ORAL ARGUMENT - 4/24/97
96-1026
VERBURGT V. DORNER

LAWYER: We are here today to determine whether or not to allow an appeal to go forward when a cost bond was filed 1-day late, and no extension of time request was filed. The CA in its original opinion has since been withdrawn. It said that the late filing was reasonably explained as a matter of law. However, they thereafter reversed themselves holding the requirement of appellate 41(a)(2) to be jurisdictional.

First of all I would like to thank you for the opportunity to present this issue to the court. But it comes with great regret, because this is a case of lawyer error, and I am that lawyer. Should this cause a dismissal of my client's case? No it should not.

It's important for this court to have an understanding because we are here on a procedural defect about what the issue was to be before the CA. This is a case that was brought on behalf of 3 minor children by their father John Verburgt. The defendant Patricia Dorner had obtained confidential records from the Methodist Mission Home regarding the minor plaintiff's mother previously placing a child for adoption numerous years before she had married their father and had given birth to them. Methodist Mission Home had allowed Patricia Dorner access to these confidential records and the mother was tracked down and found and reunited with a child of 16 years, a daughter who had been placed for adoption, who her herself had just placed a child for adoption, and was an emotional wreck according to the testimony of the counsel for Patricia Dorner.

PHILLIPS: Counsel we are called upon to make this decision. ____ totally apart from the merits of the underlying case.

LAWYER: I understand your honor. But whether or not a case is heard and why a case should be heard is relevant to whether or not this particular client has made a bona fide attempt to invoke the jurisdiction of the appellate court. The question that was before the TC was whether or not a duty was owed by the counselor to provide counseling to the family members, and whether or not a cause of action existed that this court has previously held did not exist in favor of spouses against one another, that is negligent interference with familiar relationships. This court has never addressed the underlying issue about whether or not 3.62 of the Family Code precludes a child's cause of action or a similar cause of action to alienation of affection.

The summary judgment stated that there was no cause of action and there was no extreme and outrageous conduct based upon no duty. The summary judgment was signed on Oct. 10, 1995. Under Rule 41, Texas Rules of Appellate Procedure, the bond was due to be filed on Nov. 9, 1995. Nov. 10, 1995, was Veterans day, recognized by the San Antonio's commissioner's court. The following day was a Saturday, the following day was a Sunday, the first day thereafter on the

Monday Nov. 13, 1995 cost bond on appeal was filed. A bona fide attempt was made to invoke the jurisdiction of the appellate court by the filing of that cost bond. However, inadvertently the lawyer, I am that lawyer, made a miscalculation as to the date. That was the 34th day after the signing of the judgment. The cost bond was due with a motion to extend time on Nov. 24, 1995. Recognizing that Justice Chapa, for the 4th CA, under the authority given him under Rule 83 of the Texas Rules of Appellate Procedure issued a show cause order requesting of myself why it is that the appeal should not be dismissed for failure to make a bona fide attempt to invoke the jurisdiction of his court?

Initially, the CA retained the case on their docket until a CCA came out which seemed to indicate that rule 41(a)(2) was jurisdictional, at least in the CCA mind. Rule 83 provides that a judgment shall not be affirmed, reversed, or an appeal dismissed for defects or irregularities in appellate procedure. Gentlemen we have a defect in a procedure. We do not have...

SPECTOR: I heard you say there was a show cause order issued, and then what was the response to that?

LAWYER: And the response to the show cause order was the error of the lawyer, and I am that lawyer. And that error was...that occurred on the 284th day of the year, the signing of the order. I added 30 days to that and came up with the 314th day of the year. That 314th day of the year did not include the last day of the filing. And therefore the date that I had circled on my calendar was Nov. 10, 1995, a court holiday.

SPECTOR: But this was communicated to the CA?

LAWYER: And it was communicated. And in their response in an opinion written initially by Justice Green, joined by Justice Chapa and the justice who filed a dissent, Sarah Duncan, they determined that that was as a matter of law a reasonable explanation.

HECHT: So this was an opinion that was prior to the consideration of the substance of the case?

LAWYER: Yes.

HECHT: This was just on the issue of whether it was jurisdictional or not?

LAWYER: Yes. And in fact they relied on the Garcia v. Castner Farms case which says: any conduct _____ deliberate or intentional noncompliance qualifies it as inadvertent mistake or mischance even if that conduct can also be characterized as professional negligence.

ENOCH: Was the reason explained of the lateness filed within 15 days of the day it was due?

LAWYER: No your honor because we did not at that time know that it was late. And it's our position that the 4th CA took the proper approach at that time. They took the approach under the inclusionary view of Rule 83, not the later exclusionary view of 41(a)(2) that they took. The inclusionary rule of 83 allows a court on a case-by-case basis when determining this to then make that valid determination, whether or not a party made a bona fide attempt to invoke the court's jurisdiction. The court has stated that again and again. In Matchfiel as well as _____ v. NCNB. This appellate process in the State of Texas is supposed to be a process of inclusion, not of exclusion.

ENOCH: So rule 41(b)(2) which says that the reason explaining the need for the extension must be filed, the motion with the reason for the extension, must be filed within 15 days is just advisory. If at any point in the process a motion with a reason to explain comes in, then that would be a basis for the appellate court to have jurisdiction for the appeal?

LAWYER: I characterize it two ways. I do a fair amount of appellate work and I have appeared before this court. I have never in my practice seen a motion for extension of time to file a bond within that 15 day period of time be denied. And I think that that's what that rule basically says: If you do it - you're in. But in the event and I think it was applicably pointed out in the opinion by the court when they stated what their issue was, is what happens when a litigant believing in good faith that he has filed that instrument timely, thus satisfying his own basis: we don't have a file a motion for extension of time. What happens in that fact situation? And I think that is a fact situation covered by Maxfield. Let's review what happened in Maxfield. In Maxfield we got a probate proceeding initiated to issue letters of testamentary. A separate cause number within the same case is set up to determine whether or not a summary judgment should be issued confirming a decision of a prior state. Both orders were sought to be appealed. Two separate cause numbers. In Maxfield they didn't file a bond in both cause numbers. They filed a bond in just one cause number. And in fact talking about prejudice, the other side Terry didn't even know Maxfield was complaining of the summary judgment order until he gets the brief in the mail. But at that point the SC said: This groups says that the CA should have given the appellant an opportunity to create the defects before dismissing the appeal, the inclusionary provisions of Rule 83.

ENOCH: But the bond that was in question that there was a bond that was filed within the 30 days?

LAWYER: Wrong case. There was nothing filed in the summary judgment case. Not a word.

ENOCH: So what is the bona fide attempt to invoke the jurisdiction of the court that occurred in that case? Say I permitted the court then to allow the defect to be checked?

LAWYER: The court said that they should have been given the opportunity to correct their defects.

ENOCH: What was the defect that was to be corrected?

LAWYER: The defect was there was nothing filed in the summary judgment case. The defect was that they had filed a brief on a case that they had not properly appealed.

ENOCH: If they had not filed the bond in the wrong numbered case within the 30 days, would that have even been an issue...would there even been a defect?

LAWYER: No sir. And I think that the court looked and saw that they had made a bona fide attempt to appeal from this. Just like the Linwood case. In the Linwood case the wrong document was filed. And we are of the opinion the case at bar the wrong document was filed. In Linwood a notice of appeal was filed prior to the running of the 30 days. No cost bond. They had also asked for a request for a findings of facts and conclusions of law. It was a summary judgment. Fifty-three days after the judgment had been signed, the conclusions and facts of requests was ineffective to extend the timetable. Fifty-three days later the cost bond was filed on appeal. This court held in a per curiam opinion, that the CA has jurisdiction over an appeal if a party files an instrument in a bona fide attempt to invoke the AC's jurisdiction.

ENOCH: If nothing had been filed in this case until 45 days after the date of the judgment, would that have been a bona fide _____ of appeal?

LAWYER: I think under that set of circumstances that the CA has to determine whether that's a bona fide attempt. And I think a bona fide attempt is based upon a good faith attempt. And as the CA held as a matter of law in its first opinion, we've made a good faith attempt to file that on time; and we had a reasonable explanation for failing to do it. And I think that that is what allows the appellate court the opportunity to determine whether or not a bona fide attempt has been made. But the 4th court then advertently got sidetracked by the CCA saying that 41(b)(2) is jurisdictional. I think the jurisdiction part has been reached in the other cases where they say jurisdiction is conferred upon a bona fide attempt to invoke that jurisdiction. And that bona fide attempt has been made. The bond was filed in the good faith belief that it was timely filed. To show cause, response was made to show cause response was made with a supplemental record showing that the date that was thought to be the date that the bond was due was a court holiday. A brief was filed in this case - filed timely. But the wrong document was all that was filed. In this case there should have been two documents filed on that 34th day: a motion to extend time to file the bond, and the bond. We filed the wrong document. Identical to Linwood. Analogous to Linwood. I wish I could sit here and tell you this was a case of first impression. But I think that Maxfield, Jamar, and Linwood have already dealt with this issue. And I think that issue is based upon a good faith attempt to invoke the jurisdiction.

Under Rule 83 you are given an opportunity to correct the defects. The defect in this case was there was no reasonable showing or request for an extension of time. That's the defect. None of these parties were harmed. These parties knew that an appeal was filed. They

were not harmed by this appeal and they weren't harmed by the court initially retaining it upon the docket. Forty-one is jurisdictional to the extent that something must be filed. This court has even said that 41 is not jurisdictional if a bond is not filed. Because in the Linwood case, a notice of appeal was filed, not a bond. In the Jamar case this court even said that a motion for new trial that was not completed by the paying of the fee could be conditionally filed. This court has been under the direct statement that these rules are to be interpreted liberally to include not to exclude based upon procedural irregularities.

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RESPONDENT

LAWYER: Petitioner's argument would have rule 41 read thus: An appeal is perfected if and when a bona fide attempt or an instrument is filed in a bona fide attempt to invoke appellate jurisdiction after the appellant has been given a reasonable time within which to correct defects as subsequently determined by a court in retrospect on an ad hoc basis. What's wrong with that? The petitioner's argument reads the 30 day time limit of perfecting an appeal out of rule 41.

HECHT: How is that?

LAWYER: Nothing was filed within 30 days. There was no motion. And I'm speaking in the context of this record and the facts here. There was no motion for new trial, no post-judgment motion. The original time line for perfecting an appeal was 30 days. Nothing whatever was filed within 30 days. The bond was not 1 day late. It was 4 days late. It was filed on the 34th day. Nothing was filed within 45 days of judgment beyond that. The transcript was ultimately filed in the CA in early December. On Dec. 21 in a jurisdictional screening the CA issued a show cause order. The response to that was not filed until Jan 22, and the response was not verified. It was not in the form of a motion for extension. In fact the response indicated that no motion for extension had been timely filed.

And the CA in its original opinion that was withdrawn stated that that response in January, which was after the 45 days, constituted a reasonable explanation but that explanation went outside the record. At first all that was made in the response was argument. And it was not verified, there was no affidavit. If you look at the Smirl opinion, which is cited in the briefs and cited in the dissenting opinion, as well as Glidden v. Aetna when jurisdictional facts are not in the record and the CAs needs those facts, they have to be presented in the form of an affidavit or other evidence. The response didn't provide that. There was never any reasonable explanation made in the CA for the late filing.

What's wrong with no compliance with 41 in 30 days? No compliance within 45 days, the 15 day grace period? It reads the 30 day time limit out. It reads the 15 day grace period out.

HECHT: How does it read the 30 day time limit out if you still have to show good cause?

LAWYER: That was not done in the context...

HECHT: It may not have been done, but if you still had to do it how would it read the 30 days out?

LAWYER: Well it was saying it is not applicable here because we can go beyond that. In fact the way rule 41 reads in the civil appeals portion it says: that the bond has to be filed in the TC, and the motion offering the reasonable explanation in the CA, not later than 15 days after the last day, which is the 45th day. And if you attempt to use rule 83 and the reasonable time to correct or amend defects of 83, there is a conflict then between 83, reasonable time going out to January 22 on this record and on these facts, when the 45th day was Nov. 27, the 45 days. The petitioner's argument provides no certainty, no definitiveness, no predictability, no finality to a trial court judgment.

HECHT: Why isn't it pretty predictable that if you don't file a cost bond within 30 days and don't have a good reason for doing it, and file something within 45 days, you are going to lose?

LAWYER: That is predictable, that's our position. They didn't.

HECHT: Well for example: why shouldn't the CA have treated the cost bond as implying the motion? What other reason is there to file it within 45 days?

LAWYER: A number of reasons. One is the rules require a written motion. It can't be implied. The local rules of the 4th court required a verified motion to establish facts that aren't in the record. The misunderstanding of the law if that's what it was. The Smirl case requires that, the Glidden case requires that.

HECHT: If this had been called motion and cost bond and the rest of the text had been the same, would that have been good enough?

LAWYER: No, the bond is filed in the TC. The motion for an extension is filed in the appellate court.

HECHT: So if it's filed in the wrong court, that's bad too?

LAWYER: Yes. But I think this question has addressed and the thrust of petitioner's argument is that you can use Rule 83 to provide a time to cure. Well if you look back at the origin of the derivation of the rules, and I want to cite a case that's not in the briefs: it's Walker

v. Clear, 174 S.W.2d 956, that was written by CJ Alexander in 1943, shortly after the rules were originally adopted. The rules of civil procedure were first adopted in Oct. 1940. They were amended twice in March and Dec, 1941. At that time CJ Alexander was a professor at Baylor on practice and procedure. He was on the Waco CA. He taught clinics on the new rules. Shortly after the new rules went into effect and the predecessor rule to 83 was Rule 437, and if you will look at the commentary under Rule 437 in the hard bound book of rules, there is a cite to a Texas Bar Journal article by Robert Storey of Austin, on an analysis of the rules shortly after they were written and adopted. He says that the court then made plain that the time limits for perfecting an appeal were never subject to rule 437. Rule 437 is 83 today. So from inception and historically you could never invoke rule 83 to cure a jurisdictional defect.

Now back to Walker v. Clear and Alexander's opinion in 1943. That was an appeal from an interlocutory venue judgment denying the defendant's plea of privilege. Under the rules then you had to do two things to perfect an appeal: you had to file a bond within 20 day and within the same time frame 20 days you had to file the record in the appellate court. On filing the record it had a 20 day proviso and a 5 day grace period. It also provided for motion for extension back then for good cause, not reasonable explanation. In that case, the bond was timely filed. The record was not. There was no motion for extension of time. And CJ Alexander in answering a certified question for this court, for an unanimous court, said there was no jurisdiction when there are 2 steps required to perfect an appeal, the taking of only one of those steps is insufficient.

If you look at the parallel between that rule with its original time limit of 20 days, and the 5 day grace period, and the motion for extension back then, it parallels Rule 41 today. That opinion also discussed rules 404 and 405, which today are rules 71 and 72 dealing with informalities in the record. Justice Alexander said those jurisdictional requirements can't be waived. He was making a distinction. Those are jurisdictional defects. They are not procedural irregularities within what was then 437 and what is now 83. If you look to the CCA's opinion on this very question in Alieval(?) V. State and that's cited in the briefs, the CCA last year addressed this very question. And in that case a notice of appeal, a motion for extension for the late filing had not been filed. The CCA construing very similar language held that the two requirements are jurisdictional and without them there is no jurisdiction. The timely filing of a notice of appeal in the criminal case and the timely filing of the motion for extension if you don't file it within the original 30 day time frame.

I realize that that opinion is not binding on this court. But when the integrated rules of appellate procedure were adopted in 1986, the charge from this court and from the CCA was to harmonize the rules in civil and criminal appeals so that there won't be any differences unless there is a substantial requirement or reason for the differences. Justice Clarence Gitard spoke to that in harmonizing the rules in 48 Tex. Bar Journal at 24.

Both before and after the adoption of the appellate rules in 1986 there have

been a host of cases which hold that the time requirements for perfecting an appeal are jurisdictional. They can't be waived, they are not subject to agreement, and they can't be cured. That's the Walker v. Clear, the Glidden v. Aetna and there are any number of civil appeals opinions.

HECHT: I guess you agree though if a cost bond had been timely filed in this case within 30 days, but it had the wrong case number on it, it would have perfected appeal?

LAWYER: Yes.

HECHT: How does that make sense? If you don't even know the right case is being filed and that perfects appeal, but if you do know the right case but it's filed within the 15 days it doesn't?

LAWYER: When you timely filed an instrument, and you've invoked the jurisdiction of the court, in this case within 30 days nothing was filed. And the bond was filed on the 34th day within the 15 day grace period, but that doesn't get you home. There's a second step to invoking appellate jurisdiction there. That's the motion reasonably explaining the late filing and that motion has to be granted. Here there was never any such motion, there was no order of the CA granting the motion, there was no reasonable explanation made on verified facts to the CA.

HECHT: I guess you also agree that if a document had been filed within 30 days, but was not a cost bond - just a sentence: I want to appeal, that that would have perfected appeal?

LAWYER: Well Linnwood, Grand Prairie where notice of appeal, the wrong instrument was filed, this court has said...and in all of those cases there was a perfecting instrument of some kind filed within the 30 day time line. And that invoked appellate jurisdiction allowing a time for correction. Here that was not done. There was no reasonable explanation ever made and no order of the CA ever granting leave to late file the bond.

HECHT: I thought there was an interlocutory opinion?

LAWYER: It was withdrawn.

HECHT: But there was one at one time?

LAWYER: There was one in March which was subsequently withdrawn and vacated in an un_____ opinion where they dismissed because appellate jurisdiction had not been timely and properly invoked. If you look there are two law review articles after the adoption of the appellate rules in 1986. _____ Law Journal 1 by Timothy Patton on Deadlines and Extension Motions in civil appellate matters; and 50 Texas Bar Journal 642 written by a briefing attorney and a staff attorney from the Houston 1st and 14th on the Nuts and Bolts of Civil Appellate practice.

In both of those they come to the conclusion that under the new appellate rules the 15 day time line, the grace period is absolute. Beyond that there is no discretion, no discretion vested in the CA to grant the late filing of a bond. And that's the way it should be. The litigants, the bar, the attorneys, the public need to know when a judgment becomes final. And if you look at 41 the way it's written now and the way it's proposed to be carried into the new rules effective this September, they still carry forward the 30 day, again assuming no post-judgment motions, and the 15 day grace period. What does that give you? It gives you some reasonable predictable time lines which are essential to appellate jurisdiction, essential to definitiveness, essential to certainty, it also gives you a forgiveness factor. It gives you the 30 days, it gives you the 15 day motion for extension.

SPECTOR: If on the 34th day no bond has been filed, but a motion for extension of time, would that have invoked the court's jurisdiction?

LAWYER: No. I think you have to comply with both. I think CJ Alexander answered that in the Walker v. Clear case. Now when two steps are required to perfect - doing one only is not sufficient. You have to do both.

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LAWYER: I rise to speak for the Methodist Mission Home, which is a licensed adoption agency and a charitable institution in San Antonio. I am here to speak not to the facts in the matter. We don't have the time. But, I am here to speak to one matter mentioned by counsel for Mrs. Dorner, and that is when is a trial court judgment in Texas final? And we ask you that whatever opinion you write in this case, if you indeed choose to write an opinion, you must answer that question. You must tell us at what time and after what events can we tell our respective clients that the litigation is over. In other words, finality of trial court judgment.

Now we all know lawsuits determine important rights. Who owns Black Acre? Was the defendant's conduct below the standard of care? Who gets grandpa's ranch, and who gets his oil wells? All those things require firm and fixed determinations. Once the TC makes that determination the question is is that final? And that's where Rule 41 comes into play.

ENOCH: If no cash bond is filed within 30 days, but just any document is filed in 30 days, do you agree that any document perfects an appellate jurisdiction in any particular case?

LAWYER: Anything that looks like a bona fidei attempt to invoke that jurisdiction would preserve jurisdiction.

ENOCH: So whatever is filed has to at least appear to be an attempt to invoke the jurisdiction?

LAWYER: Even if a person appeared who had filed a cost bond on a cocktail napkin from the men's club in Houston, if they had done that, that would be sufficient under the bona fidei attempt rule to invoke appellate jurisdiction. This court has held that anything that looks like it would do so would be sufficient.

ENOCH: Why isn't a bond that's filed after the 30 days, but in the 15 day period, why isn't that just any old document that looks like an extension of time to be sought?

LAWYER: Because finality of judgment requires arbitrary time limits. Rule 41a sets a 30 day limit. You don't file within that time, the consequences are described to you by Glidden. They are described to you by Walker; and described to you by Davey. You do not have jurisdiction, the CA can do nothing but dismiss.

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REBUTTAL

LAWYER: As the CA determined, and they stated it this way: We are confronted with the question, whether the appellate rules condone or result that allows a litigant who knows he is late with his bond to save his appeal, but rejects the appeal of the litigant who erroneously but in good faith believes he has timely filed his bond and thus satisfied also believed he has no need to file for an extension of time. The key word is "bona fide" attempt to invoke the court's jurisdiction. That is a good faith belief that you have done so. Justice Duncan says it best in her dissent and I can't say it any better and so I am going to read it.

> The flaw in the majority, that's the 4th court's analysis, and its disregard of not only Rule 83, but also Rule 2 arises out of its initial characterization of the issue as whether the appellate rules condone a patently unfair result. By phrasing the issue in this manner the majority presumes that a patently unfair result must obtain unless a rule or SC opinion precludes it. Finding no such authority, the majority concludes that the rules condone the patently unfair result it reaches. But the majority's presumption rests upon an approach to the rule that has been repeatedly rejected by this court.
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> The correct approach rests upon the opposite presumption, that the issue is not whether the rules condone a patently unfair result, but whether or not they require it.

The correct presumption has been most eloquently and succinctly stated by one of the original drafters of the rule, Chief Justice Alexander just quoted to you by the attorneys for the

respondent. The object of the new rules, and this was written in 1945 is to obtain a just, fair, equitable and impartial adjudication of the rights of the litigants.

A bona fide attempt was made. The respondents are trying to tell you that nothing done after 30 days can be a bona fide attempt to invoke the appellate court's jurisdiction. Nothing after 30 days can be done. Wrong instrument or not? You can file a cocktail napkin from a strip bar in Houston is what they just told you as long as you do it within 30 days. But if you are one day late, even though you've tried to invoke the jurisdiction, and even though Maxfields out there where nothing was done until the brief was filed 9 months or in the Linwood case where the wrong document was filed. Or in a situation where the case was filed in the wrong cause number.

ENOCH: The bona fide attempt to file a cocktail napkin filed within 30 days, you look at it does it express some sort of intent on the part of the parties to appeal the judgment?

LAWYER: No more than a cost bond.

ENOCH: Then if you accept that a second step is required in the 15 day period, I mean if only filing an appeal bond during the 45 days was required, there would be no purpose to the rule. So the rule says something else has to happen in this 15 day period, and something else has to happen has to be a motion for extension of time reasonably explaining why a bond wasn't filed. Can a document that is obviously a cost bond as a matter of law evidence and intent to request a motion to extend time to satisfy the second obligation which is a bona fide attempt to file a motion for extension of time?

LAWYER: I'm not sure that this court requires a bona fide attempt to file a motion for extension of time.

ENOCH: If that's not the case, then wouldn't just you file your cost bond at any time in 45 days, then all that's left is you tell the court: I forgot; I miscounted, and you've perfected the appeal to the CA?

LAWYER: I think it goes to the question of whether or not there's good faith belief that you have done something to invoke that jurisdiction - a bona fide attempt. You can't file a document on the 45th day and say you can't count to 30. Now I mean I filed it on the 34th day and said I can't count to 30, but there's a little bit of difference, and that's what it goes is to whether or not somebody showed a bona fide attempt, a good faith attempt, something that they did that shows to everybody that they're unsatisfied with the judgment and they want to be heard by an appellate court on the substance and not procedurally regularities.