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Lawyers in Westlake case face supreme assignment

By Miles Moffeit
Star-Telegram Staff Writer

Barely three minutes into her argument before the Texas Supreme Court, the attorney for Mobil Oil Corp. was hit by a volley of questions from the justices, one furiously tapping a pencil.

Why, they demanded, should they overturn lower-court rulings ordering Mobil to pay $2.4 million in the death of a worker exposed to the chemical benzene?

"How did the court of appeals err?"

"In what way did they not meaningfully apply the law?"

"Aren't we bound to go with the jury?"

Mobil's attorney, Laura Gallagher, swallowed deeply but responded calmly, describing Mobil's safety efforts in the 20 minutes she was allowed to boil down five years of litigation. The red light bulb on the lectern quickly signaled that her time had expired. Moments later, rival attorney Stephen Susman launched into his remarks, decrying benzene as an "insidious poison."

Mobil Oil Corp. vs. The Estate of Eli Arnold Ellender was vintage theater at the Texas Supreme Court, where the state's most profound issues and its most powerful attorneys and big money interests often take center stage. Headed for this stage is Scott Bradley vs. The State of Texas, a case loaded with constitutional issues that will help determine the future of a town.

It's a high-stakes arena that spurs legal teams into overdrive as they try to cover every possible angle -- from researching issues to enlisting appellate gurus to contributing to justices' election campaigns.

"It's an intense atmosphere and you can get bushwhacked if you're not careful," said Walt Borges, a spokesman for Texas Citizen Action, a nonprofit agency that monitors the legal system.

This high court, legal experts say, is the logical destination for Scott Bradley vs. The State of Texas, a battle with spinoff effects for myriad legal matters that are winding through the courts.

Simply put, the case is a dispute about whether Bradley was legally removed from office by four Westlake aldermen who appointed Dale White in his place and then dismantled the town in May 1997. In August, state District Judge Bob McGrath ruled that Bradley's "trial" was unconstitutional. That decision was overturned in November by the 2nd Court of Appeals, prompting Bradley to go to the Supreme Court.

But the case, which has attracted national interest, could decide the constitutionality of removing local officials under a nearly century-old Texas statute. It could also ultimately resolve whether Westlake's dismantling was legal and how developer Ross Perot Jr.'s prized 2,500-acre Circle T Ranch will be developed.

"I think this will be a very broadly watched case before the Supreme Court," said veteran appellate attorney John Chalk of Fort Worth. "The issues are straightforward. You'll have a lot of municipal lawyers looking at this, then all these private lawyers who do municipal law.

"And you'll have those who deal with real estate development -- that's also really driving this case."

The case is likely to get even more interest because of the hearing's landmark setting. The Supreme Court announced last week that it will convene Sept. 28 at Baylor University in Waco, marking the first time in the court's 157-year history that it will meet outside Austin.

The case of Westlake's dueling mayors has become a clash of law firm titans as it heads into the September hearing.

Representing White is Kelly, Hart & Hallman, a Fort Worth-based powerhouse renowned at every court level. The firm's founder, Dee Kelly Sr., and his son, Dee Kelly Jr., have argued cases before the Texas Supreme Court.

Bradley's main attorney, Eldridge Goins of Dallas-based Goins, Underkofler, Crawford & Langdon, has never argued before the Supreme Court, but he has more than 20 years' courtroom experience. And Goins has recruited former Supreme Court Justice Joe Greenhill and his Baker & Botts firm, the fourth-largest in the state, to his legal team.

Dee Kelly Jr. recently sized up the appellate experience of the cast of attorneys on both sides. On his team are a number of in-house specialists experienced in appellate matters.

He called Greenhill an impressive acquisition for the Bradley team.

"They've got a former justice on their side -- what else can you say?" Kelly said.

Experience is important because nuances and rules in the Supreme Court vary widely from those in lower courts, attorneys say. Nine justices preside over arguments, instead of the typical three-member panels of appeals courts; attorneys must crystallize years of litigation into sharp legal points, keeping within stringent limits for written and oral arguments; and emphasis is placed on legal procedures, instead of the facts of a case.

"It was smart for Westlake to hire Baker & Botts," said Anthony Champagne, a political science professor at the University of Texas at Dallas. "It's a completely different game at that level."

To win, attorneys must plunge into a hard analysis of the case and opponents' arguments. The best recipe for success is immersion in every facet, from closely studying the justices' voting records -- the Texas high court issues about 200 opinions a year -- to gleaning a deep understanding of an opponent's case, appellate lawyers say.

"You've got to fend off questions from nine justices, which is a lot, and it can be very intimidating," Chalk said. "They can get you off your prepared remarks, so you've really got to prepare in a different way. You have to immerse yourself in all the cases, the judges' records and all of the facts to try to know what's coming.

"There's nothing worse than being hit with the sudden knowledge that you're fully realizing a point of an opponent for the first time."

As lawyers know all too well, the stage can quickly turn to hot coals if they are not well-prepared. Some can get frustrated with the process.

"One attorney recently learned that you can't call them `nine nutty professors,' " Borges said. "The justices quickly referred him for discipline."

In the high court, attorneys also put an inordinate amount of time and energy looking at each justice's record to anticipate reactions to briefs and oral arguments, experts say.

Attorneys on both sides of the Westlake case are well into their homework.

During the Mobil hearing, briefcases labeled Baker & Botts blocked one aisle of seats. Although no one from the firm was making an argument that day, its lawyers were intently eyeing the justices and scribbling notes like baseball scouts.

Kelly said his firm is also paying close attention to the court and will step up its courtroom scrutiny as oral arguments near.

The rival firms in the Bradley case are skilled at lawyering, but they're also big players in the Supreme Court political game, consistently contributing to the justices' election campaigns.

In a study published in February by Austin-based Texans for Public Justice, both firms were ranked among The Most Financially Persuasive Law Firms Appearing Before the Texas Supreme Court.

Attorneys and political action committees tied to Baker & Botts ranked No. 2 on the list, at $169,999 in contributions from 1994 through 1997. Attorneys and PACs tied to Kelly, Hart & Hallman ranked No. 5, with contributions of $108,460. Perot's law firm, Hughes & Luce, ranked 15th, with $51,561.

Texas is one of nine states where voters elect judges through partisan elections. Of the current Supreme Court's three women and six men, seven are Republicans and two are Democrats. The Texans for Public Justice survey showed that 40 percent of the contributions to Supreme Court justices were tied to sources, primarily law firms, with cases before the court.

"The practice of mixing money with justice just isn't clean," said Andrew Wheat, research director for Texans for Public Justice.

The system may create the appearance of impropriety, Champagne said, but it's too difficult -- and likely unfair -- to make connections between certain cases and campaign contributions.

"A lot of times, Baker & Botts will handle a case that never makes it to the Supreme Court," he said. "A lot of times, Kelly, Hart & Hallman will have a case that never makes it. It's hard for me to accept that kind of reasoning.

"There are two ways of looking at the role of a judge," Champagne added. "One is as an independent decision-maker above the fray, sort of like a dweller of Mount Olympus. Then there's the other model, of judicial accountability: They're making decisions of great policy implications and should have some responsibility to answer to the people of Texas."

The high court rarely rules on local government issues, creating a formidable challenge for Bradley's and White's attorneys as they try to gauge the justices' views in the Westlake case.

The bulk of the court's cases involve injury or death liability cases. Municipal law issues make up a minuscule part of its docket.

"I would say only about 1 percent of the cases involve litigation involving a local government entity," Champagne said.

But the justices' views on other issues offer little insight.

"None of these guys have been local government types," Borges said. "A few years ago, when we had former state senators on the bench, there was more of an interest. These days, they are more interested in how the three major branches of government are balanced. Nobody seems to have a natural stake in this one."

The Texas Supreme Court targeted eight points for review in Bradley's case, which is one of a dozen lawsuits

generated by Westlake's tumult of the past two years.

Topping the court's list is whether the April 28, 1997, trial of Bradley by Westlake aldermen who acted as judge, jury and witnesses violated his rights to due process according to the Texas and U.S. constitutions.

That issue is also being watched closely by former mayors in Parker and Seven Points, who were kicked out of office after Bradley's trial under the same Texas statute.

Other points that the high court will consider include open meetings issues, questions about the vagueness of the statute, and whether that law violates the Texas Constitution's provision for separation of powers.

"This seems to be new territory," Bradley said. "There's nothing like this case that has gone before the court."

Kelly said, "There's so many issues, it's foolish to try to predict what the court will do."

Although oral arguments will likely be the most dramatic part of the Bradley case, it will probably be won or lost on written briefs -- the situation in most Supreme Court cases, observers say.

Both camps are working through the initial briefing phase. The Bradley team submitted 50 pages of arguments last month, and Kelly, Hart & Hallman plans to file its responses this week.

The deadline for all written arguments and responses is May 5.

Many of the arguments in the Bradley attorneys' brief are rehashes of previous stances.

"This case is important to the jurisprudence of the state because it presents the issue of what constitutional rights elected officers have when proceedings are brought to remove them from office," the brief begins. "The Court of Appeals opinion stands as the unfortunate model of how few rights elected officials are given in protecting the property and liberty interests they have in their elected office."

In legal documents to the appeals court, Kelly argued that the Legislature properly provided a procedure for public officials to remove elected mayors and council members.

"Official misconduct and incompetence by such officials can and should be dealt with on a local basis and not be subjected to court intervention," according to Kelly's brief last year.

Oral arguments can still be pivotal because they can clarify key points, court observers say. That has prompted heated debate about whether the time limit should be lengthened.]As the court's caseload has grown, the time allowed for attorneys' statements has been shortened.

Most attorneys believe that 20 minutes is paltry time to make a complex argument and deal with curves thrown from the bench.

"You want the court to ask questions," said Charles Eskridge, a lawyer for Susman Godfrey, the firm that represented the deceased worker in the Mobil case. "You want to clarify issues they don't understand. But it's intimidating."

Westlake is a lengthy case with sharp disagreements between the district and appellate courts, involving many issues and players. The 20-minute restriction stands, no matter the multitude of issues.

Law practitioners call the grueling Supreme Court process fitting, given the significance of the decisions the court makes.

Chalk still tastes the defeat of his first appearance before the high court in the mid-1970s in a case involving the

liability of surgeons in operating rooms.

The court's opinion triggered widespread changes in how health care cases are litigated.

"I lost the case and the whole law changed," Chalk said. "It's not one I'm proud of, but it shows that you're making law at that level. That's the power of what you're doing."

The Bradley case could also have a significant effect on Texas law.

"There is an emerging group of conservatives that think the government should be limited," Borges said. "There has yet to be a bellwether case about what limits they will recognize. Many lawyers and judges have the perspective that the process itself guarantees just adjudication. It's a different thing to say whether justice is preserved.

"This case could highlight that the system may not be fair but legal -- which is how many people take issue with lawyers and the justice system."

Miles Moffeit, (817) 685-3818
moffeit@star-telegram.com