Concurring Opinion Filed December 29, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-20-01078-CV

IN RE FREDERICK SCROGGINS AND WERNER ENTERPRISES, INC., Relators

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-01483

CONCURRING OPINION

Before Justices Schenck, Partida-Kipness, and Nowell
Concurring Opinion by Justice Schenck

We are once again faced with a trial court striking the defendant's counter-affidavits. The majority relies on a prior decision of this Court to conclude relators have failed to show a lack of adequate remedy by appeal. While I disagreed with that decision at the time it issued, I agree that it controls here. I nevertheless remain concerned not only with our decision in that case, but with whether our understanding of what amounts to an adequate remedy on appeal comports with the Supreme Court's teachings on the subject and with other decisions affording immediate mandamus review. Accordingly, while I am compelled to concur with the majority's result, I believe immediate mandamus review is warranted and would

request a response from the real party in interest to address the merits in this mandamus proceeding.

I recently dissented from our denial of *en banc* reconsideration in *In re Parks*, 603 S.W.3d 454 (Tex. App.—Dallas 2020, orig. proceeding [mand. pending]). Because our past statutory construction, in my view, raises such fundamental implications for any case where an affidavit has been stricken, I believe that mandamus review is warranted, even necessary, to avoid potentially structural error at trial and massive trial and appellate costs in the interim. I sought *en banc* reconsideration in *Parks* hoping to secure a construction that would avoid the need for recurring, interim mandamus interventions to avoid those structural error and cost concerns in cases like this one. Either of those things, in my view, would call for mandamus review under the articulation of *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136 (Tex. 2004) (orig. proceeding) (explicating concept of inadequate appellate remedy to include need for "helpful direction" in the law and "wasted" time and expense). I continue to believe that those same concerns, and the inherent posture of cases such as this, strongly animate the question whether any error, either in the form of our own past construction of the statute, or in the trial court's application of that decision in any particular case, should not be left to a subsequent, final judgment appeal.

I write separately here to express my concern that our application of the law as it relates to adequacy of remedy by appeal should be consistently applied across

our mandamus jurisprudence, which ultimately functions as a critical form of judicial triage by which we immediately rectify the most plain, serious, and elusive potential errors in advance of a final judgment. Because we continue to adhere to a reading of section 18.001 that has massive implications for trial that cannot be practically unwound after final judgment,[1] I would find the appellate remedy to be inadequate in every such case.

I.

I have already elaborated on the substance of my concerns over our adoption of the Eastland court of appeals decision in *Beauchamp v. Hambrick*, 901 S.W.2d 747, 749 (Tex. App.—Eastland 1995, no writ), in our earlier panel decision in *Ten Hagen Excavating v. Castro-Lopez*, 503 S.W.3d 463, 490–94 (Tex. App.—Dallas 2016, pet. denied). I will therefore only summarize them here.

- *Beauchamp* reads a nominally procedural statute requiring only that parties "serve" affidavits on each other to embrace (and obviously encourage) a practice of filing and striking them in order to eliminate the opponent's right to be heard at trial. The decision to "strike" the affidavit before trial has the effect not only of excluding the affidavit or testimony of the affiant but of precluding the introduction of *any* evidence relevant and otherwise admissible on the damages question.
- Under *Beauchamp*, evidence presented in an affidavit, which ekes over the admissibility threshold at trial, is deemed "sufficient" to support a

[1] While *Prudential* recognizes the sunk costs of proceeding to trial with error in place to be only part of the overall practical balancing involved with the question of the adequacy of a later appeal, 148 S.W.2d at 136–37, the United State Supreme Court has recognized that where the costs of proceeding to enforce a right exceed the litigant's interest or ability in pursuing relief, the leverage accomplished by a procedure may well be so extreme that due process directly forecloses it. *Sniadach v. Family Fin.*, 395 U.S. 337 (1969). I take it as understood that the costs of a trial, appeal and remand for new trial will often grossly exceed the damages amount effectively approved by a trial judge when he or she improvidently strikes a counter-affidavit.

> verdict and judgment regardless of its actual, objective weight, and any subsequent appeal will be confined to abuse of discretion review of the decision to strike the counter-affidavit. Accordingly, the damages award will be upheld without any evaluation (at trial or on appeal) of the evidence's actual sufficiency.

While both of these implications raise serious constitutional concerns, the latter would seem to be harmful only in cases where the affidavit, combined with the balance of the claimant's damages evidence, would not be legally sufficient, viewed as a whole, to support a judgment—something that could not be determined readily before trial and would thus be ill suited for mandamus review. It is the former prospect—that the issue will be "tried," but with one of the protagonists not permitted to be heard—that warrants review at this stage. In every case tried under the *Beauchamp/Ten Hagen* reading of 18.001, a trial judge's discretionary ruling to "strike" a served, but contested counter-affidavit bars the party resisting the claim for fees, be they legal, medical or something else, from "controverting" the fees as "necessary" or the amount as "reasonable" by introduction of the counter-affidavit *or introducing any other evidence on those questions*. That this opportunity is tactically available only to one side of the docket—the claimant, whether plaintiff or defendant[2]—hardly makes things better. *Turner v. Peril*, 50 S.W.3d 742, 747 (Tex. App.—Dallas 2001, pet. denied) (only counter-affiant must be qualified as expert).

[2] Of course, either a plaintiff or a defendant might invoke this aspect of the rule to his or her advantage in seeking, for example, recovery of medical expenses as part of a claim or attorney's fees for resisting one. *Good v. Baker*, 339 S.W.3d 260, 271–72 (Tex. App.—Texarkana 2011, pet. denied).

I understand that a party might, without "controverting" those matters, still put on evidence challenging, for example, causation. *E.g.*, *In re Liberty Cty. Mut. Ins. Co.*, No. 14-20-00579-CV, 2020 WL 6278396, at *3 (Tex. App.—Houston [14th Dist.] Oct. 27, 2020, orig. proceeding). But, the questions of liability and the amount of damages are distinct and submitted separately for that reason. I would assume, for example, the question of "how much" a litigant will be compelled to pay is often as much a concern as anything else, and that the right to trial (and to trial by jury) extends to both questions. In all events, when a party will be wholly precluded from presenting any evidence of their own on either question, the ability to develop and present the case is obviously impeded and the potential for extensive, wasted proceedings, consisting of jury selection, trial, deliberations, verdict and judgment is obvious. *In re Prudential*, 148 S.W.3d at 136.

I understand that the non-claimant who is unable to present his or her own evidence might still "cross-examine the offering parties about their injuries and prior medical conditions, and . . . introduce corresponding medical records," *insofar as they relate to other elements* of the claim, such as past or future pain and suffering or the extent of their injury. *In re Liberty Cty. Mut. Ins. Co.*, 2020 WL 6278396, at *3.[3] To the extent those efforts are offered as relevant to the "necessity" of the

[3] As I indicated in *Parks*, it is far less clear to me that counsel might argue to the jury to disregard the claimant's affidavits or how a jury might properly render a verdict contrary to the only evidence before it. For purposes of answering the question of whether mandamus review is proper, the prospect that a party cannot be heard at its own trial on an issue that is supposedly genuinely in dispute and ripe for a decision by the jury ought to be enough.

services or whether the amount charged for them was "reasonable," that effort (and related argument) would amount to the very "contesting" *Beauchamp* reads the statute to forbid. The claimant should be entitled to a limiting instruction that we would be obliged to assume the jury adhered to. The evidentiary picture at the close of the trial—insofar as the necessity and reasonable amount of services claimed as part of the damages—should consist of evidence in the form of an affidavit that was deemed sufficient as a matter of law before the trial began and any further evidence was received.

As I indicated in my *Parks* dissent, none of this is obvious, much less compelled by the text of the statute or its ostensible "procedural" objective, and should be considered as part of our obligation to read statues to avoid constitutional concerns. I would read the statute to provide the claimant with the ability to serve an affidavit and to require the opponent to "serve" a counter-affidavit as simply allowing both sides to give notice of their intention to introduce evidence, at least by form affidavit at trial, leaving them free to try their respective cases avoiding all of the questions *Beauchamp*'s construction compels. Whether either affidavit is admissible is a separate question that might be addressed before or after trial without supplanting the right to be heard.

II.

Meanwhile, shortly after our decision in *Parks*, this Court was presented with a mandamus petition arising against the backdrop of Chapter 74 of the Civil Practice

and Remedies Code. *In re Smith*, No. 05-20-00497-CV, 2020 WL 4669805 (Tex. App.—Dallas Aug. 12, 2020, orig. proceeding). Under that Chapter, a health care liability claim cannot proceed unless the party filing the claim can produce an expert report indicating that the claim has potential merit. *Id.* The statute stays all discovery in the interim and mandates dismissal absent a compliant expert report. *Id.* In *Smith,* the plaintiff urged, notwithstanding the discovery stay under Chapter 74, that the trial court abused its discretion in refusing to assist in discovery efforts insofar as they related other statutory provisions that made the requested information publicly available. The defendant urged that Chapter 74 precluded the discovery and that plaintiff's expert should be able to produce an explanation for the filing of the lawsuit without further resort to discovery. The plaintiff urged that lack of the discovery impeded her ability to prepare an expert report and might result in immediate dismissal of the claim.

As in *Parks* and this case, the principal question was whether the claimed error was one that lent itself to an adequate remedy by appeal. Owing to the nature of the statutory scheme at issue, the proceedings could only proceed along a very short path to a hearing on the adequacy of the expert report. Thus, barring our intervention by mandamus, if the trial court had found the report to be adequate without resort to additional pre-merits discovery, the case would go forward to merits discovery and trial. If, on the other hand, the court found the report to be inadequate, the case

would be dismissed, and a final judgment and plenary appeal would follow.[4] Having found the discovery authorized and that lack of that discovery "severely hampered" the plaintiff's ability to procure an adequate report and denied her "the ability to develop the merits" of her case, we quite properly granted mandamus. Nevertheless, our intervention by mandamus there spared the parties a two-hour hearing and the appeal from a final judgment that would have either been immediately available or unnecessary. By contrast, any error in striking a counter-affidavit under *Beauchamp*'s reading of section 18.001 results in a full-blown trial with one party not simply "impeded" in its ability to develop the merits, but virtually stapled to the chair.

Because of the catastrophic and immediate implications compelled by our statutory construction of section 18.001 when an affidavit is stricken, I believe immediate mandamus review is as warranted in this case. Accordingly, I would request a response from the real party in interest and address the issue in this mandamus proceeding rather than requiring the relators to participate in a trial

[4] Our *Smith* panel indicated that the relief on appeal from a final judgment seeking to enforce the separate statutory right to the requested information would still be limited Chapter 74's period of thirty days to refile the report following remand, rather than a remedy under the statute that formed the basis for appellate relief. Putting that conclusion to one side, the rules governing that discovery would permit compliance with our mandate to the extent the remand is governed by a deadline arising under Chapter 74. *See* TEX. R. CIV. P. 190.5, 191.1.

hamstrung during that process and on appeal from a final judgment.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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