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In re Rubiola, 334 S.W.3d 220 (Tex. March 11, 2011).

Can signatory parties to an arbitration agreement designate others who do not sign the agreement as "parties to the agreement" and grant them the right to enforce arbitration? Yes.

This lawsuit arose out of the home purchase agreement. As part of the loan process, the buyers executed an arbitration agreement with the mortgage finance company. The arbitration agreement designated certain non-signatories as parties to the agreement, including "individual partners, affiliates, officers, directors, employees, agents, and/or representatives of any party to [the arbitration agreement] documents . . . ." The sellers of the home fell within this group. The buyers sued the sellers for alleged misrepresentations and for failure to make certain repairs to the home. The sellers sought to compel arbitration as non-signatory parties to the arbitration agreement. The Buyers objected to arbitration and contended that the sellers, as non-parties to the agreement, could not compel arbitration. The trial court denied the Sellers' motion to compel arbitration.

Granting mandamus relief, the Supreme Court held that the trial court erred in denying the motion to compel arbitration. The Court held that signatories to an arbitration agreement may identify other parties in their agreement who may enforce arbitration as though they signed the agreement themselves. The Court further concluded that the arbitration agreement in this case was sufficiently broad to identify the Sellers as parties to the agreement and that they had the right to compel arbitration.

Franka v. Velasquez, 332 S.W.3d 367 (Tex. January 21, 2011).

The issue in this case is whether section 101.106(f) of the Texas Civil Practice and Remedies Code (Texas Tort Claims Act) entitles a government employee to dismissal regardless of whether governmental immunity from suit has been waived. The court held that it did.

Parents sued doctors of a state health center for the negligent delivery of their child. The doctors moved for summary judgment under section 101.106(f), which requires dismissal of a claim against governmental employees when the claim "could have been brought" against the government employer under the Act. The trial court denied the doctors' motion for summary judgment and the court of appeals affirmed, holding that a government employee is not entitled to dismissal under 101.106(f) until he has established that the claim "could have been brought" against the government, meaning the employer's immunity from suit has been waived by the Act.

The Supreme Court reversed, holding that for purposes of section 101.106(f), suit "could have been brought" under the Act against the government regardless of whether the Act waives governmental immunity from suit. Government employees do not have to prove the government has

waived immunity to be entitled to dismissal from a tort action based on conduct within the general scope of employment.

Samlowski v. Wooten, 332 S.W.3d 404 (Tex. February 25, 2011).

Section 74.351(b) of the Texas Civil Practice and Remedies Code requires that a trial court dismiss a health care liability claim unless the claimant serves an expert report within 120 days after filing suit. Dismissal is subject to the trial court's discretion to grant one thirty-day extension for the claimant to cure a timely served but deficient report. This case addresses when a trial court might abuse its discretion by denying such an extension.

The trial court dismissed a plaintiff's health care liability claim with prejudice because her expert report did not adequately show how the alleged negligence proximately caused her injuries. The trial court determined the report was not a good-faith effort to comply with the expert report requirement. The appeals court reversed to allow an extension to cure the report, holding that the expert report was not a good-faith "effort" but was a good-faith "attempt" to comply with the report requirement.

In a plurality opinion by Justice Medina, the supreme court reversed, concluding that "good faith" was not the test for abuse of discretion under §74.351(c). Instead, the court held that that the overriding principle guiding trial court discretion under section 74.351(c) should be the elimination of frivolous claims and the preservation of meritorious ones. Because an adequate expert report is how the statute distinguishes between the two, a trial court should grant an extension when a deficient expert report can readily be cured and deny the extension when it cannot. The court suggested that a patient should therefore promptly fix any problems with the report and do so within the statutory 30-day period, even when the trial court denies an extension, to demonstrate the court's error.

In a concurring opinion, Justice Guzman concluded that a trial court should grant an extension to cure a deficient report whenever a timely report included a qualified expert's expressed belief that a patient possessed a health care liability claim. Justice Guzman concurred in the judgment to remand.

Justice Wainwright, concurring and dissenting, concurred in the judgment to remand but suggested that the determination to grant an extension should be made as a matter of law from the deficient report's content.

Justice Johnson filed a dissenting opinion, concluding that the trial court had not abused its discretion in denying the motion to extend because the expert report was deficient and there was no evidence in the record that the report would have been cured had the extension been granted.

In re Commitment of Hill, 334 S.W.3d 226 (Tex. March 11, 2011).

At issue in this case was whether, during voir dire in a civil commitment trial, the defendant was entitled to ask the potential jurors (1) whether they could give a fair trial to a homosexual and (2) whether they would require the state to prove both elements required by statute. The trial court refused to allow the defendant to pursue both lines of questioning and the court of appeals affirmed.

The Supreme Court reversed and remanded to the trial court for a new trial. As to the first line of questioning, the Court held that because details of homosexual acts that the defendant had engaged in were relevant to the trial, he was therefore entitled to question potential jurors about their ability to give a fair trial to a person they perceived to be a homosexual. As to the second line of questioning, the Court held that because the statute required the State to prove two distinct elements, and because the jury was required by statute and oath to follow the law, the defendant must be permitted to ask the jury whether it could comply with such a legislatively mandated commitment. By denying these lines of questioning, the trial court abused its discretion. As to both issues, the Court held that error had been preserved because the defendant had requested to ask a proper question, had made clear the grounds upon which that request was based, and had obtained a ruling on the request from the trial court.

Rosemond v. Al-Lahiq, 331 S.W.3d 764 (Tex. 2011).

This case involes a health care liability suit in which Ulysses Rosemond sued Memorial Hermann Hospital System (the Hospital), Dr. Maha Khalifa Al-Lahiq, and others, alleging that their failure to provide physical therapy while he was subject to prolonged bed rest caused him to develop severe injuries. Rosemond's attorney faxed an expert report and curriculum vitae to attorneys for the Hospital and Dr. Al-Lahiq two days before the 120-day statutory deadline required for health care liability claims. But Rosemond's counsel conceded that he experienced technical difficulties faxing the report. The Hospital, which was later non-suited, admitted it received the fax containing the expert report. Dr. Al-Lahiq's law firm maintained it did not.

After the 120-day deadline for serving the expert report had passed, Dr. Al-Lahiq filed three motions to dismiss. Two of the motions were premised on timeliness objections and one on adequacy. The trial court dismissed Rosemond's case with prejudice by signing the draft order attached to the second of the three motions, which concerned the adequacy of the expert report. No findings of fact or conclusions of law were requested or filed.

The court of appeals affirmed the dismissal, but implied its decision was based on a finding that the underlying expert report was not timely filed. Specifically, the court of appeals reasoned that "[b]ecause the trial court granted Dr. Al-Lahiq's motion to dismiss, we must infer that the trial court resolved any factual dispute regarding timely service of the expert report . . . in favor of Dr. Al-Lahiq." Thus, the court of appeals did not reach the issue of the adequacy of the expert report.

The Supreme Court, however, concluded that the court of appeals incorrectly implied that the trial court resolved the factual dispute regarding timely service of the expert report in favor of Dr. Al-Lahiq. The Court explained that Dr. Al-Lahiq submitted a draft order with each of her three motions, and the trial court chose to sign the second draft order, which was attached to a motion attacking the adequacy of Rosemond's expert report at length, but which included no argument as to untimely service. Moreover, the Court noted the objection to the adequacy of the expert report would have been a moot point if the trial court had found the report was not timely served because the issue of timeliness is a threshold issue in the expert report framework – *i.e.*,

in order to rule on the merits of the report's adequacy, the trial court must first determine whether the report was timely served. Consequently, contrary to the court of appeals' finding, the record actually demonstrated that the trial court did not implicitly rule in favor of Dr. Al-Lahiq on the timeliness issue.

Ultimately, the Supreme Court reversed the court of appeals' judgment and remanded the case to that court for (1) consideration of the adequacy of Rosemond's expert report, and (2) review of the trial court's order dismissing Rosemond's health care liability claim in light of that inquiry.

Veronica Ellis & Pacesetter Builders, Inc. v. Schlimmer, No. 10-0243, 2011 Tex. LEXIS 249 (Tex. April 1, 2011).

In this case, the Supreme Court considered the propriety of the court of appeals' dismissal of an interlocutory appeal of the trial court's order denying the defendants' motion to compel arbitration for want of jurisdiction because the movants failed to establish that the Federal Arbitration Act ("FAA") did not apply.

In 2006, Ron and Tana Schlimmer purchased a house from Veronica Ellis. Coldwell Banker Pacesetter Steel Realtors ("Pacesetter") was the broker in the transaction. After allegedly discovering various undisclosed defects, the Schlimmers sued Pacesetter and Ellis asserting claims fraud, breach of contract, negligent misrepresentation, and violations of the Deceptive Trade Practices Act.

After five months and the initiation of discovery, Ellis's and Pacesetter's lawyers purportedly discovered a mandatory arbitration clause in the Schlimmers' real estate contract with Ellis. They then filed a motion to abate and compel arbitration. The Schlimmers claimed waiver and estoppel and argued that the language of the agreement did not cover the dispute between the parties.

The trial court denied the motion, and Pacesetter and Ellis filed an interlocutory appeal under section 171.098(a)(1) of the Civil Practice and Remedies Code, a provision of the Texas Arbitration Act ("TAA"). The court of appeals *sua sponte* dismissed the interlocutory appeal. The court of appeals explained that it dismissed the appeal for want of jurisdiction because (1) Ellis's and Pacesetter's motion did not invoke either the TAA or the FAA, (2) the trial court did not decide which statute applied, and (3) and an interlocutory appeal is only authorized under the TAA.

The Supreme Court explained that while Ellis and Pacesetter did not specifically invoke the TAA in their motion to compel arbitration, their counsel specifically referred to it in the hearing on the motion. Consequently, the burden was on the Schlimmers to show that some Texas state law or statutory requirement would prevent enforcement of the arbitration agreement under the TAA so that the FAA would preempt the Texas act. But the Schlimmers did not raise these arguments. Consequently, the Supreme Court concluded that the court of appeals' decision (a) erroneously placed the burden to establish the absence of any defenses to arbitration on Ellis and Pacesetter, and (b) is contrary to the strong policy favoring arbitration. Thus, the Court reversed the court of appeals' judgment and remanded the case for consideration of the appeal's merits.

In re John Does 1 and 2, No. 10-0366, 2011 Tex. LEXIS 295 (Tex. April 15, 2011).

In this mandamus proceeding, the Supreme Court considered whether a trial court may order pre-suit discovery by agreement of the witness over the objections of other interested parties without making the findings required by Rule 202.4(a) of the Texas Rules of Civil Procedure. Rule 202 allows a person to petition the court for an order authorizing the taking pre-suit deposition "(a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit." Tex. R. Civ. P. 202.1.

This case concerns Philip R. Klein and his corporations PRK Enterprises, Inc., and Klein Investments, Inc. (collectively "PRK"). PRK operates a blog called The Southeast Texas Political Review, which had been criticized by two anonymous bloggers known as Operation Kleinwatch and Sam the Eagle Weblog (collectively the "Relators"). Relators' internet sites are hosted Google.

Upset with Relators' commentary, PRK petitioned the district court pursuant to Rule 202 for an order compelling pre-suit discovery from Google of Relators' identities in anticipation of a lawsuit by Klein and/or PRK against Relators for copyright law violations, defamation, and invasion of privacy. After being served, Google agreed with PRK that it would respond to a subpoena duces tecum. Google gave relators notice of its receipt of the subpoena. Relators moved to quash the subpoena. And PRK responded by filing a motion to compel, which the district court granted. Relators then sought mandamus relief.

Relators argued that the district court abused its discretion by failing to comply with Rule 202. Rule 202.4(a) states:

> The court must order a deposition to be taken if, but only if, it finds that:
>
> (1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or
>
> (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure.

Tex. R. Civ. P. 202.4(a). The district court did not make either of these findings.

PRK maintained that compliance with Rule 202 was excused because of its agreement with Google. The Supreme Court disagreed finding that PRK and Google could not modify the procedures set forth in Rule 202 by an agreement that did not include Relators. Moreover, the Court concluded that Rule 202 does not permit the findings required under Rule 202 to be implied from support in the record. The Court noted that the "intrusion into otherwise private matters authorized by Rule 202 outside a lawsuit is not to be taken lightly" and agreed with a noted commentator that "judges should maintain an active oversight role to ensure that [such discovery is] not misused."

Ultimately, the Court concluded that the district court abused its discretion in failing to follow Rule 202 and, as a result, found

that Relators were entitled to mandamus relief.

Burlington N. & Santa Fe Ry. Co. v. Nat'l Union Fire Ins. Co., No. 10-0064, 2011 Tex. LEXIS 130 (Tex. February 25, 2011).

This case involves an insurance coverage dispute between Burlington Northern and Santa Fe Railway Company (BNSF) and National Union Fire Insurance Company. The dispute stemmed from an August 1995 collision at a railroad crossing between a BNSF train and an automobile. The driver of the car and one of the passengers were killed; the second passenger was injured. Survivors of the driver and deceased passenger brought suits against BNSF alleging that that an overgrowth of vegetation at the railway crossing had obstructed the driver's view and caused the collision. The plaintiffs alleged that SS Mobley, a chemical herbicide company hired by BNSF, was negligent in its failure to properly maintain the vegetation growth.

BNSF tendered defense of the case to National Union. After National Union denied that it had either a duty to defend or indemnify, BNSF filed suit seeking a declaratory judgment that National Union had both duties. BNSF and National Union filed competing motions for summary judgment and the trial court ultimately granted National Union's motion, and entered a take-nothing judgment against BNSF.

BNSF appealed and the court of appeals affirmed the trial court's decision. The court of appeals applied the eight-corners rule and determined that National Union did not have a duty to defend. It then concluded that National Union did not have a duty to indemnify because BNSF's arguments as to National Union's duty to indemnify were "based entirely on its duty to defend arguments." The court of appeals did not consider evidence extrinsic to the policy and the pleadings when reaching its decision that there was no duty to indemnify. Essentially, the court of appeals held that the pleadings and the relevant policy language negated both the duty to defend and duty to indemnify.

The Supreme Court agreed with the court of appeals that an insurer's duty to indemnify is determined based on the facts actually established in the underlying suit. The Supreme Court disagreed, however, that the underlying pleadings demonstrate that contractual provisions and other extrinsic evidence cannot possibly bring SS Mobley's vegetation control operations within the coverage provided by National Union's policy. Accordingly, the Supreme Court held that the erred by not considering all the evidence presented by the parties when it determined the question of National Union's duty to indemnify BNSF. Based on this holding, the Supreme Court reversed the court of appeals' judgment and remanded the case for further proceedings.