COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-17-00453-CV

IN RE HAPPY STATE BANK AND SCOTTY LINDLEY — RELATORS

ORIGINAL PROCEEDING
TRIAL COURT NO. CV16-0134

DISSENTING AND CONCURRING MEMORANDUM OPINION[1]

I respectfully dissent from the holding in this case that Taylor County acquired dominant jurisdiction over the causes of action filed in Parker County by Real Party in Interest LeClair, L.L.C. against Relators Happy State Bank (HSB) and Scott Lindley. However, because I agree with the majority that civil practice and remedies code section 15.020 governs venue in this matter and that the trial court erred by denying Relators' motion to transfer venue from Parker County to Taylor County, I concur in the result.

[1]*See* Tex. R. App. P. 47.4.

As the supreme court has instructed us, a dominant jurisdiction question arises only when "an inherent interrelation of the subject matter exists in two pending lawsuits." *In re J.B. Hunt Transp., Inc.*, 492 S.W.3d 287, 292 (Tex. 2016) (orig. proceeding) (internal quotation omitted). Here, there can be no doubt that, facially speaking, all of the claims in the Parker County and Taylor County lawsuits appear to be "interrelated," as that term is commonly understood. But to determine whether an *inherent interrelation* of the subject matter exists sufficient to invoke the dominant jurisdiction doctrine, we must go beyond what appears on its face to be interrelated and apply a well-established legal principle—the compulsory counterclaim rule. *See id*.

The compulsory counterclaim rule provides that "[a] pleading shall state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party . . . ." Tex. R. Civ. P. 97(a). Applying this portion of the rule, the question before us is a straightforward one: Can the compulsory counterclaim rule be triggered against one who is not a party to a lawsuit? Applying the plain language of the rule, the answer is no.

In essence, the compulsory counterclaim rule provides that—with some exceptions inapplicable here—when parties are cast as adversaries in a lawsuit, they must bring all related claims they have against each other in that lawsuit or be forever barred from litigating them:

> (a) Compulsory Counterclaims. A pleading *shall* state as a counterclaim any claim within the jurisdiction of the court, not the subject of a pending action, which at the time of filing the pleading the pleader has against *any opposing party*, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . .; provided, however, that a judgment based upon a settlement or compromise of a claim of one party to the transaction or occurrence prior to a disposition on the merits shall not operate as a bar to the continuation or assertion of the claims of any other party to the transaction or occurrence unless the latter has consented in writing that said judgment shall operate as a bar.

Id. (emphasis added).

Notwithstanding the numerous other parties, including guarantors on the note, who are in some manner involved in the two lawsuits at issue, only three parties are before us—HSB, Lindley, and LeClair. And it is undisputed that on May 1, 2017, when HSB and Lindley brought their Taylor County lawsuit against the guarantors, they chose not to make LeClair a party to that suit. Because LeClair was not a named party,[2] rule 97(a) never came into play, and LeClair was under no compunction to file *any* pleading—much less a counterclaim—in the lawsuit. *See Price v. Couch,* 462 S.W.2d 556, 558 (Tex. 1970) (holding that rule 97(a) does not impose a duty upon anyone to intervene in a lawsuit and pointing out that rule 97(a) "compels a 'pleader,' *i.e., one who is already a party in the*

[2]Because LeClair was not a party, it is axiomatic that LeClair had no "opposing party" against whom it was required to bring all claims arising out of the transaction. *See* Tex. R. Civ. P. 97(a). Nor, given the choice exercised by HSB and Lindley to not make LeClair a party to the lawsuit, was LeClair an "opposing party" against whom HSB and Lindley had an obligation to plead any claims. *See id.*

lawsuit, to bring forward any related claims he may have against his opposition" (emphasis added)).

As of May 1, 2017, then, when HSB and Lindley filed their suit in Taylor County but did not sue LeClair, no court had acquired dominant jurisdiction as to the claims between HSB, Lindley, and LeClair. That status remained unchanged until June 8, 2017, when LeClair amended its Parker County lawsuit to include HSB and Lindley as defendants.

On that date, LeClair was still not a party to the lawsuit in Taylor County nor under any legal obligation to intervene in that lawsuit, and the compulsory counterclaim rule still had not been triggered as to LeClair. *See id*. So, when LeClair filed its lawsuit in Parker County on June 8 against HSB and Lindley, the Parker County lawsuit became the first-filed lawsuit between these three parties. The Parker County district court acquired dominant jurisdiction because it was the first court in which these three parties were cast as adversaries.

Thus, as to the three parties before us here, applying the compulsory counterclaim rule—as we must—and barring any applicable exception, Parker County, not Taylor County, acquired dominant jurisdiction over their dispute. *See J.B. Hunt*, 492 S.W.3d at 294 ("'The general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts.'" (quoting *Curtis v. Gibbs*, 511 S.W.2d 263, 267 (Tex. 1974)).

The majority cites *Wyatt v. Shaw Plumbing Co*.[3] for the proposition that LeClair need not be named a party in the Taylor County lawsuit for the compulsory counterclaim to be invoked, holding that identical parties and identical claims are not required when considering the inherent interrelation of the subject matter. *See* 760 S.W.2d 245, 247 (Tex. 1988), *disagreed with on other grounds by J.B. Hunt*, 492 S.W.3d at 292–93 (noting that "[t]here are two mistakes in [*Wyatt's*] rendition of the compulsory-counterclaim rule"). But *Wyatt* should not be read so broadly as to ignore the plain wording of rule 97(a) and to dramatically alter the well-established application of the compulsory counterclaim rule.

For purposes of applying the compulsory counterclaim rule, the facts in *Wyatt* do not bear any resemblance to the ones before us here. In *Wyatt*, both parties—Oscar Wyatt and Shaw Plumbing Co.—were cast as adversaries in both lawsuits. *Id.* at 246. In the first suit, Wyatt sued Shaw in Duval County; in a second suit, Shaw sued Wyatt in Nueces County. *Id.* The issue in *Wyatt* was whether the absence of a third party—Wyatt's alleged agent Morgan Spear—deprived Duval County of dominant jurisdiction *as to the causes of action between Wyatt and Shaw*. *Id.* at 247.

[3]In *Wyatt*, Justice Ray wrote for the majority in a 5-1-3 decision. *See* 760 S.W.2d at 246. Justice Kilgarlin issued a concurring opinion, *see id.* at 248 (Kilgarlin, J., concurring), and Justice Gonzalez issued a dissenting opinion in which Chief Justice Phillips and Justice Mauzy joined. *See id.* at 249–51 (Gonzalez, J., dissenting).

The observation in *Wyatt* that the "the exact issues and all the parties" need not be included in the first action should be read not only in the context of the facts of that case but also in the context of the entire sentence in which the phrase appears: "It is not required that the exact issues and all the parties be included in the first action before the second is filed, *provided that the claim in the first suit may be amended to bring in all necessary and proper parties and issues*." *Id*. (emphasis added). The latter part of that sentence signals that the *Wyatt* court was not speaking to the portion of rule 97(a) that requires a compulsory counterclaim to apply only to "opposing parties" but rather to an exception to the compulsory counterclaim rule contained in a subsequent phrase in the same rule, which provides that the compulsory counterclaim rule does not apply if the claim requires for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction. *See* Tex. R. Civ. P. 97(a) ("A pleading shall state as a counterclaim any claim . . . if it . . . does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction[.]").

Assuming Spear was a necessary party, *Wyatt* explains that because the court could acquire jurisdiction over Spear, the claims that had been asserted by Wyatt against Shaw in Duvall County still invoked the compulsory counterclaim rule as between these two parties. 760 S.W.2d at 247–48. This interpretation of *Wyatt* would not abrogate the plain language of rule 97(a) that requires the claim to be one "which at the time of filing the pleader has against any opposing party."

Tex. R. Civ. P. 97(a). If read thusly, *Wyatt* can be read in harmony with other jurisprudence regarding the application of the compulsory counterclaim rule.

To further support this interpretation of *Wyatt*, in reaching its holding, the court chastised Shaw for not bringing the claim Shaw later filed in Nueces County as a counterclaim in the first-filed lawsuit: "Shaw Plumbing should have brought its compulsory counterclaim on the contract in Wyatt's tort and DTPA suit in Duval County." 760 S.W.2d at 247. And that is the very situation that is not present here. At the time LeClair filed its lawsuit, it could not have brought any counterclaims against HSB and Lindley in Taylor County because it was a stranger to that lawsuit.

The majority also cites to our opinion in *Dallas Fire Ins. Co. v. Davis* and its reliance on *Wyatt* to hold that the first-filed lawsuit's failure to name as a party the plaintiff in the second-filed lawsuit does not negate dominant jurisdiction:

> [T]he fact that the Rancel Plaintiffs were not named as parties in the Tarrant County action until after the second Panola County action was filed does not mean that the Tarrant County action did not have dominant jurisdiction.

893 S.W.2d 288, 292 (Tex. App.—Fort Worth 1995, orig. proceeding). But here, as in *Wyatt*, the facts once again demonstrate that the compulsory counterclaim rule had already been triggered prior to the filing of the later lawsuit. Thus, *Dallas Fire* does not justify alteration of the compulsory counterclaim rule.

In *Dallas Fire*, the Dallas Fire Insurance Company filed a declaratory judgment action against its insured, Bennett Rathole, in Tarrant County, claiming

that under Bennett's insurance policy, it had no duty to defend Bennett and Bennett's driver (the Bennetts) in a personal injury action then-pending in Leon County that had been filed by Sonya Rancel and her passenger (the Rancels). *Id.* at 290. Thereafter, in a lawsuit filed in Panola County, the Rancels sued Dallas Fire to collect on their Leon County judgment against the Bennetts. *Id.* at 290–91. Even though the Rancels were not named in the earlier-filed Tarrant County suit between Dallas Fire and the Bennetts when the Rancels sued Dallas Fire in Panola County, the Rancels and Dallas Fire had nevertheless been cast as adversaries in the Tarrant County lawsuit because they were already standing in the Bennetts' shoes.[4] *Id.* at 290. That is, prior to the Rancels' filing their

[4]As in this case, the timeline in *Dallas Fire* was complicated by the multiplicity of actors and lawsuits; we have bolded the key dates in that case that led to its disposition:

- March 1993: accident occurs in Leon County. 893 S.W.2d at 290.
- April 1993: The Rancels sue the Bennetts in Leon County. *Id.*
- **August 1993**: Dallas Fire sues the Bennetts in Tarrant County for a declaration that the truck in the accident was not covered under the policy. *Id.*
- September 1993: The Bennetts seek a declaratory judgment on coverage against Dallas Fire in Panola County. *Id.*
- **February 1994**: The Rancels and the Bennetts enter into an agreement under which the Bennetts assign their causes of action against Dallas Fire to the Rancels in exchange for the Rancels' agreement to delay collection of any judgment the Rancels might obtain against them in Leon County. *Id.*
- April 1994: The Rancels obtain a $2.23 million judgment against the Bennetts in the Leon County action. *Id.*
- May 1994: The Panola County court abates the Bennetts' suit. *Id.*
- **July 1994**: The Bennetts dismiss their Panola County suit, and the Rancels file suit in Panola County against Dallas Fire and the Bennetts, to collect on the Leon County judgment. *Id.* at 290–91.
- **August 1994**: Dallas Fire amends its petition in Tarrant County to add the Rancels. *Id.* at 291.

lawsuit in Panola County, the Rancels had acquired all of the Bennetts' claims against Dallas Fire regarding the insurance policy (the *Stowers* claim), plus one-half of any other causes of action that the Bennetts had against Dallas Fire. *Id.* Once the Bennetts assigned these claims to the Rancels, the Rancels' causes of action against Dallas Fire became compulsory counterclaims that, pursuant to rule 97(a), should have been brought in the earlier-filed Tarrant County lawsuit. *See id.* On appeal, this much was not even disputed—all of the parties agreed that the Rancels' *Stowers* claims were compulsory counterclaims in the Tarrant County suit. *Id.* at 292.

But here, at the time LeClair filed its lawsuit, it could not have brought any counterclaims against HSB and Lindley in Taylor County because LeClair was not a named party in that lawsuit (as in *Wyatt*), was not an unnamed party with a legal interest in that lawsuit (as in *Dallas Fire*), and had not been cast as an adversary to HSB or Lindley in any lawsuit such that the compulsory counterclaim rule was invoked.

The three became "opposing parties" only when LeClair sued HSB and Lindley in Parker County. And even if HSB and Lindley were to add LeClair as a party to the Taylor County lawsuit,[5] the compulsory counterclaim rule would still not apply to the Taylor County lawsuit because their lawsuit against LeClair would be, at that point, already the "subject of a pending action" in Parker

[5]There is no indication in this record that HSB and Lindley have ever added LeClair as a party to the lawsuit in Taylor County.

County. *See* Tex. R. Civ. P. 97(a) ("A pleading shall state as a counterclaim any claim within the jurisdiction of the court, *not the subject of a pending action* . . . ." (emphasis added)).[6]

In applying the compulsory counterclaim rule to determine whether lawsuits are inherently interrelated, I believe the supreme court has instructed us threefold:

1. With regard to dominant jurisdiction, "[a]ny subsequent suit involving the same parties and the same controversy must be dismissed." *Curtis*, 511 S.W.2d at 267.

2. It is not required that all of the parties in the two lawsuits be identical, as long as the compulsory counterclaim rule applies. *Wyatt*, 760 S.W.2d at 247.

3. Because there is no duty to intervene in a lawsuit to which one is not a party and the compulsory counterclaim rule applies

[6]HSB and Lindley rely on *Cleveland v. Ward*, 285 S.W. 1063, 1069 (Tex. 1926) (orig. proceeding), *disapproved of on other grounds by Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992) (orig. proceeding), for the proposition that because "new parties" could be added to the Taylor County lawsuit, Taylor County acquired dominant jurisdiction prior to LeClair filing its actions against HSB and Lindley in Parker County. If by "new parties," HSB and Lindley refer to LeClair, *Cleveland* does not support this conclusion. In *Cleveland*—a case that predated even the precursor to rule 97(a) by more than a decade and thus decided on common law principles of res judicata—the supreme court held that because the judgment in the first-filed lawsuit in Johnson County would be "res adjudicata as against any judgment the Dallas county court might render, it follows that the Dallas county case is abated by the Johnson county suit." *Id*. at 1070. As with *Wyatt*, the analysis does not apply here because LeClair was not a party to the Taylor County lawsuit and, under well-established principles of law, res judicata could not attach to LeClair unless LeClair was a party. *See New Talk, Inc. v. Sw. Bell Tel. Co.*, 520 S.W.3d 637, 645 (Tex. App.—Fort Worth 2017, no pet.) (citing *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996), for the proposition that for res judicata to apply, the "same parties or those in privity with them" must be present in both suits).

> only to compel "a 'pleader', i.e., one who is already a party in the lawsuit, to bring forward any related claims he may have against his opposition," a nonparty's cause of action is not a compulsory counterclaim. *Price*, 462 S.W.2d at 557–58.

Applying this guidance and the compulsory counterclaim rule as it is written, I believe the Parker County district court, as the first court to acquire jurisdiction in the controversy between these three parties, acquired dominant jurisdiction. *See Cleveland*, 285 S.W. at 1070. Thus, I respectfully disagree with the majority's conclusion that "LeClair's Parker County claims are compulsory counterclaims, and, thus, are inherently interrelated" to the Taylor County claims.

At the core of this dissent is the notion that if the compulsory counterclaim rule is the test to determine whether these lawsuits are inherently interrelated, then to determine whether the test has been met, the compulsory counterclaim rule should be applied as written and in the context of its underlying purpose of resolving questions of claim preclusion. But to reach its result in the context of dominant jurisdiction, the majority cites to *Wyatt* as authorizing a modified version of the compulsory counterclaim rule—one that ignores the plain language of the rule that requires the parties to be *opposing parties* in the lawsuit. *See* Tex. R. Civ. P. 97(a).

As explained above, in *Wyatt*, Shaw and Wyatt were cast as adversaries, so the language the majority relies upon need not be read as dispensing with the plain language of the rule that would require the parties to be cast as adversaries in the first-filed lawsuit. Instead, given the context, the language in *Wyatt* can be

read in harmony with the plain language of the rule, as a response to an argument that the rule did not apply because another, "necessary" party was not named in the first-filed lawsuit. *Wyatt*, 760 S.W.2d at 247–48. But as to the scope of *Wyatt*, there is room for disagreement.

I write this dissent to encourage the supreme court to further clarify whether, when considering the question of dominant jurisdiction, it is the compulsory counterclaim rule that applies or some hybrid or relaxed version of that rule that dispenses with rule 97(a)'s requirements that the parties be cast as adversaries and that the claim not be the subject of another pending action.

I concur in the majority's opinion with regard to LeClair's venue arguments.

/s/ Bonnie Sudderth

BONNIE SUDDERTH
CHIEF JUSTICE

DELIVERED: April 23, 2018