Trial Brief

July 30, 2018

Re: An opinion letter written for litigation purposes is <u>not</u> admissible even if the opinion letter is attached to a business record affidavit.

A lawyer cannot circumvent the rules of evidence by getting an alleged expert to write an opinion letter for litigation and then attaching the letter to a business record affidavit from the alleged expert. The opinion letter is not admissible because:

1. It does not comply with Texas Rule of Evidence 803(6);

2. It usually contains hearsay within hearsay; and

3. Admission of the opinion letter denies the opponent the chance to cross-examine the expert and does not ordinarily allow a determination of reliability under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

Texas Rule of Evidence 803(6) provides for admission of business records if it was in the regular course of the reporting entity's business to make and keep such records. <u>The Texas Rules of Evidence Handbook</u> (2018) by Brown & Rondon at page 904 states:

> *The record must be among those that are made as part of the regular practice of that particular business activity. Thus, an unusual type of record would not qualify even if it were kept as part of regularly conducted business. For example, if the "business record" was prepared for specific litigation purposes, it might well lack sufficient indicia of reliability.*
>
> (citation omitted).

In *Sessums*, a child told a relative, an investigator, and a counselor that defendant had sexually abused him. *Sessums v. State*, 129 S.W.3d 242, 249 (Tex. App. 2004). The State's evidence consisted of the testimony of four expert witnesses and a family member. *Id.* A letter was written to the prosecutor and was a summary of the treatment given to the child. *Id.* The court held that because the record indicated it was written in preparation for trial rather than in the regular course of business, the letter did not qualify as a business record under Rule 803(6). *Id.*

The Tyler Court of Appeals wrote:

> *The proffer of evidence under the regularly conducted activities exception often presents a trial court with the problem of double hearsay. If the record contains some hearsay statements, those statements are not admissible unless they fit some other exception to the hearsay rule. <u>The regularly conducted activities exception does not protect hearsay within hearsay</u>. There must also be no indication that the source of information or the method of preparation is untrustworthy. Therefore, entries must be made routinely in the regular course of the entity's activity, and not*

irregularly or sporadically. ***Thus, a document prepared for the purposes of litigation is not admissible under this exception because it lacks trustworthiness.*** *This is because "where the only function that the report serves is to assist in litigation or its preparation, many of the normal checks upon the accuracy of business records are not operative.*

Mackey v. U.P. Enters., No. 12-99-00355-CV(Tex. App. - Tyler 7/29/ 2005, no pet.)(mem. op.)(citations omitted, emphasis added).

In the *Mackey* case quoted above, the Court of Appeals ruled that the employer's report to the state agency investigating the plaintiff's claim of sexual harassment was not admissible as a business record under Tex. R. Evid. 803(6) because the report was not regularly prepared by the business, but instead was prepared "...in an adversarial setting and in anticipation of litigation."

Another Texas case supporting this principle is *T.E.I.A. v. Sauceda*, 636 S.W.2d 494 (Tex. App. - San Antonio 1982, no writ). In that workers' compensation case, the insurance company sought to introduce a letter from a physician to the insurance company stating that the injured worker had a ten percent permanent loss of function of his ankle and that "his impairment has not caused him to be disabled." This case was decided at a time when the hearsay exception for business records was codified in Article 3737e, but the language is the same as the current Tex. R. Evid. 803(6). The Court of Appeals ruled that the opinion letter did not comply with the requirement that it be made in the regular course of that business, stating:

Clearly, the letter is not evidence of a routine entry made in the regular course of Dr. Olin's business. On its face the letter is an attempt to convey an opinion which has been elicited by an outside interested source. There is no showing in the record that the evaluation would have ever been made but for the request from TEIA's representative.

Id. at 499.

The Houston First Court of Appeals followed the reasoning of the *Sauceda* case in *Freeman v. American Motorist Ins. Co.*, 53 S.W.3d 710 (Tex. App. - Houston [1st Dist.] 2001, no pet.). The court held that a letter from a physician to the plaintiff's attorney about the plaintiff's disability was not a business record because it appeared to be in response to a request by an attorney, and was prepared for litigation purposes, instead of being a routine entry in the doctor's records. The Houston Court of Appeals wrote:

... it appears that he [the doctor] wrote the letter solely in response to a request from Freeman's attorney. Like the letter in Sauceda, the letter in this case, "on its face," is "an attempt to convey an opinion which has been elicited by an outside interested source." Dr. Sajadi's letter to Freeman's attorney does not qualify as a routine entry in Freeman's medical history; therefore, it is inadmissible as a business record under rule 803(6).

Freeman at 714-715. **[A copy of this opinion is attached.]**

Other cases that support exclusion of an opinion letter disguised as a business record include *Hardy v. State*, 71 S.W.3d 535, 537 (Tex. App. - Amarillo 2002, no pet.)(holding that a faxed letter from pump manufacturer stating that pump he examined belonged to a particular distributor did not qualify as a business record because there was evidence the letter was prepared at the state's request for use in a

criminal trial); and *Hazelip v. Am. Cas. Co. of Reading*, No. 01-09-00659-CV, (Tex. App. - Houston [1st Dist.] June 28, 2012)(mem. op. on reh'g)(holding that the trial court did not abuse its discretion in determining that the letter from the physician was not admissible under the business records exception, Tex. R. Evid. 803(6), as it contained opinions from her physician on whether the spinal conditions were compensable injuries).

The U.S. Supreme Court in 1943 excluded a railroad company accident under a statute that was the predecessor to Fed. R. Evid. 803(6). Justice Douglas wrote:

> *In short, it is manifest that in this case those reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in the court, not in the business. Their primary utility is in litigating, not in railroading.*
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> *Palmer v. Hoffman*, 318 U.S. 109, 114 (1943).

The U.S. Seventh Circuit in 2013 applied the identical Federal Rule of Evidence 803(6) and ruled a trucking adjustor's accident report should have been excluded and cited many federal cases on the subject in *Jordan v. Binns*, 712 F.3d 1123 (7th Cir. 2013).

> *The business-records exception removes the hearsay bar for records kept in the course of a regularly conducted business activity if making the records is a regular practice of that business activity, so long as "neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness." Such records are presumed reliable because businesses depend on them to conduct their own affairs, so there is little if any incentive to be deceitful, and because the regularity of creating such records leads to habits of accuracy.*
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> *It is well established, though, that documents prepared in anticipation of litigation are not admissible under FRE 803(6). Litigation generally is not a regularly conducted business activity. And documents prepared with an eye toward litigation raise serious trustworthiness concerns because there is a strong incentive to deceive (namely, avoiding liability).*
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> *Here, U.S. Xpress hired Niles to prepare the Adjuster's Report and then offered that report into evidence at trial. It is difficult to see what purpose, other than preparing for litigation, is served by an insurance adjuster's report created after an accident investigation. Had Binns or another employee of U.S. Xpress created the report, then it would clearly not be a business record under Palmer and its progeny because U.S. Xpress's business is trucking, not litigation. This case, however, presents an added wrinkle because Niles was not an employee of U.S. Xpress. Yet this is a distinction without a difference. The primary motive for commissioning reports such as the Adjuster's Report is a better indicator of trustworthiness than the form of the investigation or the identity of the investigator. Moreover, a nonaffiliated investigator may have pecuniary motives to skew a report in favor of the client that hired him, for a damaging report may result in the client looking elsewhere next time.*
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> *Jordan* at 1135-36 (citations omitted).

Page 710 no pet.

53 S.W.3d 710 (Tex.App.-Houston [1st Dist.] 2001)
STANLEY FREEMAN, Appellant
v.
AMERICAN MOTORISTS INSURANCE COMPANY, Appellee
No. 01-00-00935-CV
Court of Appeals of Texas, Houston (1st Dist.)
July 26, 2001.

On Appeal from the 129th District Court Harris County, Texas Trial Court Cause No. 99-22185

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Panel consists of Chief Justice Schneider and Justices Hedges and Nuchia.

OPINION

Hedges, Justice

Plaintiff/appellant, Stanley Freeman, sued defendant/appellee, American Motorists Insurance Company (AMIC), to set aside a compromise settlement agreement based on AMIC's alleged fraud and misrepresentations.

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The trial court rendered summary judgment for AMIC. We affirm.

Background

Freeman was injured on November 3, 1989, in the course and scope of his employment, when the turnbuckle from a trash dumpster broke loose and struck him in the head. AMIC was the employer's workers' compensation insurance carrier. Freeman filed a notice of injury and claim form with the Industrial Accident Board. The parties signed a compromise settlement agreement during a prehearing conference on February 20, 1990. The Industrial Accident Board[1] approved the agreement on March 7, 1990, ordering that AMIC pay $1,500 to Freeman and $500 attorney's fees to Freeman's attorney. AMIC was also ordered to pay Freeman's reasonable and necessary medical treatments until February 13, 1991.

Almost nine years later, on April 28, 1999, Freeman sued AMIC to set aside the compromise settlement agreement based on AMIC's alleged fraud and misrepresentations. AMIC moved for summary judgment, arguing that: (1) the fraud claim was barred by the applicable limitations period; (2) there was no evidence of legal disability; and (3) there was no evidence of fraud or misrepresentations. On May 22, 2000, the trial court rendered summary judgment for AMIC based on the statute of limitations.

Freeman contends that the trial court erred in rendering summary judgment because (1) Freeman's legal disability tolled the statute of limitations and (2) there is evidence of AMIC's misrepresentations. AMIC contends that the trial court erred in overruling AMIC's motion to strike Freeman's response to the motion for summary judgment.

Standard of Review

To prevail on a motion for summary judgment, a defendant must establish that no material fact issue exists and that it is entitled to judgment as a matter of law. See Rhone-Poulenc, Inc. v. Steel, 997 S.W.2d 217, 222 (Tex. 1999). If a defendant moves for summary judgment on the basis of an affirmative defense, it has the burden to prove conclusively all the elements of the affirmative defense as a matter of law. See KPMG Peat Marwick v. Harrison County Hous. Fin. Corp., 988 S.W.2d 746, 748 (Tex. 1999). In conducting our review of the summary judgment, we take as true all evidence favorable to the nonmovant, and we make all reasonable inferences in the nonmovant's favor. See id.

Statute of Limitations

In his first point of error, Freeman contends that the trial court erred in rendering summary judgment because his legal disability tolled the statute of limitations.

The statute of limitations for a fraud action is four years after the day the cause of action accrues. Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(4) (Vernon 2001). In this case, the limitations period began to run on the date the Industrial Accident Board approved the compromise settlement agreement, or on March 7, 1990. See Brooks v. Lucky, 308 S.W.2d 273, 276 (Tex. Civ. App. Beaumont 1957, writ ref'd n.r.e.); see also Brannan v. Texas Employers' Ins. Ass'n, 248 S.W.2d 118, 119 (Tex. 1952). Thus, Freeman had four years from March 7, 1990, or

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until March 7, 1994, to file suit. It is undisputed that he did not file suit until over five years later, on April 28, 1999.

Unsound Mind Tolling Theory

Freeman contends the statute of limitations was tolled because he was legally disabled according to section 16.001(a)(2) of the Civil Practice and Remedies Code, which states that a person is under a legal disability if the person is of "unsound mind." Tex. Civ. Prac. & Rem. Code Ann. § 16.001(a)(2) (Vernon Supp. 2001). If a person entitled to bring a personal action is under a legal disability when the cause of action accrues, the time of the disability is not included in a limitations period. Tex. Civ. Prac. & Rem. Code Ann. § 16.001(b) (Vernon Supp. 2001). A disability that arises after a limitations period starts does not suspend the running of the period. Tex. Civ. Prac. & Rem. Code Ann. § 16.001(d) (Vernon Supp. 2001).

Generally, persons of unsound mind and insane persons are synonymous. Hargraves v. Armco Foods, Inc., 894 S.W.2d 546, 548 (Tex. App. Austin 1995, no writ). The term "unsound mind" refers to a legal disability, although it is not limited to persons who are adjudicated incompetent. Casu v. CBI Na-Con, Inc., 881 S.W.2d 32, 34 (Tex. App. Houston [14th Dist.] 1994, no writ). The limitations period is tolled for persons of unsound mind for two reasons: (1) to protect persons without access to the courts and (2) to protect persons who are unable to participate in, control, or understand the progression and disposition of their lawsuit. Ruiz v. Conoco, Inc., 868 S.W.2d 752, 755 (Tex. 1993); Hargraves, 894 S.W.2d at 548.

To prevail on the unsound mind tolling theory, Freeman had to produce either (1) specific evidence that would enable the court to find that he "did not have the mental capacity to pursue litigation" or (2) a fact-based expert opinion to that effect. See Grace v. Colorito, 4 S.W.3d 765, 769 (Tex. App. Austin 1999, pet. denied); see also Porter v. Charter Med. Corp., 957 F. Supp. 1427, 1438 (N.D. Tex. 1997) (applying Texas law).

Summary Judgment Evidence

To establish an unsound mind, Freeman's response to the motion for summary judgment relied on three doctors: (1) Dr. Charles Covert; (2) Sheila Jenkins, Ph.D.; (3) and Dr. Cyrus Sajadi.

The first and second doctors did not specifically opine that Freeman lacked the mental capacity to pursue litigation. First, Dr. Covert diagnosed Freeman with a "major depressive disorder with mood congruent psychotic features" and a "chronic pain syndrome from muscoskeletal injuries." Second, Dr. Jenkins stated that Freeman was "severely depressed" with reading and math disabilities. However, she stated that his "thought processes were logical and coherent," and that he was "in the borderline

range of intellectual functioning." She also noted that Freeman could, without any assistance, dress himself, put his shoes on the correct feet, brush his teeth, bathe, tell time, know emergency telephone numbers, and understand denominations of money. Neither Dr. Covert nor Dr. Jenkins suggested that Freeman could not "participate in, control, or understand the progression and disposition" of his lawsuit. See Ruiz, 868 S.W.2d at 755; Porter, 957 F. Supp. at 143.

Dr. Sajadi's Letter

However, the third doctor, Dr. Sajadi, did state that Freeman lacked "the mental capacity to comprehend his circumstances and therefore did not pursue litigation." Dr. Sajadi's statement was offered as summary judgment evidence in the form of a one-page letter from Dr. Sajadi to Freeman's attorney, Mr. Robert McAllister.

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The letter dated May 12, 2000, recites as follows:

Dear Mr. McAllister,

I have had the pleasure of evaluating and treating Mr. Stanley Freeman on May 8, 2000. The following is a short narrative of my evaluation of this patient.

In reviewing the psychological evaluations done on this patient by Charles B. Covert, MD on 2-5-91 and 3-18-91, Pushpa Gummattina, MD on 5-26-93, Sheila A. Jenkins, Ph.D. on 9-3-97, as well as my own observation and evaluation of the patient, it is my professional opinion that Mr. Freeman's condition has remained the same without any significant improvements. He indeed suffers from limited mental capacity secondary to traumatic brain injury, as well as borderline intellectual functioning. Due to the above impairment, Mr. Freeman did not have the appropriate judgment and the mental capacity to comprehend his circumstances and therefore did not pursue litigation for the definite period of time.

If I can be of further assistance regarding this patient, please contact me at the telephone number above.

Sincerely,

Cyrus Sajadi, M.D., P.A.

Business Record

Freeman offered the doctor's letter under the business record exception to the hearsay rule, which states:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Tex. R. Evid. 803(6).

Attached to the letter was an affidavit from Dr. Sajadi's custodian of records, attesting that the letter was a transmitted in the regular course of Dr. Sajadi's business. See Tex. R. Evid. 803(6), 902(10). We question whether it was in the regular course of business for Dr. Sajadi to draft a letter to a patient's attorney about the patient's condition. In other words, was Dr. Sajadi's letter a business record or was it prepared for the purpose of litigation?

The San Antonio Court of Appeals addressed a similar issue in Texas Employer's Insurance Association v. Sauceda, 636 S.W.2d 494 (Tex. App. San Antonio 1982, no writ). In that workers' compensation case, a doctor's letter to the insurance carrier was inadmissible as a business record because it did not qualify as a routine entry in the claimant's medical history. Id. at 498. The court explained that the business of doctors is to care for patients, and the nature of this business requires the systematic keeping of numerous books and records essential to proper care. Id. The records reflect the day-to-day operation and include histories, diagnoses, and treatments. Id.

Without the doctor's remaining records, the court could not ascertain the reason for the letter's existence, but concluded that it was prepared in response to the insurance carrier's request. Id. at 499. "On its face the letter is an attempt to convey an opinion which has been elicited by an outside interested source." Id. Because the letter in Sauceda was not evidence of a routine entry made in the regular

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course of the doctor's business, it was inadmissible as a business record. Id.

In this case, Dr. Sajadi's letter to Freeman's attorney was dated May 12, 2000 over 10 years after the cause of action accrued and a mere 10 days before the summary judgment hearing. This time frame indicates a lack of trustworthiness. In the absence of Dr. Sajadi's remaining records, it appears that he wrote the letter solely in response to a request from Freeman's attorney. See id. Like the letter in Sauceda, the letter in this case, "on its face," is "an attempt to convey an opinion which has been elicited by an outside interested source." See id. Dr. Sajadi's letter to Freeman's attorney does not qualify as a routine entry in Freeman's medical history; therefore, it is inadmissible as a business record under rule 803(6).

We conclude that Freeman did not raise a fact issue about whether he suffered from an "unsound mind" to toll the limitations period. The trial court, therefore, did not err in granting AMIC's motion for summary judgment based on the statute of limitations.

The first point of error is overruled.

Conclusion

We hold that the trial court properly rendered summary judgment based on the statute of limitations. Because the first point of error is dispositive, we need not address Freeman's remaining issue regarding AMIC's alleged fraud and misrepresentations. Nor do we address AMIC's argument regarding its motion to strike Freeman's response to the motion for summary judgment.

We affirm the judgment of the trial court.

NOTES:

1. The Industrial Accident Board was renamed the Texas Workers' Compensation Commission effective April 1, 1990. Act of December 12, 1989, 71st Leg., 2nd C.S., ch. 1, § 17.01, 1989 Tex. Gen. Laws 1, 115, repealed by Act of May 12, 1993, 73rd Leg., R.S., ch. 269, § 5(2), 1993 Tex. Gen. Laws 987, 1273.
