IN THE SUPREME COURT OF TEXAS

NO. 06-0911

EDWARDS AQUIFER AUTHORITY ET AL., PETITIONERS,

v.

CHEMICAL LIME, LTD., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

Argued April 1, 2008

JUSTICE WILLETT, concurring.

I agree with the Court that under *Barshop*[1] the Edwards Aquifer Authority became effective on the date of our opinion in that case. The issue as briefed to us, however, and as addressed at length by the court of appeals, raised a more fundamental legal question: When does an appellate-court judgment become final and take effect? This vexing question will no doubt recur and, in my view, warrants the Court's rulemaking attention. To some degree, the issue has a certain "angels dancing on the head of a pin" quality to it, interesting (to some) as a matter of logic and perplexing (to all) as a matter of practice. It is confounding, to be sure, but also consequential.

[1] *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618 (Tex. 1996).

So I join in the Court's judgment and, like JUSTICE BRISTER, most of its opinion. But as a general matter the better default date is the mandate, the formal order declaring our review complete, our decision final, and our judgment enforceable. Yogi Berra was right: In law as in life, "It ain't over 'til it's over."[2]

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An appellate court's mandate is the official order declaring to the district court, the parties, and all other interested persons that the court has closed the book on its review and is once-and-for-all finished. I can understand, therefore, why the court of appeals and Chemical Lime view the date of our mandate in *Barshop* as when the Authority and the Edwards Aquifer Authority Act became effective. Their position is hardly unreasonable. A decision from this Court, of course, is subject to a motion for rehearing, and can also be reconsidered on our own motion.[3]

The Authority says the date of the *Barshop* mandate is inappropriate because issuance of the mandate is merely the "ministerial act" of a court clerk.[4] I disagree. The mandate under our rules

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[2] Yogi Berra with Dave Kaplan, *When You Come to a Fork in the Road, Take It!* 88 (Hyperion 2001); *see also* Carlo DeVito, *Yogi: The Life & Times of an American Original* 285-286 (Triumph Books 2008) (explaining the offbeat etymology of this famous Yogi-ism); *see also generally* Stacy Obenhaus, *It Ain't Over 'Til It's Over: The Appellate Mandate in Texas Courts*, 15 THE APPELLATE ADVOCATE: STATE BAR OF TEXAS APPELLATE SECTION REPORT 4, 8 (2003).

[3] As to the authority of a court to reissue an opinion on its own motion, see *Raborn v. Davis*, 795 S.W.2d 716, 717 (Tex. 1990) (holding that the Court, after settlement and change in the law, "on its own motion, vacates its opinion and judgment"); *Cocke v. Smith*, 179 S.W.2d 958, 958 (Tex. 1944) (holding, after granting mandamus petition, that "[u]pon further consideration of this matter by this court upon its own motion, we are of the opinion that we are without jurisdiction to grant such writ"); *Prouty v. Musquiz*, 58 S.W. 996, 996 (Tex. 1900) (holding that where the Court discovers error in its answer to certified question, "[i]t is proper that the mistake should be rectified, and therefore, of our own motion, we order that the specific answer given in our former opinion be set aside, and that in lieu thereof the following answer be certified . . . ").

[4] The City of San Antonio likewise refers to the issuance of the mandate as "a purely ministerial procedure."

is not a mere ministerial postscript or duplicative reminder. Our rules require appellate courts to prepare a mandate, without which an appellate-court judgment cannot be enforced.[5]

Several statutes also tie the finality of appellate-court decisions to issuance of the mandate.[6] If the mandate served no meaningful purpose there would be no need to require one.

In addition, Texas Rule of Appellate Procedure 18.6 makes clear that appellate-court judgments in accelerated appeals, when time is of the essence, are not effective until the mandate issues. It would be peculiar to hold, as the Authority urges, that our judgment in an ordinary, unexpedited appeal takes effect instantly when the rules make plain that our judgment in an accelerated appeal[7] takes effect only "when the mandate is issued."[8]

The parties make several arguments as to whether the trial court's judgment was superseded while *Barshop* was on appeal, and whether the trial court was obliged to follow *Barshop* immediately upon its issuance. The Authority argues the State was exempt from the requirement of

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[5] *See* TEX. R. APP. P. 51.1 (providing that the appellate clerk must prepare a mandate and that the appellate court's judgment must be enforced in the trial court once the trial court receives the mandate); TEX. R. APP. P. 65.2 (providing that the trial court clerk must enforce the judgment of the Supreme Court upon receipt of the Court's mandate); *In re Ford Motor Co.*, 165 S.W.3d 315, 321 (Tex. 2005) (orig. proceeding) (noting that plaintiff has no right to recover damages from defendant "unless or until a mandate to that effect issues after trial, judgment, and possible appeals").

[6] *See* TEX. ALCO. BEV. CODE § 61.34(c) ("If a license is issued on the basis of a district court judgment and that judgment is reversed on appeal, the mandate of the appellate court automatically invalidates the license and the applicant is entitled to a proportionate refund of fees for the unexpired portion of the license."); TEX. BUS. CORP. ACT art. 7.02 § F (providing that if judgment of revocation or dissolution of corporate certificate of authority is appealed, appellate court shall in certain circumstances "remand the case to the trial court with instructions to grant the corporation opportunity to cure such defaults, such cure to be accomplished within such time after issuance of the mandate as the appellate court shall determine but in no event more than sixty (60) days thereafter"); TEX. GOV'T CODE § 30.00142(d) (providing that appointment of special appellate judge "automatically terminates at the time the mandate or mandates issue in the case he was appointed to hear").

[7] *See* TEX. R. APP. P. 28.1.

[8] TEX. R. APP. P. 18.6.

filing a supersedeas bond under Section 6.001 of the Civil Practice and Remedies Code, and therefore the trial court's declaratory judgment was automatically suspended when the State perfected its appeal.[9]

The Authority also argues that the trial court's injunction against enforcement of the Act dissolved immediately when we issued our decision in *Barshop*. The Authority cites *Poole v. Giles*, where we stated that an appellate "order dissolving a temporary injunction is effective immediately even though not final."[10] It further cites *Texas Workers' Compensation Commission v. Garcia*, in which we observed that even though the trial court and court of appeals had declared the Workers' Compensation Act unconstitutional, they had not issued injunctions, and the Workers' Compensation Commission had "accordingly continued implementing the Act notwithstanding the judgments of the courts below."[11] In contrast, we stated in *Barshop* that "[b]ecause of the district court's injunction," the Act "has yet to be implemented," but we concluded by holding that the injunction "is dissolved."[12]

The court of appeals distinguished the trial court's injunction and its declaratory judgment, reasoning that even if, immediately after our *Barshop* decision, "the district court could not enforce its injunction with contempt power . . . this does not mean that the supreme court's judgment declaring the [Act] constitutional and reversing the district court's contrary declaration also became

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[9] The State makes this argument as well, contending that its "notice of appeal in *Barshop* automatically superseded the trial court's judgment."

[10] *Poole v. Giles*, 248 S.W.2d 464, 465 (Tex. 1952).

[11] *Tex. Workers' Comp. Comm'n v. Garcia*, 893 S.W.2d 504, 517 (Tex. 1995).

[12] *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 625, 638 (Tex. 1996).

effective at that time."[13] Chemical Lime, too, contends that the *Barshop* judgment had no effect on the trial court's declaratory judgment until our mandate issued, and that "[d]istinctions between injunctive and declaratory relief are irrelevant for this purpose."

Chemical Lime further takes issue with the Authority's contention that the State's notice of appeal in *Barshop* automatically superseded the trial court's judgment, characterizing this position as inconsistent with the position the State took in *Barshop*. In *Barshop* we noted the State's position that it was before the Court "seeking authorization to implement the Act," and that we should construe the Act "to merely require that the declarations be filed with the Authority six months after the *eventual* effective date of the statute."[14] Chemical Lime argues that even if ordinarily the State was not required to post a supersedeas bond, the trial court in *Barshop* purported in its judgment to exercise its discretion "to deny supersedeas of this Judgment." Chemical Lime contends the State chose not to challenge the order denying supersedeas and should not now be heard to argue that its notice of appeal in *Barshop* automatically superseded the judgment in that case.[15] Indeed, taking the Authority's argument to its logical conclusion might mean the Act was effective when the State filed its notice of appeal in *Barshop* in 1995, and the six-month window for filing declarations of historical use expired before our opinion issued on June 28, 1996.

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[13] 212 S.W.3d at 694.

[14] *Barshop*, 925 S.W.2d at 628 (emphasis added).

[15] The State contends it had concluded in the *Barshop* appeal that "it would make little sense to implement the Act while the direct appeal was pending," and that it voluntarily chose to delay implementation of the permit program, but that the trial court in *Barshop* nevertheless erred in reasoning that it could deny supersedeas of its judgment. The State argues that its notice of appeal in *Barshop* automatically superseded the trial court's judgment and that its subsequent conduct in that appeal did not effect a waiver of the automatic suspension of the judgment, issues the Court need not resolve today.

As the Court notes, these arguments regarding supersedeas and other issues are not dispositive,[16] and they obscure a key point. I do not believe the trial court or the parties would have acted in a manner inconsistent with our opinion in *Barshop* after it issued, regardless of whether, in some technical sense, the injunction immediately dissolved when we so stated in *Barshop* or the trial-court judgment was superseded at the time. I assuredly do not suggest parties may flout an appellate-court decision or judgment merely because the mandate has not yet issued.

Nevertheless, our *Barshop* decision was still not "final"[17] when issued in one important sense: *We* were still free to reconsider it and hold the Act unconstitutional or otherwise correct or modify our opinion or judgment. This authority of the issuing court to modify its own opinion or judgment ordinarily extends until the mandate issues, regardless of whether the judgment awards monetary, injunctive, or declaratory relief.

Although in exceptional circumstances we can recall the mandate,[18] the date of the mandate is ordinarily the appellate court's formal and final order signaling it is finished with its review of the case and considers its decision final and its judgment enforceable.[19] Indeed, by correspondence the

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[16] __ S.W.3d at __ n.45. As the Authority argues in its briefing, "The effective date of the Act should not turn on a complex question of law regarding whether and in what circumstances supersedeas is automatic under a tangled web of facts regarding supersedeas at the trial court in the *Barshop* case (which are outside the record in this case)."

[17] I caution that "final" for purposes of describing a judgment has several meanings, and can, depending on the context, refer to finality for purposes of determining (1) whether the judgment is appealable, (2) whether the time for altering the judgment has expired, or (3) whether the judgment operates as res judicata. *See Sultan v. Mathew*, 178 S.W.3d 747, 751 (Tex. 2005).

[18] *See* TEX. R. APP. P. 18.7.

[19] *See In re Long*, 984 S.W.2d 623, 626 (Tex. 1999) (orig. proceeding) (per curiam) (noting that appeal was not "exhausted" or "final" until court of appeals issued its mandate); *Traders & Gen. Ins. Co. v. Hicks Rubber Co.*, 169 S.W.2d 142, 145 (Tex. 1943) ("After the judgment in the J.W. Harper suit became final, mandate was duly issued and returned to the district court."); *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 302 (1995) ("The United States Court

clerk advised the trial court and parties in *Barshop* as follows when the mandate issued: "The judgment of the Supreme Court of Texas is now final in the above referenced cause. As Rule 186, Tex. R. App. P., has been satisfied, we have issued the mandate as of today." As the court of appeals aptly noted, the period between judgment and mandate affords the court "the opportunity to correct an appellate judgment before commanding its execution and enforcement in the lower court."[20] An appellate court can issue a mandate earlier than the rules ordinarily prescribe if it has good cause for making its judgment more immediately final and enforceable.[21] Moreover, this Court has discretion to shorten the time for filing a motion for rehearing or even to disallow such a motion altogether.[22] Again, if opinions were immediately final for all purposes upon issuance, there would be no need for a mandate and no reason for courts sometimes to issue mandates early or to shorten the usual timetable for rehearing motions.

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of Appeals for the Fifth Circuit affirmed, issuing its mandate on October 12, 1990, and thus rendering 'final' respondents' judgment against Celotex."); *Charpentier v. Ortco Contractors*, 480 F.3d 710, 713 (5th Cir. 2007) ("Before our mandate issues, we have the power to alter or modify our judgment. Accordingly, our decision is not final until we issue a mandate." (footnotes omitted)); *In re City of Cresson*, 245 S.W.3d 72, 74 (Tex. App.—Fort Worth 2008, orig. proceeding) ("It is true that this court's judgment is not enforceable in the trial court until it is final and mandate issues.").

Indeed, it is not uncommon for parties to jointly request that the Court expedite issuance of the mandate so the parties can complete a settlement and ask the trial court to issue an agreed dismissal order. *See* TEX. R. APP. P. 18.1(c) (allowing for early issuance of the mandate "if the parties so agree, or for good cause on the motion of a party").

[20] 212 S.W.3d at 695.

[21] *See* TEX. R. APP. P. 18.1(c). The United States Supreme Court has on occasion followed a similar procedure. *See Bush v. Gore*, 531 U.S. 98, 111 (2000) ("Pursuant to this Court's Rule 45.2, the Clerk is directed to issue the mandate in this case forthwith."); *United States v. Nixon*, 418 U.S. 683, 716 (1974) ("Since this matter came before the Court during the pendency of a criminal prosecution, and on representations that time is of the essence, the mandate shall issue forthwith.").

[22] TEX. R. APP. P. 64.1.

The date of the mandate, therefore, is generally the date the parties' duties become fixed.[23] In this case, it was the date that all uncertainties regarding the Act's constitutionality were finally and definitively dispelled.

JUSTICE BRISTER points out many peculiarities in the law (complicated, it seems, by our inconsistent adherence to myriad rules and internal practices).[24] As between the opinion and the judgment, I agree with JUSTICE BRISTER that the judgment is more "operative" — the judgment takes action; the opinion explains why. I also agree that "judgments should mean what they say," but the

[23] *See* FED. R. APP. P. 41(c) advisory committee's note (1998 amendments) ("A court of appeals' judgment or order is not final until issuance of the mandate; at that time the parties' obligations become fixed.").

[24] I do question the persuasiveness of some of JUSTICE BRISTER's comparisons, such as his references to mandamus proceedings, "which we decide by 'orders' rather than 'judgments.'" __ S.W.3d at __ (Brister, J., concurring). The fact that we don't issue mandates in mandamus cases — typically involving interlocutory, conditional, emergency rulings directed to the lower court only and not the parties — seems unrelated to the question of the mandate's effect in a case involving a final, unconditional judgment. (In fairness, I also make some reference to interlocutory appeals and mandamus law.) Our settled practice is to grant writs of mandamus only conditionally, with our final sentence usually reading something like this: "We are confident the trial court will comply, and our writ will issue only if it does not." *In re Schmitz*, __ S.W.3d __ (Tex. 2009). So while a writ will issue when necessary to enforce our decision and require the respondent to take action — similar to a mandate in an appeal — we rarely have to do so.

I also cannot completely agree with JUSTICE BRISTER's assertion that no mandate issues when we deny a petition for review. __ S.W.3d at __ (Brister, J., concurring). If we deny a petition, the court of appeals then issues a mandate to enforce its judgment. *See* TEX. R. APP. P. 18.1(a)(2).

question remains: Which judgment?[25] An appellate court can reconsider its judgment and the opinion on which it rests until the mandate issues, the date finality attaches.[26]

I appreciate JUSTICE BRISTER's point that the judgment merits instant respect. But if a judgment is operative for all purposes upon issuance, what exactly is the mandate of a mandate — why enact rules and statutes that tie finality and enforceability to something that amounts to

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[25] JUSTICE BRISTER states, "First of all, we should start with the principle that cases are decided by judgments, not mandates. Judgments are rendered by the court, and a majority of the court must agree to them. Mandates, by contrast, are drafted and signed by the clerk; judges rarely even see them." __ S.W.3d at __ (Brister, J., concurring) (footnotes omitted). Until this case, I had certainly never seen a mandate. But I have a slightly different view, which may be more stylistic than substantive. While judgments are in a sense more "operative" than opinions, I think cases are decided — that is to say *reasoned* — by opinions, not judgments. The judgment, like the mandate, is a separate document that sets forth the court's bottom-line decision and addresses the payment of costs. And like mandates, judgments are drafted by the Court's staff and usually not reviewed by judges. Our judgments, for example, are not signed by anyone, either a judge or anyone in the clerk's office. But the fact that the Court designates a task to its staff doesn't mean the action taken is not an official act of the Court, nor does it diminish its significance. Our mandates state, "**[W]e command you** to observe the order of our said Supreme Court in the behalf, and in all things to have recognized, obeyed, and executed." (emphasis in original). And by its terms, the mandate is issued "BY ORDER OF THE SUPREME COURT OF THE STATE OF TEXAS."

[26] JUSTICE BRISTER contends the mandate is an imperfect proxy for finality because "mandates issue 10 days *after* our judgment is final" — so why postpone the effective date for ten days if the judgment is final? __ S.W.3d at __ (Brister, J., concurring) (footnote omitted). This ten-day period sometimes applies, but not always, and there is a sound practical reason for it. When the Court denies rehearing, the mandate issues immediately because the judgment is final. There is no second motion for rehearing. TEX. R. APP. P. 64.4. When no rehearing is sought, the mandate issues ten days after the deadline for filing a motion for rehearing or seeking an extension of time to file such a motion — that is, forty days after judgment. *See* TEX. R. APP. P. 64.1 ("[a] motion for rehearing may be filed . . . within 15 days from the date when the Court renders judgment"); TEX. R. APP. P. 64.5 ("[t]he Court may extend the time to file a motion for rehearing . . . if a motion . . . is filed . . . no later than 15 days after the last date for filing a motion for rehearing"); TEX. R. APP. P. 18.1(b) (the clerk must issue the mandate "[t]en days after the time has expired for filing a motion to extend time to file a motion for rehearing"). The ten-day postponement is justified by the so-called mailbox rule, which provides that if a motion is received within ten days of the filing deadline it is considered timely filed if it was sent to the proper clerk by U.S. mail in a properly addressed envelope and deposited in the mail on or before the last day of filing. *See* TEX. R. APP. P. 9.2(b). Since the Court has no way of knowing whether a motion for rehearing or an extension of time to file a motion for rehearing will be timely filed until ten days after the deadline, we simply factor in the mailbox rule and sit tight.

Seinfeld-ian nothingness?[27] It seems odd that a decision would be fully effective yet neither final nor enforceable.[28]

I agree with the Court that our decision in *Barshop* itself decides today's case. I agree, too, with JUSTICE BRISTER that our decisions "can take effect whenever we say they do,"[29] but as a general default rule, I would treat the mandate as a more-than-clerical act. It is the judicial equivalent of "Yes, that's my final answer" — the dispositive order concluding the appeal, declaring the judgment final and enforceable, and commanding that the judgment be "recognized, obeyed, and executed." I trust the Court's rulemaking process will focus its expertise on this important issue and deliver bright-line guidance going forward.

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Don R. Willett
Justice

OPINION DELIVERED: June 26, 2009

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[27] Not that there's anything wrong with that. As a matter of fact — and law — there *is* something wrong with that.

[28] *See* TEX. R. APP. P. 51, 65.

[29] __ S.W.3d at __ (Brister, J., concurring). In *Turner v. Gen. Motors Corp.*, 584 S.W.2d 844, 851 (Tex. 1979), we stated what I believe is a sensible general rule, deeming "this opinion to be effective . . . after the date on which our judgment herein becomes final," which we clarified in a later case was "the date of the overruling of the last motion for rehearing," *Acord v. Gen. Motors Corp.*, 669 S.W.2d 111, 115 (Tex. 1984). That date happens to be when the mandate issues. Interestingly, we decided *Acord* just seventeen days after amending a rule making it clear that a court's judgment regarding an interlocutory order did not take effect until the mandate issued. Steven McConnico & Daniel W. Bishop II, *Practicing Law with the 1984 Rules: Texas Rules of Civil Procedure Amendments Effective April 1, 1984*, 36 BAYLOR L. REV. 73, 120-21 (1984).