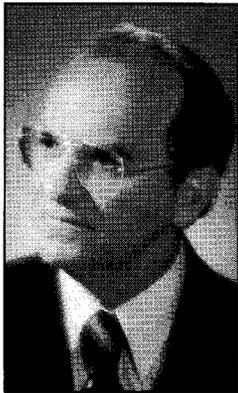


Depositions v. Trials But Just How Dead Is He?

By Judge Jerry Buchmeyer



The “which is worse” quest continues, with contributions from Abilene (**Jon Hanna**), Amarillo (**Mark Tatum**), Belton (**Judge James Russell**),¹ Denton (**Gary Walters**), Waco (**R. D. Pattillo, III**), El Paso (**David Nichols**), Fort Worth (**Walter Fortney** and **Jerry Loftin**), Houston (**Judge Tom Sullivan** and **Ron McPherson**) — and, of course, from Atlanta, GA (**Holly Barnett**) and Jonesboro, AR (**Michael Mullally**).²

I’m Glad We Cleared That Up!

From **Gary A. Walters** of Denton (Milner & Walters), this excerpt from the deposition of the plaintiff in a personal injury case; **Randy Stout** of Denton is deposing, with **Camille Milner** representing the plaintiff. The deposition begins with questions about the plaintiff’s “family background and her household inhabitants.”

- Q. Sandra Kay Lemlyn [lives with you]?
A. Yes, that’s my daughter.
Q. How old is she?
A. Thirty-five.
Q. Is she employed?
A. No, sir. Not at this time.
Q. When was the last time she was

- employed?
A. Several months ago. *She’s expecting at this time.*
Q. Okay. A child?
A. Yes, sir. I *think* that’s what it is. (Discussion off the record.)

From **Walter S. Fortney** of Fort Worth (Law, Snakard & Gambill), this deposition excerpt discovered while he was “preparing for trial:”

- Q. What is your relationship to [the plaintiff]?
A. I don’t understand the question.
Q. Are you related to him by family?
A. *He and my wife are sisters...* (continuing) His wife and my sister — his wife and my wife are sisters.

From **R. D. Pattillo, III** of Waco (Williams, Pattillo & Squires), “two gems that occurred on the same page” of a deposition he took in a products liability case involving a death caused by a tractor/trencher. First, the distributor is being asked what oral safety instructions would have been given to the purchaser with the limited warranty card:

- Q. ...What types of oral [safety] instructions would you give [to the buyer]?
A. *Truthfully?*
Q. Uh-huh.
A. *“Sign this damn card so I can get on out of here.”*

Then, only 10 lines later, R. D. started to ask the distributor questions designed to show that the tractor/trencher was defectively designed because it did not have a “dead-man control safety device:”

- Q. ...Do you understand what a dead-man control device would be in its application to, say, an LM-35?
A. Well, *it would be a device that a dead man could switch off before he died.*

Did I Really Hear That?

From **Jon Hanna** of Abilene (Hanna Law Firm), these excerpts from the deposition of “one of our clients — a very serious-minded fellow, [who] amazingly uttered these lines without any attempt at humor.”

- Q. [What other arrests have you had besides “minor in possession of alcohol” when you were 13 or 14 years old?]
A. And once for — I don’t remember what they call it. I was probably about 15 or 16. I snuck a couple of little girls out the window and we went to the lake and partied and got caught.
Q. Did they throw you in jail for either of these offenses?

- A. Well, yeah. I spent the night in jail. *But I kept them two or three days.*
Q. *You kept what?*
A. *The girls.*

- Q. Were you living in Irving at the time?
A. Yes.
Q. Were you checking into a room at the hotel?
A. Yes.
Q. For what reason?
A. Well, the girlfriend I had living in my house wasn’t going to like the one that I had with me.
Q. That would be a good reason. Okay.

- Q. You haven’t had a drink in over a year?
A. That’s right.
Q. Has there been a time in your life where you’ve considered yourself to have a drinking problem?
A. *I really never considered it a problem. It was about the easiest thing I ever done.*

We Might Jump Ahead Just A Bit

From **Holly B. Barnett** of Atlanta (Alston & Bird), this excerpt from the deposition of an expert witness — with the comment that, “Although the transcript is humorous in and of itself, it was most amusing at the time since it cut the air in the room like a knife and thus relieved the tension, at least temporarily.”

- Q. Now, can you give us your employment background, say, from the time of your first job and the approximate dates?
A. Yes, sir. My first job was serving watermelon and I was 11 years old. (Laughter)

THE WITNESS: Do you want me to continue from there or do you want me just to jump ahead or what?

MR. DONOHUE: No, I’d like you to continue because I started working when I was 14 and I’m getting tired.

MR. GRAVES: I sold mistletoe at the grocery store. I think selling watermelon is a little more exciting.

THE WITNESS: Oh, it allowed you to stay out late at night. I loved it — 25 cents an hour.

MR. DONOHUE: That was big money in those days.

THE WITNESS: Surely was.

- A. All right, sir. Following that I had a paper job off and on, I was a part-time

helper for Mrs. Baird's Bread delivery, I was a package boy and worked my way up through Wyatt's Food Stores in Dallas...I worked for National Van Lines as a helper for their long-haul and local moves.

- Q. Approximately what year was that?
A. Oh, that would have been in the '50-'53 time frame, somewhere in there I would gather.
Q. How old are you now if you don't mind me asking?
A. 56.

The Surprise Witness

From retired County Court at Law **Judge James H. Russell** of Belton (Bell County Court at Law No. 1), this story from a "fender-bender jury case" he tried several years ago. The witness, a police officer, "was putting the usual intersectional drawing on the blackboard;" then...

JUROR (Jumping to his feet): No, no! I live near there; the filling station is not where you put it. It's across the street.

WITNESS (Quickly erasing and making the correction).

Judge Russell adds: "Neither lawyer objected; they were stifling laughter. That was the only case I ever tried that had un-sworn testimony from a juror."

Did He Really Say That?

From **Jerry J. Loftin** of Fort Worth, this excerpt from a criminal case that Jerry tried before U.S. District **Judge Eldon Mahon**:

THE COURT: Let me ask the first 12. You all look very happy and healthy and ready to deliberate. I don't see any problem that has been developed by any of you, so you may retire, the 12 of you. Mr. Spencer, you may remain seated for just a moment *while the jury passes out* and then — I should have said *filed out*, not *passed out*. That's kind of an awkward word. You might have wished you *passed out* before, but that's a poor word from the court's standpoint. You will *file out* and select your foreman and when you have reached a unanimous verdict, the court will be here to receive it.

Jerry added: "The jurors all *passed out* from laughter."

From **David Landel Nichols** of El Paso (assistant U.S. attorney), this testimony from the cross-examination of a border patrol agent in a drug case.:

- Q. But as you do your search, if you find marijuana in somebody's pocket, you're sure going to make note of that, aren't you?
A. We sure are.
Q. And if he smells of marijuana, you're sure going to make note of that, aren't you?
A. Yeah.
Q. *He didn't smell, did he, of marijuana?*
A. *No. Not of marijuana.*

But Just How Dead Is He?

From **Judge Tom Sullivan** of Houston (County Civil Court at Law No. 2) — and from his court reporter, **Ron McPherson** — this excerpt from a trial before Judge Sullivan:

- Q. Were Marge Pope and *Cecil Melis* husband and wife?
A. I don't think so. I think they attempted to marry and that was annulled.
Q. Did they live together as far as you know?
A. About 19 years.
Q. And you testified that *Cecil Melis is now dead?*
A. That's correct.
Q. Do you recall when he died?
A. Very recently. This year: March, April, May. I do not recall the date.
Q. Okay. *So he's not available to testify in this hearing about any matters; is that right?*
A. He would not have been available to testify from some time before.
Q. *But he's not available now?*
A. No, not now.
Q. *Because of his death?*
A. Correct.

From **Michael E. Mullally** of Jonesboro, AR (Snellgrove, Laser, etc.), this excerpt from the deposition of the plaintiff in a personal injury case; the deposer was **Robert Coleman** of Blytheville, AR (Reid, Burge, etc.).

- Q. [What about your back surgery?]
A. I had pilonidal cyst surgery on my back twice.
Q. And when was that?
A. Once was in 1972, and then again in 1976.
Q. Okay. And who was it that did those surgeries?
A. [The one in 1972] was done at Kingport, TN, and I can't recall the name of the surgeon there... The one here [in 1979] was done by Dr. Strickland here in Batesville.
Q. And...
A. If you need the name of that, I can find out, of the other surgeon. *He's dead now.*
Q. Well, he probably wouldn't answer any of my letters then, would he?
A. *Well, for your sake, I hope not.*

1. My thanks to **Judge Russell** for the *ultimate compliment*:
"Your *Texas Bar Journal* feature is most enjoyable. First thing I read, *then the obits*. (I'm 75 years old.)"
2. "Going Hence" Amarillo footnote: According to **Mark Tatum** of Amarillo (Robinson & Fotheringham), while he was "researching other great legal issues, I stumbled (my usual research technique) upon the case of *Muse v. McWilliams*, 295 SW2d 680 (Tex. Civ. App. — Amarillo 1956). In that case, the trial court entered judgment in favor of defendant that plaintiff "...take nothing by his and that the defendant go hence with his cost without day..." *id.* at 681. There follows, in the opinion, Justice Martin's scholarly discussion of the significance of the term "without day," including the *Bower's Law Dictionary* definition:

"Without day. This signifies that the cause or thing to which it relates is indefinitely adjourned; as, when a case is adjourned without day it is not again to be inquired into."

Jerry Buchmeyer is a federal district judge in Dallas. If you have a contribution to this column, send it to him at U.S. District Court, Northern District of Texas, Dallas 75242.

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