Notable New Cases at the Dallas Court of Appeals

Guns for Websites, Crazy Horse People, and Other Recent Developments

November 5, 2015
Dallas/Fort-Worth Joint Appellate Seminar
Richard Smith, P.C.

The Award For Most Epic Opening Sentence Goes To …

"This case involves a gun in exchange for the design of a website deal gone badly."

– Justice David Schenck, *In re King* (October 22)

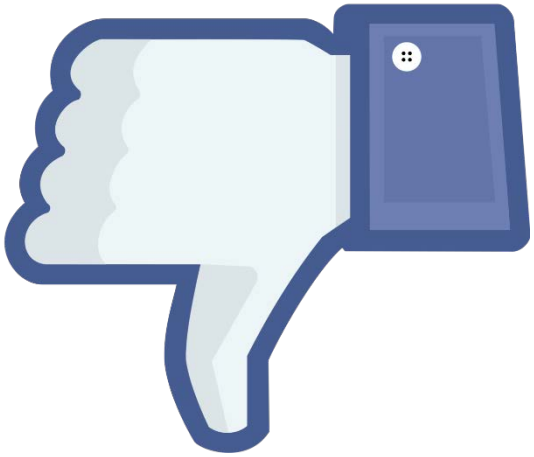
(Yes, it's from the actual website)

In re King

- Custom gun seller failed to come through with promised rifle as payment for website design, so designer filed suit in Harris County justice court for damages of less than $10k.
- Seller responded by filing suit for damages in excess of $100k in Collin County district court. Designer moved to transfer venue to Harris County.
- Trial court denied transfer, and Dallas COA affirmed.
- Case could not be transferred because it exceeded the jurisdictional limits of the justice court.
- Court declined to speculate whether the justice court could transfer the case to another Harris County court with jurisdiction over the larger claim.

Backes v. Misko,
2015 Tex. App. LEXIS 2416 (Tex. App.-Dallas 2015, pet. filed)

+



- One of the more colorful fact patterns of 2015.
- Two horse breeders sued a third for tortious interference, who counterclaimed for defamation.
- Opinion quotes extensively from the Facebook rants that led to the lawsuit.

Backes v. Misko,
2015 Tex. App. LEXIS 2416 (Tex. App.-Dallas 2015, pet. filed)

HELD:

- Affirmed trial court's dismissal of conspiracy to libel claim under TCPA, but reversed and remanded dismissal of libel claim against primary poster.
- Counterclaimant had met her burden to establish a prima facie case of libel because it was easy to identify her as the unnamed person who supposedly harmed her daughter due to a case of Munchausen-by-Proxy.
- Counterclaimant failed to show conspiracy to libel because posting other crazypants Internet comments with the primary actor did not show a meeting minds on the libelous post.

Some Other Notable TCPA Opinions

- *D Magazine Partners, L.P. v. Rosenthal* (Aug. 28) – false implication of welfare fraud an "Welfare Queen" headline supported defamation claim
- *Campbell v. Clark* (August 10) – false campaign ads implying candidate for sheriff intervened in child molestation charges against his "nephew" supported both malice and defamation
- *The Dallas Morning News, Inc. v. Mapp* (June 26) – no constitutional malice for reporting that Senate candidate said ranchers should be allowed to "shoot on sight" illegal border crossers, when actual quote was that ranchers should be able to "shoot on sight" if in fear for their lives

Some More Practical TCPA Opinions

- *Mansik & Young Plaza LLC v. K-Town Mgmt., LLC* (July 24) – an award of attorney fees under TCPA does not need to be superseded to appeal dismissal of plaintiff's case
- *Horton v. Martin* (June 16) – plaintiff must wait for final judgment instead of pursuing interlocutory appeal when trial court dismisses claims against most, but not all, defendants
- *Breitling Oil & Gas Corp. v. Petroleum Newspapers of Alaska, LLC* – filing a notice of nonsuit does not allow a plaintiff to escape a TCPA motion to dismiss or the attorney fees authorized by the statute

In re VERP Investment, LLC,
457 S.W.3d 255 (Tex. App.-Dallas 2015) (orig. proceeding)

- Mandamus proceeding challenging trial court order requiring defendants to turn over hard drive for inspection and copying by forensic examiner.
- Plaintiffs had sought production of accounting and invoicing data contained on the hard drive.

In re VERP Investment, LLC,
457 S.W.3d 255 (Tex. App.-Dallas 2015) (orig. proceeding)

HELD:

- "An order requiring direct access to an electronic device is burdensome because it is intrusive."
- The party seeking direct access has the evidentiary burden of showing that the responding party is in default of its discovery obligations. Plaintiff did not meet that burden.
- Even if direct access were appropriate, Plaintiff did not meet his burden to explain how his proposed search protocols would make retrieval of the requested information feasible.
- Without such evidence, trial court abused its discretion in ordering inspection of the hard drive.

A Trio of Memorandum Opinions Create Exceptions to *In re Columbia Medical Center*

- *In re Foster* (February 18) – holding no explanation is required for granting new trial following a bench trial
- *In re Dixon* (March 16) – holding no explanation is required even when the judge who grants new trial is the successor to the one who tried the case*
- *In re Klair* (April 23) – holding no explanation is required when trial court grants new trial to set aside default judgment

Rationale: No concerns about transparency when trial judge is not setting aside a *jury verdict*.

*Mandamus filed, merits briefing requested.

Recent Cases from the Fort Worth Court of Appeals

The Hot, the Loud, the First Impression, and the Merely Interesting

November 5, 2015
Dallas/Fort-Worth Joint Appellate Seminar
Dabney Bassel & Constance Hall

Cases Covered

- *Wise Electric Cooperative, Inc. v. American Hat Company,* No. 02-13-00439-CV, 2015 WL 5460543 (Tex. App.—Fort Worth September 17, 2015, no pet. h.)
- *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 451 S.W.3d 150 (Tex. App.—Fort Worth 2014, pet. filed)
- *American Homeowner Preservation Fund, LP v. Pirkle,* No. 02-14-00293-CV, 2015 WL 5173066 (Tex. App.—Fort Worth September 3, 2015, pet. filed)
- *Orca Assets, G.P., L.L.C. v. Dorfman,* No. 02-14-00056-CV, 2015 WL 4389056 (Tex. App.—Fort Worth July 16, 2015, no pet. h.)
- *Rauhauser v. McGibney,* No. 02-14-00215-CV, 2014 WL 6996819 (Tex. App.—Fort Worth Dec. 11, 2014, no pet.)
- *State v. Valerie Saxion, Inc.,* 450 S.W.3d 602 (Tex. App.—Fort Worth 2014, no pet.)
- *Ex Parte Roberson*, 455 S.W.3d 257 (Tex. App.—Fort Worth 2015, pet. ref'd)

Wise Electric Cooperative, Inc. v. American Hat Company, No. 02-13-00439-CV, 2015 WL 5460543 (Tex. App.—Fort Worth September 17, 2015, no pet. h.)

- Negligence suit based on overhead electric service wire becoming detached and causing grass fire.
- Smoke from fire damaged inventory that plaintiff used to produce straw and felt cowboy hats.
- Judgment for plaintiff-$18,000,000.00.
- Court of Appeals affirms damage award.

Wise Electric Cooperative, Inc. v. American Hat Company, No. 02-13-00439-CV, 2015 WL 5460543 (Tex. App.—Fort Worth September 17, 2015, no pet. h.)

- General comments:
  - Opinion is forty reporter pages long; and
  - Exhaustive discussion of the record that will be difficult to attack on petition for review.
- Specific area of interest-use of replacement value to measure damages to personal property, in the form of inventory.
- Little or no Texas law dealing with how to value a destroyed inventory.

Wise Electric Cooperative, Inc. v. American Hat Company, No. 02-13-00439-CV, 2015 WL 5460543 (Tex. App.—Fort Worth September 17, 2015, no pet. h.)

- Opinion charts process how to get from the general measure of damage for injury to personal property to a more tailored approach:

> *When the property negligently injured is personal property, the general rule in determining the amount of compensation due for the damage to the personal property is the difference between its reasonable market value immediately before and immediately after the damage at the place where the damage occurred.*

> *Although negligent damage to personal property is usually measured by the diminishment in the property's fair market value attributable to the negligently-inflicted damage, different factual situations may dictate the application of a different valuation of the damage to the property.*

Wise Electric Cooperative, Inc. v. American Hat Company, No. 02-13-00439-CV, 2015 WL 5460543 (Tex. App.—Fort Worth September 17, 2015, no pet. h.)

- Quotes from opinion (cont.):

> *For example, the personal property might be totally destroyed or may have no fair market value, requiring application of a fair-market-value-at-time-of-destruction valuation, replacement valuation, or repair valuation.*

> *When the damaged property has neither a market value nor a real value, but it is shown what it would cost to replace or reproduce the article, then such cost is the measure of recovery.*

> *Plaintiff has burden to establish that a method of valuation, other than market value, is appropriate.*

Wise Electric Cooperative, Inc. v. American Hat Company, No. 02-13-00439-CV, 2015 WL 5460543 (Tex. App.—Fort Worth September 17, 2015, no pet. h.)

- Opinion painstakingly reviews record and concludes no post-fire market existed for inventory, general measure of damage does not apply, and replacement value is proper measure.

- Opinion is a good primer for charting course to alternate measure of damages and structuring proof to allow use of alternative measure.

Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 451 S.W.3d 150 (Tex. App.—Fort Worth 2014, pet filed)

- Jury found pipeline compressor station built on adjoining property constituted negligent nuisance.

- Court of appeals reverses two-million-dollar judgment because evidence factually insufficient to support negligent nuisance finding.

Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 451 S.W.3d 150 (Tex. App.—Fort Worth 2014, pet filed)

- Opinion uses twelve reporter pages to summarize testimony.
- In essence, plaintiffs testified station really loud but offered no expert testimony establishing standard of care how station should have been built to lessen noise or noise abated after construction.
- Defendant offered testimony that it worked to abate noise and showed how abatement procedures reduced noise levels.
- Record contained a scintilla to support negligent nuisance finding but evidence factually insufficient to support that finding.
- With a lack of evidence from plaintiff on standard of care, not enough to measure whether defendant's efforts were reasonable.

Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 451 S.W.3d 150 (Tex. App.—Fort Worth 2014, pet filed)

- Dissent takes majority to task for not adhering to *Pool* standard when reversing on factual insufficiency grounds:

  > *The Majority Opinion in its four-paragraph conclusory factual-sufficiency analysis merely cherry-picks isolated snippets of evidence or testimony; substitutes its own credibility determinations that these snippets must be true, despite extensive, directly-conflicting evidence that the jury below found persuasive; and then holds that the evidence is factually insufficient to support the jury's "yes" finding simply because snippets of conflicting evidence exist.*

- Supreme Court has asked for briefs on the merits.

American Homeowner Preservation Fund, LP v. Pirkle, No. 02-14-00293-CV, 2015 WL 5173066 (Tex. App.—Fort Worth September 3, 2015, pet. filed)

- Question if assignee of lien holder could assert due process rights of lien holder/assignor when the assignor was not joined in suit to collect delinquent taxes.
- Issue of first impression in Texas
- Lien holder not joined in tax suit. Lien assigned to third party that took with notice of constable's deed that conveyed property to satisfy delinquent tax judgment. Assignee did not avail itself of Tax Code procedures to redeem property but collaterally attacked judgment in tax suit claiming that it stepped into shoes and had same rights to assert due process claim as lien holder not joined in tax suit.

American Homeowner Preservation Fund, LP v. Pirkle, No. 02-14-00293-CV, 2015 WL 5173066 (Tex. App.—Fort Worth September 3, 2015, pet. filed)

- No question that original lien holder was necessary party to tax suit. If not joined in that suit, judgment did not bind it, even if it did not comply with redemption procedures.
- But that protection did not embrace assignee of original lien holder.

American Homeowner Preservation Fund, LP v. Pirkle, No. 02-14-00293-CV, 2015 WL 5173066 (Tex. App.—Fort Worth September 3, 2015, pet. filed)

- Opinion begins with the general rule that causes of action are freely assignable but makes a detailed policy analysis why the the general rule yields and does not protect assignee:
  - equity demands diligence---assignee should not be able to take property with notice that right assigned is extinguished and then be able to collaterally attack judgment that extinguishes right;
  - allowing assignee to collaterally attack judgment would undermine public policy setting time limits on claims;
  - tax code designed to ensure that purchaser at tax sale takes clear title and to allow assignee due process claim undermines that policy;

American Homeowner Preservation Fund, LP v. Pirkle, No. 02-14-00293-CV, 2015 WL 5173066 (Tex. App.—Fort Worth September 3, 2015, pet. filed)

- Opinion (cont.) :
  - allowing collateral attack fosters litigation;
  - allowing collateral attack undermines finality of judgment; and
  - when legislature creates a remedy, principles of comity require courts to act with restraint when creating alternate remedy that allows a party to side-step legislative mandate.

Orca Assets, G.P., L.L.C. v. Dorfman, No. 02-14-00056-CV, 2015 WL 4389056 (Tex. App.—Fort Worth July 16, 2015, no pet. h.)

- Question if judgment in prior suit cancelling deed was void because necessary party not joined.
- Collateral attack against judgment succeeds only if trial court lacked subject matter jurisdiction.
- Prior judgment not void for failure to join necessary party because trust not joined in prior suit was "virtually represented" by party that was joined.

Orca Assets, G.P., L.L.C. v. Dorfman, No. 02-14-00056-CV, 2015 WL 4389056 (Tex. App.—Fort Worth July 16, 2015, no pet. h.)

- Orca stated virtual representation binds nonparty to judgment if:

  > *[I]ts privity of interest appears from the record, and there is an identity of interest between the litigant and a named party to the judgment.*

Orca Assets, G.P., L.L.C. v. Dorfman, No. 02-14-00056-CV, 2015 WL 4389056 (Tex. App.—Fort Worth July 16, 2015, no pet. h.)

- Opinion then itemizes circumstances by which nonparty may be in privity with joined party:

> *Parties may be in privity in at least three ways: (1) they can control an action even if they are not parties to it; (2) their interests can be represented by a party to the action; or (3) they can be successors in interest, deriving their claims through a party to the prior action.*

Orca Assets, G.P., L.L.C. v. Dorfman, No. 02-14-00056-CV, 2015 WL 4389056 (Tex. App.—Fort Worth July 16, 2015, no pet. h.)

- Nonparty trust bound by the judgment because:
  - it was the sole shareholder of an entity that was a party in prior suit;
  - it appears from the record the trust had the right to control the entity joined in the suit and the trust's interest was dependent on the validity of a conveyance to that entity; and
  - there was an "identity of interest" between the trust and the entity joined.

Rauhauser v. McGibney, No. 02-14-00215-CV, 2014 WL 6996819 (Tex. App.—Fort Worth Dec. 11, 2014, no pet.)

- Interlocutory appeal Under the Texas Citizens' Participation Act from the denial by operation of law of a motion to dismiss filed under Act.
- Defendant filed motion to dismiss before even being served and plaintiff immediately nonsuited.
  - Motion to dismiss survived nonsuit.
  - Motion to dismiss under TCPA provides for dismissal with prejudice, attorney's fees, and sanctions.
  - Motion to dismiss provides defendant more relief that he would be entitled to under nonsuit and is an affirmative claim for relief that survives nonsuit.
  - Fact that defendant did not wait to be served, knew he was going to be nonsuited, and lacked "good faith" in filing motion was irrelevant to whether motion to dismiss was a affirmative claim for relief that survived nonsuit.

Rauhauser v. McGibney, No. 02-14-00215-CV, 2014 WL 6996819 (Tex. App.—Fort Worth Dec. 11, 2014, no pet.)

- Motion to dismiss under TCPA has shifting burdens:
  - Movant has initial burden to show by a preponderance of the evidence that the action is based on, relates to, or is in response to a party's exercise of the right to free speech, petition, or association.
  - If the movant satisfies this burden, the trial court must dismiss the legal action unless the party who brought the action ”establishes by clear and specific evidence a prima facie case for each essential element of the claim in question.”

Rauhauser v. McGibney, No. 02-14-00215-CV, 2014 WL 6996819 (Tex. App.—Fort Worth Dec. 11, 2014, no pet.)

- Movant satisfied its burden by showing plaintiff was a limited-purpose public figure.
- A three-part test determines who is a limited-purpose public figure:
  - (1) the controversy at issue must be public both in the sense that people are discussing it and in the sense that people other than the immediate participants in the controversy are likely to feel the impact of its resolution;
  - (2) the plaintiff must have more than a trivial or tangential role in the controversy; and
  - (3) the alleged defamation must be germane to the plaintiff's participation in the controversy.

Rauhauser v. McGibney, No. 02-14-00215-CV, 2014 WL 6996819 (Tex. App.—Fort Worth Dec. 11, 2014, no pet.)

- Plaintiff was a limited-purpose public figure with respect to vigilante justice for victims of bullying and marital infidelity.
- Plaintiff did not even attempt to carry its burden to show essential elements of its claims.
- Although award of costs, attorney's fees, expenses and sanctions mandatory when motion to dismiss properly granted, court of appeals remanded claim because awards are subject to trial court discretion:
  - fee award is "as justice and equity may require"; and
  - sanctions to be "as the court determines sufficient to deter the party who brought the legal action from bringing similar actions described in this chapter."

State v. Valerie Saxion, Inc., 450 S.W.3d 602 (Tex. App.—Fort Worth 2014, no pet.)

- State brought action to enjoin defendant from making representations about medical efficacy of dietary supplements.
- Defendant counterclaimed that State's actions violated her rights to religious freedom, free exercise, and free speech.
- First issue whether defendant had the right to an interlocutory appeal from denial of motion for summary judgment under Section 51.014(a)(6) of the Civil Practice and Remedies Code that covers:
  - Claims involving members of the electronic or print media, acting in such capacity;
  - Or a person whose communications appears in or is published in the media; and
  - The claim arises "under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73 [of CPRC involving libel]. "

State v. Valerie Saxion, Inc., 450 S.W.3d 602 (Tex. App.—Fort Worth 2014, no pet.)

- The court of appeals had no jurisdiction because Defendant failed to bring her interlocutory appeal within terms of section 51.014(a)(6):
  - Defendant was being sued not for her media activities in promoting supplements but as a manufacturer of a product that the State regulates;
  - Communications at issue were not publications in media but labeling of products; and
  - The claims made by the State were not the type of libel-based claims that section 51.014(a)(6) addresses.

State v. Valerie Saxion, Inc., 450 S.W.3d 602 (Tex. App.—Fort Worth 2014, no pet.)

- Second issue-sovereign immunity barred Defendant's claim that the State's actions violated her right to free exercise of religion.
  - Defendant's claim was an ultra vires claim that must be brought against a state official and not the state itself.
  - To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act . . . . Stated another way, these suits do not seek to alter government policy but rather to enforce existing policy.

State v. Valerie Saxion, Inc., 450 S.W.3d 602 (Tex. App.—Fort Worth 2014, no pet.)

- Likewise, if the claimant attempts to restrain a state officer's conduct on the grounds that it is unconstitutional, the claimant must allege facts that actually constitute a constitutional violation.

- No ultra vires or constitutional violation

  - If the government's action burdens the free exercise of religion by interfering with an individual's observance or practice of a central religious belief, the issue is whether the burden is a substantial, and if so, whether it is justified by a compelling governmental interest.

  - State not trying to restrain defendant from practicing any religious belief but protecting public by regulating advertising and labeling of dietary supplements.

Ex Parte Roberson, 455 S.W.3d 257 (Tex. App.—Fort Worth 2015, pet. ref'd)

- Appeal from pretrial denial of writ of habeas corpus.
- Pending on petition for writ of cert. before U.S. Supreme Court (scheduled for conference tomorrow).
- Question if investigator from prosecutor's office made contact with juror and then reported contact to trial judge to "goad" defendant into moving for mistrial with the motive to avoid effect of pretrial ruling adverse to prosecution.
- If conduct were intentional, jeopardy attached and defendant could not be retried after mistrial in first case.

Ex Parte Roberson, 455 S.W.3d 257 (Tex. App.—Fort Worth 2015, pet. ref'd)

- Majority and dissent contrast how same set of facts can produce different and visceral reactions, even among staid appellate judges

- Majority carefully applies abuse of discretion standard to conclude trial judge within his discretion to conclude investigator's acts were unintentional

Ex Parte Roberson, 455 S.W.3d 257 (Tex. App.—Fort Worth 2015, pet. ref'd)

- Dissent different view of evidence (and role of court):

  I must respectfully dissent from the majority opinion because I believe appellate courts are obligated to admit that the emperor is wearing no clothes, no matter how popular the emperor might be.

  Unlike trial judges, who primarily see only the conduct in the courtrooms over which they preside, appellate courts are presented with records from other courts in that county as well as other courts in other counties within that appellate district. Appellate judges are in a better position than trial judges to see patterns of conduct. Consequently, appellate judges have an obligation to speak up when observed patterns show a course of conduct at odds with constitutional mandates and fundamental fairness.

- Dissenting justice picks apart the state's explanations, and concludes that permitting retrial condones and encourages improper conduct by prosecution.

Questions?

Thank you for your attention!

Dabney Bassel
Law Office of Dabney Bassel
500 Main Street, Suite 350
Fort Worth, Texas 76102
817-989-6485
dbassel@dabneybassel.com

Constance (Connie) Hall
The Law Office of Constance K. Hall, PLLC
835 E. Lamar Blvd., #330
Arlington, Texas 76011
682-232-3529
connie@challlaw.com