

TADC APPELLATE LAW NEWSLETTER

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Co-Editors

*Pete Meeker
Davis & Wilkerson, P.C., Austin*

&

*Carlos D. Lopez
The Law Office of Carlos D. Lopez, Austin*

NEW RULES FOR ELECTRONIC BRIEFS AND OTHER DOCUMENTS

Texas Supreme Court

Effective May 31, 2010, attorneys must e-mail electronic copies of the following documents to the Clerk of the Court on the same day the original paper documents are filed: (1) petitions; (2) responses to petitions; (3) replies to responses to petitions; (4) briefs on the merits, including respondents' briefs on the merits and petitioners' reply briefs on the merits; (5) amicus briefs; (6) post-submission briefs; (7) motions for rehearing; and (8) emergency motions or motions for stay.

The electronic-copy requirement applies to both petition-for-review proceedings under TRAP Rule 53 and original proceedings under TRAP Rule 52.

For more information go to: <http://www.supreme.courts.state.tx.us/ebriefs/ebriefs.asp>.

Dallas Court of Appeals

Beginning October 1, 2009, the Fifth Court began requiring electronic copies of briefs filed in all cases.

For more information go to: <http://www.5thcoa.courts.state.tx.us/eBrief/ebrief.doc>.

Austin Court of Appeals

The Third Court is now accepting electronic courtesy copies of briefs, reporter's records, and clerk's records, and other filings.

For more information go to: <http://www.3rdcoa.courts.state.tx.us/rules/efiling.asp>.

San Antonio Court of Appeals

The Fourth Court of Appeals has posted guidelines for filing courtesy electronic copies of briefs: <http://www.4thcoa.courts.state.tx.us/ebriefs/ebriefs.asp>.

RESTITUTION FOR SUCCESSFUL APPELLANTS

Miga v. Jensen, 299 S.W.3d 98 (Tex. 10/23/2009)

A judgment debtor is entitled to supersede the judgment while pursuing an appeal. This defers payment until the matter is resolved, but it does not halt the accumulation of interest on the judgment. If the debtor rejects the supersedeas option and does not otherwise suspend enforcement, the creditor may execute on the judgment by seizing bank accounts or other property. To avoid seizure, the debtor may pay the judgment outright, which stops the accumulation of post-judgment interest.

But these alternatives to suspending enforcement put at risk the judgment debtor's ability to recoup the seized assets or payment when the appeal is successful.

The judgment debtor in this case, under an Agreed Order negotiated with the judgment creditor, paid \$23.4 million toward satisfying the \$25.4 million judgment and then subsequently won the appeal. When the judgment creditor refused to return the overpayment, the judgment debtor filed suit seeking restitution. The trial court entered judgment ordering restitution, and the judgment creditor appealed. The Court of Appeals affirmed, whereupon the judgment creditor appealed to the Supreme Court.

The question presented was whether the judgment creditor could keep the money previously tendered by the judgment debtor. Restitution after reversal has long been the rule in Texas and elsewhere; however, the judgment creditor argued that the parties' agreement precluded restitution. The Agreed Order clearly indicated that the judgment debtor intended to appeal, but it was silent on restitution. The Supreme Court agreed with the court of appeals that "implicit in reserving a right to appeal is the right to a refund of the money in the event that the judgment is later modified or reversed." The situation would be no different had the judgment creditor executed on a non-superseded judgment. There would be no agreement that the judgment debtor could (or could not) seek restitution, but the right to recover the funds upon reversal of the judgment would nevertheless be established as a matter of law. Because the parties' agreement was silent on this point, it did not displace the restitution-after-reversal rule.

The judgment creditor next asserted the voluntary payment rule which provides that "money voluntarily paid on a claim of right, with full knowledge of all the facts, in the absence of fraud, duress, or compulsion, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability." The Court cited the Third Restatement:

any payment made in response to a judgment is treated as a payment made under compulsion, at least for the purpose of permitting the judgment debtor to avoid the consequences that would flow from

regarding the payment as "voluntary."

When, as here, payment on a judgment is coupled with an expressed intent to appeal when appellate relief is attainable, the voluntary payment rule will not preclude restitution if the judgment is later reversed.

The Court concluded that prohibiting restitution would penalize the judgment debtor for the court's mistake and is inimical to the unjust enrichment principles underlying the doctrine.

WHAT'S YOUR REMEDY WHEN THE COURT REPORTER LOSES HER STENOGRAPHIC NOTES?

Mid-Continent Group v. Goode, (Tex. App.—Amarillo 10/16/2009) (No. 07-09-0181-CV)

Appellant timely filed its notice of appeal and requested a reporter's record. The court reporter filed all but one volume of the reporter's record but was unable to prepare the record as to a post-trial hearing because her notes were lost when her car was broken into and her stenography machine stolen.

Under TRAP Rule §34.6(f), an appellant is entitled to a new trial if the appellant has timely requested a reporter's record; if, without the appellant's fault, a significant portion of the court reporter's notes and records has been lost; if the lost portion of the record is necessary to the appeal's resolution; and if the lost portion of the reporter's record cannot be replaced by agreement of the parties. The Court of Appeals held that the issues of significance, necessity, and replaceability could not be fully determined from the record before it, so in the interest of justice it remanded to the trial court to hear evidence and determine:

- (1) What was the purpose of the post-trial hearing?
- (2) Was any evidence presented during the hearing; and, if so, what was the nature of that evidence?

(3) If evidence was presented during the hearing, can that portion of the reporter's record be replaced by agreement of the parties?

ATTORNEY'S FEE AWARD SUPPORTED BY UNCONTRADICTED TESTIMONY WAS UNREASONABLE IN LIGHT OF THE AMOUNT INVOLVED AND THE RESULTS OBTAINED AND WAS THEREFORE IMPROPER AS A MATTER OF LAW

Smith v. Patrick W.Y. Tam Trust, 296 S.W.3d 545 (Tex.2009)

The plaintiff sought over \$200,000 in damages, but the jury awarded only \$65,000. The plaintiff presented uncontroverted testimony of \$62,438.75 in attorney's fees; but the jury awarded none. The trial court rendered judgment on the verdict for \$65,000 in damages and notwithstanding the verdict for \$22,500 in attorney's fees. The Court of Appeals vacated the attorney's fee award and instead rendered judgment for the full amount requested, holding that because the plaintiff presented competent, uncontroverted evidence of its requested amount of attorney's fees and because the defendant did not challenge the amount, nature, or necessity of these fees, they were established as a matter of law.

The Supreme Court cast the issue as whether a trial court is authorized to award attorney's fees as a matter of law when a jury awards roughly one-third of the damages sought and no fees. Because, under such circumstances, a court's award of the full amount of fees sought is unreasonable, the Supreme Court remanded to the trial court for a new trial on attorney's fees.

An award of the amount claimed is not mandated in every case when uncontradicted testimony is offered. For example, even though the evidence might be uncontradicted, if it is unreasonable, incredible, or its belief is questionable, then such evidence would only raise a fact issue to be determined by the trier of fact. In such cases, attorney's fees, even though supported by uncontradicted testimony, may not be awarded by a court as a matter of law.

In this case, because the fee was unreasonable in light of the amount involved and the results obtained, the evidence did no more than raise a fact issue to be decided by the jury. The jury, however, awarded nothing. Although it could have rationally concluded that, in light of the amount involved and the results obtained, a reasonable fee award was less than the full amount sought; and no evidence supported the jury's refusal to award any attorney's fees (as the court of appeals correctly noted). The trial court could have directed the jury to reform its verdict under Rule 295, but the court was not free to set a reasonable fee on its own. Accordingly, the plaintiff was not entitled to its fees as a matter of law, and the defendants were entitled to a new trial on attorney's fees.

JURY'S FINDING OF ZERO ATTORNEY'S FEES WAS IMPROPER AS A MATTER OF LAW

Midland Western Bldg. L.L.C. v. First Service Air Conditioning Contractors, Inc., 300 S.W.3d 738 (Tex. 11/20/2009)

In this suit on a sworn account, the trial court entered judgment on a jury verdict that awarded \$14,645 in damages but zero attorney's fees. The only evidence on the issue was presented by the plaintiff's attorney who testified that \$24,000 to \$26,000 was a reasonable fee; however, he admitted during cross examination that some of that amount was related to parties that were no longer in the case. The plaintiff appealed arguing that there was no evidence of zero attorney's fees and that the evidence conclusively established its reasonable and necessary fees as a matter of law. The Court of Appeals reversed and rendered judgment for \$24,000 in fees.

Citing its recent decision in *Smith* (above), the Supreme Court held that the fees could not be awarded as a matter of law because they were not supported by uncontradicted testimony, due to the attorney's admission that some of the fees involved claims against other parties. On the other hand, the jury's award of no fees was also improper. While the jury could have rationally concluded that a reasonable and necessary fee was less than the amount sought, an award of no fees was improper in the absence of evidence affirmatively showing that no attorney's services were needed or that any services provided were of no value. The Court

reversed the court of appeals' judgment and remand the case to the trial court for a new trial on attorney's fees.

PUNITIVE DAMAGE AWARDS THAT ARE STATUTORILY CAPPED ARE REQUIRED TO BE RECALCULATED WHEN ACTUAL DAMAGES ARE REDUCED ON APPEAL

***In re Columbia Medical Center of Las Colinas*, 306 S.W.3d 246 (Tex. 3/12/2010)**

This mandamus case followed an appeal of a judgment awarding economic and punitive damages. In that appeal, the Supreme Court vacated a portion of the economic damages award (for loss of inheritance damages) and affirmed the rest of the judgment.

After the mandate issued, the defendant attempted to tender payment to the plaintiffs, subtracting the loss of inheritance damages amount and reducing the punitive damages amount proportionately. When the plaintiffs refused this payment, the defendant moved the trial court to enter a modified final judgment by reducing the economic damages award, as well as by reducing the punitive damages award to twice the amount of the economic damages award that was affirmed, plus interest. The trial court denied the motion. As a result, the amount of punitive damages awarded by the final judgment exceeded the statutory cap; and the defendant petitioned the Supreme Court for mandamus relief.

Punitive damage awards that are statutorily capped are required to be recalculated when the actual damages against which they are measured are reduced on appeal. The plaintiffs did not dispute that an order by the Supreme Court expressly requiring a reduction of the punitive damages award would have been proper. However, the Supreme Court's judgment did not expressly address the amount of punitive damages, so the question presented here was whether the Supreme Court's judgment had that effect.

The Court held that even though its judgment did not expressly address the amount of punitive damages, the statute capping punitive damages as measured against economic damages requires a reduction in punitive damages as a matter of law. Thus, regardless of whether an appellate court judgment expressly

commands it, trial courts must give effect to statutory caps on damages when the parties raise the issue. Accordingly, to give full effect to the Supreme Court's judgment vacating a portion of economic damages, the trial court was required to reduce the punitive damages award in compliance with the statutory cap. By failing to do so, the trial court abused its discretion.

SUPERSEDEAS ISSUES WHERE THE JUDGMENT INVOLVES A REAL PROPERTY INTEREST

***Whitmire v. Greenridge Place Apartments*, 2010 WL 547536 (Tex. App.–Houston [1st Dist.] 2/18/2010)(01-09-00291-CV)**

This case began as an action by a landlord against its tenant for eviction and collection of rent. The trial court awarded possession to the landlord and ordered the tenant to pay \$850 in rent and \$850 in attorney's fees, plus costs and post-judgment interest. The TRAP Rules and Property Code both provide that in setting the amount of the supersedeas bond requirement when the judgment involves a real property interest, the trial court must consider the value of rent or revenue likely to accrue during the pendency of an appeal. Tex. R. App. P. 24.2(a)(2)(A). The judgment set the amount of the supersedeas bond at \$10,000 in the event the tenant appealed, and the tenant's parents acted as sureties and posted the bond.

The tenant then appealed; the Court of Appeals affirmed the trial court's judgment; and the tenant filed a petition for review in the Supreme Court. Throughout the appeal process, the tenant remained in possession of the apartment but did not pay rent. After increasing the amount of the supersedeas bond to \$15,000, the trial court further increased the bond amount to \$25,000 "to cover rental amounts accrued during the pendency of the appeal;" and the sureties complied with this order. When the Texas Supreme Court dismissed the tenant's petition for review, the tenant filed a motion for rehearing. While the motion for rehearing was pending, the trial court ordered that a cash bond of \$35,000 be deposited into the court's registry; however, the sureties did not increase their surety obligation.

The tenant then vacated the apartment and tendered a check to the landlord in the amount of \$2,101.14 to

cover the amount of the judgment plus post-judgment interest. The check stated that the amount was for “full satisfaction of the judgment,” and the landlord accepted the tenant’s check.

After issuance of the Court of Appeals’ mandate, the landlord requested that the judgment and mandate be amended to reflect the sureties’ joint and several liability up to the \$25,000 supersedeas bond they posted; and the Court of Appeals so amended its judgment and mandate.

Next, in the trial court, the landlord moved for entry of judgment for \$25,000 against the tenant and sureties, jointly and severally, to cover the amount of lost rent and attorney’s fees incurred during the appeal, and against the tenant, individually, for costs in excess of the \$25,000 supersedeas bond. Based on uncontroverted evidence that \$22,687 in rent was due and that the landlord had incurred at least \$19,245.70 in attorney’s fees during the appeal, the trial court rendered judgment that the landlord could recover \$25,000 from the sureties, jointly and severally, and the excess amount of costs from the tenant, individually. The tenant appealed again, asserting among other things that (1) that the amended judgments were void because both courts lacked plenary power to amend their respective judgments and (2) that the landlord’s acceptance of the tenant’s payment of the original judgment amount mooted the controversy. The Court of appeals affirmed.

(1) Plenary Power to Amend the Judgment as to Sureties

The Court of Appeals held that it and the trial court each had jurisdiction to amend their respective judgments to render judgment against the sureties on the \$25,000 supersedeas bond. Its rendering of judgment against the sureties after it had affirmed the judgment was a ministerial act involving no judicial discretion; and thus it could amend its judgment, after the expiration of its plenary power, to operate against the sureties on the supersedeas bond. When a Court of Appeals affirms the judgment of the trial court, it must also render judgment against the sureties on the supersedeas bond for the performance of the judgment and any costs taxed against the appellant. This is a mandatory duty, and the Court of Appeals’ failure to do so in its initial judgment did not deprive it of the power to, at any time, even after its plenary power had expired, amend its judgment to reflect the sureties’

liability. Thereafter, the trial court “has no jurisdiction to review, interpret, or enforce [the appellate court’s] mandate; it must observe and carry it out. Its orders carrying out the mandate are ministerial. Thus, the trial court did not err by following the Court of Appeals’ mandate and rendering judgment against the sureties in the amount of their supersedeas bond obligation.

(2) Effect of Tenant’s Tender of the Underlying Judgment Amount

The Court of Appeals held that payment of the original judgment amount did not moot the controversy because the tenant did not tender payment for the rents that accrued while he remained in possession of the apartment during the pendency of his appeal. When the underlying judgment is for the recovery of a real property interest and the judgment debtor does not pay the value of the property’s rent or revenue during the pendency of the appeal, the sureties are subject to liability up to the amount of the bond. Thus, a live controversy still existed between the parties – one to resolve once the judgment was final.

APPELLANT MAY NOT RAISE A NEW ISSUE IN A REPLY BRIEF

Private Mini Storage Realty, L.P. v. Smith, 304 S.W.3d 854 (Tex. App.–Dallas 2/1/2010)

After the parties filed cross-motions for summary judgment, the trial court granted summary judgment for the plaintiff. The defendants then filed a motion for rehearing presenting new arguments and evidence that was essentially a request to supplement their previously denied motion for summary judgment. The trial court denied the motion for rehearing, and the defendants appealed.

The defendant-appellants’ brief on appeal never alleged any error in the denial of their motion for rehearing, nor did it mention the motion for rehearing. In their reply brief, defendant-appellants asserted for the first time that they were appealing the trial court’s denial of their motion for rehearing. The Court of Appeals held that the argument in the reply brief that the court erred in not granting the motion for rehearing of the motions for summary judgment raised a new issue, that a party may

not raise a new issue in a reply brief, and that such arguments were therefore not properly before the Court.

TRIAL COURTS CANNOT GRANT NEW TRIAL SIMPLY “IN THE INTEREST OF JUSTICE AND FAIRNESS.” MUST GIVE SPECIFIC WRITTEN EXPLANATION

***In re United Scaffolding, Inc.*, 301 S.W.3d 661 (Tex. 1/15/2010)**

In our Fall 2009 Newsletter, we reported on the Texas Supreme Court’s decision in *In re Columbia Medical Center of Las Colinas*, 290 S.W.3d 204 (Tex. 2009), which significantly changed the trial court’s duty to detail its reasoning when it issues an order to grant a new trial. The Court held that a trial court acts arbitrarily and abuses its discretion when it disregards a jury verdict and grants a new trial, but fails to specifically set out its reasoning. Just as appellate courts that set aside jury verdicts are required to give reasons for doing so, trial courts must give a specific written explanation for setting aside a jury verdict and granting a new trial.

In *In re United Scaffolding, Inc.*, as in in *In re Columbia Medical Center*, the trial court granted a new trial, and the only reason articulated in the order was “in the interest of justice and fairness.” United Scaffolding petitioned the court of appeals for mandamus relief. Acting on the petition prior to the Supreme Court’s decision in *In re Columbia* opinion, a divided court of appeals denied mandamus relief.

United Scaffolding then petitioned the Supreme Court for mandamus, arguing that *In re Columbia* was distinguishable in that the trial court specifically considered and adopted the motion for new trial and in essence incorporated the motion and its reasoning by reference. The Supreme Court disagreed that the order in question was so specific and instead focused on the language of the order that specified only one reason for granting it, namely “in the interest of justice and fairness.”

Relator also argued, to no avail, that there was no abuse of discretion because the trial court followed the law in effect at the time it granted a new trial (i.e. before the

Supreme Court decided *In re Columbia*). The Court held, however, that an erroneous legal conclusion is an abuse of discretion even if it may not have been clearly erroneous when made.

The Supreme Court conditionally granted mandamus and directed the trial judge to specify its reasons for disregarding the jury verdict and ordering a new trial.

BE CAREFUL APPEALING AN ORDER GRANTING A HYBRID MOTION FOR SUMMARY JUDGMENT

***Talkington v. Mccurley*, 2009 WL 3823392 (Tex. App.–Dallas 11/17/2009) (05-08-01166-CV)**

This was an appeal from a trial court’s summary judgment in favor of the appellee in a suit for negligence and breach of fiduciary duty. Appellee had filed a hybrid motion for summary judgment asserting both traditional and no-evidence grounds. The trial court’s order did not specify whether it was based on traditional or no-evidence grounds were supported by the motion. On appeal, appellant complained only that the lower court granted the no-evidence summary judgment and did not challenge the traditional summary judgment.

When a trial court’s order does not specify the grounds on which it granted summary judgment, the appellate court must affirm if any of the grounds have merit. Thus, an appeal from a hybrid motion for summary judgment must necessarily challenge all grounds where the trial court’s order fails to specify whether it granted summary judgment on traditional or no-evidence grounds. By failing to brief one of the grounds for summary judgment, an appellant waives any error as to the granting of that ground for summary judgment.

Accordingly, the Court of Appeals held that because appellant failed to challenge each possible ground on which summary judgment could have been granted, the summary judgment on the unchallenged ground must be affirmed.