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THERE *IS* A LIMIT BEYOND WHICH THE SUPREME COURT WILL NOT GO TO COMPEL ARBITRATION

In re Merrill Lynch Trust Co. FSB, ___ S.W.3d ___, 2007 WL 2404845 (Tex.), 50 Tex. Sup. Ct. J. 1030 (Tex. 08/24/07)

Juan Alaniz and his wife recovered a $2 million settlement in a personal injury suit and engaged Merrill Lynch, through its employee Henry Medina, to provide financial and investment services. The Alanizes opened a series of cash and investment accounts with Merrill Lynch. For each account, the Alanizes agreed to arbitrate any disputes that might arise with Merrill Lynch. As a part of their financial plan, the Alanizes set up an irrevocable life insurance trust with Merrill Lynch Trust Company ("ML Trust") as trustee. ML Trust then purchased a life insurance policy from Merrill Lynch Life Insurance Company ("ML Life"). Both of these Merrill Lynch affiliates had their own contracts with the Alanizes, neither of which contained an arbitration clause. ML Life paid a commission on the sale to Merrill Lynch, which then paid Medina, a licensed agent for ML Life.

The Alanizes sued ML Trust, ML Life, and Medina–but not Merrill Lynch–alleging various claims, all related to the insurance trust. The defendants moved to stay the litigation and compel arbitration, which the trial court denied. The Thirteenth Court of Appeals denied mandamus relief. The Supreme Court held (with two concurring and dissenting opinions) that arbitration must be granted for claims against the Merrill Lynch employee, but not against either of the Merrill Lynch affiliates. The Court further held that the claims against the Merrill Lynch affiliates must be stayed until the arbitration is concluded.

This case shows that we are now approaching the limit as to how far the Texas Supreme Court (or at least seven justices) will go on compelling arbitration (at least until "federal law under the FAA" changes). The following is an over-simplified version of the questions answered by the Court:

1. Must the claims against the employee be arbitrated, where the arbitration agreement was with his employer (who was not a party to the lawsuit) and not him or the other defendant Merrill Lynch affiliates (who had no arbitration agreement)?

YES, according to six justices. Three justices (Hecht, Medina, and O'Neill) dissented from that holding and would hold that there is no reason to require the plaintiffs to litigate against the employee when the claims are really for his actions as "agent" for the Merrill Lynch affiliates who did not have any arbitration agreement.

2. Must the claims against the Merrill Lynch affiliates (who were not party to an arbitration agreement) be arbitrated?

NO, according to seven justices who evidently believe that would be going too far. ML Trust and ML Life relied on the doctrine of "joint misconduct estoppel" or "concerted conduct estoppel" to subject the claims against the affiliates to arbitration even though the contracts for those affiliates had no arbitration Provision. Justices Johnson and Wainwright would hold that arbitration is required as to these affiliates under the "joint misconduct" theory even though there was no arbitration language in their contracts.

3. Since the Alinezes had claims against the employee that are subject to arbitration and claims against the Merrill Lynch affiliates that were not subject to arbitration, should the non-arbitrable claims be stayed?

YES, according to eight justices who held that the litigation must be abated until the arbitration is concluded. There is no discussion at all of collateral estoppel issues that might arise.

BECAUSE OF PLAINTIFF'S DEATH ON APPEAL, COURT DECLINED TO ADDRESS "IMPORTANT CONSTITUTIONAL ISSUE" UNTIL CASE FULLY LITIGATED AND ARGUMENTS FULLY DEVELOPED

Kallam v. Boyd, ___ S.W.3d ___, 2007 WL 1721947 (Tex.), 50 Tex. Sup. Ct. J. 899 (Tex. 06/15/07)

Patient sued her health care providers for failing to diagnose her colorectal cancer. The trial court granted partial summary judgment dismissing her claims of negligence that occurred more than two years before she filed suit as being barred by limitations. The court of appeals reversed in part, concluding that the Open Courts provision of the Texas Constitution precluded application of the statute of limitations to bar claims before the plaintiff reasonably could have discovered them, and remanded the case to the trial court. The Supreme Court initially granted the defendants' petitions for review to decide this issue, but shortly before oral argument, the plaintiff died.

The Court withdrew its order granting the petitions for review as improvidently granted and denied the petitions for review. The plaintiff's death did not affect the court of appeals' judgment or the continuation of this appeal, but because of "the change in the posture of the case," the Court declined to address the "important constitutional issue" that is presented. The Court explained that although it has held generally that "wrongful-death and survival claimants cannot establish an open-courts violation because they 'have no common law right to bring either,' " the plaintiff's counsel and amicus curiae contend that the rule should be different in this case because the plaintiff's death while on appeal resulted directly from the negligent misdiagnoses and denying Open Courts protection to her family's statutory claims on these facts would subvert public policy goals.

Stay tuned.

COURT OF APPEALS APPLIED WRONG "NO EVIDENCE" STANDARD OF REVIEW

Goodyear Tire and Rubber Co. v. Mayes, ___ S.W.3d ___, 2007 WL 1713400 (Tex.), 50 Tex. Sup. Ct. J. 886 (Tex. 06/15/07)

The plaintiff injured in a vehicular accident brought a negligence action against the driver and the driver's employer. The trial court granted a take-nothing summary judgment in favor of the driver's employer, and the plaintiff appealed. A divided court of appeals reversed the trial court's judgment. The Supreme Court held that the court of appeals erred in considering only the evidence favorable to the nonmovant, ignoring undisputed evidence in the record that cannot be disregarded. The court reiterated the rule that an appellate court reviewing a summary judgment must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented. In doing so, it must consider all the evidence in the light most favorable to the nonmovant, indulging every reasonable inference in favor of the nonmovant and resolving any doubts against the motion.

REITERATION OF JNOV STANDARD OF REVIEW

Central Ready Mix Concrete Co., Inc. v. Islas, 228 S.W.3d 649, 50 Tex. Sup. Ct. J. 971 (Tex. 06/29/07)

An injured employee obtained a jury verdict against his employer (who carried no workers' compensation insurance) and the owner whose truck he was repairing. The trial judge entered a take nothing JNOV for the latter, but the court of appeals reversed. The Supreme Court reversed and reinstate the trial court's judgment.

In its memorandum opinion issued a few months before the Supreme Court's landmark decision in *City of Keller v. Wilson*, the court of appeals said it would "examine the record for evidence supporting the jury finding and ignore all evidence to the contrary." This

standard is proper so long as a reviewing court keeps in mind that some contrary evidence cannot be ignored. The standard for reviewing a JNOV, like all other motions rendering judgment as a matter of law, requires a reviewing court to credit evidence favoring the jury verdict if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.

MANDAMUS RELIEF IS AVAILABLE TO ENFORCE FORUM-SELECTION CLAUSES
MANDAMUS & INTERLOCUTORY APPEAL JURISDICTION

In re AutoNation, Inc., 228 S.W.3d 663, 50 Tex. Sup. Ct. J. 960 (Tex. 06/29/07)

AutoNation, which owns a national chain of automobile dealerships, brought suit in Florida to enforce a covenant not to compete against a former employee, who had been general manager of one of its Texas dealerships. In the employment contract containing the covenant, AutoNation and the employee had agreed to litigate any disputes arising under the contract in Florida under Florida law. Later, the former employee and his new employer sued AutoNation in Texas, seeking declaratory judgment that the non-compete obligation was governed by Texas law and was unenforceable. The employee cited an unpublished Florida case (involving AutoNation and another of its Texas employees) in support of his argument that the Florida court would apply Florida non-compete law, which the employee contended would "yield a result that offends Texas public policy." The trial court concluded that "it is probable the covenant not to compete is unenforceable in Texas," and it accordingly declined to dismiss or stay the Texas action and enjoined AutoNation from pursuing the first-filed Florida action.

AutoNation filed a notice of accelerated appeal of the injunction order, and the following week it filed a petition for writ of mandamus in the court of appeals. The court of appeals denied mandamus relief on the grounds that an adequate remedy at law was available to AutoNation, namely its interlocutory appeal. In the interlocutory appeal, the court of appeals affirmed the anti-suit injunction.

AutoNation then sought mandamus relief in the Supreme Court. The Supreme Court granted AutoNation's petition for writ of mandamus, holding that mandamus relief is available to enforce forum-selection clauses. Such clauses generally should be given full effect and should control absent a strong showing that they should be set aside. Accordingly, forum-selection clauses–like arbitration agreements (described by the Court as "another type of forum-selection clause")–can be enforced through mandamus.

Note the jurisdictional question raised by AutoNation's seeking mandamus relief in the Supreme Court from the anti-suit injunction affirmed by the court of appeals. The court of appeals decision in the interlocutory appeal of the anti-suit injunction was final (absent Supreme Court conflicts or dissent jurisdiction). The Supreme Court stated that the relief sought by AutoNation by way of mandamus was broader than the relief from the temporary injunction that was the subject of its interlocutory appeal to the court of appeals. The interlocutory appeal was necessarily limited to challenging the anti-suit injunction against litigating the dispute in Florida or elsewhere, *see* CP&RC §51.014(4), whereas the mandamus petition to the Supreme Court sought dismissal of the entire Texas action, or alternatively a stay of the suit. The Supreme Court determined that it had mandamus jurisdiction regardless of the finality of the court of appeals' ruling in the interlocutory appeal of the temporary injunction. Specifically, "[w]e are not divested of mandamus jurisdiction because we lack appellate jurisdiction."

APPELLATE MOTION TO REDUCE BOND &SET AMOUNT FOR SUPERSEDEAS

Flores v. StarCab Co-op Ass'n, Inc., 2007 WL 2296166 (Tex. App.–Amarillo 08/10/07)

This opinion was issued in response to the appellants' motion to reduce the supersedeas bond amount. The trial court entered a take nothing judgment against the plaintiffs and awarded the defendants attorney's fees

totaling $123,500, making the plaintiffs and their attorneys jointly and severally liable for the fees. The trial court required the supersedeas bond to include the attorney's fees award amount. The plaintiff-appellants challenged the amount of the bond, contending that the fees were imposed as sanctions, did not constitute "compensatory damages awarded in the judgment" under the language of T RAP 24.2(a)(1), and therefore need not be secured by supersedeas.

The court of appeals did not reach the substance of the issue and instead overruled the motion because the appellants had not provided an ***evidentiary*** basis on which to conclude the trial court had abused its discretion with regard to the amount of security needed to supersede the judgment. The court of appeals viewed the motion as one that must be evaluated in light of the procedural context in which the trial court made the attorney's fees award and noted that the appellants' motion contained no discussion of the record or page references to aid the court.

The lesson for appellate practitioners is to include sufficient record evidence in your motion to support your description of the bases for the trial court's award of attorney's fees and the reason why it was wrong.

PAIN & SUFFERING, MENTAL ANGUISH, & FUTURE MEDICAL EXPENSES ARE INAPPROPRIATE FOR SUMMARY JUDGMENTS

Rivera v White, ___ S.W.3d ___, 2007 WL 2480546 (Tex. App.–Texarkana 09/05/2007 06-07-00019-CV)

The Court of Appeals reversed & remanded, in part, this summary judgment rendered in favor of P in an auto accident case. The Court held that awards for pain & suffering, mental anguish, & future medical expenses are unliquidated damages that cannot be proven with the necessary degree of certainty for a summary disposition. It also held there is no pleading or summary judgment evidence to support the award for lost income or attorney's fees. It affirmed the summary judgment as to the proven damages of the value of the van & medical expenses paid by P as a result of the accident.

SUPREME COURT CONTINUES TO INSIST THAT THE CART NOT COME BEFORE THE HORSE

In re Allied Chemical Corporation, et al., 227 S.W. 3d 652 (Tex. 2007)

This is an opinion on a petition for writ of mandamus by Defendants in a mass tort action who sought to prevent the case from going to trial because they could not learn through discovery what it was they would be defending. Brilliant!

This case was filed by approximately 1900 Plaintiffs against 30 defendants in Hidalgo County. Essentially, plaintiffs alleged they were exposed to a "toxic soup" of chemical fumes and leaks from nearby pesticide mixing and storage facilities. After five years on the docket, the trial judge consolidated five plaintiffs and set that case for trial to commence in just six months.

Shortly after the order setting trial, the Texas Supreme Court issued *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 208 (Tex. 2004). In that case the Court reversed a similar order, in a similar case, in the same county, holding that in a case such as this where the allegations were mired in generalities that "the tort is immature."

Defendants argued the impropriety of the consolidations to the trial court based on *In re Van Waters & Rogers, Inc.*, but the judge was not persuaded to change the order. Defendants then petitioned for writ of mandamus in the13th Court of Appeals which was denied. When the Supreme Court granted a stay and requested full briefing the plaintiffs adjusted their position. On motion of the plaintiffs, the trial court then modified its order and set only one plaintiff's case for trial. This arguably made the issue of consolidation moot. However, the Court noted that this action by the trial court did not solve the issue because hundreds of similar claims remained, and because the plaintiffs maintained they had no duty to supplement their discovery to articulate causation by experts, that left open the possibility that this scenario would unfold again. The Court found this to be a situation "capable of repetition in a manner that evades review" which required that mandamus issue.

In its analysis, The Court reminded us that since 1847 the law has been that trial courts' discretion is such that they may "set trials as they wish" but not where doing so would deprive a party of a just defense or jeopardize their rights in any way. Litigation in this era requires new applications of this rule as the Court did 11 years prior in *Able Supply Co. v. Moye*, 898 S.W.2d 766 (Tex. 1995) where the Court held that in a mass tort case involving hundreds of parties and complex causation issues a trial judge cannot postpone responses to basic (i.e. essential) discovery until shortly before trial.

Although five years had passed since filing the case, the plaintiffs all responded either "not applicable" or that "none of their treating physicians" could do so. The Court likened the abject failure/refusal to disclose the evidence on causation to *Able Supply* and based this decision largely on that holding.

The Court conceded in deference to the dissenting opinion that it generally does not employ mandamus to take up complaints about trial settings or orders refusing to compel discovery, but reiterated the three reasons for doing the latter in *Able Supply* which were also present in this case:

> (1) When a discovery order imposes a burden on one party far out of proportion to any benefit to the other. In analyzing these facts the Court reasoned, "The burden of making 30 defendants prepare in the dark for 1,900 claims is far out of proportion to the benefit of giving the plaintiffs more time (after five years) to decide who or what injured them. Filing thousands of claims like those here requires only a reasonable inquiry and belief that they are not groundless; recovering on them requires considerably more. In the meantime, thousands of hours and millions of dollars may be needlessly wasted if the claims can never be proved. Mandamus is appropriate in such cases to avoid this 'monumental waste of judicial resources.'"
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> (2) When a denial of discovery goes to the heart of a party's case. The Court stated there are many cases in which it is perfectly reasonable to conduct discovery up until 30 days before trial. But in suits like this one, denying discovery until then goes to the very heart of this case, as well as what our justice system is supposed to be about.
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> (3) When a discovery order severely compromises a party's ability to present any case at all at trial. The Court reasoned that if Plaintiffs cannot name an expert to make this "vital [causal] connection" that Defendants cannot prepare for trial.

Ultimately, the Court conditioned issuance of a writ of mandamus on the trial court acquiescing in the directive to vacate its order setting trial until such time as the Plaintiffs disclose who will connect their products to the plaintiffs' injuries and are afforded reasonable opportunity to prepare for trial after this revelation.

WHEN IN DOUBT, LET THE TRAP RULES BE YOUR GUIDE

Ptomey v. Texas Tech University, 2007 WL 1660735 (Tex. App.–Amarillo 2007) and *Ptomey v. Texas Tech University*, 2007 WL 1964559 (Tex. App.–Amarillo 2007)

The Amarillo Court of Appeals issued consecutive, *per curiam* opinions in this appeal which considered the appellate rules on briefing requirements. The decisions are somewhat generous in affording the appellant multiple opportunities to file a compliant brief, and for practitioners these opinions represent a tale of how not to proceed.

Appellant had been granted four motions for extension of time in which to file her brief. Appellant then filed a brief which did not substantially comply with Rules of Appellate Procedure as the brief was not signed; lacked the requisite certificate of service; and was devoid of a prayer for relief. *See* Tex. R. App. P. 9.1(a), 9.5(e), 38.1(i). Moreover, the brief also failed

to conform to the formatting requirements of Rule 9.4(d) and (e).

Nevertheless, the Court afforded Appellant an opportunity correct the brief, or in essence ordered that Appellant do so, but she did not seize this opportunity. The Court of Appeals then dismissed for want of prosecution and failure to comply with the Court's directive resulting in the first opinion cited above. *See* Tex. R. App. P. 42.3(b) & (c).

The unwavering appellant then filed a verified motion for rehearing and sought reinstatement of the appeal asserting a laundry list of reasons for the failure including that counsel never received the court's notice to correct the deficient brief and that counsel was "unaware" the brief did not comply with the rules. Appellant also requested the Court receive the brief for filing even though it was not compliance with Rule 9.4, or allow the filing of the brief despite that it did not comply with the page limitations of Rule 38.4. In response to the averment regarding "court rules" the Amarillo Court of Appeals noted that, "This [C]ourt has not adopted local rules. The Texas Rules of Appellate Procedure govern briefing practice in this court."

Appellee filed a response in opposition to both reinstatement and enlargement of the page limitation. Appellee argued the history of delay in the prosecution of the appeal and challenged counsel's stated reason that she did not receive notice of the briefing defects before her appeal was dismissed. Undoubtedly to the chagrin of Appellee, on this issue the Court opined, "The procedural history of this appeal suggests appellant's counsel has given less-than-thorough attention to the Rules of Appellate Procedure, but it does not present an objective basis on which we can conclude counsel timely received, but mis-read or disregarded, our notice of his briefing deficiencies and direction to file a corrected brief. Relying instead on counsel's integrity, we grant appellant's motion for rehearing and reinstate the appeal."

The Court did deny the appellant's request to suspend application of the briefing rules and directed Appellant to file a brief in compliance with the applicable Rules of Appellate Procedure and admonished that if a conforming appellant's brief was not timely *received* by the clerk, the appeal will be dismissed without further notice.

IS THERE A DOCTOR IN THE HOUSE? SUPREME COURT CLARIFIES WHEN EXPERT MEDICAL TESTIMONY IS REQUIRED

Guevara v. Ferrer, ___ S.W.3d ___, 2007 WL 2457760 (Tex. 2007)

In this appeal arising from a jury verdict for the Plaintiff in a car wreck case, The Texas Supreme Court considered whether expert medical testimony was required to support a finding that an automobile accident caused medical expenses of over $1 million. In deciding this case, The Court clarified its holding *Morgan v. Compugraphic Corp.,* 675 S.W.2d 729 (Tex.1984).

The only testimony at trial regarding damages came from two surviving relatives of the elderly gentleman who was injured in the car wreck and ultimately died several months later. The testimony indicated the decedent was wearing his seatbelt and that after the accident was screaming, moaning, and complaining of a stomach ache. A surviving relative testified, without objection, that the decedent underwent abdominal surgery on the night of the accident and then an additional abdominal surgery because the first surgery was not healing properly.

Neither party introduced medical records of the lengthy, initial hospitalization nor any testimony of a health care provider (i.e. competent witness). However, multiple medical bills were admitted evidencing a period of hospitalization, almost entirely in an intensive care unit, from October, 2002, until February 2003, followed by an additional two weeks in a continuing care facility. The only medical record introduced on that two-week admission was a mere physician's note which listed decedent's chief complaint upon admission as "shortness of breath."

The defendant driver moved for a directed at verdict the close of evidence and argued there was no evidence that the course of treatment and lengthy hospitalization were caused by the accident. Plaintiff argued that evidence of the *sequence of treatments* following the accident, coupled with the family's testimony about the accident and the decedent's pre-accident medical condition were sufficient to establish the requisite

causal relationship. The trial court denied the motion for directed verdict. The jury then found damages in the amount of over $1.1 million for medical expenses and $125,000 for pain and mental anguish.

The driver then moved for judgment notwithstanding the verdict based, in part, on the same causation arguments raised in the motion for directed verdict. The trial court granted the motion and entered a take-nothing judgment. Plaintiff appealed.

The court of appeals held that legally sufficient evidence of causation existed and concluded that the testimony met the holding in *Morgan* because it "established a sequence of events which provided a strong, logically traceable connection between the event and the condition" such that a layperson could "determine, with reasonable probability, there was some evidence of the causal relationship between the event and the condition." The court of appeals reversed and remanded for entry of judgment based on the jury's verdict.

Appellant argued in this appeal that the use of *Morgan* to support a "*post hoc, ergo propter hoc"* reasoning ("after this, therefore because of this," Black's Law Dictionary 1186 (7th ed.1999)) beckoned that *Morgan* be reexamined. Appellant urged *Morgan* should be overturned to the extent it is inconsistent with the rule that expert testimony of causation is required in cases involving complex medical conditions.

The Supreme Court reiterated the well-settled j.n.o.v. standard of review: "When reviewing a court of appeals' judgment reversing the trial court's grant of judgment notwithstanding the verdict, we conduct a legal sufficiency analysis of the evidence. We review the evidence presented at trial in the light most favorable to the jury's verdict, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not."

The Court explained that the basic premise affirmed in *Morgan* is that competent evidence is required to prove the existence and nature of a condition and a causal relationship to the event sued on even though, in limited circumstances, the existence and nature of certain basic conditions, proof of a logical sequence of events, and temporal proximity between an occurrence and the conditions can be sufficient to support a jury finding of causation without expert evidence. Thus, non-expert evidence alone is sufficient to support a finding of causation in limited circumstances where both the occurrence and conditions complained of are such that the general experience and common sense of lay persons are sufficient to evaluate the conditions and whether they were probably caused by the occurrence. Whereas, expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of jurors. The Court stated that competent proof of the relationship between the incident sued upon and the injuries or conditions complained of "has always been required."

The Court in applying the above principles to the underlying facts gave a pretty strong indication of the outcome when it enumerated the following list of medical conditions upon which the jury based its verdict: (1) at least two abdominal surgeries; (2) three separate confinements in health care facilities, one of which was for over three months; (3) a great variety and quantity of various pharmaceutical supplies, medicines, and drugs; (4) numerous varied laboratory procedures; (5) extensive treatments for respiratory failure and therapy; (6) physical therapy of various kinds; (7) treatments for kidney failure; and (8) a great assortment and quantity of "central supply" and miscellaneous medical charges. The Court stated, "[Appellee] maintains that a legally sufficient causal link was established as to all the conditions and treatments for them even though no expert evidence provided such a link. We disagree."

Absent proof (through expert testimony) of the conditions and their causes, judgment for the medical expenses is not supported by legally sufficient evidence. The Court conceded that the affidavits proffered to prove up the medical bills were evidence that those expenses were reasonable and necessary, but were not competent evidence of the nature of the conditions nor their causal relationship, if any, to the car wreck. Likewise the Court found the few medical records for admission and consultation by physicians several months after the accident were essentially too attenuated to establish causation for all of the prior medical treatments. However, the Court did note that there was legally sufficient evidence that some of the medical expenses were causally related to the accident. Yet the evidence was not legally sufficient to prove which conditions generated the medical expenses on

which plaintiffs sought relief nor that the accident caused all of the conditions and related expenses.

The Court held that, "expert medical evidence is required to prove causation unless competent evidence supports a finding that the conditions in question, the causal relationship between the conditions and the accident, and the necessity of the particular medical treatments for the conditions are within the common knowledge and experience of laypersons." The Court concluded, "because only lay evidence was offered to prove that the accident caused all of the medical expenses and expert evidence was required to prove many of them, we reverse and remand . . ."