# TADC Commercial Litigation Newsletter

***Fall 2014 Edition***

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*Special thanks to David Ledyard, Greg Dykeman, K.B. Battaglini, Stacie Augustine, Mike Dodson, and Chris Mahfouz*

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*This newsletter is intended to summarize significant cases and issues impacting the commercial litigation practice area in the past six months. It is not a comprehensive digest of every case involving commercial litigation issues during that time period or a recitation of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice.*

## OVERVIEW OF NEWSLETTER DECISIONS

### TEXAS SUPREME COURT DECISIONS

**<u>TEXAS SUPREME COURT ORAL ARGUMENTS</u>**



**<u>TEXAS COURTS OF APPEALS DECISIONS</u>**

# Texas Supreme Court Decisions

## Ritchie v. Rupe

*Opinion Delivered June 20, 2014*
*2014 WL 2788335*

**Synopsis**

A shareholder in a closely held corporation brought an action against the directors, alleging that shareholder oppression failed to demonstrate the type of oppressive actions justifying a rehabilitative receivership.

**Factual Background and Trial Court Proceedings:**

Rupe Investment Corporation (RIC) is a Texas closely held corporation. RIC's board of directors had four members: Paula Dennard, who chaired the board; Dallas Gordon Rupe, III (Buddy), who was Dennard's brother; Lee Ritchie, who served as president of RIC; and Dennis Lutes, an attorney whose clients included RIC, Dennard, and her family. Paula Dennard and Buddy Rupe were the descendants of RIC's founder, and Ritchie is the descendant of one of its early owners. Three different family trusts collectively owned approximately 72% of RIC's voting stock. Dennard, Ritchie, and Lutes served as trustees of those trusts and collectively controlled a majority of RIC's voting power. Ritchie and his family also owned an additional 10% of the shares, directly increasing the combined voting power to 82%. Buddy owned the remaining 18% directly. There was no shareholders' agreement.

Ann Rupe joined the family when she married Buddy in 1983. Rupe was Buddy's second wife, and their marriage and the birth of their son, Guy, took place after the death of Dennard and Buddy's father, Gordon. Gordon's will created Gordon's Trust, which named Gordon's wife, his children (Dennard and Buddy), and Dennard's three children as beneficiaries. Buddy and Rupe wanted their son to be added as a beneficiary of Gordon's Trust, but Dennard and her children refused, and this created some friction between Rupe and Dennard.

Buddy died in 2002. His 18% interest in RIC had been placed in a trust for the benefit of Rupe and their son (Buddy's Trust), naming Rupe as trustee. In Rupe's view, Dennard, Ritchie, and Lutes immediately became "hostile" towards her. Rupe asked Ritchie if RIC would be interested in buying out her shares. Ritchie replied that RIC could not afford it at the time. Soon thereafter, Rupe's attorney sent a letter to Lutes, requesting the opportunity to review and copy RIC's corporate documents and directing the Rupe and Ritchie family members not to communicate directly with Rupe regarding RIC or any other business matters.

On behalf of RIC, Lutes later offered to redeem Rupe's shares for $1 million. He encouraged Rupe not to redeem the shares until they "ultimately" increased in value. Rupe declined the redemption offer because RIC's sales exceeded $150 million and it had assets in excess of $50 million.

Rupe subsequently terminated her relationship with her attorney and personally requested a new redemption offer from Ritchie. Ritchie reiterated that he did not recommend selling her shares at that time, but he agreed to raise the issue at an upcoming board meeting. After the board meeting, Ritchie made a new offer of $1,760,947, which he said was based on a formula that RIC had previously used to value RIC's shares and, in any event, was "the highest cash offer that RIC directors believed they could make without jeopardizing the company and its other shareholders." Rupe declined the offer and decided to try to sell her shares to an outside party. Throughout late 2005, Ritchie and Lutes worked with Rupe's latest attorney to draft confidentiality agreements to allow disclosure of some of RIC's confidential business information to Rupe's prospective outside purchasers.

In January 2006, Rupe sent a note to Ritchie, asking for dates when he could meet with prospective purchasers. After conferring with Lutes and an outside attorney with expertise in securities law, Ritchie sent a reply to Rupe, declining to participate in such meetings. Ritchie stated that, because RIC would not be a party to the sale of her shares to an outside buyer, "it would be inappropriate for me or any other officer or director of [RIC] to meet with your prospects or otherwise participate in any activities relating to your proposed sale of stock." Rupe did not succeed in selling the stock because, "everybody wanted to be able to meet Lee Ritchie and talk to the executives ... as part of their due diligence." Rupe's broker testified that Rupe's shares were incredibly difficult to market without such meetings, and the likelihood of selling the shares was "zero."

In July 2006, Rupe filed this suit against defendants, alleging that they engaged in "oppressive" conduct and breached fiduciary duties to her. Rupe requested an accounting and valuation and an order requiring RIC to purchase her shares at fair market value or, alternatively, appointing a receiver to liquidate RIC. The jury found in Rupe's favor on essentially all of her claims and found that the fair value of Rupe's stock was $7.3 million. The trial court rendered judgment on the jury's verdict, concluding that Dennard, Ritchie, Lutes, and RIC had "engaged in oppressive conduct to the rights of [Buddy's Trust] that is likely to continue in the future," that "the most equitable remedy" for this oppression was to require RIC to redeem Rupe's shares, and that this remedy was "less drastic" than liquidating the company or appointing a receiver. Based on these conclusions and the jury's findings, the trial court ordered RIC to purchase Rupe's shares for $7.3 million. Defendants appealed.

**<u>Court of Appeals:</u>**

The Court of Appeals held that the appellant's refusal to meet with Rupe's perspective purchasers constituted oppressive conduct as a matter of law. To reach that conclusion, it did not consider whether any other actions by defendants were oppressive as alleged by Rupe. The Court affirmed the trial court holding requiring RIC to purchase Rupe's shares, but concluded that the trial court erred by instructing the jury not to discount the shares' values to account for lack of marketability and control. The case remanded for new determination of the shares' fair value. The defendants petitioned the Texas Supreme Court for review.

**<u>Texas Supreme Court's Holding:</u>**

The Court began by determining the meaning of "oppressive" as the Legislature used the word in the Texas Receivership Statute. This Statute, former article 7.05 of the Texas Business Corporations Act and its successor § 11.404 of the Texas Business Organizations Code, authorized Texas courts to appoint a receiver to rehabilitate a domestic corporation under certain circumstances. Although Rupe sought appointment of a receiver to liquidate RIC rather than rehabilitate it, she only sought that remedy as an alternative to other remedies. She did not obtain relief in the judgment and did not request that relief on appeal, relying solely on a statute as authority for the trial court's judgment ordering RIC to buy out her shares. The Court noted that it had not previously construed either former article 7.05 or the current §11.404.

The opinion first examined the history of shareholder oppression cases in Texas. Most recently in 1988, the First District Court of Appeals in Houston in *Davis v. Sheerin*, 754 S.W.2d 375 (Tex. App.—Houston [1st Dist.] 1988, writ denied) acknowledged that the statute did not expressly authorized a buyout order and no Texas court had previously forced a shareholder buyout in the absence of a buyout agreement. It nevertheless concluded that, "Texas courts under general equity power, may decree a buyout in an appropriate case where less harsh remedies are inadequate to protect the rights of the parties." The *Davis* Court concluded that courts take an especially broad view of the application of oppressive conduct to a closely held corporation where oppression may be more easily found. The Court noted two standards, generally referred to as "reasonable expectations" and "fair dealing" tests, which have been used by Texas courts in oppressive action cases.

The Supreme Court found, however, that when the Legislature adopted § 11.404, it adopted a single standard for rehabilitative receivership. The Court explained that the standard to be applied under the statute was applicable to all corporations, without regard to the number of its shareholders or the marketability of its shares. The Court further noted that nothing in the language of the statute suggests a special right or remedy unique to minority shareholders in closely held corporations.

Second, the Texas Supreme Court reasoned that the statute places significant restrictions on the availability of receivership as a remedy: 1) the receivership must be necessary to conserve the assets of the business and the corporation to avoid damage to the parties at interest; 2) all other requirements at law must be complied with; and 3) all remedies available under either at law or in equity must be inadequate. The Court noted that the appointment of receiver that is not favored.

In addition to the statute's three general requirements, a shareholder who seeks rehabilitative relationship must also prove one of five specific grounds to justify receivership. The specific grounds are: 1) illegal, oppressive or fraudulent actions by the corporation; 2) the corporation is insolvent or in eminent danger of becoming insolvent; 3) an unbreakable deadlock exists among the corporation's managers causing or threatening irreparable injury to the corporation; 4) a deadlock among the shareholders prevents the election of the corporation's management; 5) the corporation's assets are being misapplied or wasted. Rupe asserted only that the actions of the defendants were oppressive.

In considering the language and context of the statute, the Court identified three characteristics of action that the statute refers to as "oppressive": 1) the actions justify harsh, temporary remedy of rehabilitative receivership; 2) the actions are severe and create exigent circumstances; and 3) the actions are inconsistent with the directors' duty to exercise their honest business judgment for the benefit of the corporation.

When applying Legislature's intended meaning, the Court concluded that the refusal by the defendants to meet with Rupe's potential buyers did not constitute an oppressive action for which Rupe might obtain relief. The Court acknowledged the directors' refusal to meet with prospective purchasers placed Rupe in a difficult position that prevented her from selling her shares as quickly and she wasn't offered the full value. The Court further reasoned that this difficulty is intrinsic to ownership in a closely held corporation and that the misconduct relied on by the court of appeals did not meet the standard of oppressive actions.

**Dissenting Opinion:**

Justice Guzman filed a dissenting opinion, in which Justice Willett and Justice Brown joined.

The dissent began by noting that the structure of closely held corporations places minority shareholders in positions that are uniquely vulnerable to abuse because of a shareholder's inability to freely exit and specifically disagreed with the Court's holding that receivership is the only remedy available for oppression. The dissent would interpret the oppression statute to contemplate the use of lesser remedies in situations where oppression exists but does not harm the corporation. The dissent also found the majority's interpretation of the statute resulted in an unduly restrictive definition of what constitutes oppression. Finally, the dissenting opinion notes that there was adequate evidence to support the finding by the trial court of oppression and would allow an equitable buyout as a lesser remedy than dissolution.

**Practice Pointer: No. 1**

Always advise and encourage members of closely held corporations to enter a shareholders' agreement to provide a contractual method of resolving majority/minority disputes.

## HMC Hotel Properties II Ltd. Partnership v. Keystone-Texas Property Holding Corporation

439 S.W.3d 910

*Opinion Delivered June 13, 2014*

*Rehearing denied October 3, 2014*

**Synopsis:**

Supreme Court found that tenant of real property that was sought to be purchased did not slander the title or tortiously interfere with the contract regarding the attempted sale by owner.

**Factual Background &Prior Proceedings:**

The Rivercenter Mall and the ground underneath the Marriott Riverwalk hotel were both owned by Keystone—Texas Property Holding Corporation. Keystone leased the hotel land to the petitioners HMC Hotel Properties II L.P. ("Host"), which owned and operated the Marriott Riverwalk.

In 2004, Keystone put the two properties up for sale. New York investor Ben Ashkenazy soon emerged as a potential buyer at a price of $166 million for the two properties. Host was not aware the hotel land was for sale until January 7, 2005, when Keystone sent Host notice of the pending sale in an effort to comply with section 14.02 of Host's lease. Section 14.02 provides:

> If Landlord decides to sell the Leased Premises to a third party,

> Landlord will give Tenant notice of such decision and afford Tenant a reasonable period of time as specified in such notice, but in no event more than ninety (90) days, in which to attempt to negotiate a mutually satisfactory agreement for purchase of the Leased Premises.

Keystone stated it was selling the hotel land to Ashkenazy Acquisition Corporation for $65 million and that the deal would close within 75 days. Keystone invited Host to make an offer for the property, but also requested that Host waive its rights under section 14.02 so the sale to Ashkenazy could go forward.

In a letter dated February 11th, Host informed Keystone it may be interested in buying the land and was not ready to waive its rights under the lease. But Host never made an offer. Moreover, on March 17th, Host's representative emailed Keystone to say the requested waiver was "close to being signed and sent back." Host further requested that Keystone set up a meeting between Host and Ashkenazy to discuss the potential buyer's plans for the property.

At least two such meetings took place, after which Host claims it became suspicious of the $65 million offer for the hotel land, which Host valued at no more than $35 million. Host suspected—and argued extensively at trial—that in allocating the $166 million purchase price between the two properties, the price of the hotel land was inflated to discourage Host from making an offer on the property. Host then changed course, and on April 18th, sent Keystone a letter that made clear a waiver would not be issued. In the letter, Host accused Keystone of failing to comply with its obligation under the lease to extend Host a "first right of negotiation" because Keystone "apparently [had] already negotiated a deal with a third party." Host demanded Keystone extend a new 90–day negotiation period that would "focus on establishing a fair market price for the Leased Premises and not on the terms of any deal or proposed transaction that Keystone prematurely negotiated with any third party."

By the time Host sent its letter, the deal for the sale of the two properties had been split into two pieces and the mall deal had closed. But the hotel deal never did. Host sued Keystone for breach of the lease and unsuccessfully sought a temporary injunction to block the sale. Keystone counterclaimed for slander of title and tortious interference with a contract, arguing that Host's letter, which was passed to the proposed title insurers, scuttled the sale.

At the conclusion of the trial, the jury found for Keystone on all issues. The trial court awarded Keystone $39 million in actual damages, but granted Host's motion for judgment notwithstanding the verdict on the jury's award of $7.5 million in punitive damages. On appeal, the court of appeals affirmed the actual-damages award and reinstated the punitive damages award.

**<u>Court of Appeals:</u>**

The Court summarized testimony of several witnesses, many of who blamed Host's letter for killing the deal, and concluded evidence was sufficient to support the jury's finding that Host's letter approximately caused the deal's demise.

**<u>Texas Supreme Court's Holding:</u>**

The Supreme Court began by pointing out that the court of appeals did not set forth any evidence showing how the ultimate outcome of the case would have been different had

Host not sent its letter. The liability questions were submitted to the jury under a proximate cause standard which included two elements, cause of fact and foreseeability. The cause and fact element can not be established by mere conjecture or specification. The Supreme Court found that no evidence showed that the outcome would have been different if Host had not sent its letters. The Court discussed in detail the ultimate problems which Keystone had in receiving title insurance whether necessary for purchaser to close the deal whether Host's letter had been sent or not. The opinion found that no evidence demonstrated that the title insurers would have been more inclined to abandon their consistent requirement of a waiver by Host if Host had behaved differently and done nothing. Further, Host was under no affirmative duty to execute the waiver letter sought as a prerequisite for title insurance.

Specifically, the Court found that title insurance witnesses' testimony about the harsh effect of Host's letter on the transaction was not tantamount to testimony that the outcome would have been different if Host did not send the letter. The Court concluded that Host's letter certainly had an impact on the transaction but Keystone also had to show that absent Host's letter, the harm would not have occurred. The title insurance witnesses never testified there was a possibility of a different outcome had Host not sent the letter.

The Court reversed the Court of Appeals' judgment and rendered that Keystone take nothing.

## MAN Engines v. Doug Shows

*Opinion delivered June 6, 2014*
*12-0490, 434 S.W.3d 132*

**Synopsis**

The Texas Supreme Court found that the implied warranty of merchantability extends to purchasers of used goods. Resale of a used good does not automatically terminate any implied warranty obligations. The effects of express disclaimers and the effects of an "as is" clause are not reached, as they were not properly pled or asserted in the trial court or the court of appeals.

**Factual Background and Trial Court Proceedings:**

In 2002 Doug Shows purchased a yacht through a broker, Texas Sportfishing. The yacht was powered by high performance engines manufactured by MAN. MAN gave express warranties that a three-year warranty applied "on major components". At the time of the sale, Shows signed a certification of acceptance of the vessel on Texas Sportfishing letterhead stating that the vessel was being sold "as is".

One engine subsequently failed beyond repair, and MAN took the position that the express warranty did not apply because the failed part was not a "major component".

Shows replaced the engine and in June 2006 sued MAN for various causes of action, including breach of express and implied warranties. The jury found MAN liable only for breach of implied warranty of merchantability and awarded Shows $89,967.00. However, the trial court granted MAN's motion for judgment notwithstanding the verdict and issued a take nothing judgment. The trial court concluded that Shows could not prevail on an implied warranty theory because of either 1) lack of privity as a subsequent user of a used yacht or 2) disclaimer – MAN disclaimed any implied warranty at the time of the first sale.

**Court of Appeals:**

The Fourteenth Court of Appeals (Houston) reversed, holding that someone who buys goods knowing they are used may still rely on an implied warranty from the manufacturer to the original buyer, since the warranty passes with the goods.

The Court of Appeals refused to consider MAN's express - disclaimer defense, concluding that MAN failed to raise it as an affirmative defense in its pleadings, and the issue was not tried by consent. The Court of Appeals did not consider the effect of the "as is" clause, because MAN did not raise this argument in the trial court or in the Court of Appeals.

**Texas Supreme Court's Holding:**

The Texas Supreme Court affirmed the holding of the Court of Appeals. The Court held that the resale of a used good does not automatically terminate any implied warranty obligations. An express disclaimer, such as the one MAN had issued in 2003, can be a defense to implied warranties of merchantability, but such express disclaimers are an affirmative defense that must be pled under Rule 94. The defense of disclaimer is one of avoidance, rather than a defense in denial. As a result, it must be pled as an affirmative defense. Since MAN failed to plead an express disclaimer, the trial court erred in considering the defense at trial.

The Court then addressed the "as is" clause and whether such a clause can negate an implied warranty claim by a secondhand buyer against the manufacturer. The Court found that an "as is" clause can be important to the issue of an implied warranty of merchantability. Under Texas law, implied warranties can be nullified by "as is" or similar language. However, the Court held that the "as is" language could not be considered because MAN did not plead it or ever reference the clause in the trial court. There was a reference to the "as is" clause in MAN's JNOV Motion, but the clause was not the basis on which the trial court granted JNOV. Further, the "as is" defense was not raised before the Court of Appeals by crosspoint.

If the manufacturer validly disclaims implied warranties at the first sale, that disclaimer carries with the good. Absent such disclaimer language, manufacturers do not escape liability merely because the good has transferred owners, and the purchaser of a used good can rely upon an implied warranty created at the time of the first sale.

**Practice Pointer: No. 1**

In any case involving implied warranties of merchantability, defenses involving express disclaimers and "as is" language should be pled as affirmative defenses under Rule 94.

## Cardiac Perfusion v. Randall Hughes

*Opinion delivered June 27, 2014*
*13-0014, 436 S.W.3d 790*

**Synopsis**

The jury found that the majority shareholder of Cardiac Perfusion engaged in oppressive conduct to the rights of Hughes, a minority shareholder. The trial court and the Court of Appeals, as an equitable remedy, ordered Cardiac Perfusion to buy out Hughes' shares for their fair value. The Texas Supreme

Court held that court-ordered buyouts are no longer a remedy in shareholder oppression claims. A claim for shareholder oppression is only available under Section 11.404 of the Texas Business Organizations Code, and the only remedy available under that statute is rehabilitative receivership.

Because Hughes relied on precedent that was recently changed in *Ritchie v. Rupe*, No. 11-0447 (Tex. June 20, 2014) (see above, this Newsletter), the Texas Supreme Court used its discretion to remand for a new trial in the interest of justice as it appeared that a party may have proceeded under the wrong legal theory.

**Factual Background and Trial Court Proceedings:**

Joubran founded Cardiac Perfusion and hired Hughes as its first employee. A year later, Joubran, as the sole shareholder, voted to offer Hughes 10% of the company shares. Hughes accepted the offer and purchased the shares with a written buy/sell agreement. The buy/sell agreement required Joubran to purchase Hughes' shares upon the severance of Hughes' employment relationship with Cardiac Perfusion. A dispute later arose, and Hughes' employment with Cardiac Perfusion terminated in August 2006.

Cardiac Perfusion sued Hughes for breach of fiduciary duties and for tortuous interference with a contract. Hughes filed counterclaims alleging Joubran breached fiduciary duties as an officer and director and breached fiduciary duties as majority shareholder. Hughes alleged Joubran engaged in oppressive conduct and unfairly squeezed Hughes out of Cardiac Perfusion. Hughes requested that the Court require Cardiac Perfusion to buy out his shares at their fair value as of the date he was "wrongfully squeezed out of the corporation."

The trial court found that Hughes did not tortuously interfere with any contract or breach any fiduciary duties. With regard to Hughes' counterclaim, the jury found that Joubran suppressed payment of profit distribution to Hughes, paid himself excessive compensation, improperly paid his family members, improperly used funds to pay his personal expenses, wrongfully lowered the value of Hughes' stock, and refused to let Hughes examine the books. The jury found that the fair value of Hughes' shares was $300,000.

The trial court issued findings of fact and conclusions of law in which it concluded that Joubran engaged in oppressive conduct to the rights of Hughes and ordered Joubran to buy out Hughes' shares for their value of $300,000. The final judgment ordered that, as an equitable remedy for oppressive conduct, Joubran and Cardiac Perfusion redeem Hughes' shares for $300,000.

**Court of Appeals:**

The Fifth Court of Appeals (Dallas) affirmed the trial court.

**Texas Supreme Court's Holding:**

The Texas Supreme Court ruled that Texas law does not authorize the buyout order as a remedy. Citing their recent decision in *Ritchie*, the Court clarified that a claim for shareholder oppression is only available under Section 11.404 of the Texas Business Organizations Code, and that the only remedy available under that statute is rehabilitative receivership. Because a buyout order is not available under a common law claim for shareholder oppression or under the receivership statute, the Court reversed that part of the Court's judgment.

The Court noted that its recent decision in *Ritchie* did not follow previous Texas Courts of Appeals decisions recognizing a common law cause of action for shareholder oppression, and as a result, noted that Hughes may have therefore proceeded under the wrong legal theory. Using its broad discretion to remand for a new trial in the interest of justice where it appears that a party may have proceeded under the wrong legal theory in reliance on controlling precedent that was subsequently overruled, the Court affirmed in part, but reversed the Court of Appeals judgment affirming the trial court's buy out order, and in the interest of justice, remanded the case for further proceedings consistent with the opinion.

## Amedisys, Inc. d/b/a Amedisys Texas, Ltd., v. Kingwood Home Health Care, LLC d/b/a Health Solutions Home Health

*Opinion delivered May 9, 2014*
*12–0839, 437 S.W. 3d 507*

**<u>Synopsis:</u>**

Common law contract principles of acceptance apply to Rule 167/Chapter 42 offer of settlement.

**<u>Factual background and Trial Court Proceedings:</u>**

After two Amedisys employees left to join its competitor Kingwood and solicit its business, Amedisys filed suit alleging tortious interference with the non-solicitation agreement it had with the two employees. During settlement negotiations, Kingwood invoked Rule 167 and Chapter 42 of the Texas Civil Practice & Remedies Code making a 14 day time limited $90,000 offer of settlement allowing it to recover certain litigation costs in the event that Amedisys rejected the offer and Kingwood were to prevail.

Although the parties designated experts in the interim, Amedisys accepted the offer on the 14th day. Kingwood then claimed that Amedisys' consideration failed for its acceptance (as Amedisys had missed its deadline for filing experts) and had fraudulently induced the offer (suggesting that it would never accept an offer below 6 figures).

Amedisys eventually to move to enforce the settlement. In response Kingwood reasserted its claim of lack of consideration and fraudulent inducement and added a Notice of Withdrawal of Consent to Alleged Settlement Agreement. Amedisys amended its petition to include a breach of contract claim based on the settlement agreement, both as common law contract and a Rule 11 agreement between attorneys. Amedisys then moved for summary judgment on the newly asserted claim. Kingwood asserted the same defenses to which Amedisys replied that these were legally inapplicable and further failed as they were unpleaded affirmative defenses. The trial court granted Amedisys' motion without stating grounds.

**<u>Court of Appeals:</u>**

On appeal, Kingwood argued that it had raised fact issues on its affirmative defenses and added that acceptance that does not mirror the terms of the offer is a rejection of the original offer and a counter-offer. Specifically, Kingwood offer stated that the settlement would include all claims "*which could have been asserted* by Amedisys," while Amedisys's letter had accepted Kingwood's "offer to settle all monetary *claims asserted*." 437 S.W. 3d 511. Amedisys complained that this was a point not raised in the trial court.

A majority of the court of appeals agreed with Kingwood and reversed the trial court's judgment, concluding that no settlement agreement existed because Amedisys had not accepted all of the offer's material terms. The court of appeals deemed the mirroring argument as part of a challenge to the legal sufficiency of Amedisys' evidence, which could be raised for the first time on appeal.

The court of appeals did not address whether Kingwood had raised fact issues on its affirmative defenses of fraudulent inducement, failure of consideration, and withdrawal.

**<u>Texas Supreme Court's Holding:</u>**

Initially, the Texas Supreme Court looked at Amedisys' burden of proof and Kingwood's preservations of error. In doing so, the court recognized that Kingwood, as the non-movant, could raise legal sufficiency of the evidence for the first time on appeal. Thus, the court framed the issue as:

> We therefore review Amedisys's letter and email to determine whether they constitute evidence that Amedisys accepted Kingwood's settlement offer. If they constitute evidence of acceptance, they were uncontroverted evidence because Kingwood did not present any evidence to disprove or create a fact issue on the acceptance element. But if the letter and email constitute no evidence of acceptance, Amedisys did not satisfy its burden of proof and was not entitled to summary judgment.

*Id.* at 512.

Amedisys contended that common law contract principles governing acceptance did not apply; rather, Rule 167 and Chapter 42 created their own principles for acceptance. Alternatively, Amedisys argued that its acceptance satisfied the common law standard. The supreme court found that common law contract principles of acceptance applied to the offer (rejecting Amedisys' primary argument), including that the acceptance must not change or qualify the terms of the offer. If it does, the offer is rejected.

The court noted that, if Kingwood had prevailed and sought to recover its fees and expenses, then the case would be governed by Rule 167 and Chapter 42.

The Texas Supreme Court then recognized that:

> Under the common law, an acceptance may not change or qualify the material terms of the offer, and an attempt to do so results in a counteroffer rather than acceptance. … But the materiality of the altered term is key, and an immaterial variation between the offer and acceptance will not prevent the formation of an enforceable agreement.

*Id.* at 513-514. Noting that materiality is determined on a contract-by-contract or case-by-case term, the court determined that, in this case, the difference was immaterial. It cited the cover e-mail from Amedisy stated: "Attached please find Amedisys' acceptance *of the settlement offer you sent* pursuant to Rule 167."*Id.* at 515.

However, Kingwood pointed out that the acceptance "conspicuously" omitted "claims that could be asserted" as well as "non-monetary" claims (such as injunctive relief).

The Texas Supreme Court addressed each challenge in order. It noted that Kingwood's offer letter was inconsistent, in some instances referring to "monetary claims" and in others "all claims." The court concluded that "monetary claims between the parties" was a short-hand reference for all claims that could have been asserted. Further, there was no summary judgment evidence that Amedisys had any non-monetary claims, much less any it could have asserted post-settlement of the monetary claims (discussing the application of *res judicata*). Thus, the "could have been asserted" was not material. Finally, the court found that the uncontroverted evidence showed that Amedisys intended to accept Kingwood's Rule 167/Chapter 42 offer.

However the court cautioned that:

> If the divergence in language between Kingwood's offer and Amedisys's purported acceptance was material on its face, Amedisys's letter and email would have been no evidence of acceptance and Amedisys would not have been entitled to summary judgment. … Or if Amedisys's communications had been patently ambiguous about whether Amedisys intended to accept Kingwood's offer, the communications would have, themselves, created a fact issue on acceptance and Amedisys would not have been entitled to summary judgment.

*Id.* at 516. Accordingly, the Texas Supreme Court reversed the court of appeals' decision, but remanded the case back to the court of appeals to consider whether Kingwood raised any fact issues on its affirmative defenses (issues not reached by the court of appeals due to its ruling and not briefed before the supreme court).

**<u>Practice Pointer: No. 1</u>**

The court stated: As it turns out, Kingwood did not want Amedisys to accept the offer and made it only because Amedisys said it would not accept an offer under six figures. Instead, Kingwood made the offer merely to trigger a right to recover its litigation costs under rule 167. *Id.* at 509. It appears that the Texas Supreme Court may have been concerned with apparent gamesmanship or merely reminding others of the old adage: be careful what you ask for (or, in this case, what you offer).

**<u>Practice Pointer: No. 2</u>**

Noting that "The shifting burden of proof in the summary judgment context is important to the disposition of this case. … But Kingwood did not submit any contrary evidence, nor did it challenge the validity of the acceptance at all until after the trial court granted summary judgment." The trial court is your last chance to get evidence into the record. Legal sufficiency is a tough row to hoe.

**<u>Practice Pointer: No. 3</u>**

Plead your affirmative defenses. This could be a real issue on remand. Hard to overcome a lack of pleadings and a lack of proof.

**<u>Practice Pointer: No. 4</u>**

Although you have limited space, raise your issues at the Texas Supreme Court if you go there. Given the Texas Supreme Court's disposition of the issues, one has to wonder whether it would have gone all the way for Amedisys. I guess we will find out after the remand decision returns to the supreme court.

## LAN/STV and STV Inc. v. Martin K. Eby Construction Co. Inc.

*Opinion delivered June 20, 2014*
*11–0810, 435 S.W. 3d 234*

**Synopsis:**

"The issue in this case is whether the [economic loss] rule permits a general contractor from recovering the increased costs of performing its construction contract with the owner in a tort action against the project architect for negligent misrepresentations (errors) in the plans and specifications. We conclude that the economic loss rule does not allow recovery . . . ."

**Factual background and Trial Court Proceedings:**

This case has now been to the Texas Supreme Court twice. The Dallas Area Rapid Transportation Authority ("DART") contracted with LAN/STV to prepare plans, drawings, and specifications for the construction of a light rail transit line. LAN/STV agreed to "be responsible for the professional quality, technical accuracy, and . . . coordination of all designs, drawings, specifications, and other services furnished," and to be "liable to the Authority . . . for all damages to the Authority caused by [LAN/STV's] negligent performance of any of the services furnished." DART incorporated LAN/STV's plans into a solicitation for competitive bids to construct the project. Eby submitted the low bid and was awarded the contract. Eby and LAN/STV had no contract with each other. Thus, LAN/STV was contractually responsible to DART for the accuracy of the plans, as was DART to Eby, but LAN/STV owed Eby no contractual obligation.

Days after beginning construction, Eby discovered that LAN/STV's plans were full of errors. Eby found that 80% of LAN/STV's drawings had to be changed (significantly higher than the customary 10% of changes). This disrupted Eby's construction schedule and required additional labor and materials, resulting in a claimed $14 million loss on the project. Eby proceeded against DART (initially in federal court and then administratively, claiming $21 million and settling for $4.7 million).

Eby simultaneously pursued this tort suit against LAN/STV resulting in a trial (after the Eby/Dart settlement) on its negligent misrepresentation only. The jury agreed and assessed Eby's damages for its losses on the project at $5 million, but they also found that the damages were caused by Eby's and DART's negligence as well, and apportioned responsibility 45% to LAN/STV, 40% to DART, and 15% to Eby. The trial court concluded that Eby's $4.7 million settlement with DART should not be credited against the damages found by the jury, but that LAN/STV should be liable only for its apportioned share of the damages. Accordingly, the trial court rendered judgment for Eby for $2.25 million plus interest.

**Court of Appeals:**

Both parties appealed. The court of appeals affirmed. Both parties filed petitions for review. The Texas Supreme Court granted both, but eventually determined that only LAN/STV's petition needed to be addressed.

**Texas Supreme Court's Holding:**

Justice Hecht began the court's opinion by reaching back to *Robins Dry Dock*, the 1927 Supreme Court decision, which he cited as an early example of the economic loss rule. In that case, a ship charterer, who had leased the vessel from its owner, tried to recover on both a contract (third party beneficiary) and a negligence theory for delay damages from the dry dock, which had a contract only with the owner to repair the vessel. Quoting Justice Holmes from *Robins Dry Dock*:

> [N]o authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong.... The law does not spread its protection so far.

435 S.W. 3rd at 238 (quoting *Robins Dry Dock*, 275 U.S. 303, 308-309, 48 S. Ct. 134, 72 L. Ed. 290 (1927)). The Texas Supreme Court also noted that "a plaintiff may not recover for economic loss caused by his reliance on a negligent misrepresentation that was not made directly to him … ."*Id.* (relying on Judge Higginbotham citation in *State of Louisiana v. M/V Testbank*, 752 F.2d 1019, 1022 (5th Cir.1985) (en banc) of James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L.REV. 43, 43 (1972).) The court further noted that risk of economic loss is better allocated by contract or covered by insurance.

The Texas Supreme Court had not addressed the "the extent to which Texas precludes recovery of economic damages in a negligence suit between contractual strangers, notwithstanding the rule's genesis in such cases." Quoting Professor Powers [in 1992], the court observed that, "[a]lthough cases between contractual strangers are the paradigm of the traditional 'economic loss' rule, no Texas case involving "strangers" expressly addresses the economic loss rule.'" *Id.* at 243. In dicta, the Texas Supreme Court had first suggested strangers could recover and then in a later opinion suggested they could not. "Since then, Texas courts of appeals have uniformly applied the economic loss rule to deny recovery of purely economic losses in actions for negligent performance of services." *Id.*

The Court noted three instances in which the Texas Supreme Court has allowed economic loss in negligent misrepresentation cases, but, in each case, noted the limitations:

> These cases should not be read to suggest that recovery of economic loss is broader for negligent misrepresentation than for negligent performance of services. We agree with the *Restatement* that "[t]he general theory of liability is the same" for both torts … .
>
> …
>
> And for both torts, whether and how to apply the economic loss rule "does not lend itself to easy answers or broad pronouncements." Rather, as we have already observed, the application of the rule depends on an analysis of its rationales in a particular situation.

*Id.* at 245-246. The court then turned to the subject of construction contracts and noted that such projects operate by agreement among the participants and, with the exception of the architect, are typically vertical in nature (owner contracts with general contractor, who in turn contracts with subcontractors, who may then contract with sub-subcontractors and so on.) In this circumstance, the court fashioned at least one bright line rule: “We think it beyond argument that one participant on a construction project cannot recover from another—setting aside the architect for the moment—for economic loss caused by negligence.” *Id.* at 246.

Having answered the question for construction contracts generally, the Court addressed whether architects should be treated differently and whether to distinguish between an action for negligent performance of services and an action for negligent misrepresentation. With regard to the two torts, the Court concluded that the *Restatement* should be followed and the two should not be treated differently. However, with respect to architects, the Court diverged from the *Restatement*:

> And while there is some analogy between the architect’s plans and an accountant’s audit report, under *Grant Thornton*, the latter is not an invitation to all investors to rely, but only those to whom it is more specifically directed. Here, the architect’s plans are no more an invitation to all potential bidders to rely.

*Id.* at 247. Thus, the Court refused to recognize an exception to the general rule prohibiting recovery of economic loss in negligent services or negligent misrepresentation claims for architects in construction contracts. Justice Hecht noted: “Finally, the courts are fairly evenly divided over whether to apply the economic loss rule in this situation. We side with those who do.” *Id.* at 249 (footnote omitted).

**<u>Practice Pointer: No. 1</u>**

If you have an economic loss rule case, this scholarly tome of an opinion is a great starting point. It is written almost like a law review article with at least 60 footnotes, some of which are quite lengthy.

**<u>Practice Pointer: No. 2</u>**

As a general rule, economic loss is not recoverable in tort in situations that could be governed by contract. The Texas Supreme Court defers to the parties to allocate risk as they see fit. However, there are exceptions and a few are recognized in this case. For instance, the three cases cited by Justice Hecht in which the Texas Supreme Court allowed recovery of economic loss were not expressly overturned, overruled, or disapproved.

## Venture Cotton Cooperative v. Freeman

*Opinion delivered June 13, 2014*
*13–0122, 435 S.W. 3d 222*

**<u>Synopsis:</u>**

In this Federal Arbitration Act case, any implied waiver of cotton farmers’ statutory right to recover attorneys’ fees was invalid as contrary to public policy and severable from the remainder of the arbitration agreement. However, the one-sided attorneys’ fees provision of the arbitration agreement was insufficient to invalidate the agreement as unconscionable.

**<u>Factual background and Trial Court Proceeding:</u>**

Cotton farmers contracted to sell their cotton crop to a cooperative marketing pool, Venture. During the contract period, the price of cotton rose significantly, a drought occurred in West Texas, and a dispute arose over the quantity of cotton subject to the agreement.

The farmers alleged that they were fraudulently induced to join the cooperative and sued Venture alleging fraud, negligent misrepresentation, breach of fiduciary duty, mutual mistake, civil conspiracy and violations of the Texas Consumer Protection—Deceptive Trade Practices Act, and the Texas Free Enterprise and Antitrust Act of 1983. Freeman and Brewer also sought declaratory and injunctive relief and attorney's fees under Texas Civil Practice and Remedies Code § 38.001.

In part, the contracts provided that the farmers had to pay Venture's attorney's fees and expenses in the event that it prevailed, but that there was no reciprocal obligation for Venture to pay the farmers' attorney's fees and expenses in the event the farmers prevailed, defeating the farmers right to pursue such fees and expenses under § 38.001.

The contracts also contained arbitration provisions invoking the Federal Arbitration Act. Venture, therefore, moved to stay the litigation and compel arbitration. The farmers claimed the contracts were unconscionable.

The trial court concluded that the arbitration provisions should not be enforced because it is unconscionable. Venture filed an interlocutory appeal.

**<u>Court of Appeals:</u>**

The court of appeals affirmed reasoning that the arbitration agreement is unconscionable because it prevents the farmers from pursuing the statutory remedies and attorney's fees alleged in their pleadings.

**<u>Texas Supreme Court's Holding:</u>**

The Texas Supreme Court analysis began by setting forth the standard of reviewing contracts containing arbitration agreements:

> Although the Federal Arbitration Act preempts state law that conflicts with its objectives, state law remains relevant to declare an arbitration agreement itself unenforceable on "such grounds as exist in law or in equity for the revocation of any contract." 9 U.S.C. §2 (the saving clause). "This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."

435 S.W. 3d at 227 (internal citations omitted). Thus, the Texas Supreme Court analyzed the formation of the contract under Texas law and noted that unconscionability is not easily defined. Rather,

> Under the UCC, an unconscionability defense is a question of law that involves a highly fact-specific inquiry into the circumstances of the bargain, such as the commercial atmosphere in which the agreement was made, the alternatives available to the parties at the time and their ability to bargain, any illegality or public-policy concerns, and the agreement's oppressive or shocking nature.

*Id.* at 228. In this case, the farmers' argument upon which the court of appeals focused was that "[t]he agreement and ACSA rules violated the state's public policy by illegally eliminating their statutory right to attorney's fees and other remedies under the Texas Consumer Protection—Deceptive Trade Practices Act (DTPA)." *Id.* at 229. However, the Texas Supreme Court distinguished its decision *In re Poly–America, L.P.*, 262 S.W.3d 337 (Tex. 2008), in which it had found that "[i]t would be unconscionable for an arbitration agreement to mandate arbitration of a statutory claim and at the same time eliminate the rights and remedies afforded by the statute." *Id.* The arbitration rules at issue foreclose the farmers' statutory claims for attorney's fees and enhanced damages under the DTPA. In most circumstances, an agreement to arbitrate a statutory claim should not waive the statutory remedies, but act like a forum selection clause merely enforcing those rights and remedies in a different forum.

However, the court found that DTPA remedies could be waived if the statutory waiver requirements are followed. Venture's contract did not follow those requirements. Further, the Texas Supreme Court agreed with the court of appeals that any implied waiver is against public policy and invalid.

Although invalid, the Texas Supreme Court agreed with Venture that, if only a term (and not the whole contract) is found unconscionable, then the term can be severed so long as it does not constitute the essential purpose of the agreement, i.e. whether or not parties would have entered into the agreement absent the unenforceable provisions. Here, the term was not an essential purpose and should have been severed.

The Texas Supreme Court next addressed the farmers' claims for attorney's fees under section 38.001:

> Parties are generally free to contract for attorney's fees as they see fit. Thus, a contract that expressly provides for one party's attorney's fees, but not another's, is not unconscionable *per se*. Although perhaps relevant to a broader inquiry into contractual oppression or an imbalance in bargaining power, the attorney's fee provision here is not, standing alone, decisive proof of an unconscionable bargain.

*Id.* (internal citations omitted).

Accordingly, the Texas Supreme Court reversed the court of appeals decision and remanded the case for further consideration on the unconscionability issue.

## Jaster v. Comet II Construction Inc.

*Opinion delivered July 3, 2014*
*12–0804, 438 S.W.3d 556*

**Synopsis:**

The plurality opinion held that Texas Civil Practices and Remedies Code section 150.002(a), the statute's certificate of merit or expert-affidavit requirement, does not apply to third-party claims or cross-claims.

**Factual background and Trial Court Proceedings:**

Dawoud purchased a home from Comet. About ten years later, Dawoud sued Comet for negligence, negligent misrepresentations, fraud, deceptive trade practices, and breach of contract, alleging that Comet defectively designed and constructed the home's foundation. In turn, Comet asserted third-party claims against Austin Design, from whom Comet had purchased the foundation plans, and against Jaster, the licensed professional engineer who had prepared the plans. Comet sought contribution and indemnity from the Jaster and Austin Design. Austin Design Group filed a cross-claim against Jaster, also seeking contribution and indemnity.

Jaster moved to dismiss Comet's third-party claim and Austin Design's cross-claim, arguing that they were each "the plaintiff", that he was a licensed professional engineer, and that they had failed to file an expert affidavit ("certificate of merit") required by chapter 150. In response, Comet amended its third-party petition and attached for the first time a certificate of merit. Jaster amended his motion, arguing that Comet did not comply with the statute because it did not file the certificate of merit with the original third-party petition and thus did not file it "with the complaint." The trial court denied Jaster's motion.

**Court of Appeals:**

On interlocutory appeal, the court of appeals affirmed, concluding that chapter 150 does not require third-party plaintiffs or cross-claimants to file a certificate of merit.

**Texas Supreme Court's Holding:**

The Texas Supreme Court began its opinion by noting: "Chapter 150 requires 'the plaintiff' in 'any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional' architect, engineer, land surveyor, or landscape engineer to file a supporting expert affidavit 'with the complaint.'" 438 S.W. 3d at 558-559. Failure to file the certificate of merit "shall" lead to dismissal, possibly even dismissal with prejudice. No party disputed Jaster's position as a licensed or registered professional triggering Chapter 150. Nor was there any dispute that both Comet and Austin Design failed to file the certificate of merit with their original pleading asserting the claim against Jaster. Thus, "the only issue in this appeal is whether the statute required them to do so."*Id.* at 560.

The Texas Supreme Court identified the arguments of the parties as follows:

> Jaster argues: (1) for purposes of section 150.002, "there is no meaningful distinction" between an original "plaintiff" and a third-party plaintiff or a cross-claimant because they all assert affirmative claims for relief and are subject to the same pleading requirements; (2) third-party claims and cross-claims are "actions," and thus must comply with the statute's requirements for "any action"; and (3) not applying the requirement to third-party plaintiffs and cross-claimants thwarts "the statute's purpose to protect licensed professionals from unmeritorious or frivolous claims." In response, Comet and Austin Design Group contend: (1) because the statute uses the word "plaintiff" rather than the more inclusive term "claimant," the certificate-of-merit requirement applies only to a party that initiates a lawsuit; (2) requiring a defendant who denies the plaintiff's allegations to file a certificate of merit that supports the plaintiff's claims would be "absurd," "unfair," and "unreasonable"; and (3) if applying the requirement only to "the plaintiff" undermines the statute's purpose, the Legislature should address that problem, not the courts.

*Id.* at 560-561. The plurality opinion then reviewed three courts of appeals cases that had written on the issue of a third party's obligations under Chapter 150. The Dallas Court of Appeals required a third-party plaintiff file a certificate of merit, but, in that case, defendant did not specifically argue that the statute did not apply to third-party petitions. The Fort Worth Court of Appeals found that a defendant filing a cross-claim against licensed or registered professionals need not file a certificate of merits as the plaintiff would have already filed one against the cross-defendants; however, a third–party plaintiff bringing in a wholly new licensed or registered defendant must file a certificate of merit. Finally, the Austin Court of Appeals in this case found that neither a cross-plaintiff nor a third-party plaintiff need file a certificate of merit drawing a particular distinction between the statutorily used "plaintiff" and an alternative option of "claimant" and the statute's failure to define "plaintiff" to include cross-plaintiffs and third-party plaintiffs. The Austin Court of Appeals' dissenting opinion noted the inherent inconsistency of requiring one group suing professionals to file the certificate and another group not to do so and, in doing so, defeating the purpose of the statute to allow courts to expeditiously dispose of meritless claims against professionals.

Finding no solace in the courts of appeals' decision, the Texas Supreme Court turned to statutory construction of "plaintiff" and "action" beginning by reciting the standard rules:

> We must enforce the statute "as written" and "refrain from rewriting text that lawmakers chose." We limit our analysis to the words of the statute and apply the plain meaning of those words "unless a different meaning is apparent from the context or the plain meaning leads to absurd or nonsensical results." While we must consider the specific statutory language at issue, we must do so while looking to the statute as a whole, rather than as "isolated provisions." We "endeavor to read the statute contextually, giving effect to every word, clause, and sentence."
>
> Chapter 150 does not define the terms "plaintiff" or "action," so we must give them their common, ordinary meaning unless the statute clearly indicates a different result. … The dissent asserts that, "[w]hen a word is used sometimes to mean one thing and sometimes another, neither is 'plain,' 'common,' or 'ordinary' to the exclusion of the other." We disagree. When a statute uses a word that it does not define, our task is to determine and apply the word's common, ordinary meaning.

*Id.* at 562-563 (internal citations omitted). To find the ordinary meaning, the Court first turned to the dictionary definition, which supported restricting "plaintiff" to person filing the case in the first instance (and not cross- or third-party plaintiffs). With respect to "action," dictionary definitions denote the entire case as opposed to or contracted with a "cause of action," of which there can be many in a single "action." All three of these terms' dictionary definitions are supported by case law as well. Thus, the common or ordinary meaning supports the conclusion that only the plaintiff, but not a cross- or third-party plaintiff, must file a certificate of merit with the original petition.

The Court next turned to the context of the terms to see if it changed their meaning. In considering the context, the Texas Supreme

Court noted that the statute requires (1) the plaintiff to file a certificate of merit in "any action *or arbitration proceeding*" (analogizing an action with a proceeding, both of which suggest the whole as opposed to an individual claim or cause of action); (2) the plaintiff to file a certificate of merit "*in* " an action or arbitration proceeding (as opposed to filing "in" a claim or cause of action, which would be grammatically incorrect); (3) the certificate of merit to "set forth specifically" the defendant's conduct giving rise to liability "for *each theory of recovery* " and "the factual basis for *each such claim*" (drawing an internal distinction between claim and action). Further, when looking at the entire Texas Civil Practice & Remedies Code, the terms "plaintiff" and "claimant" are used differently (even in some instances, like Chapter 71, defining plaintiff to expressly exclude counter-, cross-, and third-party plaintiffs), supporting the interpretation that "plaintiff" is the one filing the initial pleading starting the entire action. Finally, the Court looked at the Texas Rules of Civil Procedure and noted these use plaintiff and third-party plaintiff separately. Accordingly, the Court found that only the plaintiff, but not a cross- or third-party plaintiff, must file a certificate of merit with the original petition.

With respect to absurd results, the plurality noted that: "The 'bar for reworking the words our Legislature passed into law is high, and should be. The absurdity safety valve is reserved for truly exceptional cases, and mere oddity does not equal absurdity.'" *Id.* at 569 (internal citation omitted). While the dissent noted the "odd" result of forcing only a plaintiff, but not a cross- or third-party plaintiff, to file a certificate of merit, the plurality did not find this circumstance sufficient to re-work the words of the statute, which would created a "far" odder circumstance of requiring a defendant to abandon its denial of the plaintiff's claims and file a certificate of merit supporting the plaintiff's claims.

In response to both Jaster's and the dissent's assertion that not requiring cross- and third-party plaintiffs to file certificates of merit partially impairs the purpose of the statute to expeditiously eliminate meritless claims against licensed and registered professionals, the plurality explained:

> "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." We must look to the statute's text to determine the policy choices that the Legislature made when deciding how to achieve the "manifest object" of section 150.002. "[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." We "are bound, not only by the ultimate purposes [the Legislature] has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes."

*Id.* at 570 (internal citations omitted). Here, the Legislature had to balance interests and, by expressly requiring "plaintiffs" to file certificates, made its decision regarding its purpose.

Likewise, the plurality refuted the dissent's concern that the plurality's focus on the meaning of the words, rather than the intent of the statute, requires too much precision from the legislature. The plurality declared:

> We disagree and instead conclude that "[w]e must assume that the Legislature has done its very best to express its intent in the words of the statute itself." … But even if that's the case here [that the legislature made a mistake and simply used the wrong words], "courts are not empowered to 'fix' the mistake by disregarding direct and clear statutory language that does not create an absurdity."

*Id.* at 571 (internal citations omitted).

## Burbage v. Burbage

*Opinion delivered Aug. 29, 2014*
*12-0563, 2014 WL 4252274*

**Synopsis**

Reviewing a reputation damages award, the Texas Supreme Court found no evidence of actual injury that would support the jury's award.

**Factual Background and Trial Court Proceedings:**

Kirk Burbage owned and operated a centuries-old family business, Burbage Funeral Home, which he obtained from his grandmother, Anna Burbage, under her will. He also owned the family cemetery that his mother, Virginia Burbage, conveyed to him. Seething with a sibling rivalry only exacerbated by the devise of the family business and conveyance of the family cemetery by the brothers' grandmother and mother, Kirk's older brother, Chad Burbage, created a website, www.annaburbage.org, to air his grievances against Kirk. He also placed posters around town to publicize the website. Among other allegations on the website were the following:

- "Anna Burbage ('Miss Anna') was a victim of Elder Abuse. The Abuser was her grandson, Kirk Burbage and others."

- "Virginia Burbage Markham was the principal of Stephen Decatur High School serving northern Worcester County Maryland. At the present time, she is being abused by her son, Kirk Burbage, of the Burbage Funeral Home. She is currently a victim of ELDER as well as FAMILY ABUSE."

- "The methods [of abuse] include: lies, trespassing, grand larceny, will tampering/undue influence, gifts with the intent to control his mother, discrediting fellow siblings, deceptively misrepresenting the contents of legal documents requiring the signature of the ABUSED for personal gain and to cover up land fraud and involving the ABUSED ELDER in Cemetery Land Fraud."

- "Kirk Burbage has also been known to abuse the dead."

Chad also circulated letters with similar allegations to friends of the Burbage family. Kirk and Burbage Funeral home subsequently filed suit for defamation against Chad. The jury ultimately awarded Kirk $6,552,000 in damages that accounts for past injury to reputation, future injury to reputation, past mental anguish, future mental anguish, and exemplary damages. Burbage Funeral Home received an award of $3,050,000 in compensatory and exemplary damages. The trial court also permanently enjoined Chad from future defamatory speech in a listing of topics tied to the prior defamatory statements.

**<u>Court of Appeals</u>:**

Chad appealed. The Austin Court of Appeals reduced the exemplary damages to $750,000, upheld the other damages awards, and vacated the injunction. Both parties petitioned for review.

**<u>Texas Supreme Court's Holding</u>:**

The Texas Supreme Court affirmed in part and reversed in part the decision of the Austin Court of Appeals. Three issues were presented: 1) whether any defamatory statements fell within a qualified privilege; 2) whether evidence supported the jury's damage awards; and 3) whether the trial court abused its discretion by issuing the permanent injunction. The Court did not reach the first issue because Chad failed to preserve error and quickly disposed of the third issue, holding that prohibited injunctions on future speech that is the same or similar to speech that has been adjudicated to be defamatory operate as impermissible prior restraints on free speech. *Id*. at *11 (citing *Kinney v. Barnes*, No. 13–0043, WL 4252272 (Tex. Aug. 29, 2014)). The resolution of these two issues left the Court to consider the reputation damages award.

First analyzing the compensatory damages award, the Court conducted a legal-sufficiency review. Gleaning guidance from the jury charge for the standard by which to measure the award, the Court undertook to conduct a "meaningful appellate review of the jury's determination of an amount that 'would fairly and reasonably compensate' for the loss." Although acknowledging Texas law presumes nominal damages for defamatory per se statements at the outset, the review considered awards beyond nominal damages for evidentiary support.

The Court generally focused on three aspects of the evidence in determining that there was no evidence of actual injury in the record: 1) evidence of the funeral home business' value; 2) evidence of actual impact through loss of business; 3) evidence of actual personal impact based on the centrality of Kirk's role in the family business. Looking first at evidence of the funeral home's value, the Court dismissed Kirk's loose assertion that the business was probably worth a few million based on Kirk's caveats that he did not really know the value and was just "throw[ing] something out there." The Court further rejected speculative statements by Kirk that the value of the business would be "zero" in his opinion if forced to close. In the Court's estimation, Kirk's conclusory and speculative statements of a ballpark value and estimated loss did not present "some concrete basis for an estimate" from which a jury could determine actual damages for injury to the business' reputation.

The Court similarly found evidence of actual injury to the business as speculative. In support of his contention that the funeral home lost business as a result of the defamatory statements, Kirk testified that many customers had cancelled pre-paid contracts. When pushed for further details, however, Kirk admitted that he never inquired nor received an explicit indication that customers were cancelling contracts because of the defamatory statements. In response, the Court observed the following:

> [T]he jury could not reasonably infer that defamation caused the cancellations when the cancellations could have occurred for any number of reasons.

*Id*.

Lastly, the Court looked at the actual impact of the statements on Kirk personally, finding the evidence wanting once again. Kirk offered only vague testimony on whether the community would believe the accusations and revealed that he was simply one of four funeral directors at the business. Notably, neither Kirk's name nor his personal visage was included in advertisements for the funeral home. Consequently, the Court understood Kirk's testimony to undermine the scope of any impact on him personally.

As a consequence of the review of the reputation damages award, the Court held that no evidence supported the jury's award of actual damages. In the absence of actual damages, the Court also held that Kirk and the funeral home were unable to recover exemplary damages.

# Exxon Mobil Corp. v. Drennen

*Opinion delivered Aug. 29, 2014*
*12-0621, 2014 WL 4782974*

**<u>Synopsis</u>**

The Texas Supreme Court held that a New York choice-of-law clause in an executive bonus-compensation program was enforceable since the "detrimental activity" clause in the agreement did not operate as a covenant not to compete in violation of a fundamental policy of Texas.

**<u>Factual Background and Trial Court Proceedings</u>:**

William Drennen, III worked as a geologist for Exxon Mobil more than thirty-one years. Over the course of his tenure at Exxon Mobil, Drennen received incentive compensation, including participating in formalized incentive programs under which he was given, among other benefits, restricted stock options. In total, Drennen earned some 73,900 shares of restricted Exxon Mobil stock, 50% of which were to be delivered to him without restrictions three years after each grant and 50% which were to be delivered seven years after each grant. The restricted stock agreement incorporated the terms of the incentive programs. The agreements were executed in Texas through a corporate representative of Exxon Mobil at the company's headquarters in Irving, Texas. Notably, the incentive programs included choice-of-law provisions providing for application of New York law, even though Exxon Mobil is headquartered in Texas and incorporated in New Jersey. The programs also included termination provisions that allowed Exxon Mobil to terminate outstanding awards if an employee engaged in "detrimental activity" to the company (defined roughly as a material conflict with the company) or left the company before the standard retirement plan without approval.

Drennen took early retirement from Exxon Mobil in 2006 after the company ushered in a new CEO with plans to shake up the executive structure, including Drennen's position. Prior to his departure, Drennen received assurances that he would not run afoul of the termination provision and consequently would be able to keep any unvested stock options as long as he did not work for one of the other four "majors" (Shell, BP, ChevronTexaco, or ConocoPhillips). After Drennen took a position at Hess, another energy giant, Drennen received a notification from Exxon Mobil cancelling his incentive awards because Drennen was engaging in "detrimental activity" to the company.

Drennen sued Exxon Mobil to recover restricted stock that Exxon Mobil claimed he forfeited by working for a competitor, seeking a declaratory judgment that the "detrimental activity" provision operated as an unenforceable covenant not to compete that was void under Texas fundamental policy as overbroad and also arguing that Exxon Mobil breached an oral agreement not to cancel his incentives if he did not go to the four "majors." The jury ultimately found for Exxon Mobil on all claims. The trial court denied Drennen's JNOV.

**Court of Appeals:**

Drennen challenged the trial court's denial of his JNOV on appeal. The Fourteenth Court of Appeals reversed and ordered the trial court to render a declaratory judgment for Drennen, holding that the forfeiture conditions were unreasonable covenants not to compete which were unenforceable under Texas law as a matter of public policy. Therefore, the Court of Appeals refused to enforce the New York choice-of-law provision since the result would be against Texas fundamental policy. Exxon Mobil petitioned the Texas Supreme Court, arguing that the choice-of-law provision was enforceable, which would allow for application of the "detrimental activity" provision under New York law.

**Texas Supreme Court's Holding:**

The pertinent and primary portion of the Texas Supreme Court's opinion analyzed whether the New York choice-of-law provision was enforceable. The Court walked through application of the Restatement (Second) of Conflict of Laws § 187 as interpreted in the Court's seminal opinion in *Desantis*. 2014 WL4782974 at *3-4 (citing *Desantis v. Wackenhut Corp.*, 793 S.W.2d 670 (Tex. 1990)). After briefly finding that New York bears a substantial relationship to the parties and the agreements at issue in addition to Texas since Drennen spent three years of his career working for Exxon Mobil in New York and the stock at issue in the case was traded on the New York Stock Exchange, the Court turned to a lengthier discussion of the second hurdle over which a contractual choice-of-law provision must jump:

> The law of the state chose by the parties to govern their contractual right and duties will be applied . . . unless . . . application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of §188, would be the state of applicable law in the absence of an effective choice of law by the parties.

The Court walked down the three step analysis for determining the enforceability of contractual choice-of-law provisions under this second hurdle as laid out in *Desantis*, assessing which state had the most significant relationship with the parties and transaction, which state had a materially greater interest in the parties and transaction, and whether enforcing the contractual choice-of-law provision would conflict with the fundamental policy of the state with the most significant relationship and materially greater interest.

The Court quickly dispensed with the first two steps, finding that Texas had the most significant relationship to the transaction and parties since both parties were located in Texas, the agreement was executed in Texas, and performance was to occur in Texas. Similarly, the Court found that Texas had a materially greater interest than New York, observing that Texas's concern for Drennen as an employee in Texas and Exxon Mobil as a national company doing business in Texas outweighed Texas and New York's common, general interest in protecting the justifiable expectations of parties doing business in several states.

The Court lingered on the final step, looking to see if enforcing the New York choice-of-law provision would conflict with a fundamental policy of Texas. Because the Court had already declared that the law governing enforcement of non-competes is fundamental policy in Texas, the key consideration in the current case was whether the "detrimental activity" provision in the Exxon Mobil incentive program that provided for forfeiture of the stock-options operated as a covenant not to compete. *Id*. The Court made a careful distinction between non-competes and the provision here:

> Looking at the facts in our prior non-compete cases, it is clear that the agreement here does not fit the mold . . . there is a difference, although a narrow one, between an employer's desire to protect an investment and an employer's desire to reward loyalty. Non-competes protect the investment an employer has made in an employee, ensuring that the costs incurred to develop human capital are protected against competitors who, having not made such expenditures, might appropriate the employer's investment. Forfeiture provisions conditioned on loyalty, however, do not restrict or prohibit the employee's future employment opportunities. Instead, they reward employees for continued employment and loyalty.

*Id*. at *7. Significantly, Drennen did not promise to refrain from competing nor from soliciting clients or employees from Exxon Mobil, only agreeing that he would receive bonus compensation as a reward for his loyalty. Therefore, the Court found that the "detrimental activity" provision was not a covenant not to compete that triggered Texas fundamental policy concerns as in *Desantis*. *Id*. at 8. The Court even hinted at a broader change in Texas policy:

> [T]he policy concerns regarding uniformity of law raised in *DeSantis* have changed in the past twenty-four years. With Texas now hosting many of the world's largest corporations, our public policy has shifted from a patriarchal one in which we valued uniform treatment of Texas employees from one employer to the next above all else, to one in which we also value the ability of a company to maintain uniformity in its employment contracts across all employees, whether the individual employees reside in Texas or New York.

The finding that the "detrimental activity" provision was not a non-compete coupled with the changing winds of Texas policy led the Court to find that whether or not Texas and New York law may reach different result on the enforceability of the "detrimental activity" provision, it could not conclude that application of New York law to the determination could be contrary to a fundamental policy of Texas. Accordingly, the Court upheld enforcement of the parties' contractual choice-of-law provision.

# Zachry Const. Corp. v. Port of Houston Auth. of Harris Cnty.

*Opinion delivered Aug. 29, 2014*
*12-0772, 2014 WL 4472616*

**Synopsis**

The Texas Supreme Court found a no-damages-for-delay provision unenforceable in light of deliberate, wrongful conduct by the party seeking the benefit of its enforcement.

**Factual Background and Trial Court Proceedings:**

Zachry Construction Corporation ("Zachry") contracted to construct a wharf on the Bayport Ship Channel for the Port of Houston Authority of Harris County, Texas ("Port"). The contract between the parties included the following provision that made Zachry an independent contractor in sole control of choosing the manner the work would be conducted:

> The Port Authority shall not have the right to control the manner in which or prescribe the method by which the Contractor [Zachry] performs the Work. . . .

The Port, however, remained engaged in Zachry's decision-making regarding the wharf project. The contract between the parties further provided that time was of the essence, specifying that Zachry would have a two-year period for the project. Zachry also agreed to pay $20,000 per day in liquidated damages for missing deadlines. Nine months into the project, the Port approached Zachry about expanding the nature of the project. The parties agreed to a change order despite unstated reservations by the Port about Zachry's method of executing the expanded project. Two weeks after the change order was agreed to, the Port ordered Zachry to revise its plans based on those unstated concerns. The order by the Port resulted in a refusal to allow construction for a period of time. Zachry protested under the provision that granted it sole control on the manner of completing the work, but the Port rebuffed the complaints. As a result, Zachry was forced to change the method of completing the work, facing delays and increased costs. Although the parties orally agreed not to impose the liquidated damages provision in negotiating the change order, the Port withheld $2.36 million in payments. Zachry completed the wharf project two-and-one-half years after the original contract deadline.

Zachry filed suit after the Port refused to allow construction, claiming $30 million in delays. The Port pointed to a contractual provision precluding delay damages:

> [Zachry] shall receive no financial compensation for delay or hindrance to the Work . . . AND EVEN IF SUCH DELAY OR HINDRANCE RESULTS FROM, ARISES OUT OF OR IS DUE, IN WHOLE OR IN PART, TO THE NEGLIGENCE, BREACH OF CONTRACT OR OTHER FAULT OF THE PORT AUTHORITY. [Zachry's] sole remedy in any such case shall be an extension of time.

The trial court agreed with Zachry's assertion that a non-delay-damages provision could not be enforced in light of the Port's intentional misconduct. The trial court also entered judgment on the jury's finding that Zachry had not released a claim for $2.36 million in liquidated damages under the release it executed to obtain periodic payments from which liquidated damages were withheld. In addition to awarding delay damages and liquidated damages to Zachry, damages were also awarded to the Port for defective wharf fenders.

**<u>Court of Appeals</u>:**

Both parties appealed. The Fourteenth Court of Appeals held that the no-delay-damages provision of the contract barred Zachry's recovery of delay damages, that Zachry released its claims to withheld liquidated damages, and that the Port was entitled to the $970,000 awarded by the jury for defective wharf fenders. Zachry petitioned for review.

**<u>Texas Supreme Court's Holding</u>:**

Before the Texas Supreme Court, the Port advanced two arguments: 1) the no-damages-for-delay provision is enforceable and 2) the Local Government Contract Claims Act did not waive governmental immunity from suit for any recovery a contract does not itself provide for. The Court first disposed of the Port's claim of immunity, concluding that the Local Government Contract Claims Act waives immunity for a contract claim for delay damages not expressly provided for in the contract:

> While the Legislature clearly intended to limit the recovery of consequential damages on contract claims permitted by the Act, nothing in the Act suggests that the Legislature intended to create a unique and somehow limited standard for measuring direct damages for breach of contract. Generally, a contract has a right to delay damages for breach of contract. The parties are free to modify or exclude it by agreement, but unless they do, the right provided by law is as much a part of the contract as the right the contract expressly creates.

*Id*. at *8.

The Court next examined whether Zachry's claim was barred by the no-damages-for – delay provision in the contract. The outcome turned on whether Zachry satisfied an exception to the general rule that a contractor may generally agree to assume the risk of construction delays and not seek damages. The recognized list of exceptions included the following:

> [W]hen the delay: (1) was not intended or contemplated by the parties to be within the purview of the provision; (2) resulted from fraud, misrepresentation, or other bad faith on the part of one seeking the benefit of the provision; (3) has extended for such an unreasonable length of time that the party delayed would have been justified in abandoning the contract; or (4) is not within the specifically enumerated delays to which the clause applies.

(citing *Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 387 (Tex. 1997)). Zachry contended that the circumstances fell under exception two or a previously hinted at but formally unrecognized fifth exception for intentional acts of interference taken by the one seeking the benefit of the provision. In light of Zachry's contention that the Port actively interfered with the contractor and/or engaged in wrongful conduct causing the delay, the Court considered recognition of a fifth exception. In recognizing a fifth exception, the Court dismissed the Port's claim that the provision's express wording that Zachry could not recover for the Port's negligence, breach of contract, or other fault precluded recovery. Applying the rule of *ejudsem generis*, the Court found it doubtful that "other fault" when read in conjunction with "negligence" and "breach of contract" would include deliberate, wrongful conduct. Further, the Court looked to the purpose of the second exception in expanding the scope of the second exception to a "fifth exception":

> Regardless, the purpose of the second *Ball* exception is to preclude a party from insulating himself from liability for his own deliberate, wrongful conduct. We have indicated that pre-injury waivers of future liability for gross negligence are void as against public policy. Generally, a contractual provision exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy. We think the same may be said of contract liability. To conclude otherwise would incentivize wrongful conduct and damage contractual relations.

Accordingly, the Court found that the no-damages-for-delay provision of the parties' contract was unenforceable.

In a final issue, the Court considered whether the various releases Zachry signed to claim periodic payments, released the Port from Zachry's claim for liquidated damages. The Court held that the releases plainly referred to only claims for work completed, omitting reference to liquidated damages held for delays. Therefore, the releases did not preclude Zachry's claims.

In an opinion written by Justice Boyd, four justices dissented in part. The crux of the dissent concerned statutory interpretation of Chapter 271 of the Texas Local Government Code. Particularly the dissenting Justices pointed to language in the Code limiting recovery against a governmental entity qualifying for immunity to the "balance due and owed . . . under the contract." In a lengthy textual analysis of the phrase and surrounding section, the dissenters rejected the majority's seeming insistence that the phrase includes all common law damages regardless of whether they are contemplated in the parties' contract. *Id*. Instead, the dissenting Justices argued that the Code only permits an award of delay damages if the damages are expressly provided for or contemplated in the agreement. Both the absence of a provision in the contract expressly allowing for delay damages coupled with the express provision in the contract prohibiting delay damages "'even if such delay or hindrance' was owner-caused" precluded recovery in the Justices' estimation.

## Texas Supreme Court Oral Arguments

## American Star Energy and Minerals Corp. v. Stowers

*Oral argument occurred October 14, 2014*
*Case No. 13-0484*
Amarillo Court of Appeals Opinion
405 S.W. 3d 905 (2013)

**Issues Considered:**

Whether limitations to recover a partnership's judgment debt from general partners began when the debt judgment was entered or when the underlying breach-of-contract action accrued.

## State of Texas v. Clear Channel Outdoor Inc.

*Oral argument occurred September 17, 2014*
*Case No. 13-0053*
Houston [1st District] Court of Appeals Opinion 2012 WL 4465338

**Issues Considered:**

Whether the trial court erred by permitting the company's expert to value the billboards based on advertising income. (Clear Channel challenged the state's determination that its two billboards were personal property apart from the condemned land and subject only to the state paying for their relocation. The trial court ruled that the billboards were not personal property and should be valued as part of the condemned real property. After hearing, Clear Channel's expert testified that the billboards should be valued based on lost advertising income. The court of appeals affirmed, holding, in part, that the billboards were real-estate improvements. The appeals court also held that Clear Channel's expert testimony on valuation was admissible.)

## PlainsCapital Bank v. William Martin

*Oral argument occurred September 17, 2014*
*Case No. 13-0337*
Dallas Court of Appeals Opinion 402 S.W.3d 805

**Issues Considered:**

In a statutory-offset provision, whether the amount a borrower may owe a lender after a foreclosed property sale depends on depends on the property's actual resale price or the foreclosure-sale price.

## State Courts of Appeals

### Anglo-Dutch Petroleum Intern,. Inc. v. Case Funding Network, LP.

2014 WL 1910302 (Tex. App.—Houston [1st Dist.] May 13, 2014)

**Synopsis:**

Fraudulent inducement in signing of release.

Investors were fraudulently induced by the plaintiff in underlying case where the plaintiff's president made actionable misrepresentations by telling investors that there was an urgency in agreeing to a lesser settlement than expected, accepting less than the investment agreement provided, that most of the investors had already signed the release agreement, when in fact only four of thirty-three investors had signed, when president falsely claimed that a recent Texas Supreme Court case would change the outcome of the case on appeal, and when the plaintiff had in fact already entered into a settlement agreement in the underlying lawsuit.

**Overview**

This is a complex commercial case arising from an underlying misappropriation of trade secrets case. In 2000, Anglo-Dutch, a company engaged in oil and gas exploration, filed a lawsuit against Haliburton and Ramco [Haliburton], alleging that Haliburton had misappropriated Anglo–Dutch's trade secrets and breached confidentiality agreements, which the parties executed during their development of an oil and gas field in Kazakhstan. To fund the prosecution of the case, meet its operating expenses and avoid bankruptcy, Anglo-Dutch secured lawsuit funding from thirty-three investors who agreed to finance the Halliburton lawsuit. The investors entered into claims investment agreements which required Anglo–Dutch to pay the investors a certain sum of money from any cash recovery in the suit against Halliburton. After a jury rendered a verdict, the district court entered a judgment in 2004 against Halliburton, awarding Anglo–Dutch damages in the amount of approximately $81 million, including $10 million in attorneys' fees. The trial court ordered the parties to mediation. Anglo-Dutch and Haliburton agreed to a settlement of $51 million dollars. Haliburton and Anglo-Dutch then executed a formal settlement agreement, which Haliburton funded the same day.

The president of Anglo-Dutch, Van Dyke, sent a letter to the investors stating that, subsequent to the entry of the final judgment in the Halliburton lawsuit, the Texas Supreme Court had issued an opinion adversely impacting Anglo–Dutch's position with respect to the appeal process and the settlement of the lawsuit. He also stated that the district court had entered an amended final judgment, "significantly reducing" the value of the original judgment. Van Dyke represented that "[i]n light of current Texas law, it is Anglo–Dutch's strong desire to settle the Lawsuit. Halliburton is expressing willingness to settle the case at this time, but for a significantly lower amount than what we ever expected." In order to resolve the Halliburton lawsuit, Van Dyke requested the investors to accept a lower payment than that prescribed by the investment agreements. He also attached to his letter the proposed settlement and release agreements, and represented in his letter that "[m]any of the parties who entered into Claims Investment Agreements have executed their respective Settlement and Releases and returned them to us." This statement was untrue, as only four of the thirty-three investors had signed. Within days, six of the investors had signed, but the remaining twenty-seven had not. Anglo–Dutch sent the remaining twenty-seven investors a letter in which it disputed the validity of the investment agreements, asserting that they were "contrary to Texas public policy" and "unenforceable under Texas law." Anglo–Dutch enclosed a check for each of the investors for "less than the amount called for" under their investment agreements, and asserted to these investors that by depositing the check, they would be acknowledging an "accord and satisfaction," discharging Anglo–Dutch from further obligation under the investment agreements. The remaining investors all signed and deposited the checks.

Later in 2004, a number of the investors filed suit against Anglo-Dutch for breach of contract, alleging that Anglo–Dutch had failed to pay them in accordance with the investment agreements, and torts stemming from the investment agreements and negotiations related to the investment agreements, including fraud, fraudulent inducement, breach of fiduciary duty, and conversion. Anglo–Dutch counterclaimed for breach of contract, breach of the release agreements, fraud, and it sought to recover its attorneys' fees. After granting various summary judgments and partial summary judgments, the issue to be tried before the trail court was with regard to the investors' claims for fraudulent inducement. After a bench trial, the trial court found that Anglo–Dutch had fraudulently induced the investors to enter into the release agreements, and awarded damages.

Anglo-Dutch appealed to the Court of Appeals, contending that the trial court erred in finding it fraudulently induced the investors to sign the release agreements because it had refused to disclose the proposed settlement amount of the Halliburton lawsuit and, thus, the investors could not have relied on that lack of information to their detriment. Anglo–Dutch further argued that the investors' claim for fraudulent inducement failed, contending Anglo-Dutch made no actionable affirmative misrepresentations to the investors, that the investors did not rely on any misrepresentation in executing the releases, and that the investors ratified the release agreements and waived any right to damages. However, the Court of Appeals found that Anglo-Dutch had indeed made actionable affirmative misrepresentations and fraudulently induced the investors to sign the releases to their detriment. Specifically, the Court found that Anglo-Dutch had falsely represented that "many" investors had already signed their releases, and to one of the investors had represented that "all" of the investors had signed a release except for that one, and that he was the "last person that he had to get this agreement from." The Court also outlined additional affirmative misrepresentations, including that a case had recently been decided by the Supreme Court which had impacted Anglo-Dutch's position with respect to an appeal; that Anglo-Dutch had a :strong desire" to settle the Halliburton lawsuit; that Haliburton was willing to settle the case for a significantly lower amount than expected; that to achieve resolution of the lawsuit, the investors needed to accept a lower payment than was set forth in the investor agreements; and that with all of the other investors having executed and returned the releases to them, and that time was of the essence, Anglo-Dutch needed the remaining investor to return the executed release by fax the next day. Van Dyke had told that one investor that if the case was not settled, the case would go to the Texas Supreme Court, who had "thrown out" a similar case that was "virtually identical," and if he did not sign the release that all other investors had signed, then "no one" would get their money. Relying upon the representations, that investor signed.

Anglo–Dutch argued that Van Dyke's statements to the investors about the Texas Supreme Court's opinion in *Kerr–McGee Corp. v. Helton,* and the impact that it had on Anglo–Dutch's position in the Halliburton lawsuit, did not constitute actionable fraud because his statements were merely predictions or statements about a future event, and that the statements concerned a point of law and were not actionable without Van Dyke having a special knowledge of the law that took advantage of the investors' ignorance of the law. However, the Court noted that Van Dyke's statements regarding the *Kerr–McGee* opinion were intertwined with his statements about the settlement process and the possible appeal of the Halliburton lawsuit. Further, by the time that Van Dyke had sent his letters to the investors, he had already signed what he believed to be a valid settlement agreement with Halliburton to pay Anglo–Dutch $51 million, which was eighty-percent of the trial court's judgment. To the extent Van Dyke's statement about the *Kerr–McGee* opinion constituted a prediction about an appeal in the Halliburton lawsuit, the Court held that would not be actionable, citing *Allen v. Devon Energy Holdings, LLC,* 367 S.W.3d 355, 374–75 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgment vacated w.r.m). However, to the extent that Van Dyke's statement about the *Kerr–McGee* opinion constituted a statement about the settlement of the Halliburton lawsuit and Anglo–Dutch's desire to settle, the Court held that it was an actionable affirmative misrepresentation because it was made with the intent to induce the investors to sign the release agreement and accept less money than they were contractually entitled to receive. The falsity of Van Dyke's statements was evidenced by the fact that he had already entered into a settlement agreement with Halliburton. At the time he made the statements, he believed he had a committed settlement agreement with Haliburton to pay Anglo–Dutch $51 million, and therefore, the *Kerr–McGee* opinion could not have impacted Anglo–Dutch's settlement with Halliburton or caused it to have a "strong desire" to settle with Halliburton.

The Court also rejected Anglo-Dutch's arguments that the investors did not rely upon the statements by Van Dyke and Anglo-Dutch, holding that the evidence was legally sufficient to support the trial court's finding that the investors relied on the affirmative representations of Van Dyke in deciding to execute the release agreements. The Court also rejected Anglo-Dutch's argument that the investors had ratified and waived their claims.

In a preliminary issue, Anglo-Dutch had contended two of the investors did not have the capacity to maintain the suit because they had forfeited their corporate charters in Nevada prior to trial, were not authorized to do business in Texas. Anglo–Dutch further argued that the two investors transacted intrastate business in Texas, they were required to register with Texas to maintain their suit. Anglo–Dutch filed a plea in abatement, asserting that the two investors were not "valid existing corporate entities in their home state of Nevada" and were not "properly registered to [do] business in the State of Texas." However, the Court rejected these arguments because under Nevada law, once a corporation is in existence, it is entitled "[t]o sue and be sued in any court of law or equity," and, even after dissolution, a "corporation continues as a body corporate for the purpose of prosecuting and defending suits." Accordingly, the Court concluded that under Nevada law, the loss of the capacity to maintain a lawsuit is not among the penalties imposed for the administrative default of a corporation, and therefore the two investors did not lose their corporate existence or their ability to sue and be sued, they were still eligible to register as valid foreign-filing entities in Texas and maintain the lawsuit.

Anglo–Dutch further argued that the two investors lacked capacity to maintain this lawsuit because they failed to register to do business in Texas. However, the Court rejected this argument, noting that there is an exception for business being transacted in "interstate" commerce, as opposed to "intrastate" commerce, and that the investor agreements upon which the investors' causes of action were based, did not constitute the "transaction of business" in Texas under Tex. Bus. Org. Code 9.251 because they involved "interstate" commerce. Since the transactions in issue were conducted in interstate commerce, it was not necessary for the investors to register to do business in Texas.

With regard to attorneys' fees, Anglo-Dutch argued that the investors failed to segregate their attorneys' fees between the contract claims and the fraudulent inducement tort claim. However, the Court ruled that it was not necessary for the investors to segregate the claims, because to overcome Anglo-Dutch's defense of release to the breach of contract claims, the investors had to pursue the fraudulent inducement claims to defeat Anglo-Dutch's breach of contract defense of release. The fraudulent inducement claims were therefore intertwined with the breach of contract claims.

## Bowman v. El Paso CGP Company,

431 S.W.3d 781 (Tex. App.—El Paso 2014, pet. denied.)

**Synopsis:**

Texas Uniform Fraudulent Transfer Act

Genuine issue of material fact existed as to whether judgment debtor received reasonably equivalent value for its transfers of money to its sole shareholder, precluding summary judgment in judgment creditor's action against shareholder under the Texas Uniform Fraudulent Transfer Act (TUFTA).

**Overview:**

In this case, El Paso CGP Company [El Paso], a judgment creditor of Atasca Resources, Inc. [Atasca], brought suit against Bowman, Atasca's sole shareholder, for allegedly fraudulent transfers Atasca made to Bowman. El Paso relied upon Section 24.006(a) of the Texas Uniform Fraudulent Transfer Act (TUFTA):

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

El Paso moved for summary judgment, filing as evidence in support of its motion some of Bowman's interrogatory responses and a document produced by Bowman reflecting various transactions between Bowman and Atasca during the period of Atasca's insolvency. The evidence reflected that the transactions designated as "to

Atasca" totaled $2,178,056.94, while the entries designated as "from Atasca" totaled $1,208,628.94. Bowman produced the document to El Paso in response to El Paso's interrogatory asking Bowman to "describe each and every payment or distribution, or transfer of any interest in any property or asset, from Atasca or any of its affiliates to you from January 1, 2001 through the present." Bowman answered the interrogatory, stating that "[t]ransfers to Atasca from Bowman were loans to Atasca, and transfers from Atasca to Bowman consisted of loan repayments, salary payments, expense reimbursement and/or distributions." Using the document produced by Bowman, El Paso added the thirty-one entries in the "From Atasca" column during the period of Atasca's insolvency and sought judgment against Bowman for the sum of $794,628.94.El Paso also filed evidence showing that Bowman was the sole shareholder and president of Atasca, and Bowman admitted to using the money from Atasca to pay for his personal expenses. Bowman testified at his deposition that the transfers to and from Atasca were loans or repayment of loans, but none of these purported loans were documented with promissory notes, none were secured, and none had repayment schedules, interest rates, or other definite terms. Bowman testified, "It was just continuous dollars back and forth."

In his affidavit filed in response to El Paso's motion, Bowman testified that the transfers complained about by El Paso were loans to him from Atasca, and that all loans were repaid to Atasca. He further averred that he paid more money to Atasca than he received, and that as of 2008, he had had transferred over $1.8 million to Atasca, and that the net transfers between him and Atasca ended with a positive balance in favor of Atasca. There was also an affidavit from Bowman and Atasca's accountant, similarly averring that the transfers to Bowman were loans, all loans were repaid, and it was a common practice for Atasca and Bowman to transfer money to each other since the company's inception.

The trial court granted El Paso a final summary judgment against Bowman, awarding El Paso $987,915.82. Bowman appealed. On appeal, the Court of Appeals reversed the summary judgment against Bowman, finding that a genuine issue of material fact existed as to whether the transfers to Bowman were made for reasonably equivalent value.

El Paso had contended that the payments from Atasca to Bowman were not "loans" under Texas law because the loan agreements between Atasca and Bowman lack the material terms generally seen in loan agreements, such as the amount to be loaned, the maturity date, the interest rate and the repayment terms. However, the Court concluded that Bowman and the accountant testified by affidavit that all the transfers El Paso relied upon were loans from Atasca to Bowman. El Paso's evidence showed the amount of each transfer, thus satisfying the material term of the amounts loaned. Bowman and the accountant testified that all loans were repaid, and El Paso's evidence showed transfers from Bowman to Atasca, thus satisfying the material term of the maturity dates and repayment terms. That Atasca did not attempt to collect interest from Bowman, the Court concluded that an interest rate was not a material term to the loan agreements. Accordingly, the Court ruled that El Paso did not conclusively establish that the transfers to Bowman were not loans as a matter of law.

El Paso also contended that the transfers did not include value to Atasca, relying upon a definition in Section 24.004(a) of TUFTA, that " . . . value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person." El Paso contended that value could only be in the form of an "unperformed promise" if the promise is made in the ordinary course of the promisor's business to furnish support to the debtor or another person. However, the Court, noting that El Paso's contention was incorrect and without authority. As the Court explained, only one type of "unperformed promise" that is not value as a matter of law is a promise to furnish support not made in the ordinary course of the promisor's business. Whether another form of consideration constitutes value must be determined in light of the purpose of the statute, to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Thus, as the Court explained, an unperformed promise may provide value, depending upon the facts of the case. The general rule is that an unperformed promise may constitute value, and the amount of value to be ascribed to an unperformed promise in a particular case is a factual question. In this case, Bowman adduced evidence that the various transfers to him were loans, and he actually performed his promises to repay the loans. He and the accountant testified that Bowman repaid all the money he took from Atasca. Because Bowman promised to repay the money and then actually repaid it, El Paso failed to conclusively prove that Bowman gave Atasca no value as a matter of law.

Lastly, El Paso contended that the various transfers did not include reasonably equivalent value to Atasca, claiming that without documents memorializing the "loans," the loans could not constitute "reasonably equivalent value." However, the Court recognized that the lack of documentation does not negate reasonably equivalent value as a matter of law. As the Court explained, as part of El Paso's summary judgment burden on its claim under TUFTA, El Paso had to conclusively prove that Atasca did not receive reasonably equivalent value in exchange for the transfers to Bowman. Although a transaction may give a debtor reasonably equivalent value as a matter of law, the question of reasonable equivalence is usually a question of fact, or is at least fact-intensive. To determine whether value is reasonably equivalent, courts have to examine all the circumstances surrounding a transaction, looking to whether there is a reasonable and fair proportion between what the debtor surrendered and what the debtor received in return. The reasonableness of the value must be determined by the facts and circumstances of the particular case. The proper focus is on the net effect of the transfers on the debtor's estate, the funds available to the unsecured creditors. "Value" is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. The emphasis is not on whether value was received contemporaneously with the transfer, but on the net effect on the debtor's estate.

The determination of reasonably equivalent value requires focusing on the substance of what occurred between Bowman and Atasca. As the evidence showed, Bowman, the owner of a closely held company transferred assets to and from his company, with no net loss to the company. Bowman testified that he "paid more money to Atasca than he received. He testified that he repaid all of the money he took from Atasca, and the "net transfers between himself and Atasca ended with a positive balance in favor of Atasca. Even El Paso's evidence showed that during the period of insolvency, while Atasca transferred up to $794,628.94 to Bowman, Bowman transferred up to $1,934.056.94 to Atasca. As the Court concluded, under these circumstances, a fact finder could find that Atasca received reasonably equivalent value. The risk of non-repayment was low because there is evidence that Atasca and Bowman transferred money to and from each other since Atasca's inception, and Bowman had repaid all loans to Atasca. The Court concluded that it was impossible to determine as a matter of law from the summary judgment record that Bowman's promises to repay Atasca were not reasonably equivalent in value to the transfers to him in light of the evidence that Bowman repeatedly fulfilled his promises and transferred more money to Atasca than he received. Accordingly, the Court found that there was a genuine issue of material fact about whether Atasca received reasonably equivalent value for its transfers to Bowman, thereby precluding summary judgment.

## IHR Sec., LLC v. Innovative Business Software, Inc.

2014 WL 1057306 (Tex. App.—El Paso 2014, no pet.)

**Synopsis:**

Breach of Software License Agreement and Data Duplication Agreement**.**

Genuine issues of material fact precluded summary judgment, when it was unclear if amount billed on invoice was for basic monitoring conversion, which was capped under software license agreement, or software set-up, and whether software company's customer was obligated to pay maintenance fees under license agreement.

**Overview:**

This case arises as a result of a dispute between IHR, a company that installs alarms and provides alarm monitoring services for its customers, and IBS, a software company is in the business of providing software and software-related goods and services to its clients. In 2010, IHR was using alarm monitoring software, but it wished to obtain software which would integrate the accounting and service call data into the monitoring software package. Consequently, IHR contacted IBS about a software package to perform these functions. IHR and IBS entered into both a Data Duplication Agreement and a Software License Agreement. In accordance with the terms of the License Agreement, IHR paid IBS the sum of $20,000 for installation of the software and to have its existing accounting data imported into the new program. According to IHR, the accounting software did not function as promised; consequently, it did not have IBS import the data into the alarm monitoring software. IHR subsequently refused to pay the invoices submitted by IBS for goods and services performed under both the License Agreement and the Data Duplication Agreement.

IBS filed suit against IHR for breach of both agreements. In its first amended petition, IBS alleged it had performed all of its obligations under both agreements and it sought to recover the unpaid balances on the invoices submitted pursuant to the License Agreement and the Data Duplication Agreement in the total amount of $52,437.17. IBS also sought to recover attorneys' fees. IHR did not raise any counterclaims and instead asserted in its answer that its liability was capped at $5,000 under a limitation of liability clause in the

License Agreement.

IHR filed a motion for partial summary judgment on its limitation of liability affirmative defense. At about the same time, IBS moved for summary judgment on its breach of contract claims based on the License Agreement and the Data Duplication Agreement. IBS sought to recover the total sum of the unpaid invoices, $52,437.17. Following a hearing, the trial court granted IBS's motion for summary judgment and denied IHR's motion. In its final judgment, the trial court awarded IBS the sum of $52,437.17, accrued interest, and attorneys' fees. IHR appealed.

On appeal, IHR did not raise any issue related to the portion of the judgment awarding IBS the amount of the unpaid balances owing on the invoices related to the Data Duplication Agreement, so that portion of the judgment was affirmed. Instead, IHR argued that its liability was capped pursuant to the limitation of liability clause in software licensing agreement at $5,000, and that there were fact issues precluding summary judgment. The Court of Appeals, first addressing the limitation of liability issue, noted that the 30 plus page licensing agreement provided for a number of various fees, charges and costs. The last sentence of the limitation of liability provision read as follows:

> Notwithstanding anything to the contrary, the total dollar liability of either party under this agreement or otherwise shall be limited to U.S. $5,000.

IHR argued that this sentence meant its liability under the entire license agreement, including its obligation to pay for the goods and services provided by IHR, was capped at a maximum of $5,000. The Court rejected this reading, stating that IHR's construction of the provision took the sentence out of context and in isolation from the rest of the agreement. When considered as a whole and in relation to the rest of the Agreement, it was apparent that the intent of the parties was to limit their liability for damages caused by the improper functioning or failure of the software itself. The provision did not purport to limit IHR's liability in the event it breached the license agreement by refusing to pay for goods and services provided by IBS. To construe the limitation of liability provision in the manner asserted by IHR would render meaningless all of the other provisions regarding fees and payment by IHR for goods and services rendered by IBS. The Court concluded that IHR's interpretation of the license agreement was unreasonable.

Addressing the evidence, IHR argued that it raised a material fact issue regarding the validity of IBS's invoices. IBS's summary judgment evidence related to the amount of damages included an account receivables ledger and eleven invoices related to the accounts receivable. The license agreement provided that the "Initial Conversion Costs shall be capped at $27,700." However, one of the invoices, totaling $17,613.14, stated on its face that it was for "Initial System Set-up and Software Installation Per License Agreement," but also stated that it was for "Basic Monitoring Conversion." A second invoice, in the amount of $19,420.05 was noted to be for "Conversion Per License Agreement." The license agreement provided that: "Initial Conversion Costs shall be capped at $20,700." IHR contended that both of these invoices were for conversion costs, and that the total amount of $37,033.19 exceeded the cap of $20,700.00. IBS responded that a ledger entry in evidence showed the $17,613.14 invoice was billed for "software set up," which the Court noted was correct. However, as the Court noted, the invoice itself plainly stated that it was "Basic Monitoring Conversion." The Court concluded that this conflict in the summary judgment evidence created a fact issue regarding whether the amount billed on the $17,613.14 invoice was for basic monitoring conversion or software set-up.

In addition, IHR contended that a fact issue existed with respect to the portion of the damages based on an invoice in the amount of $3,247.50 which was for "Maintenance Fees Per License Agreement." The license agreement provided that IHR was required to pay maintenance fees for every month after IHR "is live and using any portion of the Software . . .." IHR's evidence reflected that the accounting software never functioned and that IHR had never used any portion of the software. Since the software never functioned properly, IHR never had its data imported into the monitoring software function. Taking the summary judgment evidence favorable to IHR as true, the Court concluded that there was a material fact issue with respect to whether IHR was obligated to pay the maintenance fees under the license agreement.

Since there were material fact issues, the summary judgment in favor of IBS was reversed.

## Weaver and Tidwell, L.L.P. v. Guarantee Co. of North America USA,

427 S.W.3d 559 (Tex. App.—Dallas 2014, pet. filed) [Note: Texas Supreme Court requested full briefs on the merits 10-24-2014]

**Synopsis:**

Limitations for Professional Accounting Malpractice/Discovery Rule and Surety Execution of Performance Bonds**.**

Surety who issued performance bonds for construction company was barred by limitations from bringing professional malpractice claim against accounting firm for audited financial statements when claim was not brought within two years from Surety's reliance upon the statements in issuing the bonds. As for application of discovery rule, surety failed to secure findings from the trial court as to when surety knew or should have known of facts giving rise to the claim. The trial court properly granted summary judgment as to accounting firm's counterclaim, finding that surety, through assignment from construction company, did not assume construction company's liabilities for attorney fee award from previous arbitration proceeding, and was not the contractual or equitable subrogee of the construction company.

**Overview:**

J & V, a now defunct construction company, was required by TxDOT to acquire performance bonds in order to bid on its projects. Guarantee, a bonding company that issued performance bonds for J & V, required J & V to provide it with audited financial statements in connection with its issuance of performance bonds. J&V submitted audited financial statements for 2005 and 2006 prepared by its accounting firm Weaver. Guarantee issued performance bonds for J & V, and J & V obtained contracts with TxDOT. When J & V later defaulted on its contracts with TxDOT, Guarantee had to take over and complete some of the TxDOT jobs under its various performance bonds and suffered losses on performance bonds that it issued on behalf of J & V.

In September 2008, J & V sued Weaver, alleging breach of fiduciary duty, fraud, and accounting negligence. Weaver moved to compel arbitration, which was ordered by the trial court. In August 2009, Guarantee also sued Weaver for accounting negligence. Although Weaver sought to compel arbitration as to the Guarantee claim, the arbitration was denied and affirmed in an interlocutory appeal. In the J&V arbitration, J & V was awarded nothing, and Weaver was awarded its attorney's fees and other fees and costs against J & V. The arbitration award was confirmed for Weaver totaling $773,843.82. Weaver then filed a counterclaim, in which Weaver sought a declaratory judgment that Guarantee was liable for Weaver's arbitration award against J & V. The trial court granted summary judgment in favor of Guarantee and dismissed Weaver's counterclaim. After a non-jury trial, the trial court awarded Guarantee approximately $2.6 million against Weaver for the accounting malpractice, finding that Weaver's 2005 audit of J & V was "false and/or misleading" and that Guarantee justifiably relied on the 2005 audit in deciding to issue bonds on behalf of J & V, which caused losses to Guarantee. The trial court also entered findings of fact as to Weaver's defense that the two-year statute of limitations barred the claim and Guarantee's, plea that the discovery rule deferred the accrual of the cause of action, finding that:

> 30. The Surety, however, ultimately did not discover that the 2005 Audit was false and/or misleading until long after the fact. In particular, Jameson [an underwriter for Guarantee] offered credible, relevant, and persuasive testimony that he did not learn that the 2005 Audit was false and/or misleading until his deposition occurred on June 29, 2010, in a separate lawsuit. Mike Bowen ("Bowen"), bond claims manager for the Surety, offered credible, relevant, and persuasive testimony that he did not consider a possible suit against Weaver until March 26, 2008. In any event, the Surety's lawsuit was filed against Weaver on August 27, 2009, and Weaver offered no credible, relevant, and persuasive evidence rebutting the discovery by the Surety or establishing that the Surety by exercising reasonable diligence could have discovered that the 2005 Audit was false and/or misleading in [sic] any earlier point in time.
>
> * * *
>
> 50. Weaver failed to bring forward credible, relevant, and persuasive evidence in support of its affirmative defense of statute of limitations. Weaver failed to bring forward credible, relevant, and persuasive evidence rebutting the date of discovery by the Surety that the 2005 Audit was false and/or misleading. Weaver failed to bring forward credible, relevant, and persuasive evidence establishing that the Surety by exercising reasonable diligence could have discovered that the 2005

> Audit was false and/or misleading at any earlier point in time.

Based on these findings, the trial court concluded that Weaver had not met its burden of proof to establish its affirmative defense of statute of limitations and that Guarantee had "met its burden in establishing the applicability of the discovery rule to its claim of negligent misrepresentation."

On appeal, the Court of Appeals reviewed the discovery rule, noting as a rule, a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred. A person suffers legal injury from faulty professional advice when the advice is taken. The discovery rule is applied to a negligent misrepresentation claim if the injury is inherently undiscoverable and evidence of injury is objectively verifiable. In this case, Weaver bore the initial burden of pleading, proving, and securing findings to establish its affirmative defense of statute of limitations. Guarantee, as the party seeking to benefit from the discovery rule, bore the burden of proving and securing favorable findings thereon, or otherwise waiving the complaint on appeal. Weaver contended that Guarantee's claim for negligent misrepresentation accrued as soon as Weaver's alleged misrepresentation induced Guarantee to act, which was "as soon as Guarantee issued its first bond in alleged reliance on the 2005 audit." Guarantee argued that its claim accrued later because it did not suffer a legal injury until J & V defaulted on its contracts and Guarantee suffered resulting losses on the performance bonds that it issued for J & V.

The Court found that Guarantee's claim was indeed barred by limitations. As the Court stated, the first bond that Guarantee issued in alleged reliance on Weaver's representations in the 2005 audit was issued on May 4, 2006. As a result, the cause of action accrued on that date and the two-year statute of limitations for Guarantee's negligent misrepresentation claim based on Weaver's representations in the 2005 audit ran on May 4, 2008. Although Guarantee argued that the discovery rule applied, it did not obtain findings on when Guarantee knew or should have known of the facts that gave rise to its cause of action. Instead, the trial court made a finding that Guarantee "ultimately did not discover that the 2005 Audit was false and/or misleading until long after the fact" based on Jameson's testimony that he did not learn that the 2005 audit was false and/or misleading until he gave his deposition in a separate lawsuit and Bowen's testimony that he did not consider filing suit against Weaver until March 26, 2008. But Jameson's deposition took place on June 29, 2010, ten months after Guarantee had already filed the lawsuit on August 27, 2009, and a finding of when Bowen first considered filing suit is not a finding of when Guarantee knew or should have known of the fact of misrepresentation. The trial court never made a finding about when Guarantee knew or should have known of the facts giving rise to Guarantee's claim. Since Guarantee did not obtain those findings from the trial court, Guarantee could not rely upon the discovery rule to toll the statute of limitations, The Court therefore reversed and rendered judgment that Guarantee take nothing on its claim.

The Court next looked to Weaver's issue contending that the trial court erred in dismissing its counterclaim for recovery of the attorneys' fees awarded against J&V in the arbitration. Weaver contended that Guarantee was the assignee and subrogee of J & V and stood in J & V's shoes as the financial beneficiary of any arbitration award. However, the Court rejected each of these contentions. Specifically, the Court concluded that Weaver did not raise a genuine issue of material fact that Guarantee was J & V's assignee of the claims and liabilities in the arbitration. The general indemnity agreement between J&V and Guarantee provided Guarantee with various rights in consideration for Guarantee's execution of bonds, but the agreement did not assign J& V's liabilities to Guarantee, and additionally, did not include any assignment of J & V's liabilities in connection with its claims against Weaver. The agreement allowed Guarantee to "settle or compromise any claim, liability, demand, suit or judgment upon any BOND or BONDS executed or procured by it" and provided that J & V would indemnify Guarantee for any claims and losses that Guarantee suffered as a result of executing the bonds, including "by prosecuting or defending any action in connection with any BOND or BONDS." Although J & V assigned Guarantee their rights and property in collateral, including inventory, receivables, and equipment, to enable Guarantee to use the collateral in the event of J & V's default, it specified that it did so to allow Guarantee to complete performance of and pay obligations incurred in performing a bonded contract. No provisions of the agreement imposed liability upon Guarantee for expenses J&V incurred in a malpractice suit by J & V against Weaver.

The Court further held that although Guarantee, in consideration for funding attorney's fees in J & V's malpractice claim against Weaver, had the absolute right to control pursuit of" J & V's malpractice claim, including the unconditional right to settle the malpractice claim, and had the right to be reimbursed for costs it incurred and losses it suffered on the bonds, Weaver failed to establish that Guarantee asserted a right of subrogation in a judicial proceeding, and therefore failed to raise genuine issue of material fact that Guarantee acted as contractual or equitable subrogee of J & V with respect to the arbitration.

Accordingly, the Court concluded that the trial court did not err in entering summary judgment and dismissing Weaver's counterclaim against Guarantee for J&V's attorneys' fees awarded in the arbitration.

## Collective Asset Partners LLC v. Schaumburg

432 S.W.3d 435 (Tex. App.—Dallas 2014, no pet.)

**Synopsis:**

In action against Architect by asset management company for negligent misrepresentation, negligence and professional negligence, gross negligent, common law fraud and statutory fraud, the Court found 1) that any allegedly false statements provided by architect to appraiser did not proximately cause company's injuries and 2) that the contracts between the parties were not contracts for professional services, and as such, the architect did not owe professional duty to the company. Therefore, summary judgment was proper.

**Overview**

In 2007, CAP was a partnership consisting of Ashley Patten, a title fee attorney, and Ted Peters, an independent businessman. CAP operated as an asset management company which invested in commercial real estate, residential real estate, securities and royalty income from mining, oil and gas. Michael Schaumburg was an architect who had a past working relationship with Patten and Peters. In 2007, Schaumburg told Peters about 13.88 acres of land in Tarrant County (the "Property") which was for sale and that had been previously appraised for $10.25 million. Schaumburg advised that CAP needed to act quickly as the Property was a distressed sale. The parties ultimately entered into a joint venture agreement with one of Schaumburg's companies, Urban Contractors, Inc. CAP signed a purchase contract for the Property and financed the purchase with a loan. In May 2007, the bank received a copy of a property appraisal with a value of $10.25 million. On June 27, 2007, CAP closed on a $5 million loan with the bank for the Property. Schaumburg made approximately $1 million from the deal. After two (2) years, CAP was unable to continue paying on the loan and the bank foreclosed on the Property in 2009.

In September 2012, CAP filed suit against several defendants, including Schaumburg, individually and against Schaumburg Architects, P.C. for negligent misrepresentation, professional negligence, gross negligence, common law fraud, statutory fraud, and conspiracy. CAP alleged that the defendants failed to disclose that a large portion of the Property was located in a 100-year flood plain, and as such, the Property was not worth the $10.2 million appraisal value.

Schaumburg filed a traditional motion for summary judgment contending that CAP knew the Property was located in a 100-year flood plain before it purchased the Property. Schaumburg further contended that the Property was still developable despite being in a flood plain. The trial court granted summary judgment and CAP appealed.

The Dallas Court of Appeals affirmed the trial court's summary judgment in favor of Schaumburg. The Court of Appeals reviewed each cause of action asserted by CAP against Schaumburg. The Court first examined the negligent misrepresentation claim and found that CAP had knowledge that the Property was in a flood zone at the time of closing. The summary judgment evidence showed that 1) the executive summary on the appraisal indicated that the Property was in a flood plain; 2) CAP received a survey in May 2007 indicating that the Property was in a flood plain; and 3) Patten testified that he signed two documents near the time of closing both of which indicated that part of the Property was located in a flood plain. CAP also alleged that Schaumburg provided false information about the $10.25 million value of the Property. However, the appraiser testified that the "intended user" of the appraisal was the bank which provided the loan and that a borrower, such as CAP, was not an "intended user" nor did he expect a borrower, such as CAP, to see the appraisal. As such, the Court of Appeal held that CAP failed to establish proximate cause to support its cause of action for negligent misrepresentation.

The second issue on appeal related to the negligence and professional negligence causes of action. In his motion for summary judgment, Schaumburg contended that no professional services contract existed between the parties establishing any duty on his part, and therefore, he did not breach any duty or proximately cause any damages. The Court considered the language of the two agreements between the parties. The Court held that neither of the agreements discusses Schaumburg providing professional services. Because the contracts did not involve professional services, the Court agreed with Schaumburg and concluded that CAP's assertion that Schaumburg owed CAP a duty was without merit. Along those same lines, because ordinary negligence is a predicate to gross negligence, the Court found that CAP's gross negligence claim failed as well.

The Court next examined CAP's claim of common law fraud. CAP asserted that Schaumburg knew or recklessly disregarded facts and artificially inflated the cost of the Property and that Schaumburg provided false or misleading information regarding the development of land and its location in the 100-year flood plain. Because the Court previously concluded that Schaumburg did not provide any false information regarding the Property and any alleged false statements to the appraiser in regards to the appraisal could not be the proximate cause of any injuries, the Court held that CAP's common law fraud cause of action had been negated.

Lastly, with respect to CAP's claim of statutory fraud, the Court of Appeals agreed with Schaumburg's assertion that "it was neither unfair nor deceptive when he characterized that Property as developable, because the statement was true."

Because the Court of Appeals overruled all of CAP's issues on appeal, the judgment of trial court granting summary judgment in favor of Schaumburg was affirmed.

## Davis v. Chaparro

431 S.W.3d 717 (Tex. App.—El Paso 2014)

**Synopsis:**

The Court of Appeals upheld a judgment granted in favor of a Spanish translator for breach of oral contract action brought against an attorney after he allegedly failed to pay for her translation services.

**Overview:**

Mark Davis is an attorney. He instructed his office manager to obtain the services of a Spanish translator to translate a recorded conversation on an audio cassette tape in a post-divorce case for Davis' client. The office staff contacted Norma Chaparro, a certified translator who had previously provided interpretation services for Davis' office. Chaparro advised the office employee that she could perform the translation services and Davis's office provided Chaparro with the tape recording. The price for Chaparro's translation services was not discussed during the initial conversation as Davis' office staff understood that Chaparro could not provide a fee quote before examining the tape.

Chaparro first transcribed the conversation in Spanish and then translated it to English. Due to difficulty in translating due to the quality of the recording, Chaparro enlisted the help of her sister, Susana Chaparro. Susana Chaparro contacted Davis's office and advised that the tape recording was inaudible. The office employee instructed Susana to contact opposing counsel and obtain another copy of the recording. Susana advised Davis' employee that the transcription would exceed fifty pages and the employee continued to reiterate the importance of getting the transcription done regardless of what needed to be done to finish it. The finished transcript consisted of 110 pages.

Chaparro delivered the transcript to Davis' home and Davis accepted delivery of the transcript. Thereafter, Chaparro forwarded a bill for her translation services to Davis' office. She charged $25.00 per page for 110 pages totaling $2,750.00. In hopes for a quicker payment, she offered a courtesy discount of $1,250 making the amount due $1,500.00. Davis failed to pay Chaparro.

After several months of nonpayment, Chaparro spoke with Davis about the unpaid invoice. Davis responded that Chaparro would need to seek payment directly from his client—who was unknown to Chaparro. Chaparro filed suit against Davis and his client for breach of contract and collection of the debt. Chaparro non-suited the client before trial.

In a bench trial, Chaparro testified that it was her common business practice to bill and collect payment from attorneys rather than their clients. Chaparro also testified that when she worked as an interpreter for Davis' office in the past, she would bill and receive payment directly from Davis.

At the conclusion of a bench trial, the trial court found that there was an enforceable contract and that Chaparro performed and tendered performance of her contractual obligations. The trial court further found that Davis breached the contract by not paying Chaparro and that Davis' breach caused Chaparro's injury (nonpayment). The trial court awarded $2,750.00 to Chaparro as the amount due and owed on the contract and $5,433.68 in attorney's fees and expenses. Davis appealed.

Davis contended that a valid contract did not exist because he did not promise to pay Chaparro for her translation services. The Court looked at the following factors: 1) Davis' office staff contacted Chaparro to take a job similar to jobs she had performed in the past for Davis and for which he paid her; 2) Davis provided the tape recording which needed translating and transcribing to Chaparro; 3) Davis accepted the completed transcript; and 4) Chaparro billed Davis's office consistent with her past billing practices. The Court held that based on the circumstances, the parties' course of conduct and their earlier business dealings, more than a scintilla of evidence existed to support the trial court's implied finding that Davis promised to pay Chaparro for her services.

The Court considered Davis' argument that the parties did not agree on specific elements to form a contract during their initial conversation, i.e., price, time frame for completion, and Chaparro's express acceptance to perform the work. The Court agreed with the trial court's finding that a valid contract existed based on all of the parties' conversations, not just the initial conversation, as well as the acts and circumstances thereafter. The Court reasoned that when a contract is lacking an agreement on price but all other elements have been met, it is not so incomplete as to be rendered unenforceable and that the court may imply a reasonable price. The Court held that a meeting of the minds existed between the parties regarding the contract for translation services as well as to pay a reasonable fee for the translation services. Therefore, the Court held that the contract was still enforceable absent an express agreement on the price.

The Court next examined the issue of special liability and third party services. Davis contended that he could not be liable for payment of Chaparro's services because he did not personally enter into a contract with Chaparro, but did so as the agent of a disclosed principal, i.e. his client. He asserted that he could not be personally liable because Chaparro knew the transcription was requested on behalf of his client and he did not expressly or impliedly assume special liability for the contract. The Court held that when an attorney contracts third-party services on behalf of his client without specifying his agency status, the attorney may assume special liability for payment of the services. The Court noted that 1) Davis' office never specified that the client would be responsible for the payment; 2) Davis had paid Chaparro for translation services in the past; 3) Chaparro's common business practice was to bill and collect payment from the attorneys she provides services to and not their clients; and 4) Davis' office collected payment from clients for third-party services and then paid the third-party provider directly. The Court held that the evidence supported an implied finding that Davis expressly or impliedly assumed special liability and was responsible for payment of the contract.

With respect to damages, Davis contended that Chaparro was only entitled to recover $1,500 and not $2,750 because she only expected payment of $1,500. The Court of Appeals held that expectation is not the standard for determining damages for breach of contract. The fact finder determines just compensation as the value of the loss or damage actually sustained. The court pointed out that Chaparro's decision to offer a discount at the time she billed Davis did not change the value of the work she provided.

Lastly, Davis contended that Chaparro was not entitled to an award of attorney's fees because her husband represented her. Davis also claimed that the trial court's attorney's fees award calculated at $275 per hour was excessive because the lodestar method warranted a lower rate. However, the Court of Appeals did not address this issue because Davis failed to present his complaints regarding attorney's fees to the trial court, and as such, those complaints were not preserved for consideration on appeal.

## Jones and Westex Notrees, L.P. v. R.O. Pomroy Equip. Rental, Inc.,

438 S.W.3d 125 (Tex. App.—Eastland 2014, pet. filed).

**<u>Synopsis:</u>**

Usury laws do not apply to pure rental/lease transactions.

**<u>Overview:</u>**

R.O. Pomroy Equipment Rental, Inc. d/b/a Roper, Inc. ("Roper") rented an air compressor and loader to Westex Notrees, L.P. ("Westex"). Westex representatives, including the owner and general partner, Russell Scott Jones, signed two equipment rental agreements ("Agreements") with Roper. The Agreements allowed for interest to be charged on unpaid accounts and provided that all past-due balances were subject to the maximum amount of interest allowed by law. Later seeking recovery of unpaid sums and the accompanying interest allowed under the Agreements, Roper brought suit for breach of the Agreements and presented documentation that Westex owed Roper $9,994.53 in unpaid rental invoices. Jones and Westex asserted a usury claim in response to Roper's suit for breach of the Agreements because Roper allegedly charged or demanded an 18% per annum charge on Westex's account. Although Jones did not contest that he owed $9,994.53, he claimed he never agreed to 18% interest being charged for unpaid balances.

The trial court entered judgment in favor of Roper and denied the usury claim brought by Jones and Westex, awarding $9,994.53 plus prejudgment interest and 5% post-judgment interest as well as attorney's fees of $10,000 to Roper based upon breach of the Agreements. Jones and Westex presented five issues on appeal, one of which questioned the trial court's denial of Westex's usury claim. Roper brought one issue by cross-appeal, challenging the prejudgment and post-judgment interest rates set by the court.

In upholding the trial court's denial of the usury claim brought by Jones and Westex, the Eastland Court of Appeals cited the Texas Supreme Court's opinion in *Holley v. Watts* in which the Court stated:

> The essential elements of a usurious transaction are: (1) a loan of money; (2) an absolute obligation that the principal be repaid; and (3) the exaction of a greater compensation than allowed by law for the use of the money by the borrower.

438 S.W.3d at 133 (quoting *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982)). Looking to these requirements as they are applied in the context of lease agreements, the Eastland Court of Appeals found that before the usury statutes can be applied to a lease, it is necessary to first establish that the lease is not merely a lease, but a lease-purchase agreement instead. 438 S.W.3d at 133. The Agreements signed by Jones and Westex did not evidence a lease-purchase agreement, but strictly a rental agreement in which Westex was not buying the equipment. Citing to a litany of prior Texas appellate cases, the court reaffirmed that there can be no usury in a pure lease transaction. *Id*. Accordingly, the trial court did not err when it ruled that the Agreements here did not charge usurious interest since the usury laws do not apply to rental transactions. Even had the usury laws hypothetically applied, the Eastland Court of Appeals further held that a contract specifying that interest will be collected on unpaid balances from an agreement and that interest will accrue at the maximum rate allowed by law is not, as a matter of law, usurious. *Id*. Finally, the prejudgment and post judgment interest rates were adjusted to 18% simple interest as provided in the Agreements.

**Practice Pointer: No. 1**

Check the relevant agreement among the parties to see if it is more properly characterized as a lease/rental agreement or lease-purchase agreement. While the latter triggers application of the usury laws, the former does not.

## Addison Urban Dev. Partners, L.L.C. v. Alan Ritchey Materials Co., L.C.,

437 S.W.3d 597 (Tex. App.—Dallas 2014, no pet.).

**Synopsis:**

"Furnish" in the Texas Property Code § 53.021 refers to supplying materials, not actual use of those materials. / Components of final invoiced price of material, including freight and fuel surchages, were properly included in the materialman's lien price.

**Overview:**

Addison Urban Development Partners, L.L.C. ("Addison") contracted with ForceCon Services, LLC ("ForceCon") for paving, excavation, street lights, and other work in constructing improvements on a subdivision development in Addison, Texas. Pursuant to its contract with Addison, ForceCon provided concrete for use in constructing the subdivision. To make the concrete needed for the subdivision, ForceCon ordered the necessary ingredients from several materialmen, including Alan Ritchey Materials Company, LC ("Ritchey") who supplied concrete sand and rock gravel. ForceCon was to pay Ritchey a unit price per ton of material delivered for the subdivision project that included a fuel surcharge. Ultimately, the quantity of material ordered from and supplied by Ritchey exceeded the amount required for the job by nearly four times. In total, ForceCon ordered material from Ritchey totaling $114,470.56. After demands for payment were not met, Ritchey provided statutory notice to Addison as well as ForceCon and subsequently filed a statutory lien for this amount. In a bench trial after suit was brought by Addison, the trial court concluded that Ritchey's lien against the Addison subdivision was valid and decreed that judgment foreclosing the lien was granted.

In challenging the trial court's judgment on appeal, Addison advanced two challenges: (1) the lien was not valid because excess materials were not "furnished" as required under the statutory scheme for mechanic and materialmen's liens found in Tex. Prop. Code Ann. (West 2007) and (2) the lien is not valid because it was perfected only as to concrete sand and should not include the rock gravel or associated freight and fuel charges Ritchey included in its claim.

The Dallas Court of Appeals began its analysis of Addison's first challenge by citing the general rule that a materialman prove that he or she "furnished goods … for a specific job" in order to establish a valid lien under the statutory scheme for mechanic and materialmen liens. 437 S.W.3d at 603 (quoting *Lexcon, Inc. v. Gray*, 740 S.W.2d 83. 86 (Tex. App.—Dallas 1987, no writ). Looking to the first part of the standard, the court turned to case law for guidance on defining the statutorily undefined term "furnish," reaffirming that the term "does not require … that the material should actually enter into the construction of the improvement. To furnish materials for the construction of a house and to furnish materials which enter in its construction are very different things. To give our statute the latter construction is to strain its words beyond their usual meaning, and this should not be done for the purpose of depriving mechanics and others of the protection which the statute was evidently designed to give them." 437 S.W.3d at 604 (quoting *Trammell v. Mount*, 4 S.W. 377, 378 (Tex. 1887)). Accordingly, the statutory lien properly encompassed surplus material supplied and thereby "furnished" for the job in addition to materials actually used.

The second part of the standard, proving that materials were furnished for a "specific job," required the court to review if conflicting evidence existed as to whether Ritchey's materials were furnished for the Addison subdivision or another project. Addison argued that the court's decision should be guided by the analysis in *Morrell Masonry Supply, Inc. v. Scott Griffin & Assocs.*, Inc., No. 01-09-01147-CV, 2011 WL 2089677 (Tex. App.—Houston [1st Dist.] May 19, 2011, no pet.). In *Morrell*, the trial court concluded that the supplier did not prove that the materials furnished to the contractor were delivered to a particular builder for a particular construction job. *Id*. at *7. The First Court of Appeals in *Morrell* found some evidence to support the trial court's order denying the lien, noting that conflicting evidence existed as to whether the supplier delivered all the materials to a particular job because of evidence that cast real doubt on the reliability of the invoices and delivery tickets relied upon by the supplier. *Id*. at *6. The Dallas Court of Appeals distinguished the *Morell* case relied upon by Addison, placing emphasis on the lack of conflicting evidence in the present case:

> The facts in Morrell are distinguishable from the case at bar, and this distinction is critical to our inquiry. Here, the controlling facts are not in dispute. The parties stipulated that the materials made the subject of Ritchey's claim were all delivered to a batch plant operated by ForceCon, and Addison knew the materials were not being batched on the Project site. The stipulated evidence shows that each time ForceCon ordered materials from Ritchey, it specified that the materials were for the Project. Addison created a dispatch sheet for each order documenting the type and quantity of material ordered and the project for which it was being provided. Ritchey assigned order numbers 1211, 1216, and 1220 to the orders placed by ForceCon, and these order numbers identified the materials … and the Project. At delivery, Ritchey presented delivery tickets reflecting the types of materials delivered, the amount, and that the materials were for use on the project. A ForceCon representative acknowledged receipt of these delivery tickets. The invoices for the materials ordered reference the delivery tickets and also designated the Project by name. In the present case, there is no evidence that the materials delivered were used at another job. Addison's theory concerning ForceCon's use of the excess materials is but conjecture.

437 S.W.3d at 605. Consequently, the facts in the case conclusively established that Ritchey delivered materials to ForceCon for the Addison subdivision project.

The Dallas Court of Appeals then addressed and similarly dismissed Addison's second challenge to the lien's validity, assessing the validity of including the cost of gravel and associated freight and fuel charges in the lien amount. With respect to gravel, the court found that although mention of the gravel was omitted from the general description in the lien affidavit, Ritchey "substantially complied" with the statutory requirements. Of particular importance was the statutory scheme's insistence that "[t]he affidavit is not required to set forth the individual items of work done or material furnished or specially fabricated." Tex. Prop. Code Ann. § 53.054(c) (West 2007). Additionally, the court emphasized that "the evidence reflects that concrete sand and gravel are known components of prepared concrete, and there is no dispute that both gravel and sand were required for the concrete that was to be batched … and there is nothing to suggest that Addison or any third party was surprised or suffered prejudice by reason of Ritchey's general description of the aggregate in the affidavit." 437 S.W.3d at 607.

Turning then to the inclusion of freight and fuel surcharges in the lien price, the Dallas Court of Appeals agreed with Ritchey's assertion that freight or delivery was factored into the price of the materials sold and consequently subject to inclusion in the lien as "material ordered an delivered for consumption" in addition to "fuel consumed." *Id*. at 607. The court discussed at length the importance of how materials, freight, and fuel together constituted the final invoiced price of the materials provided:

> Ritchey demonstrated that all three components (materials; freight, and fuel surcharge) are added together to arrive at the final invoiced price of the material. The price charged is calculated by multiplying the tons of material delivered by the component rates for that material and freight. An additional percentage is then applied to the freight portion to obtain the fuel surcharge. The material and freight components are broken out on the invoices so that customers can track the proper application of the fuel surcharge … This evidence establishes the components of that which was consumed in the direct prosecution of the work, or ordered and delivered for incorporation or consumption.

*Id*. at 608. Therefore, the Dallas Court of Appeals found that the evidence supported inclusion of the component items of the final price, freight and fuel surcharge, in the lien price.

**Practice Pointer: No. 1**

Counsel for suppliers take note of the lengthily quoted passage above distinguishing *Morrell* for a form and method of invoicing that has greater potential, at least in one appellate court's estimation, for withstanding challenges by adverse parties

## Wise v. SR Dallas, LLC

36 S.W.3d 402 (Tex. App.—Dallas 2014, no pet.).

**Synopsis:**

Proper Measure of Damages for Conversion of Furniture, Fixtures, and Equipment

**Overview:**

SR Dallas, LLC ("SR") and WiseTime Entertainment, LLC ("WiseTime") entered into an asset purchase and sale agreement for the purchase of WiseTime's Texas Show Girls adult entertainment club based on a number of inaccurate representations made by Curtis Wise, principal and sole member of WiseTime. Among the identified debts included in the purchase and sale agreement was a $440,000 debt to Jerry Spencer, LP ("Spencer")for the remodeling of the club secured by a security agreement and a UCC-1. After the inaccurateness of Wise's representations were revealed post-sale, SR initiated the underlying suit against Wise and asserted claims for beach of contract, fraud and negligent misrepresentation which Wise answered and counterclaimed for breach of contract. Spencer filed a plea in intervention and asserted claims against SR for breach of contract and conversion. Regarding the conversion claim, Spencer argued that that debt owed to it was secured by furniture, fixtures, and inventory ("FFE") of the club that SR converted when SR removed all of the FFE from the club's premises. At trial, the jury awarded Spencer damages in the amount of $258,234.05 as the fair market value of converted property based on testimony by Spencer that $258,234.05 was the amount due and owing on the $440,000 loan. SR challenged the factual and legal sufficiency of this award.

Spencer responded to SR's challenge to the factual and legal sufficiency of the jury's findings that SR converted property with a fair market value of $258,234.05 by advancing two arguments. First, Spencer argued that the evidence established that $248,234.05 is the fair market value of the converted property because it represented the balance due on the note. In supplemental briefing, Spencer also argued that the actual value of the FFE is the appropriate measure of damages, and that the $258,234.05 awarded reflected the actual value of the FFE.

The Dallas Court of Appeals first noted that the general measure of damages for conversion is the fair market value of the property at the time and place of the conversion. 436 S.W.3d at 412 (citing the Texas Supreme Court's opinion in *United Mobile Networks, L.P. v. Deaton*, 939 S.W.2d 146, 146-48 (Tex. 1997). The court then stated an exception to this general measure of damages, observing that when converted property has no readily ascertainable fair market value, the measure of damages is the actual value of the property to the owner at the time of its loss with the purchase price serving a probative evidence of actual value. 436 S.W.3d at 412 (citing B*urns v. Rochon*, 190 S.W.3d 263, 270 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

Looking first to the general measure of damages, fair market value, the Dallas Court of Appeals found that there was no evidence to support the fair market value of the FFE *at the time of conversion*. The court rejected vague testimony concerning the value of what SR received when it took possession of the club. The testimony did not establish the value at the time payments to Spencer were discontinued under the loan agreement which was when the conversion presumably occurred. Spencer's argument that the amount of the debt for the remodel was evidence of the fair market value of the property that allegedly secured the debt was also dismissed:

> Even if we were to assume that the purchase price of the FFE was the $440,000 debt under the Agreement, there is no evidence concerning the depreciation, wear and tear of the items, the condition of the property, and the manner, time place and use of the property.

436 S.W.3d at 413.

The Dallas Court of Appeals similarly declined to accept Spencer's argument that there was sufficient evidence to establish actual value instead of the fair market value of the converted property. While the court agreed that the actual value measure of damages should be used in lieu of the fair market value measure to determine the value of restaurant and bar furniture and equipment, as well as other property with no readily ascertainable value, the actual value measure was not submitted nor requested and Spencer's testimony of the amount due under the note would not have established the value of the FFE to Spencer or SR at the time of the loss anyway. *Id*. at 414. Therefore, the evidence was legally insufficient to support the damages awarded by the jury for conversion.

## Bannum, Inc. v. Mees

No. 07-12-00458-CV, 2014 WL 2918436 (Tex. App.—Amarillo June 24, 2014, no pet.).

**<u>Synopsis:</u>**

Contractual right of renegotiation post-closing constituted some evidence of causation. / Inability to establish agency relationship defeated materialman's lien.

**<u>Overview:</u>**

Bannum, Inc. ("Bannum") contracted with Eugene Mees to buy the latter's building. The contract was contingent upon Bannum winning a bid with the Bureau of Prisons to provide a half-way house for convicted individuals and beginning the performance of those services. Should either contingency fail, the contract was to be rendered null and void by its terms. Bannum retained Tovar Construction Company ("Tovar") to renovate the property after Bannum and Mees entered in the contract to convey the property but before the sale actually closed. Although the Bureau of Prisons initially accepted Bannum's bid, the Bureau ultimately terminated the agreement for various reasons, including Mees' misrepresentation that the property to be acquired by Bannum was zoned to house an "unlimited" amount of transitional or half-way house residents. Bannum and Mees subsequently sued each other, alleging breach of contract and other causes of action. Caught in the middle of the feuding parties, Tovar sought to collect on a materialman's lien for the renovations to the property. On appeal, Bannum contested the trial court's decision to grant Mees' summary judgment on Bannum's breach of contract claims as well as the trial court's granting of summary judgment against its claims for negligent misrepresentation or concealment and deceptive trade practices claim. Additionally, Bannum complained the trial court erred in directing verdict against Bannum's efforts to enforce Tovar's mechanic/materialman's lien against Mees.

After affirming the trial court's decision to grant Mees' summary judgment on Bannum's breach of contract claim because the contract between Bannum and Mees was void as a result of the Bureau of Prison's decision to terminate its contract with Bannum, the Amarillo Court of Appeals turned to the trial court's grant of Mees' summary judgment on Bannum's claims for negligent misrepresentation or concealment and deceptive trade practices. The trial court granted summary judgment based on Mees' arguments that the alleged misrepresentations regarding the housing capacity of the property did not cause Bannum damages since Bannum failed to purchase the facility on the June 4, 2006 closing date. The Amarillo Court of Appeals, however, found some evidence that Bannum retained a contractual right to buy the property after the June 4, 2006 closing date:

> [U]pon review of the record before us, we discover some evidence of record indicating that through renegotiation or otherwise, Bannum retained the right to buy the property after June 4, 2006. Indeed, Mees acknowledged as much in its motion for summary judgment when asserting that 1) after failing 'to close on the original contract … [Bannum] had to re-negotiate with Mees to re-obtain the right to purchase' and 2) in 'December, 2006, Bannum and Mees signed a document called a second addendum to the Contract' which addendum 'was to re-state the original Contract and Addendum I and completion of the sale of the property'

2014 WL 2918436 at *2. Consequently, the trial court erred in granting summary judgment against Bannum's claims for negligent misrepresentation or concealment and deceptive trade practices.

Next, the Amarillo Court of Appeals addressed the trial court's directed verdict on Bannum's attempt to assert Tovar's mechanic/materialman's lien against Mees. In settling its payment dispute with Bannum, Tovar assigned the purported lien to Bannum. In turn, Bannum sought to enforce it against Mees. In order to satisfy the general rule that a mechanic's lien attaches only to the interest of the person contracting for construction, Bannum argued that it was Mees' agent. The Amarillo Court of Appeals rejected this argument, affirming the directed verdict by the trial court on four grounds. First, since Bannum intended to buy the property so it, and not Mees, could enter into an economic arrangement with the Bureau of Prisons, Bannum's actions did not conform with the general rule that an agent acts solely for the benefit of the principal. *Id*. at *4. Second, there was no evidence that Mees' agreed to by bound by the contract executed on its behalf by the supposed agent. *Id*. Third, there was no evidence of an express or implied agreement between the Bannum and Mees in which Bannum agreed to be subject to the directives and authority of Mees. *Id*. Notably, Mees making the property available for Tovar to do the work Bannum contracted for did not fill this void, merely evidencing that Mees sought to help Bannum pursue Bannum's interest in acquiring the building. *Id*. Fourth, there was no evidence that Bannum had apparent authority from Tovar's viewpoint to act for Mees. *Id*. at *5.Accordingly, the Amarillo Court of Appeal affirmed the trial court's directed verdict on Bannum's assertion of Tovar's mechanic/materialman's lien against Mees.

## Cox v. State

No. 07-12-00453-CV, 2014 WL 2965420 (Tex. App.—Amarillo July 1, 2014, no pet. h.).

**Synopsis:**

Rejection of the Federal "Guiding Spirit" Doctrine that Holds an Individual Liable for Actions Taken by the Corporation

**Overview:**

Patrick Cox is a certified public accountant that offered tax resolution services to clients through various business entities, including TMIRS Enterprises, Ltd., TM GP Services, LLC, and Taxmasters, Inc. Cox owned TMIRS and was President, Chief Executive Officer, Chairman of the Board, and majority shareholder of TaxMasters, Inc. TMIRS and TaxMaster, Inc operated under the name "Taxmasters." Taxmasters began advertising its tax resolution services nation-wide through commercial advertising in 2005 in which Cox would appear as TaxMasters' spokesman. When potential clients would call in, sales associates would make deceptive and misleading statements regarding the services TaxMasters offered. While Cox did not participate in the daily operation of Taxmasters, it was apparent that he was aware of many of the false, deceptive, and misleading practices occurring.

In May of 2010, the State of Texas filed a public enforcement action against TaxMasters, Inc., TMIRS Enterprises, Ltd., and Cox. Despite Cox's protestations both before and after the jury verdict that there was no basis on which to find him personally liable for DTPA violations, the jury returned a verdict that all three defendants engaged in false, misleading, and deceptive trade practices, awarding restitution, civil penalties, and attorneys fees against each defendant. On the basis of the jury's finding, Cox was personally ordered to pay $14,622,102 in restitution, $31,250,000 in civil penalties, and $315,332.67 in attorney's fees.

On appeal, Cox challenged the trial court's entry of judgment against him, individually, for actions taken by the company defendants. Cox contended that in the absence of veil-piercing, he could only be held liable for actions he personally took that violated the DTPA. While the State did not pursue traditional veil-piercing, it contended that in addition to any personal violations of the DTPA, Cox should also be held personally liable for the actions of TaxMasters' employees because Cox was the "guiding spirit" of the company. The State's argument relied on importing the "guiding spirit" doctrine from federal case law interpreting the Federal Trade Commission Act that holds:

> [T]he actions of a corporation can be imputed onto an individual if the individual personally participated in the business; committed, oversaw, or was purposefully ignorant of the deceptive actions of the business; and was so involved in the business as to be seen as the 'guiding spirit' of the business and its deception.

2014 WL 2965420 at *3 (compiling federal case law on the "guiding spirit" doctrine). The Amarillo Court of Appeals surveyed Texas case law concerning the "guiding spirit" doctrine, determining that no Texas court had applied the doctrine to hold an individual liable under the DTPA for actions taken by a corporation. *Id.* (compiling Texas case law wrestling with the federal "guiding spirit" doctrine, particularly with regard to Texas courts exercising jurisdiction over an individual acting on behalf of a corporation). Accordingly, the court rejected the doctrine's application, punting to the Texas Legislature and/or Texas Supreme Court to change the law. The remainder of the opinion found no evidence to support jury findings that Cox violated laundry list provision of the DTPA personally. The Amarillo Court of Appeals ultimately reversed the trial court's judgment and rendered judgment that Cox was not personally liable for any DTPA violations of TaxMasters.

**<u>Practice Pointer: No. 1</u>**

Keep this case handy for a collection of Federal cases, particularly in the 5th Circuit, as well as Texas cases concerning the "guiding spirit" doctrine.

## Vak v. Net Matrix Solutions, Inc.

No. 01-13-00385-CV, 2014 WL 2593043 (Tex. App.—Houston [1st Dist.] June 10, 2014, no pet.)

**<u>Synopsis:</u>**

Exclusive Venue-Selection Clause Treated as Forum Selection Clause

**<u>Overview:</u>**

Vladimir Vak, a resident of California, filed an interlocutory appeal after a Harris County, Texas court denied his special appearance. Vak sought employment by posting his resume online in 2012. Net Matrix, a computer consulting firm in Houston, Texas saw the resume and contacted Vak about temporary contract work for a company in California. Vak accepted this work. Under the written agreement between the parties, Net Matrix made a proposal to a California company that it retain Vak at an hourly rate. Net Matrix also bore responsibility for invoicing the California company and paying Vak. Vak would bill Net Matrix for his time. The agreement also included the following language:

> This Agreement shall be governed by and construed under the law of the state of Texas. The parties agree that this Agreement is made in Harris County, Texas, and that exclusive venue for all litigation arising under or in connection with this Agreement

> shall be in the courts of Harris County, Texas.

2014 WL 2593043 at *1. After Vak gave notice that he was resigning two weeks later to take a new job, Net Matrix sued Vak in Harris County, alleging breach of contract. Among other responsive pleadings, Vak filed a special appearance that the trial court denied.

On appeal, Vak advanced two arguments to support his challenge to personal jurisdiction. First, he argued that the agreement between the parties contained a venue-selection provision rather than a forum-selection provision. Second, Vak asserted that there was legally insufficient evidence of acts by Vak directed at Texas to support personal jurisdiction over him.

Assessing Vak's first argument, the First Court of Appeals distinguished between venue-selection clauses in which the parties agree that courts in a particular jurisdiction will have venue or are proper venues and those clauses that provide for exclusive venue. While the former venue-selection clauses do not establish consent to the jurisdiction of the courts in question, clauses providing for exclusive venue are treated as forum-selection clauses. *Id*. at *4. Referencing the Texas Supreme Court's construction of a similarly worded provision in *Michiana Easy Livin' Country, Inc. v. Holten*, the First Court of Appeals found that the *exclusive* venue-selection clause in the Vak and Net Matrix contract operated as a mandatory forum-selection clause. *Id*. at *5 (citing *Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777 (Tex. 2005)). Because Vak failed to negate the first basis of jurisdiction on which the trial court relied, the forum-selection clause, the court affirmed the decision of the trial court and did not address Vak's second challenge.

**<u>Practice Pointer: No. 1</u>**

Also take note of the Fort Worth Court of Appeals' opinion in *Luxury Travel Source v. American Airlines*, Inc. briefly distinguished within this opinion. 276 S.W.3d 154 (Tex. App.—Fort Worth 2008, no pet.) (finding lack of personal jurisdiction over some defendants because the forum-selection clause was binding only on lawsuits brought against the airline, not those suits brought by the airline).

# JJJJ Walker, LLC v. Yollick

No. 14–13–00161–CV, 2014 WL 4933040 (Tex. App.—Houston [14th Dist.]Sept.25, 2014, no. pet.)

**<u>Synopsis:</u>**

The Limits of Attorney Immunity in Fraud Suits

**<u>Overview:</u>**

Plaintiffs JJJJ Walker, LLC; Dynafab USA, LLC; Renaissance Properties of Texas, LLC; Priya Properties, LLC; BD Texas, LLC; and KW Hospital Acquisition, LLC filed suit against First National Bank ("Bank"), its agent and attorney Eric Yollick, and Merensky Reef Hospital Corporation, alleging fraud and conversion among other claims in connection with a loan for the purchase of three hospitals. The Plaintiff LLC's claimed that the Bank and its agents, including Yollick, wrongfully seized their ownership interests in Louisiana Texas Healthcare Management, LLC, which owned the hospitals, and then sold off the hospitals. Acting as the attorney for the Bank, Yollick signed the Letter Agreement under which the seizure of the ownership allegedly occurred, making representations through signing that the Bank intended to abide by the terms of the agreement.

The jury ultimately found that the representations made by Yollick and the Bank were fraudulent because the Bank never intended to comply with the Letter Agreement's terms, using it instead as a vehicle to seize the ownership interests of the LLC's and sale off the hospitals without accounting to the LLC's for any profit. As to each liability theory, the jury found that the Plaintiff LLC's sustained actual damages of over $19 million, the Bank was 80% responsible for actual damages, and Merensky Reef and Yollick were each 10% responsible. In connection with the fraud claims, the jury also award punitive damages of $45.6 million against the Bank and $5.7 million against Merensky Reef and Yollick. The trial court subsequently granted Yollick's motion for judgment not withstanding the verdict on the grounds that there was no evidence to support the jury's findings of individual liability for Yollick, but denied the portion of Yollick's motion asserting attorney immunity.

Among other issues considered on appeal, the Fourteenth Court of Appeals discussed at length Yollick's assertion of attorney immunity as an affirmative defense. Yollick's primary argument for attorney immunity was that the parties stipulated he represented the Bank and/or Merensky Reef and not the investor LLC's. Thus, he maintained that he did not owe an independent duty of care to a non-client in the provision of legal services nor could a non-client reasonably have relied on statements made by him as opposing counsel in an adversarial context. The Fourteenth Court of Appeals rejected these arguments, emphasizing that the allegations did not concern malpractice or even reliance on Yollick's professional knowledge and training as an attorney, but violation of an independent duty not to intentionally or recklessly make false statements of fact for the purpose of fraudulently inducing others into a contract in his capacity as the agent of the Bank (i.e. – representing through signing that the Bank intended to follow through with its promise of future performance when he knew it did not). 2014 WL 4933040 at *13-14. Accordingly, Yollick could be held independently liable for his own fraudulent or tortious acts committed while in service of the Bank like other agents and would not receive a different standard simply because he was the Bank's attorney. *Id*. at *14.

The Fourteenth Court of Appeals also quickly dismissed Yollick's remaining arguments for attorney immunity, affirming the following: 1) an agent-attorney is liable even if only acting in the client's interest and not his or her own; 2) there is no requirement that an attorney must intend an injury for a fraud claim as in conspiracy; and 3) while agents for disclosed principals can avoid contractual liability, tort liability remains. *Id*. at *15.

## General Metal Fabricating Corp. v. GMF Leasing, Inc.

438 S.W.3d 737 (Tex. App.—Houston [14th Dist.] 2014, no pet.)

**Synopsis:**

Rule 11 Enforceability When the Agreement Calls for the Execution of Additional Documents

**Overview:**

Two entities and their respective owners, collectively known as GMF and Stergiou, engaged in litigation over ownership of shares of GMF stock for over a decade. During the second trial over stock ownership, the parties settled and entered a Rule 11 agreement reflecting the settlement. The terms of the agreement were contingent on the outcome of the second trial. If the jury found in favor of GMF, Stergiou would assign all of the stock at issue to GMF and the parties would execute a mutual release. If the jury found in favor of Stergiou, however, then GMF would pay Stergiou $300,000 for the return of the stock in the form of a promissory note that would be secured by a first lien deed of trust and security agreement covering certain equipment, fixtures, receivables, and real property of GMF. The parties agreed to execute all documents necessary to effectuate the agreement and file a joint notice of non-suit with prejudice within ten days of the trial court's acceptance of the jury's verdict. Ultimately, the jury returned a verdict for Stergiou. GMF and Stergiou, however, could not agree on the specific terms to be included in the documents to be executed as contemplated in the Rule 11 agreement. Stergiou rejected a tender by GMF of an executed motion to dismiss and cashiers checks totaling $300,000, moving for entry of judgment on the jury's verdict. The parties sought resolution of the dispute through competing summary judgment motions. Among other issues at dispute among the parties, GMF contended that the Rule 11 agreement was an enforceable contract. Stergiou argued for the opposite view. The trial court found the Rule 11 agreement enforceable.

Stergiou advanced three primary arguments against enforceability of the Rule 11 agreement on appeal: 1) the agreement was nothing more than an "agreement to agree"; 2) the agreement's terms were too indefinite; and 3) the agreement did not satisfy the statute of frauds.

The First Court of Appeals held that the agreement was not an "agreement to agree." Its decision turned on characterizing the essence of the agreement as GMF's promise to pay Stergiou $300,000 in exchange for the return of the GMF stock and the dismissal of the lawsuit. 438 S.W.3d at 746. The additional documents did not contain essential terms having the same foundational importance. *Id*. Consequently, the parties were free to leave other, non-essential terms to be made later. The court distinguished situations in which the parties have an ongoing relationship that would give the underlying documents foundational importance. *Id*. Here, however, the agreement did not contemplate such an ongoing relationship, but a brief period of payment followed by a parting of ways.

The First Court of Appeals also quickly dismissed two kindred arguments. Stergiou argued that execution of the accompanying documents served as a condition precedent to formation of a binding settlement agreement. In response, the court pointed to Stergiou's statement to the trial court that the parties had reached an "agreement" and how Stergiou's interpretation would unreasonably allow a party who did not like the jury verdict on which the agreement was expressly contingent to sabotage the whole purpose of the agreement post-verdict. *Id*. at 749-50. Echoing the excerpt of the opinion analyzing whether the agreement was really an "agreement to agree," the court further found that the agreement did not fail for indefiniteness:

> [W]e have already disapproved of Stergiou's assertion that the Rule 11 agreement lacked material terms . . . Here, the Rule 11 agreement set out the amounts to be paid for the return of the GMF Companies' stock and the dismissal of the lawsuit, how

> those amounts were to be paid and when, and the interest rate. These terms provide a basis for determining the existence of a breach and for giving an appropriate remedy, meaning they are sufficiently definite to enable a court to ascertain the parties' respective legal obligations. We therefore hold that the terms of the Rule 11 agreement are not so indefinite so as to preclude its enforcement.

*Id*. at 752.

Addressing Stergiou's final argument against enforceability, violation of the statute of frauds, the First Court of Appeals was similarly not persuaded. Stergiou challenged the legal descriptions of the real property that would serve as security for GMF's promise to pay Stergiou. The court, however, saw no real dispute among the parties regarding the identification of the relevant real estate since the agreement referenced commonly known names of the real estate and circulated drafts of the security agreements by both parties had mirror descriptions in greater detail describing the common names. *Id*. at 753. Consequently, the statue of frauds, like Stergiou's previous arguments, did not present a stumbling block to enforceability.

## Parham Family, L.P. v. Morgan

434 S.W.3d 774 (Tex. App.—Houston [14th Dist.] 2014, no pet.)

**Synopsis:**

Uniform Fraudulent Transfer Act Standing

**Overview:**

Diane Morgan f/k/a Diane Parham ("Diane") worked for Parham Enterprises, Inc. ("PEI") until her separation and ultimate divorce from Shawn Parham in May of 2006. In September of 2007, the president of PEI, Rhetta Parham, signed a deed attempting to convey property to a non-existent entity, the Parham Family Limited Partnership ("Partnership"). In July of 2008, Diane obtained a judgment against PEI for unauthorized use of her personal credit cards. The transfer of the property occurred during the pendency of the credit card dispute. After Diane's attempts to execute the judgment against PEI proved unsuccessful, she filed suit as a judgment creditor against PEI and Rhetta Parham, seeking to aside the deed as fraudulently transferred and enjoin further conveyances of the property. The Partnership and another Parham family member, Vann Parham, Jr., then intervened in the lawsuit as purported grantees of the conveyed property. Ultimately, the trial court struck the intervention, granted partial summary judgment for Diane on the attempted transfer, declared the deed void, and signed final judgment on the jury verdict that awarded Diane attorney fees and enjoined the Partnership and Vann, Jr. from pursuing collateral suits.

Among other issues on appeal, the Partnership and Vann, Jr. challenged Diane's standing to seek an anti-suit injunction against them. They argued that Diane did not have standing because the transfer of property occurred nine months prior to Diane's claim against PEI that resulted in the judgment. The Fourteenth Court of Appeals emphatically rejected this argument:

> But their [the Partnership and Vann, Jr.'s] assertion ignores the provisions of the Texas Uniform Fraudulent Transfer Act that include 'creditor's claim[s that] arose before *or within a reasonable time after the transfer was made or the obligation was incurred*.' Thus, Partnership and Van Jr.'s argument begs the entire question of Diane's case: Is the September 22, 2007 deed purporting to transfer the subject property void as a fraudulent conveyance or otherwise? If the purported conveyance failed to transfer to Partnership, then title of the property remained with PEI, and Diane's judgment lien against PEI attached. Thus, Diane had a clear justiciable interest in whether her judgment lien attached to a property she alleges was fraudulently transferred to Partnership to defeat her monetary claim against PEI; the Texas Uniform Fraudulent Transfer Act provides that justiciable interest **because** she was not a party to the transaction.

434 S.W.3d at 785 (internal citations omitted).

## Landers v. Aurora Loan Servs.

434 S.W.3d 291 (Tex. App.—Texarkana 2014, no pet.)

__**Synopsis:**__

For a fraud claim to survive, the company agent that makes the representation must also have the requisite mental state.

__**Overview:**__

Ken and Clarlinda Landers purchased a home in 2006 with a note of $440,000. Soon struggling to make the required payments on the note, the couple asked and received approval from the lender, Aurora Loan Services ("Aurora"), to make reduced payments for several months. The interim arrangement provided for three lower monthly payments followed by a substantially higher fourth payment. Based on representations by Aurora, however, the Landers believed a loan modification that would significantly reduce their payments long term would be completed prior to the fourth payment coming due. When this modification did not ultimately occur, the Landers defaulted on the note and Aurora initiated foreclosure proceedings.

The Landers subsequently sued Aurora, alleging fraud based on the following sequence of events: 1) Aurora representatives telling the couple they were eligible for a federal Home Affordable Modification Program adjustment to their loan; 2) Aurora later concluding they were not eligible for the modification; 3) Aurora representatives telling them not to make a payment so they would qualify; 4) Aurora then claiming the couple breached the modification program based on failure to make payments; and 5) Aurora never telling the Landers they were not eligible. The trial court granted summary judgment in favor of Aurora on the fraud claim.

In affirming the decision of the trial court, the Texarkana Court of Appeals cited the San Antonio Court of Appeals' decision in *Dynegy, Inc. v. Yates* for importing into Texas case law the federal view that a plaintiff must prove that the same company agent making a false representation also has the requisite mental state to prove a fraud claim. 434 S.W.3d at 296 (citing *Dynegy v. Yates*, 345 S.W.3d 516 (Tex. App.—San Antonio 2011), *rev'd on other grounds*, 422 S.W.3d 638 (Tex. 2013)). Accordingly, a plaintiff cannot establish fraud if one company agent makes a false statement, but the evidence establishes only that a different officer knows the statement is false. 434 S.W.3d at 296. Applying the adopted rule, the Texarkana Court of Appeals affirmed the summary judgment, finding that there was no evidence that the Aurora representative who allegedly made false representations to the Landers either knew the representation was false or was reckless about the truth.

**<u>Practice Pointer 1</u>:**

There is an express caveat in the opinion that companies cannot create a scheme to mislead customers in which the company limits the information available to some employees in the hopes of avoiding fraud liability. 434 S.W.3d at 297.

**<u>Practice Pointer 2</u>:**

See the *Dynegy* opinion for the listing of almost exclusively federal authority that served as the basis for importing the rule

## *Vanderpool v. Vanderpool*

2014 WL 3939035 (Tex. App.—Tyler 2014)

**<u>Synopsis:</u>**

In this limitations case involving conversion and fiduciary duty, the court found insufficient summary judgment evidence to support the defense with respect to conversion of a note, but also found that no informal fiduciary duty was created and, therefore, the discovery rule did not apply to conversion of 213 Krugerrrands. Finally, the plaintiffs did not prove fraudulent concealment tolled limitations as they did not present proof that the defendant actually knew she had wronged the plaintiffs nor did they satisfy their duty of inquiry.

**<u>Overview:</u>**

This a family feud between the children and stepmother, Barbara, over her husband's, Ray's, estate. Ray owned a life interest in property (the family farm and 213 Krugerrands) with the remainder interest belonging to his children. In 2005, Ray and Barbara conveyed to the Kings real property, including Ray's interest in the family farm, in exchange for a note, which matured in 2010. Ray died in 2007. When the note matured, Barbara did not distribute any of the proceeds to the children nor did she relinquish the Krugerrands.

In 2011,the children filed suit alleging "causes of action" initially for conversion and breach of fiduciary duty, a constructive trust, and an accounting and later adding fraud and "breach of confidential relationship."

Barbara filed a motion for partial summary judgment contending the statute of limitations barred Appellants' causes of action for conversion and breach of fiduciary duty, and later responded that the discovery rule and doctrine of fraudulent concealment did not apply. The trial court granted Barbara's motion for partial summary judgment on the children's "causes of action for fraud, conversion, breach of fiduciary duty, accounting and a constructive trust."

1. Conversion

The court explained:

> A conversion of personal property occurs upon the unauthorized and wrongful assumption and exercise of dominion and control over the personal property of another to the exclusion of, or inconsistent with,

> the owner's rights. The limitations period for a claim of conversion is two years. The date a cause of action accrues is a question of law.
>
> …
>
> In conversion actions where possession is initially lawful, and demand and refusal is useless or unequivocal acts of conversion have occurred, the cause of action accrues upon demand and refusal or discovery of facts supporting the cause of action, whichever occurs first.

2014 WL 3939035 at 2-3 (internal citations omitted). The children claimed the conversion arose from the King note, but Barbara did not proffer the note as evidence nor did she prove up its terms.

2. Constructive Notice

Barbara then argued that the children had constructive notice of the sale of property in which they had an interest when the note was listed in the inventory of their father's estate in the probate court filings. The court noted that the doctrine of constructive notice "creates an irrebuttable presumption of actual knowledge of certain matters" and "is usually applied when a person knows where to find relevant information but failed to seek it out." As the children were devisees of their grandparents, therefore interested persons in their probated estates, they would be "charged with notice of the contents of the probate records." *Id.* at 3 (internal citations omitted).

> Courts will impose constructive notice of the contents of a public record when there exists a need for stability and certainty, as in instances relating to titles to real property and in circumstances concerning *in rem* proceedings. But an unrecorded deed does not give constructive notice.

*Id.* (internal citations omitted). The court questioned whether the single entry regarding the King note on the father's probate inventory was sufficient to grant constructive notice; however, the record did not contain their father's will and, therefore, the court could not determine whether the children were interested persons in his estate. Thus, Barbara's evidence fails with respect to constructive notice from the probate records.

Barbara also claimed that the children had constructive notice based on recitations regarding the King note in their petition. The court noted that this was actual, not constructive, notice; however, the summary judgment evidence did not establish when the children acquired the information.

Thus, the court of appeals reversed the trial court's summary judgment on conversion of the King note proceed.

3. Discovery Rule (Requiring Fiduciary Relationship)

Based on its rulings on conversion of the note proceeds, the court limited its ruling on the discovery rule to conversion the Krugerrands and breach of fiduciary duty. After reciting the general principles underlying the discovery rule, the court discussed inherently undiscoverable injuries and noted that:

> The discovery rule does not excuse a party from exercising reasonable diligence in protecting its own interests. A plaintiff is relieved of the responsibility of diligent inquiry if the injury is the result of fiduciary misconduct, but the discovery rule is not applied so as to excuse a party from the exercise of diligence in

> protecting his own interests merely because a relationship of trust and confidence exists.

*Id.* at 5 (internal citations omitted).This lead to a discussion of fiduciary relationships and duty, initially noting that Texas courts are reluctant to find such a relationship, whether formal or informal. Here, the children were seeking an informal fiduciary relationship, which the court described as:

> Informal fiduciary relationships, sometimes referred to as "confidential relationships," may give rise to a fiduciary duty where one person trusts in and relies on another, whether the relation is a moral, social, domestic, or purely personal one. An informal fiduciary relationship exists where influence has been acquired and abused, and confidence has been reposed and betrayed. A familial relationship, while considered a factor, does not by itself establish a fiduciary relationship.
>
> …
>
> A party claiming the existence of an informal fiduciary relationship (confidential relationship) must have been accustomed to being guided by the judgment or advice of the other.

*Id.* at 5-6 (internal citations omitted). Although Barbara admitted that she had tried to develop a trust relationship with the children in order to try to improve relations between the children an their father, the relationship was not such that the children became accustomed to being guided by her judgment. Rather than trusting her statements about the life estate assets because they trusted her, the children relied on her statements because she was the executrix of the estate and they assumed that, in that capacity, she would have knowledge of the life estate's assets. This is not sufficient to establish an informal fiduciary relationship. Further, the children did not exercise reasonable diligence. Therefore, an inherently undiscoverable injury permitting application of the discovery rule did not exist and the court upheld this aspect of the summary judgment.

4. Fraudulent Concealment

Based on the prior holding, the court limited its discussion on fraudulent concealment to the conversion of the Krugerrands. The children had the burden of proving the fraudulent concealment, which the court noted:

- Is a fact-specific, equitable doctrine.
- Is an affirmative defense to limitations based on the rationale that a person cannot avoid liability for her actions by deceitfully concealing wrongdoing until limitations has run.
- Tolls the limitations period only until "the fraud is discovered or could have been discovered with reasonable diligence."
- Requires a plaintiff to establish an underlying wrong, and that (1) the defendant actually knew the plaintiff was in fact wronged, and (2) concealed that fact to deceive the plaintiff.

*Id.* at 9 (internal citations omitted). The summary judgment evidence did not show that Barbara actually knew the children were wronged when she sold 87 of the Krugerrands to make a down payment on her house. Further, the children did not make inquiries about the property of the life estate and, thus, she did not conceal anything. As Barbara was not a fiduciary, the children were not relieved of their burden of inquiry. Accordingly, the court upheld the summary judgment on limitations with respect to the conversion of the Krugerrands.

The court recognized that Barbara, having asserted limitations, had the burden to prove when the cause accrued and, to the extent the discovery rule applies, when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered, the nature of its injury.

## Winston Acquisition Corp. v. Blue Valley Apartments, Inc.

436 S.W. 3d 423 (Tex. App.—Dallas 2014)

**Synopsis*:***

Interpretation of unambiguous contract interpreted; provisions harmonized to avoid alleged nullity

**Overview:**

Winston agreed to buy an apartment complex from Blue Valley. The closing date was to be December 15, 2010. Winston paid $150,000 in earnest money, which was non-refundable unless Winston properly terminated the contract. The contract required Blue Valley to provide certain documents, including an Environmental Site Assessment (that included as an attachment to an exhibit and EPA pamphlet), during the due diligence period. Conversely, Winston had the right to object to Blue Valley's failure to satisfy these conditions, but Winston had to do so within the due diligence period. While Winston objected to certain issues with the title commitment during the due diligence period, it did not rely on these to terminate the contract as required by the termination provision; rather, it only mentioned the pamphlet. Winston did not show for the closing. Each party sued the other for breach of contract.

After a bench trial, the trial court sided entered judgment for Blue Valley awarding the earnest money, attorneys' fees, and pre- and post-judgment interest and ordered that Winston take nothing finding (1) Winston breached the Contract by failing to close on the apartment complex, (2) Blue Valley did not breach the Contract by failing to provide the EPA Pamphlet, (3) Blue Valley's failure to provide the EPA Pamphlet did not justify Winston's failure to close and (4) Winston did not properly terminate the Contract.

The Dallas Court of Appeals, finding the contract unambiguous, permitting a *de novo* review, recited the standard for interpretation.

> It is a basic premise of contract interpretation that unambiguous contracts are construed as a matter of law. The entire instrument, taken by its four corners, must be read and considered to determine the true intention of the parties. Terms are given their plain, ordinary, and generally accepted meaning, unless the instrument shows the parties used them in a technical or different sense. When interpreting a contract, courts examine the entire agreement in an effort to harmonize and give effect to all provisions of the contract so that none will be meaningless. Courts presume the parties to a contract intend every clause to have some effect.

*Winston*, 436 S. W. 3d at 427 (internal citations omitted). The Dallas Court of Appeals found that Winston failed to lodge its objections within the due diligence period as contractually required and failed to close by the date contractually specified. Indeed, Winston first objection came ten days after the due diligence period.

Winston argued that, after the due diligence period, it could still raise an objection to Blue Valley's failure to provide documents, suggesting any other interpretation nullified the provision (3.2) allowing a waiver in writing. The court rejected this argument, saying:

> Our refusal to construe the Contract as Winston suggests does not render section 3.2, (allowing written waiver of conditions) a nullity. Ever mindful of the principle that no one phrase, sentence or section of a contract should be isolated and considered apart from other provisions of the contract, we review sections 3.2, 3.3, 3.4 in an effort to harmonize the expression of the parties' intent. Section 3.2 specifies that escrow is to close on the closing date provided that all conditions "have been satisfied or waived in writing." Use of the disjunctive "or" signifies two alternatives: satisfied or waived in writing.

*Id.* at 428 (internal citations omitted).