Goldilocks and the Three Outcomes: Civil *En Banc* Review in the Dallas Court of Appeals, 2001-18

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Even by Texas standards, the Dallas Court of Appeals is big – thirteen Justices serve 3.5 million residents of its jurisdiction,[1] which is a larger population than many states. And it produces hundreds of opinions a year, virtually all from three-judge panels. Despite the Court's size and prodigious output, *en banc* review has played a limited role in the court's civil cases over the last 15-plus years. This article concludes that the court's position as an intermediate court forces *en banc* review to play a specific and limited role.

Specifically, since 2001, six civil cases[2] have received *en banc* review from the Dallas court. In retrospect, one stands out as "big splash" cases with statewide ramifications; two are more or less "successful failure" cases that drew the attention of the Texas Supreme Court, but to review or criticize them; and two were "just right," because they served a limited, somewhat technical role – but a successful one. Only time will tell which category the sixth case, decided earlier this year, will ultimately fall within.

From the histories of these cases, it appears that the "just right"—or "Goldilocks"—category is where *en banc* review may be most likely to succeed, even if those issues are less glamorous or, appealing.

"Big Splash"

The longest shadow cast by a recent Dallas *en banc* case was that of *Jose Fuentes Co., Inc. v. Alfaro,*[3] a thorough treatment of the technical requirements for a "no evidence" summary judgment motion. In *Jose Fuentes*, the Dallas court considered

1 Texas Ethics Commission election certifications for judicial offices online.

2 Excluding tax, family, and administrative law cases.

3 418 S.W.3d 280 (Tex. App.—Dallas 2013, pet. denied) (en banc).

the language of Texas Rule of Civil Procedure 166a and held that a no-evidence motion requires specificity, i.e. the movant must specifically identify the elements she contends are not supported by any evidence —"fair notice" of the movant's contentions is insufficient.

The reasoning in *Jose Fuentes* was largely "assimilated"[4] by the Texas Supreme Court in *Community Health Systems Professional Services Corporation v. Hansen*,[5] when that Court agreed that a no-evidence motion for summary judgment cannot superficially attack a claim with rote references to "one or more" or "any of" the listed elements of a claim or defense.

"Successful Failures"

At the other end of the spectrum is *Rachal v. Reitz*,[6] a dispute about arbitrability that the Texas Supreme Court overruled outright.[7] In *Rachal*, the Dallas Court decided that a trustee and a trust beneficiary had no valid agreement to compel arbitration. That is, the trust instrument required arbitration, but the trust instrument expressed the trust settlor's intent, and the instrument did not reflect the trustee or beneficiaries' intent to arbitrate.

In reaching this result, the Dallas Court followed a 2004 Arizona Court of Appeals case and a 2011 California Court of Appeals case, which both rejected a direct-benefits-estoppel theory and found that trust beneficiaries could not be bound to arbitrate by a trust instrument. And the Dallas Court noted "[i]t is for the Texas Legislature to decide whether and to what extent the settlor of this type of a trust should have the power to bind the beneficiaries of the trust to arbitrate any future dispute arising from the trust." The Supreme Court, however, reversed

4 *See* https://en.wikipedia.org/wiki/Borg_(Star_Trek) (visited May 20, 2018).

5 525 S.W.3d 671 (Tex. 2017).

6 347 S.W.3d 305 (Tex. App —Dallas 2011) (en banc), *rev'd*, 403 S.W.3d 840 (Tex. 2013); *see also Rachal v. Letkiewicz*, No. 05-09-01396-CV, 2011 Tex. App. LEXIS 5597 (App.—Dallas July 22, 2011, pet. denied) (en banc) (mem. op.).

7 403 S.W.3d 840 (Tex. 2013).

the decision and found that beneficiaries who seek direct benefits can be forced to arbitrate under a trust instrument.

Similarly, *Whitworth v. Blumenthal*[8] may be cast as a "failure" because, it was criticized, in part, by *Walker v. Gutierrez*.[9] In *Whitworth*, the Dallas Court addressed the timeliness of expert reports; specifically whether a deficient expert report may qualify for an extension to file after the deadline.[10] The Dallas Court first ruled that the report at issue was deficient, and then construed the rule to allow an extension because the deficiency was not due to intentional disregard or conscious indifference.

In *Walker*, the Supreme Court agreed that an extension could be granted for a deficient expert report, but criticized *Whitworth* for ignoring Supreme Court precedent by seemingly allowing any mistake of law to trigger an extension.

"Just Right"

This leaves two opinions, neither of which has been overruled or disapproved, but neither of which has been cited much either. Both are primarily focused on "housekeeping" of earlier cases within the District.

First, *Capital Technology Information Services, Inc v. Arias & Arias Consultores*[11] adopted the Supreme Court of Texas's personal-jurisdiction analysis in *PHC-Minden, L.P. v. Kimberly-Clark Corp.*[12] In *Capital Technology*, a parent corporation exerted "control [] greater than that normally associated with common ownership and directors," to the extent it was "beyond appropriate parental involvement." And although this may not have been sufficient to show alter ego under earlier Fifth Court precedent, which required that "the parent corporation controls the day-to-day operations of the subsidiary to establish alter ego," the Dallas Court "necessarily overrule[d]" its earlier holding to follow *PHC*. Under *PHC,* the *en banc* Dallas Court

[8] 59 S.W.3d 393 (Tex. App.—Dallas 2001, pet. dism'd by agr.) (en banc).

[9] 111 S.W.3d 56, 63-64 (Tex. 2003).

[10] *See* what has since become Texas Civil Practice and Remedies Code § 74 (H).

[11] 270 S.W.3d 741 (Tex. App.—Dallas 2008, pet. denied) (en banc).

[12] 235 S.W.3d 163, 166 (Tex. 2007).

recognized that day-to-day control was just one of many factors that may prove alter ego. Following the Supreme Court's lead, the Dallas Court was, thus, safe to overrule a prior panel and state the new test for alter ego.

The second, *Crown Asset Management, L.L.C. v. Loring,*[13] addressed a technical matter about when a default judgment ruling is preserved for appeal, as well as a procedural topic about "aggressive" enforcement of docket control orders. On the first point, the *en banc* court held that a written notice from the trial court informing the movant of defects in its proposed default judgment was "an adverse ruling on the motion." In doing so, the court overruled "all inconsistent" earlier opinions, which the dissent specified in a footnote. On the second point, the court recognized the context-specific nature of a trial court's decision to dismiss a case for want of prosecution, and found that the trial court may consider the "entire history" of a case to determine if it has been diligently prosecuted.

Where will *St. John* go?

The Dallas Court's most recent *en banc* opinion, *St. John Missionary Baptist Church v. Flakes*, looks to be something more than housekeeping.[14] In an 8 to 5 majority opinion, the full court revived a 1970's Texas Supreme Court rule about error preservation on appeal.

In *St. John*, the appellees filed a motion to dismiss and plea to the jurisdiction that contained two key arguments—either of which (if proven) could have supported the trial court's dismissal. But when the trial court granted the appellees' motion and dismissed the suit, it did not state the basis—or bases—for its decision. So when the appellants only challenged one basis on appeal, a majority of the *en banc* Dallas Court determined would not sustain an appeal.

The Dallas Court's reasoning ultimately turned on the

[13] 294 S.W.3d 841 (Tex. App.—Dallas 2009, pet. denied) (en ban).

[14] No. 05-16-00671-CV, 2018 Tex. App. LEXIS 2318 (Tex. App.—Dallas Mar. 29, 2018, pet. filed) (en banc).

1970 Texas Supreme Court case *Malooly Bros., Inc. v. Napier*,[15] which coined the term "Malooly issue," and held that "[t]he judgment must stand, since it may have been based on a ground not specifically challenged." The Dallas Court also found that the plain language of Rule 38.9[16] does not authorize a court to *sua sponte* identify new issues and request supplemental briefing on an issue not fully presented by the parties.

St. John seems to fall outside the "Goldilocks" range, as it does not specifically overrule an earlier Dallas opinion, and addresses an issue of statewide significance. But as for its ultimate effect, only time will tell.

Conclusion

While six cases do not fill a library, they do teach some useful lessons. When an intermediate court of appeals uses its full *en banc* resources to address an issue of statewide significance, the Texas Supreme Court is likely to also be interested in that issue. As a result, it may will address the matter itself and moot the importance of the intermediate opinion. By adopting it, the new opinion becomes the one that everyone will cite; and obviously overruling it ends its precedential value. "Win or lose," then, the *en banc* opinion falls by the wayside.

This situation is similar to the difficulty faced by the Fifth Circuit when it addresses an important and unsettled issue of state law. There again, "win or lose," a state supreme court opinion on the issue will control, no matter what the *en banc* Fifth Circuit does. As a result, the Fifth Circuit has an unwritten but strong policy against reviewing state law issues *en banc*.[17]

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[15] 461 S.W.2d 119, 121 (Tex. 1970).

[16] Citing Justice Scalia & Bryan Garner's Reading Law: The Interpretation of Legal Texts (2012).

[17] *See, e.g.*, *In re: Air Crash Disaster Near New Orleans, La.*, 821 F.3d 1147, 1169 n.38 (5th Cir. 1987) (en banc), vacated on other grounds, 490 U.S. 1032 (1989) ("[M]atters of state law are rarely worthy of en banc review. En banc review is reserved for only the most important federal law issues and is prompted by the need for a definitive statement on the law by the full court.").

This article suggests that by focusing on "Goldilocks" issues, the Dallas court – and indeed, any intermediate court of appeals in Texas – would have the most lasting impact with its *en banc* cases. Historically, that type of opinion seems to have succeeded in its task; practically, because of their specific focus, such opinions do not have to be of great length to present their legal reasoning.

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