



2009

Honorable Chief Judge Harold Barefoot Sanders, N.D. Tex., The

Carolyn Sortor

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Recommended Citation

Carolyn Sortor, *Honorable Chief Judge Harold Barefoot Sanders, N.D. Tex., The*, 62 SMU L. Rev. 1725 (2009)
<https://scholar.smu.edu/smulr/vol62/iss5/22>

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THE HONORABLE CHIEF JUDGE
HAROLD BAREFOOT SANDERS,
N.D. TEX.

Carolyn Sortor (Law Clerk, August 1986–September 1987)

WE law clerks and Judge Sanders' super-hero assistant, Phyllis Macon, all called him "Judge," as if it were a given name, like "Bob."

He was one of the most brilliant, effective and great-hearted people I've ever known; plus he had a great sense of humor.

Of course I wanted to live at least part-way up to his example (leaving out the cigars and eyebrow-hair length). Though I tried to maintain a cool demeanor, I found Judge sufficiently awesome that when I first started working for him, I actually broke out in a rash.

Judge was a great judge for a lot of reasons; but maybe one was that he was such a great listener. When I began working for him, he'd already had quite a career (three terms as a Texas state legislator, U.S. Attorney, high posts in the U.S. Department of Justice, and Legislative Counsel to President Johnson, not to mention distinguished accomplishments as a judge)—but it was difficult to get him to talk about himself or his own affairs. He'd much rather hear about everything else, especially you.

I personally am very reliant on written notes and records, but I soon found that although the notes I prepared for Judge helped *me*, *he* preferred to *hear* me explain my recommendations.

That was probably one of the most important lessons I learned from him—I hope I became a better listener after working for Judge than I might otherwise have been. Working with great people can really enhance your understanding of what greatness takes.

By the way, Judge performed my marriage ceremony; for better or worse, that didn't stick as well as his other orders.

This was all more than two decades ago, so please forgive me if some details are fuzzy.

*HUNT V. BANKERS TRUST CO.*¹ THE HUNT BROTHERS' LENDER LIABILITY CASE

The even-numbered docket I inherited from judicial clerk Andy Morris included a suit filed by affiliates of Texas oil heirs Nelson Bunker Hunt and William Herbert Hunt (among other affiliates) against their twenty-three lenders. The Hunt brothers had borrowed heavily in connection with their ill-fated attempt to corner the silver market during the 1970s. When that bubble burst, their approximately \$1.5 billion in loans had been restructured, with the Hunts pledging oil assets and other property as collateral.

The restructured loans had gone into default, and the Hunts' lenders were threatening foreclosure. The Hunt brothers were now alleging the lenders had committed various wrongs in connection with the restructure.

The economy had taken a downturn, and "lender liability" theories were proliferating as lenders and their defaulting borrowers grappled; *Hunt* was a relatively high-profile case involving such claims.

The Hunts' counsel had generated a lengthy list of claims against the banks based on fraud in the inducement, breach of fiduciary duty, impairment of performance, promissory and equitable estoppel, impairment of collateral, bad faith, the Texas Miscellaneous Corporation Laws Act, Texas antitrust law, setoff, recoupment, federal antitrust law, conspiracy to monopolize, and the Bank Holding Company Act. Among other things, the Hunts accused their banks of conspiring to monopolize the contract offshore oil drilling industry and fix drilling rates.²

Each of the twenty-three lenders had its own counsel, some from more than one firm, including what seemed like most of the prominent law firms in Dallas and a number from New York, Boston, and beyond.

My first day on the job, I sat in with Andy on the hearing on the Hunts' motion to restrain the lenders from foreclosing on collateral including oil and gas properties, land in two states, and stock in several of the Hunts' companies. The courtroom was packed to the gills—not only with the lawyerly horde, but the fourth estate was also present in full force.

During the hearing, Judge made one of his many widely-quoted remarks: that he didn't think the Hunt brothers exactly "rode into town on a load of turnips." (That was the first of many colorful expressions I first heard from him; others include "frog-strangler" (a hard rain), "bird's nest on the ground" (a lucky find), "going around your elbow to touch your thumb" and "nervous as a cat in a room full of rockers").

Andy worked on Judge's opinion denying the Hunts' motion for a temporary restraining order. At some point, the parties had agreed not to file any related proceedings elsewhere; but after Judge denied the TRO,

1. 689 F. Supp. 666 (N.D. Tex. 1987) (partial summary judgment); see also 646 F. Supp. 59 (N.D. Tex. 1986) (denying TRO).

2. *Hunt*, 689 F. Supp. at 672.

the Hunts filed bankruptcy in Louisiana. Judge promptly ordered the bankruptcy cases transferred to Northern District of Texas, but the tactic had succeeded in forestalling the foreclosures until they could be re-noticed.

The Hunts' lenders next filed various motions for full or partial summary judgment.

As every clerk knows, summary judgment is your friend; but it could only be granted "if the nonmovant fails to make a showing sufficient to establish each element of his claim or defense as to which he will bear the burden of proof at trial—if he fails to do so after adequate opportunity for discovery."³

Judge's decision on the lenders' motions eliminated setoff, recoupment, federal antitrust law, conspiracy to monopolize, and the Bank Holding Company Act as bases for denying summary judgment, but he held that given the little discovery yet had, the remaining claims could not be disposed of at that point.

I'd had the benefit of education in Shakespeare, which I consider hard to beat either substantively or stylistically. In general, there was very little disagreement between me and Judge regarding the substance or form of the opinions I worked on; but this particular opinion probably occasioned the most discussion. I think Judge suspected most or all of the Hunts' claims were probably spurious, and he would have liked to grant summary judgment against more of them. However, since the remaining claims (based on fraud in the inducement, etc.) were fact-dependent, we agreed it would be premature to eliminate them before the Hunts had had meaningful discovery.

As far as I observed, Judge never had any agenda in his decision-making, other than to administer justice in accordance with the law while also attending carefully to what might actually be helpful.

To my mind, this opinion mostly involved just applying then-existing law in a rather vivid context. Courts and legislatures have refined and narrowed the available bases for lender liability. Given current economic conditions, I expect debtors are exploring ways to expand such claims again.

Overall, the quality of the legal representation in the case was excellent; but one of the biggest shocks to me in my experience as a clerk was the paucity of authority cited in parties' filings. With all the firepower on both sides of this case, in particular, you'd think there wouldn't have been much research left for me to do; but there was—plenty. (In fairness, the lawyers had a lot of legal theories to cover.)

One memorable moment was when the lead attorney for Manufacturers Hanover, Mel Cantor of Simpson, Thacher & Bartlett, New York City, called me personally to give me his room number at The Mansion,

3. *Hunt*, 689 F. Supp. 666 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-24 (1986)).

possibly the most elegant and expensive hotel in Dallas, and invite me to phone him directly if I had any little question at all (this was before cell phones).

At some point, the Hunts brought in Steve Susman of Susman Godfrey in Houston to serve as their lead attorney. He had a billing rate that at that time raised even the New Yorkers' brows (I want to say \$500 or \$600 per hour; I understand it's twice that now).

Judge also understood that "justice delayed is justice denied."⁴ Soon after I began working for Judge, he required the lenders in *Hunt* to create a committee and coordinate their activity, so we didn't have to deal with twenty-three separate motions at every turn. I think this was probably more efficient for everyone, especially in the early stages of the case, since at that point the lenders shared many of the same issues and might as well have benefitted from sharing their twenty-three law firms' expertise while possibly reducing their total legal fees. In any event I don't recall anyone objecting. David McAtee with Thompson & Knight, Dallas was elected to speak for the committee; for what it's worth, I thought he did a very fine job.

(Judge's impatience with avoidable delay was manifested in other cases and was, I believe, another part of why he was a good judge.)

Another shock to me in the course of this case concerned the media. We clerks were permitted to talk with reporters on a "background" basis only, to help them understand the issues and status of the case. I spent quite a bit of time trying to explain *Hunt* to reporters. I'm happy to say, to my knowledge, none I spoke with violated the "on background" understanding. I'm *unhappy* to add that, despite my best efforts, few reporters got anywhere close to getting the story right. (I'd like to put this down to their being under-paid, over-extended, and on unreasonably short deadlines)

*GETER v. FORTENBERRY: THE LINELL GETER CASE*⁵

Another case on my side of the docket involved Lenell Geter, a young black engineer who had been convicted of robbing a Kentucky Fried Chicken even though his fellow employees later confirmed he was at work at the time the crime was committed—but not even Geter's own defense lawyers had interviewed these witnesses.

Geter was ultimately fully exonerated and freed, but only after a *60 Minutes* piece on the case⁶ prompted a reluctant District Attorney Henry Wade to order re-investigation.⁷

4. RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS (Suzy Platt ed., 1989) (attributing the quotations to William E. Gladstone).

5. No. 87-1605 (N.D. Tex. 1985).

6. CBS News Video 19883: Lenell Geter, http://www.cbsnews.com/video/watch/?id=4455605n%3fsource=search_video (last visited Mar. 20, 2009).

7. Carlton Stowers, *The Way of the Gun: The Untold Story of Why Lenell Geter Was Freed*, OBSERVER, Nov. 15, 2001, available at <http://www.dallasobserver.com/2001-11-15/news/the-way-of-the-gun/1>.

Geter's lawyers had filed in federal court for damages, alleging civil rights violations. Judge ruled against dismissal of Geter's suit in an unpublished opinion. The Fifth Circuit partially reversed.⁸

I'm somewhat comforted to have since discovered that Geter is now an author and professional speaker,⁹ advertising that he "has traveled from coast to coast to share his methods for developing a winner's attitude"¹⁰

THE TRUANT JUROR

A fellow who'd been called for jury duty and failed to appear was hauled before Judge. Judge asked where the man had been that day instead (I presume, in case he actually had a decent excuse), and the fellow confessed he'd simply gone fishing. Back in chambers, Judge, frustrated, asked what we thought he should do with the fellow. Half-seriously, I suggested the man be sentenced to write out the Bill of Rights ten times by hand. That was the sentence Judge gave him.

When the fellow returned to show he'd completed his sentence, he said he'd learned *a lot* from the experience.

LUNCH

I need to mention lunch, in the unlikely event no one else does.

Judge, Phyllis, and the law clerks had lunch together nearly every day, usually in chambers. We mostly talked about everything except cases. (As I understood, Judge got up at 4:00 a.m. each day to read several newspapers; and he expected his clerks to arrive at work early and informed.)

I think Judge had an affirmative interest in working with a wide variety of kinds of people; his former clerks include staunch Republicans as well as Democrats. Though Judge and I usually agreed quickly on dispositions of cases, we had many vigorous discussions on policy or political matters—I'm embarrassed to say, usually with him doing most of the questioning and listening. And, usually punctuated with lots of laughs.

Judge dined daily on a can of tuna accompanied by jalapenos, Fritos and mayonnaise (he'd dip the Fritos directly into the mayo). After lunch, he'd go for a twenty-minute walk. Sometimes he'd report he'd encountered one of several harmless kooks who venerated/stalked him—one of them used to actually get on his knees and bow, which Judge vigorously discouraged.

8. Geter v. Fortenberry, 849 F.2d 1550 (5th Cir. 1988).

9. Mr. Geter has a website: <http://www.lenellgeter.com/>.

10. Lenell Geter Enterprises, About Lenell Geter, <http://www.lenellgeter.com/about/lenell.html> (last visited Mar. 20, 2009).

RECORDS

None of us had computers in those days, not even Phyllis. Our reference resources were all hard-copy, and Phyllis kept detailed case records in giant paper ledgers which were fast, infallibly accurate, and never crashed. To get our opinions typed up, we walked down one floor to Judge Hill's chambers; they had one of the few word-processing computers in the building and could make revisions.

JUDGE'S ART

I don't know how many works of art by Judge there are extant, but I've got one. I'm attaching with this Article a photo of a self-portrait that Judge scribbled on a note he passed to Phyllis from the bench. I saved it, and it hangs on my office wall to this day.

