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Editor:

William C. Little
MehaffyWeber, P.C. – Beaumont

THE PROCEDURE FOR BRINGING AN AGREED INTERLOCUTORY APPEAL OF A CONTROLLING QUESTION OF LAW MAY NOT BE USED BY THE TRIAL COURT TO "CERTIFY" THE QUESTION TO THE COURT OF APPEALS

Gulley v. State Farm Lloyds, No. 04–11–00076–CV (Tex. App.—San Antonio May 11, 2011, no pet. h.).

This homeowner's insurance coverage dispute involved an agreed interlocutory appeal of a "controlling question of law" pursuant to Section 51.014(d) of the Texas Civil Practice & Remedies Code. The parties were disputing about which policy endorsement applied to foundation problems caused by a below-slab leak. State Farm argued it was covered under the "Dwelling Foundation Endorsement" to the policy, while the plaintiff-homeowner claimed she was entitled to additional benefits under the "Water Damage Endorsement" of the policy.

Both parties moved for summary judgment asserting that their interpretation of the policy endorsements applied as a matter of law. The trial court issued a general order denying both motions for summary judgment. The plaintiff filed a second motion for summary judgment, and State Farm filed a motion to reconsider its original motion. Again, the trial court issued a general order denying both motions.

Then, both parties filed motions to reconsider. The trial court once again denied the motions, but also authorized an agreed interlocutory appeal under section 51.014(d), finding that all three criteria outlined in the statute were satisfied.

The parties and trial court agreed in the order that the following was a "controlling question of law" to be determined on appeal: "Whether damage to walls, floors, roofs or ceilings caused solely by foundation movement resulting from a below-slab plumbing leak is covered under either the Dwelling Foundation Endorsement . . . or the Policy's Water Damage Endorsement." However, in its orders, the trial court expressly declined to answer that controlling question of law.

Based on the parties' stipulation of the controlling legal question, along with the trial court's endorsement, there were no disputed fact issues precluding summary judgment and one of the policy endorsements had to be correct as a matter of law. However, by declining to decide the issue, "the trial court failed to comply with its duty to rule on the substantive legal issue, instead opting to ask this Court to make the initial 'matter of law' decision through an agreed interlocutory appeal." In effect, the trial court sought to certify a question to the appellate court. The court of appeals "found no reported case in which section 51.014(d) was used in this manner to present an intermediate court of appeals with a 'controlling legal question' prior to the trial court making a substantive ruling on the legal issue."

The San Antonio Court of Appeals held that Section 51.014(d) was "not intended to relieve the trial court of its role in deciding substantive issues of law properly presented to it." Accordingly, the court of appeals reversed and remanded to the trial court so it could "make a substantive decision on the 'matter of law' question presented by the parties' competing summary judgment motions."

PARTY HAD RIGHT TO OFFER TESTIMONY AT HEARING ON MOTION FOR NEW TRIAL

In re M.B.D., No. 06–10–00015–CV, 2011 WL 1709895 (Tex. App.—Texarkana May 6, 2011, no pet. h.)

The Texarkana Court of Appeals held that the trial court erred by not admitting evidence at a hearing on a motion for new trial following the trial court's order concerning conservatorship and child support. The court of appeals held that "facts were alleged which, if true, would have entitled appellant mother to a new trial, and therefore the trial court was obligated to hear evidence." The court of appeals reversed and remanded for an evidentiary hearing on the mother's motion for new trial.

This case arose from ongoing litigation between a mother and father over conservatorship of their child. After several temporary hearings, the court entered an ostensibly agreed order at a final hearing naming the parents as joint managing conservators and giving the mother standard visitation rights. The mother then filed a motion for new trial asserting that her consent was given under undue influence and duress.

The trial court denied the mother's request to present expert testimony that she had experienced post-traumatic stress due to her underage sexual relationship with the father that began when she was fourteen and he was approximately twenty. The mother offered a written statement which mirrored the allegations in her affidavit filed in support of the motion for new trial. The trial court refused to admit the statement, but accepted it into the record as an offer of proof. No other testimony was presented at the hearing, although the mother requested that she be allowed to testify.

Following the hearing, the mother filed a brief in support of her motion for new trial asserting that Section 153.004 of the Texas Family Code supported her position. That section prohibits the appointment of joint managing conservators if credible evidence is presented of a history by one parent of child neglect, physical or sexual abuse against the other parent or a child. The mother pointed to the history of her underage sexual history with the father as such "credible evidence." The court of appeals found this to be a sufficient offer of proof to raise a factual issue:

This raises the question of whether the trial court was presented with credible evidence of one of the situations which would preclude appointment of joint managing conservators. Although only admitted as an offer of proof, the trial court was presented with a written statement from mother (albeit unsworn) alleging in detail a sexual relationship which amounted to sexual assault of a child as defined by the Texas Penal Code. Also, the unsworn statement admitted as an offer of proof at the new trial hearing closely mirrored the allegations and history detailed in mother's sworn affidavit, attached to the initial motion for new trial. And near the end of the new trial hearing,

mother's attorney did ask to put mother on the stand to testify. Thus, mother presented the trial court with a summary of evidence which, if developed through testimony or other admissible evidence, could have amounted to credible evidence that father had engaged in sexual assault of mother."

Because the mother's evidence raised a question of fact which, if true, would have entitled her to a new trial, the trial court was obligated to hear evidence and make a finding on that question. The trial court committed reversible error by "failing to allow the mother to testify at the motion for new trial hearing." Therefore, the judgment was reversed and the case remanded to the trial court to conduct an evidentiary hearing on the mother's motion for new trial.

FINAL JUDGMENT RENDERED WHILE CASE WAS STAYED AND INTERLOCUTORY APPEAL WAS PENDING WAS VOIDABLE, AND THE INTERLOCUTORY ORDER MERGED WITH THE FINAL JUDGMENT FOR PURPOSES OF THE APPEAL

Roccaforte v. Jefferson County, No. 09–0326, 2011 WL 1661445, 54 Tex. Sup. Ct. J. 900 (Tex. April 29, 2011)

In this case, the Supreme Court of Texas answered the question: "What happens when a party perfects an appeal of an interlocutory judgment that has not been severed from the underlying action, and that action proceeds to trial and a final judgment?"

Larry Roccaforte sued Jefferson County and Constable Jeff Greenway claiming that his wrongful termination deprived him of certain constitutional rights. The County filed a plea to the jurisdiction. The trial court indicated that it would sustain the plea and sever those claims from the underlying case, but did not do so before Roccaforte tried his claims against Greenway. After the jury returned a verdict in Roccaforte's favor, the trial court signed an order granting the County's plea to the jurisdiction but failing to sever the claims from the underlying case. Roccaforte then filed an interlocutory appeal of the order sustaining the plea to the jurisdiction. While the appeal was pending, Greenway filed a motion for JNOV which was granted in part and denied in part. Roccaforte then moved for entry of judgment, and the trial court entered a purported final judgment that contained a "Mother Hubbard" clause, and no party objected to the continuation of the trial court proceedings although the case should have been stayed while on appeal.

The Ninth Court of Appeals affirmed the order dismissing the County, not because the trial court lacked jurisdiction, but because Roccaforte failed to notify the County of the suit by registered or certified mail. The court of appeals also modified the dismissal order to reflect that dismissal was without prejudice.

Before discussing the merits of the case, the Texas Supreme Court analyzed the impact of the trial court's final judgment upon Roccaforte's interlocutory appeal. The final judgment purported to dismiss Roccaforte's claims against "all parties," including the County, despite the fact that the trial proceedings should have been stayed. "Ordinarily, under these circumstances," the Supreme Court explained, "Roccaforte would have to complain on appeal that the trial court erroneously dismissed [his] claims [against the County]. Roccaforte, however, did not complain about the County's dismissal in his appeal from the final judgment." Roccaforte also failed to object to the rendition of the final judgment

when the proceedings should have been stayed.

The Texas Supreme Court decided whether the trial court's failure to observe the stay made the final judgment void or merely voidable, and whether the interlocutory appeal had become moot. In resolving a conflict in the courts of appeals, the Supreme Court held that the final judgment was voidable. "We agree with those decisions that have held that a party may waive complaints about a trial court's actions in violation of the stay imposed by [CPRC] section 51.014(b) . . . . The trial court's rendition of final judgment while the stay was in effect was voidable, not void, and Roccaforte's failure to object to the trial court's actions waived any error related to the stay."

On the issue of whether the interloctory appeal had become moot, the Supreme Court cited Texas Rule of Appellate Procedure 27.3 and acknowledged that Roccaforte timely perfected appeals from both the interlocutory order and the final judgment. "Because the claims against the County had not been severed, the County remained a party to the underlying proceeding despite the interlocutory appeal. The final judgment necessarily replaced the interlocutory order, which merged into the judgment, even though Roccaforte's interlocutory appeal remained pending. Under our rules, however, we may treat this interlocutory appeal as an appeal from the final judgment. That permits us to reach the merits of Roccaforte's claims rather than dismiss the interlocutory appeal as moot. . . . [W]e treat Roccaforte's appellate complaints about the trial court's grant of the County's jurisdictional plea as though they related to the appeal of the final judgment."

THE TEXAS SUPREME COURT HELD THAT THE "RELATION-BACK" DOCTRINE WAS NOT NEEDED TO SUBSTITUTE A GOVERNMENTAL EMPLOYER AS A DEFENDANT AFTER LIMITATIONS HAD EXPIRED

Univ. of Texas Health Science Ctr. at San Antonio v. Bailey, 332 S.W.3d 395 (Tex. 2011).

In this case concerning Section 101.106(f) of the Texas Tort Claims Act, the Texas Supreme Court decided whether the "relation back" doctrine allowed a plaintiff who sued a government employee in his official capacity to avoid dismissal by substituting the governmental employer as a defendant after limitations has run. The Court held that the "relation-back" analysis was inapplicable because a lawsuit against a government employee in his official capacity was considered a suit against the employer.

The plaintiffs sued Dr. Albert Sanders on a health care liability claim, but did not sue Sanders' governmental employer. The plaintiffs' petition did not specify whether they were suing Sanders in his individual or official capacity. Several weeks after limitations had run, Sanders filed a motion asserting that the suit was, by law, against him in his official capacity, and requesting the trial court to order the plaintiffs to substitute Sanders' governmental employer for him as the defendant or have their case dismissed pursuant to Section 101.106(f) of the Tort Claims Act. The trial court ordered the suit against Sanders dismissed with prejudice unless the plaintiffs amended their pleadings to substitute Sanders' employer, so the plaintiffs did so.

After the employer filed its answer, the plaintiffs moved for partial summary

judgment that their amended pleading substituting the employer, filed after limitations had run, related back to their original petition filed against Sanders. The employer moved for summary judgment based on limitations and argued that the "relation-back" doctrine did not apply when adding a new party (as opposed to a new claim), and that the two-year statute of limitations for bringing a health care liability claim applied "notwithstanding any other law," including the "relation-back" doctrine.

The Supreme Court held that the "relation-back doctrine does not affect the running of limitations on a cause of action; rather, it defines what is to be included in 'the action' to which limitations applies . . . . [T]he purpose of the relation-back doctrine is to determine not when, but on what limitations runs. Because the doctrine does not impede the running of limitations on health care liability claims, it is not, under *Chilkewitz* [*v. Hyson*, 22 S.W.3d 825 (Tex.1999)], an 'other law', the application of which is forbidden."

Ultimately, the Supreme Court held that the relation-back doctrine did not apply in these circumstances, although ordinarily "an amended pleading adding a new party does not relate back to the original pleading." Instead, the plaintiffs' suit survived the limitations challenge because Section 101.106(f) did not allow them to sue Sanders in his individual capacity, even though they attempted to do so. The statute provided that, when a government employee is sued for tortious conduct within the general scope of employment, and the employer could have been sued, "the suit is considered to be against the employee in the employee's official capacity only." The Court therefore concluded, "the [plaintiffs'] suit against Sanders was, in all respects other than name, a suit against the [employer]. In requiring a government employer to be substituted on the employee's motion, the statute is silent on whether the employer may complain of prejudice from the delay in being named a party. In this case, the [employer] has made no such complaint. When the [employer] was substituted as the defendant in Sanders' place, there was no change in the real party in interest. Consequently, the [employer] cannot prevail on its defense of limitations."

THE 120-DAY DEADLINE TO SERVE EXPERT REPORT IN HEALTH CARE LIABILITY CLAIM WAS NOT EXTENDED UNDER THE "DUE DILIGENCE" DOCTRINE APPLICABLE TO SERVICE UNDER TRCP 21a OR THE OPEN COURTS PROVISION OF THE TEXAS CONSTITUTION

Stockton v. Offenbach, 2011 WL 711094, 54 Tex. Sup. Ct. J. 590 (Tex. Feb. 25, 2011).

In this appeal involving a health care liability claim, the Texas Supreme Court held that a "due-diligence" exception did not apply to extend the plaintiff's 120-day deadline to serve the required expert report after the plaintiff made diligent but unsuccessful efforts to locate and serve the defendant physician.

The plaintiff filed a health care liability claim against Dr. Howard Offenbach alleging that he committed medical negligence when delivering her son back in 1989. The plaintiff alleged that Offenbach was an addict who abused prescription drugs for many years. Offenbach subsequently lost his medical license in 2001 and may have left the State, and his whereabouts was unknown. The plaintiff made diligent attempts to try and locate Offenbach, all to no avail.

The plaintiff filed her claim on June 13, 2007, and attached an expert report to her petition. She unsuccessfully tried to serve Offenbach at his last known address, and later moved the trial court to issue citation by publication, which was finally issued on March 13, 2008. Offenbach's location was still unknown, but Offenbach's insurance carrier was put on notice and hired an attorney to defend the suit. Offenbach's attorney answered and then moved to dismiss the suit because the plaintiff did not serve an expert report within 120 days of filing suit, which in this case was on or before October 11, 2007. As such, her expert report was due almost two months before the trial court authorized service by publication and six months before service by publication was completed.

The Court explained that Section 74.351(a) of the Texas Civil Practice & Remedies Code requires that the claimant serve an expert report on each party or their attorney within 120 days of filing suit. "Several courts have interpreted the Legislature's use of the word 'serve' to require compliance with Texas Rule of Civil Procedure 21a." The plaintiff argued that, if Chapter 74 incorporates the service requirements of Rule 21a, it should also incorporate the "due diligence" doctrine. That doctrine provides that a plaintiff who "files a petition within the limitations period but does not complete service until after the statutory period has expired, is entitled to have the date of service relate back to the date of filing, if the plaintiff has exercised diligence in effecting service." Here, the Supreme Court held that, "even assuming that a due diligence exception applies to service completed after Chapter 74's expert report deadline, we are not persuaded that the evidence here is legally sufficient to raise the issue."

In deciding the "due diligence" argument against the plaintiff, the Court noted that forty days went by after the suit was filed until she filed a motion for substituted service. Then, almost four more months of inactivity passed before the plaintiff filed an amended motion for substituted service. Only after several more months did the citation for substituted service finally issue. Furthermore, during all this time, the plaintiff did not notify the trial court of any sense of urgency in issuing the citation for substituted service.

The Court also rejected the plaintiff's open courts challenge in which she argued that the expert report deadline was unconstitutional, as applied to her. "The open courts provision prohibits the Legislature from making 'a remedy by due course of law contingent upon an impossible condition.' . . . But to claim an open court's violation, the person must raise 'a fact issue establishing that he did not have a reasonable opportunity' to be heard. . . . And '[a] plaintiff may not obtain relief under the open courts provision if he does not use due diligence.'" Here, the Supreme Court's "analysis of [the plaintiff's] due diligence issue accordingly forecloses her related open courts challenge."

QUESTIONS ABOUT A PARTY'S SEXUAL HISTORY SHOULD HAVE BEEN ALLOWED ON VOIR DIRE

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

In this appeal from a civil commitment proceeding, the Texas Supreme Court held that the trial court committed reversible error by refusing to allow two permissible lines of questioning and not giving the party adequate "latitude to intelligently use its

peremptory challenges to seat a jury that, to the greatest extent possible, is free from bias." The underlying proceeding was brought by the State to commit Seth Hill under state law that provided for the civil commitment of certain violent sexual offenders. There was evidence that Hill had a history of both heterosexual and homosexual tendencies, and the State's expert testified that this history was evidence of "instability" and a personality disorder.

During voir dire, Hill's attorney inquired, without objection, whether potential jurors could be fair to a person they believed to be a homosexual. Several stated that they could not do so. The trial judge then instructed Hill's attorney to terminate that line of questioning. Hill's attorney then tried to ask the panel whether they would convict Hill based solely on evidence that he had committed two or more violent sexual offenses, or would they also require the State to prove that Hill had a behavioral abnormality predisposing him to commit such acts. The trial court sustained the State's objection to this line of questioning as improperly attempting to commit the jury.

The Supreme Court explained: "Litigants have the right to question potential jurors to discover biases and to properly use peremptory challenges. . . . This right is 'constrained by reasonable trial court control.' . . . However, the proper discretion inquiry turns on the propriety of the question: 'a court abuses its discretion when its denial of the right to ask a proper question prevents determination of whether grounds exist to challenge for cause or denies intelligent use of peremptory challenges.' . . . A party preserves error by a timely request that makes clear – by words or context – the grounds for the request and by obtaining a ruling on that request, whether express or implicit." (citing Tex. R. App. P. 33.1).

As to the first line of questioning, the Court held that Hill's "sexual history was part of the State's proof of his alleged behavioral abnormality, yet the trial court refused questioning that went to the potential jurors' ability to give him a fair trial. This prevented Hill from discovering the potential jurors' biases so as to strike them for cause or intelligently use peremptory challenges." Hill preserved error because he asked proper questions, making clear why the questions were needed, and the negative answers from several prospective jurors before the trial court suspended that line of questioning established "both the propriety of the question and the trial court's abuse in denying Hill the right to ask it."

As for the second line of questioning, the trial court held that they were improper commitment questions. "This ruling was incorrect, however, because the 'commitment' that the potential jurors were asked to make was legislatively mandated: they were asked whether they would require the state to prove both elements of a conjunctive statute. . . . Jurors swear an oath to render 'a true verdict . . . according to the law . . . and to the evidence." Tex. R. Civ. P. 236. Implicit in that oath is a commitment to follow the law the Legislature enacted, and a party participating in jury selection may solicit from potential jurors that promise, essential to the empaneling of a fair jury." Thus, the Supreme Court held that the trial court abused its discretion by refusing that line of questioning, and Hill preserved error by asking a proper question and obtaining a ruling.