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Ethical Implications of Sua Sponte Waiver Findings

Scott Rothenberg

Author Contact Information:
Scott Rothenberg
Law Office of Scott Rothenberg
Bellaire, TX

scott@rothenberglaw.com
713-667-5300

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By Scott Rothenberg

I. Introduction

Imagine you have briefed and argued an important appeal. You are the appellant. The brief of appellee contains no contention of briefing waiver. Oral argument is denied and the appeal is submitted on the briefs. The court of appeals issues its opinion and judgment months later. Decision? Affirmed due to a finding of briefing waiver even though neither opposing counsel nor the court ever mentioned any contention of briefing waiver prior to issuance of the court of appeals' opinion and judgment.

The results of such a finding can be devastating to both the attorney and to the client. A finding of briefing waiver can result in loss of licensure (grievance), loss of board certification, loss of employment, loss of professional reputation, loss of money (legal malpractice), and loss of the appeal for the client. With all of that on the line, it would seem that findings of briefing waiver are rare. They are not. It would certainly seem that findings of briefing waiver *sua sponte* in a court of appeals' opinion in the absence of any warning – in the brief of appellee, during oral argument, by pre-submission notification by the court, or otherwise – would be rare. They are not.

With all of the thousands of appellate opinions written each year in the State of Texas, one would think that the jurisprudence surrounding appellate findings of briefing waiver, whether *sua sponte* or with prior notice, would be well-settled. It is not. Sua sponte briefing waiver was recently the subject of vigorous majority and dissenting opinions by the Dallas Court of Appeals sitting en banc. *St. John Missionary Baptist Church v. Flakes*, ___ S.W.3d ___, No. 05-16-00671-CV, 2018 WL 153122 (Tex. App.– Dallas, March 29, 2018, no pet. hist.) (*en banc*) ("hereinafter *Flakes*"). Given the enormous stakes involved, a detailed analysis of the divergent opinions by the *Flake* majority and dissent is warranted.

Facts and Procedural History Underpinning *Flakes*

In *Flakes*, a majority of members present at a church vote elected to terminate the contract of the pastor, Bertrain Bailey. *Id.*, at 1. Bailey refused to vacate the position, instead, selling property owned by the church. *Id.* Members of the church filed a petition seeking a temporary restraining order and permanent injunction to prevent the continued sale of church property. *Id.*

The church members who opposed Pastor Bailey's removal (and supported the sale of church property) filed a motion to dismiss and a plea to the jurisdiction. *Id.* They asserted two different grounds: (1) lack of subject matter based upon the ecclesiastical abstention doctrine, and (2) lack of standing. *Id.* During a hearing on the motions, both grounds were argued. *Id.* The trial court granted the motion and dismissed the lawsuit. *Id.* The trial court's dismissal order did not state on which ground the dismissal was granted. *Id.*, at 2. The plaintiffs perfected an appeal and filed an appellate brief that addressed only the standing argument, but not the ecclesiastical abstention doctrine. *Id.*, at 1. The brief of appellees does not invoke the doctrine of briefing waiver in any manner. The appeal was submitted on the briefs, with no oral argument permitted.

Flakes was resolved with a majority opinion joined by 8 justices and a dissenting opinion joined by 5 justices. Both opinions are important to a full understanding of the challenging issues surrounding sua sponte briefing waiver.

The Majority Opinion in *Flakes*

The majority in *Flakes* noted the well-established principle that "[w]here an order does not specify the grounds on which it is based, appellants must show that each independent ground is insufficient to support the order. *McMahon Contracting, L.P. v. City of Carrollton*, 277 S.W.3d 458, 468 (Tex. App.—Dallas 2009, pet. denied)." *Id.*, at 2. The majority continued, "If the appellant fails to challenge all possible grounds, we must accept the validity of the unchallenged grounds and affirm the adverse ruling. *See Malooly Bros.*, 461 S.W.2d at 121 ("The judgment must stand, since it may have been based on a ground not specifically challenged by the plaintiff and since there was no general assignment that the trial court erred in granting summary judgment."). *Id.*

The majority considered and rejected the possibility that the Court could provide the appellants with notice of the briefing deficiency and an opportunity to correct it. "The Texas Supreme Court has not overruled *Malooly* or provided authority that would allow us to *sua sponte* identify a potentially reversible issue not briefed by appellants and then offer appellants the opportunity to further brief that issue. *Id.*, at 3. The majority was especially critical of any notion that the Court should allow the opportunity for rebriefing by the appellants:

> Contrary to the dissenting opinions' view of rule 38.9(b), the text of this rule does not authorize issue identification by an appellate court and supplemental briefing. *See* Tex. R. App. P. 38.9(b). Moreover, directing rebriefing on an issue not raised in appellants' opening brief after submission of a case to a panel is even more disruptive to the appellate process than

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