

**Bar Association of the Fifth Federal Circuit
2022 Appellate Advocacy Seminar**

**Summary of Issues for Oral Argument
On Tuesday, October 4, 2022**

East Courtroom

Majestic Oil, Incorporated v. Certain Underwriters at Lloyd's, London (No. 21-20542)

Plaintiff, a wholesale distributor of oil for commercial trucks, owns property in Pasadena, Texas, including a commercial building used as a warehouse and office. According to plaintiff, Hurricane Harvey extensively damaged the building's roof, which did not leak prior to the storm, and as a result of the roof damage, wind-driven rain leaked into and damaged the interior of the building. Plaintiff's insurer, Certain Underwriters at Lloyd's, London, denied the claim, contending the interior damage pre-existed Hurricane Harvey. Plaintiff filed suit for breach of the insurance contract.

On motion of Lloyd's, the District Court struck the supplemental report of plaintiff's causation expert, Gregory Becker. Lloyd's filed a motion for summary judgment, invoking the concurrent causation standard and claiming plaintiff failed to segregate damage caused by Hurricane Harvey from non-covered losses. In opposition, plaintiff submitted an affidavit from Becker. The District Court struck the affidavit as a "sham" and granted the motion for summary judgment in favor of Lloyd's. Plaintiff appealed.

On appeal, plaintiff argues that the District Court abused its discretion by excluding key causation evidence and that it applied an improper standard in evaluating the summary judgment motion by disregarding evidence favorable to plaintiff, the non-movant. Lloyd's argues summary judgment should be affirmed because the undisputed evidence shows plaintiff failed to allocate covered and non-covered damages. Further, plaintiff's own expert conceded he could not rule out non-covered causes of damage to the property. Lloyd's contends the District Court properly excluded Becker's new analysis because it altered his original conclusion and was based on information that had been available for years.

En Banc Courtroom

Spring Branch Wildlife Preserve v. EPA (No. 22-40031)

Plaintiffs Spring Branch Wildlife Preserve (SBWP) and Houston Land and Cattle Company, L.C. (HLC) own separate but adjacent tracts of property in Surfside, Texas, and are attempting to develop those properties. Section 404 of the Clean Water Act (CWA) authorizes the United States Army Corps of Engineers to regulate the discharge of dredged and fill material into waters of the U.S. through the issuance of permits. In September 2019, the Texas General Land Office submitted a complaint to the Corps stating that an unpermitted discharge of fill material into jurisdictional wetlands had occurred on SBWP's property, in an area where SBWP had earlier and unsuccessfully sought verification to proceed with work under nationwide permits. After a site visit, the Corps sent cease-and-desist letters to plaintiffs to stop unpermitted discharge of fill material into U.S. waters. The Corps then referred the matter to the Environmental Protection Agency (EPA) for possible enforcement.

Plaintiffs filed a declaratory judgment action challenging (1) the applicability of Section 404 to their properties; (2) the validity of 33 C.F.R. § 328(a), adopted by the EPA under its rule-making authority to enforce the CWA; and (3) the jurisdiction of the Corps and the EPA. Plaintiffs also attempted to assert takings claims based on the Texas and U.S. Constitutions. Defendants filed a motion to dismiss all claims for lack of subject matter jurisdiction and some of the claims for the additional reason that they failed to state a claim on which relief could be granted. As for the jurisdictional argument, defendants explained that the CWA does not provide for judicial review, so that the general review provisions of the Administrative Procedure Act (APA) applied by default. Further, they contended that because plaintiffs' suit did not challenge a final agency action reviewable under the APA, jurisdiction was lacking.

The District Court granted defendants' motion, dismissing all claims for lack of jurisdiction. The District Court concluded that the actions of the Corps and the EPA were intended as intermediate actions and not final agency actions. The District Court also dismissed the takings claims for lack of jurisdiction because they were unripe, and it denied plaintiffs' request to amend their complaint as futile. Plaintiffs filed a motion to alter or amend the order under Federal Rule of Civil Procedure 59(e), and the District Court denied the motion after supplemental briefing. Plaintiffs appealed.

On appeal, plaintiffs argue that actions by the Corps and EPA meet the two-prong test for final agency action under *Bennett v. Spear*, 520 U.S. 154 (1997). Defendants argue the District Court correctly determined it lacked subject matter jurisdiction because none of the actions by the Corps or the EPA were final agency actions.

Daniel Ramirez v. Paloma Energy Consultants, L.P. (No. 21-20536 c/w 21-20665)

Plaintiff was working a 14-day stint on an offshore platform when he suffered a stroke. The platform was owned and operated by Talos Energy, L.L.C., Talos Energy Offshore L.L.C., and Talos Gulf Coast Offshore L.L.C. (collectively, "Talos"). Plaintiff was employed as a welder and pipefitter for Performance Energy Services, a contractor for Talos performing construction work on the platform. Also aboard the platform was Madrid Pitre, employed by Paloma Energy Consultants as construction manager for Talos. Plaintiff noticed his symptoms when he woke up during the night. After calling his girlfriend, plaintiff woke Pitre. According to plaintiff, he told Pitre he was having a stroke, but instead of calling a medevac or physician, Pitre ran internet searches of plaintiff's symptoms and speculated plaintiff had vertigo. Plaintiff claims that after more than an hour, Pitre woke Joe Breland, a Talos employee who was the Person in Charge aboard the platform. Breland requested a visit from a neighboring rig's medic. When the medic examined plaintiff, the medic called an onshore physician, who immediately advised the medic to call for a medevac because plaintiff likely was having a stroke. Hours later at an onshore hospital, plaintiff was diagnosed with an acute ischemic stroke. Unfortunately, the window for plaintiff to receive the standard tissue plasminogen activator (tPA) treatment had passed.

Plaintiff filed suit against Paloma, Talos, and others, contending that because of the unreasonable delay in treatment, he has permanent, debilitating injuries. Paloma and Talos filed motions for summary judgment, both of which the District Court granted. The District Court held that Paloma, through Pitre, owed no duty of reasonable care to plaintiff under Louisiana law and breached no such duty. It held Talos's failures were not the cause-in-fact of plaintiff's injuries. Plaintiff appealed both judgments, and the appeals were consolidated.

On appeal, plaintiff argues that the District Court's holdings were erroneous, that the District Court misapplied Louisiana caselaw on duty-of-care, and that it improperly weighed conflicting evidence while ignoring other pieces of evidence. Paloma argues that the District Court correctly found no material dispute as to when plaintiff woke up or how much time elapsed between when plaintiff woke Pitre and Pitre woke Breland. Further, even if a material dispute exists, Pitre owed no general duty to plaintiff to provide aid or assistance under Louisiana law. Talos contends that summary judgment was proper because the uncontroverted testimony of the treating medical professionals established that, even if plaintiff had arrived at the hospital earlier, he would not have received tPA. Talos argues that, based on plaintiff's statements to the treating medical professionals, the tPA treatment window had expired before plaintiff even woke up on the platform.

West Courtroom

United States v. David Tran (No. 21-30608)

Based on evidence gathered during the execution of a federal search warrant at a warehouse in Bridge City, Louisiana, defendant was charged with conspiracy to distribute 1,000 or more marijuana plants, possession with intent to distribute 400 grams or more of fentanyl, possession with intent to distribute 500 grams or more of methamphetamine, and the manufacture of 100 or more marijuana plants. Defendant initially was represented by federal public defender Gary Schwabe but then hired attorney Stephen Shapiro. After conflicts arose between defendant and Shapiro, the Magistrate Judge appointed attorney Robert Jenkins to represent defendant. After a jury was selected for defendant's trial, he changed his pleas to guilty and signed a factual basis outlining the circumstances of his offenses. The District Court conducted a colloquy with defendant and accepted his guilty pleas. The colloquy confirmed there was no plea agreement.

Prior to sentencing, defendant moved for Jenkins's dismissal, but the District Court denied the motion. Jenkins later successfully moved to withdraw, and the District Court appointed Annalisa Miron as defendant's new counsel for sentencing. Through new counsel, defendant moved to withdraw his guilty plea, asserting his plea "was not knowing and voluntary as he was told [by prior counsel] he could challenge the wiretap and search and seizure warrants after he was sentenced." The motion also advised that Jenkins had been suspended from the practice of law. The District Court denied the motion without an evidentiary hearing and sentenced defendant to a within-guidelines term of 140 months in prison. Defendant appealed.

On appeal defendant argues that he expressed to his attorneys his desire to pursue a suppression motion, but none would file one. Further, when his trial date arrived, Jenkins (subsequently suspended for a serial practice of deficient representations) failed to advise him that entering an unconditional plea would waive any challenge under the Fourth Amendment. Thus, at the time he entered his plea, defendant did not have close assistance of counsel, and his plea was not knowing and voluntary. Defendant contends these two reasons provide sufficient justification under the factors outlined in *United States v. Carr*, 15 F.4th 382, 386 (5th Cir. 2021), for granting the motion or at least an holding an evidentiary hearing on his claims.

The government argues that the District Court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea and correctly determined the *Carr* factors weighed against withdrawing the guilty plea. Further, any argument that defendant received constitutionally ineffective assistance of counsel should be dismissed without prejudice to defendant's right to raise such a claim in a later proceeding under 28 U.S.C. § 2255.

George F. Forbis, III v. Exeter Finance, L.L.C. (No. 21-10193)

Plaintiff worked for defendant as a temporary employee beginning in August 2014. In March 2015 defendant hired him for the full-time position of senior treasury analyst. Over the years defendant received satisfactory performance reviews, and his duties were expanded. In June 2019 he attended a team lunch with other employees, including Ben Miller, defendant's Senior Vice President of Treasury. Plaintiff bowed his head to say grace before eating as part of his religious practice. According to plaintiff, Miller remarked, "Let's all stop so that George can say his prayer. You mean to tell me that you believe in God. That there is some puppeteer in the sky pulling all the strings. You people kill me thinking there is a God." Plaintiff, the only Black person at the table, was deeply offended. In October 2018 plaintiff made two complaints to investigators with defendant's human resources department. The following month, defendant gave plaintiff his first unsatisfactory performance evaluation. About two months later, he was terminated.

Plaintiff filed suit against defendant, asserting claims for retaliatory discharge and racial and religious discrimination Under Title VII of the Civil Rights Act of 1964. Defendant moved for summary judgment, arguing plaintiff was terminated for unsatisfactory job performance and a decline in work product. Plaintiff filed a motion for additional discovery under Federal Rule of Civil Procedure 56(d), which the District Court denied. The District Court then granted defendant's motion for summary judgment and dismissed plaintiff's claims with prejudice. The District Court found plaintiff failed to create a genuine issue of material fact as to pretext regarding his termination and failed to show any alleged comparator who was similarly situated. Plaintiff appealed.

On appeal, plaintiff argues the District Court erred in denying his motion for additional discovery and in granting defendant's motion for summary judgment. He contends he received disparate treatment on the basis of his race. Defendant argues the District Court did not abuse its discretion in denying plaintiff's Rule 56(d) motion, and that plaintiff's failure to diligently pursue discovery warranted the denial. Defendant also contends the District Court properly granted summary judgment. As to the retaliation claim, it argues plaintiff cannot show he engaged in protected activity or that there was a causal connection between the alleged protected activity and his termination. As to the race discrimination claim, defendant argues plaintiff cannot show he was treated less favorably than a similarly situated employee of a different race. Further, defendant argues that plaintiff failed to show that its reasons for his termination were a mere pretext.

Sanare Energy Partners, L.L.C. v. PetroQuest Energy, L.L.C. (No. 21-20677)

Sanare Energy Partners, L.L.C. and PetroQuest Energy, L.L.C. entered into a purchase and sale agreement (PSA) effective December 1, 2017, by which Sanare purchased from PetroQuest certain “Assets,” including a number of offshore oil and gas properties and associated contracts and assets. The Assets included PetroQuest’s interests in a federal oil and gas lease known as the WD-89 Lease, its related contracts, and the wells and platform on Block 89 of the West Delta Area of the Gulf of Mexico (collectively, the “WD-89 Properties”). According to Sanare, consent-to-assign provisions recognized by the PSA required PetroQuest to obtain the consent of certain third parties. Sanare began operating the WD-89 Properties in February 2018, but when disputes arose Sanare took the position that the WD-89 Properties were never transferred to it because PetroQuest did not obtain the required consents.

PetroQuest filed for bankruptcy in November 2018 under Chapter 11 of the Bankruptcy Code. Sanare filed an adversary proceeding against PetroQuest seeking, inter alia, a declaration that it was not obligated to pay certain invoices because the WD-89 Properties were never transferred to it. In response, PetroQuest also sought declaratory relief and alleged Sanare breached the PSA and was obligated by the liability-assumption provision of the PSA to pay all costs of plugging and abandoning the WD 89-wells.

PetroQuest moved for partial summary judgment on its claim for a declaration that Sanare assumed the plugging and abandoning obligations with respect to the WD-89 Properties. Sanare filed its own motion for summary judgment, seeking a judgment that the PSA was void with regard to the transfer of the WD-89 Properties, and Sanare had no plugging and abandonment obligations with respect to the WD-89 Properties. The Bankruptcy Court granted PetroQuest’s motion in part and denied it in part and denied Sanare’s motion. The Bankruptcy Court ruled that the PSA was unambiguous with respect to the issues and that the WD-89 Lease, wells, and platform constituted “Assets” as defined in the PSA and to which all obligations and liabilities set forth in PSA § 11.1 were assumed. The parties then stipulated to the dismissal of the remaining claims. Sanare appealed, and the District Court affirmed, concluding that the PSA was unambiguous and that Sanare expressly assumed the obligations and liabilities with respect to the “Assets” as set forth in § 11.1 of the PSA. Sanare appealed.

On appeal, Sanare argues that the Court should begin its analysis with the fact that the WD-89 Properties and related agreements never transferred to Sanare, a fact Sanare contends the lower courts did not address. According to Sanare, that fact requires reversal. Sanare further argues that the Bankruptcy Court disregarded material arguments, created inconsistencies within the order itself, and should not have isolated § 11.1 from the rest of the contract. In addition, Sanare posits that the District Court’s order amplified those errors by going beyond the scope of the appeal, considering parol evidence, and misconstruing the parol evidence. PetroQuest argues that the Court should affirm summary judgment in its favor because under the express terms of the PSA, Sanare assumed all obligations and liabilities for the WD-89 Properties, regardless of whether post-closing consents were obtained. It contends that both the Bankruptcy Court and the District Court correctly interpreted the terms of the PSA.