IN THE SUPREME COURT OF TEXAS

NO. 08-0570

IN RE ADM INVESTOR SERVICES, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE WILLETT, concurring.

I join the Court's result and write separately only to add a brief word on the evidentiary burden borne by a party asserting medical hardship to escape a forum-selection clause, an issue of first impression in this Court. Also, while today's case is a sub-par vehicle given its slim record, I believe the Court should one day clarify something else in medical-hardship cases: the meaning of phrases like "seriously inconvenient" and "unreasonable or unjust" — two of the bases for avoiding a forum-selection clause — and, relatedly, whether physical ailments can qualify as "special and unusual circumstances" sufficient to defeat enforcement. Actions to enforce forum-selection clauses arrive at the Court via mandamus, and it seems unfair to conclude a lower court clearly abused its discretion by acting without reference to guiding principles if the principles they must reference supply scant guidance.

1. What sort of health-related evidence would suffice to escape a forum-selection clause?

I agree that Jetta Prescott's affidavit detailing her myriad health woes is, standing alone, insufficient to avoid the contracted-for forum. The lesson of *In re Lyon*, as the Court notes, is that

the mere assertion of "financial and logistical difficulties" is not enough to negate a forum-selection clause, lest such clauses become "practically useless."[1] Ease of evasion is certainly no less a concern when the claimed hardship is physical rather than financial. So I agree that a party asserting medical infirmities must offer more than her own testimony.

I would go a step further, however, and make clear for the bench and bar what sort of evidence *would* suffice. Boiled down, a party opposing a forum-selection clause bears a "heavy burden"[2] of proving a heavy burden — that trial in the chosen forum would be unjustly onerous. And if the assertion is health-related, a health professional should do the asserting. In my view, first-party patient testimony is insufficient (though perhaps not always necessary), and third-party provider testimony is necessary (though perhaps not always sufficient). Specifically, a competent medical provider should attest that the patient's condition makes travel to the agreed forum not merely inconvenient or impracticable, but medically prohibited. This is the approach adopted in a recent federal-court case involving an 81-year-old New York resident who broke her hip on a cruise ship and argued "inconvenience" to defeat transfer of her personal-injury suit to Washington State under a forum-selection clause.[3] Both the plaintiff and her orthopedic surgeon described her condition, the surgeon testifying she could tolerate a plane flight, although it would be difficult and

---

[1] *In re Lyon Fin. Servs., Inc.*, 257 S.W.3d 228, 234 (Tex. 2008) (per curiam).

[2] *In re AIU Ins. Co.*, 148 S.W.3d 109, 113 (Tex. 2004).

[3] *See Caputo v. Holland Am. Line, Inc.*, No. 08-CV-4584, 2009 WL 2258326 (E.D.N.Y. July 29, 2009) (stating an 81-year-old plaintiff whose recent hip surgery made her unable to walk alone or sit for extended periods could have made the requisite showing if she had shown she was physically unable to fly to the selected forum).

she would suffer discomfort.[4] The court held that while this plaintiff failed to make the requisite showing — she proved only that travel would be unpleasant, not unfeasible — a plaintiff whose physical limitations bar travel can satisfy the heavy burden of proof required to set aside a forum-selection clause on grounds of inconvenience.[5] If health concerns are ever held to preclude enforcement, this type of proof, at minimum, seems necessary.

2. In a forum-selection clause case involving a medically infirm party, what do "seriously inconvenient" and "unreasonable or unjust" mean?

A litigant may defeat enforcement of a forum-selection clause by showing one of four things:

(1) enforcement would be unreasonable or unjust,

(2) the clause is invalid for reasons of fraud or overreaching,

(3) enforcement would contravene a strong public policy of the forum where the suit was brought, or

(4) the selected forum would be seriously inconvenient for trial.[6]

Today's case focuses on grounds (1) and (4) above, and while I understand that the slender record makes this case a less-than-ideal vehicle for extended analysis, I believe we should one day explain more fully how these rather opaque phrases apply to assertions of medical hardship.

Most Texas cases avoid fleshing out the term "seriously inconvenient"; the only discernible "definition" seems to emerge from piecing together examples of what various courts have held *not*

---

[4] *Id.* at *1-2.

[5] *Id.* at *4.

[6] *Lyon*, 257 S.W.3d at 231-32. Despite the disjunctive "or," which signals textual separateness, we seemed to intermingle grounds (1) and (4) in *In re Lyon*, asking "whether Pennsylvania is such an inconvenient forum that enforcing the forum-selection clause would produce an unjust result." *Id.* at 233.

to be seriously inconvenient.[7] Many cases recite the general standard from *M/S Bremen v. Zapata Off-Shore Co.,*[8] essentially that "a forum clause . . . may [] be 'unreasonable' and unenforceable if the chosen forum is seriously inconvenient for the trial of the action," and conclude the party's proof fell short.[9] None of the cases, however, are medical-hardship cases; today's case is the first, meaning Texas courts have no guidance for discerning the confusing, but apparently consequential, line between "inconvenient" (clause enforced) and "seriously inconvenient" (clause evaded) . . . not to mention what separately qualifies as "unreasonable or unjust" in the context of someone asserting health maladies that arose after the clause was adopted.

---

[7] *See, e.g.*, *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 679, 680 (Tex. 2009) (per curiam) (holding that even though plaintiff may have to pursue two suits, one in Illinois and one in Texas, that is not the type of unusual and special circumstances that shows litigating in the contracted-for forum would be so gravely difficult and inconvenient that plaintiff would be deprived of its day in court; also, Illinois is not a remote alien forum for purposes of forum-selection agreements); *Lyon,* 257 S.W.3d at 233-34 (clause was not so inconvenient to the lessee that enforcing it would produce an unjust result, even though lessee claimed it lacked the financial or logistical ability to pursue its claims in Pennsylvania); *AIU*, 148 S.W.3d at 112-13 (rejecting argument that many if not most potential witnesses regarding coverage issues were in Texas and therefore trial in New York would be seriously inconvenient); *First ATM, Inc. v. Onedoz, Inc.,* No. 03-08-00286-CV, 2009 WL 349164, at *3 (Tex. App.—Austin Feb. 13, 2009, no pet.) (mem. op.) (holding that unsupported pleadings regarding a party's financial condition and its expected costs of litigation in Texas did not show that litigating in Texas would be so inconvenient that party would be deprived of its day in court); *Bailey v. Sorenson Labs., Inc.*, 217 B.R. 523, 527 (Bankr. E.D. Tex. 1997) (finding that mere fact that debtor had experienced financial difficulties resulting in bankruptcy was not sufficient to preclude enforcement of a forum-selection clause on the theory that it had become seriously inconvenient).

[8] 407 U.S. 1, 16 (1972) (the Supreme Court also noted: "the serious inconvenience of the contractual forum to one or both of the parties might carry greater weight in determining the reasonableness of the forum clause," *id*. at 17). The Court later clarified in *Carnival Cruise Lines, Inc. v. Shute* that the inconvenience discussion in *The Bremen* was in the context of a hypothetical agreement between two Americans to resolve a local dispute in a remote alien forum, not an agreement to resolve the dispute in another of the United States. 499 U.S. 585, 594 (1991). *See Lyon*, 257 S.W.3d at 234.

[9] *See, e.g.*, *AIU*, 148 S.W.3d at 112-13; *Deep Water Slender Wells, Ltd. v. Shell Int'l Exploration & Prod., Inc.*, 234 S.W.3d 679, 692-93 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *In re Talent Tree Crystal*, No. 01-05-00686-CV, 2006 WL 305015, at *4 (Tex. App.—Houston [1st Dist.] Feb. 9, 2006, no pet.) (mem. op.); *Phoenix Network Techs. (Europe) Ltd. v. Neon Sys., Inc.*, 177 S.W.3d 605, 621 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

Cases involving medical hardship strike me as somewhat unique. Financial or logistical burdens may be easily anticipated; not so with many medical burdens.[10] The Court notes that when a forum's inconvenience is foreseeable at the time of contracting, the party opposing enforcement must "show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court."[11] True, but in conducting that analysis we must also confront what we confirmed just last year: a party asserting inconvenience can avoid enforcement by proving that "special and unusual circumstances developed *after* the contracts were executed" such that litigation in the chosen forum would work a deprivation of its day in court.[12] So can exacting evidence of severe medical ailments constitute "special and unusual circumstances" in certain cases?

The Court never mentions this "special and unusual circumstances" basis for negating a forum-selection clause, but that is immaterial here. Mrs. Prescott's only evidence of post-contract medical problems is her lone affidavit, which even if wholly persuasive, is wholly insufficient. Accordingly, we need not consider the affidavit's substance (or lack thereof) and whether Mrs. Prescott's ailments qualify as "special and unusual circumstances."

---

[10] Parties ought not bear an expectation of prognostication when it comes to their health, required to foretell whether future maladies might make a potential out-of-state trial too onerous. Infirmities are inevitable, but that doesn't make them foreseeable such that healthy parties who execute a forum-selection clause must consider whether health woes years or decades down the road might pose a travel problem. Cross-country travel may be undemanding for a healthy 60-year-old who signs a forum-selection clause but inconceivable for an ailing almost-80-year-old who contests one.

[11] __ S.W.3d __ (citing *AIU*, 148 S.W.3d at 113 (quoting *The Bremen*, 407 U.S. at 18)).

[12] *Int'l Profit Assocs.*, 274 S.W.3d at 680 (emphasis added). *See also Lyon*, 257 S.W.3d at 234 (noting no "proof of special and unusual circumstances" and "no evidence that . . . conditions changed from the time the agreements were executed").

In sum, this Court has never addressed, nor has *any* Texas appellate court, whether medical concerns can negate a forum-selection clause. Given the ubiquity of such clauses in everyday contracts, both commercial and consumer, I hope a future case with a more-developed record gives us an opportunity to clarify how the various bases for avoiding enforcement apply when a party asserts serious medical hardship. This seems only fair. Actions to enforce forum-selection clauses reach us via mandamus,[13] a remedy "controlled largely by equitable principles,"[14] and we must determine if the court below clearly abused its discretion in denying enforcement. It seems inequitable to fault lower courts for acting without reference to guiding principles if there are few on-point principles to be referenced.

I understand why the Court declines to use today's imperfect case to dive deeper and provide greater specificity for forum-selection cases involving medical hardship, but I hope a future case will give us occasion to say more.

_____
Don R. Willett
Justice

OPINION DELIVERED: February 19, 2010

[13] *See Lyon*, 257 S.W.3d at 231 ("There is no adequate remedy by appeal when a trial court refuses to enforce a forum-selection clause, and such clauses can be enforced via mandamus.").

[14] *Int'l Profit Assocs.*, 274 S.W.3d at 676.