NO. 10-0104

In the Supreme Court of Texas

IN RE TOYOTA MOTOR CORPORATION AND TOYOTA MOTOR SALES, USA, INC.

ORIGINAL PROCEEDING FROM THE 18TH DISTRICT COURT, JOHNSON COUNTY, TEXAS

BRIEF OF AMICUS CURIAE OWENS-ILLINOIS, INC., THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, THE ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, THE CALIFORNIA EMPLOYMENT LAW COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS, IN SUPPORT OF RELATORS

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INTEREST OF THE AMICUS CURIAE
OWENS-ILLINOIS, INC.

Owens-Illinois, Inc. ("Owens-Illinois") is the world's largest manufacturer of glass containers for the food and beverage industries. Each year, Owens-Illinois is the target of hundreds of lawsuits across the United States. These lawsuits range from asbestos-related personal injury claims to commercial breach of contract claims and employment disputes.

While Owens-Illinois often disputes the validity of many of the lawsuits, Owens-Illinois also recognizes that litigation is disruptive to its business, expensive and time-consuming. Owens-Illinois thus has a strong and recurring interest in settling litigation.

Like many other businesses, one of Owens-Illinois' primary goals when it settles litigation is to achieve finality. Owens-Illinois believes that the trial court's decision to reopen a lawsuit that had been settled and dismissed erodes this important concept of finality and also undermines the integrity of settlement agreements. The import of the trial court's decision extends beyond this case and beyond Texas. It has the potential to effect settlement decisions in all types of cases, everywhere. This Court should consider these broader implications as it reviews the trial court's actions.

ALLIANCE OF AUTOMOBILE MANUFACTURERS AND ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS

The Alliance of Automobile Manufacturers ("Alliance") is a nonprofit trade organization formed in 1999. Its mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to emerging challenges associated with the manufacture of new automobiles. The members of the Alliance are BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda North America Operations, Mercedes-Benz USA, Mitsubishi Motors North America, Inc., Porsche Cars North America, Inc., Toyota Motor North America, Inc, and Volkswagen of America, Inc. The Alliance frequently participates as *amicus curiae* or as an intervenor in cases addressing products liability issues and Federal regulation of motor vehicles. In doing so, the Alliance presents the broad perspective of vehicle manufacturers.

The Association of International Automobile Manufacturers ("AIAM") is a nonprofit trade association that represents international motor vehicle manufacturers, certain original equipment suppliers, and other automotive-related trade associations. AIAM's mission is to protect and promote the unique interests of international automakers and their suppliers in the United States. AIAM is dedicated to the promotion of free trade and to policies that enhance motor vehicle safety and the protection of the environment. AIAM's automobile manufacturer

members include: American Honda Motor Co., American Suzuki Motor Corp., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Isuzu Motors America, LLC, Kia Motors America, Inc., Mahindra & Mahindra Ltd., Maserati North America, Inc., McLaren Automotive, Ltd., Mitsubishi Motors North America, Inc., Nissan North America, Inc., Peugeot Motors of America, Subaru of America Inc. and Toyota Motor North America, Inc. Like the Alliance, AIAM frequently participates as *amicus curiae* in cases addressing federal regulatory and products liability law issues.

This case raises issues of considerable importance to the Alliance, AIAM, and their respective members. Members of the Alliance and AIAM frequently settle litigation. Thus they have an interest in the finality of those settlements and might be reluctant to enter in settlements if the finality of those settlements could be called into doubt at a later time.

THE CALIFORNIA EMPLOYMENT LAW COUNCIL

The California Employment Law Council ("CELC") is a multi-employer organization of major employers. Like all major employers, its members are frequently sued in employment litigation. Many of the lawsuits are purported class actions. Many of the lawsuits involve extensive discovery demands.

CELC members regularly attempt to settle such litigation either directly or through the use of mediators. Routinely, these settlements result in a dismissal with prejudice of the lawsuit that is the subject of the settlement.

CELC members are interested in this case because their principal objective in settling litigation is finality. CELC members fully recognize the right of any party to a contract, including a settlement contract, to initiate a new legal proceeding to set aside the contract in the event there was conduct such as fraud. However, it would totally undermine the utility of settlements if a court which had finally dismissed a case with prejudice could simply reopen the case based on a contention of a party that not all of the extensive discovery demands in the underlying litigation had been met. This case thus has implications that transcend the borders of the State of Texas. CELC therefore joins in this brief amicus curiae.

THE NATIONAL ASSOCIATION OF MANUFACTURERS

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

NAM members have an interest in this case because the members frequently settle litigation so that they can achieve finality and avoid the distraction caused by litigation. NAM members would be hesitant to settle lawsuits if they were faced with the possibility that the settlement did not bring finality.

PRELIMINARY STATEMENT

This Amicus Curiae brief is respectfully submitted by Owens-Illinois, the Alliance of Automobile Manufacturers, the Association of International Automobile Manufacturers, the California Employment Law Council, and the National Association of Manufacturers (hereinafter, "Amici") in support of Relators, Toyota Motor Corporation and Toyota Motor Sales, U.S.A., Inc. ("Relators").

Amici incorporate by reference herein the Statement of Facts contained in Relators' Brief on the Merits filed May 10, 2010. Tex. R. App. Proc. 9.7.

At issue is whether the trial court has the power to reopen a personal injury lawsuit settled and dismissed with prejudice by Relators and Real Party in Interest Pennie Faye Green ("Real Party in Interest") more than two years ago. Amici contend that the trial court has no such power after the court loses its jurisdiction, in large part because of the overriding importance of finality in the judicial process, as well as the public policy favoring settlement.

The public policy arguments are important in all cases, but are especially compelling in a case such as this, where the trial court's decision to reopen the lawsuit was based solely on unsubstantiated allegations, made by a different plaintiff in another lawsuit, that Relators may have violated a discovery order in this case. While Real Party in Interest has tried recently to narrow the scope of these proceedings by recasting the action as an investigation of criminal contempt, the public policy implications remain.

In every lawsuit, the parties, the attorneys and the courts seek to achieve a result that is fair, correct and final. In most cases, our courts achieve this result with remarkable precision. In others, the search for a result that is fair and correct may be at odds with the idea of finality. Either party can always argue that a more thorough search for documents should have been made, that more discovery should have been allowed, or that more evidence should have been admitted. Nevertheless, at some point, the greater value lies in the expectation that cases must come to an end, even if the result is unpopular, unfair, incomplete, or in some cases, wrong. Because few things in the law are, or can ever be, perfect, there are times when perfection is finality. Such is the case here.

A corollary to the important function served by finality is the equally important role of settlement agreements. Litigants like those in the underlying lawsuit enter into settlements for one overarching purpose: the desire to resolve

their dispute so that they can move on. As was the case here, litigants often agree to settle with the understanding that additional time or discovery may possibly yield different results. Yet, because of the overwhelming need for finality and closure, litigants accept this possibility. These principles would be frustrated if settling parties were faced with the risk that a trial court, like the one in this case, could reopen a lawsuit every time a party made an after-the-fact, unproven allegation regarding what transpired in the underlying litigation.

The need for finality does not leave litigants without rights, however. The American court system is replete with procedures that permit parties to attack judgments and/or settlement agreements that were improperly procured. These procedures include, but are not limited to, a suit to set aside the judgment, a suit for fraud on the underlying agreement and, a remedy somewhat unique to Texas, an equitable bill of review.

The trial court's decision to reopen this case may appear innocuous. It is not. The court's decision to reopen this lawsuit which ended two years ago has the potential to weaken the important public policy of finality, as well as undermine the integrity of settlement agreements and final court orders – not just in this case, but in all cases, civil or criminal. Accordingly, this Court must reverse the trial court's decision – not only for the obvious reason that the trial court lost plenary jurisdiction and cannot overreach itself, but also because when this case was settled

and subsequently dismissed with prejudice in 2007, the law deemed this particular case over, that is to say, at an end and final and hence, no longer subject to qualification or modification.

ARGUMENT

Amici fully support, but will not burden the Court, by repeating arguments already made by Relators and other Amici. Cf. Sup. Ct. R. 37.1 (disfavoring repetitive arguments by amici).

I. THE DISTRICT COURT HAS FRUSTRATED THE PUBLIC POLICY FAVORING FINALITY AND ENCOURAGING SETTLEMENT.

A. *THE DISTRICT COURT'S ORDER DISTURBS THE PUBLIC POLICY IN FAVOR OF FINALITY.*

The District Court's Order (the "Order")[1] should be reversed because it frustrates the important public policy of finality. Finality is not merely a "technical concept of temporal or physical termination."[2] Rather, as the United States Supreme Court recognized long ago, finality is the "means for achieving a healthy legal system."[3] Finality reflects the societal and judicial desire "to bring litigation to an end."[4]

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[1] See Relators' Brief on Merits, at pg. 2 defining Order. Tex. R. App. Proc. 9.7 (adoption by reference).

[2] Cobbledick v. United States, 309 U.S. 323, 326 (1940) (analyzing finality in the context of the predecessor to 28 U.S.C. § 1291, relating to final decisions of district courts).

[3] Id.

[4] United States v. Munsingwear, Inc., 340 U.S. 36, 38 (1940) (discussing

Indeed, the American system of justice is teeming with concepts and procedures that seek to further the goal of finality.[5] This interest in finality extends to all courts, state and federal, at all levels, trial and appellate, and to all proceedings, civil or criminal.[6]

As the first and sometimes the only court to hear a case, however, trial courts play a particularly unique and significant role in promoting and maintaining a "healthy legal system."[7] The trial court's primary task is to serve as a tribunal of truth and justice. Unfortunately, the search for truth and justice is often at odds with finality.[8] Inherent in the concept of finality is the recognition – indeed, the imploration – that once litigation comes to an end, justice requires that it remains there.[9]

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importance of finality with respect to *res judicata*). See also Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (describing efficiency arguments supporting the final judgment rule).

[5] Munsingwear, 340 U.S. at 38 (res judicata); see also Firestone, 449 U.S. at 374 (final judgment rule).

[6] Cobbledick, 309 U.S. at 330 (noting that finality is a well-established "phase of the distribution of authority within the judicial hierarchy.").

[7] Id.

[8] Hollee S. Temple, Raining on the Litigation Parade: Is It Time To Stop Litigant Abuse Of The Fraud On The Court Doctrine?, 39 U.S.F. L. Rev. 967, 973 (2005).

[9] Elaine A. Carlson & Karlene S. Dunn, Navigating Procedural Minefields: Nuances in Determining Finality of Judgments, Plenary Power, and Appealability, 41 S. Tex. L. Rev. 953, 961 (2000) (finality reflects the belief that "courts must resolve a dispute so that the litigants can go on to other matters.") (internal citations and quotations omitted).

The trial court's Order in this case contravenes the important policy of finality and deprives Relators of due process because, in effect, the court has taken the epic step of reopening a lawsuit that it dismissed more than two years ago.[10] What is more, the trial court has done so based solely on the unsubstantiated allegations – made by another plaintiff, in another lawsuit, in another state – that Relators may have violated a previous discovery order issued by the trial court either by failing to produce information, or producing incomplete information. [R. 164.] These allegations are neither remarkable nor extraordinary. Most lawsuits are "tales that begin with great fanfare and suspense, with fire-and-brimstone pleadings telling dueling stories of injustice and lies."[11] As such, unproven allegations should not be used to undermine the core principles that make finality such an important part of our legal system.

This result is not changed by Real Party in Interests' belated and artificial attempt to recast this proceeding as an original investigation into "criminal

[10] Although the Order does not contain any explicit language re-opening the lawsuit, that is certainly its effect. The trial court cannot resolve the truth of the allegations made against Relators without engaging in some type of fact-finding. Among other things, this fact-finding odyssey would require the trial court to re-familiarize itself with the facts of this case, re-open discovery, delve into the facts and circumstances concerning the production of documents in the underlying litigation, review the documents that were produced, compare them with the documents that allegedly were not produced, and backtrack through time to recreate the parties' understanding as it existed in 2006 and 2007.

[11] Scott A. Moss, Illuminating Secrecy: A New Economic Analysis of Confidential Settlements, 105 Mich. L. Rev. 867, 869 (2007).

contempt." Notwithstanding that the "criminal contempt" insinuation lacks any support in the record, the fact remains that even criminal contempt investigations cannot continue indefinitely.

This is not to suggest that a court does not have the authority to sanction improper conduct. But the trial court's decision to enter the Order is quite remote from its inherent ability to sanction a party for contempt or other improper conduct. Here, there was no autonomous or apparent violation of any of the trial court's orders and no obvious improper conduct, i.e., a violation of the court's order to produce documents or to appear at a specified time. Instead, there is the mere allegation that Relators may have violated a discovery order.[12] The concept of finality precludes the trial court from exercising its authority in the manner it did merely because "it may appear. . . that an injustice has been done."[13] Otherwise, finality would become a legal fiction.

In both civil and criminal cases, the search for documents, witnesses, facts, information, and the truth could continue in perpetuity; a litigant could always argue that a better or more thorough search for documents could have been made or that additional documents should have been produced. But, at some point in every lawsuit, the litigants decide that the search for the truth must yield to the

[12] Id.

[13] Alexander v. Hagedorn, 226 S.W. 2d 996, 998 (Tex. 1950) (discussing final judgment and equitable bills of review) (emphasis supplied).

greater goal of putting the matter to rest and moving on. The litigants in this lawsuit reached that point in December 2006 when they decided to settle the case at mediation.

Once a case is over, "relief . . . can never extend to rewriting history."[14] History was written in this case on April 23, 2007, when the district court entered its final judgment and dismissed this case. On that day, the law's "proverbial bell" was rung, and the trial court lost jurisdiction thirty days later.[15] This bell cannot now be "unrung" to investigate unproven allegations in an unrelated matter, and it is irrelevant that the "investigation" is purportedly criminal in nature.[16] This is true not just in this case, but in every case where litigation has ended, because "unending litigation is itself an injustice."[17]

B. *THE DISTRICT COURT'S DECISION UNDERMINES THE PUBLIC POLICY ENCOURAGING SETTLEMENT AGREEMENTS.*

The public policy in favor of settlement agreements also compels reversal of the trial court's Order. Real Party in Interest argues that there is "simply no basis" to believe that this "criminal contempt proceeding will threaten settlement

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[14] Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 872 (1994).

[15] TEX. R. CIV. P. 329b.

[16] Digital Equip., 511 U.S. at 872.

[17] See also, supra, Alexander, 226 S.W. 2d at 998 ("endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice.").

agreements."[18] Real Party in Interest is mistaken. Several months prior to the trial court's dismissal, the parties in this lawsuit entered into a settlement agreement that fully and finally disposed of the claims and issues. [R. 253-274.] The trial court's Order is not only in complete derogation of the terms of the settlement agreement in this case, but also completely frustrates the underlying purposes of all settlement agreements.

The risk that additional information could, would or should have been produced, is present in every lawsuit that settles prior to the close of discovery; the parties weigh this risk and factor it into their decision.[19] Indeed, Amici often settle lawsuits notwithstanding the veracity of the allegations – and sometimes despite the veracity of the allegations. Lawsuits nonetheless settle because of the business, societal and judicial desire for finality. Supra. If businesses were faced with the possibility of being confronted with additional proceedings arising out of the discovery (or lack thereof) in the settled lawsuit, the impetus for settlement would be negated. This is true regardless of how those post-settlement proceedings are characterized and what form they take.

Settlement often furthers the goal of finality because it achieves many of the same results: it eases the burden on the courts, conserves judicial resources, and

[18] Response of Real Party in Interest/Plaintiff, Pennie Faye Green to Relator's Brief on the Merits, at pg. 3.

[19] See Stephen Bundy, The Policy in Favor of Settlement in an Adversary System, 44 Hastings L.J. 1, 45-46 (1992).

reduces the expense and risk of litigation.[20] Like finality, settlements provide litigants with a sense of closure and ease the "toll taken by the aggravation and distress that so often plague a party as a lawsuit grinds its way through the court system."[21] The trial court's Order undermines each of these important benefits.

Settlement also provides benefits beyond finality. Economically, settlement often reflects the plaintiff's belief that an agreed upon sum now is more valuable than the uncertainty of a larger damage award later. Similarly, settlement is often economically valuable to defendants because it provides them with a certain, fixed and definite expense. Practically, settlements permit both parties to control the process and account for the flaws, risks and uncertainties in the law, which are often said to deprive litigants of justice by creating an "all or nothing" result.[22]

In this instance, the parties' settlement was a fair bargained for exchange that achieved the important goal of bringing litigation to an end. The negotiated agreement accounted for both the uncertainty and expense of continuing to trial. Thus, the true injustice lies not in Relators' alleged failure to comply fully with a

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[20] Margaret M. Cordray, Settlement Agreements and the Supreme Court, 48 Hastings L.J. 22 (1996-97); see also Janneh v. GAF Corp. , 887 F.2d 432, 435 (2d Cir. 1989), *overruled on other grounds*, 511 U.S. 863 (1994) ("Litigants, courts, and Congress view settlement as a positive force, indispensable to judicial administration. Foregoing formal courtroom procedures, including discovery, trial, briefs and arguments, brings substantial benefits to the parties. The costs of litigation are reduced and crowded dockets are relieved.").

[21] See Cordray, 48 Hastings L.J., at 37.

[22] See Bundy, supra, 44 Hastings L.J. at 46.

discovery order, but in the trial court's Order, which violates the finality of their agreement.

II. THE CONCEPT OF FINALITY DOES NOT LEAVE LITIGANTS WITHOUT OTHER AVENUES OF RELIEF.

Once a trial court's jurisdiction has expired, the rule of finality precludes litigants from taking the proverbial "second bite" at the apple. Finality does not leave litigants who desire to attack a judgment and/or set aside a settlement agreement without redress, however. To the contrary, the law recognizes that there are specific instances in which judgments should be reconsidered, and prescribes a panoply of procedures that may be used to afford post-judgment relief.

For example, a litigant may seek to set aside a settlement agreement based on fraud.[23] Alternatively, in Texas, a litigant may challenge either a final judgment or a settlement agreement using an equitable bill of review,[24] which is "an independent equitable action brought by a party to a former action seeking to set aside a judgment which is no longer appealable or subject to [a] motion for new

[23] See, e.g., Authorlee v. Tuboscope Vetco Int'l, Inc., 274 S.W.3d 111, 119 (Tex. App.-Houston 1st. Dist. 2008) (suit for fraud on settlement agreement).

[24] Cf. King Ranch, Inc. v. Chapman, 118 S.W. 3d 742, 751 (Tex. 2003) (equitable bill of review may be used to set aside final judgment); Kalyanaram v. Univ. of Texas Sys., No. 03-05-00642-CV, 2009 WL 1423920, at *3 (Tex. App.-Aust. May 20, 2009) (using equitable bill of review to challenge settlement agreement allegedly procured by fraud).

trial."[25]

Indeed, Real Party in Interest provides yet another remedy for conduct that it characterizes as "indirect contempt." Specifically, Real Party in Interest contends that Texas has a "unique procedure requiring the alleged contemnor to have notice of the charge, right to trial or hearing, and right to counsel."[26] Finally, as Relators have noted, any party who is wronged by lawyer conduct is free to file a complaint with the appropriate disciplinary body governing lawyers.

These avenues may not be available or meritorious in every case, and perhaps not even in this case. Nonetheless, these rules of procedure may not be disregarded merely because one party makes a post-hoc determination – or someone in another lawsuit makes a post-hoc allegation – that the amount of discovery allowed was insufficient, that the court's rationale lacked merit, or that they are simply dissatisfied with the outcome. Like all rules of procedure and practice, they serve an important role in the judicial hierarchy and for several reasons, must be followed.

First, these rules provide a check against the ability of litigants to burden the courts with never-ending challenges to final judgments. Second, these rules give all litigants notice of the type of post-judgment attacks to which they may be

[25] Patrick J. Dyer, A Practical Guide to the Equitable Bill of Review, Texas Bar Journal Online (January 2007).

[26] Real Party in Interest Reply Brief, at 7.

subjected. Third, these avenues of post-judgment review give litigants guidance regarding the standards that will be applied in reviewing attacks on final judgments. Without these rules, lawsuits would detour into procedural thickets, with no end on the horizon. Indeed, that is precisely what has happened in this case.

Real Party in Interest chose not to employ any of the available post-judgment procedures. As a result of Real Party in Interests' decision – and the trial court's assent – Relators and their counsel have now expended significant time, effort and money to fight what they believed was a discrete issue in a case that they thought was settled and which, more importantly, had been dismissed. The discrete issue argued at the trial court level has now been further "refined" by Real Party in Interest, and bears no relation to arguments made in the trial court, resulting in additional waste of Relators' resources. To be sure, this case does not illustrate the harshness of finality, but rather "the need for it in providing terminal points for litigation."[27] Permitting Real Party in Interest or any litigant to end-run around the rules of practice in this manner makes the rules superfluous, at best, and meaningless, at worst. Accordingly, the trial court's Order should be reversed.

[27] Munsingwear, 341 U.S. at 41 (*res judicata* barred relitigation of issue that had been resolved).

CONCLUSION

The Court should grant review and reverse the trial court on the grounds that once the trial court lost jurisdiction, the important interest in finality and the public policy in favor of settlement precludes the trial court from reopening a lawsuit based on unsubstantiated allegations of discovery abuse made by a party in another lawsuit.

Respectfully submitted,

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