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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 22-0256

In the Supreme Court of Texas

ALFRED DEWAYNE BROWN,
Plaintiff-Appellant

v.

CITY OF HOUSTON, TEXAS; HARRIS COUNTY, TEXAS; BRECK MCDANIEL; TED C. BLOYD; AND D.L. ROBERTSON
Defendants-Appellees

On Question Certified from the United States Court of Appeals
for the Fifth Circuit, Cause No. 21-20302

SUR-REPLY OF APPELLEE HARRIS COUNTY, TEXAS

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TO THE HONORABLE SUPREME COURT OF TEXAS:

STATEMENT OF THE FACTS

On April 1, 2022, the Fifth Circuit Court of Appeals certified the question at bar to the Supreme Court of Texas. On June 8, 2022, Appellant Alfred Dewayne Brown filed his Brief on the Merits. On July 28, 2022, Appellees Harris County and City of Houston filed their Briefs on the Merits. On August 5, 2022, the State of Texas filed an amicus brief supporting Appellees' position. On August 12, 2022, Brown filed a Reply Brief.

SUMMARY OF THE ARGUMENT

While reserving all other arguments, Harris County files this Sur-Reply to correct two serious misrepresentations of law and fact made by Appellant Alfred Dewayne Brown in his Reply Brief.

First, Brown claimed 11 times in his Reply that Appellees "waived" their argument that Texas Civil Practices & Remedies Code § 103.153(b) is ambiguous, or that Brown's interpretation of it is absurd.[1] As a matter of law, a party cannot "waive" an argument when responding to the Supreme Court's request for briefing on a certified question. Further, Harris County has consistently maintained its

[1] Brown's Reply Brief at 4, 10, 17, 19, 20, and footnotes 23, 35, 38, 39, and 41. *See also,* discussion, *infra*, that identifies 11 places in Brown's 22-page Reply Brief where Brown falsely accuses Harris County of conceding or waiving points on appeal.

position in briefing and oral argument to the Fifth Circuit Court of Appeals and this Court, despite Brown's claims to the contrary.

Second, Brown incorrectly asserts that he should be able to maintain his federal lawsuit because he "*had* to file" it "to be deemed innocent and qualify for funds under the Tim Cole Act in the first place." (Reply Brief at 18) (emphasis in original). That is not in the record, it is not relevant, and it is not true. Brown was not legally required to file a federal lawsuit to receive compensation under the Tim Cole Act, and he has no competent record evidence to establish causation between his lawsuit and the approximately $2 million payment he received from the State.

ARGUMENT

I. Harris County never "waived" the argument that Texas Civil Practices & Remedies Code § 103.153(b) is ambiguous, or that Brown's interpretation of it would lead to absurd results.

Appellees and the State of Texas provide many reasons why the Tim Cole Act is a statutory settlement obligating Brown to dismiss his federal lawsuit. In his Reply, Brown failed to meaningfully address topics such as sovereign immunity,[2]

[2] *See, e.g.*, Harris County's Brief at 9-16 and City of Houston's Brief at 16-20. Brown devoted little more than one page to addressing the substance of appellees' sovereign immunity arguments. *See* Brown's Reply Brief at 20-21.

the Code Construction Act factors,[3] the absurdity and consequences of his interpretation of the Act,[4] or the reasons his arguments and cases are inapposite.[5]

Instead, Brown summarily dismissed many of these arguments by falsely claiming Appellees "waived" or "conceded" them and they "should be not be [sic] considered by the Court."[6] That is wrong for two reasons. First, a party does not need to preserve error when briefing a certified question. Second, Brown is factually wrong, and Appellees briefed these issues in the Fifth Circuit Court of Appeals.

A. As a matter of law, it is impossible to "waive" arguments when responding to a certified question.

Brown fundamentally misunderstands what it means for the Fifth Circuit to certify a question to the Supreme Court of Texas. The Texas Constitution grants jurisdiction to the Supreme Court to "answer questions of state law certified from a federal appellate court." Texas Const. art. V § 3-c(a). The Texas Rules of Appellate Procedure provide that the Supreme Court "may answer questions of law certified to it by any federal appellate court if the certifying court is presented with

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[3] *See* Harris County's Brief at 17-30. Rather than substantively address these factors, Brown did little more than argue that the Court should not consider them at all. "…The Court cannot—as Defendants suggest—resort to extrinsic aids, such as legislative history, to interpret a statute that is clear and unambiguous." Brown's Reply Brief at 11.

[4] *Id.*

[5] *See* Harris County's Brief at 30-35.

[6] Brown's Reply Brief footnote 35. *See, also,* Brown's Reply Brief at 4, 10, 17, 19, 20, and footnotes 23, 35, 38, 39, and 41.

determinative questions of Texas law having no controlling Supreme Court precedent." Tex. R. App. Proc. 58.1.

In this case, none of the parties requested certification, and the Fifth Circuit selected and submitted the issue, *sua sponte*, to the Supreme Court. The Fifth Circuit expressly disclaimed "any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the question certified." *Brown v. City of Houston, Tex.*, No. 21-20302, 2022 WL 989364, at *3 (5th Cir. Apr. 1, 2022), certified question accepted (Apr. 8, 2022), quoting *Janvey v. GMAG, L.L.C.*, 925 F.3d 229, 235-36 (5th Cir. 2019) (quoting *Janvey v. Golf Channel, Inc.*, 792 F.3d 539, 547 (5th Cir. 2015)).

Thus, the issue presented to this Court was not raised by the parties and is not an issue that needed to be "preserved" or could be "waived" by either party in the federal district court or court of appeals, as Brown suggests.[7] Brown supports his position with cases that have nothing to do with certified questions and are not even remotely relevant.

Castillo deals with an appellant claiming for the first time on appeal that a Social Security administrative judge failed to make a factual finding about whether appellant could obtain and maintain employment. *Castillo v. Barnhard*, 325 F.3d

[7] Even when an appellant has a duty to preserve an issue, Texas appellate courts hesitate to find waiver and will liberally construe pleadings "so that the right to appeal is not lost by waiver." *Lion Copolymer Holdings, LLC v. Lion Polymers, LLC*, 614 S.W.3d 729, 732 (Tex. 2020).

550, 553 (5th Cir. 2003). *Kelly* considered whether the "fact-specific defense of qualified immunity" was waived when it was not raised in the trial court. *Kelly v. Foti*, 77 F.3d 819, 822 (5th Cir. 1996). In *Mijalis*, the issue was whether an appellant properly preserved an objection to a jury charge regarding the calculation of damages. *F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1326–27 (5th Cir. 1994).

Each of Brown's cases involve an appellant claiming that a trial court erred, even though the appellant never raised the issue in the trial court. Appellants in those cases tried to argue new fact-specific issues on appeal without preserving the error they complained about—a very different scenario from parties being instructed to brief an issue selected by a court.

Further, even if this was not a certified question, Appellees prevailed in the district court and had no error to preserve. Finally, none of Brown's cases prevent a party from refining or developing legal arguments on appeal, or making alternative legal arguments, as Appellees have done.[8] Appellees briefed the purely legal question of how to interpret the Tim Cole Act, and Brown had the opportunity to get the last word in his Reply Brief. Instead of responding to many of these arguments, he falsely claimed this Court was not permitted to consider them.

[8] Under Brown's own logic, his appeal should be barred because he changed his legal position in this case. For example, Brown told the district court that "§ 103.153(b) should not apply" to his case at all "as a policy matter." *Brown v. City of Houston, Tex.*, 538 F. Supp.3d 725, 731-32 (S.D. Tex. 2021). He now insists that § 103.153(b) not only applies, but supports his position.

B. Brown inaccurately told this Court that appellees waived their arguments regarding the Tim Cole Act.

Even if Brown was right about the law, he is wrong about the facts. Eleven times in his Reply, Brown claimed that Harris County waived arguments or conceded that the Tim Cole Act was unambiguous:

> (1) "Defendants now erroneously contend, ***for the first time***, that the Tim Cole Act may be ambiguous and must be resolved in favor of retaining Defendants' immunity."[9]
>
> (2) "Defendants—***at the District Court and Fifth Circuit Court of Appeals*** – ***conceded that the Tim Cole Act is unambiguous***."[10]
>
> (3) "Defendants now—***for the first time—***argue that this result would be 'absurd.'"[11]
>
> (4) "Defendants now contend, ***for the first time on appeal***, Section 103.153 precludes Mr. Brown's § 1983 lawsuit because (1) ***his interpretation of the statute is ambiguous*** and (2) ***his interpretation leads to an 'absurd result***.'"[12]
>
> (5) "***For the first time***, Defendants now assert that the statute may be ambiguous. ***Not only is this in direct contradiction to their previous positions***, but it is simply incorrect."[13]
>
> (6) "Indeed, ***at oral argument at the 5th Circuit, Defendants*** City of Houston (at 19:35) and ***Harris County*** (at 34:16) both ***admitted that the statute was not ambiguous***. *See Brown v. City of Houston*, 21-20302, Oral Argument Recording at 18:39,

[9] Brown's Reply Brief at 4 (emphasis added).

[10] Brown's Reply Brief at 10 (emphasis added).

[11] Brown's Reply Brief at 17 (emphasis added).

[12] Reply Brief at 19 (emphasis added).

[13] Reply Brief at 20 (emphasis added).

available at https://www.ca5.uscourts.gov/OralArgRecordings/21/21-20302_3-7-2022.mp3"[14]

(7) "***Defendants have waived this argument*** [that Brown's interpretation is absurd] ***by failing to raise it at the District Court or the Fifth Circuit Court of Appeals***. As such, it should be not be [sic] considered by the Court."[15]

(8) "***In another newly-raised argument, Harris County now asserts that the Tim Cole Act must be read consistently with Texas Government Code Sections 311.021 and 311.023*** **[Code Construction Act],** which set forth various presumptions and statutory construction aids to assist courts in determining the meaning of words in a statute."[16]

(9) "Harris County has taken a different perspective, arguing instead that the statute *is* ambiguous ***despite having denied the same before the United States Court of Appeals for the Fifth Circuit at oral argument***."[17]

(10) "In their Responses, Defendants raise ***for the first time*** their arguments regarding Mr. Brown's interpretation of the statute as (1) ***ambiguous***, and (2) ***leading to an 'absurd result'***. . ."[18]

(11) "***Harris County also argues, for the first time, that the Court must look to Section 311.021 and 311.023*** **[Code Construction Act]** for guidance in interpreting a statute."[19]

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[14] Brown's Reply Brief at footnote 23 (emphasis added).

[15] Brown's Reply Brief at footnote 35 (emphasis added).

[16] Brown's Reply Brief at footnote 38 (emphasis and bracketed material added).

[17] Brown's Reply Brief at footnote 39 (some emphasis in original and some emphasis added).

[18] Brown's Reply Brief at footnote 41 (emphasis added).

[19] Brown's Reply Brief at footnote 41 (emphasis added).

1. Harris County could not have "conceded" anything at the district court, because it did not brief this issue.

The 11 statements above are demonstrably false. First, Harris County could not have "conceded" at the "District Court" that the Tim Cole Act was unambiguous, because Harris County never briefed this issue at the district court. The City of Houston is the only party to move for summary judgment, and the district court dismissed both the County and City because the same analysis applied to both.[20]

2. Harris County's Fifth Circuit briefing unequivocally states that Brown's construction is an "absurd reading that ignores the purpose and legislative history of the Act."

Second, Harris County never "conceded" on appeal that the Tim Cole Act was unambiguous. To the contrary, it has always maintained that Brown's interpretation would lead to an absurd result. For example, Harris County argued in briefing to the Fifth Circuit Court of Appeals that Brown's construction of the Tim Cole Act was an "absurd reading that ignores the purpose and legislative history of the Act." *Brown v. City of Houston, Texas, et al.*, 2021 WL 5541140, at *27 (emphasis added). Harris County also explained at length how Brown's interpretation was untenable in the context of the statute. *Id.*, 2021 WL 5541140, at *27-31.

[20] *See* ROA.19-21 (Docket Sheet), ROA.2812-2827 (Memorandum and Opinion), and ROA.2828 (Final Judgment). Further, the City of Houston never "conceded" at the district court that the Tim Cole Act was unambiguous, because the issue was not directly briefed in the district court. Brown and the City had differing views of the plain language meaning of the Tim Cole Act, and the City explained in its Reply Brief that a "plain language analysis—is not as easy as Brown suggests." (ROA.2790.) When parties demonstrate to a court how their interpretation of a statute differs, that is the *opposite* of conceding that the statute is unambiguous.

3. Brown misrepresented Harris County's Fifth Circuit oral argument.

Brown also misrepresented that "***at oral argument at the 5th Circuit***," Harris County's counsel "***admitted that the statute was not ambiguous***."[21] There is a reason Brown did not quote this alleged admission—it is not true. Here is what counsel actually said at oral argument:

> **Judge Duncan**: So your view is that bringing an action is ambiguous, is that right?
>
> **Hopkins**: . . . the way we interpret it in the context of the statute, it's not—but if you interpret it the way Mr. Brown interprets it, **it is ambiguous, and then you have to go to the Statute [Code] Construction Act [Tex. Govt. Code § 311.021 & § 311.023]** . . .[22]

Brown's decision to misrepresent what was said at oral argument was more than mere negligence. Brown provided a pinpoint citation to the sentence above, and he mentioned this argument elsewhere in his brief.[23] Instead of responding to Appellees' points about the absurdity of his interpretation of the Act, or providing a proper analysis under the Code Construction Act, Brown took the dishonorable

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[21] Reply Brief at footnote 23 (emphasis added). *See also*, items 2, 6, 7, and 9 in the list above. In at least four places, Brown directly misrepresented what was said at oral argument.

[22] *Brown v. City of Houston*, 21-20302, Oral Argument Recording at 34:16, available at https://www.ca5.uscourts.gov/OralArgRecordings/21/21-20302_3-7-2022.mp3 (cleaned up).

[23] "Nor, as Defendant Harris County puzzlingly argues, is the statute ambiguous *only* as to Mr. Brown's interpretation..." Brown Reply Brief at 20 (emphasis in original).

approach of telling this Court that it cannot consider these arguments because Appellees waived them.[24]

Harris County has always taken the position that Brown's construction of the Tim Cole Act is absurd, and this portion of the statute must be viewed in the context of the Act or through the lens of the Code Construction Act. The parties' competing interpretations are further proof that the statute is ambiguous. As Judge Duncan pointed out during the City's argument to the Fifth Circuit Court of Appeals: "You think it's unambiguous in your favor. The other side thinks it's unambiguous in their favor. Isn't that an indication that it might be ambiguous?"[25]

II. Brown inaccurately claimed he "*had* to file" his federal civil rights case to recover under the Tim Cole Act.

Brown also inaccurately claimed in his Reply that he "*had* to file that case [his underlying federal lawsuit] to be deemed innocent and qualify for funds under the Tim Cole Act in the first place." (Reply Brief at 18) (emphasis in original). He uses that to justify recovering under both the Act and his federal lawsuit.

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[24] Brown failed to cite the standard for an oral judicial admission, which requires (1) a statement made in the course of judicial proceedings, (2) contrary to an essential fact or defense, (3) deliberate, clear, and unequivocal, (4) cannot be destructive of the opposing party's theory of recovery or defense, and (5) consistent with public policy. *City of Webster v. Hunnicutt*, No. 14-20-00421-CV, 2022 WL 1111872, at *6 (Tex. App.—Houston [14th Dist.] Apr. 14, 2022, pet. filed), citing *Mendoza v. Fid. & Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980). The statement Brown relies on does not meet the second, third, fourth, or fifth elements.

[25] *Brown v. City of Houston*, 21-20302, Oral Argument Recording at 19:41-19:57, available at https://www.ca5.uscourts.gov/OralArgRecordings/21/21-20302_3-7-2022.mp3. The City responded: "Potentially. I agree with you."

Brown made the same startling claim to the Fifth Circuit Court of Appeals, and during oral argument, Judge Stewart asked Brown's counsel: "You said he *had* to file this action in order to *pursue* his Tim Cole Act claim?"[26] Counsel gave an ambiguous answer that lasted longer than a minute, and Judge Stewart repeated: "My question, though, was, did you say that he *needed* to file this action in order to pursue his claim under the Tim Cole Act?" Counsel responded: "Yes. Yes, your honor. I am telling you that."[27]

Later, Judge Stewart asked a third time: "And the fact is, what you told me, if he hadn't brought this § 1983 action, he wouldn't have gotten the actual innocence determination that resulted in his receiving the pay under the Tim Cole Act. That's what you told me earlier." Counsel responded: "That's exactly right." Judge Stewart concluded: "He had to do it."[28]

Brown's federal lawsuit was not a prerequisite to recover under the Tim Cole Act, and Brown has no competent record evidence of even a causal relationship between the two events. Brown has not taken any depositions, and he has no idea what motivated Harris County District Attorney Kim Ogg to appoint an independent

[26] *Brown v. City of Houston*, 21-20302, Oral Argument Recording at 3:43-3:38, available at https://www.ca5.uscourts.gov/OralArgRecordings/21/21-20302_3-7-2022.mp3

[27] *Brown v. City of Houston*, 21-20302, Oral Argument Recording at 4:55-5:11, available at https://www.ca5.uscourts.gov/OralArgRecordings/21/21-20302_3-7-2022.mp3

[28] *Brown v. City of Houston*, 21-20302, Oral Argument Recording at 12:51-13:08, available at https://www.ca5.uscourts.gov/OralArgRecordings/21/21-20302_3-7-2022.mp3

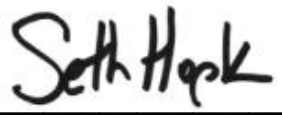
special prosecutor to investigate his claim. He has no proof that the prosecutor would have reached a difference conclusion if Brown had not filed his lawsuit. Yet Brown continues to claim that Ogg only declared him actually innocent as a result of his federal lawsuit,[29] and that this somehow entitles him to maintain that lawsuit. Brown's counsel's unsworn speculation cannot be presented to this Court as evidence, and even if it could, it has no legal bearing on the issue at bar.

CONCLUSION AND PRAYER

In his Reply, Brown materially misstated law and facts, and Harris County respectfully requests that this Court note that Appellees did not—and could not—waive or concede the arguments before this Court. Harris County further requests that this Court note that Brown was not required to file his federal lawsuit to receive Tim Cole Act compensation. Finally, Harris County respectfully requests that this Court answer the certified question in the affirmative.

[29] While this is not in the record, Brown seems to base this on the fact that the special prosecutor was given access to the same files that were produced in discovery in the federal lawsuit.

Respectfully submitted,



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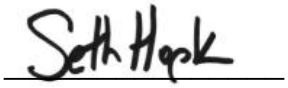
CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that this document was produced on a computer and printed in a conventional typeface no smaller than 14-point, except for footnotes, which are no smaller than 12-point. This document also complies with the word-count limitations of Tex. R. App. P. 9.4. Relying on the word count of the computer program used to prepare this document, it contains 3,096 words, excluding the portions listed in Tex. R. App. P. 9.4(i)(1).



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CERTIFICATE OF SERVICE

I certify that on September 13, 2022, a true and correct copy of the foregoing instrument was electronically filed with the court's efiling system. In addition, the following counsel were served a courtesy copy by electronic transmission:

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