IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-40877

JILL BROWN
Plaintiff - Appellee-Cross-Appellant

v.

BRYAN COUNTY, OK; ET AL
Defendants

BRYAN COUNTY, OK
Defendant - Appellant-Cross Appellee

STACY BURNS
Defendant - Cross-Appellee

Appeals from the United States District Court for the
Eastern District of Texas, Sherman

December 14, 2000
ON PETITION FOR REHEARING AND REHEARING EN BANC
(Opinion 7/18/00, 5 Cir., 2000, 219 F.3d 450)

Before REYNALDO G. GARZA, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ E. Grady Jolly
E GRADY JOLLY

United States Circuit Judge

DISSENT FROM ORDER DENYING REHEARING EN BANC

DeMOSS, Circuit Judge:

I file this dissent to the Order entered herein denying the Petition for Rehearing En Banc for the following reasons:

1. While the Order denying relief is technically correct in stating that a majority of the judges who are in regular active service did not vote in favor of en banc reconsideration, I think the actual vote by this Court on that issue should be stated: seven judges voted for en banc reconsideration and seven judges voted against en banc reconsideration. This tie vote reflects the depth of disagreement as to whether the conclusions of law reached by the majority in the panel opinion in this case are correct. I state this as a matter for the public record in order to encourage Bryan County to apply for a writ of certiorari to the United States Supreme Court and to encourage the Supreme Court to grant certiorari in this case and clearly decide the issue which was not before it in the prior appeal of this case to the Supreme Court.

The second reason I file this dissent is to disclose that during the course of balloting on whether this Court would reconsider this case en banc, the votes at one point were eight to four in favor of en banc reconsideration with two judges not yet voting. Shortly thereafter, one of the judges who had not previously voted, voted for en banc reconsideration and one of the

judges who had previously voted for en banc reconsideration switched his vote to against en banc reconsideration. Shortly thereafter, another judge who had previously voted for en banc reconsideration switched his vote to against en banc reconsideration and the judge who had not previously voted at all, voted against en banc reconsideration. In my tenure on this Court, this is the first occasion in which vote switching at the very end of the balloting had such a dramatic effect. In my view, the manner in which this tie vote was achieved is a further indication of the inconclusiveness of this tie vote as an indicator of the correctness of the majority opinion.