13.6	(0.5)	451	487	938	134.0	(27.9)	(23)	(58)	(81)	(11.6)	14.8	
5th/Dallas.....	13	66	90	156	12.0	0.4	738	1365	2,103	161.8	26.2	87	104	191	14.7	0.6	871	1726	2,597	199.8	37.9	(133)	(361)	(494)	(38.0)	(11.7)	
6th/Texarkana.....	3	13	18	31	10.3	(1.2)	115	144	259	86.3	(49.2)	15	29	44	14.7	0.6	180	274	454	151.3	(10.6)	(65)	(130)	(195)	(65.0)	(38.7)	
7th/Amarillo.....	4	22	17	39	9.8	(1.8)	215	189	404	101.0	(34.6)	22	39	61	15.3	1.2	257	399	656	164.0	2.1	(42)	(210)	(252)	(63.0)	(36.7)	
8th/El Paso.....	4	12	18	30	7.5	(4.1)	222	187	409	102.3	(33.3)	25	34	59	14.8	0.7	269	298	567	141.8	(20.2)	(47)	(111)	(158)	(39.5)	(13.2)	
9th/Beaumont.....	3	29	24	53	17.7	6.1	266	313	579	193.0	57.5	15	11	26	8.7	(5.4)	293	325	618	206.0	44.1	(27)	(12)	(39)	(13.0)	13.4	
10th/Waco.....	3	14	17	31	10.3	(1.2)	176	119	295	98.3	(37.2)	16	18	34	11.3	(2.8)	183	212	395	131.7	(30.2)	(7)	(93)	(100)	(33.3)	(7.0)	
11th/Eastland.....	3	8	15	23	7.7	(3.9)	83	114	197	65.7	(69.9)	8	18	26	8.7	(5.4)	150	318	468	156.0	(5.9)	(67)	(204)	(271)	(90.3)	(64.0)	
12th/Tyler.....	3	13	25	38	12.7	1.1	189	209	398	132.7	(2.9)	14	13	27	9.0	(5.1)	200	213	413	137.7	(24.2)	(11)	(4)	(15)	(5.0)	21.4	
13th/Corpus Christi.....	6	39	20	59	9.8	(1.7)	367	298	665	110.8	(24.7)	36	30	66	11.0	(3.1)	431	473	904	150.7	(11.2)	(64)	(175)	(239)	(39.8)	(13.5)	
14th/Houston.....	9	67	71	138	15.3	3.8	647	912	1,559	173.2	37.7	69	100	169	18.8	4.7	632	865	1,497	166.3	4.4	15	47	62	6.9	33.2	
TOTALS	80	435	490	925			4,892	5,952	10,844			488	640	1,128			5,367	7,585	12,952			(475)	(1,633)	(2,108)			
STATEWIDE AVERAGE					11.6					135.6					14.1					161.9						(26.4)	

* Average calculated on number of active justices on court.

LAW OFFICES OF
FLEMING & ASSOCIATES, L.L.P.

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ANTHONY E. FARAH

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May 16, 2001

Ms. Linda Rogers, Clerk
Sixth Court of Appeals
20 Bi-State Justice Building
100 N. State Line Avenue
Texarkana, TX 75502-5952

Re: *Merritt, et al. v. Shell Oil Company*, No. 14-01-00317-CV

Dear Ms. Rogers:

Enclosed for filing is Appellant's Motion to Request Transfer, which seeks transfer of cause number 14-01-00317-CV from the Fourteenth Court of Appeals to the Sixth Court of Appeals for consolidation with cause number 06-01-00060-CV.

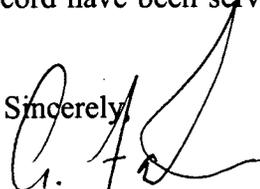
The Texas Supreme Court established the procedure for requesting transfers between the courts of appeals in *Miles v. Ford Motor Company*, 914 S.W.2d 135, 137 n.2 (Tex. 1995). Under *Miles*, appellants are requesting that this court forward this motion to the Clerk of the Texas Supreme Court, along with a written statement as to whether this court has any objection to the proposed transfer.

Accordingly, appellants are filing:

- An original and three copies for use by this court;
- An original and 11 copies for forwarding to the Supreme Court of Texas;
- An extra copy to be file-stamped and returned to us.

The filing fee of \$10.00 is enclosed. Please file-stamp the extra copy of this Motion and return it in the enclosed envelope. All counsel of record have been served. Please let me know if you have any questions concerning this filing.

Sincerely,


Anthony E. Farah

AEF:gar

Enclosure

NO. 14-01-00317-CV

RECEIVED IN
The Court of Appeals
Sixth District

IN THE COURT OF APPEALS

MAY 18 2001

FOR THE SIXTH JUDICIAL DISTRICT OF TEXAS

Texarkana, Texas
Linda Rogers, Clerk

TEXARKANA, TEXAS

JOHN MERRITT, JOHN GEORGE AND REX GORDON,
Appellants,

vs.

SHELL OIL COMPANY,
Appellee.

On Appeal from Cause No. 1998-12653
in the 234th District Court of Harris County, Texas

**Appellants' Motion to Request Transfer of *Merritt v. Shell*
from the Fourteenth Court of Appeals to this Court and to
Consolidate/Coordinate *Merritt v. Shell* with *HRN v. Shell***

Under the procedure established by the Texas Supreme Court,¹ Appellants John Merritt, John George and Rex Gordon respectfully ask that the Court request the transfer to this Court of *Merritt, et al. v. Shell* (No. 14-01-00317-CV), presently pending in the Fourteenth Court of Appeals. A similar appeal, *HRN, et al. v. Shell* (No. 06-01-00060-CV) is now pending in this Court. Appellants request further that the two appeals, *HRN*

¹ The Supreme Court established the procedure for requesting transfers between courts of appeals in *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 137 n.2 (Tex. 1995).

and *Merritt*, be consolidated or in some manner considered together. A copy of Appellants' motion is attached hereto as Ex. "A."

Under the procedure adopted in *Miles v. Ford Motor*, Appellants request that this Court forward their motion to the Texas Supreme Court, accompanied by a written statement from the Court on whether it objects to the proposed transfer. Appellants have simultaneously requested the Fourteenth Court of Appeals to request the transfer of *Merritt v. Shell* to this Court.

Appellants request transfer and consolidation because the two appeals are based partly on the same facts. Additionally, both involve the same counsel, and arise from nearly contemporaneous judgments of dismissal entered by the same trial court.

Appellants in both cases are independent Shell branded lessee-dealers who operate or have operated Shell service stations. *Merritt* (No. 14-01-00317-CV), filed in 1998, was based primarily on Shell Oil Company's variable rent program (VRP). The *Merritt* plaintiffs had alleged that Shell committed breach of contract, fraud, negligent misrepresentation, and violation of the Texas Deceptive Trade Practices Act. *HRN* (No. 06-01-00060-CV) brought allegations similar to those of the *Merritt* plaintiffs. Additionally, the *HRN* plaintiffs alleged fraudulent inducement through the VRP and the violation of UCC § 2-305 caused by Shell's gasoline pricing. See TEX. BUS. & COM. CODE ANN. § 2.305 (Vernon 1994).

The plaintiffs in both cases were represented by the same counsel. Despite opposition, both cases were ultimately assigned to the same trial court, where the cases were coordinated (but not consolidated). Shell moved for summary judgment in both

cases, asserting the same grounds on the overlapping VRP claims. The trial court granted Shell's motion for summary judgment in *Merritt* on December 12, 2000 and in *HRN* on December 14, 2000. These two appeals ensued.

In the interest of judicial economy, these related appeals should be briefed together and heard by the same court. Both appeals are in their preliminary stages. Neither side has submitted its brief in either case, nor is the clerk's record ready in either case.

Appellants therefore request the transfer of *Merritt v. Shell* (No. 14-01-00317-CV) from the Fourteenth Court of Appeals to this Court, where *HRN v. Shell* was recently transferred by the Texas Supreme Court.² Accordingly, under *Miles*, Appellants ask that this Court forward their motion to the Texas Supreme Court with a written statement on whether the Court has any objection to the transfer. If the Texas Supreme Court approves the transfer, Appellants request consolidation of the *Merritt* appeal with the *HRN* appeal, or the coordination of the two appeals.

² Shell moved to transfer and to consolidate *HRN* with *Merritt*. Concurrently with this motion, the *HRN* appellants filed their opposition in the Fourteenth Court of Appeals.

Respectfully submitted,

FLEMING & ASSOCIATES, L.L.P.

George M. Fleming

State Bar No. 07123000

Sylvia Davidow

State Bar No. 05430551

Anthony E. Farah

State Bar No. 24007172

Anita Kawaja

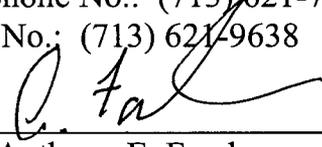
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ATTORNEYS FOR PLAINTIFFS

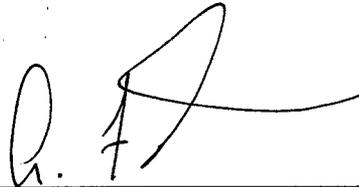
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **Appellants' Motion to Request Transfer of *Merritt v. Shell* from the Fourteenth Court of Appeals to this Court and to Consolidate *Merritt v. Shell* with *HRN v. Shell*** was served as described on the 16 day of May, 2001 to all counsel of record shown below:

By **COURIER SERVICE**

Mr. J. Gregory Copeland
Mr. J. Michael Baldwin
Mr. Richard A. Brooks
Mr. David M. Rodi
Baker & Botts, L.L.P.
910 Louisiana
Houston, TX 77002

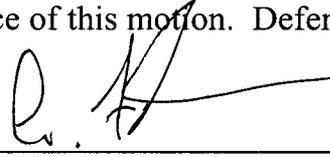
Ms. Anne Spiegel
Senior Litigation Counsel
Equiva Services L.L.C.
910 Louisiana
Houston, TX 77002



Anthony E. Farah

CERTIFICATE OF CONFERENCE

Counsel for Plaintiffs conferred with counsel for Defendants, David Rodi, on the 14 day of May, 200 on the substance of this motion. Defendants are opposed to this motion.



Anthony E. Farah

NO. 14-01-00317-CV

IN THE COURT OF APPEALS
FOR THE FOURTEENTH JUDICIAL DISTRICT OF TEXAS
HOUSTON, TEXAS

JOHN MERRITT, JOHN GEORGE AND REX GORDON,
Appellants,

vs.

SHELL OIL COMPANY,
Appellee.

On Appeal from Cause No. 1998-12653
in the 234th District Court of Harris County, Texas

**Appellants' Motion to Request Transfer of *Merritt v. Shell*
from this Court to the Sixth Court of Appeals and to
Consolidate/Coordinate *Merritt v. Shell* with *HRN v. Shell***

Under the procedure established by the Texas Supreme Court,¹ Appellants John Merritt, John George and Rex Gordon respectfully ask that this Court request the transfer to the Sixth Court of Appeals of *Merritt, et al. v. Shell* (No. 14-01-00317-CV), presently pending in this Court. A similar appeal, *HRN, et al. v. Shell* (No. 06-01-00060-CV) is now pending in the Sixth Court of Appeals. Appellants request further that the two

¹ The Supreme Court established the procedure for requesting transfers between courts of appeals in *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 137 n.2 (Tex. 1995).

appeals, *HRN* and *Merritt*, be consolidated or in some manner considered together. A copy of Appellants' motion is attached hereto as Ex. "A."

Under the procedure adopted in *Miles v. Ford Motor*, Appellants have requested that this Court forward their motion to the Texas Supreme Court, accompanied by a written statement from the Court on whether it objects to the proposed transfer. Appellants also ask this Court to request the transfer of *Merritt v. Shell* to the Sixth Court of Appeals.

Appellants request transfer and consolidation because the two appeals are based partly on the same facts. Additionally, both involve the same counsel, and arise from nearly contemporaneous judgments of dismissal entered by the same trial court.

Appellants in both cases are independent Shell branded lessee-dealers who operate or have operated Shell service stations. *Merritt* (No. 14-01-00317-CV), filed in 1998, was based primarily on Shell Oil Company's variable rent program (VRP). The *Merritt* plaintiffs had alleged that Shell committed breach of contract, fraud, negligent misrepresentation, and violation of the Texas Deceptive Trade Practices Act. *HRN* (No. 06-01-00060-CV) brought allegations similar to those of the *Merritt* plaintiffs. Additionally, the *HRN* plaintiffs alleged fraudulent inducement through the VRP and the violation of UCC § 2-305 caused by Shell's gasoline pricing. See TEX. BUS. & COM. CODE ANN. § 2.305 (Vernon 1994).

The plaintiffs in both cases were represented by the same counsel. Despite opposition, both cases were ultimately assigned to the same trial court, where the cases were coordinated (but not consolidated). Shell moved for summary judgment in both

cases, asserting the same grounds on the overlapping VRP claims. The trial court granted Shell's motion for summary judgment in *Merritt* on December 12, 2000 and in *HRN* on December 14, 2000. These two appeals ensued.

In the interest of judicial economy, these related appeals should be briefed together and heard by the same court. Both appeals are in their preliminary stages. Neither side has submitted its brief in either case, nor is the clerk's record ready in either case.

Appellants therefore request the transfer of *Merritt v. Shell* (No. 14-01-00317-CV) from this Court to the Sixth Court of Appeals, where *HRN v. Shell* was recently transferred by the Texas Supreme Court.² Accordingly, under *Miles*, Appellants have requested that this Court forward its motion to the Texas Supreme Court with a written statement on whether the Court has any objection to the transfer. If the Texas Supreme Court approves the transfer, Appellants request consolidation of the *Merritt* appeal with the *HRN* appeal, or the coordination of the two appeals.

² Shell moved to transfer and to consolidate *HRN* with *Merritt*. Concurrently with this motion, the *HRN* appellants filed their opposition in this Court.

Respectfully submitted,

FLEMING & ASSOCIATES, L.L.P.

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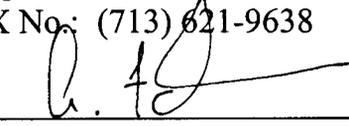
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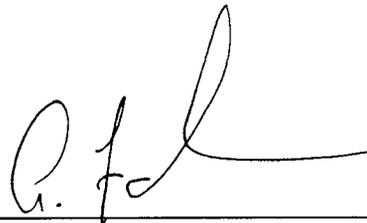
CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing **Appellants' Motion to Request Transfer of *Merritt v. Shell* from this Court to the Sixth Court of Appeals and to Consolidate *Merritt v. Shell* with *HRN v. Shell*** was served as described on the 14 day of May, 2001 to all counsel of record shown below:

By **COURIER SERVICE**

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Mr. J. Michael Baldwin
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Anthony E. Farah

CERTIFICATE OF CONFERENCE

Counsel for Plaintiffs conferred with counsel for Defendants, David Rodi, on the 14 day of May, 2001 on the substance of this motion. Defendants are opposed to this motion.



Anthony E. Farah

NO. 14-01-00317-CV

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS
HOUSTON, TEXAS

JOHN MERRITT, JOHN GEORGE AND REX GORDON,
Appellants,

vs.

SHELL OIL COMPANY,
Appellee.

On Appeal from Cause No. 1998-12653
in the 234th District Court of Harris County, Texas

**Appellee's motion to request transfer of cause number 06-01-00060-CV
from the Sixth Court of Appeals to the Fourteenth Court of Appeals and to
consolidate cause number 06-01-00060-CV with cause number 14-01-00317-CV**

Under the procedure established by the Texas Supreme Court,¹ Appellee Shell Oil Company respectfully asks this Court to request the transfer of cause number 06-01-00060-CV from the Sixth Court of Appeals to this Court, in which cause number

¹ The Supreme Court established the procedure for requesting transfers between courts of appeals in *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 137 n.2 (Tex. 1995). A copy of this opinion is attached as Exhibit 1.

14-01-00317-CV is pending, and to consolidate the two appeals. Shell has simultaneously requested the Sixth Court of Appeals to request transfer of cause number 06-01-00060-CV to this Court. A copy of Shell's motion addressed to the Sixth Court of Appeals is attached as Exhibit 2. Under the procedure adopted in *Miles*, Shell asks that this Court forward this motion to the Texas Supreme Court accompanied by a written statement from the Court on whether it objects to the proposed transfer.

Shell requests transfer and consolidation because the two appeals are largely based on the same facts, involve many of the same parties and lawyers, and arise out of nearly contemporaneous summary judgments entered by the same trial court.

Appellants in both cases are independent lessee-dealers who operate or have operated Shell-branded service stations. Three lessee-dealers originally brought the *Merritt* case (cause number 14-01-00317-CV) in Harris County in 1998, alleging that Shell Oil Company had committed breach of contract, fraud, negligent misrepresentation, and DTPA violations in connection with Shell's Variable Rent Program ("VRP"). In 1999, a second group of lessee-dealers brought the *HRN* case (cause number 06-01-00060-CV) in Harris County against Shell and its successor companies. Like the *Merritt* plaintiffs, the *HRN* plaintiffs alleged breach of contract, fraud, and negligent misrepresentation in connection with Shell's VRP. The *HRN* plaintiffs also alleged that Shell fraudulently induced them to become dealers through the VRP and that Shell's gasoline pricing violated Section 2.305 of the Uniform Commercial Code.

Plaintiffs in both *Merritt* and *HRN* are represented by the same counsel. In light of their commonalities, both cases were assigned to the 234th District Court, where

the trial judge ordered that they be coordinated for purposes of trial, though not necessarily consolidated.² Shell moved for summary judgment in both cases, asserting the same grounds on the overlapping VRP-related claims. The parties' briefs on these claims in the two cases were virtually identical. *HRN* was argued first, and plaintiffs' counsel advised that they would not appear at the *Merritt* summary judgment hearing because the issues were "substantially the same" as those raised in *HRN* and re-argument would "not be a wise use of judicial resources."³ The trial court entered summary judgment in *Merritt* on December 12, 2000, and in *HRN* on December 14, 2000. Both groups of plaintiffs appealed, giving rise to these separate actions pending in two different courts of appeals. The record is not yet complete in either appeal.

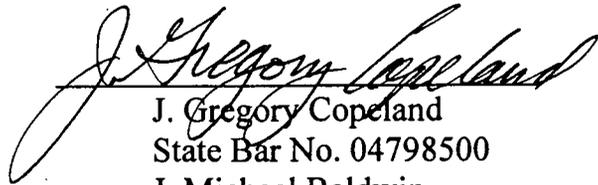
It is in the interest of judicial economy for these related cases to be briefed together and heard by the same court. Both of these appeals are in their preliminary stages. Neither side has yet submitted its brief in either case. Shell therefore requests transfer of the *HRN* case (cause number 06-01-00060-CV) from the Sixth Court of Appeals to the Fourteenth Court of Appeals, where the earlier-filed case and appeal is pending. Accordingly, under *Miles*, Shell asks this court to forward this motion to the Supreme Court of Texas with a written statement on whether this court has any objection to the transfer. If the Texas Supreme Court approves the transfer, Shell requests consolidation of *HRN* into *Merritt* (cause number 14-01-000317-CV).

² Ex. 3 (Tr. of 9/11/00 Hearing at 22-23). The tape recording of this hearing was filed as part of the Recorder's Record in the *HRN* appeal.

³ Ex. 4 (Letter of 12/11/00 from Anthony E. Farah to J. Gregory Copeland).

Respectfully submitted,

BAKER BOTTS L.L.P.



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ATTORNEYS FOR APPELLEE SHELL OIL
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CERTIFICATE OF CONFERENCE

I certify that on May 7, 2001, my associate David Rodi conferred with Sylvia Davidow, appellant's counsel, who indicated that appellants are opposed to this motion.



J. Gregory Copeland

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2001, a true and correct copy of the above and foregoing was served on all counsel of record by certified mail as follows:

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