shayes@stevehayeslaw.com

From: Law Office of Steven K. Hayes <shayes@stevehayeslaw.com>
Sent: Wednesday, September 4, 2024 4:31 PM
To: shayes@stevehayeslaw.com
Subject: Second Court Newsletter: Lots of New Opinions, And I Suspect a Busy 2024-2025

September 4, 2024

Dear Friends:

Well, today's issue wraps up the opinions issued by the Court in civil cases for the last fiscal year, i.e., the 12 months ended August 31, 2024. The Court went out with a bang, issuing ten such merits opinions on Thursday the 29th (which I summarized and circulated last week), and then another nine such opinions on Friday the 30th (which we'll cover in this Newsletter). I've not checked with the Clerk's office, but that leads me to speculate that the Court had a lot of new notices of appeals filed in August. So I suspect we're in for another busy year in 2024-2025. But at least it has cooled off a little bit. :-)

Recent opinions issued by the Court in civil cases cover the following issues

- Bank Accounts (Freezing, Closing, Summary Judgment, Contract, DTPS, Intentional Infliction of Emotional Distress, Unjust Enrichment)
- Contract (Summary Judgment, Timeliness, Fact Issue, Purchase Price, Time of Performance, Written Agreement)
- Contract, Sworn Account, Quantum Meruit (Summary Judgment, Ownership of Invoices)
- Family Law (Family Violence, Protective Order)
- Family Law (Protective Order, New Statute, Findings as to Future Family Violence Likelihood)
- Juvenile (Anders, Court Costs, Indigence)
- Mandamus (Special Exceptions, Discovery, Protective Order)
- Parent Child Relationship (Pleading, Modification of Foreign Order)
- Parental Rights Termination (Best Interest, Legal Sufficiency)

Recent opinions issued by the Court in civil cases cover the following issues (footnotes omitted in all summaries unless otherwise stated. All names in suits involving minors are aliases unless otherwise noted):

Bank Accounts (Freezing, Closing, Summary Judgment, Contract, DTPS, Intentional Infliction of Emotional Distress, Unjust Enrichment): *Asekun v. Bank of America,* No. 02-23-00311-CV– "Former customers who held accounts at a bank appeal a summary judgment in favor of the bank. At the heart of this appeal is a dispute over whether the deposit agreement executed between the customers and the bank authorized the bank to freeze (and later close) the customers' accounts without advance notice and without "a lawful court order." We hold that the deposit agreement expressly authorized the bank to freeze and close the accounts, and we affirm the summary judgment....Appellants contend that the trial court erroneously granted BANA's motions for summary judgment. All of Appellants' causes of action were predicated on the same alleged misconduct: BANA's freezing (and later closing) of Appellants' bank accounts without the authority to do so and without advance notice to Appellants....Examining the entire agreement and giving effect to each provision, we conclude that the deposit agreement expressly authorized BANA to close Appellants' bank accounts without advance notice and to freeze or decline transactions on the accounts in the process....

- Contract: "The deposit agreement was enforceable as a contract between BANA and Appellants....By executing signature cards for each respective bank account, Appellants agreed to all the provisions in the deposit agreement, regardless of whether Appellants read them."
- DTPA: "[C]ontrary to [Appellants'] misguided assertion [that BANA represented it would obtain a court order before account freezing and closing], the deposit agreement contained no such provision requiring BANA either to obtain a court order or to provide advance notice before it froze or closed the accounts.....[Additionally] Appellants' reasoning ..."would convert every breach of contract into a DTPA claim."...Appellants cannot restructure their breach-of-contract claim into a DTPA claim because "[a]n allegation of breach of contract, without more, does not constitute a false, misleading, or deceptive act in violation of the DTPA.'"
- Libel: "If BANA communicated to third parties that Appellants' bank accounts had been frozen or blocked, those statements would be true and thus cannot form the basis of Appellants' libel claim."
- Intentional Infliction of Emotional Distress: "Here, Appellants' IIED claim must fail because it is based on the same conduct as their other causes of action against BANA: refusing to pay checks issued by Appellants to third parties, closing Appellants' bank accounts "without notice," representing to third parties that Appellants' bank accounts had been frozen, and refusing to release Appellants' money."
- Unjust Enrichment: "Appellants agreed to be bound by the terms of the deposit agreement when they executed signature cards with BANA at the time that each account was opened. Recovery under a theory of unjust enrichment would be inconsistent with that express agreement."

Contract (Summary Judgment, Timeliness, Fact Issue, Purchase Price, Time of Performance, Written Agreement)*: Katuwal and Ghimire v. Kafle*, No. 02-23-00404-CV–"Appellants Manoj Katuwal and Bhes R. Ghimire (collectively Katuwal and Ghimire or Appellants) sued Appellee Bisharjana Kafle to enforce an alleged oral contract under which Kafle agreed to sell Appellants her shares in Ferguson International, Inc., the company she owned with Appellants. Kafle moved for no-evidence and traditional summary judgment on Appellants' claims. Shortly before the summary judgment hearing, Appellants filed their own summary judgment motion. The trial court granted Kafle's motion without considering Appellants' motion. On appeal, Appellants argue that the trial court erred by granting summary judgment for Kafle, by not granting their motion, and by not sustaining their objections to Kafle's summary judgment evidence. Appellants' summary judgment motion was untimely, and the trial court did not err by not considering it. However, even considering the evidence challenged by Appellants, Kafle did not establish her entitlement to summary judgment, and we will therefore reverse."

- Timeliness: "The trial court heard Kafle's motion by submission on May 4, 2023. It did not consider Appellants' motion at the hearing.... Appellants filed their combined response and motion on April 27, 2023, which was only a week before the submission hearing on Kafle's motion. Appellants asked the trial court coordinator to set a hearing on their motion "at least 21 days from" the date of their filing.... See Tex. R. Civ. P. 166a(c). A hearing in accordance with Appellant's request and Rule 166a(c) would have made the hearing date no sooner than May 18, with Kafle's response due by May 11—that is, a week after the May 4 summary judgment hearing. See id. Appellants' filing was timely as a response to Kafle's motion but not timely as a cross-motion."
- Fact Issue: "In summary, under Kafle's letter of intent, she was relieved of her obligation to perform if the bank did not release her, but the agreement that her attorney drafted contained release-related terms but did not condition the sale's closing on the obtaining of a release. Thus, Kafle's own evidence raised a fact issue about whether the parties had agreed that her performance was conditioned on her

release or that the failure to obtain a release would constitute a breach by Appellants. Because Kafle's summary judgment evidence did not establish as a matter of law that her obligation to sell her shares was conditioned on a release occurring before closing, she was not entitled to summary judgment on this ground. We sustain this part of Appellants' first issue."

- Purchase Price: "We first address Kafle's contention that Appellants could not establish a meeting of the minds because no evidence showed that the parties had agreed on a price for the sale of her shares....the evidence that Kafle had proposed this term [of performance conditioned on release] some time after the parties' meeting does not establish as a matter of law that the parties had not agreed on a price at their meeting. Accordingly, we sustain this part of Appellants' first issue.
- Time of Performance: "In sum, Kafle's evidence merely raises a fact issue about whether the parties had agreed to a time for performance. Consequently, Kafle was not entitled to traditional summary judgment on this ground. We sustain this part of Appellants' first issue."
- Written Agreement: Even without a written agreement, "the evidence did not establish as a matter of law that no agreement on material terms had been reached at the parties' meeting,...or that Kafle would have no obligation to sell until a written agreement was signed by all parties."

Contract, Sworn Account, Quantum Meruit (Summary Judgment, Ownership of Invoices)*: Pilot Point Care v. M Chest Institutional*, No. 02-24-00068-CV–"Appellant Pilot Point Care, Inc. d/b/a Pilot Point Care Center appeals the summary judgment granted in favor of Appellee M Chest Institutional Pharmacy Group, LLC. In a single issue, Pilot Point argues that the evidence is insufficient to support judgment as a matter of law because the invoices used in support of Appellee's summary-judgment motion were in the name of a company other than Appellee without any explanation from Appellee as to how the companies listed on the invoices were related to Appellee. Because the affidavit from Appellee's custodian of records showed Appellee's ownership of the invoices for the account with Pilot Point and because there was no evidence contradicting the affidavit, we affirm the trial court's summary judgment."

Family Law (Family Violence, Protective Order)*: Walther v. Walther*, No. 02-23-00393-CV–"In two issues challenging evidentiary sufficiency—both legal and factual—[ex-Wife] appeals the trial court's protective order entered against her based on findings of family violence directed toward her husband...and of the likelihood of future family violence. Because the evidence supports the family-violence findings, we will affirm."

Family Law (Protective Order, New Statute, Findings as to Future Family Violence Likelihood)*: M.W. v. M.W.*, No. 02-24-00048-CV–"Appellant M.W. (Husband) appeals from the trial court's protective order issued on the application of his wife (Wife).... We will affirm....[Under the post-9/1/23 version of Tex. Fam. Code Ann. § 85.001(b), and the post 9/1/23 rendition here] The trial court was not required to make a finding about the likelihood of future violence, and the evidence supports the trial court's finding that family violence had occurred. Accordingly, we overrule both of Husband's issues."

Juvenile (Anders, Court Costs, Indigence)*: C.J.*, No. 02-24-00070-CV–"After carefully reviewing the record and counsel's brief, except for the court costs addressed below, we find nothing in the record that might arguably support the appeal; thus, we agree with counsel that the appeal is frivolous....We do, however, find error in the court costs assessed against C.J....The record reflects that in April 2022, C.J. (via his mother) filed an affidavit of indigence in the trial court and received appointed counsel. There is no showing that C.J. ever ceased to be indigent or that his indigency was ever contested. Nonetheless, the trial court clerk assessed costs of $205 (district-clerk fees, clerk's record fees, and certification and seal) for the preparation of the clerk's record and $56 (clerk's record fees and certification and seal) for the preparation of the sealed clerk's

record. Because of C.J.'s indigence, we delete these charges from the bills of costs, see id.; affirm the trial court's judgment; and grant counsel's motion to withdraw.

Mandamus (Special Exceptions, Discovery, Protective Order)*: Tri-County Electric*, No. 02-24-00337-CV–Mandamus petition seeks "relief from the trial court's orders denying (1) their special exceptions to real party in interest Darryl Schriver's Second Amended Petition and (2) their joint motion for protective order and stay of Schriver's discovery. Although we conclude that Relators are not entitled to mandamus relief from the trial court's special-exceptions ruling, we nevertheless grant Relators mandamus relief from the denial of their joint motion for protective order and direct the trial court to provide Relators the opportunity to present evidence and argument on their specific discovery objections."

- Special Exceptions: "Relators contend that the trial court abused its discretion by denying their special exceptions to Schriver's second amended petition. But mandamus relief is not available to correct this ruling....in the absence of extraordinary circumstances....not present here."
- Protective Order (Discovery): "In their second issue, Relators contend that the trial court abused its discretion by denying their amended and renewed motion for protective order. We agree....Relators' renewed motion for protective order...raised three objections to Schriver's discovery requests, namely, that they were (1) premature and improper because Schriver had failed to properly plead his claims, (2) overly broad, and (3) unduly burdensome. Thus, even after the trial court effectively ruled that Schriver had properly pleaded his claims by denying Relators' special exceptions, the trial court could not rule on Relators' motion for protective order without first considering each of their individual overbreadth and undue-burden objections. But the record does not reflect that the trial court did so....[but] in contravention of the procedure proposed by the trial court and agreed upon by the parties...the trial court declined to set another hearing on Relators' motion for protective order after overruling their special exceptions and instead simply signed an order denying the motion....By denying Relators a meaningful opportunity to present oral argument and evidence regarding their specific discovery objections, [and by signing an order which does not identify the evidence presented by Relators in denying their motion for protective order], the trial court effectively failed to consider these individual objections and, in so doing, abused its discretion.

Parent Child Relationship (Pleading, Modification of Foreign Order)*: S.I.,* No. 02-24-00109-CV–"In this suit affecting the parent–child relationship (SAPCR), Appellant T.I. (Mother) appeals the trial court's final order in which it appointed her as joint managing conservator and F.M. (Father) as joint managing conservator with the right to determine the residence of their teenage daughter, S.I.1 Mother raises two issues on appeal: (1) the trial court abused its discretion in granting relief not requested by any party in their pleadings or tried by consent and (2) the trial court did not have subject matter jurisdiction to modify orders entered by a foreign state court. We will affirm."

- Pleading (Joint Managing Conservatorship): "Here, the Department pleaded for termination but also made it clear that its first goal was reunification. And, though it did not specifically plead for Mother and Father to be appointed as joint managing conservators, it did ask the trial court to make certain custody determinations in the event that it did not terminate their parental rights. In the end, the trial court denied termination and reunified S.I. with her parents, naming them as joint managing conservators. Thus,...we hold that the trial court did not abuse its discretion and that Mother's due-process rights were not violated when it named the parents joint managing conservators of S.I."
- Modification of Foreign Order (Filing of Same, Jurisdiction): "In her second issue, Mother argues that the trial court did not have jurisdiction to modify the Massachusetts Orders because they had not been filed as foreign orders under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and were not

> in evidence for the trial court to consider. We disagree with the premise of Mother's argument that the trial court's final order modified any custody determinations of the Massachusetts Orders. Those orders did not make any child-custody determinations to modify."

Parental Rights Termination (Best Interest, Legal Sufficiency)*: A.A. and J.A.*, No. 02-24-00162-CV; H.A., No. 02-24-00163-CV–"Appellant Father appeals from judgments terminating his parent–child relationship with three of his children—Tabitha, Allison, and Gail1—challenging the legal sufficiency of the trial court's finding that termination was in the children's best interest. We affirm."

All for now. Y'all stay safe and well. Have a great weekend!

Yours,

Steve Hayes
Law Office of Steven K. Hayes
777 Main Street, Suite 340
Fort Worth, Texas 76102
shayes@stevehayeslaw.com; 817/371-8759; www.stevehayeslaw.com

---