

CAUSE NO. PR-11-3238-1

**IN RE: ESTATE OF MAX D. HOPPER,
DECEASED**

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IN THE PROBATE COURT

JO N. HOPPER
Plaintiff,

NO. 1

v.

**JPMORGAN CHASE BANK, N.A.
STEPHEN B. HOPPER, and LAURA S.
WASSMER,**
Defendants.

DALLAS COUNTY, TEXAS

DEFENDANTS' TRIAL BRIEF IN SUPPORT OF OPENING STATEMENTS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendants, Stephen B. Hopper and Laura S. Wassmer, and files this, their Trial Brief in Support of Opening Statements, and would respectfully show the following:

1. Counsel for Defendants may describe details in its opening statement that will be further developed as consistent and admissible evidence.
2. Because the standard of review is abuse of discretion, the scope of a party's opening statement is a matter resting within the broad discretion of the trial court.

AUTHORITIES

1. Counsel for Defendants may describe details in its opening statement that will be further developed as consistent and admissible evidence. *Guerrero v. Smith*, 864 S.W.2d 797, 800 (Tex. App. - Houston [14th Dist.] 1993, no writ). First, Rule 265 of the Texas Rules of Civil Procedure governs opening statements. Under the rule, trial courts are provided broad authority and discretion to control trial procedure including opening statements. *See* Tex. R. Civ. P. 265.

Because of a trial court's broad discretion and the further admission of evidence, trial courts have held that attorneys may discuss evidence that is not significantly different from evidence later admitted. *See Guerrero*, 864 S.W.2d at 800. That is, counsel may introduce evidence in its opening statement so long as the evidence does "not vary in any significant manner from the evidence that the trial court subsequently admit[s]." *In re Hernandez*, No. 09-12-00329-CV, 2013 Tex. App. LEXIS 11787 at *5 (Tex. App. – Beaumont, Sept. 19, 2013). Here, counsel was properly able to generally describe the testimony of witnesses she expected to present during the case. *Id.* at *4.

Even if opening statements should be limited to evidence preadmitted, use of evidence later offered is also appropriate. That is, when the record reflects that the same piece of evidence is later admitted into evidence, use of the evidence in the opening statement is permissible. *See Guerrero*, 864 S.W.2d at 800. Especially when there is ample evidence presented at trial to support the jury's verdict. *See id.* For example, one court has ruled that even if the trial court should have limited counsel's opening regarding the details at issue, the appellant was not harmed by the opening statement because the details at issue were later proven during the trial. *Dod*, so long as details surrounding the evidence mentioned by counsel in its opening statement are consistent with those shown at trial, the use of evidence is proper.

Finally, Rule 203.6(b) of the Texas Rules of Civil Procedure should be noted. According to the rule "all or part of a deposition may be used for any purpose in the same proceeding in which it was taken." Because all or part of a deposition may be used for any purpose in the same proceeding, deposition testimony may be used throughout the same trial and thus throughout a party's opening statements.

2. Next, because the standard of review is abuse of discretion, the scope of opening statements is a matter resting within the broad discretion of the trial court. *Guerrero v. Smith*, 864 S.W.2d 797, 800 (Tex. App. - Houston [14th Dist.] 1993, no writ); *Ranger Ins. Co. v. Rogers*, 530 S.W.2d 162, 170 (Tex. Civ. App. - Austin 1975, writ ref'd n.r.e.). First, “any abuse of discretion by the trial court is reversible error only if it was calculated to cause and probably did cause the rendition of an improper judgment.” *Tacon Mech. Contractors, Inc., v. Grant Sheet Metal, Inc.*, 889 S.W.2d 666, 675 Tex. App.—Houston [14th Dist.] 1993, writ denied) (citing *S. Pac. Transp. Co. v. Peralez*, 546 S.W.2d 88, 97 (Tex. Civ. App.—Corpus Christi 1976, writ ref'd n.r.e.); see Tex. R. App. P. 44.1(a)(1).

Error only occurs when opening statements discuss evidence that is not eventually offered at the trial. See *Guerrero*, 864 S.W.2d at 800. Nonetheless, the error is reversible error only if it was calculated to and probably did cause the rendition of an improper judgment. Tex. R. Civ. P. 265(a); see *Guerrero*, 864 S.W.2d at 800. For example, it is permissible for counsel to describe testimony of witnesses she expects to present because her opening statement does not vary in any significant manner from the evidence that will eventually be admitted. *In re Hernandez*, No. 09-12-00329-CV, 2013 Tex. App. LEXIS 11787 at *6 (Tex. App. – Beaumont, Sept. 19, 2013).

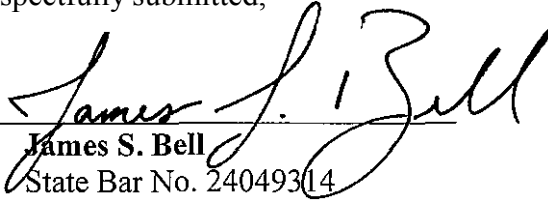
Finally, an appellate court has even ruled that because of the broad discretion of the trial court in determining the scope of opening statements, the appellate court will not decide whether the trial court should have limited the opening statement. See *In re Dodson*, 434 S.W.3d 742, 749 (Tex. App. – Beaumont, 2013). Therefore, a trial court may properly allow a party to discuss deposition testimony and other relevant evidence later admitted.

PRAYER

For the foregoing reasons, Defendants respectfully request that the Court permit them to describe details in its opening statement that will be further developed as consistent and admissible evidence before this Honorable Court.

Dated: August 28, 2017

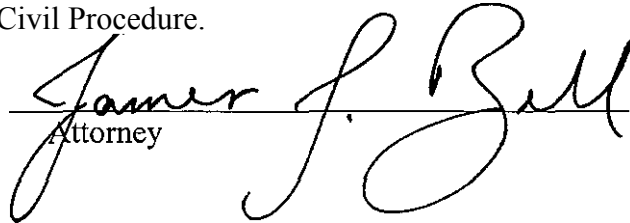
Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on a true and correct copy of this document was served on all counsel in accordance with the Texas Rules of Civil Procedure.


Attorney