Affirmed and Opinion filed May 18, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01275-CV

JOHN E. HEARN, JR. AND LARA ENERGY, INC., Appellants

V.

COX & PERKINS EXPLORATION, INC., YUMA PETROLEUM CO., JAMES O. BLACKWELL, JR., A.B. COPLAND, SAM L. BANKS, ROEMER OIL CO., RODNEY POPEJOY, JAMES L. COLLINS, FRANEY OIL OPERATIONS, INC., AND ROBERT PARKER, Appellees

---

On Appeal from the 2nd and 25th District Court
Colorado County, Texas
Trial Court Cause No. 19,219-A

O P I N I O N

In an interpleader action, Cox & Perkins Exploration, Inc. brought suit to determine the appropriate payee of oil and gas proceeds derived from lands under title disputes. The interpleader court awarded summary judgment against appellants John E. Hearn, Jr. and Lara Energy. Appellants bring five points of error, claiming the trial court erred (1) in applying collateral estoppel with no evidence of the pleadings from the underlying suit; (2) in applying collateral estoppel to the question of who is entitled to interpleaded funds when the underlying suit was still on appeal; (3) by permitting funds to be distributed from the registry of

the court less than thirty days after judgment; (4) in failing to permit Hearn to supersede the judgment; and (5) in granting the Motion to Transfer Venue. For the reasons stated below, we affirm the judgment of the trial court.

BACKGROUND

Cox & Perkins, as operator for property known as the Gracey Ranch Prospect, paid proceeds to various interest owners. Due to the conflicting claims to such payments, Cox & Perkins filed an interpleader action and unconditionally tendered all of the disputed funds into the court's registry. All the defendants claimed to own a part of the Gracey Ranch Prospect through Yuma Petroleum Company. Two concurrent lawsuits existed as a result of these conflicting claims. Appellants John Hearn and Lara Energy brought one suit against Yuma Petroleum and related defendants in Lavaca County. Roemer Oil Company brought a second suit against Yuma Petroleum in Harris County.

In the Lavaca County action, appellants claimed that they acquired by contract a portion of the interest in the Gracey Ranch Prospect held by appellees Yuma Petroleum and Sam L. Banks. The jury rendered a verdict against appellants. Appellants have since appealed that judgment, and their appeal is pending in the Thirteenth Court of Appeals.

Prior to judgment being rendered in the Lavaca County suit, Cox & Perkins instituted an interpleader action in Nueces County. Yuma Petroleum filed a motion to transfer venue to Colorado County, the location of the Gracey Ranch. The Nueces court granted the motion, relying on the mandatory venue provision of TEX. CIV. PRAC. & REM. CODE ANN. § 15.011.

The District Court in Colorado County granted the interpleader and discharged Cox & Perkins from liability. The other parties then filed multiple motions for summary judgment. The court granted summary judgment against the claims of Hearn and Lara Energy, finding that the issues in the interpleader action had been litigated in the Lavaca County suit. Accordingly, the court concluded that appellants' claims were barred by the doctrine of collateral estoppel.

After summary judgment was granted, the parties agreed to an order distributing the funds. After the order was entered, the Hearn Summary Judgment was severed. Hearn sought to supersede the

judgment of the trial court, but the court denied his attempt to post a supersedeas bond. This appeal was taken in the severed action.

Except for point of error three, we will address appellants' points sequentially. Because point of error three is dependant upon how we dispose of the other issues, we will address it last.

POINT OF ERROR ONE

By point of error one, appellants argue that the interpleader court erred in applying collateral estoppel with no evidence of the pleadings from the underlying suit. The Colorado County District Court applied the principal of collateral estoppel based on the jury charge and the amended judgment from the Lavaca County suit. Appellants claim that the evidence was insufficient to apply collateral estoppel without pleadings from the Lavaca suit being presented to the Colorado court. We note that the same trial judge who presided over the Lavaca County jury trial also presided over the interpleader action. The judge signed the Amended Judgment in Lavaca County one month before he heard the motions in Colorado County.

Appellants cite the following cases for the proposition that the pleadings must be proffered to the court along with the judgment to sustain a claim for collateral estoppel: *Permian Oil Co. v. Smith*, 107 S.W.2d 564, 568 (Tex. 1937); *Jones v. City of Houston*, 907 S.W.2d 871, 874 (Tex. App.–Houston [1st Dist.] 1995, writ denied); *Cuellar v. City of San Antonio*, 821 S.W.2d 250, 256 (Tex. App.–San Antonio 1991, no writ); *Scurlock Oil Co. v. Smithwick*, 787 S.W.2d 560, 562 (Tex. App.–Corpus Christi 1990, no writ); *Traweek v. Larkin*, 708 S.W.2d 942, 945 (Tex. App.–Tyler 1986 writ ref'd n.r.e.). We will discuss each of these cases individually, and then consider their impact on the present action.

The abovementioned cases hold that the party relying upon collateral estoppel must introduce into evidence *both* the judgment and the *pleadings* from the prior suit or the doctrine of collateral estoppel is not applicable in the second proceeding. By tracing the history for this line of reasoning, we find that *Jones* cites to *Traweek* as precedent for this position. *Cuellar* and *Scurlock* both rely on *Traweek* as well as *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316 (Tex.

App.–San Antonio 1984, no writ). Finally, *Traweek* relies solely on *City of Houston*. All these cases can thus be traced back to *City of Houston*.

The status of *City of Houston* as binding precedent, at least for the proposition that these cases mention, is very much in doubt. The court of appeals in *City of Houston* held that collateral estoppel applies once the movant proves the issues determined in the original proceeding. *See City of Houston*, 673 S.W.2d at 321 (*citing Griffin v. Holiday Inns of America*, 496 S.W.2d 535, 538 (Tex. 1973)). The court then refused to apply res judicata or estoppel by judgment because appellee introduced *neither* the pleadings *nor* the judgment. *See id*. Nowhere does the court in *City of Houston* specify the necessary proof when judgment is urged as an estoppel or bar. Rather, the court merely stated that the proof before it was insufficient.

We note that in discussing the proof necessary for issue preclusion, *City of Houston* cited the following four cases: *Permian Oil Co. v. Smith*, 129 Tex. 413, 107 S.W.2d 564 (1937); *State of Oklahoma v. State of Texas*, 256 U.S. 70 (1921); *Kveton v. Farmers Royalty Holding Co.*, 149 S.W.2d 998 (Tex. Civ. App.– Galveston 1941, no writ); *Wilhite v. Adams*, 640 S.W.2d 875 (Tex. 1982). Again, we shall discuss each case in turn.

In *Permian Oil*, the Supreme Court of Texas discussed both res judicata and collateral estoppel. *Permian Oil* held that for res judicata purposes, only the judgment should be inquired into, absent ambiguity in the judgment. *See Permian Oil*, 107 S.W.2d at 567. Where the judgment is ambiguous, extrinsic evidence is admissible to help interpret the judgment. *See id*. If the issue is one of collateral estoppel, the Court held that the whole record of the first case is admissible in order to determine whether the issue involved had already been resolved in the prior suit. *See id*. At no time did the *Permian Oil* court mandate the necessity of introducing both the pleadings and the judgment from the prior suit. The Court did state that one must look only to the pleadings and the judgment, absent ambiguity, in cases where the original judgment is being collaterally attacked; but this has no bearing on the case at bar or on the *Traweek* line of cases. *See id*. at 568.

The other three cases referenced in *City of Houston* are not helpful to our analysis. *State of Oklahoma v. State of Texas* and *Kveton v. Farmers Royalty Holding Co*. discuss only res

judicata. While *Wilhite v. Adams* does address issue preclusion, the case presents no guidelines as to what evidentiary proof is necessary to establish collateral estoppel.

It is our conclusion that *Traweek* and its lineage have misinterpreted the caselaw and have thus created law based on a flawed analysis. As such, we decline to follow those cases. Even though the pleadings were not tendered to the trial court to verify the issue on which preclusion is sought, the jury charge together with the judgment sufficiently notified the court of the issues decided in the Lavaca proceedings. Question number one of the jury charge reads, in part, as follows:

> Did Hearn fail to stay with Yuma Petroleum long enough for Hearn to sell and for all monies to be collected on the following prospects:
> It is your duty to interpret the following language of the 1994 Geologist Consultant Agreement:
> "6.03 in the event consultant elects to terminate this Agreement in accordance with Sec. 6.01(a) or (b), the Consultant will have to stay with the company long enough for the Consultant to sell the Prospect and for all the monies to be collected in order for the Consultant's interest to be vested."

The jury answered "yes" as to the Gracey Ranch, thereby affirming that Hearn's interest in the property did not vest. Question number two of the jury charge reads as follows:

> Did John Hearn and Sam Banks (on behalf of Yuma Petroleum Company) agree on July 20, 1995 that in exchange for John Hearn's assistance in completing the sale of S. W. Speaks Prospect that John Hearn/Lara Energy, Inc. would earn the oil and gas interests provided for in Sec. 3.02(a)(c) and (d) of the 1994 Geologist Consultant Agreement?

The jury answered "no." The judgment of the Lavaca court adopted these findings and ordered that Hearn and Lara Energy "take nothing by their claims, particularly the claims as to mineral interests in the Southwest Speaks prospect, the Gracey Ranch prospect, and the Four Sisters prospect." Because appellants' claim to the interpleaded funds were based on the same Geologist Consultant Agreement, the interpleader court would have to answer the same questions that had already been conclusively determined by the jury. That, exactly, is the basis for invoking collateral estoppel. To hold as necessary extraneous information in the form of the pleadings would only elevate form over substance. A jury instruction cannot insert issues not raised by the pleadings and the evidence. *See* TEX. R. CIV. P. 278; *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992). If the issue to be estopped is readily apparent from the evidence

presented to the trial court, we see no reason to make presentment of the pleadings an absolute requirement.

To hold otherwise would subvert the goals of judicial economy and efficient administration of justice. Appellees would only have to introduce the same collateral estoppel evidence, this time with the pleadings, in order to obtain the same result. The addition of the pleadings contributes nothing to appellants' cause. After a thorough review of the parties' arguments and the summary judgment proof, we hold appellees presented sufficient evidence to apply the doctrine of collateral estoppel. We also find that appellants presented no controverting proof showing that the content of the pleadings was necessary to the determination of issue preclusion. In the absence of such controverting proof, we conclude that the trial court properly applied collateral estoppel. We overrule point of error one.

POINT OF ERROR TWO

In point of error two, appellants state that the trial court erred in applying collateral estoppel to the interpleader action while the Lavaca County suit is still pending on appeal. This claim is in direct conflict with Texas Supreme Court authority holding that a judgment is final despite a pending appeal. *See Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986).[1]

Applying collateral estoppel to the case before us is consistent with the policy underlying *Scurlock* – the prevention of unnecessary litigation. In the interpleader action, appellants sought to relitigate whether they were entitled to proceeds from the sale of minerals extracted from the Gracey Ranch Prospect. Appellants' theory of entitlement was that they had acquired by contract a portion of the interest in the

---

[1] Appellants attempt to distinguish *Scurlock Oil Co.* with *Texas Beef Cattle Co. v. Green*, 921 S.W.2d 203, 208 (Tex. 1996). The principal reason the Supreme Court formulated the the *Scurlock* rule was the nonsensical alternative of retrying the same issues between the same parties in subsequent proceedings with the possibility of inconsistent results. *See Scurlock*, 724 S.W.2d at 6. In *Green*, the Court refused to extend the *Scurlock* rule to malicious prosecution cases. *See Green*, S.W.2d at 207. The Court held that a malicious prosecution suit did not, strictly speaking, relitigate the claims of previous cases. *See id.* Rather, malicious prosecution suits are more accurately characterized as being predicated upon a party's success in the previous cases and distinct from the issues tried therein. *See id.* Extending *Scurlock* to malicious prosecution suits would actually promote repetitive and unnecessary litigation because it would allow the plaintiff to prosecute a claim only to have it rendered meaningless if later all or part of the appeal of the underlying action is decided adversely. *See id.* at 208.

Prospect held by appellees Yuma and Banks. This is precisely the same issue litigated in the Lavaca County suit between the same parties. Applying issue preclusion to the present case is consistent with *Scurlock*. Such action binds the parties to the original judgment and promotes judicial economy by requiring a losing party to follow the ordinary appeals process, rather than relitigating adverse fact findings in a new lawsuit. Point of error two is overruled.

POINT OF ERROR FOUR

In point of error four, appellants maintain that the trial court erred in failing to permit Hearn to supersede the judgment. After ordering the immediate distribution of interpleaded funds, the court denied Hearn's attempts to supersede the judgment. Appellants rely on *Elizondo v. Williams*, 643 S.W.2d 765, 767 (Tex. App.–San Antonio 1982, no writ) to contend that the trial court had no discretion in this matter because Hearn had an absolute right to supersede a judgment. It is true that with certain exceptions, a party's right to supersede a judgment is not a matter within the trial court's discretion. *See Man-Gas Transmission Co. v. Osborne Oil Co.*, 693 S.W.2d 576, 577 (Tex. App.–San Antonio 1985, no writ); *Weber v. Walker*, 591 S.W.2d 559 (Tex. Civ. App.–Dallas 1979, no writ). However, the Texas Rules of Appellate Procedure 24.1 (a)-(f), as substantially revised in 1997, provides that a judgment may be superseded by a "judgment debtor."

A "judgment debtor" is defined as "a person against whom judgment has been recovered, and which remains unsatisfied." BLACK'S LAW DICTIONARY 845 (6th ed. 1990). A judgment debtor has also been defined as "a person obligated to pay a money judgment." TEX. REV. CIV. STAT. ANN. Art. 5069-1B.002 (Vernon Supp. 1999).[2] Appellants do not fall within either of these definitions. Appellants have not been ordered to transfer money or property to anyone. They have not been enjoined either temporarily or permanently, nor have they been ordered to take any action by the interpleader court. In fact, appellants' claims to the proceeds in the interpleader action were no greater than their claims to the proceeds arising from the Lavaca County action, in which they were plaintiffs. We find that for the

[2] Art. 5069-1B.002 was repealed by Acts 1999, 76th Leg., ch. 62, § 7.18(b), eff. Sept. 1, 1999. It has been replaced verbatim by TEX. FIN. CODE ANN. § 301.002 (Vernon Supp. 2000).

purposes of this interpleader action, appellants were not judgment debtors, and therefore had no absolute right to suspend the judgment.

If appellants are successful on appeal, they have an adequate remedy under the law. The distributed funds may be collected and re-distributed as necessary. *See Teve Holdings Ltd. v. Jackson*, 763 S.W.2d 905, 909 (Tex. App.–Houston [1st Dist.] 1988, no writ) ("If the underlying suit is reversed on appeal, appellant's remedy is to recover from the Appellees the market value of the property seized and executed.").

Point of error four is overruled.

POINT OF ERROR FIVE

By point five, appellants assert that the Nueces County trial court erred in granting the Motion to Transfer Venue. The Yuma Defendants moved to transfer venue based on the mandatory venue provision of TEX. CIV. PRAC. & REM. CODE ANN. § 15.011. The statute provides:

> Actions for recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property, or to quiet title to real property shall be brought in the county in which all or a part of the property is located.

TEX. CIV. PRAC. & REM. CODE ANN. § 15.011 (Vernon Supp. 2000). Appellants concede that the Lavaca County suit involved an interest in land. However, appellants contend that the interpleader action was merely a suit over oil and gas proceeds and did not concern an interest in real property. For the reasons stated below, we disagree.

The parties' pleading and proof limits a trial court's discretion to determine venue. A plaintiff's choice of venue stands unless challenged by proper motion to transfer venue. *See* TEX. R. CIV. P. 86(1); *In re Missouri Pacific R. Co.*, 998 S.W.2d 212, 221 (Tex. 1999). Once challenged, the plaintiff has the burden to present prima facie proof by affidavit or other appropriate evidence that venue is maintainable in the county of suit. *See* TEX. R. CIV. P. 87(2)(a), (3)(a); *Missouri Pacific*, 998 S.W.2d at 221. The plaintiff's prima facie proof is not subject to rebuttal, cross-examination, impeachment, or disproof. *See Missouri Pacific*, 998 S.W.2d at 221.

However, if the plaintiff fails to discharge the burden, the right to choose a proper venue passes to the defendant, who must then prove that venue is proper in the defendant's chosen county. *See* TEX. R. CIV. P. 87(2)(a); *Missouri Pacific*, 998 S.W.2d at 221.

We conduct an independent review of the entire record to determine whether venue is proper in the ultimate county of suit. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 15.064(b) (Vernon 1986); *Wilson v. Texas Parks & Wildlife Dept.*, 886 S.W.2d 259, 261 (Tex.1994); *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 757-58 (Tex.1993). Where there is probative evidence to support the trial court's determination, even if the preponderance of the evidence is contrary, we defer to the trial court's determination. *See Wilson*, 886 S.W.2d at 262; *Ruiz*, 868 S.W.2d at 758. If there is no supporting evidence, the judgment must be reversed and the cause remanded to the trial court. *See Ruiz*, 868 S.W.2d at 758. Thus, we review the entire record in the light most favorable to the trial court's ruling, but do not defer to its application of the law. *See Ruiz*, 868 S.W.2d at 758.

In the instant case, the determination of property rights was a necessary predicate to the disbursement of the interpleaded funds. The amount of interpleaded funds due to any one claimant depended on what fractional mineral interest they owned in the real property. When the Nueces County court heard the Motion to Transfer Venue, the Lavaca County suit involving Hearn and Lara Energy had not yet concluded. The Harris County action involving Roemer had not even begun. The Nueces County court could not have predicted how, or if, these other courts would dispose of the title issues raised in those cases. The initial step of determining property rights had to be taken in one of these three courts. Because all three suits were live at the time the Motion to Transfer Venue was made, there is evidence that the interpleader court would have to determine interests in real property.

The petition of the interpleader, Cox & Perkins, acknowledged the existence of a dispute as to who owned an interest in the Gracey Ranch Prospect. To the extent that Yuma Petroleum did not possess enough interest in the Gracey Ranch Prospect to satisfy both the Hearn claims and the Roemer claims, certain other parties who had received assignments from Yuma Petroleum

faced a reduction in their interests. Cox & Perkins even attempted to ascertain the interests of the parties not involved in the Hearn and Roemer suits by asking the various litigants to execute a Release Agreement and Disclaimer. Several parties, including Hearn and Lara Energy, refused to sign the disclaimer. Thus, the pleadings state that not only were the Hearn, Lara Energy, and Roemer interests in dispute, but so were the interests of Rodney Popejoy, James L. Collins, Franey Oil Operations, Inc., and Robert Parker (the "Bystander Defendants"). Even if the Lavaca and Harris County suits concluded before the interpleader action, it is possible that the interpleader court would have been faced with trying to determine the interests of these other defendants in the Gracey Ranch Prospect.

Appellants concede that there was a question as to whether Yuma Petroleum retained enough interest to satisfy the claims of appellants, Roemer, and the Bystander Defendants. Even if we agree with appellants that the interest in land of Hearn, Lara Energy, and Roemer could have been ascertained in their respective actions, it would still be up to the interpleader court to determine the interests of these Bystander Defendants. Appellants further concede that the Bystander Defendants were parties to the interpleader action because Cox & Perkins could not get clear title to their interests under Yuma. Such concessions strongly indicate that this action involves an estate or interest in real property, and any determination made by the trial court would serve to quiet title to real property.

These are all matters of conjecture that we are able to discuss only with the benefit of hindsight. At the time Yuma's Motion to Transfer Venue was heard, the Lavaca and Harris County Suits were still pending. Yuma Petroleum had the burden of showing venue existed in Colorado County, the location of the Gracey Ranch Prospect. Yuma Petroleum succeeded in that showing. The evidence adduced after the issue of venue was decided by the trial court does not destroy the prima facie proof on which the trial court relied. The record supplies probative evidence to support the trial court's determination, and, therefore, we must defer to the trial court's ruling. *Wilson*, 886 S.W.2d at 262. We overrule point of error five.

POINT OF ERROR THREE

By point three, appellants contend that the trial court erred by permitting funds to be distributed from the registry of the court less than thirty days after judgment. Appellants contend that because a judgment becomes final only after the expiration of thirty days from the date the judgment is signed, execution may not issue on a judgment until after thirty days has expired and the judgment becomes final. *See* TEX. R. CIV. P. 627. Thus, appellants conclude that the release of the interpleaded funds before the expiration of thirty days from the signing of the judgment was unlawful. Because we have determined that appellants had no interest in the interpleaded funds, this point of error is rendered moot.

Under classic mootness doctrine, a justiciable controversy is definite and concrete and must impact the legal relations of parties having adverse legal interests. *See Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937); *Reyna v. City of Weslaco*, 944 S.W.2d 657, 662 (Tex. App.–Corpus Christi 1997, no writ). Therefore, a controversy between the parties must exist at every stage of the legal proceedings, including the appeal. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). Cases may become moot when allegedly wrongful behavior has passed and could not be expected to recur. *See Securities & Exch. Comm'n v. Medical Comm. for Human Rights*, 404 U.S.403, 406 (1972); *Reyna*, 944 S.W.2d at 662.

Because we find that the trial court did not err in granting summary judgment against appellants, it follows that appellants had no interest in the interpleaded funds. For this court to resolve whether the trial court erred in prematurely distributing the funds would have no impact on the legal relations of the parties and is, therefore, moot. Under such circumstances the determination sought by appellants would constitute no more than an impermissible advisory opinion. *See Fireman's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968). We overrule point of error three and

affirm the judgment of the trial court.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed May 18, 2000.

Panel consists of Justices Edelman, Wittig, and Lee[3].

Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Senior Justice Norman R. Lee sitting by assignment.