



# Back to Basics: Defending the Aviation Litigation Case

Aviation Law Section

December 3, 2021



# John Wayne Airport c. 1994



# Background



- Got to Texas as fast as I could.
- Met wife, Ashley, a Fort Worth native, at Stanford.
- Law school in Tucson.
- Started working for Steve Howell in 2011.
- Hopelessly addicted to aviation.





# Promises Up Front



- This will not go long.
- If this PowerPoint bleeds into lunch time, I walk home to FW.
- I have nothing against Dallas.
- None of this is that hard.



# Quick Overview of Presentation



- “New” Disclosure Rules of 2021
- Airplane! Trivia
- Snap Removal
- Quick (!) Discovery Review
- Airplane Trivia (no exclamation point)
- Transfer of Venue
- “Sample” Airline Case
- Maybe one last Airplane(!) video before lunch

# Initial Disclosures - Deadlines



- **Automatic**
  - Must respond at or within 30 days after the filing of the first answer
  - Unless a different time is set by the parties' agreement or court order.
- **No one can serve discovery until after the initial disclosures are due**



# Rule 195 – Expert Disclosures



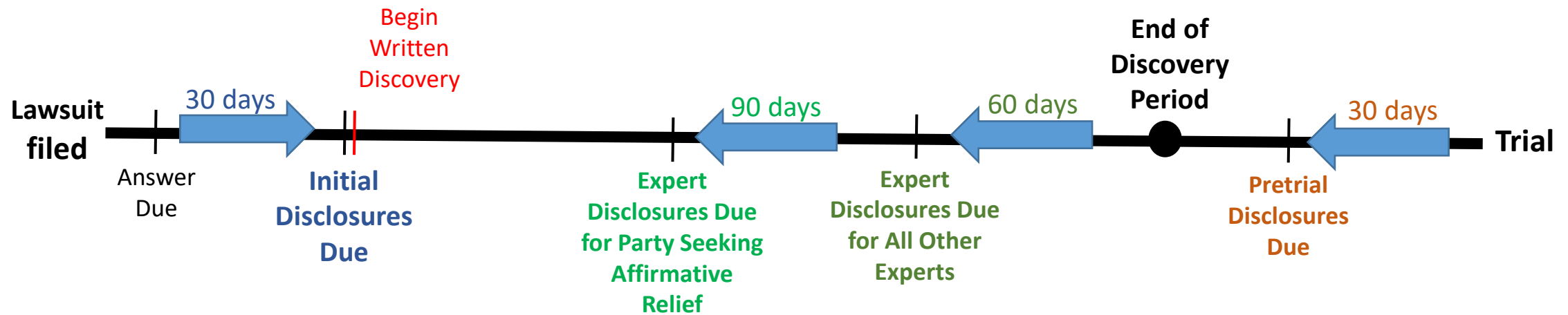
- **More Time to Determine Experts**

- 90 days before end of discovery period for parties seeking affirmative relief
- 60 days before end of discovery for all other experts

- **Disclosures must include all information formerly required, plus:**

- the expert's qualifications, including a list of all publications authored in the previous 10 years;
- a list of all other cases in which, during the previous four years, the expert testified as an expert at trial or by deposition; and
- a statement of compensation

# OVERVIEW OF REQUIRED DISCLOSURES





# Snap Removal



# Snap Removal - The Case to Cite



- *Serafini v. Southwest Airlines, Co.*, 485 F. Supp. 3d 697 (N.D. Tex. 2020).
- Plaintiff files in state court, alleging negligence against Southwest.
- After the suit was filed, **BUT before getting served**, Southwest “snap-removed” to federal court. “Southwest wanted to get away.”
- Plaintiff moved to remand.



# Snap Removal - The Case to Cite



- Diversity jurisdiction includes the forum-defendant rule...an action otherwise removable solely on the basis of diversity cannot be removed if any party in interest properly joined and served as defendant is a citizen of the State in which such action is brought.
- Southwest's removal was proper because it had not yet been served. If it had been served, the forum-defendant rule would have barred removal.
- "The Court concludes that Southwest's removal was proper under the law. And so it **DENIES** Serafini's motion to remand. The parties will proceed in federal court. Welcome aboard."

# Snap Removal



- Any aerospace companies PPB in Texas?
- So what? I don't like federal court, why go through this rigmarole?
- Analyze the judges in state vs. federal.
- Analyze the jury pools.
- Analyze the speed of proceedings.



# Airplane! Trivia



# Airplane! Trivia



- Directed by brothers David and Jerry Zucker. Directorial debuts.
- Plan was to hire actors with no comedic backgrounds to drive home the deadpan deliveries.
- Started Leslie Nielsen's comedy career.
- Peter Graves was best known as Jim Phelps in Mission Impossible.
- Robert Stack was best known as prohibition agent Elliot Ness.
- Robert Hays, at the time of filming, was actually a licensed private pilot for single-engine airplanes.

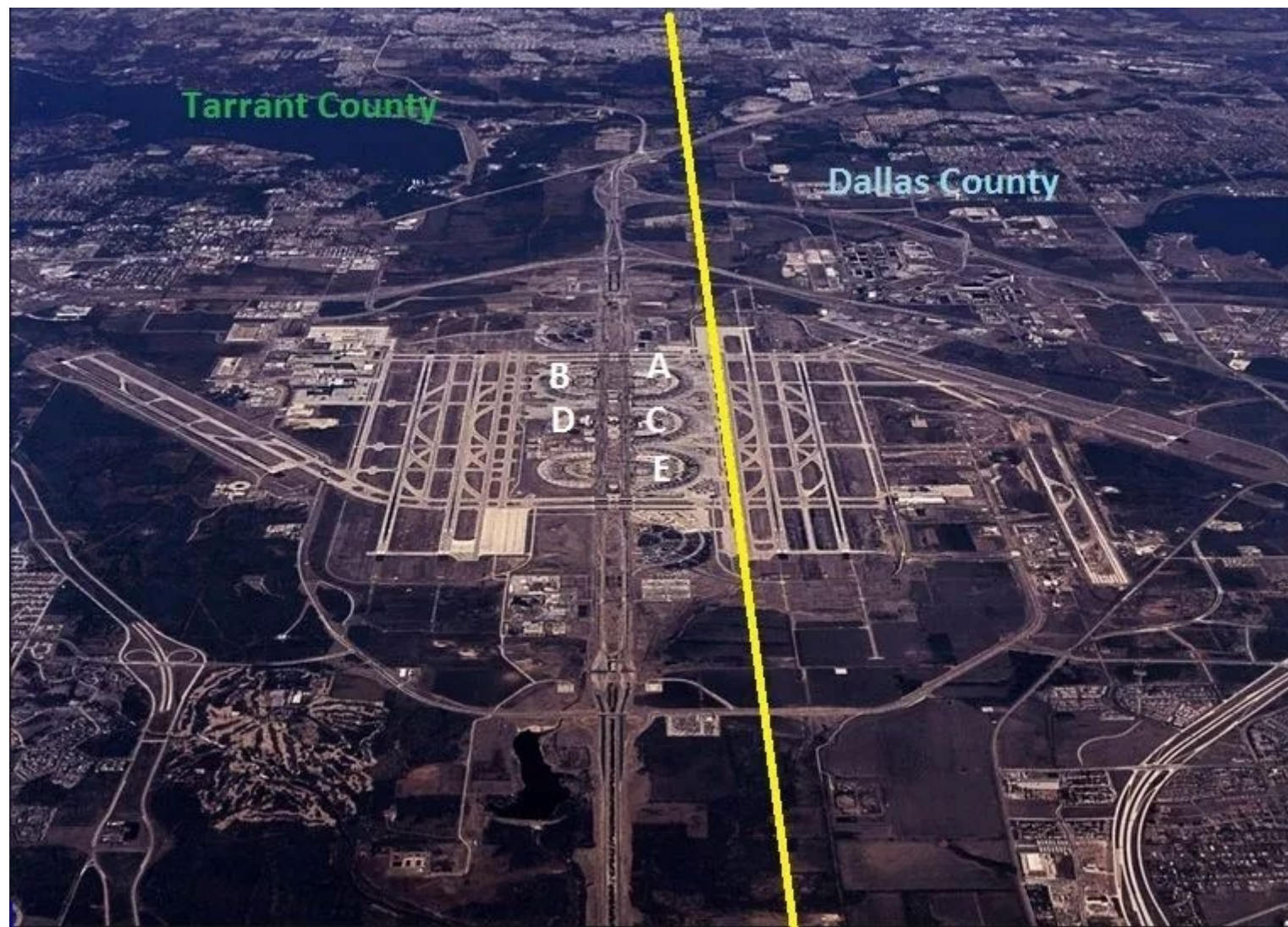


# Motion to Transfer Venue



**What county is DFW Airport in?**







# Motion to Transfer Venue



- What about the Corporate Aviation Terminal at DFW?
  - Address: 1816 N 24<sup>th</sup> Avenue, Dallas, TX 75261
- ...Tarrant County



# Motion to Transfer Venue



- Mandatory Provisions (relevant to aviation):
  - Suit against a county.
  - Suit against a political subdivision (think municipality) of 100,000 or less.
- (If no mandatory provisions apply) Permissive Venue Provisions:
  - Breach of Warranty. (1) Either the county where all or a substantial part of the events or omissions giving rise to the claim occurred, or (2) the county where the manufacturer has its principal office in Texas, or (3) the county where the plaintiff resided when the cause of action accrued.
- Mandatory trumps permissive.



# Motion to Transfer Venue



- If no mandatory provisions apply, but a permissive and a general venue provision(s) apply, it's plaintiff's choice.
- General provisions (very common in aviation cases):
  - Where all or a substantial part of the events giving rise to the claim occurred.
  - Defendant's residence or principal office in Texas.
- REMEMBER:
  - Counties/municipalities have lots of venue protections, if they're involved.
  - Do your homework on DFW Airport! It's very likely that whatever happened, happened in Tarrant County.

# Quick Discovery Review





# Interrogatories



**\*\*WARNING — Pontificating comment from 70 years ago\*\***

“One of the biggest surprises is the usefulness, popularity, and versatility of the old written interrogatory to the parties. Its chief advantage is cheapness and convenience . . . .”

William H. Speck, *The Use of Discovery in United States District Courts*, 60 Yale L. J. 1132, 1142 (1951).

# These Are Discoverable



- Identity and location of documents and other tangible things.
  - Tex. R. Civ. P. 192.3(b); Tex. R. Civ. P. 192.5(c)(4). Follow up with requests for production.
- Identity and location of any person who is expected to be called to testify at trial.
  - Tex. R. Civ. P. 192.3(d); Tex. R. Civ. P. 192.5(c)(1).
- Any other party's legal contentions and the factual basis for those contentions.
  - Tex. R. Civ. P. 192.3(j); Tex. R. Civ. P. 192(c)(1).
- Persons who helped prepare interrogatory responses.



# These Are Not Discoverable



- Information about another party's testifying expert witnesses (you can only do this through request for disclosures, depositions, and reports).
  - Tex. R. Civ. P. 195.1.
- Requiring other party to marshal its evidence.
  - Tex. R. Civ. P. 197.1.
- Fishing expeditions.

# Objections—Marshalling All Evidence



“Contention discovery is permitted by the rules of civil procedure. But all that is required is a basic statement of those contentions and not a marshaling of evidence . . . ***Marshaling means ‘[a]rranging all of a party’s evidence in the order that it will be presented at trial.’ . . .***”

*Sheffield Dev. Co. v. Carter & Burgess, Inc.*, No. 02-11-00204-CV, 2012 WL 6632500, at \*6–7 (Tex. App.—Fort Worth 2012, pet. dism’d).



# Objections—Marshalling All Evidence



- Marshalling: “all” facts or “each” or “every” fact concerning a cause of action or defense.
- Not marshalling:
  - (1) the identity of persons with knowledge about a claim, defense, or allegation;
  - (2) identification a complained-of part or sub-component of an engine, the basis of a claim, defense, or allegation.
    - We made it through discovery.

# Airplane Trivia



- Most produced civilian aircraft of all-time?
  - Cessna 172 (44,000+)
  - Piper Cherokee (32,788)
  - Cessna 182 (23,237)
  - Piper Cub (20,191)
  - Beech Bonanza (17,000+)



# Airplane Trivia



- Other most produced aircraft of all-time.
  - B-24 Liberator (18,482)
  - Bell UH-1 (16,000+)
  - Mooney M20 (11,000+)
  - Boeing 737 (10,655+)
  - Beech King Air\* (8,000+)
  - Beech Baron (6,884)
  - Cirrus SR22 (6,150+)

# Trivia Source





# Sample Case (Based on a Real Case)



- **Facts**

- Woman (Plaintiff) boards a red-eye from LAX to Nashville, Boeing 737.
- Plaintiff assigned to Middle Seat.
- Plaintiff's sister assigned to Aisle Seat.
- Unknown stranger assigned to Window Seat.
- Plaintiff is 5' 0". She's in her 70s.
- Unknown Stranger is 6'3", 215 pounds. He's about 40 and wearing boots.
- Shortly after takeoff, Mr. Unknown Stranger Man falls asleep, and his long legs and heavy boots have encroached into Plaintiff's foot-space and her feet are now trapped under the heavy boots.

# Elaine from Seinfeld Can Relate





# Sample Case (Based on a Real Case)



- Plaintiff claims, on a scale of 1 – 10, her pain level from the boots is “22.”
- But unlike Elaine, Plaintiff **does not wake up** Mr. Unknown Stranger Man.
- Nor does she wake up her (sleeping sister).
- Nor did she wake anyone else up.
- Nor (she says) could she reach the Call Button to summon a FA, she said she was too short. (But she didn’t hail a FA).
- She just sat there. All flight. All 3.5 hours.

# Sample Case (Based on a Real Case)



- **Plaintiff alleged:**
- Negligence against the airline.
- Negligence per se against the airline (under FAR Part 135)





# Sample Case (Based on a Real Case)



- **Plaintiff alleged:**
- Strict liability against the airline.
- Breach of implied warranty airline.
- Breach of contract against the airline.
- (No claims against Mr. Unknown Stranger).

# Sample Case (Based on a Real Case) – Negligence



- Back to Basics on Negligence
- Negligence requires:
  - Defendant owed a legal duty to Plaintiff.
  - Defendant breached the duty.
  - The breach proximately caused Plaintiff's injury.
  - Proximate cause requires both (1) foreseeability, and (2) cause-in-fact.



# Sample Case (Based on a Real Case) – Negligence



- Under Texas law, a common carrier owes a high duty of care to its passengers from foreseeable dangers.
- Used the undisputed facts and the *The City of Dallas v. Jackson* to break down the foreseeability prong.
- *City of Dallas* involved a bus driver that told two passengers arguing to “quiet down.” They wouldn’t. Driver stopped the bus when he saw a nearby police officer. One passenger pulled out a gun and killed the other while the driver was getting the police.

# Sample Case (Based on a Real Case) – Negligence



- The Texas Supreme Court found that the bus driver fulfilled the common carrier duty by stopping and seeking help, but did not have a duty to remove, restrain, or eject either passenger as the eventual (and tragic) conclusion was not foreseeable.
- Back to our case, nobody on the airplane (FA, pilot, passenger, even Mr. Unknown Stranger) knew or could foresee Plaintiff's injuries.
- Foreseeability requires “more than someone, viewing the facts in retrospect, theorizing an extraordinary sequence of events whereby the defendant should have anticipated conduct that would bring about injury.”

# Sample Case (Based on a Real Case) – Negligence



- Foreseeability—usually a fact question—was rendered undisputed here.
- Cause-in-fact...*pro se* Plaintiff admitted that in deposition.
- Last prong: Legal Duty. Plaintiff alleged the airline owed “the highest degree of care.” This is incorrect. Texas law is: a common carrier owes its passengers a “high degree” of care. It is not limitless. The carrier is not “an insurer of safety.” \*\*This theme will appear again\*\*



# Sample Case (Based on a Real Case) – Strict Liability



- Remember: this is a back-to-basics CLE, and this was a *pro se* plaintiff.
- Strict liability is meant to provide: “judicial protection for the otherwise defenseless consumer who usually lacks the ways and means to discover or prove the defect in a product that the consumer purchases.” *McDevitt v. Standard Oil Co. of Tex.*, 391 F.2d 364, 370 (5th Cir. 1981).
- “Strict liability is imposed under Texas law in only very limited situations” ... such as “dangerously defective products or dangerous animal cases.” *Fugett v. DCP Midstream, L.P.*, No. 2:14-CV-00111-J, 2015 WL 510965, at \*5 (N.D. Tex. Feb. 6, 2015).

# Sample Case – Breach of Implied Warranty & Contract

- Recall that a common carrier owes a high duty, but not the “highest” and certainly not limitless.
- “A high degree of care means how a very cautious, prudent, and competent person would use under the same or similar circumstances.” *Slentz v. American Airlines, Inc.*, 817 S.W.2d 366, 369 (Tex. App.—Austin 1991, writ denied).
- “Delta is not an insurer of safety.” *Delta Air Lines, Inc. v. Gibson*, 550 S.W.2d 310, 312 (Tex. App.—El Paso 1977, writ ref’d n.r.e.).
- Unless a carrier contracts for it—and they wouldn’t or shouldn’t—there is no contractual duty above what is described above, and there is no implied warranty, either. Negligence is the savvy cause-of-action.

# Concluding Wisdom

