Dallas Bar Association
Appellate Law Section

October 18, 2018

5th District Court of Appeals
Panel Discussion:

RECENT CASE LAW DEVELOPMENTS AND PRACTICE TIPS

Key Holdings of Significant and Recent Cases from the SCOTX

I. Arbitration:

- *Jody James Farms, JV v. The Altman Grp., Inc.*, 547 S.W.3d 624 (Tex. 2018)
  - The courts presumptively determine the issue of arbitrability.
  - The arbitrator may determine arbitrability if there is "clear and unmistakable evidence of the parties' intent to submit that matter to arbitration."
  - Even when the party resisting arbitration is a signatory to an arbitration agreement, questions related to the existence of an arbitration agreement with a non-signatory are for the court, not the arbitrator.
  - The Court also analyzed non-contractual bases to compel a non-signatory to arbitrate, including agency, third-party-beneficiary, and estoppel theories.

II. Summary Judgment Procedure:

- *Seim v. Allstate Texas Lloyds*, 551 S.W.3d 161 (Tex. 2018) (per curiam)
  - A trial court's ruling on a motion for summary judgment is not a ruling on evidentiary objections unless the ruling on the objections was "clearly implied."
  - The court did not address what makes a ruling clearly implied.
  - However, if the trial court could have granted summary judgment with or without the evidence, then no ruling on the objections was implied by the summary judgment.
  - The *Seim* opinion does not mention the court's statement in *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572 (Tex. 2017), that "[e]ven objected-to evidence

remains valid summary-judgment proof 'unless an order sustaining the objection is reduced to writing, signed, and entered of record.'" *Id.* at 583.

- Bottom line for practitioners: get an express, written ruling on evidentiary objections in summary judgment cases or timely object in writing to the trial court's failure to rule.

- *Lance v. Robinson*, 543 S.W.3d 723 (Tex. 2018)
  - Deeds that had been offered and admitted at a prior temporary-injunction hearing but were not attached to the MSJ qualified as proper summary-judgment evidence, and the trial court did not err by relying on those documents.

III. Sham Affidavits:

- *Lujan v. Navistar, Inc.*, No. 16-0588, 2018 WL 1974473 (Tex. Apr. 27, 2018), reh'g denied (Sept. 28, 2018)
  - A trial court has the authority to apply the sham affidavit rule when confronted with evidence that appears to be a sham designed to avoid summary judgment.
  - Under the sham affidavit rule, if a party submits an affidavit that conflicts with the affiant's prior sworn testimony and does not provide a sufficient explanation for the conflict, a trial court may disregard the affidavit when deciding whether the party has raised a genuine fact issue to avoid summary judgment.

IV. Responsible Third Parties:

- *In re Dawson*, 550 S.W.3d 625 (Tex. 2018) (orig. proceeding) (per curiam)
  - A party may not name a responsible third party after the statute of limitations expires on the plaintiff's cause of action if the party failed to timely disclose that the person may be designated as a responsible third party.
  - A statement in the party's response to a request for disclosures that the party will supplement the disclosure regarding responsible third parties is insufficient for the party to give the plaintiff timely notice of whom the party intended to designate as a responsible third party as required by TEX. R. CIV. P. 194.2(l) and TEX. CIV. PRAC. & REM. CODE § 33.004(d).
  - A plaintiff may seek mandamus relief when a trial court erroneously grants a defendant leave to designate a responsible third party.
- *In re Coppola*, 535 SW3d 506 (Tex. 2017) (orig. proceeding)
  - The trial date at the time a motion to designate responsible third party is filed is the trial date used to calculate the deadline for filing the motion to designate.
  - Trial court has no discretion to deny a motion for leave to designate responsible third party without affording the party an opportunity to replead.

- A relator ordinarily does not have to establish a lack of adequate appellate remedy to obtain mandamus relief regarding a trial court's denial of a timely-filed motion for leave to designate responsible third party.

V. Personal Jurisdiction

- *Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550 (Tex. 2018)
  - Defendant did not purposefully avail herself of the State of Texas by sending money to Texas, receiving money from Texas, and engaging in phone calls with a longtime friend who resides in Texas.
  - "A proper minimum-contacts analysis looks to the defendant's contacts with the forum state itself, not the defendant's contacts with persons who reside there."
  - In other words, a plaintiff must connect the nonresident to Texas, not to a Texan.
  - Reaffirmed that the "test for establishing purposeful availment has three factors: (1) we consider only the defendant's contacts with the forum; (2) those contacts must be purposeful rather than random, fortuitous, or attenuated; and (3) the defendant must seek some benefit, advantage, or profit by availing itself of the jurisdiction."

VI. Medical Bills Affidavits:

- *Gunn v. McCoy*, 554 S.W.3d 645 (Tex. 2018), reh'g denied (Sept. 28, 2018)
  - An insurance adjustor can establish reasonableness and necessity of past medical fees.
  - The court also addressed harmless error and other issues, including jury charge error, sufficiency of the evidence to support a finding of proximate cause, and determining the ripeness of an indemnity claim.

VII. Plain Text Construction

- *Murphy Expl. & Prod. Co.-USA v. Adams*, No. 16-0505, 2018 WL 2449313 (Tex. June 1, 2018)
  - This case involved a dispute over the proper definition of "offset well" in a drilling lease.
  - In determining the meaning, the court looked at the context in which the lease was executed, including the type of drilling the parties to the lease anticipated engaging in and the specific requirements set out in the lease for actions that must be taken if the offset provision of the lease was triggered.
  - The court limited it's holding to the specific facts of the case, "which involve unconventional production in tight shale formations."
  - The dissent averred that the majority failed to follow the accepted definition of offset wells from the past 100 years.

- *Texas Workforce Comm'n v. Wichita County*, 548 S.W.3d 489 (Tex. 2018)
    - The narrow issue presented is whether an individual qualifies as "unemployed" under the Texas Unemployment Compensation Act (Unemployment Act or Act) while taking unpaid leave from her job under the Family Medical Leave Act (FMLA).
    - The court applied the Act's unambiguous language and held that the individual does qualify as unemployed.
- *Harris County v. Annab*, 547 S.W.3d 609 (Tex. 2018)
    - The victim of a road rage incident sued Harris County under the Tort Claims Act because the assailant was a Harris County deputy constable who was off duty at the time of the shooting.
    - The victim argued that Harris County's governmental immunity was waived because Harris County sued tangible property when the assailant shot the victim.
    - The supreme court held that Harris County did not "use" tangible property when the off-duty officer shot his personal firearm because "use" means "more than making tangible personal property available for use by another. To use something, the governmental unit must 'put [it] or bring [it] into action or service [or] employ [it] for or apply [it] to a given purpose.'"
- *Wenske v. Ealy*, 521 S.W.3d 791 (Tex. 2017)
    - "The best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it; for ... it may be safely assumed that such was the aspect in which the parties themselves viewed it." *Dunham v. Kirkpatrick*, 101 Pa. 36, 43 (1882) (citation omitted).
    - The dissent disagreed with the "mass of mankind" sentiment and averred that the court should not say what the parties probably meant

VIII. E-discovery:

- *In re State Farm Lloyds*, 520 S.W.3d 595 (Tex. 2017)
    - When electronic data in a reasonably usable form is readily available, a trial court must balance the burdens with the benefits in ordering production in a different form.

IX. *Casteel* Issues and Expert Qualification:

- *Benge v. Williams*, 548 S.W.3d 466 (Tex. 2018)
    - The evidence established that an expert witness was "practicing medicine" for purposes of the Texas Medical Liability Act and was qualified to testify as an expert under the Act even though at the time he was working as a professor in South Korea and not seeing patients there.

- The trial court committed harmful error in failing to instruct the jury that it could not consider a surgeon's nondisclosure of a resident's involvement in the surgery when assessing whether the surgeon was negligent.

X. Just and Right Divorce:

- *Bradshaw v. Bradshaw*, No. 16-0328, 2018 WL 3207131 (Tex. June 29, 2018)
  - It was not just and right to divide community estate to award interest in family home to husband who had been convicted of using the home to sexually abuse his stepdaughter.

Briefing Rules

Following are some areas to consider carefully regarding briefs filed in Texas Appellate Courts (all rule references are to the Texas Rules of Appellate Procedure)

A. Rule 38.1(f), Issues Presented: The brief shall contain a concise statement of the issues or points presented for review.

B. Rule 38.1(g), Statement of Facts: The brief shall contain a concise statement of facts without argument.

C. Rule 38.1(i), Argument: The brief shall contain a clear and concise argument for the contentions made, "with appropriate citations to authorities and to the record."

D. Rule 38.1(k)(1),(2): Appendix:

- Necessary contents. The appendix must contain the following "unless voluminous or impracticable":
  - judgment or order appealed from;
  - charge and verdict or findings of fact and conclusions of law, if any;
  - text of rules, regulations, ordinances, statutes, constitutional provisions, or other law (but not case law) on which the argument is based, and the text of any contract or other document that is central to the argument.
- Optional contents. The appendix may include any other item pertinent to the issues or points presented for review, including:
  - copies or excerpts from case law, documents, pleadings,
  - excerpts from reporter's record,

- items should not be included in an attempt to avoid the page limitation on briefs.

E. Rules 9.4(c),(d),(e),(g), Form Requirements of Briefs:

- Margins must be a minimum of one-inch on both sides, the top, and the bottom of the page
- Text must be double-spaced.
- Footnotes, block quotations, short lists, and issues or points of error may be single-spaced
- If produced on a computer, brief must print in a conventional typeface, the text must be at least 14-point font and footnotes must be at least 12-point font.
- Request for oral argument must be noted on front cover of party's first brief.

F. Rule 9.4(i), Length of Briefs:

- Initial briefs shall not exceed 15,000 words if computer-generated
- A reply brief shall not exceed 7,500 words if computer-generated
- In a civil case, the aggregate of all briefs filed by a party must not exceed 27,000 words if computer-generated
- The court may, on motion, permit a longer brief.
- The caption, identity of parties and counsel, statement regarding oral argument, table of contents, indie of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix are not included in calculating the length of the brief.

G. Rule 38.6, Time to file briefs (non-accelerated appeal):

- Appellant, 30 days from the later of the date of the clerk's record was filed, or the date the reporter's record was filed.
- Appellee, within 30 days after the date the appellant's brief was filed.
- Reply, if any, within 20 days after the date the appellee's brief was filed.

TIPS FOR QUALITY BRIEFS

A. Choose only the key issue to address on appeal-what errors will carry the day.

B. Frame issues clearly and concisely; look at case law for framing of pertinent issues.

C. Cite relevant case law accurately: do not cite for propositions not in the case, and do not stretch meaning of authority

D. Cite to record accurately: do not stretch beyond what is in the record because the court reads the record

E. Make the brief readable: is it well organized, clearly worded, and logical?

F. Append reasonable number of items including copies of the most important cases (even Texas cases), statutes, reporter's record, and documents. Inclusion of such items makes it easier to follow your arguments.

Oral Argument: Key Steps to Effective Judicial Persuasion

Below are some areas lawyers should consider regarding oral argument:

A. Quality of brief usually equals quality of argument, ergo; poor brief usually equals poor oral argument.

B. Preserve credibility as counsel.

C. Preparation: master issues, facts, and law.

D. Selectivity: choose maximum of 2-3 issues to argue.

E. Organization: compile appellate notebook to facilitate your organization (arguments and case law).

F. Condense material to concisely present.

G. Anticipate questions from the court.

H. Practice, practice, practice-but don't appear memorized.

I. Preview the court and proceedings-know how the court is laid out and how it works.

J. Review other cases of similar nature on current and prior dockets-if arguments are recorded listen to how the court deals with oral argument.

K. Know local rules.

L. Use notes sparingly at podium.

M. Maintain eye contact with judges.

N. Speak clearly and project voice.

O. Tone with court must be respectful and patient, yet confident.

P. Make the first 60 seconds count-introduce self, give preview of nature of case (don't drone on about facts), then commence argument.

Q. Move directly to the point-i.e., right away!!

R. Develop argument in logical, reasonable, objective way-jury arguments are a waste of time and lack credibility.

S. Answer the court's questions-ask for clarification if necessary- answer directly and do not avoid the question.

T. Address the full court, not just the presiding judge.

U. After answering question-return to game plan-do not be thrown off.

V. Use time efficiently to address critical issues-don't run out of time.

W. Dress for success.

X. Instruct staff on decorum in the court room-no talking, delivery of notes to the lawyers at counsel table.

Y. Instruct, educate, and caution clients about oral argument, their need to be quiet, contain emotions, do not hold up demonstrative aids, and turn off cell phones.

"Don'ts"-Avoid these Pitfalls:

A. Don't show up and "wing it."

B. Don't forget to re-read at least relevant parts of the trial record.

C. Don't think all issues are equal-some are dispositive others are not.

D. Don't use up time with lengthy treatment of facts and procedure or simply jump to argument-give necessary foundation and proceed.

E. Don't ask for argument unless it will benefit the court.

F. Don't arrive late or at last minute-be early.

G. Don't lead with the disclaimer that you are not trial counsel-the court knows.

H. Don't try to impress the court with identification of panel member as author of important case-it appears to be a 'stroking" gesture.

I. Don't castigate trial court or opposing counsel.

J. Don't divide argument.

K. Don't argue outside the record.

L. Don't engage in distracting behavior-when arguing or while opponent argues.

M. Don't underestimate importance of judges' questions.

N. Don't fall prey to court's hypotheticals, restatements of propositions, or invitations to concede.

O. Don't ignore the weakness of your case-be prepared to address it head on-your opponent will.

P. Don't forfeit your credibility and integrity by over stating.

Q. Don't repeat prior argument in rebuttal-use it to rebut.

R. Don't pontificate, be boring, or fake it.