TADC APPELLATE LAW NEWSLETTER
Fall 2010 Edition
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University of Texas Southwest Med. Ctr at Dallas v. Estate of Arancibia, No. 08-0825, 2010 WL 4144590 (Tex. Oct. 22, 2010).

Preserving governmental immunity issues for interlocutory appeal.

Plaintiffs filed a medical malpractice suit against two doctors for health care claims occurring at a teaching hospital. The doctors filed general denials. Later, the doctors moved to dismiss under Texas Civil Practice and Remedies Code section 10l.106(f) and to substitute in the governmental agency; six days later, plaintiffs amended to drop the doctors and sue the Hospital. The Hospital moved to dismiss, claiming lack of notice under section 101.101. The trial court denied the motion, which was affirmed by the court of appeals. For the first time on appeal, the Hospital asserted that the doctors' general denial was a section 101.106(f) motion to dismiss and Plaintiff failed to timely amend within 30 days.

After resolving the notice issue against the Hospital, the Supreme Court did not reach the question of whether compliance with section 101.106(f) was an immunity issue akin to jurisdiction that could be raised for the first time on appeal. Instead, the Court held that the doctors' general denial was not a section 101.106(f) motion to dismiss. The answer was not titled a motion, did not contain the allegations required by 101.106(f), and did not have a request for a setting.

Sweed v. Nye, No. 09-0465, 2010 WL 4144589 (Tex. Oct. 22, 2010).

General appeal notice could perfect a restricted appeal; defects could be amended after the deadline to file restricted appeal.

Plaintiff's case was dismissed for want of prosecution, though notice of intent to dismiss had been sent to the wrong address. Within the six-month deadline to appeal, Plaintiff filed a general notice of appeal that omitted the special statements required for a restricted appeal. The court of appeals gave notice of the defect; Plaintiff then filed an

amended notice that contained the special allegations for a restricted appeal, but it was filed after the six-month deadline. The court of appeals dismissed for lack of jurisdiction.

The Supreme Court held the original notice, though defective, invoked the court of appeals' jurisdiction. The failure to contain the special allegations for a restricted appeal made the notice defective which could be corrected. Further, the merits of the appeal were irrelevant to the adequacy of the notice or curing it by amendment.

In re 24R, Inc., No. 09-1025, 2010 WL 4145601 (Tex. Oct. 22, 2010).

The record for a mandamus petition must contain only the relevant portions of the trial court transcript, not everything.

This was a mandamus petition in which real parties successfully persuaded the trial court that the arbitration agreement in connection with "at will" employment was illusory. Relator/employer included in the mandamus record only the arbitration agreement. In granting mandamus relief, the Supreme Court held that Texas Rule of Appellate Procedure 52.7(a)(2) did not require the entire trial transcript, only the relevant portions. Because the question was one of law that could be decided based on the writing, the trial transcripts were unnecessary.

Transcontinental Ins. Co. v. Crump, No. 09-0005, 2010 WL 3365339 (Tex. Aug. 27, 2010).

Incorrect jury charge definition of "producing cause" was reversible error.

Crump had a serious pre-existing renal problem. At work, he received a blow to the kidney and died within a year after several health complications. His widow sued for workers compensation death benefits. At trial the chief issue was "but for" causation, whether he would not have died but for the trauma. Experts testified on both sides. The court's charge did not advise the jury that "producing cause" required that death would not have occurred but for the injury; instead the definition stated only that the injury was a cause that in a natural sequence of events produced death. Judgment was for the Plaintiff.

The Supreme Court reversed. "Producing cause" in workers compensation cases should follow the definition used in products liability cases, including "but for" causation. The "but for" part of the definition is generally useful. The definition is now incomplete if "but for" causation is omitted. The error was not harmless because the question of whether the pre-existing condition would have killed him anyway was hotly disputed. A

proper definition would have helped the jury decided a critical element of the claim. The insurer preserved the error by tendering a substantially correct definition, one that included "but for" causation.

In re Daredia, 314 S.W.3d 347 (Tex. 2010).

Judgment is final if it says so; cannot later correct to delete language saying it is final as to all parties if it is the judgment plaintiff asked trial court to enter.

In a collection case, American Express sued Map Wireless and Daredia; only Daredia filed an answer. American Express took a default judgment against Map Wireless; the default judgment recited all relief not granted was denied, it disposed of all claims and all parties, and it was "FINAL." Months later, American Express moved for a judgment nunc pro tunc that it was an interlocutory judgment that did not dispose of the Daredia. The trial court granted the motion and Daredia sought mandamus relief, arguing the trial court had lost jurisdiction to modify a final judgment.

The Supreme Court granted mandamus relief. First, any inadvertent error did not mean the judgment was not final; it expressly said so on its face and expressly said it disposed of all parties. Second, the error was not clerical. Clerical errors are errors in entering a judgment. The record showed the trial court signed the judgment proposed by American Express's motion for default.

De Gonzalez v. Guilbot, 315 S.W.3d 353 (Tex. 2010).

Tertiary recusal motion statute clarified, with pitfalls for both sides.

This was an intra-family dispute over family businesses arising from a probate case filed in statutory probate court. After an unsuccessful attempt to remove to federal court was remanded, Defendants moved to recuse the trial judge. When the Presiding Judge Herman appointed a second judge to hear that motion, Defendants moved to recuse the second judge. Then Judge Herman appointed himself to hear the recusal motion; Defendants moved to recuse Judge Herman, though the motion was technically defective. Texas Civil Practice and Remedies Code section 30.016 permits a judge against whom a tertiary recusal motion is filled to continue to preside, though the tertiary motion must then be referred to a higher judge to be heard. Judge Herman initially dismissed the motion against himself, heard the recusal motion against the original judge, denied that motion and sanctioned Defendants for frivolous motions. Judge Herman then referred the recusal motion as to himself to the Supreme Court to assign a judge to hear it. However, in the interim, the original judge granted judgment for Plaintiffs. The court of

appeals revered, holding that "tertiary recusal motion" was the third motion filed by one party against the same judge.

The Supreme Court reversed in part. Section 30.016 applied to "a tertiary recusal motion" which meant any motion; the "tertiary motion" was the third motion filed against any judge. Consequently, Judge Herman could proceed to hear the recusal motions filed against the other two judges. However, Section 30.016 still required Judge Herman to forward the tertiary motion against himself. Because that motion remained pending, the case had to be remanded to the court of appeals where it would be abated until the motion against Judge Herman is decided. If the motion against Judge Herman is denied, the appeal would be affirmed; if the motion is granted, the appeal must be reversed.

Hildalgo v. Hidalgo, 310 S.W.3d 887 (Tex. 2010).

An appellant who relies on a rule of law overruled during that party's appeal may re-brief in the interests of justice.

Ex-wife sued former husband to enforce out-of-state divorce decree that ordered him to purchase insurance. Trial court initially denied her relief, but then granted a new trial. More than 75 days after the first judgment, the trial court vacated the new trial and reinstated the original judgment. Wife then appeals third order, arguing under *Porter v. Vick*, 888 S.W.2d 789 (Tex. 1994), that trial court lost jurisdiction to "un-grant" the grant of new trial on the 75th day after signing the first judgment. In reliance on this good procedural point, her initial briefs did not focus on substantive arguments. Initially, the court of appeals reversed based on *Porter*. Then, the Supreme Court reversed *Porter* in *In re Baylor Med. Ctr. at Garland*, 280 S.W.3d 287 (Tex. 2009). The court of appeals granted the husband's motion for rehearing; it refused to address her substantive arguments because she had not briefed them.

The Supreme Court reversed. The Supreme Court may remand to the court of appeals in light of substantive changes in the law. Texas Rule of Appellate Procedure 60.2(f). It also has such discretion "in the interests of justice." Here, the wife had a meritorious procedural argument when she briefed her case and the court of appeals had no reason to address substantive arguments. Due to a change in the law and the interests of justice, the case was remanded.