1986

Litigating a Novel Course and Scope of Employment Issue: INA of Texas v. Bryant

J. Thomas Sullivan
University of Arkansas at Little Rock William H. Bowen School of Law, jtsullivan@ualr.edu

Litigating a Novel Course and Scope of Employment Issue: *INA of Texas v. Bryant*

J. Thomas Sullivan*

The case of *INA of Texas v. Bryant*[1] illustrates two common problems that may concern litigants in personal injury actions: (1) the tactical choice between pursuing recovery under the Texas Workers' Compensation Act[2] (the "Act") and prosecuting the claim in negligence, and (2) the ambivalent role of the deposition as a discovery tool and as a source of substantive evidence. This article traces the litigation strategies used by counsel for the plaintiff employee and the defendant insurance carrier in *Bryant*, through the trial and appellate court proceedings, in order to demonstrate the uncertain interplay between the state of the record made at trial and the ultimate disposition of a case of first impression.

The decision to seek benefits under the Act

Bryant worked as a temporary employee of the Collin Street Bakery in Corsicana (the "Bakery").[3] Her employment was terminated when the shift on which she worked was discontinued by the employer.[4] Subsequently, she went to the employer's premises to pick up her final paycheck and was injured in a fall on the stairway leading to the firm's second floor offices.[5] Bryant was unable to assist in developing any witnesses to the incident who could have testified as to the circumstances of her accident, or helped to establish negligence on the part of the employer.[6]

---

* B.A. 1972, University of Texas; J.D. 1976, Southern Methodist University; L.L.M. 1982, University of Texas. Mr. Sullivan is an attorney in Dallas, Texas.

1. 686 S.W.2d 614 (Tex. 1985) (*aff'g* 673 S.W.2d 693 (Tex. App.—Waco 1984)).
2. TEX. REV. CIV. STAT. ANN. arts. 8306-8309f (Vernon 1967).
3. 673 S.W.2d at 693.
4. *Id.*
5. *Id.* at 694.
6. Interview with trial counsel, Paul W. Pearson, Attorney at Law. But Bryant could still have pursued a claim in negligence, relying on her testimony concerning her fall and the doctrine of res ipsa loquitor. *See also* Mobil Chemical Co. v. Bell, 517 S.W.2d

For meritorious claimants, there are two chief virtues of pursuing recovery under the Act: it dispenses with the need to prove negligence,[7] and it abolishes the common law defenses of contributory negligence, fellow servant negligence, and assumption of risk, which traditionally defeated claims by injured workers.[8] These advantages were significant to counsel's decision in *Bryant* to pursue a workers' compensation action, even absent prior Texas decisions interpreting the "course and scope of employment"[9] concept under the Act to include injuries sustained after the employee's termination. Since Bryant was unable to produce testimony other than her own to establish negligence on the part of her employer, the jury could have concluded that the fall was the result of pure accident or Bryant's own negligence, rather than the fault of her employer.[10] On the other hand, because the fall itself was undisputed, Bryant could sustain her burden in a workers' compensation action based solely on her own testimony[11] and that of the physician who subsequently examined

245, 251 (Tex. 1974); 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES, PJC 61.01 (1982).

7. The burden of proof in a simple workers' compensation action requires the claimant to establish that (1) she was an "employee" at the time of the accident; (2) that she was "engaged in or about the furtherance of her employer's affairs or business"; and (3) that her injury was of a "kind and character that had to do with and originated in the employer's work, trade, business, or profession." Deatherage v. International Ins. Co., 615 S.W.2d 181, 182 (Tex. 1981).

8. Art. 8306, § 1 (Vernon 1967).

9. *See* 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES, PJC 21.10 (1970) which defines course and scope of employment: "Injury in the course of employment" means any injury having to do with and originating in the work, business, trade, or profession of the employer, received by an employee while engaged in or about the furtherance of the affairs or business of the employer, whether upon the employer's premises or elsewhere.

10. Negligence requires proof of a breach of a legal duty resulting in injury. Thus, the claimant would have had to show the employer's negligence in failing to discover a dangerous condition on the premises, in failing to correct the dangerous condition, or in failing to adequately warn about the dangerous condition. *See* Adam Dante Corp. v. Sharpe, 483 S.W.2d 452, 455 (Tex. 1972). Otherwise, the claimant's contributory negligence in failing to appreciate an obvious danger or keep a proper lookout for dangerous conditions could have resulted in no recovery. Montes v. Lazzara Shipyard, 657 S.W.2d 886, 889 (Tex. App.—Corpus Christi 1983, no writ) (plaintiff's failure to keep proper lookout was cause of injury where he was injured using a defective ladder); Friedan v. Pan Tex Hotel Corp., 652 S.W.2d 365, 366-67 (Tex. App.—San Antonio 1983, no writ) (plaintiff's own negligence constituted 60% of total negligence causing injury).

11. The claimant's testimony alone can be sufficient to establish the fact of injury, not requiring corroborative evidence. In fact, wholly circumstantial evidence may even be sufficient where the claimant is dead or unable to testify. *See* Sullivan, *Unexplained*

her,[12] if the jury were to find that the injury was sustained while acting within the course and scope of her employment.[13]

By electing to seek recovery under the Act, counsel for the plaintiff employee in *Bryant* avoided the difficult factual problems the case would have presented as a negligence cause of action,[14] and instead confronted Texas courts with the novel legal issue of whether an employee who suffers an injury subsequent to his termination comes within the statutory meaning of "course and scope" of employment.

The state of the case law prior to Bryant

The defendant insurance carrier in *Bryant* relied on *Ellison v. Trailite, Inc.*[15] to support its argument that Bryant could not recover under the Act for an injury occurring after the employer had terminated her employment.[16] In *Ellison*, the plaintiff employee was injured by another employee on firm premises in an assault occurring after the plaintiff's termination. The defendant employer sought to establish the Act as the exclusive basis for recovery, in response to the plaintiff's claim for damages based on the doctrine of respondeat superior.[17] The court of appeals rejected the employer's argument and concluded that the employment relationship ceased when the employment was terminated. Furthermore, the Act could not be construed to govern a claim arising out of a dispute which followed termination of employment.[18]

Accidents and Assaults: The Problems and Burdens of Proof Under the Texas Workers Compensation Statute, 16 TEX. TECH L. REV. 875 (1985).

12. Testimony of a medical expert is generally critical for establishing the extent of disability resulting from an injury. *See* Blair v. INA of Texas, 686 S.W.2d 627, 628-29 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.). However, in her deposition, Bryant admitted that her treating physician told her he was unable to diagnose any organic basis for her pain.

13. Deatherage v. International Ins. Co., 615 S.W.2d 181, 182 (Tex. 1981).

14. *See infra* p. 305.

15. 580 S.W.2d 614 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ).

16. The carrier argued two theories: first, that plaintiff was not an "employee" on the date of her injury because she had already been terminated from her employment with the Bakery; and second, that the injury itself did not occur within the course and scope of plaintiff's employment, even assuming she could meet the threshold requirement of establishing that she was an "employee" at the time of the accident. Brief in Support of Defendant's Motion for Summary Judgment at 3-5, *Bryant*, No. 336-83 (Dist. Ct. of Navarro County, 13th Judicial Dist. of Texas).

17. 580 S.W.2d at 615.

18. "We hold that once employment is terminated by resignation or by the em-

Bryant relied on *Texas General Indemnity Co. v. Luce*,[19] a workers' compensation decision, in her appeal from the trial court's grant of the defendant's summary judgment motion. The employee in *Luce* had not been terminated prior to her injury, but had been on vacation. She returned to the employer's premises, at the employer's direction,[20] to pick up her paycheck. While on the employer's premises, she stopped to talk with fellow employees at the cafeteria and was injured.[21]

Neither *Ellison* nor *Luce* were clearly dispositive of Bryant's claim. The plaintiff in *Ellison* had not brought his cause of action under the Act, while the employee in *Luce* had not been terminated prior to returning to her employer's premises to pick up her check. Furthermore, the general rule of *Royalty Indemnity Co. v. Madrigal*,[22] which the Waco Court of Appeals relied on to reverse the trial court's grant of summary judgment in *Bryant*,[23] did not address the issue directly. The *Madrigal* court concluded:

> [A] workman who has ceased his work for the day and is on his way to the office of his employer to obtain his pay, or after obtaining such pay is leaving the premises of his employer and is injured on the premises of his employer, will be held entitled to compensation.[24]

Madrigal, however, did not address the case of a *terminated* employee injured on the employer's premises while picking up a paycheck.

Despite the absence of controlling Texas decisions, Bryant was able to rely on a substantial body of case law from other ju-

---

ployee's being fired, no injury thereafter incurred is received within the course of his employment, for purposes of workmen's compensation law." *Id.*

19. 491 S.W.2d 767 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.).

20. *Id.* at 768.

21. The court rejected the argument that the employee's act in stopping to talk with her co-workers constituted a deviation from the course and scope of employment so as to preclude coverage. Instead, the court concluded:

> The law must be reasonable. Employer here—admittedly for its benefit—required employee to physically draw her pay at the place of business, even during a vacation period. In so requiring, employer and this court must expect employee to exchange greetings with co-workers as she entered or left. We are unable to apply the principle of deviation from employment so rigidly as to ignore the common habits of most people.

Id.

22. 14 S.W.2d 106 (Tex. Civ. App.—Beaumont 1929, no writ).

23. 673 S.W.2d at 696.

24. 14 S.W.2d at 108. The *Luce* court noted that the statement by the *Madrigal* court "has never been challenged (or cited either, for that matter). . . ." 491 S.W.2d at 768.

risdictions.[25] Most of these decisions reflected the general principle that termination of the employment relationship does not foreclose recovery where employees suffer injuries while engaged in activities concluding their employment. In *Parrott v. Industrial Commission of Ohio*,[26] for example, the employee was injured while picking up his paycheck after having been terminated and having missed the regular payday.[27] The court reasoned that payment for work performed was integral to the employment relationship,[28] and thus held that the employee was entitled to benefits for an injury sustained while obtaining his final paycheck.[29] Similarly, in *Solo Cup Co. v. Pate*,[30] the Oklahoma Supreme Court ruled that statutory benefits were available to an employee injured in the process of returning her uniform to the employer and picking up her final paycheck. Bryant's appellate counsel was also able to rely on Professor Larson's general observation concerning the employment relationship:

> The contract of employment is not fully terminated until the employee is paid, and accordingly an employee is in the course

25. *See generally* 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 26.00-26.40 (1984) (and cases cited therein) [hereinafter LARSON].

26. 145 Ohio St. 66, 60 N.E.2d 660 (1945).

27. *Id.* at 66-68, 60 N.E.2d 661.

28. The court observed:

> It is the well-established custom. . .that the employee shall go to the office of the employer for his pay on or after regular payday fixed by the employer. The contract of employment, as to the matter of wages and their payment, is not fully terminated or satisfied until the workman's wages, already earned, are paid. It was not only the right but the duty of plaintiff to go to the coffin company plant and obtain his wages.

Id. at 71, 60 N.E.2d 663.

29. *Id.* (relying on Crane Co. v. Industrial Comm'n, 306 Ill. 56, 137 N.E. 437 (1922)).

30. 528 P.2d 300 (Okla. 1974) (looking to the benefit conferred upon the employer in having the employee return to deliver uniforms and pick up her final paycheck). The Oklahoma court observed that had the injury occurred while the employee was on the premises after termination to pick up personal tools, recovery would have been denied since this act would have only benefited the employee and not the employer (citing Parten v. State Indus. Court of State of Okla., 496 P.2d 114 (Okla. 1972); *accord* Pederson & Voechting v. Industrial Comm'n of Wis., 201 Wis. 599, 231 N.W. 267, 268 (1930); *see also* Johnson v. City of Albia, 203 Iowa 1171, 212 N.W. 419, 422 (1927) (holding that engineer returning to work to pick up tools after terminating employment was not entitled to recovery in absence of showing that it was customary in the trade to do so in completion of the performance of duties). *Cf.* Mitchell v. Consolidated Coal Co., 195 Iowa 415, 192 N.W. 145 (1923) (miner injured while picking up tools in the course of quitting his job was entitled to compensation where evidence showed it was customary for miner to finish certain work prior to removing tools from job site after terminating employment).

of employment while collecting his pay.[31]

Finally, Bryant could rely on decisions of the Arizona and Wisconsin Supreme Courts in *Peter Kiewit Sons Co. v. Industrial Commission*[32] and *Massachusetts Bonding and Insurance Co. v. Industrial Commission*,[33] respectively, in support of her position. In the Arizona case, the employee was assaulted and injured while waiting, at the direction of his foreman, to pick up his paycheck. In the Wisconsin case, a discharged employee was accidentally injured when he returned to the employer's premises to pick up his tools and final paycheck.[34]

The defendant to Bryant's action moved for summary judgment, advancing two theories in support of its motion. Relying on *Ellison*, the carrier argued that Bryant's termination precluded recovery under the Act since her injury occurred subsequent to her termination. In addition, the carrier offered the affidavit of the Bakery's bookkeeper to establish that the policy of the employer was to mail checks to employees upon their request.[35] The bookkeeper stated that to her knowledge no employee of the Bakery had ever advised Bryant that she would be required to return to the premises to personally pick up her final paycheck.[36] In its motion for summary judgment, however, counsel for the carrier expressly asked the trial court to consider Bryant's deposition, which was taken and filed in the trial court prior to the hearing.[37] The order granting summary judgment recited that the trial court had considered the deposition in reaching its deci-

31. LARSON, *supra* note 25, § 26.30.

32. 88 Ariz. 164, 354 P.2d 28 (1960).

33. 8 Wis.2d 606, 99 N.W.2d 809 (1959).

34. The primary issue in the case was, however, whether the employee was intoxicated when he returned to pick up his check and, if so, whether his injury resulted from his intoxication. Under the statute this circumstance would have reduced the claimant's recovery by 15%. *Id.* at 608, 99 N.W.2d at 811.

35. The affidavit stated:

> If Lawana Bryant had requested that her check be mailed to her, I would have done so, as it was the policy of the Collin Street Bakery to allow the employees who had been terminated to pick up the checks personally or have them mailed. To my knowlege, no employee or representative of the Collin Street Bakery ever instructed Lawana Bryant that she was required to pick up her final paycheck in person.

673 S.W.2d at 694 (court of appeals opinion).

36. *Id.*

37. Defendant's Motion for Summary Judgment at 1, *Bryant*, No. 336-83 (Dist. Ct. of Navarro County, 13th Judicial Dist. of Texas).

sion.[38] The court of appeals seized upon the trial court's reliance on Bryant's deposition to conclude that her testimony directly refuted the bookkeeper's affidavit.[39] The court then quoted directly from portions of Bryant's deposition to support its conclusion that the bookkeeper's affidavit failed to establish that Bryant had been told that her check would be mailed to her.[40]

The relevant portions of Bryant's testimony demonstrate the problems posed by the use of the deposition as a discovery tool[41] when portions of it are later extracted for substantive use:[42]

Q: (by INA's trial counsel) Nobody at the bakery ever told you that you had to come back and pick up your check, did they?

A: They said we had to come back in two weeks.

Q: But they told you you could get your check in two weeks, isn't that right?

A: Uh-huh.

Q: But they didn't tell you you had to come back to get it, did they?

A: They said we had to come and get them, to get the checks.

Q: Do you remember if someone told you specifically that they could send it to you?

A: They didn't say that.

Q: Do you remember—

A: Uh-huh, to come get them.

Q: Do you remember who told you that?

A: Huh-uh.

Q: You didn't talk to—

A: I didn't talk to them. My husband did, so, I don't know.

Q: So nobody told you that you had to go back to the bakery to get your check, right?

38. *See* 673 S.W.2d at 694, where the court of appeals expressly noted the language of the order in rejecting INA's contention "that the deposition is not properly a part of the summary judgment evidence."

39. 673 S.W.2d at 694.

40. *Id.*

41. For an early analysis of the perceived limitations on the use of the deposition as a discovery tool posed by the court of appeals opinion in *Bryant*, *see* Note, *Bryant v. INA of Texas: A New Splinter from an Old Log*, 37 BAYLOR L. REV. 277, 287-88 (1985).

42. TEX. R. CIV. P. 207 provides for use of deposition testimony as substantive testimonial evidence at trial. *See also* TEX. R. EVID. 801(e)(1)(a) and 804(b)(1) (governing exclusion of deposition testimony from general rules against admission of hearsay).

A: That's right. Just my husband.

Q: So, if you understood that, it was only because of what someone told your husband.

A: Uh-huh. He was the foreman or whatever he was, you know. He was the foreman—I guess that's what he was.[43]

The court noted that much of Bryant's testimony would have been subject to objection as hearsay,[44] but that no objections had been made.[45] Relying on the newly adopted evidence code,[46] the court concluded that the hearsay was probative in the absence of a timely objection.[47] Bryant's testimony that she relied on the instructions of the bakery foreman in returning to pick up her final paycheck was deemed sufficient to raise a fact issue regarding the course and scope question, thus requiring reversal of the grant of summary judgment.[48]

The court held that when an employer instructs a terminated employee to return to the premises to pick up his final paycheck, the employee's compliance with this instruction is within the course and scope of her employment.[49] The court thus concluded that the deposition testimony raised an issue of fact regarding the employee's understanding of her employer's instruction—which could not be disregarded in deciding the

---

43. 673 S.W.2d at 694-95 (quoting from deposition of claimant).

44. *Id.* at 695. Arguably, of course, many of the statements made by Bryant which might have been subject to objection on hearsay grounds would have been admissible as admission made by a party opponent under TEX. R. EVID. 801(e)(2), which provides that a statement is not hearsay if:

> (2) The statement is offered against a party and is. . .(D) a statement made by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship. . . . Thus, Bryant's recollection of statements made by her foreman, or even by her husband, who was also an employee, relating to her employer's instructions, would not have been hearsay under the new evidence code.

45. *Id.* At the time of taking the deposition both counsel reserved substantive objections for trial, pursuant to TEX. R. CIV. P. 204(4) as amended, effective April 1, 1984.

46. TEX. R. EVID. 802 which provides, in pertinent part: "Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay."

47. The court stated:

> Since the deposition was considered by the court and no objection was filed to the hearsay contained in it, we consider as probative appellant's testimony that she relied on the instruction of a bakery foreman in returning to the bakery some fifteen days after she was discharged to pick up her final paycheck.

673 S.W.2d at 695.

48. "[T]he summary judgment evidence conflicted as to whether appellant was instructed to return to the bakery to pick up her last paycheck." *Id.*

49. *Id.*

summary judgment motion.[50]

In its Motion for Rehearing and Application for Writ of Error, the carrier complained of the court's reliance on hearsay to reverse the order for summary judgment.[51] The Texas Supreme Court did not address the issue directly; instead, it found that portions of Bryant's deposition testimony, other than testimony which arguably could have been excluded as hearsay at the trial,[52] independently demonstrated a fact issue.

The supreme court's disposition leaves open a significant issue for summary judgment practice: whether hearsay developed through discovery prior to the hearing can raise an unresolved fact issue requiring denial of a motion for summary judgment.

---

50. *Id.* at 696 (relying on City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979), which held summary judgment proper only if movant establishes that no material fact issue exists in the case and that he is entitled to summary judgment as a matter of law).

51. Appellee's Motion for Rehearing, Bryant v. INA of Tex., 673 S.W.2d 693 (Tex. App.—Waco 1984)(No. 10-84-019CV) (Points of Error 1, 2, and 3). In Point of Error 2, INA objected that Bryant's deposition testimony was not based on "personal knowledge" as required by TEX. R. CIV. P. 166-A(e). However, the rule speaks to *affidavits* offered in support of opposing summary judgment, rather than *deposition* testimony with regard to the "personal knowledge" requirement. The distinction is critical since affidavits cannot, by their nature, be tested by cross-examination conducted with the witness under oath.

Point of Error 3 objected to the court's reliance on hearsay in the Bryant deposition not because it was hearsay, but because the testimony "was never raised at the trial court level and, therefore, objections to same would not have been proper." Appellee's Motion for Rehearing at 10, *Bryant*, No. 336-83 (Dist. Ct. of Navarro County, 13th Judicial Dist. of Texas). The trial court's order granting summary judgment recited, however, that "the deposition on file" was considered by the court. Order, *Bryant, id.* Both counsel approved this Order as to form.

In INA's conclusion in Petitioner's Application for Writ of Error, the carrier argued both that Bryant could not recover as a matter of compensation for an injury sustained following her termination and that the court of appeals erred in relying on her deposition testimony in finding an unresolved fact issue. Petitioner's Application for Writ of Error at 21-22, *Bryant*, 686 S.W.2d 614 (Tex. 1985)(No. C-3430). With regard to the latter, INA vigorously asserted:

> The only summary judgment evidence the court of appeals relies on to find an issue of fact is deposition testimony of the Plaintiff which was never cited or relied upon by the Plaintiff at the trial court level. Not only was this evidence not raised and properly presented to the trial court to preserve the right to rely upon same at the appellate level, but same is inadmissible evidence and, therefore, is not proper to create an issue of fact. Moreover, it would be ludicrous and violative of due process, and all that is fair and just to require a movant for summary judgment to object to all evidence which could be raised by a Respondent on the basis of its inadmissibility, when same has not even be (sic) cited or relied upon by the Respondent.

Id.

52. *Id.* at 615.

Clearly, the change in the rules of evidence[53] is sufficient to suggest that trial counsel must guard against affirmatively relying[54] on a deposition where disputed facts may be inferred from hearsay statements contained in the testimony. As a discovery tool, of course, the deposition may prove far less valuable if counsel is forced to avoid probing the mind of the witness to establish just such a basis for belief or action as the claimant provided in *Bryant*.[55]

In order to avoid complication of the summary judgment process with statements arguably subject to exclusion at trial, counsel for the movant should preserve an objection in the motion for summary judgment, or otherwise advise the trial court of the existence of the objectionable testimony or evidence in the record. In *Bryant*, trial counsel not only failed to voice any objection to consideration of hearsay statements contained in the deposition,[56] but expressly requested the court to consider the deposition in ruling on the summary judgment motion.[57] Defense counsel also could have avoided the problem posed by the deposition testimony simply by waiting to schedule examination of the claimant until after the summary judgment motion had been granted or denied: defense counsel already had available through the client the evidence that the employee had been terminated prior to her injury and, thus, did not need to rely on the claimant's deposition in the summary judgment motion. Since

53. The adoption of the new evidence code, and specifically, Rule 802, has substantively altered Texas' view on the probative value which may be accorded to unobjected hearsay. *See* Note, *supra* note 41, at 279-82, and notes accompanying text for a discussion of the pre-Rule 802 rule that hearsay evidence was without probative value.

54. Clearly, Rule 166-A contemplates that deposition testimony may be relied on in support or in opposition to the motion for summary judgment.

55. Counsel agreed prior to taking the deposition "that any and all objections to any question or answer herein may be made upon the offering of this deposition in evidence upon the trial of this cause with the same force and effect as though the witness were present in person and testifying from the witness stand." Deposition of Lawana Bryant at 4, *Bryant*, No. 336-83 (Dist. Ct. of Navarro County, 13th Judicial Dist. of Texas). *See* TEX. R. CIV. P. 204(4). One problem posed by *Bryant* is that even though the supreme court did not rely on the "hearsay statements" contained in the Bryant deposition, it did expressly rely on other evidence in the deposition to support its favorable holding for the claimant; thus, it is not the hearsay question which plagues the insurer in *Bryant*, but rather the existence of the deposition at all. 686 S.W.2d at 615.

56. The court of appeals noted: "Since the deposition was considered by the court and no objection was *filed* to the hearsay contained in it. . . ." 673 S.W.2d at 695.

57. INA's Motion for Summary Judgment at 1, *Bryant*, No. 336-83 (Dist. Ct. of Navarro County, 13th Judicial Dist. of Texas).

Rule 206[58] mandates filing of the deposition by the officer after it is prepared, counsel could not in good faith have requested a delay in filing to avoid having made the record available to the trial court. However, had the deposition simply been deferred until after resolution of the motion, the evidence relied on by the appellate courts in *Bryant* would not have been available to support the decisions holding the grant of summary judgment improper. Of course, INA might still have suffered reversal because of the equivocal nature of the bookkeeper's affidavit regarding whether it was the employer or employee who elected to have the final paycheck mailed.[59] In any event, the existence of Bryant's testimony served to sharply question the effect which could be accorded to the bookkeeper's statement regarding the employer's practice of mailing checks to terminated employees.[60]

Had INA's reliance on *Ellison*[61] proved to be correct, the question of the employer's instruction, or lack thereof should have been immaterial to the disposition of the case. However, as the opinions of the court of appeals[62] and of the majority[63] and dissenting judges[64] of the supreme court show, the issue became critical to the disposition of the case since both courts declined to apply either an absolute rule of coverage or an absolute rule precluding coverage. Ultimately, decision of the case turned on the evidence available to assess whether or not the employee reasonably believed she had to return to the employer's premises to pick up her final check.[65]

58. TEX. R. CIV. P. 206(1) provides the officer taking the deposition "shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing" after it is prepared and certified.

59. The Texas Supreme Court majority opinion noted "the failure of INA to establish that Bryant was informed of her choice as to the method of payment. . . ." 686 S.W.2d at 615.

60. *Id.* *See supra* note 35 for relevant text of the bookkeeper's affidavit.

61. Brief in Support of Defendant's Motion for Summary Judgment, *Bryant*, No. 336-83 (Dist. Ct. of Navarro County, 13th Judicial Dist. of Texas).

62. 673 S.W.2d at 696.

63. 686 S.W.2d at 615. The majority opinion authored by Justice Gonzalez neither cited nor discussed the holding in *Ellison*.

64. 686 S.W.2d at 615-16. Justice Spears did not cite or discuss *Ellison*.

65. The majority of the supreme court held:

> Bryant states that her husband had worked in the past at the bakery and that he had *always* returned to the plant to pick up his pay. This fact coupled with the failure of INA to establish that Bryant was informed of her choice as to the method of payment, raises a material issue of fact as to whether the practice of the bakery required Bryant to return in order to receive her final paycheck.

The decisions of the appellate courts

The appellate courts could have applied one of four rules available in suits to recover injuries sustained by an employee after termination of the employment relationship.

1. The courts could have applied a rule of absolute non-coverage for an injury sustained after the employee's termination.[66] Such a rule probably would have required an exception for injuries sustained during the employee's immediate exit from the employer's premises, or sustained during the remainder of any workday or period of actual employment.[67] Otherwise, this approach would have required that any claim for an injury subsequently sustained on the premises or in conjunction with the prior duties of employment be based on negligence or some other tort theory. This approach most closely resembles the reasoning of *Ellison* and the argument advanced by INA in the court of appeals.[68]

2. Recovery could have been authorized upon an affirmative showing by the employee that the injury was a consequence of

686 S.W.2d at 615 (emphasis in original).

66. Pederson & Voechting v. Industrial Comm'n of Wis., 201 Wis. 599, 604, 231 N.W. 267, 269 (1930) (holding injury sustained by employee returning to premises to remove work clothes and tools not compensable). *Cf.* Massachusetts Bonding and Ins. Co. v. Industrial Comm'n, 8 Wis.2d 606, 99 N.W.2d 809 (1959), in which the Wisconsin court held a similar injury compensable without expressly overruling or modifying *Pederson*. Worth noting is the fact that the discharged employee in *Pederson* had already received his final paycheck and was only involved in getting personal items when the injury occurred, whereas in *Massachusetts Bonding* the employee was injured while returning for his tools and final paycheck.

67. *See, e.g.*, Mitchell v. Consolidated Coal Co., 528 P.2d 300 (Okla. 1974) (miner injured while picking up his tools while in the course of quitting his job suffered compensable injury since custom of trade required employee to complete day's work after being terminated).

68. 673 S.W.2d at 695-96. In Appellee's Motion for Rehearing to the court of appeals, *Bryant*, 673 S.W.2d 693 (Tex. App.—Waco 1984) (No. 10-84-019CV), appellee relied on Lesco Transp. Co. v. Campbell, 500 S.W.2d 238 (Tex. Civ. App.—Texarkana 1973, no writ) in addition to *Ellison*. In *Lesco*, however, recovery was denied not because the employee had been terminated prior to sustaining injury, but because he had deviated from the duties of his employment when he was hurt. *Lesco* stands generally for the proposition that an employee is not covered for every conceivable injury which may occur while he is employed, even if it occurs while he is engaged in work activities on his employer's premises. The injury must originate in the actual duties of the worker's employment. In *Lesco*, the court rejected the argument that the employee's activity was so logically related to his work that the resulting injury was necessarily covered. Instead, the court essentially held that he undertook to assume maintenance duties which did not further his employer's interests.

the employer's direct instructions to return to the premises.[69] This rule would have permitted employers virtually to escape any liability under the Act simply by directing all terminated employees not to return for their final paychecks in person, but to wait to receive them in the mail. Such a rule would place a heavy burden on a terminated employee so advised to prove that he had a reasonable basis for believing that he should attempt to obtain the final paycheck in person.[70] Interestingly, this approach is reflected in the opinion rendered by the court of appeals[71] and in the dissenting opinion by Justice Spears,[72] joined by Justice Campbell. The court of appeals concluded:

> . . . the summary judgment evidence conflicted as to whether appellant was instructed to return to the bakery to pick up her last paycheck. This conflict becomes material if the instruction to return has the effect of putting an employee in the course and scope of his employment when he returns upon that instruction to pick up his paycheck and he is injured while on the employer's premises while so engaged. We believe that the instruction does have such effect, and that appellant would have been in the course and scope of her employment at the time of her injury if she received the instruction and was acting under it.[73]

---

69. When the employer affirmatively directs the employee to take the action which results in the employee ultimately locating himself at the place where the injury occurs, for instance, recovery would logically follow. *E.g.*, Crane Co. v. Industrial Comm'n, 306 Ill. 56, 137 N.E. 437 (1922) (employee injured by fall on ice when returning to employer's premises to pick up his paycheck at the employer's direction entitled to recover); Hackley-Phelps-Bonnell Co. v. Industrial Comm'n, 165 Wis. 586, 162 N.W. 921 (1917) (logger instructed to ride to office in distant village by company logging train to get pay entitled to compensation for injury sustained while riding on train).

70. 686 S.W.2d at 615. If the employer directs the employee that the final paycheck will be mailed and that the employee should not return for it in person, then the employee could not reasonably believe she should return to the premises for it. Similarly, the directive would expressly negate reliance on "plant practice" to justify a return to the workplace or business office of the former employer. *See also* Rodriguez v. Sunnyside Garden Kennels, 27 A.D.2d 967, 279 N.Y.S.2d 407 (1967). There the employer expressly directed the employee to meet him at a specific public location to discuss the overtime pay due to the employee. The claimant was struck by an automobile while at the designated street corner. The employer's specific directive was sufficient to link the accident to the employment to justify compensation. In this same vein, an injury suffered while the claimant travels at the direction of the employer is compensable under Texas law. *E.g.*, Freeman v. Texas Compensation Co., 603 S.W.2d 186 (Tex. 1980).

71. 673 S.W.2d at 696 ("[W]hether appellant was *instructed* by her employer to return to the bakery to collect her final pay is a disputed material issue." (emphasis in original)).

72. 686 S.W.2d at 615-16 (Spears, J., dissenting).

73. 673 S.W.2d at 695.

The court of appeals relied on the hearsay testimony concerning statements made either to Bryant[74] or her husband[75] by their foreman[76] to explain Bryant's having returned to pick up her paycheck, and concluded that Bryant had met her burden of raising an issue of fact sufficient to defeat summary judgment for the carrier.[77] In his dissent, Justice Spears indicated he would have applied the same rule to affirm the trial court: an employee, to be covered under the Act, must be instructed to return to the employer's premises to receive his pay, but he will not be covered if he decides to pick up his paycheck based on hearsay or rumor. Furthermore, if the employee does not request that her paycheck be mailed to her, then it is for her convenience that she decides to return to get it.[78] The dissenters did not find that Bryant met her burden under this formulation,[79] even in light of the deposition testimony relied on by the court of appeals.[80]

3. The third alternative, and that adopted by the majority of the supreme court,[81] permits recovery either upon a showing that the employer has instructed the terminated employee to return

74. *Id.* The court's apparent characterization of statements made by the employer to Bryant as hearsay was incorrect. These statements are not "hearsay" in light of TEX. R. EVID. 801(e)(2)(C) or (D).

75. *Id.* Had the statements made to Bryant's husband not been excluded as hearsay based on application of Rule 801(e)(2)(C) or (D), Mr. Bryant's perception based on his relation of the employer's statement to Mrs. Bryant would also have been admissible to explain her state of mind in deciding to return to the premises to collect her final pay. *See* Walters v. American State Ins. Co., 654 S.W.2d 423, 428 (Tex. 1983); Great American Indem. Co. v. Elledge, 159 Tex. 288, 289, 320 S.W.2d 328, 329 (1959).

76. The claimant's foreman on the job would clearly appear to be an "agent or servant" whose statement regarding the means of collecting a final paycheck would constitute a statement "concerning a matter within the scope of his [foreman's] agency or employment, made during the existence of the relationship." TEX. R. EVID. 801(e)(2)(D).

77. 673 S.W.2d at 696.

78. 686 S.W.2d at 615-16. Justice Spears also preferred to characterize the relationship between the terminated employee and employer still owing wages as one of debtor-creditor. This approach was noted in the concurrence of Judge Zimmerman in Parrott v. Industrial Comm'n, 145 Ohio St. at 73, 60 N.E.2d at 663, who also concluded: "Although on October 29, 1942, plaintiff's employment was at an end in the sense that he had ceased to work under a contract for hire, it had not actually terminated until the employer had met its contractual obligation of paying plaintiff his wages."

79. 686 S.W.2d at 615-16.

80. *Id.* The dissent rejected, moreover, the deposition testimony relied on by the majority, which reflected that Bryant's decision was based on her husband's prior experience.

81. 686 S.W.2d at 614-15.

to work to pick up a final paycheck,[82] or upon the employee's reasonably held belief that it is necessary to do so in order to receive final payment for work performed.[83] As Justice Gonzalez wrote for the majority:

> We hold that when an employee is directed or reasonably believes from the circumstances she is required by the employer to return to the place of her employment to pick up her pay after termination and an otherwise compensable injury occurs, then such injury is reasonably incident to her employment and is incurred in the furtherance of the employer's affairs.[84]

Thus, an employee may recover under the Act upon this showing of reasonable belief, even if the employer's testimony suggests that the policy of the firm is to mail a final check.[85] This rule appears to avoid the problem of summary judgment or directed verdict, based solely on the testimony of the employer or his representative, where the employee's affidavit or testimony shows his reason for having a contrary perception of his need to return to the employer's place of business.[86]

4. A final alternative which could have been adopted by the appellate courts would have permitted recovery under the Act for *any* injury sustained by a terminated employee returning to the workplace or employer's premises after termination. This approach, arguably most favorable to the employee, might have proved unfair in any number of instances, because it would permit an employer to use the Act defensively to avoid a potentially greater recovery from a negligence action.[87] For example, in the

82. *Id.* at 615.

83. *Id.* Reliance on the employee's reasonably held belief is illustrated by the decision in Seventh St. Rd. Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976). There, a laborer new to the job was injured upon his return to the workplace on a Wednesday when, apparently unknown to him, his pay was not due until Saturday. Relying on the principle that the employment relationship does not terminate until the employee is paid, the court held that the injury arose within the course of employment. *Id.* at 470-71.

84. 686 S.W.2d at 615.

85. In *Bryant*, the ambiguity regarding the employer's policy of mailing final checks, as evidenced by the bookkeeper's affidavit, opened the door to plaintiff's reliance on her "reasonably held belief" that she had to return to the bakery to collect her pay. *Id.*

86. The reasonableness of the employee's perception in such a case would likely constitute a fact issue to be resolved by the trier of fact, roughly analogous to the issue of good cause for failure to give notice of injury within the six month period imposed by art. 8307, § 4a. *See* 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 24.02 and comment (1970).

87. Recovery under the Act is limited to statutory amounts for general and specific amounts based on either total or partial incapacity suffered as a result of the injury.

Ellison case application of the Act to the injury sustained could have limited or precluded recovery since the injury sustained as a result of the assault might not have caused any period of disability.[88] While the employee's negligence or intentional tort actions against the employer and fellow employees, respectively, could have resulted in substantial awards for minimal injuries, given the circumstances of the assault,[89] recovery under the Act would have been negligible in the absence of serious injury.[90] Moreover, adoption of this rule would have led to continuing liability of the employer for an indefinite period following termination of the employee.[91] On the other hand, in those cases in which the injury claimed is suspect, or is a product of fraud on the part of a disgruntled employee,[92] the employer's opportunity to defend against the claim would be compromised by his inability to rely on common law defenses[93] or to require the employee to prove the negligence or the intentional act producing the injury.[94]

TEX. REV. CIV. STAT. ANN., art. 8306, §§ 10, 11, 11a, and 12 (Vernon 1967). The maximum recovery available to a totally and permanently disabled employee is calculated as the average weekly wage at the time of injury multiplied by 401 weeks. *Id.* § 10(b). The average weekly wage is determined by reference to § 29.

88. In order to recover under the Act the employee must prove that he has suffered some period of incapacity resulting from the work-related injury sustained. Abeyta v. Travelers Ins. Co., 566 S.W.2d 708, 709-10 (Tex. Civ. App.—Amarillo 1978, writ dism'd).

89. Punitive damages, for example, cannot be recovered under the Act unless an employer's gross negligence contributes to the cause of the employee's death. TEX. REV. CIV. STAT., art. 8306 § 5 (Vernon 1967); *see also* Burk Royalty Co. v. Walls, 616 S.W.2d 911 (Tex. 1981).

90. Absent a period of incapacity attributable to the assault, plaintiff Ellison would have been deprived of any recovery under the Act. *See supra* note 88.

91. 686 S.W.2d at 616; *see also* Waters v. Industrial Comm'n, 349 Ill. 214, 214-15, 181 N.E. 828 (1932) (denying compensation for injury sustained by terminated employee returning to collect final pay on March 5th following termination on December 31st); Olson v. Hurlbert-Sherman Hotel, 210 A.D. 537, 207 N.Y.S. 427, 428 (1924) (recongnizing need to limit extended period of employment relationship following termination for purposes of employee collecting final pay).

92. The Act does recognize the right of either the claimant or carrier to seek to set aside an award or settlement obtained by fraud, although this power is also construed as a general grant of authority from the constitution and statutes governing the jurisdiction of state courts. Luersen v. Transamerica Ins. Co., 550 S.W.2d 171, 173 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

93. TEX. REV. CIV. STAT. ANN. art. 8306, § 1 (Vernon 1967). For instance, the employer could not raise contributory negligence or assumption of risk as defenses. This section does permit the employer to defend on the ground that the employee intentionally caused the injury himself. *See also Id.* art. 8309, § 1 (definition of "injury" excludes injury intentionally self-inflicted or caused by employee intentionally).

94. Section 1(a) of the Act provides that an injured employee is required to prove

Application of the rule in future cases

The *Bryant* rule gives direction to trial counsel in selecting the appropriate theory for recovery in similar cases. The employee's perception that it is necessary to return to the employer's premises to pick up a final paycheck, or to perform some other duty necessary to the appropriate conclusion of the employment relationship, will be sufficient to recover under the Act.[95] In the absence of a reasonable basis for this perception,[96] or in light of a directive from the employer negating the reasonableness of the inference,[97] the injured employee will have to bring a negligence action with its attendant greater burden of proof.

The approach advocated by the dissent[98] would permit employers to virtually dictate the course of the litigation by firm policy,[99] and would increase the possibility of fraud by affording the employer the opportunity to testify, after the fact, that the employee had been notified that a paycheck would be mailed, even when no such notification had been given.[100] Furthermore, even without notification, recovery would be barred if the employee could testify only that he assumed he should return for his final check.[101] The dissenters' approach effectively would place a burden on the employee to request that the final check be mailed, rather than require that the employer affirmatively direct that this procedure be followed.[102] If the employee never receives the paycheck, the dissent's position apparently would not recognize recovery under the Act for an injury sustained while attempting

---

negligence only if the employer is not a subscriber to worker's compensation insurance coverage. *See* Holiday Hills Retirement and Nursing Center, Inc. v. Yeldell, 686 S.W.2d 770, 771 (Tex. App.—Ft. Worth 1985) *rev'd on other grounds*, 701 S.W.2d 243 (Tex. 1985).

95. 686 S.W.2d at 615.

96. *Id.*

97. *Id.*

98. 686 S.W.2d at 615 (Spears, J., dissenting).

99. "[I]n order for a terminated employee to be covered, that employee must have been instructed to return to the employer's premises in order to receive her pay." *Id.*

100. The employer's testimony, if in conflict with that of the employee, would still raise a fact issue as to the notification. This approach would not, consequently, facilitate disposition of claims or summary judgment.

101. This suggests an issue raised by Justice Kilgarlin at oral argument in *Bryant*: At what point in time would the claimant have been justified in returning to the business to inquire about the fact that she had not received her final paycheck through the mail?

102. It seems odd that an employee would ever be placed in the position of *initiating* the procedure, as opposed to selecting from among options offered by the employer.

to obtain the paycheck in person. This approach simply fails to recognize the employer's duty to make certain that the terminated employee is fully compensated for all work done.

The bookkeeper's affidavit in *Bryant*[103] did not affirmatively show that the claimant was ever instructed to return to the employer's premises to pick up her check.[104] Bryant herself did not testify that she requested the check be mailed to her.[105] Applying the rule advocated by the dissent, she would not have been entitled to recover under the Act for the injury sustained in picking up her check, since the dissenters expressly rejected her reliance on the hearsay.[106] By contrast, the majority looked at Bryant's actions in light of the ambiguity implicit in the situation[107] and found a fact issue regarding the reasonableness of her belief that she had to return to the bakery to pick up her final paycheck. Consequently, the reasonableness of her belief and her credibility are properly reserved for the jury.[108]

Bryant clearly suggests that employers can minimize their potential liability for injuries sustained by terminated employees by notifying them that final checks are routinely mailed, and by requiring designation of a mailing address at the time of termination.[109] The dissent's criticism that the majority's holding fails to appropriately limit the duration of coverage after termination[110] has been recognized by other courts,[111] which have held that coverage will nevertheless continue, but only for a reasonable period of time.[112] Thus, an employer's actual mailing of the final

103. 673 S.W.2d at 694 (court of appeals opinion).

104. *Id.*

105. 673 S.W.2d at 694-95 (court of appeals opinion).

106. 686 S.W.2d at 616.

107. *Id.* at 615.

108. *Supra* note 71.

109. This conclusion is reached by applying the converse of the majority's statement: "If plant practice required Bryant to return to pick up her pay, then her injury would have occurred in the course and scope of employment." 686 S.W.2d at 615.

110. The dissent stated:

> At some point when a former employee has not received her pay, the employee-employer relationship is transformed into a debtor-creditor relationship. . . otherwise, a terminated employee who is not required to return, but fails to leave a forwarding address so the check can be mailed, would return for her paycheck six months later, fall, and be covered by worker's compensation.

686 S.W.2d at 616.

111. *Supra* note 91 and cases cited therein.

112. *Id. See* LARSON, *supra* note 25, § 26.30: "It must be conceded that there is something to this argument. For an employee who came back for his pay two or three months

paycheck appears to serve as a final act resulting in a termination of coverage under the Act regardless of the employee's good faith in returning the premises thereafter.[113]

Litigating "course and scope" questions

Course and scope of employment questions present trial counsel with an excellent opportunity to engage in creative lawyering and to shape the development of the law. Most jury trials in workers' compensation cases focus on two types of issues: 1) whether an injury was sustained by an employee while in the furtherance of their employer's interests;[114] and 2) the extent or duration of disability resulting from the injury.[115] The latter issue constitutes a factual inquiry typically resolved by jury[116] verdict, while course and scope issues may simply involve matters of law which arise in the context of summary judgment or directed verdict practice.[117]

While course and scope issues are essentially legal issues, it is important that trial counsel present a sufficient factual record. This assures the court's awareness that an issue would be raised by the evidence, in the event the court is inclined to apply the construction favored by the employee-claimant. Otherwise, both the trial and appellate courts may hold that no fact issue has been raised, regardless of the rule applied. Counsel cannot simply rely on a hypothetical set of facts to sustain the employee's claim

later would hardly be said to assume the employment relationship once more for the brief journey to the pay office."

113. Of course, if the check was never mailed, the employee might still be justified in returning to the business to seek an explanation for the employer's apparent failure to make the final payment of wages.

114. *See* Sullivan, *supra* note 11.

115. *E.g.*, Southern Farm Bureau Casualty Ins. Co. v. Aguirre, 690 S.W.2d 672, 676-77 (Tex. App.—Waco 1985, writ ref'd n.r.e.) (extension of specific hand injury to general injury to the body); Texas Employers Ins. Ass'n v. Rivera, 690 S.W.2d 632 (Tex. App.—Austin 1985, writ granted) (holding that employee may not recover for the combined effect of general and specific injuries); Sonnier v. Texas Employers Ins. Ass'n, 417 S.W.2d 433, 435 (Tex. Civ. App.—Houston 1967, no writ) (extent and duration of disability are jury questions).

116. De los Angelos Garay v. Texas Employers Ins. Ass'n, 700 S.W.2d 657, 659 (Tex. App.—Corpus Christi 1985, no writ).

117. Vernon v. City of Dallas, 638 S.W.2d 5 (Tex. App.—Dallas 1982, writ ref'd n.r.e.) (summary judgment on course and scope of employment proper where no material fact issue is in dispute); Lindley v. Transamerica Ins. Co., 437 S.W.2d 371 (Tex. Civ. App.—Fort Worth 1969, no writ) (disputed issue as to material fact precluded summary judgment on course and scope of employment).

since, technically, the record will not support reversal of an incorrect decision at trial in the absence of a disputed fact issue.[118] In *Bryant* the court of appeals observed, for example, that the controverting affidavits filed by plaintiff's counsel in response to the summary judgment were not timely.[119] Because the order granting summary judgment did not expressly demonstrate that the trial court granted leave for their late filing[120] and that they were considered, the affidavits were of no utility on appeal in arguing that an issue of fact had been raised.[121] Fortunately for Bryant, her deposition provided the needed factual basis for her claim.

Since a substantial body of case law exists on course and scope issues, it is likely that most individual claims fit fairly closely within the parameters of favorable decisions. Where controlling decisions may be distinguished factually, however, the precise wording of the employee's affidavit, his testimony on deposition, or any other evidence, may prove critical to surviving a summary judgment motion. However, in the absence of controlling case law, *Bryant* suggests that reliance on decisions from other jurisdictions may prove significant in affording the appellate courts some basis for decision.[122] These decisions, even if factually dissimilar,[123] may nevertheless reflect general trends in the evolution of the law which support favorable disposition for the plaintiff employee.

Finally, counsel should recognize the tendency for issues and

118. *See* Deatherage v. International Ins. Co., 615 S.W.2d 181 (Tex. 1981), where the court held the evidence insufficient to support a finding that the employee's death was work-related, even though in similar circumstances the law recognizes a presumption in favor of the employee injured in a caretaker job when evidence as to the exact origin of the cause of injury is unavailable; Sullivan, *supra* note 11.

119. 673 S.W.2d at 694 (relying on Lee v. McCormick, 647 S.W.2d 735, 736 (Tex. App.—Beaumont 1983, no writ) (untimely response to summary judgment motion not considered by appellate court unless the trial court granted leave for late filing or considered same in ruling on the motion)).

120. 673 S.W.2d at 694. The supreme court also noted the late filing, holding that it had to "presume that the trial court did not consider it in rendering a take nothing judgment in favor of INA." 686 S.W.2d at 615.

121. 673 S.W.2d at 694.

122. The supreme court majority cited the Minnesota decision in Johnson v. Toro Co., 331 N.W.2d 243 (Minn. 1983) and the Oklahoma decision in Solo Cup Co. v. Pate, 528 P.2d 300 (Okla. 1974). 686 S.W.2d at 615.

123. *Johnson* and *Solo Cup* were distinguished by Justice Spears in his dissent, 686 S.W.2d at 616, but apparently insufficiently so to persuade the majority.

emphasis to shift during the course of litigation. The *Bryant* case illustrates how a relatively simple case can generate novel issues in both substantive and procedural law: although counsel may present what is essentially a legal argument to the trial court in moving for summary judgment, the ultimate disposition of the case may be decided on the basis of factual issues raised by deposition testimony. While *Bryant* resulted in a definitive and workable rule on the course and scope of employment issue, of greater significance for the conduct of litigation is the problem of hearsay as summary judgment evidence. Clearly the court of appeals' opinion in *Bryant* points to this problem as an area of potential concern for future litigants and indicates the need for trial counsel to protect the client's interest in similar situations.