Dissenting and Opinion Filed February 16, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01312-CV

CHAN IL PAK, Appellant
V.
AD VILLARAI, LLC, THE ASHLEY NICOLE WILLIAMS TRUST, VILLAS ON RAIFORD CARROLLTON SENIOR HOUSING, LLC, AND VILLAS ON RAIFORD, LLC, Appellees

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-06030

DISSENTING OPINION

Before Justices Francis, Evans, and Stoddart
Opinion by Justice Evans

Appellees argue appellant failed to preserve his appellate complaints that the former trial judge who tried the case did not sign the findings of fact and conclusions of law, but instead the newly elected trial judge did so. The majority concludes appellant did not need to preserve his complaints and reverses the trial court's judgment. Because I agree with appellees, I dissent.

I. Background

December 31, 2014, was the expiration of the term of the Honorable Judge Martin Lowy due to his re-election loss. Judge Lowy presided over the trial of this case and signed a modified final judgment on November 24, 2014. On December 1, 2014, appellant requested findings of

fact and conclusions of law. Appellant filed his notice of past-due findings of fact and conclusions of law on December 31, 2014, at 4:52 p.m.

On January 6, 2015, newly elected Honorable Judge Staci Williams signed an order entitled, *Order for Court Reporter to Produce Court Reporter's Record in Response to Defendant's Notice of Past-Due Findings of Fact and Conclusions of Law* ("*First Order*"). In her *First Order*, Judge Williams stated that she was not the judge who tried the case, and did not learn until that day of the notice of past-due findings of fact and conclusions of law, so she ordered the court reporter who reported the trial to produce a transcript by January 8, 2015, at noon.

On January 8, 2015, Judge Williams signed an order entitled, *Order for Court Reporter to Produce Court Reporter's Record in a Readable Format* ("*Second Order*"). In her *Second Order*, Judge Williams stated she entered her *First Order* "so that the Court could timely respond to the past-due findings of fact and conclusions of law," recited that two "3x5 floppy disks" that had been delivered to the court along with exhibits were not a format compatible with Dallas County's computers, and ordered the reporter to "immediately prepare and deliver the court reporter's record in either CD-ROM or thumb drive" to the court by 5:00 p.m., January 8, 2015.

On January 9, 2015, appellees filed their revised, proposed findings of fact and conclusions of law. Judge Williams signed and caused to be filed findings of fact and conclusions of law on January 12, 2015.

Appellant did not object in the trial court to either of Judge Williams's orders announcing her intent to make, sign, and file findings of fact or conclusions of law. Nor did appellant object after Judge Williams filed her findings of fact and conclusions of law.

II. Discussion

A. Expiration of Judge Lowy's Term

The purpose of making an objection to a trial court's ruling or procedure is so that the trial court may have the opportunity to correct any errors without the necessity and cost of an appeal. *In re Estate of Womack*, 280 S.W.3d 317, 321 (Tex. App.—Amarillo 2008, pet. denied). The purpose of the past-due notice is to remind the trial court that it has not signed and filed findings and conclusions and that it has been requested to do so. *See Nisby v. Dentsply Int'l, Inc.*, No. 05-14-00814-CV, 2015 WL 2196627, at *2 (Tex. App.—Dallas, May 11, 2015, no pet.) (mem. op.). The reason is because, in the normal business of the trial courts, such a request could escape the judge's attention.[1]

Appellant's past-due notice was filed at 4:52 p.m. on December 31, 2014—eight minutes before the close of business on the last day of Judge Lowy's term of office. Because the notice was filed immediately before the judge left office, the extended time period during which Judge Lowy could have filed findings of fact and conclusions of law under rule 297 of the rules of civil procedure occurred after he left office. *See* TEX. R. CIV. P. 297 (timely past-due notice extends the time for filing findings and conclusions to forty days after the filing of the request for findings and conclusions); *see also* TEX. R. CIV. P. 4 (in computation of time, "the day of the act, event, or default after which the designated period of time begins to run is not to be included"). The record does not show whether the past-due notice was ever brought to Judge Lowy's attention as required by rule 297. *See* TEX. R. CIV. P. 297 (past due notice "shall be immediately

[1] For this same reason, a prematurely filed notice of past-due findings and conclusions is ineffective to preserve an appellate complaint because inherently it cannot remind the trial court of the omission to file findings and conclusions. *See id.* (citing *Estate of Gorski v. Welch*, 993 S.W.2d 298, 301 (Tex. App.—San Antonio 1999, pet. denied)); *Echols v. Echols*, 900 S.W.2d 160, 162 (Tex. App.—Beaumont 1995, writ denied).

called to the attention of the court by the clerk"). The reason for rule 297's notice requirement is amplified when a judge nears the end of his term on the bench. As observed by the supreme court in *Storrie v. Shaw* regarding the judge's winding down and leaving the bench, the request for findings of fact and conclusions of law "having escaped his attention in the press of other official duties" none were signed when the judge left the bench. *See Storrie v. Shaw*, 75 S.W. 20, 21(Tex. 1903). Normally an appellant should not have to prove the past-due notice was brought to a trial judge's attention. But in these circumstances, where it would be exceptional for a clerk on New Year's Eve with eight minutes left in the business day on the last day of a judge's term to bring a matter to the attention of the almost-departed judge, I conclude that for appellant to rely on any authorization for Judge Lowy to act after the expiration of his term, appellant should have to demonstrate from the record that Judge Lowy was made aware of the past-due notice.

B. Texas Civil Practice & Remedies Code § 30.002(a)

After Judge Williams took the oath of office, she was the presiding judge of, and in sole control of, the district court that tried this case. Shortly after assuming office, Judge Williams entered the *First Order* on January 6, 2015, the *Second Order* on January 8, 2015, then signed and filed findings of fact and conclusions of law on January 12, 2015, making all parties aware that she would and did respond to the past-due notice. Appellant had ample opportunity to object not only to spare Judge Williams from wasting judicial resources but more importantly, to assert that a new trial would be required unless Judge Williams requested her predecessor to return to address the post-judgment matter of signing and filing findings of fact and conclusions of law. Section 30.002(a) of the civil practice and remedies code authorized Judge Williams to do so, providing in relevant part,

> If a district . . . judge's term of office expires before the adjournment of the court term at which a case may be tried or during the period prescribed for filing . . .

> findings of fact and conclusions of law, the judge may . . . file findings of fact and conclusions of law in the case.

TEX. CIV. PRAC. & REM. CODE ANN. § 30.002(a) (West 2015). Had appellant made such an objection and request, he would have alerted Judge Williams that she had two options: retry the case or request Judge Lowy to participate in filing findings of fact and conclusions of law. The absence of a record about what either judge would have done is a result of appellant never raising his complaint in the trial court, thereby giving Judges Williams and Lowy the opportunity to act pursuant to section 30.002(a).

The *Storrie* case provides an example of what two judges did in the identical situation. In November 1902, the Honorable W.H. Wilson conducted a bench trial but "in the press of other official duties" did not sign and file findings of fact and conclusions of law before relinquishing the bench to his newly elected successor, the Honorable W.P. Hamblen. *Storrie*, 75 S.W. at 21. When the appellant filed a second motion for new trial in the trial court, then presided over by Judge Hamblen, complaining that Judge Wilson had left the bench without filing findings and conclusions for which a new trial should be granted, Judge Hamblen asked Judge Wilson to return to the bench to rule on the matter. *Id*. Judge Wilson prepared, signed, and filed findings of fact and conclusions of law that Judge Hamblen also signed. *Id*. Judge Wilson also overruled appellant's second motion for new trial. *Id*. The supreme court concluded this was appropriate. *Id.* Thus, in *Storrie* by raising the issue in the trial court, an appellant obtained findings of fact and conclusions of law from the judge who tried the case and whose term had expired.

C. Texas Government Code § 74.052

Furthermore, by January 21, 2015, as required by statute, the First Judicial Administrative Region listed former Judge Lowy as available for appointment as a visiting judge

and, by February 23, 2015, the Office of Court Administration had done likewise.[2] *See* TEX. GOV'T CODE ANN. § 74.052 (West 2013) (assignment of visiting judges); *id*. § 74.055 (presiding judge of each judicial administrative region to maintain list of retired and former judges subject to assignment). To be so listed, Judge Lowy was required to certify his willingness not to practice law from January 1, 2015, through December 31, 2016. *See id*. §§ 74.0551(a), (b). Thus, in January 2015, Judge Lowy was available to be assigned as a visiting judge to decide the post-judgment issue of signing and filing findings of fact and conclusions of law. But appellant never asked Judge Williams to request an assignment of Judge Lowy.

D. Ample Time for Judge Lowy to Sign and File Findings and Conclusions

The short time between Judge Williams's commencement of her term of office and January 12, 2015, the fortieth day after appellant requested findings and conclusions pursuant to rules 297 and 4, is not, as appellant suggests, an excuse for the failure to make an objection to Judge Williams's filing findings and conclusions and a request for Judge Lowy's involvement. First, nothing in the record indicates Judge Lowy's participation could not have been accomplished in those twelve days. Second, appellant timely filed a motion for new trial so the district court's plenary jurisdiction did not expire until March 9, 2015.[3] Third, we have held the

[2] *See* http://www.txcourts.gov/media/814463/seniorretiredandformerjudges.pdf (First Judicial Admin. Region list dated Jan. 21, 2015); http://www.txcourts.gov/media/868296/Senior-and-Former-Judges-2015.pdf (Office of Court Admin. list dated Feb. 23, 2015). Appellate courts may take judicial notice of the official records of another judicial entity of this state or the federal government. *See Freedom Commc'ns, Inc. v. Coronado*, 372 S.W.3d 621, 623 (Tex. 2012) (supreme court may take judicial notice of trial judge's federal, criminal plea agreement demonstrating financial interest in civil case making judge's orders void). The material issued by a public authority pursuant to law is self-authenticating. *See* TEX. R. EVID. 902(5). Accordingly, it is proper to take judicial notice of documents on government websites. *See Williams Farms Produce Sales, Inc. v. R & G Produce Co.*, 443 S.W.3d 250, 259 (Tex. App.—Corpus Christi 2014, no pet.). For the same reason, the Fifth Circuit has determined that courts may take judicial notice of governmental websites. *See Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005) (taking judicial notice of approval by the National Mediation Board published on the agency's website); *Coleman v. Dretke*, 409 F.3d 665, 667 (5th Cir. 2005) (per curiam) (taking judicial notice of Texas agency's website). The website of the First Judicial Administrative Region is on the same government server as this Court's website maintained by the Office of Court Administration.

[3] March 9, 2015, is the 105th day after November 24, 2014, the day Judge Lowy signed the amended judgment. *See* TEX. R. CIV. P. 329(c), (e).

expiration of a trial court's plenary jurisdiction does not impair its power to make and file findings of fact and conclusions of law. *HSBC Bank USA, N.A. v. Watson*, 377 S.W.3d 766, 772 (Tex. App.—Dallas 2012, pet. dism'd); *Morrison v. Morrison*, 713 S.W.2d 377, 381 (Tex. App.—Dallas 1986, writ dism'd) (concluding that there is no jurisdictional impediment to a trial judge's making belated findings of fact). In other words, if findings and conclusions signed by Judge Lowy were part of this appellate record, we would not ignore them merely because he signed them after January 12, 2015. Fourth, section 30.002(a) of the civil practice and remedies code does not limit the time period during which a judge, whose term has expired, is authorized to file findings of fact and conclusions of law in the case. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 30.002(a). Fifth, Judge Lowy has been continuously available to be assigned as a visiting judge to his former court and this case to sign and file findings of fact and conclusions of law.[4] *See* TEX. GOVT. CODE ANN. § 74.052. Accordingly, appellant had ample opportunity to ask Judge Williams to request Judge Lowy to return to preside over his former court to consider the request that he make, sign, and file findings of fact and conclusions of law. The record does not reflect appellant did so.

III. Conclusion

In summary, by filing a past-due notice at 4:52 p.m. on the last day of Judge Lowy's term of office, appellant did not provide Judge Lowy the extended time under rule 297 to sign and file findings and conclusions before the expiration of his term. Appellant then did not object when Judge Williams complied with the past-due notice, did not assert that the lack of findings and conclusions signed and filed by Judge Lowy would require Judge Williams to retry the case, and did not object to the actions by Judge Williams other than to request Judge Lowy's return to

[4] *See* http://www.txcourts.gov/media/691393/section-74listpublish.pdf (First Judicial Admin. Region list dated Nov. 20, 2015); *see also supra*, n.2.

preside over the post-judgment request for findings and conclusions either pursuant to section 30.002(a) of the civil practice and remedies code or section 74.053 of the government code. In these circumstances, I conclude appellant did not preserve his objection to the lack of findings of fact and conclusions of law signed by Judge Lowy. Accordingly, on these specific facts I would reject appellant's first issue, so reversal and remand for new trial would not be required on the grounds set forth in the majority opinion. I would reach the remaining issues raised by appellant as well as appellees' issues in their cross-appeal. For these reasons, I respectfully dissent.

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/ David Evans/
DAVID EVANS
JUSTICE