

Texas Supreme Court Issues Opinions Regarding Forum-Selection Clauses, Landowner Liability, Personal Jurisdiction, Arbitration, Class Certification, Medical Malpractice, and References to Illegal Immigration Status In Trial

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Winstead News Alert

I. Texas Supreme Court Enforces Forum-Selection Clauses

A. A Court Should Enforce A Forum-Selection Clause Contained In One Of Many Documents That Evidence A Transaction.

In *In re Laibe Corporation*, there was a dispute over a drilling rig sold in Wise County, Texas. No. 09-0426, 2010 Tex. LEXIS 280 (Tex. March 26, 2010). The parties' first agreement was a mere invoice that did not contain a forum-selection clause. Later, the parties signed another agreement that contained a forum-selection clause naming Indiana as the chosen jurisdiction for litigation and a merger clause that stated that "[t]his Contract is the entire agreement" of the parties and "no other oral or written agreements, terms, or promises" shall be binding. *Id.* The defendant filed a motion to dismiss based on the forum-selection clause. The district court denied the motion to dismiss.

The Texas Supreme Court granted mandamus relief to the defendant because the later agreement contained a standard merger clause and was the controlling agreement: "[t]he merger clause thus indicates that the invoice on which [plaintiff] relies is not the final and binding agreement of the parties." *Id.* Moreover, the Court acknowledged that a contract can consist of more than one document, and therefore, a forum-selection clause in the second document would still control.

The Court also disagreed with the plaintiff's argument that enforcing the forum-selection clause would cause serious inconvenience. The Court declines: "to enforce a forum-selection clause against a party only if the inconvenience it faces is so extreme as to effectively deny the party its day in court." *Id.* The Court held that the plaintiff's evidence was too conclusory to support a finding of serious inconvenience:

[Plaintiff] gave very brief testimony that [its] daily operations would basically cease if it were required to pursue a lawsuit in Indiana, but "[i]f merely stating that financial and logistical difficulties will preclude litigation in another state suffices to avoid a forum-selection clause, the clauses are practically useless." The testimony, lacking in specifics or elaboration as to the nature of [plaintiff's] business or the witness's understanding of the burden of litigation in another forum, was conclusory and did not amount to a clear showing of special and unusual circumstances. We have held that "conclusory statements are insufficient to establish" the level of extreme inconvenience required to disregard the forum-selection clause.

Id. The Court granted mandamus relief and ordered the trial court to grant the motion to dismiss.

In this case the Court clarifies that a forum-selection clause in one of many documents associated with a transaction should be enforced. Further, the Court provides more guidance on the evidence that is necessary to support a finding of serious inconvenience that would justify not enforcing a forum-selection clause.

B. A Defendant Does Not Easily Waive A Forum-Selection Clause, And A Plaintiff's Inability To Travel May Be A Defense To The Enforcement Of Such A Clause.

In *In re ADM Investor Services, Inc.*, the court of appeals found that a defendant waived its right to enforce a forum-selection clause by allowing a co-defendant, who was also an agent for the first defendant, to file and hear a venue motion before the first defendant had a hearing on its motion to dismiss. 257 S.W.3d 817 (Tex. App.—Tyler 2008, orig. proceeding). The Texas Supreme Court disagreed and held that the plaintiff did not overcome the presumption against waiver or satisfy her burden to demonstrate that enforcing the clause would be unreasonable and unjust. *See In re ADM Investor Services, Inc.*, No. 08-0570, 2010 Tex. LEXIS 174 (Tex. February 19, 2010). Simultaneously filing an answer and motion to transfer venue with a motion to dismiss falls short of substantially invoking the judicial process to the plaintiff's detriment or prejudice so there was no finding of waiver. Regarding prejudice, the plaintiff had argued that she would be prejudiced by having to pursue claims against one defendant in Texas and another in another forum. The Court disagreed again and held that the mere existence of another defendant does not compel joint litigation, even if the claims arise out of the same nucleus of facts.

Finally, the plaintiff argued that it would be unreasonable or unjust to enforce the forum-selection clause because she was elderly and not in good health. The Court stated:

Although we are sympathetic to Prescott's health concerns, the record does not establish that requiring her to pursue her claims against ADM in Illinois, the forum to which she agreed in 2001, would be unreasonable or unjust. Further, assuming that health concerns could render a selected forum sufficiently inconvenient to preclude enforcement of a forum-selection clause, we believe that Prescott's conclusory statements are insufficient to establish such inconvenience. *Id.* Although the Court found that the plaintiff's health condition in this case did not reach a level that would allow a court to ignore a forum-selection clause, the Court did not find that health conditions could never form the basis of an exception to enforcement:

By allowing for exceptions when enforcement of forum-selection clauses would be unreasonable or unjust, or seriously inconvenient . . . we have recognized that there may be extreme circumstances that courts cannot presently anticipate or foresee; but we have not established a bright-line test for avoiding enforcement of forum-selection clauses. We have consistently refused to close the door to the possibility that exceptional circumstances could exist, even as we have chosen not to confront them in particular cases.

Id. Justice Willett authored a concurrence wherein he essentially advocated for a health exception to the enforcement of forum-selection clauses where there is evidence from a medical care provider that would establish that travel to the other forum is not merely inconvenient or impracticable, but medically prohibited.

II. Landowners May Have An Affirmative Duty To Protect Invitees From Unreasonable Dangers Of Which The Landowners Have Notice – And A Mere Warning May Not Be Sufficient.

In *Del Lago Partners Inc. v. Smith*, the plaintiff suffered serious injuries attempting to rescue a fallen friend in a fight between Sigma Chi fraternity members and people attending a wedding party in a resort's bar. No. 06-1022, 2010 Tex. LEXIS 284 (Tex. April 2, 2010). The plaintiff sued the resort arguing that the resort lacked adequate security. At trial, the plaintiff presented evidence of escalating tensions between members of the two groups preceding the fight. The jury found the defendant negligent and awarded the plaintiff \$1.5 million in damages, and the trial court entered judgment on that verdict. The court of appeals affirmed due in part to evidence of past criminal conduct.

The Texas Supreme Court affirmed the jury's verdict but not on the evidence of past criminal conduct. It held that the defendant had a duty to protect the plaintiff because it had actual knowledge a violent confrontation was imminent, had time to stop it, and there was legally sufficient evidence to show a breach of duty that proximately caused the plaintiff's injuries. When a landowner has actual or constructive knowledge of any premises condition that poses an unreasonable risk of harm to invitees, the owner has a duty to take whatever action is reasonably prudent to reduce or

eliminate the risk. The defendant observed, but did nothing to reduce, an hour-and-a-half of verbal and physical hostility in its bar. Additionally, the defendant continued to serve drunken rivals who were engaged in repeated and aggressive confrontations. A reasonable and fair-minded jury could find that the defendant breached its duty to the plaintiff by failing to take reasonable steps to defuse the dangerous situation at the bar. The Court found that the defendant's duty arose not because of prior similar criminal conduct but because it was aware of an unreasonable risk of harm at the bar that night.

The Court was careful to state that it was not holding that a landowner always has a duty to protect patrons from other patrons or that a landowner always has a duty to protect a customer when another customer becomes inebriated or when words are exchanged that may lead to a fight. "One need not believe that Del Lago has a universal duty to insure patrons' safety against all third-party crimes, or that prior criminal activity at Del Lago imposed a duty to post security guards in the bar at all times, in order to accept that on *this* record *this* sequence of conduct on *this* night in *this* bar could foretell *this* brawl." *Id.* (emph. in original).

There were several other important aspects to the Court's opinion. First, the Court held that simply giving a warning of even obvious and open dangers may not satisfy a landowner's duty. Previously, the Court had held that landowners must adequately warn *or* make the premises safe, but in some circumstances, no warning can adequately substitute for taking reasonably prudent steps to make the premises safe. *Id.* at n. 32. In this case, the Court determined that a warning about drinking alcohol and fighting was not sufficient to meet the duty of care the landowner owed, the landowner had an affirmative duty to eliminate the risk by having security, ejecting violent customers, and not serving alcohol to violent customers.

Second, the Court held that the plaintiff's conduct in not removing himself from the fight solely went to his proportionate responsibility and was not an absolute bar to his claim. The Court did not disagree with the jury's assessment of forty-nine percent responsibility on the plaintiff. The Court was careful to state that in some circumstances, a plaintiff's conduct regarding an open and obvious danger may bar his or her claim as a matter of law.

Third, the Court stated that the plaintiff's claim in this case was properly submitted as a premises defect as opposed to a negligence claim. "We have recognized that negligent activity encompasses a malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury, while premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe." *Id.* The Court held that the plaintiff's claim was primarily a premises defect claim because he complained about the defendant's "nonfeasance – its failure to remedy an unreasonably dangerous condition for ninety minutes and failure to react promptly once the fight started." *Id.* The Court affirmed the jury's verdict and judgment in favor of the plaintiff.

Although the outcome of this case is different than most premises liability appeals in the Texas Supreme Court, it does not represent a sea of change. Rather, the Court was careful to state that this case does not set any big picture rules and is tied the unique facts of the case.

III. A Party Has The Right To An Interlocutory Appeal From A Trial Court's Order Denying An Arbitration Award And Ordering A New Arbitration.

In *East Texas Salt Water Disposal Co. Inc. v. Werline*, an employee and his employer had a dispute regarding termination which they submitted to arbitration. No. 07-0135, 2010 Tex. LEXIS 214 (Tex. March 12, 2010). After the employee won the arbitration, the employer sued to vacate the award. The trial court ruled for the employer and ordered a new arbitration, finding that the arbitration award should be vacated because the evidence admitted in the arbitration showed partiality, willful misconduct and gross mistake. On interlocutory appeal, the court of appeals reversed and rendered judgment confirming the award. The Texas Supreme Court held that the Texas Arbitration Act allows an interlocutory appeal from a trial court's order denying an arbitration award's confirmation and commanding new arbitration. The Court affirmed the employee's arbitration award.

IV. Texas Has Personal Jurisdiction Over A Foreign Manufacturer That Intentionally Targets Texas As Its Marketplace For Its Products But Not If The Manufacturer Solely Transports Products Through Texas.

In *Spir Star AG v. Kimich*, the plaintiff was injured by a high pressure hose that burst. No. 07-0340, 2010 Tex. LEXIS 210 (Tex. March 12, 2010). The plaintiff sued multiple parties, including the manufacturer, which was a German company that used a distributor to sell its products in Houston, Texas. The German company filed a special appearance, which the trial court denied. The court of appeals affirmed, finding that the plaintiff had established general jurisdiction over the German company due to the company's systematic contacts.

The Texas Supreme Court affirmed the trial court and the court of appeals based on specific jurisdiction. The Court acknowledged that specific jurisdiction is not established merely when "the stream of commerce may or will sweep the product into the forum state." *Id.* Rather, the Court requires some "additional conduct" beyond merely placing the product in the stream of commerce that indicates an intent or purpose to serve the market in the forum state. *Id.* Examples of this additional conduct include: (1) designing the product for the market in the forum state; (2) advertising in the forum state; (3) establishing channels for providing regular advice to customers in the forum state; (4) marketing the product through a distributor who has agreed to serve as the sales agent in the forum state. The Court held that when an out-of-state manufacturer specifically targets Texas as a market for its products, that manufacturer is subject to a product liability suit in Texas based on a product sold in Texas, even if the sales are conducted through a Texas distributor or affiliate. Finally, the Court held that the establishment of jurisdiction in Texas complied with the traditional concepts of fair play and substantial justice: litigating the dispute in Texas did not pose an undue burden on the German company and Texas had a significant interest in exercising jurisdiction over controversies arising from injuries that a Texas citizen sustained. The Court affirmed the denial of the special appearance.

In *Zinc Nacional S.A. v. Bouché Trucking Inc.*, the plaintiff sued his employer for injuries he suffered in a trucking accident, and the employer sought indemnity and contribution from the manufacturer of the cargo because it allegedly loaded the truck in a negligent manner. No. 09-0734, 2010 Tex. LEXIS 285 (Tex. April 9, 2010). The trial court denied the manufacturer's objection to personal jurisdiction, and the court of appeals affirmed finding that the employer established specific jurisdiction over the manufacturer. The Texas Supreme Court reversed the trial court's finding of specific jurisdiction. It held that the manufacturer's decision to ship its goods through Texas to a recipient outside of Texas does not, by itself, constitute purposeful availment:

When specific jurisdiction is asserted, the minimum contacts analysis focuses "on the 'relationship among the defendant, the forum, and the litigation.'" . . . [T]he mere fact that goods have traveled into a state, without more, does not establish the minimum contacts necessary to subject a manufacturer to personal jurisdiction within the state. . . The exercise of jurisdiction over a merchant requires that the merchant actually direct sales *to* the forum state, not *through* it.

Id. (emph. in original). But the Court remanded the case to the court of appeals to determine the merits of the employer's general-jurisdiction argument.

In these two cases, the Texas Supreme Court has clearly stated that merely sending products into the stream of commerce that may flow through Texas does not subject a manufacturer to jurisdiction of a Texas court. However, if a manufacturer directs the sale of its products in Texas, even through an intermediary, it will be subject to suit in Texas.

V. In Medical Malpractice Cases Where The Plaintiff's Injury Is Difficult To Discover, A Defendant May Not Be Able To Rely On The Statute Of Limitations As A Defense But May Rely On A Statute Of Repose.

In *Walters v. Cleveland Regional Medical Center*, the plaintiff sued over a sponge left in her abdomen. No. 08-0169, 2010 Tex. LEXIS 209 (Tex. March 12, 2010). The trial court granted the defendants a summary judgment based on the two-year statute of limitations, and the court of appeals affirmed. The plaintiff had argued that the open-courts provision of the Texas Constitution required that she knew or should have known of her injury before the limitations period ended. The Texas Supreme Court reversed the summary judgment finding that despite the evidence that the plaintiff suffered some pain, there was a fact question regarding whether the plaintiff should have discovered her injuries within two years after the sponge was left in her. The Court stated that sponge cases constitute a unique class of malpractice claims, thus meriting unique open-courts treatment because the injuries are notoriously hard to discover, the existence of wrongdoing are usually undisputed, and an absolute two-year cutoff would render superfluous the Legislature's ten-year statute of repose.

In *Methodist Healthcare System of San Antonio Ltd., L.L.P. v. Rankin*, the plaintiff sued over a sponge left in her abdomen eleven years after her surgery. No. 08-0316, 2010 Tex. LEXIS 211 (Tex. March 12, 2010). The trial court granted the defendants a summary judgment based on the statute of repose. The court of appeals reversed and declared the statute of repose unconstitutional under the open-courts provision because it deprived the plaintiff of her right to compensation before she had a reasonable opportunity to discover the injury. The Texas Supreme Court reversed the court of appeals and held that the open-courts provision does not confer an open-ended and perpetual right to sue but merely gives litigants a reasonable time to discover their injuries and file suit. The Texas Legislature has not enacted an exception to the statute of repose. The Court noted that to hold that a statute of repose must yield to a plaintiff's inability to discover her injury would treat a statute of repose like a statute of limitations and would effectively repeal this and all other statutes of repose. Therefore, the Court affirmed the trial court's summary judgment for the defendant.

These two cases highlight the difference between the effect and constitutionality of a statute of limitation and a statute of repose. The Court holds that statutes of limitations may not be enforced when a plaintiff reasonably should not be able to discover her injury, but that the same defense does not apply to a statute of repose.

VI. In A Trucking Accident Case, The Court Affirmed The Admission Of The Plaintiffs' Accident Reconstruction Expert's Testimony But Reversed And Remanded The Pro-Plaintiff Judgment Based On Repeated References To The Truck Driver Being An Illegal Immigrant.

In *TXI Transportation Company v. Hughes*, the plaintiffs were survivors of decedents who were killed in a truck accident when the decedents' vehicle swerved into the truck's lane. No. 07-0541, 2010 Tex. LEXIS 212 (Tex. March 12, 2010). The plaintiffs sued the trucking company, and during trial, the court admitted the plaintiffs' accident-reconstruction expert who testified that the decedents swerved into the truck's lane because the truck swerved across the center line first. The trial court also allowed in evidence that the truck driver was an illegal immigrant on the basis that the evidence impeached the driver's prior statements. After a jury found for the plaintiffs and the trial court entered a judgment on that verdict, the court of appeals affirmed.

The Texas Supreme Court reversed and remanded determining that even though the expert evidence was properly admitted, the driver's illegal status was irrelevant and harmful. Regarding the expert evidence, the Court stated that the *Robinson* factors were not exclusive, and do not fit every scenario: "[t]hey are particularly difficult to apply in vehicular accident cases involving accident reconstruction testimony." *Id.* The Court went on to state that rather than focus on the reliability of the underlying technique, "we have found it appropriate in cases like this to analyze whether the expert's opinion actually fits the facts of the case." *Id.* "In other words, we determine whether there are any significant analytical gaps in the expert's opinions that undermine its reliability." *Id.* After reviewing the evidence and expert's testimony, the Court determined that the expert's testimony was neither mere conclusions nor subjective beliefs. The expert cited to facts and evidence to support his conclusions and theories. Therefore, the expert's testimony "meets our standard for reliability, and the trial court therefore did not abuse its discretion by admitting the testimony." *Id.*

Regarding the admission of the evidence regarding the truck driver's status as an illegal immigrant who lied to obtain his driver's license and his job, the Court found that such evidence was not relevant even though the plaintiffs had pled a claim for negligent entrustment and hiring. The Court held that such claims are meritless if the risk that caused the entrustment to be negligent did not cause the collision and if the defendant's negligence did no more than furnish a condition that made the injury possible. The Court noted that the driver being an illegal immigrant did not cause the collision in this case even if the trucking company's failure to screen his immigration status furnished the condition that made the accident possible. Moreover, although the driver's statements about his immigration status may have been offered for impeachment as prior inconsistent statements, they were not admissible because his immigration status was a collateral matter that could not be used for impeachment. Further, evidence of specific instances of conduct cannot be used for impeachment purposes. Finally, the Court held that the plaintiffs' repeated references to the driver's immigration status was harmful:

The record indicates that [the plaintiffs] sought to hedge [their] theory by calling attention to [the driver's] illegal immigration status whenever [they] could. Such appeals to racial and ethnic prejudices, whether "explicit and brazen" or "veiled and subtle," cannot be tolerated because they undermine the very basis of our judicial process. . . . Such error was harmful, not only because its prejudice far outweighed any probative value, but also because it fostered the impression that [the driver's] employer should be liable because it hired an illegal immigrant.

Id. The Court reversed the judgment due to the admission of the repeated statements concerning the driver's illegal status and remanded for a new trial.

VII. Court Decertified A Class Where The Representative Did Not Show That It Would Adequately Represent The Class Where The Representative Had Different, And Potentially Conflicting, Interests.

In *Southwestern Bell Telephone Co. v. Marketing On Hold Inc.*, a class-action representative sued a telephone company for alleged overbilling. No. 05-0748, 2010 Tex. LEXIS 159 (Tex. February 19, 2010). The class-action representative was a company that audited telephone bills for customers, and if a reduction was obtained, the company received a percentage of the recovery. After the class-action representative determined that there were alleged overbillings, it obtained assignments from five customers to pursue class-action claims. After the trial court certified the class, the court of appeals affirmed.

The Texas Supreme Court held that the assignments were proper and gave the class-action representative standing to file the class lawsuit. Specifically, the Court did not find that public policy barred the assignments:

[The Defendant] argues that [the class representative's] representation distorts the litigation process and flouts the legitimate goals of the class action device because [the representative] has suffered no common class injury and is using the class device as a covert means to generate a finder's fee for itself, rather than to compensate for an out-of-pocket loss. However, the valid assignment of claims to a party is not invalidated by the party's designation as the representative in a class suit. Nothing unique to the class action context or to this case dictates that we take the extraordinary step of invalidating otherwise contractually valid assignments on the asserted public policy grounds. . . . Certainly, class actions are not intended to serve as vehicles for commercial investment in desired large recoveries or as avenues for entrepreneurial business development. To the extent those concerns exist in a class suit, the courts of this state must scrutinize the circumstances on a case-by-case basis to determine if the arrangement undermines the tenets and purpose of the class action.

Id.

Regarding typicality, the Court held that due to the valid assignments, the "claims" were typical among class members and the representative. Regarding predominance, the Court found that common issues predominated. The Court first reviewed the liability aspects of the plaintiffs' express warranty and unjust enrichment claims. The defendant argued that predominance was not present regarding liability because of individualized proof of each customer's reliance on the bills in question. The Court held that because class members were subjected to a uniform misrepresentation in the bills and that, by paying their bills, class members relied on those misrepresentations, that the trial court did not abuse its discretion in determining that reliance was susceptible to class-wide proof. The Court also found that the trial court did not abuse its discretion in finding that individual issues of damages did not defeat the predominance requirement. Based on conflicting expert evidence, the trial court found that "a computer program could be constructed to review the bills and payments and perform the requisite mathematical calculations to determine the damages owed to each class member." *Id.* Even though the defendant could point to conflicting evidence that the computer program would not be sufficient, the Court found that the trial court did not abuse its discretion.

The Court then turned to the issue of adequacy of the representative. A class representative must prove that it will adequately represent the class. The Court looked to three considerations in determining whether an assignee representative would adequately represent the class: "(1) the assignee's connection to the classwide injury; (2) the benefits the assignee receives under the assignments; and (3) the assignee's motivation in asserting claims on behalf of the assignor(s)." *Id.* These considerations "ensure that the assignee's interests are aligned with the interests of the unnamed class members." *Id.* The Court determined that the assignee representative had a conflict with absent class members because it had a materially lesser interest in making itself and the class whole because it was never personally aggrieved by the defendant's conduct. The representative has an "incentive in settling quickly in order to minimize

litigation expenses" and that may differ "from class members who have overpaid and may be willing to hold out for a settlement that approximates their actual damages." *Id.* Moreover, the representative had consulting contracts with other customers, and therefore the representative "stands in somewhat different shoes from other class members by virtue of its possible recovery pursuant to" these other contracts. *Id.* The representative's "motives, different interests, and potentially conflicting interest created by the benefits under the five assignments and consulting contracts distinguish it from the thousands of other class members." *Id.* The Court concluded that the representative failed to adequately show that in pursuing its claims, it would advance the interests of the class. The Court therefore decertified the class.

This case is important because it reinforces the importance of the adequacy of representation element. Many class-action defendants ignore or only give little attention to the adequacy requirement. However, it is an important requirement, and class-action defendants should defend on that ground at trial and on appeal. Moreover, this case is important because it emphasizes the importance of evidence in the certification process. Many class-action plaintiffs and defendants rely solely on allegations without proof. However, where a plaintiff and defendant can produce proof of the various elements of class certification, that evidence should be offered to the trial court. In this case, the Texas Supreme Court affirmed the trial court's decision that the plaintiff met the predominance element by producing evidence that a computer program could alleviate what was undisputedly very individualized damage findings for the class.

Contact:

[David F. Johnson](#) | 817.420.8223 | dfjohnson@winstead.com

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