



Opinion Summaries October 1, 2021

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PROCEDURE---APPELLATE

Waiver

Li v. Pemberton Park Community Ass'n, ___ S.W.3d ___ (Tex. Oct. 1, 2021) [20-0571]

The issue in this case was whether the petitioner waived appellate review by failing to preserve her argument that the respondent had enforced deed restrictions against her in violation of the Property Code. Respondent Pemberton Park Community Association (Association) is a homeowners' association. The Association enforces deed restrictions under a Declaration of Covenants, Restrictions and Easements (Covenants). The Association sued Li for violating certain Covenants when she repaired a crack in the stucco exterior of her house. In various pretrial pleadings, Li, representing herself pro se, raised the defense that other residents "with much worse violations" had not been subjected to enforcement efforts by the Association. She alleged that the Association had breached a covenant "of fair dealing" and "equal and same manner," and that the deed restrictions had been "selectively enforced" against her because she had complained about unrelated matters.

The trial court granted summary judgment in favor of the Association. On appeal, Li argued that she had raised a fact issue on whether the Association's enforcement action was barred because it violated section 202.004(a) of the Property Code. Section 202.004(a) provides that an exercise of discretionary authority by a homeowners' association is presumed reasonable unless the court determines that the exercise of authority was "arbitrary, capricious, or discriminatory." The court of appeals held that this argument had been waived because Li had not raised it in the trial court.

The Supreme Court reversed. The Court reasoned that, under TEX. R. CIV. P. 166a(c), issues not raised in the trial court cannot be considered on appeal as grounds for reversal of a summary judgment. However, procedural rules should be construed liberally so that the right to appeal is not lost unnecessarily. If the substance of the issue was presented to the trial court, then the issue is preserved, even if the party did not rely on precisely the same caselaw or statutory subpart that she now urges on appeal. Parties are free to construct new arguments in support of issues raised below. Under these standards, Li preserved her claimed statutory defense. Even

though she did not cite section 202.004(a), she had argued that the Association's actions were arbitrary and discriminatory in that she was unfairly singled out for disparate treatment. The Court also noted that as a pro se litigant Li's pleadings should be evaluated "with liberality and patience." Because Li preserved her statutory defense, the Court reversed the court of appeals' judgment. It remanded the case to the court of appeals for consideration of other issues that court had not reached.

DISCOVERY

Oral Depositions/Right to Control Witness

***In re Texan Millwork*, ___ S.W.3d ___ (Tex. Oct. 1, 2021) [20-0662]**

Under Texas Rule of Civil Procedure 199.3, a subpoena is generally required to compel a witness's appearance at a deposition. But if the witness is (1) a party or (2) "retained by, employed by, or otherwise subject to the control of a party," the witness's attendance may be compelled following "service of . . . a notice of oral deposition upon" the party's attorney. In this original proceeding, the issue is whether the trial court erroneously compelled the relator, Texan Millwork, to produce a co-defendant for an oral deposition without a subpoena.

This discovery dispute arises from a fatal industrial accident. A granite store employee died when two 400-pound granite slabs fell off a construction worker's truck. After obtaining a default judgment against the construction worker, Lazaro Cabrera, the survivors added claims against Texan Millwork, a cabinet-maker that had hired Cabrera to fabricate the granite slabs into countertops for a residential construction project. Shortly after being sued, Texan Millwork obtained a sworn statement from Cabrera, which it later offered as evidence to support a summary-judgment motion asserting he was an independent contractor not subject to the cabinet-maker's control at the time of the accident.

Cabrera subsequently evaded the survivors' multiple attempts to contact him and serve him with a subpoena for an oral deposition. About a year later, the survivors served a notice of oral deposition on Texan Millwork and a motion to compel Cabrera's deposition. The survivors argued that Rule 199.3 dispensed with the subpoena requirement because Cabrera was either employed by Texan Millwork or subject to its control. In response, Texan Millwork produced evidence to refute past employment or control and establish the nonexistence of present employment or control, including uncontroverted evidence that Texan Millwork had no business relationship or contact with Cabrera for more than eight months prior to service of the deposition notice. The trial court ordered Texan Millwork to make the worker available for a deposition within twenty-one days, and the court of appeals denied mandamus relief, citing disputed evidence that Texan Millwork employed or controlled the worker on the day of the accident, some three years before the survivors served the deposition notice. The court said the existence of fact issues arising from that disputed evidence mandated deference to the trial court's ruling.

After a successor trial judge declined to reconsider the ruling, the Texas Supreme Court conditionally granted mandamus relief. The Court construed Rule 199.3's plain language to preclude a court from compelling a party to produce a witness when employment and control are

lacking at the time production is requested or required. Without considering whether the evidence raised a fact issue about employment or control at the time of the accident, which remained disputed, the Court found no evidence that either existed contemporaneous with service of the deposition notice or thereafter and the record instead bore uncontradicted evidence to the contrary. Focusing on the relevant time period, the Court held that (1) the trial court's order exceeded the permissible bounds of discovery and (2) the error was irreparable on appeal.