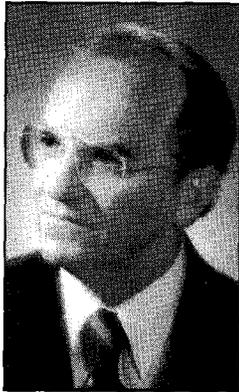


DEPOSITIONS VERSUS TRIALS: THE ANIMAL FAIR

By Judge Jerry Buchmeyer



Depositions are worse—or is it trials? More examples. . .

I'm Glad We Cleared That Up: The Dogs

Victor A. Fleming of Little Rock (Cattlett, Stubblefield) who was sitting as a special judge in Pualski County Circuit Court, sends this trial story (replete with Initial Caps):

"Plaintiff sought damages due to Defendant's vicious dogs having attacked her. At the time of the Alleged Attack, Defendant and Plaintiff were Romanically Involved, and the primary defense was that Defendant regularly kept the dogs penned up when Plaintiff was about and on the Day in Question was guilty of Comparative Fault by voluntarily venturing outside when the dogs were not penned.

"Much testimony had touched upon the canines and the facility in which Defendant claimed regularly to corral them whenever people were present. But there had been a *Rather Long Pause* between overt reference to the animals and the attorney's next question to his client on the stand:

"Q. Generally, when you have people out for a party, do you keep them in a cage?"

"JUDGE: *You mean the dogs, right?*"

Did I Really Say That?

This deposition excerpt comes from Steven W. Harris of Austin (Clark, Thomas, etc.); he explains that the deposition—in a real estate contract case, "involving a piece of property . . . which [my clients] attempted to sell to *Whataburger*—was being taken by Diane Henson, a very fine attorney and partner in Graves, Dougherty" (and a self-described "hamburger helper").

Q. All right. Now, according to Harris' answer to interrogatories, and the ones I'm reading from are from Mr. David Whopperman—Wupperman, I'm sorry. I think I got whopper in there. I'm getting these hamburgers all mixed up.

MR. HARRIS: We'll have it your way, Diane.

Steve adds:

"Although Diane Henson and I are both extremely aggressive in the representation of our clients. . . I think this. . . demonstrates the fact that being an adversary does not necessarily require you to leave your sense of humor at home.² I think it also shows the tongue twisting effect that a long deposition can have."

I'm Glad We Cleared That Up: The Elephants

From Mark W. Laney of Plainview, these excerpts from the deposition of the

defendant's expert in a workers' compensation case; the expert has just testified that—contrary to the opinion of the treating physician—he believes the plaintiff could return to work (even though he had no idea of what the plaintiff did before he was injured). Then. . .

Q. Your understanding of "total incapacity" is that it's whether or not they can go back to what they were doing before, right?

A. Right.

Q. You have no idea what Johnny Elledge was doing before, right?

A. Right.

Q. So you don't have any way of saying by your own definition whether or not he has total incapacity, do you?

A. Yes, I do, in that apparently he was able to do the job he did before. . .

Q. So it's your testimony that in spite of his operation to remove two discs. . . that, *if his job before this was to carry elephants from one test to another*, then he ought to be able to get back out there and do that?

A. *With proper training, yes.*

Q. So would it be a fair summary of your opinion to say that having an operation for one or two ruptured discs is just flat not going to affect a person's ability to do heavy manual labor?

A. If the person is given an opportunity to return his body to appropriate strength.

Did I Really Hear That?

From Parker C. Folst, III of Houston (Susman Godfrey), this excerpt from a deposition in a RICO case taken by his partner, Ken Marks; the witness was "the chairman of a New York-based investment banking company"—who was not too "bashful about volunteering his opinions concerning a former employee."

Q. Are you aware that in 1986 Jones & Company entered into an engagement with an outfit called the Three Initials Corporation? . . .

A. I've heard about it since, but I did not know about it at the time, and I would have been madder than hell if I had. . . Because that outfit is headed by a guy that I don't like.

Q. Is that Mr. Smith?

A. That's Mr. Smith.

Q. Do you know where Mr. Smith is today?

A. *I hope he's in hell, but I don't know.* I can't confirm it.

* * *

Q. By the way, what is it that you don't like about Mr. Smith?

A. He's dishonest.

Q. How do you know that?

A. Intimate experience. . . *He's a re-treaded insurance man.* He doesn't know anything about anything. He's a four-flusher.
 [Attorney for witness (*belatedly*). Let me talk to the witness off the record for one second.]

I'm Glad We Cleared That Up: The Horses

From **Paul K. Browder** of Austin (Jon N. Coffee & Associates), this excerpt from a trial before **U.S. District Judge Eldon Mahon** of Fort Worth; Paul explains that the plaintiffs—in “attempting to establish a pattern of horse breedings between particular studs and mares—had meticulously fashioned a large calendar on which they painstakingly attempted to place an accurate notation for each event that occurred.” However, after being asked “a similar question several times,” Paul's client could not resist “setting the record straight.”

Q. Well then, Mr. N_____ would it be fair to write on our calendar that on March 23, 1985 “Mr. N_____ breeds Mr. W_____’s mare.”
 A. (Angrily, in a slow Texas drawl): No sir. *It wasn't me. It was D.C. . . my horse.*³

Recalling & Recollecting

From **Roger Evans** of Dallas (Vinson & Elkins), this excerpt from a workers' compensation deposition taken by **Grover Swift** of Fort Worth (Swift, Bell, etc.):

Q. You're wanting to tell the court and jury the reason you went to the day shift was because of your seniority and no medical reason from your doctors; is that correct?
 A. *I don't remember.*
 Q. Okay. Have you had a memory problem onset in the last couple of years? I'm not trying to be funny with you, but some of the things I've asked you I felt pretty sure you would remember?
 A. *I do have a hard time remembering things.*
 Q. Is it your contention that your memory problem has resulted from something that happened to you at [the Company]?
 A. Do you mean do I . . .
 Q. In this lawsuit. Are you suing, in this situation, “Insurance Company,” about a memory problem you're having?
 A. No, sir, *not that I recall.*

I'm Glad We Cleared That Up: Bulls & Snakes

From **Farrell Bolz** of Houston, these excerpts from “the deposition of [Huntly B. Farichild] an elderly landowner of Sunshine, LA, whose bull wandered through a gate and then a highway fence, and was struck by my client's [truck] in the middle of an interstate highway.”

Q. I need to ask you some things about what you do or do not know about how the accident happened.

I'm not trying to trick you about anything.

A. I'm not worried about that.
 Q. The only thing I ask you to do, is if I ask you something that you don't understand—
 A. I'm going to ask.
 Q. —Tell me and I'll be glad to rephrase it for you, okay?
 A. *You talk my language.*
 * * *

Q. Did you yourself after you knew that hole was in the fence, do anything to try to get that particular hole fixed?
 A. No, because it didn't bother me. It could have stayed there. . .
 Q. You knew the Hole was there but you didn't do anything to get it fixed?
 A. Well, it wasn't bothering me.
 * * *

Q. Why is it that no one can enter your property just by crossing this ditch and going through the hole in the fence?
 A. They couldn't get back in unless they go down about a 150, 200 yards of ditch down there that you can't—*it will bog a snake.*
 * * *

Q. You don't have any knowledge that people were using this hole as a means of avoiding having to circle all the way back to the entrance and exit ramps?
 A. No. Ain't nobody went through there, honey. I'm telling you it was wet, and the ditch, they didn't drive through it. Now, a four-wheeler or jeep or something would go through it, but that is what I was watching for, but didn't nobody go through it.

If it wasn't that, I would have never fixed the fence. *I fixed it not because of cattle, but fixed it keep outlaws and inlaws out.*

I'm Glad We Cleared That Up: The Cows

“**Al Ellis Lawyer**” (of Dallas)—leading the way as Dallas Bar Association president—has taken the pledge; at least, he says that this questioning by **Matt McKool** (also of Dallas) “has pretty much convinced me never to take another deposition as long as I practice law!!!!”

Q. Do you find—do you know cows at all?
 A. I've never known one personally.
 Q. Do you associate with cows?
 A. I've been around cows.
 Q. Are they smart animals? Do you know them to be smart animals?
 A. Well, let's see. Having never known one personally but having worked on a farm as a child, they know when it's time to come to the barn. They know where to go.
 Q. Outside of meat and milk, they're fairly—and manure, they're fairly useless animals, are they not?

A. Oh, I don't think someone in the dairy industry would say that. I think that—
 Q. Outside of the meat, milk, and manure, the three Ms., okay?
 A. The big three Ms.
 * * *

Q. Okay. Cows are unpredictable, are they not? Assuming a lay person, a citified lay person that hasn't been around cows much, what would they expect—what would they expect a cow to do that was walking along the roadway?
 A. I don't have any idea.
 Q. But you know cows; isn't that true?
 A. No. I've never known any cows. I would drive behind it. *I wouldn't drive in front of it because that's usually the need that's controlling where it goes so I would drive behind it.*

1. *Real Lawyers Do Change Their Briefs*, Victor A. Fleming (Rose Publishers 1989).
2. From **James P. Walker, Jr.** of Dallas (J.C. Penney Legal Department), this excerpt from one of his depositions—which demonstrates how depositions are intended “to narrow and focus the issues” in controversy, particularly “the relevant time period.”
 Q. You stated off the record. . . that you believed J.C. Penney knew that you were doing business as National Collection Services?
 A. No. I do not believe. I know they knew.
 Q. Who is they?
 A. Starting from the beginning—
 Q. Yes.
 A. —of time?
 Q. Well, since your association with J.C. Penney?
3. Another horse story comes from a post-judgment deposition taken by **Vikram Chandhok** of Dallas (Carrington, Coleman, etc.). The witness first gave these suggestive, if not downright exotic names of the “brood mares” that he owned:
 A. *Triple Fancy. . . Zane and Impressive Miss. Sunny Bar Penny. Sizzling Tammy. Charisma Red. . . Cindy Bingo. Millie's Diamond. Dark Rerun. Rosita Bonanza.* That is all.
 Then the witness is asked if he has a stallion, and he responds: “*Parker's D. Bar* is a stallion. . . he is a 20 year old. *We bred [him] one mare last year and he nearly died.* He is just there to live his life out.”

More et cetera

Jerry Buchmeyer is a federal district judge, Northern District of Texas, in Dallas. If you have a contribution to the et cetera column send it to Judge Buchmeyer, U.S. District Court, Northern District of Texas, Dallas, TX 75242.