each day. After her death, Jem asks Atticus why he was subjected to what felt like a pointless exercise since the old lady did not seem to pay much attention to his reading. Atticus explains that Mrs. Dubose hadn't always been the way she was as an old woman. But she had become addicted to morphine during an illness through no fault of her own. In the end, she'd vowed to beat the addiction so that she could die on her own terms. The reading had helped her endure the withdrawal. And Atticus adds: "I wanted you to see what real courage is, instead of getting the idea that courage is a man with a gun in his hand. It's when you know you're licked before you begin but you begin anyway and you see it through no matter what. You rarely win, but sometimes you do."

Of course, that description of "real courage" precisely captures how Scout and Jem and much of Maycomb County come to see Atticus in his Sisyphian battle to save Tom Robinson. As the kids watch the trial, they feel sure he will win an acquittal for his client. But they are forced to recognize that the trial had been rigged against the defendant from the outset: "Atticus had used every tool available to free men to save Tom Robinson, but in the secret courts of men's hearts Atticus had no case. Tom was a dead man the minute Mayella Ewell opened her mouth and screamed." The only hypothesis that Jem can come up with later to explain the injustice of the jury's verdict against patently innocent Tom Robinson has to do with reading. He theorizes that avid readers like Atticus must have descended from some Finches "over in Egypt" where "one of 'em must have learned a hieroglyphic or two and he taught his boy." And, Jem further reasons, Atticus must be able to see and respond to injustice where others don't because he'd "just been readin' and writin' longer'n they have."

Jem's hypothesis has some real problems—because being a lawyer who reads hardly guarantees that a person will be equipped with greater moral courage. But at least, perhaps, here is yet another way that Atticus can inspire us. His profound commitment to reading, which goes well beyond reading the law, is something we can and should emulate. Reading beyond the law increases the odds that we lawyers will be equipped to see the world's dazzling complexity—what Dylan Thomas described as its "delight and glory and oddity and light." And that broader perspective may in turn better equip us to serve as translators for those sitting on juries who are more tempted to act on impulse and succumb to blind prejudice. Reading teaches perspective; perspective enables empathy; and, ironically, empathy is the only way jurors can be fair-minded with respect to someone they see as quite different from themselves. ■

# Fact Issues in the Fifth Circuit

by David Coale

## Introduction

Recent Fifth Circuit opinions provide excellent practical guidance for summary judgment practice in federal court. They remind that legitimate credibility questions can raise genuine issues of material fact, that conclusory statements may fail to do so, and that not every case requires a complex damages analysis to defeat summary judgment. Attention to these cases will help not only with the preparation of good summary judgment motions and responses, but with counseling about the realistic chances of resolving a matter at the summary judgment stage.

## Credibility Questions

In *Vaughan v. Carlock Nissan of Tupelo*, the plaintiff alleged that a car dealership unlawfully terminated her after she reported several irregularities there to Nissan. No. 12-60568 (Feb. 4, 2014, unpublished). The Fifth Circuit found a credibility issue about her manager's "bad faith," noting credibility questions about his claimed justifications for the firing, the ambiguity of his statement that Vaughn had "no right to report these things to Nissan," and the timing of the termination. Slip op. at 12-13.

Similarly, in *St. Bernard Parish v. Lafarge North America, Inc.*, a barge moored at a facility operated by Lafarge came loose during Hurricane Katrina and caused extensive damage. No. 13-30030 (Dec. 19, 2013, unpublished). The district court granted summary judgment to Lafarge, finding that the plaintiff's damage theory was not scientifically credible in light of the observed weather conditions at the time. The Fifth Circuit agreed that "[t]here is a great deal of testimony supporting Lafarge's position, to be sure, and little to support the Parish's, but we are mindful of the summary judgment standard," and reversed — noting eyewitness testimony inconsistent with the defendant's expert analysis. Slip op. at 14.

The prisoner case of *Davis v. LeBlanc* further illustrates this idea. No. 12-30756 (Sept. 12, 2013, unpublished). Davis, a Louisiana prisoner, was attacked and injured by another inmate, Anderson. Davis sued under 42 U.S.C. § 1983, alleging that several prison officials and guards were "deliberately indifferent"

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to a "substantial risk of serious harm" to his safety. Davis offered a sworn declaration from another inmate who spoke to a guard defendant shortly before the attack, and was told by that guard that Anderson was going to "'whip that [expletive] Davis in the cell next to him' and 'that [expletive] needs a good [expletive] whipping and it is worth the paperwork for him to get it.'" Slip op. at 4. Summary judgment for that guard was reversed and the case was remanded for further proceedings.

Finally, in ***Devon Enterprises v. Arlington ISD***, Devon Enterprises was not re-approved as a charter bus operator for the Arlington schools after the 2010 bid process. No. 13-10028 (Oct. 8, 2013, unpublished). Devon argued that it was rejected solely because of its bankruptcy filing in violation of federal law; in response, the district cited safety issues and insurance problems. An email by the superintendent said "[Alliance] was the company that [AISD] did not award a bid to for charter bus services because they are currently in bankruptcy." Slip op. at 5. Calling this email, "some, albeit weak, evidence" that the filing was the sole reason for the decision; the Fifth Circuit reversed a summary judgment for the school district.

## Keep it Simple

Consistent with the above line of cases that reversed summary judgments on credibility issues, the Fifth Circuit reversed a summary judgment for the insurer in a bad faith case in ***Santacruz v. Allstate Texas Lloyds***, No. 13-10786 (Nov. 13, 2014, unpublished). The insured alleged inadequate investigation into her claim of covered wind damage to her home, and the Court found fact issues on two matters.

First, as to liability for bad faith, the Court noted: "The extent of Allstate's inquiry into the claim consisted of its adjuster taking photographs of the damaged home. Significantly, Allstate did not attempt to talk to the contractor, who submitted an affidavit in this case describing what he observed concerning the roof and attributing the cause to wind damage. Nor is there any evidence showing that Allstate obtained weather reports or inquired with neighbors to see if they suffered similar damage, which would tend to show the damage was caused by wind rather than normal wear and tear." Slip op. at 6.

Second, as to damages, the Court said: "Santacruz claimed three types of damages: (1) the replacement of the roof, supported by an invoice from Pedraza providing that Santacruz paid him $3,900 to repair the roof; (2) a list of damaged personal and household items compiled by Santacruz and his family with an estimate of the value of all the belongings; and (3) repair work needed for the damaged interior of the home, supported by an estimate from a contractor listing the repairs to be done. Further, Pedraza submitted an affidavit testifying to the necessity of repairing the roof, and Santacruz submitted photographs showing the extensive damage to the home's interior to support his claim that repairs were necessary." Slip op. at 7.

In the same spirit, the Fifth Circuit reversed a summary judgment on a construction subcontractor's promissory estoppel claim in ***MetroplexCore, LLC v. Parsons Transportation***, 743 F.3d 964 (5th Cir. 2014). The Court noted the specificity of the statements made to the plaintiff by representatives of the general contractor, the parties' relationship on an earlier phase of the project, and specific communications describing reliance. ***Id.*** at 978-81. The Court relied heavily on the analysis of a similar claim by the Texas Supreme Court in ***Fretz Construction Co. v. Southern National Bank of Houston***, 626 S.W.2d 478 (Tex. 1981).

## Conclusory Affidavit Fails

In ***Vinewood Capital LLC v. Dar Al-Maal Al-Islami Trust***, "[t]he only evidence offered by Vinewood in support of the alleged oral contract between Vinewood and DMI for DMI to invest $100 million in real estate [was] Conrad's deposition testimony and affidavit." No. 12-11103 (Oct. 8, 2013, unpublished). The Fifth Circuit reminded: "[A] party's uncorroborated self-serving testimony cannot prevent summary judgment, particularly if the overwhelming documentary evidence supports the opposite scenario." Slip op. at 7-8 (citing ***Vais Arms, Inc. v. Vais***, 383 F.3d 287, 294 (5th Cir. 2004)). Therefore, "[a]s the district court concluded, Conrad's self-serving testimony is belied by the parties' contemporaneous written communications and written agreements and is therefore insufficient to create an issue of fact." ***Id.*** at 8-9. ***See also Gonzalez v. U.S. Bank, N.A.***, No. 13-10342 (Nov. 29, 2013, unpublished) (affirming summary judgment for a lender when the borrower's affidavit was "conclusory and unsubstantial" and thus insufficient to prove notice to the lender).

Conversely, in ***RBC Real Estate Finance, Inc. v. Partners Land Development, Ltd.***, No. 12-20692, the Fifth Circuit affirmed a summary judgment over evidentiary challenges to the defendant's affidavit. (Oct. 30, 2013, unpublished). As to foundation, the affidavit purported to be based on personal knowledge, and said that "[a]s an account manager at RBC[, the witness] is responsible for monitoring and collecting the . . . Notes." "Therefore, [he] is competent to testify on the amounts due . . . ." Slip op. at 4. As to sufficiency, the Court quoted Texas intermediate appellate case law: "A lender need not file detailed proof reflecting the calculations reflecting the balance due on a note; an affidavit by a bank employee which sets forth the total balance due on a note is sufficient to sustain an award of summary judgment." ***Id.*** (quoting, ***inter alia***, ***Hudspeth v. Investor Collection Servs. Ltd. P'ship***, 985 S.W.2d 477, 479 (Tex. App.—San Antonio 1998, no pet.).

## Conclusion

The Fifth Circuit's recent cases about the procedural aspects of summary judgment motions focus on practical issues and give practical guidance. They highlight the importance of the specific requirements of the Federal Rules of Civil Procedure, and Evidence, in the evaluation of a summary judgment motion.