shayes@stevehayeslaw.com

From: Law Office of Steven K. Hayes <shayes@stevehayeslaw.com>
Sent: Saturday, October 26, 2024 11:33 AM
To: shayes@stevehayeslaw.com
Subject: Second Court Newsletter: Spisak Reception, New Opinion Summaries!

October 26, 2024

Dear Friends:

Just a reminder, before turning to the opinions: In less than a week, we will honor Chief Clerk Debra Spisak's service in the Clerk's Office for more than 1/3 of the Court's existence (and for 7 of its 12 Chief Justices), as well as her impending retirement. The Second Court and the TCBA Appellate Section will host a come and go reception for her on Friday, November 1, from 4:30 to 7:30 p.m at the TCBA Bar Building at 1315 Calhoun Street in Fort Worth. Blue Mesa will cater. Come wish Debra well, visit with the Justices and Staff Attorneys, and catch up with old friends. Details are on the Bar's website under its "Browse Events" page. We look forward to seeing you!

Now, for the case summaries:

Summary by the Court of a recent opinion

- *Home Equity Lien Foreclosure*

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

- *Default Judgment (No Answer, New Trial, Substituted Service, Rule 106(b) Motion Requisites)*
- *Evidence (Discovery)*
- *Parent Child Relationship (Contempt, Judicial Bias, Child Support, Sole Managing Conservator, Evidence, Attorney Fees)*
- *Personal Injury (Damages, Future Medical Expenses, Sufficiency)*
- *Mandamus (Discovery, Net Worth)*
- *Texas Citizens Participation Act (Scope of Act, Prima Facie Case)*

Summary by the Court of a recent opinion (footnotes omitted in all summaries):

Home Equity Lien Foreclosure:

Frost Bank v. Kelley, No. 02-23-00314-CV (Oct. 17, 2024) (Walker, J., joined by Sudderth, C.J., and Womack, JJ.).

Held: Appellant's home-equity lien was foreclosure eligible against Appellees' homestead property because the loan agreement incorporated the allegedly missing loan term required under Article 16, Section 50(a)(6) of the Texas Constitution, and did so by reference.

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):

Default Judgment (No Answer, New Trial, Substituted Service, Rule 106(b) Motion Requisites)*: Gryder v. Cook*, No. 02-23-00434-CV–"Appellees Charles Cook and Flying Oaks Airport, LLC sued Daniel W. Gryder for libel and slander, business disparagement, and intentional infliction of emotional distress. Gryder did not appear or file an answer, so the trial court rendered a no-answer default judgment against him. But before the trial court's hearing on damages, Gryder became aware of the default judgment and filed a motion for new trial and to set aside the default judgment. The trial court denied the motion and, following a hearing, assessed damages against Gryder in a final judgment. In this appeal, Gryder asserts, among other things, that the suit's service was fatally defective, violating Rules 103, 106, and 107 of the Texas Rules of Civil Procedure. Because we agree that Appellees violated Rule 106(b), we will reverse and remand....Specifically, Gryder argues that (1) the email service did not comply with Rule 103; (2) the motion for, and subsequent grant of, substituted service did not comply with Rule 106(b); and (3) the return of service filed with the trial court did not comply with Rule 107. See Tex. R. Civ. P. 103, 106(b), 107....Rule 106(b) requires the party seeking substituted service to file a motion supported by a sworn statement that strictly complies with the rule. Tex. R. Civ. P. 106(b)....Here, the affidavit attached to the substitute-service motion does not contain any statement, or facts supporting an inference, that the location where service was attempted was a place "where the defendant [could] probably be found." See Tex. R. Civ. P. 106(b)....the affidavit of non-service was devoid of any information to support that Gryder could probably be found where the process server had attempted to serve him [i.e, a locked airplane hangar where "no one had seen [Gryder] in a while"]....Because the motion for substituted service here does not strictly comply with Rule 106(b)'s requirements, we conclude that the trial court erred by granting substituted service."

Evidence (Discovery)*: Diaz v. Capital One*, No. 02-23-00481-CV–"In three issues, Appellant Conrad Diaz complains that the trial court abused its discretion by admitting evidence at trial over his discovery-related objections. Because the record does not reflect an abuse of discretion, we affirm....In three issues, Diaz complains that the trial court abused its discretion by admitting Moran's business records affidavit because she was improperly disclosed under Rules of Civil Procedure 193.1, 194.2(b)(5), and 194.4 and that the evidence should have been excluded under Rule of Civil Procedure 193.6 because Capital One did not meet the exceptions for failing to amend or supplement its discovery responses. See Tex. R. Civ. P. 193.1, 193.6, 194.2(b)(5), 194.4. Diaz further argues that the trial court incorrectly relied on Markham because there was no corporate representative or other witness present at trial....Because Moran, who did not testify at trial, was the authorized agent of Capital One, a named party, and Capital One identified her in its pretrial disclosures and provided her business records affidavit ahead of trial in compliance with Rule of Evidence 902(10), as well as a means to contact her, the trial court did not abuse its discretion by overruling Diaz's objections."

Parent Child Relationship (Contempt, Judicial Bias, Child Support, Sole Managing Conservator, Evidence, Attorney Fees)*: E.I.*, No. 02-24-00015-CV–"This appeal arises from a suit affecting the parent–child relationship (SAPCR). Appellant T.J.S. (Father) appeals from the trial court's order adjudicating that he is the father of E.I.... and determining his parental rights and obligations with respect to the child. In seven issues, Father argues that the trial court (1) erred by holding him in contempt and placing him in the sheriff's custody for failing to comply with a court order; (2) exhibited judicial bias against him, thereby depriving him of a fair trial; (3) abused its discretion by ordering him to pay child support based on his earning potential as opposed to his actual income at the time of trial; (4) abused its discretion by appointing H.I. (Mother) as E.I.'s sole managing conservator based on legally and factually insufficient evidence; (5) abused its discretion by restricting his access to, and possession of, E.I.; (6) abused its discretion by admitting into evidence certain of Mother's exhibits that she had purportedly failed to properly disclose; and (7) erred by awarding Mother attorney's fees. We will affirm."

Personal Injury (Damages, Future Medical Expenses, Sufficiency)*: Tarrant County v. Reeves*, No. 02-24-00087-CV–"Appellee Shanadria Reeves sued Appellant Tarrant County (the County)

for damages resulting from a car wreck. Reeves and the County stipulated to the reasonableness and necessity of Reeves's past medical expenses in the amount of $12,813.21. The issues of Reeves's noneconomic damages and future medical expenses were tried before a jury, and the jury awarded Reeves $15,000 for future physical pain and mental anguish and $50,000 for future medical expenses. The trial court denied the County's motion to disregard the jury's award for future medical expenses and entered judgment in accordance with the jury's verdict. In its sole issue, the County argues that the evidence is insufficient to support the jury's award for future medical expenses. We will modify the judgment to delete the award of future medical expenses and affirm as modified....Dr. Mohr did not testify that Reeves would in all reasonable probability need future medical care but rather opined only that Reeves "might" need future medical care as she gets older because it is "likely" that having children or things like that could exacerbate her condition. Reeves indeed had a child in October 2023 but had not received any medical care for her injuries from the accident since 2021, and there was no evidence that she intended to receive further treatment. Evidence suggesting the possibility of future treatment, rather than a probability, will not support an award for future medical expenses....Even if Dr. Mohr's testimony sufficed to show a probable need for future medical care, Reeves had to present evidence to establish the cost of that care."

Mandamus (Discovery, Net Worth)*: Madera Residential*, No. 02-24-00423-CV–"Civil Practice and Remedies Code Section 41.0115(a) does not allow a trial court to authorize discovery of net-worth evidence until "after notice and a hearing." Tex. Civ. Prac. & Rem. Code Ann. § 41.0115(a). Because the record reflects that the trial court neither gave notice of a hearing on the amended net-worth discovery motion filed by Real Party in Interest Ray Lawrence (RPI) nor held a hearing on that amended motion before signing RPI's form order granting that discovery, and because Relators Madera Residential, LLC and Madera Residential, Ltd. d/b/a Creekside Apartments have no adequate appellate remedy for this discovery error, we sustain the first and fourth issues set out in Relators' petition for writ of mandamus and dismiss Relators' second and third issues as unripe.1.... Because the record reflects that—contrary to Section 41.0115(a)—the trial court did not give notice of a hearing on RPI's amended motion or hold a hearing on RPI's amended motion before granting the amended motion, we conclude that the trial court has abused its discretion, and we sustain Relators' first issue..... 1In their second and third issues, Relators raise evidentiary challenges, but these complaints will not be ripe until the trial court has held a hearing on RPI's amended motion. And after the trial court holds the hearing, these issues may well be rendered moot."

Texas Citizens Participation Act (Scope of Act, Prima Facie Case)*: The Kute Bar v. Tran*, No. 02-24-00119-CV–"This is an accelerated interlocutory appeal pursuant to the Texas Citizens Participation Act (TCPA). See Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001–.011, 51.014(a)(12) (authorizing interlocutory appeal of order denying motion to dismiss filed under TCPA Section 27.003). Appellants The Kute Bar, LLC; C&G All Solutions, Inc.; Trang T. Dang; Le Giang T. Tran, individually and derivatively on behalf of The Kute Bar, LLC; and Becky Binh Nguyen contend that the trial court erred by denying their TCPA motion to dismiss Appellee Fugo Tran's counterclaims for breaches of contract and fiduciary duty, tortious interference, and abuse of process. Applying the TCPA's standards, we affirm, in part, the trial court's order as it concerns Fugo's breach-of-contract, breach-of-fiduciary-duty, and tortious-interference claims; reverse, in part, and render judgment dismissing Fugo's abuse-of-process claim; and remand this matter for further proceedings consistent with this opinion....In what amounts to a single issue,... Appellants contend that the trial court erred by denying their partial motion to dismiss because (1) the TCPA applies to Fugo's breach-of-contract, breach-of-fiduciary-duty, tortious-interference, and abuse-of-process claims; (2) Fugo failed to establish each essential element of these claims by clear and specific evidence; and (3) Appellants established that they are entitled to judgment as a matter of law on each of these claims. Appellants are partially correct....Appellants failed to carry their step-one burden [as to both the breach of contract and breach of fiduciary duty claims, because] at least some of the allegations relied upon by Fugo to support his breach-of-contract claim clearly fall outside the TCPA's scope, and ....at least some of the alleged conduct comprising the breach [of

fiduciary duty claim] falls outside the TCPA's scope." The same can be said as to the tortious interference claim. As to the abuse of process claim, "[g]iven Fugo's acknowledgement that his abuse-of-process claim is based on Appellants' TRO application, the allegations in Fugo's counterpetition, and the nature of abuse-of-process claims in general, we conclude that Appellants have satisfied their burden to show that Fugo's abuse-of-process claim is based on or in response to Appellants' exercise of the right to petition....[B]ecause this tort is concerned with the use of the process after it has been properly obtained, not on the defendant's motive for originally obtaining the process,...[and] Fugo has not shown how Appellants improperly used the TRO once it was obtained....Fugo's allegation—even if true—that Appellants obtained a TRO based on false facts is insufficient to satisfy the second element....Therefore, Fugo did not establish a prima facie case for his abuse-of-process claim, and the trial court erred by denying Appellants' motion to dismiss with regard to that claim."

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

---