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IN SUPREME COURT  
OF TEXAS

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BLAKE HAWTHORNE, Clerk

BY \_\_\_\_\_

Deputy

IN THE SUPREME COURT OF TEXAS

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**SALEH W. IGAL,**  
*Petitioner*

v.

**BRIGHTSTAR INFORMATION TECHNOLOGY GROUP, INC.**  
**and BRBA, INC.,**  
*Respondents*

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**PETITIONER'S MOTION FOR REHEARING**

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**APPEAL FROM THE COURT OF APPEALS FOR THE  
ELEVENTH DISTRICT OF TEXAS AT EASTLAND  
NO. 11-03-00099-CV**

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MOTION FOR REHEARING

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ISSUES PRESENTED

- Issue I: Did the Legislature intend that a worker's failure to timely file a Payday Act claim would bar a subsequent district court suit even if the statute of limitations for filing suit in district court has yet to run?
- Issue II: Did the Texas Workforce Commission ("TWC") rule on the merits of Igal's Payday Law claim given that the Commission dismissed the claim and said that it lacked jurisdiction?
- Issue III: In determining whether to continue to pursue administrative remedies or abandon an administrative claim and pursue common law remedies, should a worker be allowed to rely on the TWC's statement that it is dismissing based on lack of jurisdiction?
- Issue IV: Can this Court limit its decision to have only prospective effect to further the purpose of the statute and prevent injustice to Igal?

## SUMMARY OF THE ARGUMENT

The Court's opinion acknowledges that the Payday Act is not an employee's sole and exclusive remedy, and instead provides an additional remedy that is cumulative of the common law. Nevertheless, the Court construes the statute to preclude a worker from pursuing a common law claim if the worker files an untimely administrative claim, even if the common law claim is not itself barred by limitations. Nothing in the statute, however, indicates that this Catch 22-result is what the Legislature intended. This result is also contrary to the Restatement provision cited by the dissent, and cases from around the country construing the provision to mean that an adjudication based on limitations in one forum does not preclude a claimant from filing the same claim in another forum with a longer limitations period.

The result reached by the Court is particularly unfair given that Igal made his decision about whether to continue pursuing his administrative remedies in reliance on the TWC's official pronouncement that it was dismissing based on lack of jurisdiction. The TWC's interpretation of the Payday statute's 180 day deadline as jurisdictional is entitled to serious consideration by this Court. And if courts are required to give deference to this conclusion, surely a claimant such as Igal is entitled to rely on the TWC's statement without wondering whether a court may one day second-guess it. This Court's opinion notes—but never actually addresses—Igal's argument on this

point. The Court should address Igal's argument on rehearing and acknowledge what fundamental fairness and the Legislature's intent in enacting the statute (giving unsophisticated and often unrepresented workers an alternative forum to pursue smaller claims) dictate: Igal should be entitled to rely on what the TWC said.

Even if the Court remains convinced that its reasoning is correct, the Court can and should give its opinion only prospective application to prevent injustice to Igal. The Court's decision of first impression was not foreshadowed by existing law at the time Igal decided to abandon his administrative claim. And the balance of equities favors applying the opinion only prospectively because, in abandoning his administrative claim, Igal justifiably relied on the TWC's statement that it lacked jurisdiction.

## ARGUMENT

### **I. The Legislature did not intend that the failure to timely file a Payday Act claim would bar a subsequent district court suit and, in any event, the Court should adopt Section 49 of the Restatement (First) of Judgments**

In holding that the dismissal of an untimely Payday Law claim has preclusive effect, the Court ignored the Legislature's intent in creating the Payday Law process. Thus, in Section IV.B.2 of its opinion, the Court incorrectly afforded preclusive effect to the conclusion of the Texas Workforce Commission ("TWC") that Igal's administrative claim was untimely.

Section 61.051(c) of the Texas Labor Code provides that a wage claim must be



filed not later than 180 days after the date the wages claimed became due for payment. TEX. LAB. CODE § 61.051(c) (Vernon 2007). This filing deadline is not a statute of limitations affecting the right of a claimant to file a state court suit for unpaid wages. The Legislature entitled Section 61.051 “Filing a Wage Claim.” The requirement is not characterized as a statute of limitations. Virtually identical language is found in the Texas Commission on Human Rights Act. That act provides that an administrative complaint must be filed not later than the 180<sup>th</sup> day after the date the alleged unlawful employment practice occurred. TEX. LAB. CODE § 21.202 (Vernon 2007). The commission is required by the statute to dismiss an untimely filed discrimination complaint. TEX. LAB. CODE § 21.202(b). There is no comparable provision in the Payday Law.

In contrast to the Payday Law, the Legislature entitled Section 21.202 “Statute of Limitations,” indicating its intent that failure to timely file an employment discrimination claim with the Texas Commission on Human Rights would bar a subsequent district court suit. This requirement is mandatory and jurisdictional. *Schroeder v. Texas Ironworks, Inc.*, 813 S.W.2d 483, 485-489 (Tex. 1991). In choosing not to characterize the Payday Law filing deadline as a statute of limitations, the Legislature signaled its intent that failure to timely file a wage claim with the TWC would not preclude a later but timely filed suit in district court for unpaid wages.

As this Court’s opinion acknowledges, the Payday Act is not an employee’s sole

and exclusive remedy; it instead provides an additional remedy that is cumulative of the common law (Op. at 14). The Court thus also acknowledges that a wage earner, having filed a Payday Law administrative claim, is not always bound by his first forum selection. (Op. at 14-15). Importantly, nothing in the Payday statute indicates that the Legislature intended to preclude a worker from pursuing common law remedies if the worker untimely files an administrative claim. To the contrary, the Legislature's decision to provide an administrative remedy that is cumulative of the common law remedy strongly suggests that the Legislature's intent was just the opposite.

Furthermore, the dissent urges adoption by analogy of the Restatement (First) of Judgments Section 49. This section, which has been adopted in many jurisdictions, allows a litigant whose first suit is dismissed on limitations to take advantage of the limitations statute of another state and sue in the second jurisdiction. *Reinke v. Boden*, 45 F.3d 166, 173 (7<sup>th</sup> Cir. 1995); *Henson v. Columbus Bank*, 651 F.2d 320, 325 (5<sup>th</sup> Cir. 1981); *Jimenez v. Toledo*, 576 F.2d 402, 404 (1<sup>st</sup> Cir. 1978); *Sack v. Low*, 478 F.2d 360, 363 (2d Cir. 1973); *Titus v. Wells Fargo Bank & Union Trust*, 134 F.2d 223, 224 (5<sup>th</sup> Cir. 1943); *Stokke v. S. Pac. Co.*, 169 F.2d 42, 43 (10<sup>th</sup> Cir. 1948); *United States v. Lyman*, 125 F.2d 67, 70 (1<sup>st</sup> Cir. 1942); *Warner v. Buffalo Drydock Co.*, 67 F.2d 540, 541 (2d Cir. 1933).

This Court should recognize a variant of Section 49 to reach a result consistent with the purposes of the Payday Law. Respectfully, the majority's observation that this

Court has not adopted Section 49 does not answer the question of whether the Court should do so. And, although Igal's briefing had not specifically referenced Section 49, he has certainly argued that it is unfair to give preclusive effect to the untimely filing of his administrative claim when he filed his district court suit within the applicable limitations period for such suits.

Moreover, the rationale for giving a dismissal based on limitations preclusive effect is that the claim has expired, and there is no law the plaintiff could rely on or forum the plaintiff could sue in that would change the result. That rationale does not apply when the law of the state where both proceedings are pending affords two different forums with two limitations periods, and the first tribunal (the TWC in this case) dismissed only on the shorter of the two periods. The Payday Law decision did not dismiss Igal's claim on the four-year statute. It does not further the purposes of the Payday Law to bar him from relying on the four-year statute to bring a state court suit.

Avoiding the re-litigation of the same issues is one reason to give preclusive effect to a suit dismissed on limitations. As the majority put it in this case: "The dissent's position would also make TWC determinations based on limitations entirely duplicative, and any party aggrieved by a final administrative decision on limitations would get another chance in a lawsuit over the same claim in a court of law." (Op. at 21). This is not correct. If Igal had appealed the Payday Law decision (however futile that would have been), the issue would have been the timeliness of his TWC filing.

The issue in this state court suit, however, should be whether he is entitled to unpaid wages. In light of the applicable four-year limitations period, limitations should not have been an issue in this subsequent state court suit. This suit should have been about the substance of Igal's claims.

**II. There was no ruling on the merits on Igal's Payday Law claim. Even if there were, Igal should be allowed to rely on the TWC's order.**

In concluding in Section IV B 1 of the opinion that the Payday Law decision was a ruling on the merits, this Court ignored the Payday Law decision itself. The claim was not dismissed on the merits. In the words of the decision:

Under Section 61.051 of the Payday Law, cited above, a wage claim must be filed within 180 days after the date the wages claimed by it were due for payment if the wage claim is to confer on the Texas Workforce Commission the authority to consider whether wages are owed.

**The Commission's jurisdiction extends back only 180 days from the filing of the wage claim. Any pay owed to the claimant would have been due well before the beginning of the Commission's jurisdiction in this case. Therefore, the wage claim was not timely filed and is dismissed.**

(C.R., p. 53) (emphasis added).

Any further question about the reason for dismissal is resolved by the TWC's amicus brief:

[Res judicata] does not apply because TWC's order was not a judgment on the merits but a procedural dismissal for untimeliness. Even though the TWC's order contain (sic) some findings, they do not transform the order – which unambiguously dismisses Igal's wage claim on the procedural ground of untimeliness, CR. 53 – into

judgment on the merits.

Brief of Texas Workforce Commission as Amicus Curiae, p. 15.

In refusing to take at face value the twice-asserted position of the administrative agency, this Court has disregarded the agency's own statement regarding what ruling it made and why it made the ruling. But the construction of a statute by an administrative agency charged with its enforcement is entitled to serious consideration by courts. *See Tarrant County App. Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993). Here, the Court simply concluded that the TWC is wrong and gave no deference to its interpretation of the 180 day period in Section 61.051(c) as imposing a limit on the agency's jurisdiction.

By the Court's interpretation, the TWC dismissed the claim as untimely, and at the same time ruled on the merits. This cannot be. It must be one or the other. Either the real ruling was on timeliness and the language this Court interprets as going to the merits was surplusage, or vice versa. Given the statutory requirement that the commission make findings and conclusions, the TWC would be expected to discuss some elements of Igal's claim on its way to dismissal for untimeliness. Administrative Procedures Act § 2001.141(b); TEX. GOV'T CODE § 2001.141(b) (Vernon 2002). But that is not a ruling on the merits that should be given preclusive effect. If the administrative agency was focused on timeliness, as it undoubtedly was, then the focus of the decision was not on the merits of Igal's claim. This Court cannot know, and

should not attempt to guess, what the ruling on whether he was owed his wages would have been, if timeliness not been the deciding factor in the dismissal.

**III. Igal was entitled to rely on the TWC's official pronouncement that it was dismissing for lack of jurisdiction**

Even if this Court remains convinced that the TWC ruled on the merits, the TWC stated in unambiguous language that the dismissal was for lack of jurisdiction based on untimeliness. Given the deference owed to the TWC's conclusion that it was dismissing based on lack of jurisdiction, a claimant such as Igal should be entitled to rely on the stated basis for the TWC's decision without pondering whether it will one day be second-guessed by a court. This Court's opinion acknowledges Igal's argument on this point (Op. at 6) ("Igal argues that he took TWC at its word that it did not have jurisdiction and therefore filed his wage claim in district court.") But nothing in the Court's opinion actually explains why Igal is not entitled to rely on what the TWC said.

Respectfully, the Court should address this argument.

In considering this argument, the Court should keep in mind the Legislature's apparent intent in enacting the Payday statute: providing an alternative remedy for typically unsophisticated and often unrepresented wage earners (Op. at 13-14). This Court should also consider the fairness and wisdom of requiring such workers to pursue a pointless appeal of an untimely administrative claim rather than proceeding

directly to court. These considerations compel the conclusion that Igal should be entitled to rely on the stated basis for the TWC's ruling.

This Court has chosen to interpret the Payday Law and the TWC's ruling strictly, leading to an exceedingly harsh result for the individual who, according to the Court, guessed wrong about what the TWC decision meant. It does not have to be this way. This Court has the right, power and authority to fashion any remedy it chooses to further the purposes of a statute that has not been complied with. In contrast to the ruling herein is *In re Francis*, 186 S.W.3d 534 (Tex. 2006), a case argued on the day before this one. In *Francis* a majority of this Court recognized that a remedy should be available when requirements of a statute have not been met. When collecting petitions for a place on the ballot, certain judicial candidates had not met statutory standards that have been strictly enforced by this Court for decades. *See Francis*, 186 S.W.3d at 539 n.15 and cases discussed therein. Applying the doctrine of abatement, the Court gave an entire class of people who ought to know better – well-educated and experienced candidates for the highest criminal judicial office in the state – a true “second bite at the apple”, allowing them to shift the responsibility for their own failure to abide by the statute to their political party, an entity whose statutory duty includes administering election laws. Igal does not argue that abatement is the proper doctrine here. Igal argues for a remedy that furthers the purpose of the Payday Law and avoids an unjust

result. Thus, the Court should conclude that Igal was entitled to rely on the TWC's pronouncement.

**IV. This Court can limit its decision to have only prospective effect to further the purpose of the statute and serve the ends of justice.**

Even if this Court does not reconsider its holding, it still has the power to avoid an unjust result for Salah Igal. Although judicial decisions generally operate retroactively, fairness and public policy may dictate that a decision be applied only prospectively. *Reagan v. Vaughn*, 804 S.W.2d 463, 467-68 (Tex.1990) (op. on reh'g); *Elbaor v. Smith*, 845 S.W.2d 240, 250 (Tex.1993). This Court has the discretion to apply a judicial decision prospectively when appropriate. *Carrolton-Farmer's Branch Ind. Sch. Dist. v. Edgewood Ind. Sch. Dist.*, 826 S.W.2d 489, 518 (Tex.1992) (op. on reh'g) (stating that the Court's decision invalidating statute providing for ad valorem taxes would apply prospectively to avoid harming school systems). Indeed, some judicial decisions should be applied prospectively only. *Id.*

To determine whether a decision warrants only prospective application, this Court applies a three-part analysis. First, the decision "must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Id.* Second, the Court looks to the prior history of the rule in question, its purpose and effect, and whether applying the decision retrospectively will further the



operation and aims of the rule. *Id.* Third, the Court weighs the equities of prospective and retroactive application, for “where a decision of [the court] could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.” *Id.* These factors are broadly balanced to “determine the ultimate considerations of fairness and policy.” *Elbaor*, 845 S.W.2d at 251. Here, all of these factors weigh in favor of applying the Court’s decision prospectively.

This case involves an issue of first impression whose resolution was not clearly foreshadowed. In *Edgewood*, this Court held that a lack of case law interpreting the constitutional provisions at issue and unique factual circumstances weighed heavily in favor of prospective application of that decision. *Edgewood*, 826 S.W.2d at 520. Similarly, when Igal first filed his claim with the TWC, there was no case law indicating that if the TWC determined the claim was untimely and dismissed it for lack of jurisdiction, this would preclude him from filing a lawsuit within the applicable statute of limitations.<sup>1</sup> Indeed, given the choice of alternative forums created under the Payday Act, it would be difficult to imagine that a plaintiff’s untimely filing in one forum would bar a timely filed action in the other.

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<sup>1</sup> The Corpus Christi Court of Appeals’ unpublished decision in *11<sup>th</sup> Street Bingo Association v. Simonson*, No. 13-02-399-CV, 2004 WL 1117161 (Tex. App.—Corpus Christi May 20, 2004, no pet.) (not designated for publication) was not issued until almost three years after Igal filed his administrative claim (CR. 52).

The second factor involves looking at the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. In *Edgewood*, this Court discussed the effect of applying retroactively its decision striking down legislation levying ad valorem taxes. *Edgewood*, 826 S.W.2d at 520-21. Reasoning that requiring a refund of taxes gathered unlawfully would wreak such damage on the school systems affected that it could further no purpose of the Constitution, the Court found this factor weighed in favor of prospective application. *Id.* The purpose of the legislation at issue here, the Payday Act, is to provide workers with an expedient, cost effective method of recouping wages wrongfully withheld from them, while still allowing them the ability to bring their claims in a traditional common law suit if that is the more appropriate option. *Holmans v. Transource Polymers, Inc.*, 914 S.W.2d 189, 192 (Tex. App.—Fort Worth 1995, writ denied). Applying this Court's decision retroactively would not further the legislature's purpose – to allow workers such as Salah Igal the opportunity to collect unpaid wages. Instead, the effect of a retroactive decision would be exactly the opposite – to bar Igal from an opportunity to have his timely district court suit decided on the merits.

The final factor requires the Court to balance the equities involved in applying the decision prospectively versus retroactively. In *Edgewood*, the Court reasoned that a retroactive application of its decision would disrupt school finances, waste time, money, and harm the children whose education the taxes were supposed to finance.

*Edgewood*, 826 S.W.2d at 521. Although the harm caused by a retroactive application of this decision would admittedly not be on the same scale as that in *Edgewood*, Igal will undoubtedly be harmed if the Court's decision is applied retroactively and he is precluded from pursuing his claim for unpaid wages and having it determined on the merits. Not only that, retroactive application of the Court's decision is unfair to Igal given that he acted in reliance on the TWC's statement that it lacked jurisdiction. On the other hand, it is difficult to imagine what prejudice Brightstar would suffer if it must simply defend on the merits a common law claim that was timely filed.

All three of the relevant factors dictate that the Court's decision should apply only prospectively. Therefore, even if the Court does not otherwise reconsider its opinion, the Court should revise its opinion to state that it applies only prospectively and then reverse and remand this case for a new trial.

#### **PRAYER**

Petitioner Saleh W. Igal prays that this Court grant this motion for rehearing and reverse the lower courts' judgments and remand for trial. Igal also requests that the Court award him his costs of appeal and such other and further relief to which he may be entitled.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2008, a true and correct copy of the foregoing has been delivered via certified mail, return receipt requested, to all parties shown below.

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