Affirmed and Majority and Concurring Opinions filed January 19, 2017.

In The

Fourteenth Court of Appeals

NO. 14-15-00234-CV

HUMAN BIOSTAR, INC. AND RNL BIO, LTD. N/K/A K-STEMCELL CO. LTD., Appellants

V.

CELLTEX THERAPEUTICS CORPORATION, Appellee

On Appeal from the 434th Judicial District Court
Fort Bend County, Texas
Trial Court Cause No. 12-DCV-202563

C O N C U R R I N G O P I N I O N

I concur with the majority's disposition of this case but respectfully disagree with its analysis in several areas, particularly concerning whether Biostar's appeal should be analyzed under the requirements for an ordinary or a restricted appeal.[1]

[1] I agree with the majority's disposition and analysis of Celltex's jurisdictional issues.

The Restricted Appeal

As the majority acknowledges, Biostar filed a notice of restricted appeal and thereafter briefed this court based on the requirements applicable to restricted appeals. Biostar did not file a notice for, or otherwise pursue, an ordinary appeal. Nonetheless, the majority construes and analyzes Biostar's appeal as an ordinary appeal.

A restricted appeal is a direct attack on the trial court's judgment. *E.g., Larson v. Giesenschlag*, 368 S.W.3d 792, 795–96 (Tex. App.—Austin 2012, no pet.); *RMS Residential Props., LLC v. Molina*, No. 14–11–00232–CV, 2011 WL 5314526, at *1 (Tex. App.—Houston [14th Dist.] Nov. 3, 2011, no pet.) (mem. op.). It is available for the limited purpose of providing a party that did not participate at trial with the opportunity to correct an erroneous judgment. *Telezone, Inc. v. Kingwood Wireless*, No. 14-15-00742-CV, 2016 WL 7436813, at *1 (Tex. App.—Houston [14th Dist.] Dec. 22, 2016, no pet. h.) (mem. op.); *Sweed v. Nye*, 354 S.W.3d 823, 825 (Tex. App.—El Paso 2011, no pet.). To prevail on a restricted appeal, Biostar must establish (1) it filed notice of the restricted appeal within six months after the judgment was signed, (2) it was a party to the underlying lawsuit, (3) it did not participate in the hearing that resulted in the judgment complained of and did not timely file any post-judgment motions or requests for findings of fact and conclusions of law, and (4) error is apparent on the face of the record. *Alexander v. Lynda's Boutique*, 134 S.W.3d 845, 848 (Tex. 2004); *see also* Tex. R. App. P. 26.1(c), 30.[2] Appellees dispute only the fourth element, arguing that the face of the record shows no error.

[2] Rule 26.1 provides that a notice of appeal generally must be filed within 30 days after the judgment is signed, except for certain listed exceptions, including "(c) in a restricted appeal, the notice of appeal must be filed within six months after the judgment or order is signed."

When reviewing a restricted appeal, the face of the record consists of all of the papers on file—including the clerk's record and the reporter's record—at the time the judgment was signed. *In re K.M.*, 401 S.W.3d 864, 866 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (citing *DSC Fin. Corp. v. Moffitt*, 815 S.W.2d 551, 551 (Tex. 1991)). Extrinsic evidence may not be considered. *Alexander*, 134 S.W.3d at 848; *W. Garry Waldrop DDS, Inc. v. Pham*, No. 14-15-00747-CV, 2016 WL 4921588, at *1 (Tex. App.—Houston [14th Dist.] Sept. 15, 2016, no pet.) (mem. op.). Evidence not before the trial court prior to final judgment is beyond the scope of review and may not be considered. *See Gen. Elec. Co. v. Falcon Ridge Apartments, Joint Venture*, 811 S.W.2d 942, 944 (Tex. 1991) (writ of error appeal); *Laas v. Williamson*, 156 S.W.3d 854, 857 (Tex. App.—Beaumont 2005, no pet.); *see also Yazdchi v. Wells Fargo*, No. 01-15-00381-CV, 2016 WL 6212998, at *2 (Tex. App.—Houston [1st Dist.] Oct. 25, 2016, no. pet. h.) (mem. op.).

As a matter of first impression, the majority concludes that Biostar's appeal should be construed as an ordinary appeal instead of a restricted appeal because Biostar filed its "Notice of Restricted Appeal" within thirty days of the trial court's final judgment.[3] I respectfully disagree. Nothing in the appellate rules expressly requires a notice of restricted appeal to be filed more than thirty days after the final judgment. *See* Tex. R. App. P. 26.1(c) (providing that notice of a restricted appeal must be filed within six months from judgment). While Texas Rule of Appellate Procedure 30 provides that "[a] party . . . who did not timely file . . . a notice of appeal within the time permitted by Rule 26.1(a) [ordinary appeal], may file a

[3] The thirtieth day after the February 1, 2015 final judgment was signed was a Sunday; therefore, March 16, 2015, the day Biostar filed its notice, is construed as "within thirty days." *See* Tex. R. Civ. P. 4.

notice of appeal within the time permitted by Rule 26.1(c) [restricted appeal]," I disagree with the majority that Biostar's Notice of Restricted Appeal should be construed as a timely notice of ordinary appeal.[4] Doing so violates the spirit of the

[4] Not only is Biostar's notice styled "Notice of Restricted Appeal," it outlines the requirements for a restricted appeal in the body of the motion (it was a party to the underlying lawsuit, it did not participate in the hearing that resulted in the judgment complained of, and it did not timely file any post-judgment motions or requests for findings of fact and conclusions of law). *See, e.g., Alexander*, 134 S.W.3d at 848. We look to the substance of a pleading to determine the relief sought, not merely to its form or title. *In re J.Z.P.*, 484 S.W.3d 924, 925 (Tex. 2016) (citing *State Bar of Tex. v. Heard*, 603 S.W.2d 829, 833 (Tex. 1980)). Here, both the title and the substance of the pleading makes clear that Biostar seeks a restricted appeal. We need not construe it otherwise.

It is further worth noting that the history of Rule 30 does not mandate the majority's reading of the rule. Rule 30 was promulgated in 1987 to replace the writ of error procedure contained in former Texas Rule of Appellate Procedure 45. *See* Tex. R. App. P. 30; *Texaco, Inc. v. Cent. Power & Light Co.*, 925 S.W.2d 586, 588 (Tex. 1996). Under former Rule 45, the writ of error procedure was only available to a party to the suit who did not participate in the actual trial and who filed the writ within six months of the judgment. *Texaco*, 925 S.W.2d at 588. When confusion arose over the definition of "participation" in certain contexts, the Texas Supreme Court, in *Texaco*, clarified the requirement, citing *Lawyers Lloyds v. Webb*, where the court made a practical distinction between those who should use the speedier ordinary appeal and those who may appeal by writ of error:

> Those who participate in the trial leading up to the rendition of judgment are familiar with the record, and are therefore in position to prepare for appeal on short notice; whereas, those who do not so participate in the actual trial, and are therefore unfamiliar with the record, may need additional time in which to familiarize themselves with the record. For example: One who participates in the *hearing of the evidence* will be familiar with the facts introduced upon the trial and can immediately begin the preparation of his appeal.

Texaco, 925 S.W.2d at 590–91 (quoting *Lawyers Lloyds*, 152 S.W.2d 1096, 1098 (Tex. 1941) (emphasis added)).

The court held that the language "did not participate in the actual trial of the case in the trial court," contained in former Rule 45(b), was intended to limit appeals by writ of error to parties who had not participated in "the decision making event" that resulted in the judgment adjudicating that party's rights. *Id.* at 589-90; *see also* John Hill Cayce, Jr., et. al., *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 Baylor L. Rev. 867, 917 (1997). Rule 30 essentially codified *Texaco* and further limited participation by prohibiting a restricted appeal if the party timely filed a post-judgment motion, request for findings of fact, or notice of an ordinary appeal. *See* Tex. R. App. P. 30; Cayce et. al, *supra*, at 917-18. The new rule does not eliminate the alternative path for an appeal for parties who did not participate in the decision making event.

appellate rules and unnecessarily complicates the appellate process for appellants, appellees, and the courts of appeals.[5]

As an appellant having filed a Notice of Restricted Appeal, Biostar then filed an appellate brief attempting to demonstrate its entitlement to relief under the requirements for a restricted appeal, not an ordinary appeal. Therefore, construing the notice as a notice for an ordinary appeal means the majority fails to address Biostar's appellate arguments as they are raised. Moreover, it appears Biostar may have pursued a restricted appeal because it did not, in fact, participate in the proceedings below that resulted in the judgment about which it complains. The majority, however, basically construes the appeal as an ordinary appeal and then holds Biostar *waived* its appellate complaints by not raising them in the proceedings in which it did not participate. The majority's holding therefore robs Biostar of the type of appellate review it sought, the only type of review that makes rational sense given Biostar's nonparticipation below. *See generally Salvaggio v. Brazos Cty. Water Control & Imp. Dist. No. 1*, 598 S.W.2d 227, 229 (Tex. 1980) ("An appellant should be accorded a very reasonable and liberal interpretation of the rules and requirements of appellate review.").

The majority's holding is also problematic when viewed from Celltex's position in this case. An appellee responding to a Notice of Restricted Appeal and briefing raising only restricted appeal issues easily could be lulled into failing to make arguments that would be proper in an ordinary appeal or perhaps not bringing forward additional parts of the record that might support the judgment. The majority's holding also unnecessarily complicates the analysis for appellate courts. Essentially, the majority has determined to address appellate issues not

[5] I note the plain language of the rule uses the past tense: "did not . . . file," clearly indicating a post-judgment motion, including a notice of appeal, filed *prior to* the notice of restricted appeal.

actually raised by the appellant and not actually responded to by the appellee. This switched analysis may appear relatively straightforward in this case, but it will not be so in all such cases. If, as the majority apparently concludes, a notice of restricted appeal can only properly be filed after 30 days have elapsed from judgment, the more reasonable holding would be to deem Biostar's prematurely-filed Notice of Restricted Appeal as filed on the first proper day on which it could be filed. This holding would provide Biostar with the review it sought, avoid confusion for Celltex, and eliminate the need for this court to craft and then resolve different issues than those actually raised.

The Face of the Record

Biostar challenges the trial court's ruling in several issues, some of which are similar to those raised by K-Stemcell. However, the analysis of Biostar's issues on restricted appeal is limited to error apparent on the face of the record. *See Alexander*, 134 S.W.3d at 848. As an initial matter, I note that Biostar's briefing does not cite the record to support its argument that error is apparent. This Court has no duty to search a voluminous record without guidance from Biostar to determine whether an assertion of reversible error is valid. *See Parex Res., Inc. v. ERG Res., LLC*, 427 S.W.3d 407, 420 (Tex. App.—Houston [14th Dist.] 2014), *aff'd sub nom*, *Searcy v. Parex Res., Inc.*, 496 S.W.3d 58 (Tex. 2016); *Nguyen v. Kosnoski*, 93 S.W.3d 186, 188 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

To the extent Biostar argues that its board of directors failed to approve the Agreement, Biostar directs us only to the Agreement itself.[6] The cited passage states: "The obligations under this Agreement are subject to Stemcell's and Celltex's board of directors' approval." No evidence in the record establishes that

[6] Biostar argues that the approval of the board of directors is a condition precedent to the enforceability of the Agreement.

the Biostar board failed to approve the Agreement. A restricted appeal requires error that is apparent on the face of the record; error that is merely inferred will not suffice. *See Ginn v. Forrester,* 282 S.W.3d 430, 431, 433 (Tex. 2009).

To the extent Biostar argues the arbitrator failed to provide it with proper notice of the arbitration hearing, Biostar directs us only to the arbitration award itself and statements made therein regarding efforts to contact the parties, which the arbitrator deemed to be proper notice.[7] The record does not reveal what "proper notice" was required under the arbitration agreement or applicable rules.[8] *See* Tex. Civ. Prac. & Rem. Code § 171.044(a) ("*Unless otherwise provided by the agreement to arbitrate*, the arbitrators shall set a time and place for the hearing and notify each party.") (emphasis added); *see also Tan v. Lee*, No. 14-06-00319-CV, 2007 WL 582084, at *2 (Tex. App.—Houston [14th Dist.] Feb. 27, 2007, no pet.) (mem. op.). Biostar, in fact, complains that "nothing in the record indicates that proper notice was received by [Biostar]." Silence of the record regarding notice is insufficient to show error on the face of the record. *See Alexander*, 134 S.W.3d at 849-50. Accordingly, I would overrule Biostar's issues on restricted appeal and

[7] In the award, the arbitrator stated that "The Parties [defined to include Biostar] received . . . notice of the hearing." The award thereafter appears to contain a typographical error in that it uses the acronym "BSI" for Biostar instead of the defined acronym "HBI." The arbitrator additionally states that "although clearly on notice, BSI has ignored the arbitration" and explains in a footnote as follows:

> Until October 23, 2014, K-Stemcell and BSI had been jointly represented by Brian Antwell and Katten Muchin Rosenman LLP, at which time, with court approval, Mr. Antwell and his firm withdrew from the representation. Thereafter, although actual notices were delivered to co-counsel in Korea and forwarded on to K-Stemcell and BSI, no counsel entered an appearance in the arbitration proceeding for either of those parties until the November 17, 2014, hearing. At that hearing, Lance B. Lee and Lee International IP & Law Group appeared, at least the Arbitrator thought, for K-Stemcell and BSI. Mr. Lee has now made it clear that his appearance and later fillings were only in behalf of K-Stemcell.

[8] The parties dispute, in post-submission letters, whether the parties agreed to be bound by the Texas Arbitration Act.

confirm the trial court's judgment as to it.

K-Stemcell's Appeal[9]

I agree with the disposition of K-Stemcell's issues, but I disagree that it waived vacatur by filing objections the day before the hearing.[10] However, at the hearing on the motion to confirm the arbitration award, K-Stemcell offered no evidence to support its objections. A party seeking to vacate an arbitration award bears the burden of presenting a complete record that establishes grounds for vacatur. *Amoco D.T. Co. v. Occidental Petroleum Corp.*, 343 S.W.3d 837, 841 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). I would overrule K-Stemcell's issues and affirm the trial court's judgment as to it.[11]

/s/ Martha Hill Jamison
Justice

Panel consists of Justices Jamison, Donovan, and Brown (Donovan, J., majority.)

[9] I would not consider Biostar's briefing on these issues, as did the majority.

[10] I agree that the challenges to the motion to compel arbitration were as to the contract as a whole and the trial court did not abuse its discretion in granting the motion to compel.

[11] I agree with the majority's denial of the motion to award frivolous appeal damages on this record.