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Recent Decisions

RECENT DECISIONS

Agency — Fiduciary Duty — Corporate Contracts

Plaintiff corporation, in acquiring substantially all the assets of Fifteen Oil Company of which the defendant Cain was president, allowed Cain to receive $57,500.00 severance pay for consideration expressed by Fifteen in the following letter agreement:

> that [Cain] . . . will be available to [plaintiff] . . . in a retained capacity for a period of six (6) months from and after May 2, 1960, in order that there will be no abrupt change in management and in order that [plaintiff] . . . may avail [itself] . . . of his special knowledge concerning the affairs and properties of Fifteen Oil Company.[1]

About five months later, Cain, as "agent and attorney-in-fact" for his father, wrote the plaintiff a letter pointing out the latter's failure to comply with the terms of a lease of oil properties (in which Cain's father owned twenty-five per cent of the mineral interest). Copies of the letter were sent to some twenty other owners of the mineral interest who suddenly demanded compliance. The plaintiff chose to surrender the lease. Soon after the surrender, Cain's father conveyed his interest to Cain, who then sold it for more than $40,000.00. Plaintiff sued Cain for breach of fiduciary duty in that he took advantage of his special knowledge and his confidential relationship, to the detriment of the plaintiff. The trial court awarded the plaintiff $57,750.00; but the court of civil appeals, finding error in one of the special issues submitted to the jury, reversed the trial court and remanded the case for a new trial. *Held, affirmed:*[2] The contract for severence pay was an arm's length transaction which concerned only the giving of advice upon request. Such a corporate contract for consultation will not create a fiduciary duty beyond "the framework of the agreement."

The scope of agency involves at least two concepts: first, the *authority* of the agent to act for his principal; and second, the *duty* of the agent to act in the interests of his principal. The former stems from common law contracts.[3] The latter involves the civil law notion of fiduciary duty adopted originally by equity.[4] Since the granting

[1] Reproduced in the principal case, Tennessee-Louisiana Oil Co. v. Cain, 400 S.W.2d 318, 320 (Tex. 1966).

[2] The Texas Supreme Court was without jurisdiction to grant any relief to Cain because he filed no application for writ of error.

[3] FERSON, AGENCY 7-9 (1954). See also SEAVEY, AGENCY 32-36 (1964).

[4] See Kinzback Tool Co., Inc. v. Corbett-Wallace Corp., 138 Tex. 565, 160 S.W.2d 509, 512-13 (1942), quoted both in FERSON, *supra* note 3, at 413 n. 49 and in the dissenting opinion in Tennessee-Louisiana Oil Co. v. Cain, 400 S.W.2d 318, 328 (Tex. 1966).

of authority to act for oneself is usually accompanied by the sharing of confidential knowledge, and since reliance on the agent's action usually relaxes the principal into inaction, authority and duty are traditional mates. In the principal case, in fact, the court admitted that a fiduciary relationship existed as to the consultation expressed in the agreement, but it emphasized that Cain was under no duty to refrain from acting adversely to the corporation's interest in areas where no authority was granted.

Fiduciary duty, however, is not always limited to the authority granted in an agency agreement.[5] An agent with an express contractual duty may place himself in such a position of trust to his principal that loyalty beyond the contractual terms is required.[6] In the principal case four dissenting judges found this situation to exist. Justice Griffin, writing the dissent, used several sections of the "Plan of Reorganization" to justify the plaintiff's assumption that Cain would act in its best interests concerning the former properties of Fifteen. The evidence is impressive.

Nevertheless, the majority refused to expand the limited fiduciary relationship expressed in the letter agreement. Certainly the plaintiff suffered the traditional handicap of a sophisticated and experienced corporation seeking help in equity. What might have been a breach of duty to an elderly widow was here merely clever business tactics.[7] *Tennessee-Louisiana Oil Co. v. Cain* should place corporate counsels on the alert. Where a confidential relationship is in fact expected to result from a business contract, it must be expressed in definite terms to the full extent desired.

J.H.W.

[5] See definitions cited in dissenting opinion in Tennessee-Louisiana Oil Co. v. Cain, 400 S.W.2d 318, 328 (Tex. 1966).

[6] See SEAVY, *supra* note 3, at 235. See also Kinzback Tool Co., Inc. v. Corbett-Wallace Corp., 138 Tex. 565, 160 S.W.2d 509 (1942) (employee's duty to disclose conflict of interests) and Johnson v. Peckham, 132 Tex. 148, 120 S.W.2d 786, 120 A.L.R. 20 (1938) (partner's fiduciary duty when selling his interest to another partner).

[7] *Cf.* Barnsdall Oil Co. v. Willis, 152 F.2d 824 (5th Cir. 1946) (Broker of oil leasee has a fiduciary duty not to buy land to the detriment of his principal.); Patterson v. Getz, 111 P.2d 842 (Or. 1941) (Son-in-law who handled accounts for parents-in-law had a special duty to manage the accounts fairly.); and cases cited note 6 *supra*. Boyd v. Eikenberry, 132 Tex. 408, 122 S.W.2d 1045 (1939) and Bradstreet Co. v. Gill, 72 Tex. 115, 9 S.W. 753, 2 L.R.A. 405 (1888), also cited by the court, discuss only the authority aspect of agency.

Antitrust — Horizontal Grocery Chain Merger Invalidated Under Clayton Act, Section 7

Von's Grocery Company, a large retail grocery chain in the Los Angeles area, acquired Shopping Bag Food Stores, a competing chain. Each company occupied a leading position in the Los Angeles retail grocery market, and in 1960 their combined sales were 7.5% of the area's total retail grocery sales. According to one view, less than one per cent of effective competition was foreclosed by the combination.[1] The United States brought an action charging that the merger violated section 7 of the Clayton Act, which prohibits asset or stock mergers resulting in a substantial lessening of competition.[2] After refusing the Government's motion for a temporary restraining order, the district court concluded as a matter of law that there was not a reasonable probability that competition would be lessened so as to violate section 7.[3] The Government appealed directly to the Supreme Court.[4] *Held, reversed:* When a market exhibits a decline in the number of small business units and when a trend toward oligopolistic concentration is shown, courts must prevent further concentration by arresting competition-reducing mergers in their incipiency. *United States v. Von's Grocery Co.*, 86 Sup. Ct. 1478 (1966).

Section 7 of the Clayton Act has been used to invalidate horizontal, vertical, and conglomerate mergers.[5] Originally directed toward stock-acquisition mergers between directly competing companies,[6] the section as amended in 1950 can now apply to any combination which tends toward a substantial lessening of competition.[7] Because the pro-

[1] See dissenting opinion of Mr. Justice Stewart, United States v. Von's Grocery Co., 86 Sup. Ct. 1478, 1493 (1966).

[2] The section now reads in relevant part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

64 Stat 1125 (1950), 15 U.S.C. § 18 (1963), amending 38 Stat. 731 (1914).

[3] United States v. Von's Grocery Co., 233 F. Supp. 976, 985 (S.D. Cal. 1964).

[4] This procedure is authorized by § 2 of the Expediting Act, 62 Stat. 989 (1948), 15 U.S.C. § 29 (1963).

[5] See, *e.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957), Note, 12 Sw. L.J. 128 (1958); FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965), Note, 20 Sw. L.J. 192 (1966).

[6] Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587, 595 (1934); FTC v. Western Meat Co., 272 U.S. 554, 559-60 (1926); United States v. Celanese Corp. of America, 91 F. Supp. 14, 17 (1950); Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 229-30 (1960); Note, *Reciprocal Dealing in Conglomerate Mergers*, 20 Sw. L.J. 192, 193-96 (1966).

[7] Brown Shoe Co. v. United States, 370 U.S. 294 n. 31 (1962), Note, 17 Sw. L.J. 286 (1963).

vision is primarily concerned with the probability that competition will be lessened, a "reasonable probability" criterion is often applied by the courts.[8]

The majority justified the decision by reciting the congressional purpose of protecting small businessmen and by painting a picture of Gargantuan chains gobbling up small "Mom and Pop" grocery stores.[9] Mr. Justice Stewart, joined by Mr. Justice Harlan in a dissenting opinion, took issue with the majority's finding that competition would be lessened.[10] Stewart viewed the decline of single-store operators and the chain store entry of the grocery market as "the result of transcending social and technological changes."[11] Continuing population growth, ease of market entry, entry and exit of competing small chains are all cited by the dissent as factors that belie a finding of lessening competition.

The decision in *Von's Grocery* points out a possible fault in the Court's attitude in antitrust cases. For certain market situations, some degree of imperfect competition may be the most accurate and workable economic norm.[12] When dealing with such a market, the Court should not automatically apply the maxims of a "perfect competition" market model, for doing so may actually cause a decline in effective competitive force.[13] The presence of chain stores within the Los Angeles retail grocery market, for example, should perhaps have been accepted as an economic fact of life. Invalidating a merger which forecloses competition in less than one per cent of total area sales and which has market-extension overtones may not be a wise implementation of congressional antitrust purposes.[14] At the least, it sets a new quantitative low for governmental action.[15]

T.M.J.

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[8] "The concept of reasonable probability conveyed by these words ['may be'] is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency. . . ." S. REP. No. 1775, 81st Cong., 2d Sess. 6 (1950). See note 2 *supra* for the relevant text of § 7.

[9] United States v. Von's Grocery Co., 86 Sup. Ct. 1478, 1479-83 (1966), *reversing* 233 F. Supp. 976 (S.D. Cal. 1964).

[10] 86 Sup. Ct. at 1485-96 (Stewart, J., dissenting in separate opinion).

[11] *Id.* at 1488 (Stewart, J., dissenting in separate opinion).

[12] "Horizontal and vertical integration will often serve to limit monopoly or destroy it. . . . The possibility that integration or diversification may be the response of one's business neighbors is one of the most potent of all forces maintaining competition in our economy." Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 47 (1949).

[13] *Ibid.* "In a sense, the defendants are being punished for the sin of aggressive competition." 86 Sup. Ct. at 1493 (Stewart, J., dissenting in separate opinion).

[14] *Id.* at 1492 (Stewart, J., dissenting in separate opinion). See note 1 *supra.*

[15] *Compare* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961) *with* United States v. Von's Grocery Co., 86 Sup. Ct. 1478 (1966). In *Tampa Electric* the Court regarded a market foreclosure of 0.77% as "quite insubstantial." Tampa Elec. Co. v. Nashville Coal Co., *supra*, at 331-33.

Conflict of Laws — Uniform Reciprocal Enforcement of Support — "The Runaway Pappy Act"

A woman (*W*) in Kentucky obtained a judgment for support against the father (*M*) of her illegitimate child. *M* defaulted in his payments and went to Texas. *W* initiated proceedings in Kentucky under the Kentucky version of the Uniform Reciprocal Enforcement of Support Act.[1] In all states, the act provides for a two-state procedure which enables the deserted dependant (*W*) to initiate proceedings at home while the "runaway pappy" is prosecuted in his new domicile by the district attorney. At the time the instant case was decided, the Texas act[2] allowed *W* to sue for support using either the law of her domicile or that of *M*'s. *W* chose to use Kentucky law, and a trial court in Texas ordered *M* to pay future support. The court of civil appeals reversed, holding that it was improper to apply Kentucky law, that the Kentucky judgment was not final and thus not entitled to full faith and credit, and that the lower court's decision denied *M* equal protection under the laws since a father in Texas is not required to support his illegitimate children.[3] *Held, reversed: W* is allowed a choice of law; the Kentucky adjudication as to *M's* duty to provide support is final; and a state may reasonably classify its citizens and apply different laws with respect to such classification without violating the Equal Protection Clause.[4] *Bjorgo v. Bjorgo,* 402 S.W.2d 143 (Tex. 1966).

The court held that the express language of the Texas act then in effect allowed *W* a choice of using either Texas or Kentucky law. Also, the Kentucky judgment was viewed as a final one with regard to *M*'s *duty* to provide support even though the *amount* of support payments might have varied. Finally, *M* was not denied equal protection under the laws by the act even though Texas laws do not call for support of illegitimate children. *M* had fostered his illegitimate child in Kentucky, a state which requires such support, and *M* therefore could not escape his obligation by fleeing to Texas.

The statutory law upon which the *Bjorgo* case was decided has been subsequently amended.[5] The new act no longer allows the

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[1] KY. REV. STAT. § 407 (1962). All states and territories and the District of Columbia now have similar legislation.

[2] Former art. 2328b, TEX. REV. CIV. STAT. ANN. (1964).

[3] 391 S.W.2d 528 (Tex. Civ. App. 1965).

[4] The act provides for such classification in that a "runaway pappy" is still bound by his previously incurred support obligations although state laws in his present domicile may be less stringent.

[5] TEX. REV. CIV. STAT. ANN. art. 2328b-4 (Supp. 1965). For a discussion of the appellate decision of the *Bjorgo* case in the light of the amended act, see 19 Sw. L.J. 801 (1965).

obligee to apply the law of her state regardless of where the obligor may have been at the time. Instead, the applicable law is now that of the state where the obligor was present during the period for which support is sought. Thus, only Texas law will apply for the period that the "runaway pappy" lives in Texas.

However, if a case similar to *Bjorgo* should arise under the new act, *W* would still be victorious because a foreign *judgment* was involved. The new act provides for registration of foreign judgments. Thus, the more cumbersome method, utilized in *Bjorgo* under the old act, of having a Texas adjudication as to the defendant's duty to support is eliminated. In such an instance, a responding Texas court will honor the original foreign judgment and need only ascertain the amount of accrued support.

G.W.O.

Mortgages — Deed of Trust — Dragnet Clause — Limitation on Subsequently Acquired Third-Party Debts

Parker Square State Bank loaned Lincoln Enterprises the sum of $125,000 in exchange for a promissory note and a deed of trust on land. The deed of trust contained a "dragnet" clause which provided that the land would also stand as security for "all other indebtedness which may accrue and become owing in the future." Thereafter, as security for a $50,000 loan from Wood, Lincoln executed a deed of trust to Wood covering the same land. Still later, Lincoln executed an unsecured note to Horton, which was subsequently purchased from Horton by Parker Square State Bank. Lincoln defaulted on all three notes and the bank foreclosed, claiming that the "dragnet" clause in the bank's deed of trust created a priority in the Horton note over the note held by Wood. The trial court and court of civil appeals[1] so ruled. *Held, reversed:* In the absence of clear and unmistakable language to the contrary, a dragnet provision applies only to obligations contemplated by and arising directly between the two original parties to the deed of trust, not to subsequently acquired third-party debts. *Wood v. Parker Square State Bank*, 400 S.W.2d 898 (Tex. 1966).

The early case of *Freiburg v. Magale*[2] established that by the addi-

[1] Wood v. Parker Square State Bank, 390 S.W.2d 835 (Tex. Civ. App. 1965).
[2] 70 Tex. 116, 7 S.W. 684 (1888).

tion of a dragnet clause a mortgage could be made to secure future debts, and such mortgage would be good "not only between the parties but as to purchasers from the mortgagee with notice of the mortgage." The broad language employed seemed to indicate that a mortgagee who was blessed with a dragnet clause, in effect had a blank check to include any later obligation, however obtained, within the protection of the original security. The more recent decision of *Moss v. Hipp*[3] limited this doctrine insofar as it applied to assignees of the mortgagee. The court refused to allow the mortgagee's assignee to utilize the mortgage to secure an earlier unsecured debt, reasoning that it was not within the *contemplation* of the original parties that the earlier unsecured debt would be secured by the mortgage. In the instant case, this same "contemplation" reasoning was used in declaring that the more reasonable construction of the clause was that it referred only to obligations arising directly between Lincoln and the bank. *Frieburg* was distinguished upon its facts which clearly indicated an intention that the clause should cover *all* future obligations and not merely those presently contemplated by the parties.

The instant case should not be regarded as establishing the rule that subsequently purchased third-party obligations are outside the ambit of the dragnet clause. It should be viewed, however, as creating a presumption that debt obligations subsequently obtained from a third party are not within the contemplation of the parties when they agree to such a clause. Left unanswered is the question of what evidence is sufficient to overcome this presumption. It appears likely that such a presumption can be overcome only by express words that third-party obligations are included. Regardless of the mechanics of application, the case has commendably placed a limitation on the broad general rule of *Frieburg*, thereby eliminating a potentially fertile area for fraud.

J.B.E.

Procedure — Appeal From Temporary Injunction Issued by Probate Court

Alice National Bank, the proponent of a will ordered to probate, appealed to the district court from a temporary injunction issued by a county court judge, sitting in probate. The temporary injunction

[3] 387 S.W.2d 656 (Tex. 1965).

had enjoined the bank from taking any action in a district court that would have interfered with the enforcement of orders issued by the county court. A motion by the contestant of the will to dismiss the appeal for want of jurisdiction of the district court was overruled, and the district court judge ordered that the temporary injunction be vacated. The court of civil appeals affirmed.[1] *Held, reversed:* An appeal from a temporary injunction issued by a county judge sitting in a probate matter, designed to protect his jurisdiction, lies to the court of civil appeals, not the district court. *Turcotte v. Alice Nat'l Bank*, 402 S.W.2d 894 (Tex. 1966).

Article 2251 of the Texas Revised Civil Statutes[2] provides that appeals from orders of county courts granting or dissolving temporary injunctions are controlled by the title "Injunctions." Article 4662,[3] which is part of title 76 relating to injunctions, provides for appeal to the court of civil appeals from a temporary injunction. Rule 385(d),[4] the rule form of article 4662, states that such an appeal does not "suspend the order appealed from, unless it shall be so ordered by the court or judge entering the order."[5] On the other hand, under section 28 of the Probate Code[6] appeals may be taken to the district court from the probate court. In the instant case, however, an appeal under section 28 "would operate to suspend the temporary injunction and the matter would have to be considered anew by the district court."[7] Since the court determined that the purpose of the temporary injunction issued by the probate court is ordinarily to preserve the status quo of parties in pending litigation, the statutes and related rules of civil procedure were deemed to control over the Probate Code provision. The court, however, did limit its decision to cases involving temporary injunctions issued in aid of the probate court's jurisdiction.[8]

P.R.K.

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[1] Turcotte v. Alice Nat'l Bank, 394 S.W.2d 228 (Tex. Civ. App. 1965).
[2] TEX. REV. CIV. STAT. ANN. art. 2251 (1964).
[3] TEX. REV. CIV. STAT. ANN. art. 4662 (Supp. 1965).
[4] TEX. R. CIV. P. 385(d).
[5] *Ibid.*
[6] TEX. PROB. CODE ANN. § 28 (1956).
[7] Turcotte v. Alice Nat'l Bank, 402 S.W.2d 894, 897 (Tex. 1966).
[8] This use of the temporary injunction is to be distinguished from cases where the ultimate relief sought is a permanent injunction.

Wills — Witnesses — Self-Proving Clause

Boren executed a typewritten document purported to be his last will and testament. The document was not attested by two witnesses as required by section 50 of the Texas Probate Code.[1] Attached to the probated will was a self-proving affidavit with the names of the testator and two witnesses subscribed, which referred to the typewritten document as the will of Boren. The trial court admitted the will to probate, finding that the signatures to the self-proving provision were sufficient to comply with the requirements of section 59. The court of civil appeals affirmed.[2] *Held, reversed:* Attesting witnesses must sign the will itself; their signatures on an attached self-proving affidavit do not suffice for purposes of attestation. *Boren v. Boren,* 402 S.W.2d 728 (Tex. 1966).

Section 59 requires that a will be signed by the testator and attested by two or more credible witnesses.[3] It further provides that, through certain statutory formalities, the will may be made self-proved; that is, the testimony of the witnesses in the probate court will be unnecessary.[4]

In *McGrew v. Bartlett,*[5] the testator had not signed the instrument purporting to be a will. The proponent of the instrument argued that the proper execution of the self-proving clause operated to publish and validate the unexecuted will. The court rejected the contention and held that the self-proving clause neither merged in the will nor amounted to a republication of the unexecuted will.[6]

In the instant case, the court was faced with only a slight variation of *McGrew.* Here the testator had signed the will but the witnesses had not. The proponent argued that the witnesses to the self-proving clause should suffice as attesting witnesses to the will. The court rejected this reasoning and firmly drew the line between the will and the self-proving affidavit. As the court stated: "The execution of a

[1] TEX. PROB. CODE ANN. § 59 (Supp. 1965).

[2] Boren v. Boren, 394 S.W.2d 704 (Tex. Civ. App. 1965).

[3] TEX. PROB. CODE ANN. § 59 (Supp. 1965): "Every last will and testament, except where otherwise provided by law, shall be in writing and signed by the testator in person or by another person for him by his direction and in his presence, and shall, if not wholly in the handwriting of the testator, be attested by two (2) or more credible witnesses above the age of fourteen (14) years who shall subscribe their names thereto in their own handwriting in the presence of the testator. . . ."

[4] *Ibid.* ". . . Such a will or testament may, at the time of its execution or at any subsequent date during the life time of the testator and the witnesses, be made self-proved, and the testimony of the witnesses in the probate thereof may be made unnecessary, by the affidavits of the testator and the attesting witnesses, made before an officer authorized to take acknowledgments to deeds of conveyance and to administer oaths under the laws of this state. . . ."

[5] 387 S.W.2d 702 (Tex. Civ. App. 1965) error ref.

[6] *Id.* at 705.

valid will is a condition precedent to the usefulness of the self-proving provisions of section 59. A testamentary document to be self-proved, must first be a will."[7] The decision reaffirms the court's reluctance to relax statutory formalities in the making of testimentary instruments.

G.M.L.

Workmen's Compensation — Extraterritorial Injury Provision — Status of a Texas Employee

Dossey instituted suit in Texas claiming recovery under the extra-territorial injury provision of the Texas Workmen's Compensation Law, article 8306, section 19,[1] for injuries received in New Mexico in the course of his employment. A Texas resident, Dossey had made an informal contract in Texas with a Texas drilling company to work as a roughneck. The terms of the contract did not clearly specify whether he would be working in Texas and New Mexico or just in New Mexico, but his first work situs was in New Mexico. After four weeks, he returned to Texas for three days. On completion of his work in Texas, he returned to another location in New Mexico where he suffered a serious injury. The trial court and the court of civil appeals[2] allowed recovery. *Held*:[3] Even though his first work situs is outside the state of Texas, an employee injured in another state can recover under the Texas compensation statute if he has the "status of a Texas employee." An employee acquires such status if he is hired in Texas to work in Texas and in another state as the circumstances of his employer may require. *Texas Employers' Ins. Ass'n v. Dossey*, 402 S.W.2d 153 (Tex. 1966).

Article 8306, section 19, provides: "If an employee, who has been hired in this State, sustain[s] injury in the course of his employment he shall be entitled to compensation according to the Law of this State even though such injury was received outside of the State . . . ." The statute has been construed[4] as requiring that an employee must have

[7] Boren v. Boren, 402 S.W.2d 728, 729 (Tex. 1966).

[1] Tex. Rev. Civ. Stat. Ann. art 8306, § 19 (1956).

[2] Texas Employers' Ins. Ass'n v. Dossey, 387 S.W.2d 758 (Tex. Civ. App. 1965).

[3] The Supreme Court of Texas agreed that the first work situs was not controlling in determining status, but they reversed and remanded the case for the jury to decide if the contract was for employment in Texas and New Mexico or just in New Mexico.

[4] For an exhaustive review of these cases see Hale v. Texas Employers' Ins. Ass'n, 150 Tex. 215, 239 S.W.2d 608 (1951).

the "status of a Texas employee" before he is entitled to any benefits under the provision. In *Hale v. Texas Employers' Ins. Ass'n*,[5] the Texas Supreme Court interpreted the previous case of *Southern Underwriters v. Gallagher*[6] as holding that a workman cannot acquire the status of a Texas employee if he has not in fact performed services for his employer in Texas *before* doing so in another state. This technical requirement was expressly rejected in the instant case. The court, recognizing the misinterpretation of *Gallagher*, held that the employee acquires the necessary status if he is hired to work in Texas as well as in another state, and this status is not lost even though he first works in the other state.

When the contract of employment does not specifically state where the work is to be performed, the matter of status under the extraterritorial injury provision is a fact question to be determined by the jury upon submission of special issues. The court suggested that the issue be submitted in terms of whether under his employment contract the employee was hired to work in Texas as well as in the other state. The instant case clarifies an area previously burdened with uncertainty and provides a workable test for determining status under the extraterritorial injury provision.

J.A.M.

Workmen's Compensation — Wife Entitled To Recover for Nursing Services Rendered Her Husband

Polk sustained a serious injury in 1961 which rendered him completely helpless. He required constant attention as he was unable to eat, drink, or attend to his bodily needs without aid. Transport Insurance Company voluntarily commenced paying Polk for the employment of a qualified nurse who worked ten hours each day for six days of each week and four hours on Sunday. However, Transport refused to furnish nursing services for the remainder of each day, and such services were supplied by Polk's wife. Upon Transport's refusal to pay Mrs. Polk the value of the nursing services rendered by her, she filed a claim under article 8306, section 7 of the Workmen's Compensation Act.[1] The board denied the claim but the district court reversed and rendered a judgment for Mrs. Polk for $6,500. The

[5] 150 Tex. 215, 239 S.W.2d 608 (1951).
[6] 135 Tex. 141, 136 S.W.2d 590 (1940).
[1] TEX. REV. CIV. STAT. ANN. art. 8306, § 7 (Supp. 1965).

court of civil appeals affirmed.[2] *Held, affirmed:* If an employer or insurer refuses to furnish nursing services required by article 8306, section 7 of the Workmen's Compensation Act, the employee's wife, after furnishing such services, is entitled to recover their reasonable value. *Transport Ins. Co. v. Polk,* 400 S.W.2d 881 (Tex. 1966). 1966).

Section 7 provides that if the insuring association fails to furnish reasonable nursing care to an injured employee, the person who supplies such nursing services shall be entitled to compensation.[3] Whether an employee's wife can recover under this provision for rendering services to her husband is a question of first impression in Texas. Decisions in other jurisdictions have refused recovery to a wife for rendering "ordinary" services to her injured husband, such as giving him prescribed medicine or assisting him in and out of bed, the rationale being that the wife is under a marital obligation to render such care and attention to her husband.[4] On the other hand, recovery has usually been allowed where "extraordinary" services were rendered to the injured spouse.[5] Medical testimony in the instant case proved that Polk was a quadriplegic and required extraordinary attention.[6] The court reasoned that Polk's insurer had an absolute statutory

[2] Transport Ins. Co. v. Polk, 388 S.W.2d 474 (Tex. Civ. App. 1965).

[3] Section 7 provides in part:

> The association shall furnish such medical aid, hospital services, nursing, chiropractice services, and medicines as may reasonably be required at the time of the injury and at any time thereafter to cure and relieve from the effects naturally resulting from the injury. If the association fails to so furnish reasonable medical aid, hospital services, nursing, chiropractic services and medicines as and when needed after notice of the injury to the association or subscriber, the injured employee may provide said medical aid, nursing, hospital services, chiropractic services, and medicines at the cost and expense of the association .The employee shall not be entitled to recover any amount expended or incurred by him for said medical aid, hospital services, nursing, chiropractic services, or medicines, nor shall any person who supplied the same be entitled to recover of the association therefor, unless the association or subscriber shall have had notice of the injury and shall have refused, failed or neglected to furnish it or them within a reasonable time.

[4] Bituminous Cas. Co. v. Wilbanks, 60 Ga. App. 620, 4 S.E.2d 916 (1939); Graf v. Montgomery Ward & Co., 234 Minn. 485, 49 N.W.2d 797 (1951); Claus v. DeVere, 120 Neb. 812, 235 N.W. 450 (1931).

[5] Recovery for extraordinary services has been permitted in many jurisdictions. See California Cas. Ind. Exch. v. Industrial Accident Com'n, 84 Cal. App.2d 417, 190 P.2d 990 (1948); Oolite Rock Co. v. Deese, 134 So.2d 241 (Fla. 1961); Brinson v. Southeastern Utilities Serv. Co., 72 So.2d 37 (Fla. 1954); Brown v. Dennis, 114 So.2d 335 (Fla. Dist. Ct. App. 1959); Crunkelton Elec. Co. v. Barkdoll, 227 Md. 265, 177 A.2d 252 (1962); Collins v. Reed-Harlin Grocery Co., 230 S.W.2d 880 (Mo. Ct. App. 1950); Daugherty v. City of Monett, 238 Mo. App. 924, 192 S.W.2d 51 (1946); Berkowitz v. Highmount Hotel, 281 App. Div. 1000, 120 N.Y.S.2d 600 (1953) .

[6] Such services included cutting up his food, holding a glass or cup while he drinks, turning him over in bed every two hours, raising and lowering him in bed, seeing that he does not become malpositioned in bed, keeping him and the bed clean and dry to avoid ulcers, rubbing his skin with alcohol, keeping him covered at night, providing medication for him during his sleepless nights, draining his urine bag, and cleaning Mr. Polk and changing the bed linens following his bowel movements.

duty[7] to furnish a nurse to perform these extraordinary services (and seemingly all services usually performed by a trained nurse). Thus, if the employer or insurer refuses to perform his statutory duty, whoever renders such services—even a wife—is entitled to compensation.

J.J.M.

[7] See note 3 *supra*.