



accruing on the damages award. Consequently, the motion asserted, Jensen no longer desired to suspend execution of the judgment. Jensen's prayer for relief asked the trial court to "[o]rder that, immediately upon the deposit as provided above, Miga, by and through his attorneys, be immediately allowed to withdraw, without condition, the funds from the registry of the court as payment of the current amount of The Judgment."

After several negotiations between the parties, Miga and Jensen entered into an Agreed Order. The Agreed Order provides, in pertinent part, that "Jensen desires to make an unconditional tender" to Miga of over \$23,000,000 "toward satisfaction of the Judgment in order to terminate the accrual of post-judgment interest on that sum."

On August 29, 2000, the trial court signed the Agreed Order. On that same day, Jensen issued a check to Miga and his attorneys for \$23,439,532.78. Then, on October 20, 2000, Jensen petitioned this Court to challenge the actual damages award of over \$23,000,000. Three days later, Miga likewise petitioned this Court to challenge the court of appeals' decision to reduce the actual damages, calculate pre-judgment interest differently than the trial court, and affirm the trial court's JNOV on the punitive damages and fraud claims. Miga also moved for the Court to dismiss Jensen's petition for lack of jurisdiction.

## **II. PARTIES' JURISDICTIONAL ARGUMENTS**

Miga contends that, under Texas law, Jensen's voluntarily paying the actual damages award moots Jensen's appeal. In response, Jensen contends that his paying the actual damages award does not moot

his appeal because the accrual of post-judgment interest rendered him “justifiably anxious.” Jensen concedes that he could have allowed the Treasury Bonds securing the supersedeas bond to lapse so he could invest the collateral more effectively and give Miga the opportunity to execute on the judgment. But, Jensen asserts, forcing Miga to execute on the judgment and make the \$23,439,532.78 payment “obviously involuntary” would have needlessly burdened Miga, the court, and the sheriff.

### III. APPLICABLE LAW

Generally, when an event occurs after a judgment that renders an issue before an appellate court moot, the court cannot decide the appeal. *Gen. Land Office of Tex. v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 570-71 (Tex. 1990); *see also Camarena v. Texas Employment Comm'n*, 754 S.W.2d 149, 151 (Tex. 1988) (appellate courts cannot decide moot controversies). This is why Texas courts have repeatedly recognized that, if “a judgment debtor voluntarily pays and satisfies a judgment rendered against him, the cause becomes moot.” *Highland Church of Christ v. Powell*, 640 S.W.2d 235, 236 (Tex. 1982); *see also Riner v. Briargrove Park Prop. Owners, Inc.*, 858 S.W.2d 370-71 (Tex. 1993); *Cont'l Cas Co. v. Huizar*, 740 S.W.2d 429, 430 (Tex. 1987); *Employees Fin. Co. v. Lathram*, 369 S.W.2d 927, 930 (Tex. 1963); *Hanna v. Godwin*, 876 S.W.2d 454, 457 (Tex. App.—El Paso 1994, no writ); *Dalho Corp. v. Tribble & Stephens*, 762 S.W.2d 733, 734 (Tex. App.—San Antonio 1988, no writ); *Stylemark Constr. v. Spies*, 612 S.W.2d 654, 656 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); *Otto v. Rau Petroleum Prods.*, 582 S.W.2d 504, 504 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ); *Travis County v. Matthews*, 221 S.W.2d 347, 348-49 (Tex. Civ. App.—Austin 1949, no writ).

This Court first recognized the voluntary-payment-of-judgments rule in 1887. *See Cravens v. Wilson*, 48 Tex. 321, 323 (1877) (recognizing that “[i]t may be, that in some case, where there is a voluntary execution or satisfaction of the judgment by the parties, neither an appeal nor writ of error to the Supreme Court would be entertained by the court.”). Since then, Texas courts have identified only limited circumstances under which a judgment debtor’s paying the judgment did not moot the appeal. The mere fact that a judgment is paid “under protest” will not prevent the case from becoming moot upon payment. *Cont’l Cas. Co.*, 740 S.W.2d at 430 (quoting *Highland Church*, 640 S.W.2d at 236). Rather, the payment must be *involuntary*. *Highland Church*, 640 S.W.2d at 236. To demonstrate that a party involuntarily paid a judgment so that such payment does not render the appeal moot, the record must show that the party paid the judgment under duress or to preclude execution. *See, e.g., Riner*, 858 S.W.2d at 370-71; *Highland Church*, 640 S.W.2d at 237.

Federal courts have a different approach for determining if a debtor’s paying the judgment moots the appeal. Federal courts hold that “payment of a judgment, of itself, does not cut off the payor’s right of appeal.” *Ferrell v. Trailmobile, Inc.*, 223 F.2d 697, 698 (5th Cir. 1955) (citing *Dakota County v. Glidden*, 113 U.S. 222, 224-25 (1885)). This rule does not apply “when such payment is by way of compromise or shows an intention to abide by the judgment, when the payment is coupled with the acceptance of benefits under the judgment, or when compliance with the judgment renders appellate relief futile.” *Ferrell*, 223 F.2d at 698.

#### IV. ANALYSIS

In resolving the mootness issue, the Court correctly states the general rule and policy underlying it established in *Highland Church*. That is, when a judgment debtor voluntarily pays and satisfies a judgment rendered against him, the cause becomes moot, because a party should not be allowed to mislead his opponent into believing that the controversy is over and then contest the payment and seek recovery. \_\_\_ S.W.3d at \_\_\_ (discussing *Highland Church*, 640 S.W.2d at 236). However, the Court does not thoroughly describe the circumstances in *Highland Church* which dictated the holding that the Church’s payment did not moot the appeal.

In *Highland Church*, the Court did not hold that the Church’s paying the judgment was involuntary — or in other words, under duress — simply because the Church sought to avoid statutory penalties and interest. *See Highland Church*, 640 S.W.2d at 237. Rather, the Court observed that it had never decided whether duress may be implied when a party pays a judgment because of a statute that “merely imposes a penalty and interest for failure to timely pay a tax.” *Highland Church*, 640 S.W.2d at 237. Then, instead of deciding that issue, the Court recognized that implied duress does arise when a business is faced with paying a tax or risk losing its right to do business while contesting the tax. *Highland Church*, 640 S.W.2d at 237. The Court concluded that the Church’s paying the delinquent tax judgment did not moot the pending appeal, because the Church was justifiably anxious about the accruing interest and penalties, and “[m]ore importantly, it would have been very embarrassing for this religious institution to have execution issued against it.” *Highland Church*, 640 S.W.2d at 237 (emphasis added). Accordingly, the Court relied on the “business compulsion” factor to hold the Church’s payment did not moot the appeal;

in other words, the Church faced duress in losing its property under writ of execution if it did not pay the judgment. *Highland Church*, 640 S.W.2d at 237; *see also Riner*, 858 S.W.2d at 370-71 (party involuntarily paid judgment because he paid only after opponent sought writ of execution on property).

Ignoring *Highland Church's* entire rationale for allowing the Church to appeal, the Court concludes that Jensen was “justifiably anxious” to avoid the post-judgment interest accruing on the judgment just as the threat of statutory penalties and interest caused the Church economic duress. \_\_\_ S.W.3d at \_\_\_. The Court explains that “[o]ne must be able to halt the accrual of post-judgment interest, yet still preserve appellate rights.” \_\_\_ S.W.3d \_\_\_. But, the Court notes, a party should explicitly reserve the right to appeal when paying the judgment and “making that reservation on the record would be optimal.” \_\_\_ S.W.3d \_\_\_. Therefore, the Court concludes, “payment on a judgment will not moot an appeal of that judgment if the judgment debtor clearly expresses an intent that he intends to exercise his right of appeal and appellate relief is not futile. We take this to be the same rule applicable in the federal courts.” \_\_\_ S.W.3d at \_\_\_, n.16.

But the Court’s focusing on whether the judgment debtor clearly expressed an intent to exercise his appellate rights and whether appellate relief is not futile — an inquiry the Court correctly likens to the federal approach — is a significant departure from the Texas rule. As previously discussed, the federal approach assumes that a party’s paying the judgment *does not* moot the appeal unless payment is by way of compromise or shows an intention to abide by the judgment, payment is coupled with the acceptance of benefits under the judgment, or compliance with the judgment renders appellate relief futile. *Ferrell*, 223 F.2d at 698. On the other hand, Texas law assumes that a party’s paying the judgment is voluntary and

*does* moot the appeal unless the evidence demonstrates that the payment was involuntary as our case law defines that term. *See Riner*, 858 S.W.2d at 370-71; *Highland Church*, 640 S.W.2d at 237. Thus, under the Texas rule, if the judgment debtor cannot show that he involuntarily paid the judgment, the appeal is moot. However, under the rule the Court applies today, the presumption that the appeal is moot unless the judgment debtor proves the payment was involuntary no longer applies. Moreover, after today, a Texas judgment debtor need only show an intent to appeal — which is not difficult to do as this case’s circumstances demonstrate — to preserve appellate rights.

The Court suggests that its focus on whether the debtor clearly expressed an intent to appeal and whether appellate relief is futile (which follows the federal approach) is consistent with the policy in *Highland Church*. That is, a party should not be allowed to simply change his mind about pursuing the case or mislead his opponent into thinking the controversy is over. *Highland Church*, 640 S.W.2d at 236. But even if the Court correctly states that its approach upholds the policy underlying the Texas rule, the Court’s determining that Jensen’s appeal is not moot under this case’s circumstances produces a result contrary to that policy. The Court relies on a post-trial affidavit from Jensen stating he informed Miga that he believed the Agreed Order did not moot the appeal, which he intended to pursue. However, other record evidence shows Jensen’s payment misled Miga. The Agreed Order between the parties expressly states that Jensen made an “unconditional tender” of the actual damages award to Miga. Moreover, the negotiations between the parties, evidenced in their attorneys’ letters in the record, demonstrate that Miga refused to enter into the Agreed Order unless Jensen excluded any language giving him the right to appeal. Thus, the record demonstrates that Jensen misled Miga into foregoing any further post-judgment interest

and believing the controversy was over, only so that Jensen could change his mind and now seek this Court's aid in recovering the payment. This is the exact consequence the policy behind Texas's voluntary-payment-of-judgment rule seeks to avoid. *See Highland Church*, 640 S.W.2d at 236.

Additionally, the Court wholly fails to explain how, under the standard it announces today, appellate relief in this case is not futile. Jensen made an unconditional payment of nearly \$24,000,000 to Miga in August 2000. Two years later, this Court holds that the trial court's \$24,000,000 damages award should only be \$1,000,000 plus interest. The Court does not explain how Jensen will recover the money he voluntarily and unconditionally paid to Miga. Ironically, the Court's deciding this appeal when it should dismiss for want of jurisdiction may very well cause more litigation about this money.

Unfortunately, the Court does not recognize the import of its decision to accept as valid Jensen's argument for why his paying the judgment did not moot his appeal. Jensen has consistently argued that he paid the judgment because the post-judgment interest accruing on the actual damages award was higher than the interest accruing on the Treasury Bonds he posted to secure the supersedeas bond. By accepting Jensen's argument as a legitimate basis for holding the appeal is not moot — regardless of whether the federal or Texas approach applies — the Court allows judgment debtors facing significant damages awards to pay the judgment, avoid post-judgment interest, and still appeal simply because they have a “leg up” over parties with smaller pocket books who cannot afford to play the interest game in the financial market. This, perhaps, shows why this Court has not held that a party's anxiety about accruing post-judgment interest alone renders a judgment debtor's paying the judgment involuntary. *See Highland Church*, 640 S.W.2d at 237. Finally, the Court contends that its holding does not undermine the Finance Code, because post-

judgment interest is not intended to punish a judgment debtor for exercising his right to appeal. While I agree that the Finance Code's post-judgment interest provisions are not punitive, the provisions do create an incentive to pay the judgment and end the litigation. But, as this case demonstrates, allowing a judgment debtor to pay the judgment but still pursue the appeal merely because the post-judgment interest is burdensome prolongs the litigation and likely requires further court intervention for the debtor to recover the money if he prevails on appeal. I fear the Court's opinion opens the doors for future judgment debtors incurring substantial post-judgment interest to follow Jensen's lead, thereby producing more litigation.

## V. CONCLUSION

It is a fundamental tenet that this Court cannot decide moot controversies. *OXYU.S.A., Inc.*, 789 S.W.2d at 570-71; *Camerena*, 754 S.W.2d at 151. This prohibition is rooted in the Texas Constitution's separation of powers doctrine, which prohibits courts from rendering advisory opinions. *See* TEX. CONST. art. II, § 1. Because Jensen's voluntarily paying the judgment mooted his appeal, I would dismiss his petition for want of jurisdiction.

---

Michael H. Schneider, Justice

Opinion Delivered: October 31, 2002