ORAL ARGUMENT – 10/3/01
00-1220
TEXAS STATE BANK V. AMARO

POWELL: We are here today in connection with the trust that was created in 1989 by the 206th DC.

HANKINSON: Are tort claims against a trustee for mismanagement of the corpus of the trust compulsory counterclaims to an accounting in an action to terminate the trust?

POWELL: Yes, I believe that they are.

HANKINSON: What authority do you have for that? Do you have any cases that you can give us?

POWELL: In terms of specific case law relating to compulsory counterclaim, no.

HANKINSON: Can you explain why you would take that position and why they are compulsory counterclaims?

POWELL: First of all, the accounting and the authority of a TC in connection with accounting allows the TC to search _____ trustee, which according to the definition in Black and we provided in our brief, basically means a penalty to a trustee for in some way being negligent or in some way misapplying his fiduciary duties.

In addition, the case that we cited in the brief is the Cobble(?) law case in 1993 out of San Antonio. And in that case, it dealt with the issue of res judicata rather than compulsory counterclaims. But I think that the issues are somewhat similar. And in that case, the probate court's approval of an estate plan and of a final accounting, they were both involved in that suit, was held to bar a suit by a successor administrator against an initial administrator alleging negligence, DTPA, breach of fiduciary duty, and misrepresentation.

HANKINSON: I understand that the court can assess a surcharge against the trustee for mismanagement, which would increase the amount of the corpus of the trust that would then be paid to the beneficiary at that point in time. But in a final accounting if the court then terminates the trust and the corpus of the trust is then conveyed to the beneficiary, that's the least the beneficiary is going to get. Isn't the claim against the trustee for breach of fiduciary duty or some other tort, isn't that then separate since it doesn't actually affect the corpus because we're looking at increasing the amount that would be paid to the beneficiary? Do you see what I mean?

POWELL: I think we're talking about shades of the same thing however. Because whether you call it a surcharge, which again would in some way be additional compensation to the

beneficiary, or whether you call it damages for breach of fiduciary duty, either way they are methods by which the trustee can be in some fashion penalized or subject to damages for negligence or for breaching his fiduciary duty.

HANKINSON: Can an accounting be tried to a jury or is it always tried to the court?

POWELL: I don't know that there is anything specific in the Texas Probate Code that addresses the issue. I am not aware of any authority that indicates that that would be tried to a jury.

HANKINSON: If an accounting is put at issue with the TC and the beneficiary of the trust files counterclaims against the trustee for breach of fiduciary duty or other tort claims, then would the entirety of that matter be tried to the jury including the accounting, or would the resolution of the tort claims occur with a jury trial and then the court would take those into account in actually doing the final accounting? How would that work?

POWELL: I am not aware of any court decision that specifically addresses that issue. In general, however, where you have cases that issues and might go to a jury along with those that are generally tried to the court, there would be two different determinations. And I would suspect that that would be the case in this particular matter.

RODRIGUEZ: Why wasn't Mr. Vargas entitled to 45 days notice?

POWELL: I don't believe that he was entitled to notice.

RODRIGUEZ: Why?

POWELL: Because to begin with, I'm not aware of anything or any indication that this particular exercise of the TC's continuing jurisdiction would be a trial within the meaning of rule 245. In addition, the most important factor is that it is Mr. Vargas who set this particular hearing, not Texas State Bank. The relief requested by Mr. Vargas dealt with whether or not he regained capacity in the corollary termination of the trust. The relief requested by Texas State Bank similarly was intertwined with that. All of this dealt with the termination of the trust and things that needed to be reviewed at that time, including the accounting.

So all that Texas State Bank did was when they received notice that Mr. Vargas had set his motion for a particular date, the Texas State Bank then immediately set its own relief for the same time period. And again, we believe that all of this was interconnected and all needed to be handled at the same time.

I might add that Mr. Vargas did not file a motion for continuance prior to the time that evidence was heard.

RODRIGUEZ: But he did object to the trial setting.

POWELL: There was a very general objection to the trial setting. That is correct. But again, he went forward on his own relief. And I don't see that one can be a trial without the other being a trial. To the extent that they both involve issues relating to the termination of the trust, it seems to me that they are of equal jurisdictional and judicial importance. And if one of them _____ trial, then I would submit to you both are. But again I am not aware of any authority that would indicate that this particular exercise of jurisdiction on the part of the TC exercising a trial court's continuing jurisdiction would be a trial within the context of rule 245.

O'NEILL: It strikes me that Justice Hankinson's question kind of goes to the heart of the problem, and that is, if a tort claim for mismanagement or breach of fiduciary duty is a compulsory counterclaim and an accounting, then I can see how your argument has merit. If it is not a compulsory counterclaim and these in fact are two different animals, then what is wrong with allowing the plaintiff to choose the forum to bring those tort claims?

POWELL: I think the easy answer to the question is that it would have been a compulsory counterclaim. Again, compulsory counterclaims generally deal with things that relate to the same subject matter, and I believe that that is exactly what we have here. We have a situation where Texas State Bank has requested approval of its accounting. And in the Cobble(?) law case that we've cited, that was held to bar subsequent claims of breach of fiduciary duty.

O'NEILL: I don't recall that the briefing much focuses on the compulsory counterclaim aspect of it. If in fact it does not fit the definition of a compulsory counterclaim, would you agree that there would be no problem then with letting the plaintiff go choose their choice of forum to try the tort claims to a jury?

POWELL: I disagree with the premise. But in addition, I don't think that that necessarily addresses the issue of whether or not the TC had the authority to issue the declaratory judgment that it issued. I think that that is the main issue...

O'NEILL: Well we're really talking about choice of forum, not jurisdiction. If you assume with me that those are two different animals, again, if it is a compulsory counterclaim I think you've got a whole different issue. But if in fact it's not and they are two different animals, you've got two courts with jurisdiction, then why shouldn't we let the plaintiff under our jurisprudence go ahead and choose the forum on those unrelated claims?

POWELL: Policy wise, I think that there is a couple of different answers to that.

O'NEILL: But then we're into policy you would say. There's nothing that would prevent the plaintiff from going into the other court other than judicial economy or things like that. It seems to me those policy choices would come into play in defining it as a compulsory counterclaim or not. And if those policy decisions did not cause it to be a compulsory counterclaim then there would be nothing wrong. It would come under what is Abor v. Black that would allow the plaintiff to choose their forum.

POWELL: Yes. But I don't think that Abor v. Black is applicable here for a couple of reasons. First, there are specific provisions of the declaratory judgment act that were not at issue here; and second, the plaintiff here did choose the forum. It was Mr. Vargas who actually filed a suit in the 206th. It is not Texas State Bank that chose the forum here. Texas State Bank merely asked that court that created the trust and abated a trustee to exercise all of the determinations required of it in connection with the termination of trust.

O'NEILL: Mr. Vargas chose that forum for his lawsuit. Sometimes I know trial judges will appoint trustees who are friends of the court, someone they know in the community. Aren't they going to be reluctant then to try a case for negligence or mismanagement against their appointed person? I mean would that be some reason why they might want another forum for mismanagement of trust issues?

POWELL: I certainly don't think that there is any indication of that in this case. But then in addition, I don't believe that the statutes involved here, specifically §142 under which this trust was created, would provide for that. Because §142.005, I believe and the rest of ch. 142 clearly contemplate continuing jurisdiction by the court that created the trust. And 142.005 of course contemplates that the court or the parties may select a particular trustee. In this case, my inclination, my belief is that it was by agreement of the parties. Texas State Bank agreed to do this, but it was not a choice of trial courts as far as I am aware.

Section 142 makes repeated references to the court and actions of the court. Again the court creating the trust would have to take. Section 142.002 for example talks about management by a _____ manager. And 142.005 talks about the trust being amended and modified or revoked by the court. That along with §115 of the Probate Code, which again contemplates the general DC jurisdictions of a trust. I think you do need to read those together. Although independently, I think they support jurisdiction here. But certainly if you read them together it appears to me that they support the jurisdiction asserted by the TC in this instance.

After all, we are talking about a trust that was created at the request of Mr. Vargas by the 206th DC, where Texas State Bank agreed to be the trustee, where both Mr. Vargas and the bank took advantage of the continuing jurisdiction of the court in terms of having fees approved and obtaining disbursements. And where Mr. Vargas himself went in to the 206th DC and requested termination of the trust. And bear in mind that he still had affirmative pleadings at the time of the judgment that requested the trust be terminated, and that the proceeds be provided to him. So it was not merely Texas State Bank that got relief here. It was also Mr. Vargas. Mr. Vargas requested that relief and as a result of that request, Mr. Vargas received directly as opposed to being in his trust some $4.5 million.

In this connection, I certainly think that both the policy arguments and the practicalities suggest that this is a situation where the 206th DC was the best court in order to review the situation. It is the court that had created the trust, supervised the trust. And furthermore, it is the court that was not chosen by Texas State Bank. It is the court that was chosen by Mr. Vargas, both

in terms of his initial lawsuit and in terms of the additional relief sought.

In connection with the issue of the declaratory judgment act, I would like to cite the court to an additional case that is not cited in our brief. And that is Causley(?) v. Staley(?), 988 S.W.2d 791 (Amarillo 1999) no petition. Which again along with Trinity Universal talks about the _____ between a declaratory judgment case involving a contract or a trust and those in the bulk of the other situations that Abor would address.

In addition there is a 5th circuit case, _____ v. Standard Marine, that again holds that the TC did not abuse its discretion in entertaining an insurance request _____ declaration for nonliability to the plaintiffs despite the plaintiffs announced intent to sue the insurer in state court, again saying the plaintiffs chose the forum. So in connection with the policy arguments here and the practicalities of the situation here, I think this is a situation where the TC did the right thing and did issue the relief that was within its jurisdiction and properly requested.

RODRIGUEZ: What are we to do with the fact that the TC granted more relief than was requested by TSB?

POWELL: First of all, I would disagree. I believe that the scope of the pleadings, although they certainly could have been broader without question, the pleadings requested by TSB did in fact request an approval of its accounting and approval of other administrative and refers specifically to administrative matters and contains a general prayer for relief. And again, I don't believe that there were objections to that.

Clearly their pleading could have been more broadly, but I believe it is sufficient to cover the relief question.

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RESPONDENTS

POST: The jurisdictional issues in this case certainly appear complicated. We believe that there are answers that are satisfactory to the jurisdictional questions.

HANKINSON: Are the tort claims compulsory counterclaims to the action for an accounting?

POST: It's not clear to me that they are. And what I would say...

HANKINSON: Why don't they under rule 97 arise from the same transaction or occurrence that's the subject matter of the suit?

POST: I think they do arise from the same transaction or occurrence. But they were the subject of a pending action, that is our lawsuit filed in the 93rd DC, which we had a right to file under Abor.

HANKINSON: But that's not the answer. My question is, then are you saying that they are - if it does arise from the same transaction or occurrence that in fact they are compulsory counterclaims?

POST: I suppose I ought to qualify the answer that they are the subject of the same transaction or occurrence. It's not clear to me that an accounting arises from the same transaction as the claims of mismanagement or breach of fiduciary duty.

HANKINSON: Isn't the transaction the trust and the management of a trust?

POST: That may be.

HANKINSON: If that's the case, then why don't tort claims arising out of that management of the trust constitute a compulsory counterclaim because they arise out of the same transaction or occurrence?

POST: They might as a general matter if all you were looking at was rule 97.a. But I would answer it in two respects. First, Abor is an exception to the ordinary rules of where claims have to be brought. And to allow a defendant...

HANKINSON: I understand. That's a different issue in terms of the court choosing to exercise its discretion to exercise jurisdiction or not. In this particular instance, Mr. Vargas made a demand upon the bank that the bank turn over the corpus of the trust to him because he believed that he was then competent, so the basis for the establishment and continuance of the trust was gone. And the bank says we find ourself in the position of being under the continuing jurisdiction of the 206th, and having to report in to that court for its actions with respect to managing the trust on behalf of Mr. Vargas. So the bank files an interpleader action in the 206th and asks the help of the 206th in resolving a question of whether or not the trust should be terminated. And you don't think there's anything improper about them having done that?

POST: I agree there's nothing improper about asking for the court to determine if the trust _____.

HANKINSON: So if that's the case, then we don't have the kind of racing to the courthouse issue that occurred in Abor?

POST: Not at that point you don't.

HANKINSON: We don't have that. So once they file with the 206th requesting an accounting and a determination from the court on whether or not the trust should be terminated, then why didn't the compulsory counterclaim rule at that point in time require Mr. Vargas to file his tort claims as counterclaims to the accounting and termination action in the 206th? That's my point.

POST: And two answers. First, one element of the compulsory counterclaim rule is the claim has to be properly within the jurisdiction of the court. And our position is that Abor is a jurisdictional rule that says you cannot fix a plaintiff's choice of forum.

HANKINSON: Abor says the court had jurisdiction. It just shouldn't have exercised it.

POST: That's correct.

HANKINSON: And you're not saying the 206th wouldn't have had jurisdiction over the tort claims are you?

POST: No. That's correct. It would have had jurisdiction.

BAKER: But are you entitled to pick your judge? All the forums is in the same county aren't they?

POST: We didn't pick the judge. The case was randomly assigned.

RODRIGUEZ: And that was going to be my point under Abor. Your place is Hidalgo county, correct?

POST: Correct.

RODRIGUEZ: And you didn't pick either the 3rd or the 206th, that was done when the time of filing and was routinely signed correct?

POST: That's absolutely correct.

RODRIGUEZ: So how was Abor violated in that respect?

POST: Abor says not that we get to go pick our judge. It says we can't be forced to litigate in the court and at the time that the defendant wants to impose...

RODRIGUEZ: Let's focus on time. Hadn't Mr. Vargas already sent a demand letter?

POST: We had sent a demand letter that indicated that we were preparing to file suit.

RODRIGUEZ: Immediately!

POST: Yes. That's absolutely correct. But under Abor, we were not obligated to then litigate in the forum chosen by TSB. And I would point out to the court this whole fight could be resolved by the local transfer rules of Hidalgo county, that would have allowed TSB, would still allow TSB to go to the 93rd DC, properly submitting to the jurisdiction under Abor and ask for a

transfer.

HANKINSON: But the alleged evil that Abor was discussing was forum selection. A county in East Texas verses a county in West Texas, or a county in North Texas verses a county in South Texas. We're talking about the same county in a circumstance in which we are looking at a requirement of random filings within a county. You don't get to go into the county and say thank you very much, I will take this DC. So I'm a little bit confused about why the policy reasons that the court stated in Abor are even implicated in this case.

POST: I would direct you respectfully to the suggestion made by Justice O'Neill. And I don't want to pus this too far. But I think it's not simply a policy of choosing forums in an abstract sense in Abor. I think we have a right to say we don't want to litigate in the forum in the court that the defendant wants to litigate this claim. There are good reasons that our case...

OWEN: Why weren't those claims properly joined under rule 51 with claims you already had pending in that very court?

POST: I think we did that. We made repeated objections...

OWEN: After the fact.

POST: We filed objections to the declaratory judgment motion on the morning of the hearing.

OWEN: Why would any court be required to transfer out of once it had jurisdiction to transfer to any other court in the same court?

POST: I would simply say...

OWEN: What rules say you get to pick which trial judge you want?

POST: No rule says that I get to pick which trial judge I want nor they they get to pick which trial judge they want. We didn't pick a judge. They did.

BAKER: What about the rule that if the court has continuing jurisdiction of the trust that your client started, that that's the proper court to litigate the trust and its closing? He was there two or three times asking.

POST: That's an excellent question, because I'm aware of no rule that says that. No statute says that a court that has created the trust has continuing jurisdiction over tort claims against the trustee. And that's in effect what TSB is asking the court to do, is enact a mandatory venue provision over future tort claims...

BAKER: You can't argue venue in this case. Everybody is in the same county. Absolutely. And this is not a venue question.

POST: By my point is, that there is no rule. There is no statute anywhere that says the court that creates a trust maintains continuing and exclusive jurisdiction over...

RODRIGUEZ: Wasn't that what Texas Property Code §115 says? The DC has original and exclusive jurisdiction over all proceedings concerning trust, including proceedings to determine the powers, responsibilities, duties and liabilities of a trustee. How do you handle that?

POST: That provision refers to something very different. That language about exclusive jurisdiction does not refer to a particular court that has created a trust. It refers to excluding concurrent jurisdiction from other tiers of the judicial hierarchy. And it came into being to overrule a decision by this court, Weatherly v. Bird, a 1978 decision. It's not cited in the briefs, but it's at 566 S.W.2d 292. And in that case, the question was whether a probate court had jurisdiction to declare a trust terminated. The statute at that time simply said the DC has original jurisdiction. And this court said that language means the DC's jurisdiction is exclusive, and consequently held the probate court couldn't exercise jurisdiction.

Now the legislature then amended the statute to overrule Whetherly(?), and it amended it by adding the language in §a that you refer to, that it will have exclusive jurisdiction except as provided by a new paragraph, §d, which says except there will be concurrent jurisdiction with a statutory probate court.

And so the history of the statute illustrates that it was not intended at all to say that a court that has created a trust is going to maintain exclusive jurisdiction over any future claim. It simply intended to eliminate the possibility of concurrent jurisdiction as to any levels of the judicial hierarchy other than the probate courts.

HANKINSON: Once Mr. Vargas made a claim to the bank to terminate the trust and pay him the proceeds of the trust, was the bank required to go back to the 206th to get a determination as to whether or not the trust should be terminated? Is that be the appropriate court or should they have gone some place else, or were they required to go to the 206th?

POST: I think they were required. I certainly would say they were entitled to go to the 206th.

HANKINSON: And they cite various statutory provisions as well as the language of the original trust document that said that the court would have continuing jurisdiction. So you would agree that they were required to go there in order to resolve this issue of whether they should be paying out the proceeds of the trust?

POST: Right. For that limited purpose.

HANKINSON: About the court's order that was entered in the 206th terminating the trust and ordering that the proceeds be paid out, the court maybe probably 4 or 5 findings about the trustee having properly and appropriately administered the trust, that the investment philosophy complied with the law, that all the distributions were appropriate, and that all the fees paid were reasonable and necessary. Were all of those findings required either under the trust documents originally in the court's original orders as well as statutory provisions in Texas law in order for the court to properly terminate the trust?

POST: I'm not aware of any authority that says they were necessary findings. I think that they were just excessive requests for basically collateral estoppel by TSB to which we properly objected to.

HANKINSON: In a final accounting of a trust, there is no requirement that the TC make any particular findings about how the trustee has managed the account. For example, is there a requirement in terms of fees having been paid or requested at the time of the final accounting, that any determination be made about the way in which the trustee has managed the account?

POST: I'm not aware of a requirement. And let me add to that a point that I think is important both for understanding the effect of this accounting and for the question about compulsory counterclaims. Because the arguments that are made here that the accounting precludes the tort claims, or that because these were compulsory counterclaims the tort claims can't be brought, are not arguments that can properly be decided in this case. Those are defensive matters that have to be asserted in the tort suit in the 93rd DC.

The only question in this case was whether the DC had the right to declare non-liability for the trustee. Now if they want to take the judgment from this case and go to the 93rd DC and set it up as a plea in bar and say we have an affirmative defense that bars these tort claims, they have the right to do that, and we will then have the right to litigate whether that is an effective bar. But it's premature now.

HANKINSON: Well it's not premature if you've appealed from that court's order challenging what the TC did. Why isn't that issue joined? I mean you're making all kinds of challenges and you didn't have 45 days notice - I mean as I understand it you're trying to avoid this order from there being any preclusive effect attached to this order. So if that's the case why is an issue joined just in a different way?

POST: The issue may be raised in a different way, but in order to assert the argument that the accounting forecloses or that these claims were compulsory counterclaims that foreclosed a future case, that's a res judicata defense that can only be ruled on to foreclose the 93rd court in that case under rule 94 and 97(a). And I might point out, that those are going to be subject to defenses(?)

HANKINSON: But the issue of either joinder as Justice Owen has pointed out or compulsory counterclaims is important to addressing the Abor argument that you have raised isn't it?

POST: I respectfully think that using those arguments to address Abor gets the question backward. If you were to say by virtue of a compulsory counterclaim the Abor rule that we have the right to choose the time and place of suit is defeated, you swallowed Abor for this kind of case.

HANKINSON: Abor is a different case on its facts isn't it?

POST: Abor has different facts but I think the policy applies.

ENOCH: The policy in Abor is to not to force the plaintiffs hand when there was not any other statutory mechanism for determining how the race to the courthouse works. And if there is a tort claim out there and the parties are fighting over the tort claim, it seemed the court just opted for the rule that the plaintiff's hand should not be forced either in the selection of the forum or in the timing. Now if the parties are already involved in litigation, and in this case it's a trust that's created and there's a court that has oversight and the fight between the parties is over how the trustee that was appointed by the court is managing the case, what is there about the policy that would really permit an appellate court to come in and say TC, we're just not going to let you resolve those disputes. We're going to say that even though you're involved in a dispute, even though you're involved in a related matter, even though the litigation is already ongoing, even though the trial is there and the parties are there, we have this policy that overrides even the underpinnings that even _____ withdraws. We now just blindly enforce the policy plan ____ to pick the case they want to go to even though the bases for the Abor policies don't exist.

POST: Right. Two answers that it would fix the forum. The trustee is supposed to be looking out for the best interest of the beneficiary. Under Johnson v. Peckham this trustee is supposed to not take advantage of any strained relationships to try and work to its advantage to the expense of the beneficiary. And yet, that is exactly what the trustee has done here by trying to get a pre-empted declaratory judgment motion.

And so I think the policy of Abor if anything applies even more strongly in this kind of case. And I will tell the court, I have read all the annotations from the Uniformed Declaratory Judgment Act. I've done a 50-state search. I can't find a case anywhere that says a trustee has the right to go and get a pre-empted declaration of nonliability on a beneficiary's tort claim.

O'NEILL: What is an accounting? What are we talking about here? Is there any statute that defines what an accounting is? Is it just a simple statement of here was the principal at the beginning of the trust; here's what we've done. I mean the accountings that I saw in the TC were very simple one-page things: here's what's happened to the account: done; signed; that was it. Or are there prerequisites for an accounting that you the TC then has to bless everything that the trustee did? That was not my impression.

POST: That's not my impression either. And that's why we would submit that the

accounting doesn't necessarily foreclose tort claims.

O'NEILL: Let's say that TC does a quick accounting - one page written motion, here's what we've done with the trust. The TC signs it. The case is dismissed. Corpus is distributed and 6 months go by and the plaintiff finds out that oh perhaps there was some mismanagement. Are they then precluded from bringing suit for that?

POST: Great question, because the answer is no. Restatement §220, that they are trying to rely on, comment a, says that if you obtain an accounting and approval by a court by fraud or misrepresentation, the accounting can be reopened. And those are one of the allegations that we're raising in the 93rd DC. Comment d says that if you get an accounting that is rendered without adequate notice and without due process of law and without compliance with the state's...

O'NEILL: I'm a little bit confused. Fraud and misrepresentation would imply to me that the TC needs to do more than just rubberstamp some transactions. I believe that's working at cross-purposes with my question. My understanding of an accounting was just a statement, like a statement of account. It doesn't necessarily mean that the investments were good, or there was not misdealing or whatever. It's just a plain vanilla statement. It doesn't get into the qualitative analysis.

POST: And my answer would be that if a beneficiary is able to question and litigate whether those statements are valid, then those issues might be decided. Where the beneficiary doesn't have a chance to do that though, the accounting can't foreclose those claims. And that emphasizes one point that I really don't want to leave this morning without stressing to the court. No matter what you decide about the jurisdictional issue, the denial of 45-days notice as required by due process as required by rule 245, as required by the 14th amendment simply cannot be overlooked here. Whichever court had jurisdiction, we had a right to sufficient notice and an opportunity to be heard and that was denied.

BAKER: If I understand the facts, you were the one that requested the trust to be terminated after they had filed their intervention and asked to be released and for an accounting to be made. Is that right?

POST: We had filed a motion to terminate before they filed their declaratory judgment motion. Then we set it for a hearing.

BAKER: And then at that hearing their counter motion was heard too.

POST: That's correct.

BAKER: And it was stated by your opposing counsel that there was no motion for a continuance based on a 45-day notice.

POST: And that's not correct.

BAKER: Is there a written motion for continuance in this record on that ground?

POST: Absolutely. Clerk's record, page 248 and 249: motion for continuance based on rule 245 that was filed on the morning of March 13. Now we appeared for the hearing on March 11, objected on the record, and you will find that vol. 5 of the reporter's record at page 15 and at page 115 on the basis of rule 245.

At the end of the hearing that day, the judge said I'm going to continue this hearing until Friday, file anything else you want me to consider. The morning of Friday, March 13, we filed objections to the declaratory judgment motion that raised rule 245. That's at pages 214 and 216 of the clerk's record. We filed objections to the order that had been tendered by the bank objecting on the basis of rule 245. That's at pages 258 - 260 of the clerk's record. And we filed a motion for continuance, which I've already cited to the court.

And I would remind the court that in the seminal case on this issue, the Peralta(?) case from the US SC, the court said a denial of fundamental due process was preserved by a motion for rehearing after a bill of review, after the default judgment because notice is so fundamental.

BAKER: But that was a garnishment case wasn't it where the _____ defendant was not given any notice?

POST: That's correct.

BAKER: It was not in court in anyway, which it's a little different than this situation.

POST: But we objected on rule 245 every time we came to court. There was no doubt that we were objecting that we had been denied adequate notice. We had no chance to prepare for this trial.

RODRIGUEZ: The March 11th hearing?

POST: Yes.

RODRIGUEZ: Was that objection verbal or in writing?

POST: The March 11th objection is oral, and it's at page 15 and page 115 of the reporter's record.

RODRIGUEZ: And was there an order from the judge as to your oral motion?

POST: There is not a written - I don't believe there is even an express order. I think it's plainly implicitly overruled though under rule 33. We object. We say, you can't go forward. We haven't had enough notice. The judge goes forward in the face of those objections and renders judgment. That's exactly the circumstance that the explicit overruling statement of Trapp 33 is intended to redress.

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REBUTTAL

RODRIGUEZ: If we can pick up just where Mr. Post left off. I am troubled by the fact that there does not appear to be any discovery allowed to Mr. Vargas to pursue his claims prior to this hearing. How do we address that?

POWELL: Mr. Vargas did not request discovery. I certainly agree that he might have been entitled to seek it, but he did not request it. In this connection, I might also point out from a fairness perspective that TSB's exhibits and proof in this regard were its annual accountings that had been provided to Mr. Vargas and his attorneys on numerous occasions throughout the years. There were annual accountings. I might add that this was not simply a little one-page affair. Rather those accountings encompassed some two volumes...

HANKINSON: And what kinds of information are contained in an accounting?

POWELL: In this particular instance, it tracks every expenditure paid by the trust. It cites the trust assets going from something less than $2 million at the end of 1999, to $4.5 million. And my recollection is an entry showing the express expenditures made, exactly where the money was held, what the interest rate was and those types of things.

HANKINSON: Is that part of our record in this case?

POWELL: Yes it is.

HANKINSON: I mentioned to Mr. Post some of the findings that the TC made in its order. Were those findings with respect to the trustee's conduct and management of the trust required by law?

POWELL: I don't know that they were required to terminate the trust. But I believe that that is something that the trustee reasonably can request, and is entitled to under the Texas Probate Code.

HANKINSON: He takes the position that you all overreached. Can you give us any authority for what we should expect of a TC in an order with respect to a final accounting in termination of a trust? It seems to me that's critical.

POWELL: Section 115.001 of the Code indicates that a TC does have the authority to require an accounting and to settle final accounts and to surcharge the trustee as we've already discussed. That is important to trustees who are being asked to serve as a trustee under one of these trusts, or under any trust. Because a trustee although certainly is acting in the duties to the benefit of beneficiary has its own interest to a degree to look after, and the trustee may well want to go to the TC to get approval of various expenditures that happened in this case, and to receive a final accounting and approval of its accounting.

HANKINSON: But this also went beyond that though. It included statements about the investment philosophy was sound, that trustee acted properly and appropriately in managing the funds. Which is a little bit different than just the actual looking at the numbers.

POWELL: I don't believe, however, that an accounting is merely a question of addition of subtraction. Accounting, if you look at the definitions that we provided, the Blacks Law dictionary for example: an accounting is a rendition of an account either voluntarily or by order of the court. In addition if you go to the restatement of trust, which we've talked about before, they talk about the way the trust is administered under the supervision of the courts of the state, we believe that this one was, these courts have jurisdiction not only to determine the interest of the beneficiaries of the trust property, but also to determine the extent of liabilities if any incurred by the trustee to the beneficiaries in the administration of a trust.

HANKINSON: Is this order typical of what we would see coming out of the TC's in Texas on a final accounting and termination of a trust, or is it an unusual order in terms of the extent of its findings?

POWELL: I'm not aware of any survey throughout the State. I can tell you that it would be typical of a case where my law firm serves as a trustee because this is something that a trustee wants.

ENOCH: I bet they do.

POWELL: I believe from a policy perspective this is something that a trustee is entitled to look to the court for. It's something that is provided for by the trust code and the trustee in order to preserves its rights _____ adjudicated by the...

ENOCH: Let me move you forward then. On the 45 day notice, is that an automatic abuse of discretion if the TC refuses to grant where the record shows there is not 45 days notice for a trial is an abuse of discretion for the TC to refuse to grant the continuance?

POWELL: I don't believe it implies in this case, but if it was I don't believe that it was.

ENOCH: What else would the record have to show to demonstrate the TC erred in refusing to grant the continuance?

POWELL: I think it would have to demonstrate for example that the plaintiffs did not request the hearing, which is what they did.

ENOCH: Let's assume that what gets set for hearing is a motion to compel discovery, and the other side comes in and files a motion for summary judgment that doesn't give the amount of time necessary, the 21 day notice. Could you defend on the notion well they set the hearing so they don't get the 21-day notice on the subject matter of our hearing.

POWELL: Certainly waiver is an issue that is allowed under the 45 day notice rule that we've already that that's _____.

ENOCH: What you're saying in this case because Mr. Vargas set for hearing a notice to have his competency accepted, and therefore declaring an end to the trust, you don't have to give him 45 days notice on your claim that would dispose of any negligence claim he had against the trustee?

POWELL: We would have two answers. First, _____ is not aware of anything that would indicate that this type of hearing is something that comes within the trial within the purview of §245. But in addition, where you have the type of situation where the relief requested by both parties is interrelated is all tied to the termination of the trust. And things that should be heard at one time. Where you have that and where I don't believe that the motion for continuance at least by my indication wasn't filed until the _____ after the evidence. Perhaps there was an additional one that I'm not aware of. But in that particular context, I don't believe that the 45 day notice _____ should be _____.

O'NEILL: The accounting definition you were just reading, where does that come from?

POWELL: Comes from Black Law dictinary...

O'NEILL: I thought you went on. Was it in the TC's order that talked about...

POWELL: I went on to quote the restatement of trust. That maybe what you are referring to.

O'NEILL: The TC's order that created this trust was that agreed? Was the bank appointed as agreed trustee?

POWELL: There was a trust instrument which is a contractual document and the bank was a party to that. And yes, they did agree to serve as trustee.

O'NEILL: No. Did Mr. Vargas agree?

POWELL: Yes.