

Supreme Court of Texas
August 30, 2013

Moncrief Oil International Inc. v. OAO Gazprom

No. 11-0195

Case Summary written by Jamie Vaughan, Staff Member.

Justice Guzman delivered the opinion of the Court.

Plaintiff, a Texas oil company, sued Russian defendant oil company for misappropriation of trade secrets and tortious interference. The two companies had had several meetings (two of which took place in Texas, where the plaintiff supplied the defendant with its trade secrets), and they had entered into contracts regarding a Russian oil field. The defendant then allegedly interfered with the plaintiff's relationship with a California company by communicating with that company and by establishing a competing company in Texas. The lower courts granted the defendant's special appearance, finding that the Texas meetings were "merely random or fortuitous" and that the defendant's activities in Texas were not sufficiently related to the tortious interference claim to establish minimum contacts.

Issue: Did the Texas courts have personal jurisdiction over the non-resident oil company, when the alleged misappropriation of trade secrets occurred at Texas meetings, but the defendants claimed their subjective intent at those meetings was to discuss an unrelated matter?

Applying a minimum contacts analysis to each claim, the Court held that it had specific jurisdiction over the trade secret claim, reasoning that the defendant's subjective intentions at the Texas meetings were irrelevant as it intended to purposely avail itself of the benefits and protections of doing business in the state. However, it held that the defendant did not have minimum contacts in Texas for purposes of the tortious interference claim, because that claim did not arise from the defendant's activity within the forum. The Court held that the defendant's allegedly tortious activity outside of Texas was insufficient, but it also held that the defendant's establishment of a Texas business was not sufficient. The Texas Supreme Court therefore affirmed in part and remanded in part.

***In re Toyota Motor Sales, U.S.A., Inc. and Viscount Properties II, L.P.,
D/B/A Hoy Fox Toyota/Lexus, Relators***

No. 10-0933

Case Summary written by Mayra Varela, Staff Member.

Chief Justice Jefferson delivered the opinion of the Court.

In a suit against Toyota, the Kings claimed that a defective seatbelt caused their family member's death. The Kings filed a motion in limine to preclude any witness testimony from Toyota that suggested that the deceased was not wearing a seatbelt at the time of the accident. During trial, the Kings' attorney accidentally introduced testimony which he specifically sought to preclude via the motion in limine. Toyota's attorney argued that because opposing counsel introduced the testimony himself, the testimony was part of the record; therefore, Toyota could use the testimony in its argument. The jury returned a verdict for Toyota. However, the judge granted the Kings a new trial. Toyota sought mandamus relief from the court of appeals. The court denied Toyota relief and declined to review the merits of the case, stating that the trial court's decision was sufficient in form to satisfy the *In re Columbia* test. Toyota then filed a writ of mandamus with The Supreme Court of Texas.

The issue presented is whether an appellate court may review the correctness of the trial court's stated reasons for granting a new trial if the trial court's order facially comports with *Columbia* and *United Scaffolding*.

The Court held that an appellate court may conduct a merits review of the bases for a new trial order after a trial court has set aside a jury verdict. If the record does not support the trial court's rationale for ordering a new trial, the appellate court may grant mandamus relief. Here, the record conflicted with the trial court's reasons for granting a new trial. Thus, the Court granted mandamus relief to Toyota.

Lehrmann, J., Concurring

In his concurrence, Justice Lehrmann agrees that the trial court abused its discretion and that the purpose of the court's decision is to safeguard an individual's right to a trial by jury. However, he emphasizes the importance of giving significant deference to trial courts. He states that because appellate courts are confined to the details found in the record, trial courts are likely more aware of all of the aspects of a case than an appellate court. Further, Justice Lehrmann adds that trial courts are better able to detect a prejudicial effect based on their observations of the juror's reactions to evidence that is improperly admitted by attorneys. For such reasons, the deference given to the trial courts must not be undermined.

The Episcopal Dioceses of Fort Worth v. The Episcopal Church

No. 11-0265

Case Summary written by Megan Kateff, Staff Member.

Justice Johnson delivered the opinion of the Court, joined by Justices Hecht, Green, and Guzman, and in Parts I, II, III, and IV-A of which Chief Justice Jefferson joined.

The Episcopal Dioceses of Fort Worth (EDFW) is a subsidiary faction, or “second tier,” of The Episcopal Church. EDFW was created after the Episcopal Diocese of Dallas was divided into two different factions. EDFW’s property was to be vested in the “Corporation of the Episcopal Diocese of Fort Worth.” When doctrinal controversy arose within The Episcopal Church, EDFW voted to withdraw and join instead with the Anglican Province of the Southern Cone. The Episcopal Church accepted the renunciation and elected a new bishop and chairperson for EDFW. The Episcopal Church later filed suit against EDFW for title to and possession of the property held by the Corporation of EDFW.

The main issue addressed in this case was whether to apply the “deference” or “identity” methodology, under which neutral principles of law are used to determine where authority has been designated within a religious organization and then deference is given to the decision made, if any, by that authority, or the “neutral principles of law” methodology, under which deference is given to the decisions of the religious organization on ecclesiastical issues, but non-ecclesiastical issues are decided based on secular law.

The Court held that the trial court erred in applying the deference methodology. The case was remanded, though, to be evaluated under the neutral principles of law methodology, given that fact issues still remained (under this methodology, property ownership must be determined by evidence such as deeds and relevant provisions and documents). The constitutionality of the application of the neutral principles of law methodology will necessarily depend on how the methodology is applied on remand.

Willet, J., Dissenting, joined by Justices Lehrmann, Boyd, and Devine

The dissent argues that the Court lacked the jurisdiction to hear this direct-appeal because direct-appeal jurisdiction would only be proper if the trial court explicitly granted its injunction based on the *constitutionality* of a state statute. Not only did the trial court not make any mention of constitutionality in its order, but when the defendants requested that the order be amended to note that the Court had held a statute unconstitutional, it declined to do so. Historically, the Court has only sparingly exercised direct-appeal jurisdiction and the dissent argues that the Court improperly did so here.

Masterson v. Dioceses of Northwest Texas

No. 11-0332

Case Summary written by Matt Mckee, Staff Member.

Justice Johnson delivered the opinion of the Court, in which Justices Hecht, Green, Guzman, and Devine joined, and in parts I, II, III-A, and V of which Justices Willett and Boyd joined.

In 1961, several individuals purchased a tract of land and donated it to the Northwest Texas Episcopal Board of Trustees (TEC) for the purpose of establishing a Mission Church. In 1965, the Diocese approved construction for a church under the name The Episcopal Church of the Good Shepard (Church). Church continued to acquire property and buildings, and in 1974 applied for parish status, incorporating under the Texas Non-Profit Act. Church subsequently acquired two additional parcels of land by warranty deed.

On November 12, 2006, citing doctrinal differences between Church and TEC, Church's members held a meeting to discuss disassociating with TEC. Two factions of parishioners developed, one of which remaining loyal to TEC. The non-loyal faction won the vote and accordingly disassociated from TEC. TEC sought a declaratory judgment to determine its property rights and to quiet title to the property involved in the case.

The trial court granted TEC's motion for summary judgment, holding that the attempt to withdraw from TEC was void and quieting title in TEC. The trial court was affirmed on appeal.

The Texas Supreme Court subsequently determined the main question was whether the issues before the Court were of a secular or an ecclesiastical nature, noting it has no jurisdiction to adjudicate questions of an ecclesiastical nature. The Court additionally noted that neutral principles of law should determine secular questions.

Finding TEC's pleadings and motions insufficient to support summary judgment because they were based on the presumption that all questions were of an ecclesiastical nature, the Court remanded the case to trial. Anticipating several arguments that will presumably be raised on remand, the Court noted that a corporation's articles of incorporation and bylaws are of a secular nature and should be determined by neutral principles of law. The Court additionally noted that, while identifying which faction of parishioners TEC would retain is an ecclesiastical decision, property rights being allocated between these factions is secular.

Boyd, J. Concurring, joined by Justice Willett

Recognizing the validity of both the majority and dissenting opinions, Justice Boyd's concurring opinion discussed the premature nature of the

decision, opining that the Court should have given both parties more time to develop the arguments within their motions.

Lehrmann, J. Dissenting, joined by Chief Justice Jefferson

In his dissenting opinion, Justice Lehrmann agreed that neutral principles should be applied to questions of a secular nature; however, he believed the questions raised before the Court were of an ecclesiastical nature.

Elizondo v. Krist

No. 11-0438

Case Summary written by Leonardo De La Garza, Staff Member.

Justice Willett delivered the opinion of the Court, joined by Chief Justice Jefferson and Justices Green, Johnson, Guzman, and Devine. Justice Hecht did not participate in the decision.

Elizondo (refinery worker), who suffered injuries caused by an explosion at the BP-owned Texas City refinery, retained respondents (attorneys) to seek a settlement from BP. After demanding a \$2 million dollar settlement, BP offered to settle for just \$50,000 and respondents could not obtain a larger settlement. Elizondo accepted the offer, but brought legal malpractice claims against respondents, to which respondents filed several motions for summary judgment. Elizondo submitted an expert affidavit of attorney Arturo Gonzalez.

Issue 1: Did the Gonzalez affidavit raise a genuine issue of material fact on malpractice damages?

The Court concluded that the affidavit did not raise a genuine issue of material fact sufficient to defeat summary judgment because the affidavit was merely conclusory, suffered from a fatal gap in analysis, and relied on nothing more than the bare assertion of the expert.

The Court likens the Gonzalez affidavit to the affidavit at issue in *Burrow v. Arce*, finding a lack of demonstrable and reasoned basis on which to evaluate its opinion that the settlement was inadequate beyond the word of the expert.

Issue 2: Should the lawyers have been estopped from prevailing on the grounds that the Gonzalez affidavit was inadequate when the lawyers also objected to discovery of information regarding other BP settlements?

The Court answered, no. First, the Court points to a confidentiality provision prohibiting the respondents, and the petitioners' expert, from disclosing details of settlements to third parties. Secondly, petitioners, if they relied on the settlement data, should have requested the trial court's deferral of ruling on summary judgment until receiving this data. But, petitioners

demonstrated that they did not need the settlement data for their expert witness.

Issue 3: Did the petitioner's own deposition testimony raise a genuine issue of material fact on malpractice damages?

The Court answered, no. The Court found that to establish malpractice damages requires an analysis of settlements made under comparable circumstances. That determination, in turn, required expert testimony. Therefore, the petitioner's own testimony is insufficient to preclude summary judgment.

Boyd, J., Dissenting, joined by Justice Lehrmann

Boyd argues that the majority's standard, requiring Elizondo to submit evidence that result obtained for the client was less than the result that would have been obtained with competent counsel, was too strict. Gonzalez's opinion that Elizondo's claims had merit but were settled as if lacking merit was supported by a recitation of facts, and *Burrows* was distinguishable. Therefore, Bod would hold that Gonzalez's affidavit constitutes competent evidence sufficient to defeat summary judgment.

Dynegy, Inc. v. Yates

No. 11-0541

Case Summary written by Jamie Vaughan, Staff Member.

Justice Green delivered the opinion of the Court, joined by Chief Justice Jefferson, and Justices Hecht, Johnson, Willett, Lehrmann, and Boyd.

Olis, a former Dynegy officer, was indicted on multiple counts of fraud, and the company's directors authorized the company to pay for Olis's attorneys' fees on the condition that Olis act in good faith. Olis hired attorney Yates and signed an agreement saying he was responsible for the payment of his fees. Olis told Yates that Dynegy would pay his fees and a board member orally confirmed the promise. Yates later tried to bill Dynegy for subsequent work, but Dynegy refused to pay the fees because they found Olis did not act in good faith. The lower court applied the main purpose doctrine as an exception to Dynegy's statute of frauds defense and ruled in favor of Yates.

Issue: Did the main purpose doctrine make Dynegy's oral promise to pay for Olis's attorney's fees binding, despite the statute of frauds?

The Court reversed and entered a take-nothing judgment in favor of Dynegy, holding that the oral agreement was unenforceable under the suretyship provision the statute of frauds, which states that a promise to answer for the debts of another needs to be in writing. The Court reasoned that Dynegy met its burden by showing that the affirmative defense of

statute of frauds applied because the suretyship provision applies to past debts of another and debts to be incurred in the future. The Court further determined that the main purpose exception did not apply because, by failing to raise the issue, Yates had waived it. Finally, the Court determined that Yates' alternative argument of fraudulent inducement was barred because his primary claim was barred by the statute of frauds.

Devine, J., Dissenting

Justice Devine argued that the Statute of Frauds' suretyship provision was meant to apply to promises to pay for *past* debts of another that the other has failed to pay, not promises to pay for fees yet to be incurred. Because Dynegy assumed the role of primary obligor through its oral promise, Dynegy should be ordered to pay the debt it promised to pay, because the main purpose doctrine does not apply, and Dynegy should not be able to use the Statute of Frauds to work a fraud.

Geoffrey Dugger v. Mary Ann Arredondo, Individually and as Representative of the Estate of Joel Martinez, Deceased, Respondents

No. 11-0549

Case Summary Written by Mayra Varela, Staff Member.

Justice Green delivered the opinion of the Court, joined by Chief Justice Jefferson and Justices Johnson, Guzman, Lehrmann, and Boyd.

Arredondo filed a wrongful death suit against Dugger on behalf of her deceased son. Arredondo's son and Dugger had both ingested heroine. Arredondo alleged that Dugger's failure to immediately call 911 and failure to disclose the deceased's use of heroine to the paramedics was negligent conduct. Dugger asserted the common law unlawful acts doctrine as an affirmative defense, which Dugger claimed applied to both personal injury claims and wrongful death claims even if all of the statutory elements were not satisfied. Arredondo argued that such doctrine conflicted with the statutory language found in Tex. Civ. Prac. & Rem. Code 93.001 and with the proportional responsibility scheme found in Chapter 33. The trial court granted summary judgment in favor of Dugger. The court of appeals reversed.

The Supreme Court affirmed the court of appeals decision and held that the common law unlawful acts doctrine is not available as an affirmative defense in personal injury and wrongful death cases because it was abrogated under Ch. 33's proportionate responsibility scheme. The Court also held that although Dugger's illegal conduct did not fall under the affirmative defense language under Tex. Civ. Prac. & Rem. Code 93.001, his share of responsibility for his injuries should be compared against the defendant's.

Hecht, J., Dissenting, joined by Justices Willett and Devine

In his dissent, Justice Hecht argues that Chapter 33 and section 93.001 do not abrogate the common law unlawful acts doctrine. Chapter 33 bars tort actions, not felonies. The majority confuses a felony with tortious conduct, thus rewarding criminals for their acts. Because Arredondo's son engaged in the unlawful act himself, he should not be entitled to damages because such holding rewards criminals for their conduct. Further, nothing in section 93.001 bars the unlawful acts doctrine. Justice Hecht argues that the majority read more into the statute that will negatively impact Texas law because it has long been the law that one with unclean hands cannot file suit for damages. Further, from a policy standpoint, "to award any damages lessens the law's prohibition against the use of heroine."

City of Lorena v. BMTP Holdings

No. 11-0554

Case Summary written by Tiffany A. Adcox, Staff Member.

Justice Guzman delivered the opinion of the Court, joined by Justices Green, Johnson, Willett, Lehrmann, Boyd, and Devine.

Chapter 212 of the Local Government Code allows municipalities to enact temporary moratoria to assist in ensuring public facilities are available to residents. This, however, can only be done if the municipalities can "demonstrate the moratoria are needed to prevent shortage of essential public facilities." One limitation to this right is the municipality must include in the moratorium "a summary of evidence showing that it is limited to property that has not been approved for development," with development being defined by the statute as including subdivision or construction. After approving a subdivision plat, the City of Lorena enforced a moratorium against the property "citing the additional sewage system capacity requirements." The owner of the property (BMTP) sued the City of Lorena "for declaratory judgment that the moratorium did not apply against its approved development and for damages arising from a regulatory taking under an inverse condemnation claim." The trial court ruled in favor of the municipality and also awarded attorney's fees. The court of appeals reversed holding the property's approval occurred prior to the moratorium taking effect and, therefore, did not apply to the property in question.

Issue: Are previously approved developments subject to subsequent moratoriums?

The Court affirmed the court of appeals, holding that the "moratorium cannot apply to the property because the municipality approved the property for subdivision before it enacted the moratorium, and the owner is therefore

entitled to prevail on its declaratory judgment claim.” The Court interpreted the plain meaning of TEX. LOC. GOV’T CODE §§ 212.133, 212.135 as prohibiting the moratorium from affecting approved development. Therefore, the moratorium was in conflict with the statutes (TEX. LOC. GOV’T CODE §§ 212.133, 212.135), resulting in the moratorium being ruled invalid. The Court further clarified TEX. LOC. GOV’T CODE § 212.133(3) by holding “the City may not enforce a moratorium on property it previously approved for subdivision or construction.” The Court remanded the inverse condemnation claim to the trial court in order to resolve factual disputes regarding the interference with the owner’s use and enjoyment of its property before it was subject to being judicially addressed. Lastly, the Court remanded the issue of attorney’s fees to the trial court in order for the trial court to determine whether the equitable and just nature of its award remained intact.

Lehrmann, J., Concurring

Justice Lehrmann agreed with the majority opinion in its interpretation of the plain meaning of the statute. Lehrmann, however, also agrees with the dissenting opinion assertion that preventing the moratorium from being applied to previously approved developments hinders the sole purpose of the moratorium, which is to prevent a shortage of essential public facilities. With the plain meaning leaving little in the way of alternative interpretation, Justice Lehrmann finds that this limitation should only result in Cities acting with additional caution when considering whether or not to approve permits authorizing developments at the onset.

Hecht, J., Dissenting, joined by Chief Justice Jefferson

Justice Hecht argued the majority opinion misinterpreted the statute, that this misinterpretation ultimately renders municipalities unable to solve problems, and that TEX. LOC. GOV’T CODE § 212.135(b)(2)(A) validates the moratorium. The dissenting opinion argues the majority opinion “reads out” (A) of the statute, making (B) the sole requirement to be met within the statute. The dissent reads the statute as not stating when the moratorium may be issued, but how it is to be issued and, therefore, find that TEX. LOC. GOV’T CODE §§ 212.133, 212.135 do not “prohibit cities from halting development, whether previously approved or not, to ensure public services for residents”

Texas Adjutant General's Office v. Ngakoue

No. 11-0686

Case Summary written by Brittany Greger, Staff Member

Justice Lehrmann delivered the opinion of the Court

Michele Ngakoue sued Frank Barnum, an employee of the Texas Adjutant General's Office, for damages resulting from an automobile accident caused by Barnum's negligence. Acting under section 101.106(f) of the Texas Civil Practice and Remedies Code, Barnum filed a motion to dismiss himself from the suit. The section allows for an employee of a governmental entity to file a motion to dismiss himself from a suit if it was filed against the employee in his official capacity. The suit would be dismissed unless the plaintiff amends his pleadings to dismiss the employee and name the governmental entity as the defendant. Ngakoue did so, but failed to request Barnum's dismissal in the body of the document. In the amended petition, Ngakoue argued that the Texas Adjutant General's Office [TAGO]'s sovereign immunity was waived by the Texas Tort Claims Act [TTCA] "because the claim arose 'from the negligent acts and omissions of [Barnum] while [Barnum] was acting the course and scope of his employment by [TAGO].'" TAGO then filed a motion to dismiss both Barnum and TAGO and a plea to the jurisdiction based on Ngakoue's failure to request Barnum's dismissal in his amended pleading. TAGO based its motion on §101.106(b), which provides, "The filing of a suit against an employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents." The trial court denied the motion, and TAGO and Barnum appealed. The appellate court reversed the trial court's order denying Barnum's motion to dismiss; however, the Court affirmed the order denying TAGO's plea to the jurisdiction. The Court held that even though Ngakoue did fail to comply with subsection (f), that failure had no effect on subsection (b). They also held that since the suit fell within the waiver of immunity of the TTCA (because the suit arose from Barnum's use of a motor vehicle) it is not barred by subsection (b).

Issue: Does subsection (b)'s bar preventing suits previously filed against governmental employees from subsequently being filed against the governmental unit apply where the governmental employee could have been sued in his official capacity?

In order to reach its opinion, the Court analyzed subsections (b) and (f). It held that subsection (b) does not apply in this case. Subsection (f) provides that "[i]f a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and it could have been brought under this chapter [the TTCA] against the governmental unit, the suit is considered to be against the employee in the employee's

official capacity only.” The Court has held previously that a suit against a state official is “merely ‘another way of pleading an action against the entity of which [the official] is an agent.’” The suit is essentially a suit against the entity itself. Therefore, the Court held, “a suit against a government employee acting within the scope of employment that could have been brought under the TTCA—meaning the plaintiff had a tort claim to assert against the government—is considered to have been brought against the governmental unit, *not* the employee.” Subsection (b)’s bar would not trigger because the initial suit filed against Barnum is considered to have been filed against TAGO.

Boyd, J., Dissenting

The dissent argued that since Ngakoue did not comply with the requirements of subsection (f) and dismiss Barnum in the amended pleadings, the suit is barred under subsection (b). Subsection (f) provides an exception to subsection (b), but only if the requirements of subsection (f) are met. Dissent further argued that the “consent” exception under TTCA does not apply in this case. Justice Boyd reasoned that consent via statutory waiver of immunity could only come from a waiver under a statute other than the TTCA. He reaches this conclusion because claims brought under TTCA are subject to subsection (f). Any other construction would render subsection (b) meaningless. Additionally, dissent also believes that under the statute, “a suit against a government employee based on conduct within the scope of employment is still a suit against a government employee.” He believes that the Court rewrites subsection (f) by holding that a suit against a government employee is actually a suit against the governmental unit.

Zanchi v. Lane

No. 11-0826

Case Summary written by Renee Polchinski, Staff Member.

Justice Lehrmann delivered the opinion of the Court.

The plaintiff filed suit individually and as a representative of Juameka Ross’s estate under the Texas Medical Liability Act (TMLA). He alleged that Ross’s death was due to the medical negligence of the defendant, Michael Zanchi, who was the anesthesiologist during Ross’s splenectomy. The lawsuit was filed on April 21, 2010 and the defendant was not served with process until September 16, 2010, due to, according to the plaintiff, the defendant’s evasion of service. On August 19, 2010, the statutory deadline for serving the expert report under the Texas Civil Practice and Remedies Code (the Code), the plaintiff mailed the expert report by certified mail and the report sent to Paris Regional Medical Center was signed by someone named Chuey Potter (NFI). The defendant is contending that the expert report was not timely

served, because the defendant was served with the report before the defendant was served process in the underlying lawsuit.

Issues: (1) Whether a claimant asserting a health care liability claim (HCLC) complies with section 74.351(a)'s mandate to serve an expert report on a "party" by serving the report on a defendant who has not yet been served with process; (2) whether service of an expert report on a defendant who has not been served with process has to comply with the service-of-citation requirements under Texas Rule of Civil Procedure 106.

The Court stated that this is a case of statutory interpretation and resolved that under the TMLA, the defendant was a "party" and thus the expert report was timely served. In making this determination, the Court first stated that the term is not defined in the TMLA, but that the TMLA requires that terms not defined explicitly be defined in line with the common law interpretations. Based on that, the Court defined party as one who is named in the lawsuit, because the Court's holdings have tacitly recognized that one can be a party to a legal proceeding even though he has not been served with process. Additionally, the Court addressed the differences between the definition of party for purposes of being served an expert report and for purposes of personal jurisdiction and stated that there are due process concerns in regards to the latter and not the former and thus this definition best effectuates the purposes of the TMLA.

After resolving the definitional problem, the Court turned to the implications of the decision based on the Code's requirement that a defendant in a TMLA suit file any objection to an expert report no later than the twenty-first day after service. The defendant argued that in defining party as one named in a suit could force a defendant to file his objection, before he is brought under the Court's jurisdiction. The Court held that this objection provision is not implicated until the defendant is served with process thereby alleviating that issue. That being said, the defendant could have objected to the report within twenty-one days of being served, but he did not, so he lost the opportunity.

In addressing the second issue, the Court stated that Rule 106 solely applied to service of citation and had the Legislature intended otherwise, it could have written that into the Rule but did not. Thus service of an expert report does not have to comport with Rule 106's requirement.

Based on these findings, the Court affirmed the judgment of the court of appeals.

Hecht, J., Concurring

Justice Hecht stated that while the correct result was reached the Court relied on an abstract meaning of the word party and should have based this result on the legislative purpose behind the expert report requirement. The purpose being to identify and eliminate frivolous claims, and this intent

would not be met if the Court construed party to mean one served, because then claims would not be dismissed because they were frivolous but instead because the defendant is hard to find.

Liberty Mutual Ins. Co. v. Adcock

No. 11-0934

Case Summary written by Brittany Weaver, Staff Member.

Justice Guzman delivered the opinion of the Court, in which Justices Johnson, Willett, Lehrmann, Boyd and Devine joined.

Ricky Adcock suffered permanent loss of use in his right hand at the wrist and right foot. Subsequently, Adcock received lifetime income benefits (LIBs). Liberty Mutual, over a decade later, sought to contest Adcock's eligibility for LIBs based on the belief Adcock may have regained use of the extremities.

Issue: Whether the Court could, under agency deference, engraft into the Texas Workers' Compensation Act a statutory procedure to re-open determinations of eligibility for permanent lifetime income benefits—a procedure the Legislature removed in 1989.

The Court held that the Legislature's choice was clear and it was not in their providence to override that determination. First, the Court looked at the plain language of TEX. LAB. CODE § 408.161, which mandated LIBs continue until the employee's death. Second, the Court looked at the comprehensive benefits scheme of the Act. Since the Legislature specifically chose to remove the authority to re-open the permanent LIB determination as a part of its reforms, the Court held they must credit that choice. In addition, when the Legislature expresses intent regarding a subject in one setting, as it did here with temporary and supplemental income benefits, but remains silent on that subject in another, LIBs, the Court generally abides by the rule that such silence is intentional. The Texas Supreme Court therefore affirmed the judgment of the court of appeals.

Green, J., Dissenting, joined by Chief Justice Jefferson and Justice Hecht

The dissent argued that: (1) the Act's general definition of "impairment" implies a procedure to re-open the LIB determination; (2) the Act gives implied authority to the agency to re-open the LIB determination because a procedure exists for contesting a claimant's current eligibility to benefits; (3) the Court's holding in *American Zurich Insurance Co. v. Samudio*, 370 S.W.3d 363 (Tex. 2012), requires the Court to allow the agency to re-open LIB determinations; and (4) it is impossible for the agency or anyone to know if a loss will be total and permanent, so the agency should be able to re-open and consider continuing LIBs.

Canutillo I.S.D. v. Farran

No. 12-0601

Case Summary written by Sam Hock, Staff Member.

Per Curiam.

Farran, formerly employed by Canutillo I.S.D., sued the District for violation of the Texas Whistleblower Act and for breach of his employment contract after he was fired. Upon reporting to District officials and the school board that he had witnessed an independent contractor violating city regulations governing proper waste disposal, among other indiscretions, Farran was warned that continued accusations could lead to his termination. Farran then contacted the FBI to report the contractor's violations. Farran was fired. The court of appeals held that the trial court erred in granting the District's plea to jurisdiction in relation to Farran's claim that he was fired in violation of the Whistleblower Act.

Issue: First, were Farran's reports to District officials in good faith to a "law enforcement authority" under the Whistleblower Act? Second, did Farran's FBI report lead to his termination, thus establishing an actionable claim under the Whistleblower Act? Third, if a breach of contract claim is based on a violation of the Whistleblower Act, is an exhaustion of administrative remedies with the Commissioner of Education necessary before pursuing statutory remedies?

The Court held that Farran's complaints to the District were not in good-faith because the officials had no authority to enforce the laws that were allegedly being violated by the contractor. Thus, these internal complaints were jurisdictionally insufficient under the Whistleblower Act. Second, the Court concluded that Farran's report to the FBI was not reasonably an influence on the District's decision to fire Farran because he received a warning concerning his possible termination prior to contacting the FBI.

Consequently, Farran failed to establish a valid Whistleblower Act claim. Lastly, the Court held that, because he did not have a cognizable Whistleblower Act claim, Farran was required to first exhaust administrative remedies for his breach of contract claim. In sum, the Court concluded the trial court properly granted the District's plea to the jurisdiction and dismissed the case.

Nathan v. Whittington

No. 12-0628

Case Summary written by Parker Pritchett, Staff Member.

Per Curiam.

Initially, Stephen Whittington, respondent, filed suit in Nevada against his former business partner, Evan Baergen, and prevailed. In May 2008, Whittington filed a second suit against both Baergen and petitioner, Marc Nathan, in order to collect on the judgment. In that second suit, Whittington claimed Baergen fraudulently transferred assets to Nathan in May 2004, violating the Nevada Uniform Fraudulent Transfer Act (Nevada UFTA). In November 2008, the Nevada court dismissed Whittington's claims for lack of personal jurisdiction. Soon after, in January 2009, Whittington filed this suit in Texas, alleging that Baergen made fraudulent transfers to Nathan in violation of the Texas UFTA (TUFTA). The trial court granted Nathan's motion for summary judgment on the basis that "TUFTA's four-year statute of repose [Texas Business & Commerce Code § 24.010(a)(1)] extinguished Whittington's claim."

On Whittington's appeal, the court of appeals reversed and remanded, holding that § 16.064(a) of the Texas Civil Practices & Remedies Code "suspended the expiration of TUFTA's statute of repose and allowed Whittington to file this new suit within sixty days" after the Nevada court's dismissal. The Texas Supreme Court reviewed the trial court's summary judgment de novo.

The issue is "whether a statute that 'suspends the running' of a 'statute of limitations' applies to a statute of repose that otherwise 'extinguishes' the plaintiff's cause of action."

The Court held "that the suspension statute does not apply to a statute of repose", reversing the court of appeals and reinstating the trial court's summary judgment. Both parties and the court of appeals agreed that 24.010, the "Extinguishment of Cause of Action" section of TUFTA, is a statute of repose, not a statute of limitations. "[W]hile statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time." *Methodist Healthcare Sys. Of San Antonio, Ltd. v. Rankin*, 307 S.W.3d 283, 287 (Tex. 2010) (quoting *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 866 (Tex. 2009)). Statutes of repose are absolute, abolish any uncertainty in regards to the related statute of limitations, and create a final deadline for filing suit. The Court reviewed independently whether § 24.010 is a statute of limitations or repose.

After reviewing the construction of the statute by other states having adopted the uniform UFTA, the Court found a lack of uniformity and instead considered the "comments of the National Conference of Commissioners on

Uniform State Laws, which promulgated the model UFTA.” Despite the Commissioners’ comments referring to the UFTA’s equivalent statute as a statute of limitations, the Court held that the comments, and the actual language of TUFTA § 24.010, pointed towards the statute being a statute of repose. The Court explains, “By its own terms the provision does not just procedurally bar an untimely claim, it substantively “extinguishes” the cause of action.” The Court continues to explain that “applying [§] 16.064 to TUFTA’s statute of repose would raise the . . . concern [that] because a trial court may dismiss a case for lack of jurisdiction long after the statute of repose extinguishes the cause of action, application of [§] 16.064 would frustrate the certainty that the statute of repose provides.”

Acknowledging the hardship TUFTA’s statute of repose may cause Whittington, the Court explained that the Legislature balanced any hardship caused with “the benefits of the certainty that a statute of repose provides by extinguishing claims upon a specific deadline.” Finally, because § 24.020 is a statute of repose and not a statute of limitations, § 16.064 does not apply and cannot revive Whittington’s claim.