

No. 06-0323

**IN THE
SUPREME COURT OF TEXAS**

JAMES J. YAQUINTO, M.D.,

Petitioner,

v.

**VAN ROGER BRITT, INDIVIDUALLY AND ON BEHALF OF THE
ESTATE OF KATHRYN ANN BRITT, DECEASED, AND AS
NEXT FRIEND OF AMY BRITT, A MINOR, AND JONATHAN BRITT,**

Respondents.

**On Appeal through the Second Court of Appeals
from the 141st Judicial District Court
Tarrant County, Texas
Cause No. 141-201545-03
Honorable Len Wade, Presiding**

RESPONDENTS' BRIEF ON THE MERITS

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IDENTITIES OF PARTIES AND COUNSEL

Respondents do not complain of the listing of parties and counsel supplied by the Petitioner, and they adopt that listing.

TABLE OF CONTENTS

Identity of Parties and Counsel.....	ii
Table of Contents.....	iii
Index of Authorities.....	v
Statement of the Case	vii
Statement of Jurisdiction	ix
Issues Presented.....	1
Statement of Facts	1
Summary of the Argument	3
Argument	3
I. Yaquinto’s petition should be denied because his complaints concerning a lack of oral hearing are now moot.	4
A. Section 13.01(f) of Article 4590i has been repealed, and the successor statute has no analogous hearing provision.	4
B. Following the repeal of 4590i, a trial court no longer has authority to grant an extension of time to file an initial expert report.	4
C. A “hearing” is no longer mentioned in the section of Chapter 74 that concerns the only available extension of time, an extension to correct a deficient report.	6
II. The invited-error doctrine does not apply when there is no complaint, no invitation, and no error.	7
A. Yaquinto’s petition should be denied because the “invited error” doctrine does not apply to the facts of this case where the Britts did not complain of any judicial error.	8

B.	Yaquinto’s petition should be denied because the “invited error” doctrine does not apply to the facts of this case where the Britts did not invite the action alleged to be erroneous.....	9
C.	The “invited error” doctrine does not apply because section 13.01(f) of former 4590i did not require an oral hearing, so the alleged error was not, in fact, erroneous.	10
D.	Yaquinto failed to preserve his “invited error” argument in the trial court by failing to bring this argument to that court’s attention.....	11
III.	Yaquinto’s petition should be denied because the trial court granted him the relief he requested regarding the 13.01(f) extension and because the court of appeals properly held that the trial court did not clearly abuse its discretion in granting a 13.01(g) “grace period” extension.....	12
A.	The Britts were denied relief under 13.01(f), so Yaquinto has no complaints on appeal.....	12
B.	The court of appeals properly held that the trial court did not clearly abuse its discretion in granting a 13.01(g) “grace period” extension.	13
III.	Yaquinto should not be granted relief on complaints that he raised for the first time in this Court.....	15
Prayer.....		16
Signature Block	Signature Page	
Certificate of Service	Certificate of Service Page	

INDEX OF AUTHORITIES

CASES

<i>Anglin v. Marrero</i> , No. 09-05-198, CV WL 665865 (Tex. App.—Beaumont Mar 16, 2006)	6
<i>Bd. of Adjustment of San Antonio v. Wende</i> , 92 S.W.3d 424 (Tex. 2002).	12
<i>Broders v. Heise</i> , 924 S.W.2d 148 (Tex. 1996).	13
<i>Diversicare General Partner, Inc. v. Rubio</i> , 185 S.W.3d 842 (Tex. 2005)	5
<i>Downer v. Aquamarine Operators, Inc.</i> 701 S.W.2d 238 (Tex. 1985)	13, 15
<i>E.I. du Pont de Nemours & Co. v. Robinson</i> , 923 S.W.2d 549 (Tex. 1995).	13
<i>Emeritus Corp. v. Highsmith</i> , No. 04-05-00551-CV, WL 1466542 (Tex. App.—San Antonio, May 31, 2006)	5
<i>Flores v. Fourth Court of Appeals</i> , 777 S.W.2d 38 (Tex. 1989)	14
<i>General Chemical Corp. v. De La Lastra</i> , 852 S.W.2d 916 (Tex. 1993).	12
<i>Gulf Coast Inv. Corp. v. Nasa I Business Center</i> , 754 S.W.2d 152 (Tex. 1988)	10

<i>Heart Hosp. of Austin v. Matthews</i> , No. 03-05-00317-CV, WL 1194881 (Tex. App.—Austin May 5, 2006)	5
<i>In re Nexion Health at Humble, Inc.</i> , 173 S.W.3d 67 (Tex.2005)	15
<i>Pilgrim’s Pride Corp. v. Smoak</i> , 134 S.W.3d 880 (Tex. App.—Texarkana 2004).	12
<i>Rosa v. Caldwell</i> , 159 S.W.3d 695 (Tex. App.—Amarillo 2004).....	11
<i>Strackbein v. Prewitt</i> , 671 S.W.2d 37 (Tex.1984)	14
<i>Thomas v. Healthmark Partners, L.L.C.</i> , 93 S.W.3d 465 (Tex. App.—Hous. [14th Dist.] 2002)	5
<i>Thoyakulathu v. Brennan</i> , 192 S.W.3d 849 (Tex. App.—Texarkana 2006)	6
<i>Tittizer v. Union Gas Corp.</i> , 171 S.W.3d 857 (Tex. 2005).	8
<i>Tucker v. McConnell</i> , No. 10-05-00067-CV, WL 1102655 (Tex. App.—Waco Apr 26, 2006)	6
<i>Valley Baptist Medical Ctr. v. Azua</i> , No. 13-05-00488-CV, WL 2076756 (Tex. App.—Corpus Christi, July 27, 2006)	5
<i>Valley Baptist Med. Ctr. v. Gonzalez</i> , 33 S.W.3d 821, 822 (Tex. 2000)	13
<i>Walker v. Gutierrez</i> , 111 S.W.3d 56 (Tex. 2003).	13

<i>Yoroshii Investments (Mauritius) Pte. Ltd. v. BP Intern. Ltd.</i> , 179 S.W.3d 639 (Tex. App.—El Paso)	15
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STATUTES

TEX. CIV. PRAC. & REM. CODE § 74.351(c)	5, 7
TEX. CIV. PRAC. & REM. CODE § 74.351(I).....	7
TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(f) (1995 version)	6, 10

RULES

TEX. R. APP. P. 33.1.	12
TEX. R. APP. P. 56.1(a)	4
TEX. R. APP. P. 53.3(c)(2).	1
TEX. R. JUD. ADMIN. 7	11

STATEMENT OF THE CASE

Respondents have no material complaints with the Statement of the Case supplied by the Petitioner.

STATEMENT OF JURISDICTION

Respondents are not dissatisfied with the Statement of Jurisdiction supplied by the Petitioner and agree that this Court has jurisdiction.

ISSUES PRESENTED

Respondents are not dissatisfied with the Issues Presented by the Petitioner, but offer the additional independent ground for affirmance. *See* TEX. R. APP. P. 53.3(c)(2).

Does the “invited error” doctrine—which estops a party from complaining upon appeal of error the party invited—apply when the facts show no complaint, no appeal, no error, and no invitation?

STATEMENT OF FACTS

The Respondents are dissatisfied with the level of argument across the Petitioner’s seventeen-page Statement of Facts and offer the following:

The underlying dispute in the trial court was a medical malpractice claim involving various Defendants’ negligence in failing to diagnose deceased Plaintiff Kathryn Ann Britt’s perforated colon, which subsequently led to her death on September 4, 2002. Plaintiffs’ Original Petition was filed on August 29, 2003. [CR: 2]

On February 23, 2004, 178 days after suit was filed, the Britts filed a motion to extend time to furnish expert reports and curriculum vitae as required by section 13.01(d) of Article 4590i, the medical liability act in effect at the time. The Britts’ motion argued that, under section 13.01(f), the trial court may extend the time period for thirty days with good cause and that good cause existed because Yaquinto had not answered and the Britts’ expert needed to review all defendants’ medical records and files before he could prepare his expert report. [CR: 22-23] The Britts did not notify Yaquinto of the motion or request a hearing on it. [CR: 24] The trial court granted the extension on the next day,

February 24, 2004, and extended the deadline to file expert reports and curriculum vitae until March 26, 2004. [CR: 24-25]

On March 1, 2004, Yaquinto answered the lawsuit and filed a motion to dismiss under 13.01(d) of former Article 4590i. On March 9, 2004, Yaquinto filed a motion requesting a rehearing on the February 24, 2004 Order. On March 26, 2004, the Britts furnished the required expert reports and curriculum vitae to counsel for Defendants. [CR: 84] That same day, they filed a motion to nonsuit Yaquinto and several other defendants, and the trial court granted the motion on March 31, 2004. [CR: 68]

Both of Yaquinto's pending motions—for dismissal and for rehearing—along with an April 15, 2004 motion by the Britts for a “grace period” extension under 13.01(g), were heard on April 22, 2004. On May 15, the trial court issued an order denying Yaquinto's motion to dismiss, denying Britt's motion for extension under 13.01(f), but granting Britt's motion for extension under 13.01(g). [CR: 164] The trial court also found that it did not have authority to grant its prior section 13.01(f) extension and reversed its February 24, 2004 order. [CR: 164]

SUMMARY OF THE ARGUMENT

This Court should deny review because the issues presented center on the interpretation of a provision in a repealed statute, and the successor statute omits the subject provision. Specifically, Yaquinto complains of invited error and of the court of appeal's rejection of that doctrine's application at the trial court level. The action by the trial court that is alleged erroneous, however, turns on the question of whether a statute requires an oral hearing. The Britts contend that it does not, note that no court of appeals has decided this issue, and argue to this Court that the issue is of no importance to the state's jurisprudence because the statute in question has been repealed. They further argue that all other elements relevant to an invited-error analysis are missing in this case. In the alternative, that Britts argue that the court of appeals was correct in holding that the trial court did not clearly abuse its discretion when it determined that the Britts' reliance on a voidable order was a mistake of law justifying relief under section 13.01(g) of the former Article 4590i.

ARGUMENT

The Britts are unable to align Yaquinto's Issues Presented with the structure of his supporting argument. Accordingly, the Britts will offer a response that combines some issues and segregates others, in contrast to the customary point-by-point response. The Britts first address mootness as a reason for denying review. Next, all issues surrounding

the invited-error doctrine are combined as the second point, the conduct of the trial court in granting the requested extensions is treated as the third point, and various waiver issues comprise the concluding point.

I. Yaquinto’s petition should be denied because his complaints concerning a lack of oral hearing are now moot.

A. Section 13.01(f) of Article 4590i has been repealed, and the successor statute has no analogous hearing provision.

Following the repeal of 4590i and codification of the medical liability act as Chapter 74 of the Civil Practice and Remedies Code, a trial court no longer has authority to grant the relief at issue in this case; that is, a trial court no longer has authority to grant an extension of time to file an initial expert report. Further, the new statute has removed any references to a “hearing” in the context of an extension of time to correct a deficient report, which is the only extension now available. These facts combine to suggest that construction of section 13.01(f) by this Court will have little impact—and perhaps no impact—on this state’s jurisprudence. This is especially true given that section 13.01(f)’s repeal was effective more than three years ago, on August 31, 2003.

B. Following the repeal of 4590i, a trial court no longer has authority to grant an extension of time to file an initial expert report.

All prior disputes in this case stem from the Britts’ request for an extension of time to provide their expert reports. It is well-established that section 13.01(f) of the former 4590i gave authority to the trial court to grant an extension for “good cause.” *See,*

e.g., *Thomas v. Healthmark Partners, L.L.C.*, 93 S.W.3d 465 (Tex. App.—Houston [14th Dist.] 2002, pet. denied)(“Under subsection (f), the trial court may extend the 180-day period to file an expert report for an additional thirty days”).

In 2003, the Legislature repealed 4590i in its entirety, amended parts of the Article, and recodified it as chapter 74 of the Texas Civil Practice and Remedies Code. *See Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842, 847 n.1 (Tex. 2005) (citing Act of June 2, 2003, 78th Leg., R.S., ch. 204, 2003 Tex. Gen. Laws 847.) The extension contemplated by the former section 13.01(f)—concerning the failure to timely file a report for “good cause”—did not survive the legislative process and, under the new Chapter 74, extensions may only be granted for reports that were timely filed but were deemed inadequate. *See* TEX. CIV. PRAC. & REM. CODE § 74.351(c). All courts of appeal that have considered the issue are in accord. *See Valley Baptist Medical Center v. Azua*, 198 S.W.3d 810 (Tex. App.—Corpus Christi 2006, no pet.)(“ . . .an extension could not have been granted under section 74.351(c) because a trial court does not have authority to grant an extension when no report is served within 120 days of filing the claim.”); *Emeritus Corp. v. Highsmith*, ____ S.W.3d____, No. 04-05-00551-CV, WL 1466542 at *2 (Tex. App.—San Antonio, May 31, 2006, no pet.)(“Accordingly, when no expert report is served within 120 days of filing the claim, a trial court has no authority to grant an extension.”); *Heart Hosp. of Austin v. Matthews*, ____ S.W.3d____, No. 03-05-00317-CV, WL 1194881 at *2 (Tex. App.—Austin May 5, 2006, no pet. hist.)(“If a

plaintiff fails to file a timely expert report, the court must . . . dismiss the case with prejudice. However, if a report has not been served within 120 days because elements of the report are found deficient, the trial court has the discretion to grant a single thirty-day extension of time to cure the deficiencies.”); *Thoyakulathu v. Brennan*, 192 S.W.3d 849, 852 (Tex. App.—Texarkana 2006, no pet.) (“Absent an agreement among the parties for an extension of time to serve the reports, the trial court has no discretion but to dismiss the case with prejudice and to award reasonable attorney's fees and costs of court if the claimant fails to meet this deadline.”); *Tucker v. McConnell*, No. 10-05-00067-CV, WL 1102655 at *1 (Tex. App.—Waco, April 26, 2006, no pet.) (Not designated for publication) (“The statute provides no opportunity for an extension if no report is served within 120 days.”); *Anglin v. Marrero*, No. 09-05-198, CV WL 665865 at *3 (Tex. App.—Beaumont, March 16, 2006, no pet.) (Not designated for publication) (“A court may grant an extension to file an expert report in a health care liability case only when the claimant timely files an expert report and the trial court finds the report is deficient.”)

C. A “hearing” is no longer mentioned in the section of Chapter 74 that concerns the only available extension of time, an extension to correct a deficient report.

The former section 13.01(f) references a hearing in the context of a motion for an extension of time. *See* TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(f) (1995 version) (“The court may, for good cause shown after motion and hearing, extend any time period specified in Subsection (d) of this section for an additional 30 days.”)

Compare this with the new extension provision of Chapter 74, which does not mention a hearing:

If an expert report has not been served within the period specified by Subsection (a) because elements of the report are found deficient, the court may grant one 30-day extension to the claimant in order to cure the deficiency. If the claimant does not receive notice of the court's ruling granting the extension until after the 120-day deadline has passed, then the 30-day extension shall run from the date the plaintiff first received the notice.

See TEX. CIV. PRAC. & REM. CODE § 74.351(c). Hearings are only required for motions to dismiss, and then only prior to the court granting the motion rather than denying the requested dismissal:

A court shall grant a motion challenging the adequacy of an expert report only if it appears to the court, after hearing, that the report does not represent an objective good faith effort to comply with the definition of an expert report in Subsection (r)(6).

See TEX. CIV. PRAC. & REM. CODE § 74.351(l).

Because the repeal of Article 4590i and the omission from its replacement of any hearing requirement in the context of an extension of time to file or correct expert reports, the issue raised by Yaquinto is moot. Therefore, the Britts request that this Court decline review.

II. The invited-error doctrine does not apply when there is no complaint, no invitation, and no error.

This Court has explained that the invited error doctrine provides, “a party cannot complain on appeal that the trial court took a specific action that the complaining party

requested.” *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 862 (Tex. 2005). As such, the doctrine is not applicable to this case where the Britts did not complain of error, did not invite the action alleged to be error, and the action was not, in fact, erroneous. Yaquinto asserts that the court of appeals reduced the invited-error doctrine to a “procedural rule governing the preservation of error for appeal,” [Yaquinto Motion at p. 37], but the Britts are unable to find support for this assertion in the lower court’s opinion.

A. Yaquinto’s petition should be denied because the “invited error” doctrine does not apply to the facts of this case where the Britts did not complain of any judicial error.

Yaquinto argues that the Britts were not entitled to “accident or mistake” relief under Section 13.01(g) of the medical liability act because they “invited the error” by not obtaining an oral hearing on their 13.01(f) motion prior to the trial court granting that motion. Yaquinto proposes that the court of appeals should have enforced this doctrine at the trial court level, but cites no authority for this proposition and suggests that the Britts should instead come forth with contrary authority. All parties apparently agree that the Britts, as Appellees, did not complain of error upon appeal.

Further, the Britts did not complain of error in the trial court. In response to Yaquinto’s motion for a re-hearing on the original 13.01(f) extension, the Britts specifically requested that the trial court “re-grant or sustain its previous order of February 24, 2004, in which a 30 day extension was given to furnish expert reports”

[CR: 74]. The Britts did not “complain” of a court error, as contemplated by the invited error doctrine. Rather, they stated in their request for alternative relief under 13.01(g):

Plaintiffs would further show that they relied on the Court’s order of February 24, 2004, wherein it granted the 30 day extension to furnish the expert reports. If there is any error in relying on this extension, such error is due to the Plaintiffs’ accident or mistake, and was not done intentionally or by way of conscious indifference.

[CR: 74]. At no point did the Britts complain of a judicial error. In requesting 13.01(g) relief, the Britts specifically refer to their error in relying on the trial court’s order as an accident or mistake justifying the requested relief. This is distinct from a request for relief based upon the court’s own error.

The invited error doctrine precludes a party from complaining of judicial errors invited by the party. Here, the Britts made no complaints of judicial error and even urged that the order in question not be disturbed.

B. Yaquinto’s petition should be denied because the “invited error” doctrine does not apply to the facts of this case where the Britts did not invite the action alleged to be erroneous.

Yaquinto complains that the trial court should not have granted the Britts’ motion without first holding an oral hearing. Yaquinto’s invited-error complaint does not allege that the Court’s ruling was erroneous; rather, his complaint is directed to the procedures followed by the trial court. Nothing in the record supports Yaquinto’s implicit position that the Britts asked the Court to rule without an oral hearing. The Britts simply filed a motion, and the court ruled on that motion less than 24 hours later. Yaquinto offers no

argument to explain how the mere filing of motion invites error when the alleged error arises not from the relief granted but from the post-filing procedures followed by the Court. As such, his Petition for Review should be denied.

C. The “invited error” doctrine does not apply because section 13.01(f) of former 4590i did not require an oral hearing, so the alleged error was not, in fact, erroneous.

Yaquinto’s “invited-error” arguments center on the assumption by the parties below, and by the trial court, that section 13.01(f) of 4590i requires an oral hearing. In the trial court and in the court of appeals, Yaquinto complained that the trial court should not have granted an extension under 13.01(f) without an oral hearing. Former section 13.01(f) provided that “[t]he court may, for good cause shown after motion and hearing, extend any time period specified in Subsection (d) of this section for an additional 30 days. Only one extension may be granted under this subsection.” TEX. REV. CIV. STAT. ANN. art. 4590i, § 13.01(f) (1995 version). The Britts counter that nothing in this statute indicates that an oral hearing is required.

This Court has expressly rejected an interpretation of the term “hearing” as requiring that the trial court conduct an oral hearing. “The term ‘hearing’ does not necessarily contemplate either a personal appearance before the court or an oral presentation to the court.” *Gulf Coast Inv. Corp. v. Nasa I Business Center*, 754 S.W.2d 152, 153 (Tex. 1988). The *Gulf Coast* Court relied on Rule 7 of the Rules of Judicial Administration:

A district or statutory county court judge shall:

....

(4) utilize to the extent consistent with safeguarding the rights of litigants to the just processing of their causes, methods to expedite the disposition of cases on the docket of the court, including

....

(b) the use of telephone or mail in lieu of personal appearance by attorneys for *motion hearings*....

Id. (quoting TEX. R. JUD. ADMIN. 7, reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. F app.(Vernon 1988)(emphasis in original).

No courts of appeal have interpreted the word “hearing” as used in Section 13.01(f). Yaquinto’s Petition for Review cites an opinion from the Amarillo Court of Appeals in support of his position that a 13.01(f) extension is improper without an oral hearing, but the cited opinion did not reach this issue. *See Rosa v. Caldwell*, 159 S.W.3d 695, 699 (Tex. App.—Amarillo 2004, pet denied)(“We do not address the effect of the entry of the order without first conducting a hearing”).

Because the trial court had the discretion under Rule 7 of the Texas Rules of Judicial Administration to issue an order granting the Britts’ requested extension without an oral hearing, the trial court did not commit an error that would prompt an “invited error” analysis based upon the Britts’ reliance on that order. For this reason, the Britts request that this Court deny Yaquinto’s petition.

D. Yaquinto failed to preserve his “invited error” argument in the trial court by failing to bring this argument to that court’s attention.

The invited error doctrine precludes a party from requesting a trial court to make a

ruling then complaining of that ruling on appeal. *See General Chemical Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex. 1993). As noted, the Britts contend that the doctrine has no application to the review of a trial court of its own ruling and has no applicability under the facts of this case. Regardless, however, Yaquinto never asked the trial court to deny the relief requested by the Britts on the ground that the Britts invited an error.

Accordingly, Yaquinto has preserved nothing for review.

III. Yaquinto’s petition should be denied because the trial court granted him the relief he requested regarding the 13.01(f) extension and because the court of appeals properly held that the trial court did not clearly abuse its discretion in granting a 13.01(g) “grace period” extension.

A. The Britts were denied relief under 13.01(f), so Yaquinto has no complaints on appeal.

The Britts are unable to determine whether Yaquinto is complaining in this Court of the trial court’s final ruling where that court reversed its prior ruling and denied relief to the Britts under 13.01(f). To the extent Yaquinto makes such complaint, the Britts respond that, as the prevailing party, he has no appellate point.

An issue becomes moot if a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome. *See Bd. of Adjustment of San Antonio v. Wende*, 92 S.W.3d 424, 427 (Tex. 2002). To preserve error on appeal, Yaquinto must appeal from an adverse ruling. *See Pilgrim’s Pride Corp. v. Smoak*, 134 S.W.3d 880 (Tex. App.—Texarkana 2004, pet. denied); TEX. R. APP. P. 33.1. As the trial court reversed itself upon rehearing, Yaquinto has no such adverse ruling. Therefore, this Court should decline to

review the trial court's initial 13.01(f) decision. *See Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (if controversy becomes moot, the court lacks subject matter jurisdiction and any ruling is impermissibly advisory and void).

B. The court of appeals properly held that the trial court did not clearly abuse its discretion in granting a 13.01(g) “grace period” extension.

A trial court's decision to grant grace period relief under 13.01(g) is reviewed for abuse of discretion. *See Walker v. Gutierrez*, 111 S.W.3d 56, 62 (Tex. 2003).

The trial court's decision must not be disturbed absent a clear abuse of discretion. *See Broders v. Heise*, 924 S.W.2d 148, 151 (Tex. 1996). “The test for abuse of discretion is whether the trial court acted without reference to any guiding rules or principles.” *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995).

To determine the trial court's guiding rules and principles, a reviewing court must look to statutes, rules, and decisions of courts of this state and of the United States. *See Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985). This Court has already established the guiding rules and principles in this area, holding that some mistakes of law can negate a finding of conscious indifference or intentional conduct, thereby entitling a claimant to relief under 13.01(g). *See Walker*, 111 S.W.3d at 63-64.

The trial court did not abuse its discretion if it acted in reference to guiding rules and principles. *See Robinson*, 923 S.W.2d at 558. Here, the trial court articulated both the question before it and the rules and principles guiding its decision:

. . .does a party's reliance on a voidable order, which does have the effect of law until set aside, as distinguished from a [void] order, does a party's reliance on a voidable order—or can it, under these circumstances, constitute an accident or mistake, or does it constitute something that's intentional or conscious indifference? That's really where we are.

[RR: 24, lines 4-21, listing statements by The Honorable Len Wade.] This explanation by the trial court shows that it was not acting without reference to guiding rules and principles and, in fact, was applying the precise rules and principles mandated by this Court.

To determine whether the trial court properly applied the rules and principles to the facts, reviewing courts must look to the knowledge and acts of the claimant. *See Strackbein v. Prewitt*, 671 S.W.2d 37, 39 (Tex. 1984). Here, the trial court heard evidence that, a) the parties agreed the trial court's February 24, 2004 order was not void but was, at most, voidable, [RR: 25, line 7]; b) at the time the order was entered, limitations had not run with respect to Yaquinto and the Britts could have non-suited him without prejudice, [RR: 34, lines 6-13]; c) the Britts did not non-suit Yaquinto in reliance on the trial court's order, [RR: 34, lines 4-5]; and d) the Britts fully complied with the terms of the trial court's order, [RR: 35, lines 11-12].

When reviewing matters committed to the trial court's discretion, the reviewing court may not substitute its own judgment for the trial court's judgment. *See Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 41-42 (Tex. 1989). “An abuse of discretion does not occur merely because the reviewing court would act differently than the trial

court.” *Yoroshii Investments (Mauritius) Pte. Ltd. v. BP Intern. Ltd.*, 179 S.W.3d 639 (Tex. App.—El Paso, pet. denied)(citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 242 (Tex. 1985). Under the facts before the trial court, the court of appeals correctly held that the trial court did not clearly abuse its discretion in finding that the Britts’ reliance on the court’s order was an accident or mistake justifying relief under 13.01(g). For this reason, this Court should deny Yaquinto’s petition for review.

III. Yaquinto should not be granted relief on complaints that he raised for the first time in this Court.

Yaquinto’s brief raises arguments that were not presented to the trial court or the court of appeals. The Britts urge this Court to deny Yaquinto’s requested relief based upon those arguments. *See In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67, 70 (Tex.2005) (op. on rehearing) (“Because this issue has not been reviewed by the courts below, we decline to reach the issue and express no opinion as to the merits of this argument.”).

At page 25, note 8 of his Brief on the Merits, Yaquinto asks this Court to reverse the trial court’s original 13.01(f) order, which granted an extension. Yaquinto bases this request on perceived uncertainty as to whether the trial court did, if fact, vacate its prior order. Because Yaquinto failed to bring to possibility to the attention of the trial court of the court of appeals, the Britts request that this Court decline review.

At page 26, note 9 of his Brief on the Merits, Yaquinto seeks reversal as to the claims of Van Roger Britt, arguing that the Motion to extend time referenced only the claims of the Britt children, and not those of Mr. Britt. Ignoring the broader scope of relief requested by Plaintiffs' counsel during the hearing on this motion, Yaquinto's argument was not presented to the courts below. Accordingly, the Britts request that he be denied the requested relief.

PRAYER

The Britts have shown that Yaquinto's complaint of invited error was properly overruled by the court of appeals. The alleged error was not erroneous because the trial court had the discretion to rule without an oral hearing. Further, the invited-error doctrine is applicable at the appellate level and not in the trial court, and the Britts did not complain to the trial court that the subject order was erroneous. Regardless, the trial court acting in accordance with proper guiding rules and principles in granting section 13.01(g) relief to the Britts and, therefore, did not clearly abuse its discretion. The Britts pray that Yaquinto's petition be denied and that this Court grant them whatever further relief to which they may show themselves entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 20th Day of December, 2006 a true and correct copy of the foregoing has been served on all counsel of record as follows:

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