SUPREME COURT OF TEXAS

Emory B. Perry, et al. v. Darryl R. Cohen, et al.

272 S.W.3d 585 (Tex. 2008) · No. No. 07-0301 · Decided November 14, 2008

SUMMARY

The Texas Supreme Court held that shareholders preserved their appellate challenge to an interlocutory order sustaining special exceptions by addressing the order's merits in the body of their appellate brief, even though they did not separately identify it in their notice of appeal or appellate issues. The court reversed the court of appeals and remanded for further proceedings. The court did not reach the shareholders' additional arguments concerning the Texas Securities Act, dismissal with prejudice, or the standard of review.

CASE DETAILS

COURT	Supreme Court of Texas
WRITING FOR THE COURT	Per Curiam
JURISDICTION	Texas
DECIDED	November 14, 2008
DOCKET	No. 07-0301
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	The shareholders appealed a trial court order dismissing their suit with prejudice after they failed to replead in compliance with an order sustaining special exceptions. The court of appeals affirmed, holding in part that the shareholders waived any challenge to the merits of the special-exceptions order. The Supreme Court of Texas reversed and remanded.
STANDARD OF REVIEW	The court considered whether the shareholders preserved error and whether the court of appeals properly applied the Texas Rules of Appellate Procedure. It did not reach the merits of the trial court's special exceptions or the other issues noted by the shareholders.
PRECEDENTIAL VALUE	Published Texas Supreme Court opinion; precedential.
PARTIES	Emory B. Perry and other shareholders of RAMP Corporation v. Darryl R. Cohen, Andrew M. Brown, Jenkens & Gilchrist

TOPICS

preservation of error · appellate procedure · pleadings · motions to dismiss · civil procedure

PRACTICE AREAS

appellate procedure · civil procedure · commercial litigation · corporate law

QUESTIONS PRESENTED

1. Whether the shareholders preserved an appellate challenge to the merits of an interlocutory order sustaining special exceptions when they appealed the final dismissal order and addressed the special-exceptions order in the body of their appellate brief, but did not separately identify that interlocutory order in their notice of appeal or appellate issues.
2. Whether the court of appeals properly affirmed the dismissal based on waiver without reviewing the merits of the special-exceptions order.

HOLDINGS

1. The shareholders preserved error because their appellate brief challenged the merits of the order sustaining special exceptions, even though they did not separately and specifically challenge that interlocutory order in their notice of appeal or in a separately stated appellate issue.
2. Both the final order of dismissal and the interlocutory order granting special exceptions must be challenged for the merits of the special-exceptions order to be reviewed on appeal.

KEY QUOTATIONS

> *"We hold that the plaintiffs preserved error by challenging the merits of the special exceptions order in the body of their appellate brief, even though they did not separately and specifically challenge the order in their notice of appeal or in the issues of their appellate brief."* (585)

> *"Both the final order of dismissal and the interlocutory order granting special exceptions must be challenged in order for the merits of the order granting special exceptions to be reviewed."* (588)

> *"The shareholders were entitled to have the court of appeals review the merits of the order granting Cohen's special exceptions."* (588)

FACTUAL BACKGROUND

Shareholders of RAMP Corporation sued Cohen, Andrew M. Brown, and Jenkens & Gilchrist after RAMP filed for bankruptcy. They alleged that, before the bankruptcy, the defendants induced them to retain or purchase RAMP stock by misrepresenting RAMP's financial condition. The shareholders asserted negligence, common-law fraud, statutory fraud, conspiracy, and Texas Securities Act claims, but the trial court found their amended pleadings failed to identify the allegations supporting each plaintiff's claims and any injury distinct from injury suffered by RAMP.

PROCEDURAL HISTORY

The trial court sustained the defendants' special exceptions, ordered the shareholders to replead, and dismissed the claims with prejudice after finding the Third Amended Petition noncompliant. The court of appeals affirmed. The Supreme Court of Texas held that the shareholders preserved their appellate challenge because their brief addressed the merits of the special-exceptions order, even though they did not separately identify that interlocutory order in their notice of appeal or appellate issues.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The judgment of the court of appeals was reversed, and the case was remanded to that court for further proceedings consistent with the opinion.

CASES CITED

- Verburgt v. Dorner, 959 S.W.2d 615, 616 (Tex. 1997)
- El Paso Natural Gas Co. v. Minco Oil & Gas, Inc., 8 S.W.3d 309, 316 (Tex. 1999)
- Cole v. Hall, 864 S.W.2d 563, 566-67 (Tex. App.—Dallas 1993, writ dism'd w.o.j.)