# SUPPORT

## HB 1561 by Smithee
## SB 1603 by Hughes

TEXAS CIVIL JUSTICE LEAGUE

*March 1, 2023*

**Support HB 1561/SB 1603:**
**Make Summary Denials of Permissive Appeals Reviewable on Abuse of Discretion Standard**

In June 2022, a divided Texas Supreme Court ruled that §51.014(f), CPRC, gives a court of appeals unfettered discretion to deny a permissive interlocutory appeal, as long as the court minimally complies with TRAP 47.1, which requires the court to give basic reasons for its decisions. §51.014(f) provides that a court of appeals *may accept* an interlocutory appeal permitted by a trial court from an otherwise nonappealable order if two requirements are satisfied: (1) the order involves a controlling question of law as to which there is a substantial ground for difference of opinion; and (2) an immediate appeal may materially advance the ultimate termination of the litigation. §51.014(d), CPRC.

The underlying case, *Industrial Specialists, LLC v. Blanchard Refining Company LLC and Marathon Petroleum Company LP* (No. 20-0174), arose from a fire at Blanchard's Texas City refinery that injured several employees of Industrial Specialists, an independent contractor, and one employee of another contractor. The employees sued Blanchard and each of its other contractors, save Industrial. Blanchard demanded a defense and indemnity from Industrial under a contractual indemnification provision that required Industrial to defend and indemnify Blanchard except for Blanchard's own negligence. Industrial refused. Blanchard and other contractors eventually settled the employees' claims for $104 million, of which Blanchard paid $86 million. Blanchard then sued Industrial to enforce the indemnity agreement. Both parties moved for summary judgment, which the trial court denied. Industrial filed an unopposed motion to pursue a permissive interlocutory appeal under §51.014(d), which the trial court granted on the basis that the interpretation of the indemnification provision involved a controlling question of law and that the appeal would materially advance the termination of the litigation. The First Court of Appeals [Houston] denied the appeal, stating only that it determined that the statutory requirements were not satisfied. Both Industrial and Blanchard sought review, arguing that the court of appeals abused its discretion when it denied the appeal.

In an opinion by Justice Boyd, joined by Justice Devine and Huddle, the Court held that §51.014(f) does not limit the discretion of the court of appeals to deny a permissive interlocutory appeal. The statute "addresses whether discretion exists at all; it does not impose principles to guide the exercise of that discretion when it does exist." Moreover, the statute does not require the court of appeals to "consider the appealing party's explanation," nor to accept an appeal even if the trial court and parties all want one. All the court must do, as prescribed by TRAP 47.1, is state its reason for rejecting the appeal, which the court of appeals did when it concluded that the statutory requirements were not met. Like petitions for review, which SCOTX has absolute discretion to hear or not hear, permissive interlocutory appeals may or may

**Please vote FOR HB 1561/SB 1603**

TEXAS CIVIL JUSTICE LEAGUE
400 W. 15th Street · Suite 1400 Austin, Texas 78701
512.320.0474 · info@tcjl.com · tcjl.com

*Carol Sims* EXECUTIVE DIRECTOR
*Lisa O. Kaufman* GENERAL COUNSEL
*George S. Christian* SENIOR COUNSEL

not be heard at the discretion of the court of appeals, just as federal circuit courts have under 28 U.S.C. § 1292(b). Although SCOTX urged courts of appeals to accept more permissive appeals in order to further the legislature's policy of resolving disputes as efficiently as possible [*Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725(2019)), it does not have authority under the statute to mandate them to do so. **The legislature could change the statute to require more, but until it does, the Court should not intervene "by judicial fiat."** Justice Blacklock, joined by Justice Bland, concurred on the basis that "may" means "may" and *Sabre Travel* resolved the issue. Unless the legislature amends the statute, courts of appeals can freely choose not to hear permissive appeals. Indeed, as Justice Blacklock argues, a permissive appeal is not really an "appeal" until the court of appeals agrees to hear it. For him, the court of appeals does not even have to give a reason under TRAP 47.1. **"If that is a bad rule," Justice Blacklock concludes, the Legislature should amend the statute, or this Court should amend the appellate rules within the confines of the statute."**

Justice Busby, joined by Chief Justice Hecht and Justice Young, delivered a long dissent taking sharp issue with the plurality and concurring opinions. Not only was the court of appeals' refusal to hear the appeal "objectively wrong" and therefore an abuse of discretion, the court's failure to adequately explain its decision violated TRAP 47.1. At the very least, Justice Busby opined, the court of appeals should have had "the courtesy" to explain to the parties why it did not think the statutory requirements (controlling question of law, advancement of termination of the litigation), as Rule 47.1 requires in the interest of fairness and transparency. **Summary denials frustrate the purpose of the statute and appear arbitrary and unreasonable, especially when the trial court has complied with the law and the parties concur. Nothing in §51.014(f)'s use of the term "may" indicates that the legislature intended the court of appeals to have absolute discretion. Instead, the term implies that the court shall apply appropriate "guiding principles" and explain its decision. An abuse of discretion standard is thus the appropriate standard for a determination under the statute.**

TCJL supports legislation responding to the majority and concurring opinions' invitation to the Legislature to amend the statute. The proposed legislation, HB 1561 by Rep. John Smithee (R-Amarillo), would adopt the dissenting opinion's position and require courts of appeals to (1) state their reasons for denying a permissive appeal under § 51.014(f), and (2) give the Texas Supreme Court explicit authority to review the court of appeals' decision on an abuse of discretion standard.

## Please vote FOR HB 1561/SB 1603