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ONE-SATISFACTION RULE, EXEMPLARY DAMAGES, AND SEGREGATION OF ATTORNEY'S FEES–THIS OPINION PROVIDES SEVERAL HOLDINGS WORTHY OF ATTENTION

Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299 (Tex. 12/22/2006)

Plaintiff brought suit against defendant car dealer for delivering a base-model Toyota Highlander rather than a Highlander Limited as allegedly represented and agreed, alleging multiple theories of recovery–breach of contract, fraud, and DTPA–for the one injury. The jury found in the plaintiff's favor and also found a difference in value of the two models of $7,213, mental anguish damages of $21,639, exemplary damages of $250,000, and attorney's fees of $20,000. The trial court disregarded the mental anguish and exemplary awards on the ground that the plaintiff's only claim was for breach of contract and the attorney's fee award because the plaintiff had not segregated fees attributable to that claim alone. The court of appeals disagreed with both conclusions, reinstating all the awards but reducing exemplary damages to $125,000. The Supreme Court reversed and remanded for further proceedings holding (1) that although the plaintiff could assert her claim in several forms, she could not recover in all of them; (2) that the court of appeals' judgment included exemplary damages exceeding the bounds of constitutional law; and (3) that the attorney's fees exceeded the bounds of Texas law.

WHEN MULTIPLE THEORIES OF RECOVERY ARE ALLEGED, A PREVAILING PARTY IS ENTITLED TO JUDGMENT ON THE MOST FAVORABLE THEORY, BUT CANNOT MIX AND MATCH BETWEEN THEORIES TO OBTAIN LARGER JUDGMENT

For breach of contract, the plaintiff could recover economic damages and attorney's fees, but not mental anguish or exemplary damages. For fraud, she could recover economic damages, mental anguish, and exemplary damages, but not attorney's fees. For a DTPA violation, she could recover economic damages, mental anguish, and attorney's fees, but not additional damages beyond three times her economic damages. The court of appeals erred by simply awarding them all.

SUPREME COURT JURISDICTION EXISTS TO REVIEW WHETHER EXEMPLARY DAMAGES ARE CONSTITUTIONALLY EXCESSIVE

While the ***excessiveness*** of damages as a factual matter is final in the courts of appeals, the ***constitutionality*** of exemplary damages is a legal question for the Supreme Court. Moreover, the U. S. Supreme Court has found unconstitutional a state constitutional provision limiting appellate scrutiny of exemplary damages to no-evidence review. Only by adhering to the practice of reviewing exemplary damages for constitutional (rather than factual) excessiveness can the Texas Supreme Court avoid a similar constitutional conflict.

EXEMPLARY DAMAGES MAY BE CONSTITUTIONALLY EXCESSIVE EVEN THOUGH WITHIN LEGISLATIVE LIMITS

The plaintiff asserted that the court of appeals erred in reducing the exemplary damages from $250,000 (the amount awarded by the jury) to $125,000, arguing that at least $200,000 in exemplary damages is constitutionally permissible because $200,000 is the cap enacted by the Legislature in Section 41.008 of the Civil Practice & Remedies Code. The Court disagreed,

holding that while state law governs the amount properly awarded as punitive damages, that amount is still subject to an ultimate federal constitutional check for exorbitancy.

EXEMPLARY DAMAGES EXCEEDING FOUR TIMES COMPENSATORY AWARD IS EXCESSIVE

The jury found economic damages of $7,213, mental anguish damages of $21,639, and exemplary damages of $250,000. The court of appeals reduced the exemplary damages to $125,000. The Supreme Court held that the $125,000 assessed by the court of appeals exceeded constitutional limits. In doing so, the Court noted that the U. S. Supreme Court has declined to adopt a bright-line ratio between actual and exemplary damages but has stated that "few awards exceeding a single-digit ratio . . . will satisfy due process." Further, the U. S. Supreme Court has pointed to early statutes authorizing awards of double, treble, or quadruple damages as support for the conclusion that "four times the amount of compensatory damages might be close to the line of constitutional impropriety."

Here, the court of appeals' award exceeded 4 times the plaintiff's total compensatory award and was more than 17 times her economic damages. The Court concluded that "[p]ushing exemplary damages to the absolute constitutional limit in a case like this leaves no room for greater punishment in cases involving death, grievous physical injury, financial ruin, or actions that endanger a large segment of the public."

TRAP RULES PROVIDE FOR REMITITUR DETERMINATIONS BY COURT OF APPEALS BUT NOT BY THE SUPREME COURT

The Texas Rules of Appellate Procedure provide for remittitur orders by the courts of appeals but make no similar provision for the Supreme Court. While the Court may review the constitutionality of an exemplary damages award, the amount of a suggested remittitur is in the first instance a matter for the courts of appeals. Accordingly, having found that the amount awarded by the court of appeals exceeded the constitutional limitations on exemplary damages, the Supreme Court remanded to the court of appeals for a determination of a constitutionally permissible remittitur.

SEGREGATION OF ATTORNEY'S FEES RULE MODIFIED

The plaintiff alleged breach of contract, fraud, and violation of the DTPA and sought recovery of her attorney's fees. Claimants have always been required to segregate fees between claims for which they are recoverable and claims for which they are not recoverable. Here, they were recoverable for the breach of contract claim but not the fraud claim. In *Stewart Title Guaranty Co. v. Sterling*, 822 S.W.2d 1, 8 (Tex. 1991), the Court added an exception to this duty to segregate when the attorney's fees rendered are in connection with claims arising out of the same transaction and are so interrelated that their "prosecution or defense entails proof or denial of essentially the same facts." Therefore, when the causes of action involved in the suit are dependent upon the same set of facts or circumstances and thus are "intertwined to the point of being inseparable," the party suing for attorney's fees may recover the entire amount covering all claims. In the *Chapa* case, the Court announced that this exception has threatened to swallow the rule, noting that the courts of appeals have been flooded with claims that recoverable and unrecoverable fees are inextricably intertwined and that the exception has also been hard to apply consistently.

The Court held in this case that to the extent *Sterling* suggested that a common set of underlying facts necessarily made all claims arising therefrom "inseparable" and all legal fees recoverable, it went too far. But *Sterling* was certainly correct that many if not most legal fees in such cases cannot and need not be precisely allocated to one claim or the other.

Accordingly, the Court affirmed the rule that if any attorney's fees relate ***solely*** to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make tort fees recoverable. However, it modified *Sterling* to this extent: ***it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated***. This standard does not require more precise proof for attorney's fees than for any other claims or expenses. For example,

attorneys do not have to keep separate time records when they draft the fraud, contract, or DTPA paragraphs of a petition. Instead, an opinion will suffice stating, for example, that 95% of the drafting time would have been necessary even if there had been no fraud claim.

CHAPA RULE APPLIED: IN SUIT ON A NOTE, NOT REQUIRED TO SEGREGATE ATTORNEY'S FEES REQUIRED TO DEFEND COUNTERCLAIM

Varner v. Cardenas, 218 S.W.3d 68 (Tex. 03/02/2007)

In this case, the Supreme Court applied its new rule enunciated in *Chapa*. The Court held that attorney's fees incurred to defend against a counterclaim were necessary to collect on a promissory note and were thus recoverable.

DEFENDANT'S NO-EVIDENCE OBJECTIONS IN ITS JNOV MOTION FAILED TO PRESERVE ERROR AS TO DAMAGES QUESTION IN JURY CHARGE

Equistar Chemicals LP v. Dresser-Rand Co., __ S.W.3d __, 2007 WL 1299161(Tex. 05/04/2007) (04-0121)

In this case the plaintiff was a chemical manufacturing company who brought action against its parts supplier on theories of strict liability, negligence, and breach of warranty. The defendant argued that the economic loss rule applied to bar the plaintiff from recovering tort damages, as distinguished from damages for breach of warranty, for injuries to the plaintiff's compressor. The defendant did not object to the damages question submitted to the jury except for objections to the legal and factual sufficiency of the evidence raised in its motion for JNOV. The court of appeals held that the no-evidence objections preserved error as to the economic loss rule. The Supreme Court disagreed, holding that the defendant failed to preserve a challenge to the jury charge on the measure of damages. Because the existence and amount of damages were part of the plaintiff's cause of action, the defendant was not required to assert the economic loss rule as an affirmative defense. But, the jury was asked to find only one damages amount and was not instructed to distinguish damages resulting from its findings that the defendant committed torts from its finding that the defendant breached an implied warranty. The defendant did not object to the damages question or instruction as proposed and submitted. If the defendant believed that the jury charge presented an improper measure of damages because it allowed the jury to find both tort and contract damages by a single answer, it was required to timely object and make the trial court aware of its complaint in order to preserve error for appeal. Its subsequent no-evidence arguments raised in its JNOV motion were insufficient to preserve error.

The Court went on to state that "assuming, without deciding, that [defendant's] no-evidence points in the trial court 'necessarily encompassed' the contention that it owed no tort duty under the facts as the court of appeals held, . . . the no-evidence complaints did not clearly and distinctly make the trial court aware of a contention that the economic loss rule applied to bar [plaintiff] from recovering tort damages for injuries to the compressor."

THE STATE CANNOT SUE A CITY

City of Galveston v. State of Texas, 217 S.W.3d 466 (Tex. 03/02/2007)

In the 171 years since the Alamo, San Jacinto, and independence, it appears that Texas has never sued one of its cities for money damages–until this case. As part of an agreement with the Texas Department of Transportation for construction of a state highway, the City of Galveston agreed to move and maintain nearby utilities. One of those utilities, a City water line, ruptured and allegedly caused $180,872.53 in damages to the highway. The Attorney General filed suit in the name of the State of Texas to recover damages for the City's "negligent installation, maintenance, and upkeep" of its water line and the resulting damage to state property. The City filed a plea to the jurisdiction, special exceptions, and a motion for summary judgment asserting governmental immunity. The trial

court granted the jurisdictional plea. The court of appeals reversed, holding that cities have no immunity from suit by the State. A divided Supreme Court reversed and held that the City is immune from suit by the State.

Political subdivisions in Texas have long enjoyed immunity from suit when performing governmental functions like that involved here. While this immunity can be waived, the courts have consistently deferred to the Legislature to do so; indeed, the Supreme Court has said immunity from liability "depends entirely upon statute. For its part, the Legislature has, in Tex. Gov't Code § 311.034, mandated that no statute should be construed to waive immunity absent "clear and unambiguous language." The State asserted no such statute here.

Home-rule cities, like Galveston, derive their powers from the Texas Constitution, not the Legislature. Among those powers is immunity from suit for governmental functions. The State has the power to waive immunity from suit for cities, but no authority to do so without the Legislature's clear and unambiguous consent. There was no such authority here.

The State argued that unambiguous legislation was unnecessary here because the question was not one of waiver, but of the existence of immunity in the first instance. The Court disagreed. Cities are not created by the State but by the Constitution and the consent of their inhabitants. Immunity was not bestowed by legislative or executive act; it arose as a common-law creation of the judiciary. The same policies that led courts to recognize immunity in the first place still apply when the plaintiff is the State. The Legislature, of course, may change the common law, and has broad power to say whether cities are immune from suit. But until it does so, the same logic that created governmental immunity for cities protects them from suits by the State for money damages.

"SUBSTANTIAL CONNECTION" TEST ESTABLISHED FOR SPECIFIC JURISDICTION

Moki Mac River Expeditions v. Drugg, ___ S.W.3d ___, 2007 WL 623805, 50 Tex. Sup. Ct. J. 498 (Tex. 03/02/2007) (04-0432)

The plaintiffs' thirteen-year-old son, Andy, died on a June 2001 river-rafting trip in Arizona with Moki Mac River Expeditions, a Utah-based river-rafting outfitter. The plaintiffs filed suit in Texas for wrongful death and for intentional and negligent misrepresentation. The trial court denied Moki Mac's special appearance and the court of appeals affirmed on the basis of specific jurisdiction, holding that the plaintiffs' misrepresentation claim arose from and related to Moki Mac's purposeful contacts with Texas. Because the court of appeals found specific jurisdiction, it did not consider whether general jurisdiction was proper. The Supreme Court reversed the court of appeals' judgment and remanded the case to that court to consider the plaintiffs' assertion that Moki Mac is subject to general jurisdiction in Texas.

A nonresident defendant's forum-state contacts may give rise to two types of personal jurisdiction: (1) general jurisdiction and (2) specific jurisdiction. If the defendant has made continuous and systematic contacts with the forum, general jurisdiction is established whether or not the defendant's alleged liability arises from those contacts. Specific jurisdiction is established if the defendant's alleged liability "arises out of or is related to" an activity conducted within the forum. The U. S. Supreme Court has provided relatively little guidance on the "arise from or relate to" requirement, nor has the Texas Supreme Court had occasion to examine the strength of the nexus required to establish specific jurisdiction. The Court thus granted Moki Mac's petition for review to consider the extent to which a claim must "arise from or relate to" forum contacts in order to confer specific jurisdiction over a nonresident defendant.

The mere sale of a product to a Texas resident will not generally suffice to confer specific jurisdiction upon our courts. Instead, the facts alleged must indicate that the seller intended to serve the Texas market. In determining whether the defendant purposefully directed action toward Texas, courts may look to conduct beyond the particular business transaction at issue–additional conduct of the defendant may indicate an intent or purpose to serve the market in the forum state. Examples of additional conduct that may indicate whether a defendant purposefully availed itself of a particular forum include advertising and establishing channels of regular communication to customers in the forum state. The evidence in this case indicated that Moki Mac did intend to serve the Texas

market. Moki Mac knowingly sold rafting trips to Texas residents and purposefully directed marketing efforts to Texas with the intent to solicit business from this state.

Purposeful availment requires that a defendant must seek some benefit, advantage, or profit by "availing" itself of the jurisdiction. Moki Mac sought and obtained profit from Texas residents, with whom the company maintained communications, and it derived a substantial amount of its business from Texas.

The Court concluded that Moki Mac had sufficient purposeful contact with Texas to satisfy the first prong of jurisdictional due process.

But purposeful availment alone will not support an exercise of specific jurisdiction. For specific-jurisdiction purposes, purposeful availment has no jurisdictional relevance unless the defendant's liability arises from or relates to the forum contacts. To support specific jurisdiction, the U. S. Supreme Court has given relatively little guidance as to how closely related a cause of action must be to the defendant's forum activities. In assessing the relationship between a nonresident's contacts and the litigation, most courts have focused on causation, but they have differed over the proper causative threshold. Some courts have pursued an expansive but-for causative approach, others have adopted a restrictive relatedness view requiring forum contacts to be relevant to a necessary element of proof, and some have applied a sliding-scale analysis that attempts to strike a balance between the two. The Texas Supreme Court settled on what it considers a middle ground "substantial connection" approach. Thus, for a nonresident defendant's forum contacts to support an exercise of specific jurisdiction, there must be a ***substantial connection*** between those contacts and the operative facts of the litigation.

In this case, the injuries for which the plaintiffs sought recovery were based on their son's death on the hiking trail in Arizona, and the relationship between the operative facts of the litigation and Moki Mac's promotional activities in Texas were simply too attenuated to satisfy specific jurisdiction's due-process concerns.

COMPLAINT OF NEGLIGENT ASSEMBLY OF HOSPITAL BED IS A HEALTH CARE LIABILITY CLAIM AND IS COVERED BY MEDICAL LIABILITY AND INSURANCE IMPROVEMENT ACT

Marks v. St Luke's Episcopal Hospital, 2007 WL 1300126 (Tex. App.–Houston [1st Dist.] 05/ 03/ 2007) (01-04-00228-CV).

We originally reported on this case in the Fall/Winter 2005 Appellate Newsletter. In the initial review of *Marks*, the Houston Court of Appeals examined whether the claims pleaded constituted health care liability claims and thereby triggered the statute's expert report requirement. The original decision in *Marks* was rendered about the same time as the Supreme Court's opinion in *Murphy v. Russell* which analyzed the same issue, applied the same principles, but reached a different result. At that time, we were curious to see whether the Supreme Court would review in light of the holding in *Murphy*. The Court did not disappoint.

On petition for review, the court of appeals judgment was vacated and the case remanded for further consideration in light of the Supreme Court's decision in *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005).

Marks, an elderly patient, suffered injuries when he fell to the floor while attempting to stand up. Marks had been seated at the foot of his bed. Marks attempted to grasp the bed's footboard to brace himself as he was getting up, but the footboard detached causing him to lose his balance and fall. Marks alleged that St. Luke's breached the duty of ordinary care by providing him with a hospital bed that had been negligently attached and assembled, among other things. Originally, Marks did not couch the suit in terms of medical malpractice. However, in an amended pleading Marks asserted a cause of action under 4590i and did file the required expert report. St. Luke's moved to dismiss the first petition for want of the filing requisite expert report. The trial court granted the motion.

The Houston Court of Appeals, in applying the definition of health care liability claim, noted that the act or omission complained of must be an "inseparable part of the rendition of medical services." The Court determined that the footboard breaking loose constituted an unsafe condition "created by an item of furniture" and held the complaint sounded in premises liability not health care liability. The Court found the footboard to be analogous to a bag full of supplies, rather than a "piece of medical equipment" which was "inseparable from medical care."

When we reported on that decision we surmised that the holding did not seem to recognize that an "unsafe condition" is arguably within the ambit of "standards of medical care, or healthcare, *or safety*" as set forth in the definition health care liability claim and that the facts would seem to suggest that the footboard is, at least in part, a safety mechanism. On remand, the appellate court did as well.

Upon further review, the appellate court reasoned that, "A hospital bed is not an ordinary bed. It is specially constructed to enable health care personnel to tend to the needs of patients. Use of the bed was an inseparable part of the services rendered to appellant during his recovery from back surgery." The court of appeals held " . . . failure to provide a safe environment and the negligent assembly of the bed are complaints of a breach of the accepted standards of safety." Ultimately, Marks' allegations stated causes of action for departures from accepted standard of medical care, health care, and safety and were therefore governed by 4590i and its expert report requirements.

INTERLOCUTORY APPEAL FROM AN ORDER DENYING A HOSPITAL'S MOTION TO DISMISS A HEALTH CARE LIABILITY CLAIM.

Jain v. Stafford, 214 S.W.3d 94 (Tex. App–Fort Worth 12/14/2006)

The Fort Worth Court of Appeals had the opportunity to apply the final judgment rule in this interlocutory appeal from an order denying a hospital's motion to dismiss a health care liability claim. The Court started with the well-settled premise that absent a statutory provision authorizing an interlocutory appeal, an appellate court possesses jurisdiction over final judgments only.

The Court in interpreting two specific statutory provisions, which allow interlocutory appeals from an order on motion pursuant to the medical liability statute, held that because the order at issue was neither one: (1) denying relief despite the lack of timely filed expert reports, nor (2) an order granting relief based on the trial court's determination that an expert report was not a good faith effort to comply with the definition of an expert report, that the order was not an appealable interlocutory order. However, the Court did not seem to fully appreciate the interplay of the medical liability statute's various provisions, particularly the effect of the definition of "expert report."

To briefly recap the expert report requirement, under Civ. Prac. & Rem. Code §74.351(b) if as to a defendant health care provider, in this case a hospital, an expert report has not been served within 120 days, the court on motion of the affected party shall award fees and costs and dismiss the claim.

If the plaintiffs file what they intend to be an "expert report" within the 120-day window and the defendant then files an objection within the time specified and moves to dismiss, the trial court must hold a hearing on whether the filing met the definition under §74.351(r)(6) and is therefore an "expert report" or whether the filing does not meet the definition and is therefore necessarily adjudged to be something less that an "expert report." An order which decides this question affirmatively is one which necessarily denies relief under 74.351(b). While the court of appeals may have considered this, the opinion does not so indicate.

Thus, the interlocutory order at issue was one denying a motion, *despite the lack of timely filed expert reports*, because in essence the movant asserted that what was filed within 120 days was not an "expert report." It appears the court of appeals errantly confined the relief sought under 74.351(b) to instances where nothing had been filed within 120 days, rather than some report which did not meet the statutory definition of an expert report.

The statute's preliminary expert report requirement is a gatekeeper function on health care liability claims.

If the sole interlocutory appeal allowable under the statute were confined to the issue of timeliness, rather than adequacy based on the (r)(6) definition, the gatekeeper function and the specific statutory grants of appellate jurisdiction over such interlocutory orders is rendered meaningless.

It seems the better-reasoned interpretation that would appear to give the statute's language effect is that only an order which extends the time to file an expert report (which would have necessarily determined that an inadequate report had been filed in good faith) is not appealable.

THIRTEENTH COURT OF APPEALS ERRED IN CREATING A FACT ISSUE WHERE NONE EXISTED

Western Steel Company v. Altenburg, 206 S.W.3d 121 (Tex. 10/27/2006).

Western Steel Company appealed the legal and factual sufficiency of the evidence to support the jury's finding that Altenburg was Western Steel Company's employee. The finding was ostensibly dispositive in that Western had asserted the affirmative defense that the injured worker was its employee, or borrowed employee, at the time of the injury and that the suit was therefore barred under the exclusive remedy provision of the Texas Workers Compensation Act.

As part of proving up its affirmative defense, Western offered Exhibit 14b which purported to be its workers' compensation policy. However, Western had inadvertently offered only proof of its commercial general liability policy in Exhibit 14b. Apparently neither the trial court nor the litigants noticed the error at trial.

On appeal, rather than reaching the merits of whether the jury's finding that Altenburg was Western's borrowed employee was supported by the evidence, the Thirteenth Court reviewed Exhibit 14b and the testimony of Western's president and concluded that there was no evidence in the record that Western had workers' compensation coverage. Following this decision, Western filed a motion for rehearing and to correct the record to tender evidence of its workers' compensation policy which motion was denied.

The Supreme Court noted that to successfully assert its affirmative defense at trial, Western had to prove: (1) that it was Altenburg's employer, and (2) that it had workers compensation coverage. The Court also noted that the issue of coverage was not raised at trial nor on appeal. At trial Altenburg tried to introduce the errant evidence contained in Exhibit 14b. Likewise, on appeal Western's averment of coverage was not disputed in the briefing. Despite all of this, the lower appellate court put the matter in issue *sua sponte*.

The Supreme Court recited Tex. R. App. P. 38.1(f)'s dictate that an appellate court normally accepts as true the facts stated in the briefing unless the opposing party contradicts them. Though there was no mention of the part of the rule that record references must support the facts, the Court in applying that rule to this case held that "[c]reating issues of fact when the facts are not in dispute is akin to a court searching for errors that the parties have not raised. In the latter circumstance, we have cautioned that, absent fundamental error, an appellate court should refrain from deciding cases on legal errors not assigned by the parties."

FOR DEFAULT JUDGMENT TO SURVIVE RESTRICTED APPEAL, THE FACE OF THE RECORD MUST REFLECT THAT SERVICE WAS FORWARDED TO THE ADDRESS REQUIRED BY STATUTE

Wachovia Bank of Delaware v. Gilliam, 215 S.W.3d 848 (Tex. 02/09/2007)

Wachovia Bank took this restricted appeal from a default judgment arguing that service of process was invalid. The plaintiff had attempted to effect service of process through the Texas long-arm statute that requires the Secretary of State to forward substituted service to a non-resident's "home or home office." Applying the rule unanimously applied by the courts of appeal, the Supreme Court held that "if nothing on the face of the record shows the forwarding address was

the defendant's 'home or home office' . . . a default judgment cannot survive a restricted appeal."

The court of appeals correctly held that the default here could not be affirmed under the long-arm statute because the record did not indicate that the address for service of process was Wachovia's home or home office. However, the court of appeals then affirmed the default based on the efficacy of substituted service pursuant to the Texas Business Corporation Act's provision allowing same on the foreign corporation's principal office. The Supreme Court noted the folly in this holding was that nothing in the record showed the address for service was Wachovia's "principal office" either.

The Supreme Court stated that while it had never passed on the issue of whether the face of the record in a restricted appeal must show that service was forwarded to a statutorily required address, "we have held repeatedly that no presumptions are made in favor of valid service in a restricted appeal from a default judgment." On this reasoning the Court held: "Accordingly, we agree with all the courts of appeals (until this one) that for a default judgment to survive a restricted appeal, the face of the record must reflect that service was forwarded to the address required by statute."

APPEAL DISMISSED FOR "ACCEPTING THE BENEFITS" OF THE JUDGMENT (THE ENTIRE JUDGMENT AMOUNT)–ISSUES OF MALICE AND EXEMPLARY DAMAGES WERE NOT SEPARABLE FROM THOSE OF ORDINARY NEGLIGENCE AND COMPENSATORY DAMAGES

Williams v. LifeCare Hospitals of North Texas, *L.P.*, 207 S.W.3d 828 (Tex. App.-Fort Worth, 10/26/2006).

In this medical negligence case, the plaintiffs brought suit seeking compensatory and exemplary damages. The trial court rendered judgment on the jury verdict against the defendant hospital based upon jury findings of negligence, awarding compensatory damages. Defendant-appellees deposited the full amount of the judgment into the registry of the court, including postjudgment interest accrued up to the date the monies were deposited, totaling $547,717.07. The clerk's record reflected that the trial court ordered $400,000 disbursed from the registry to appellants and subsequently ordered the remainder to be disbursed to plaintif-appellants' attorney of record and that appellants accepted those sums. Appellees filed a motion to dismiss the appeal, contending that appellants accepted the full benefits of the judgment and were estopped to maintain this appeal. The appellants argued that their appeal, confined to malice and exemplary damages, sought only further recovery and was separable from the remainder of the case and, if they were successful on appeal, reversal and remand would only be required as to those issues that were never submitted to the jury. The appellants also argued that because malice and exemplary damages were not included in the judgment, they did not accept any benefits for exemplary damages and were not treating the judgment as both right and wrong as to that part of the case. The court of appeals disagreed and dismissed the appeal, holding that no exception to the "acceptance of benefits" rule applied.

Under the acceptance of benefits rule, a party who accepts the benefit of a judgment is estopped from challenging the judgment by appeal. A party cannot treat a judgment as both right and wrong, and if he has voluntarily accepted the benefits of the judgment, he cannot afterward prosecute an appeal therefrom. There are two narrow exceptions to the rule: (1) when acceptance of the benefits is because of financial duress or other economic circumstances and (2) when the reversal of the judgment on the grounds appealed cannot possibly affect an appellant's right to the benefits accepted under the judgment.

The Fort Worth Court of Appeals concluded that no exception to the acceptance of benefits rule applied because the issues of malice and exemplary damages are not "separable" from those of the remainder of the case, and a reversal would therefore require remand for new trial on the entire case. The Court explained that having a different jury determine malice and exemplary damages than the jury that determined ordinary negligence and compensatory damages would contravene the requirements imposed by *Transportation Ins. Co. v. Moriel* that the same jury hear both phases of the trial and that it determine the

amount of exemplary damages considering the totality of the evidence presented in both phases.

HOW TO PRESERVE ERROR WHEN A TRIAL COURT SUSTAINS SPECIAL EXCEPTIONS

Parker v. Barefield, 206 S.W.3d 119 (Tex. 10/27/2006)

The issue in this case was whether error was preserved when the trial court sustained special exceptions, then dismissed the case without first allowing the plaintiff the opportunity to amend its pleadings. The court of appeals affirmed the dismissal, concluding that the plaintiffs had waived the error by failing to assert their right to replead in a motion for new trial. The Supreme Court held that a new trial motion was not needed to preserve error because the plaintiffs had already asserted their right to replead and had, in fact, amended their pleadings before the trial court sustained the special exceptions and dismissed their case.

Once the trial court sustains special exceptions, if the defect is curable, the court must allow the pleader an opportunity to amend. *See Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998). If the trial court fails to provide this opportunity, the aggrieved party must prove that the opportunity to replead was requested and denied to preserve the error for review. TEX. R. APP. P. 33.1(a). Here, the plaintiffs not only requested leave to amend but also filed amended pleadings before the trial court dismissed their case. Their request was effectively denied when the trial court granted special exceptions and dismissed the case. The court held that under these circumstances, an additional request to amend in a motion for new trial was not necessary to preserve error.

PRO SE APPELLANT'S UNTIMELY FILED AFFIDAVIT OF INDIGENCE DISCHARGED FILING FEE REQUIREMENT UNLESS A CONTEST TO IT IS SUSTAINED

Hood v. Wal-Mart Stores, Inc., 216 S.W.3d 829 (Tex 2/23/2007)

In this case, the *pro se* plaintiff sought to appeal a summary judgment granted against him. When he filed his timely notice of appeal in the court of appeals, he failed to pay the filing fee and had not yet filed an affidavit of indigence. Upon receiving his appellate brief, the court of appeals notified him that his fee was past due and granted an additional ten days to pay. He did not pay the fee, but he filed his affidavit of indigence with the court of appeals within the ten day window. The court of appeals responded by notifying him that the affidavit was untimely and that his failure to pay the fee after a second extension of time would result in the dismissal of his appeal. Ultimately, the court of appeals denied his motion to proceed in forma pauperis under TRAP Rule 20.1(c)(1), which requires the petitioner to file an affidavit of indigence with or before his notice of appeal.

The Supreme Court reversed and remanded to the court of appeals, holding that the petitioner's affidavit of indigence discharged the filing fee requirement unless a contest to it is sustained. Under TRAP Rule 44.3, a court of appeals may not dismiss an action due to a formal defect or irregularity without first allowing the petitioner reasonable time to cure the error.

WHEN THE LAW CHANGES, REMAND IN THE INTEREST OF JUSTICE IS PROPER

Bulanek v. WesTTex 66 Pipeline Co., 209 S.W.3d 98 (Tex. 12/01/2006)

The petitioners sought a remand in the interest of justice in part because they presented their case in reliance on the court of appeals opinion in another case which was subsequently reversed by the Supreme Court. The petitioners argued they would have proceeded differently had they had the benefit of the Supreme Court's decision in the other case. The respondent argued that the petitioners could have awaited this Court's decision in the other case but chose instead to proceed to judgment. The Court agreed with petitioners and remanded to the trial court for further proceedings in the interest of justice, noting

that "[t]he most compelling case for such a remand is where we overrule existing precedents on which the losing party relied at trial."

THE TRIAL COURT'S REFUSAL TO REVIEW ILLEGALLY OBTAINED DOCUMENTS *IN CAMERA* WAS AN ABUSE OF DISCRETION

In re Strategic Impact Corp., 214 S.W.3d 484 (Tex. App.–Houston [14th Dist.]10/10/2006)

During the course of this suit, relators anonymously received three separate packages of documents that were illegally obtained from the opposing party. Relators filed a motion requesting the anonymously produced documents be reviewed *in camera* so that the discoverable–and requested–documents could be produced. In its response to the motion, the opposing party claimed the documents were confidential. The trial court refused to conduct an *in camera* review of the documents because they were illegally-obtained; and relators sought a writ of mandamus.

The court of appeals granted the writ, holding that the trial court's denial of relators' motion to review the documents *in camera* was based on the fact the documents were stolen–by whom the record did not show–and not because the documents were determined to be confidential. This is contrary to Texas law and constituted an abuse of discretion. Because the trial court's denial to examine the documents *in camera* may have vitiated relators' ability to present their claims, relators did not have an adequate remedy by appeal.

In civil cases, even illegally obtained evidence may be admissible at trial; and, generally, all relevant evidence that is not privileged is discoverable. Because of this, the party resisting discovery has the burden to plead and prove any privilege claimed. The trial court determines whether an in camera inspection is necessary at that point, and if so, the documents are produced to the court. Once a prima facie case for the privilege is established and the documents are tendered, the trial court "must conduct an *in camera* inspection of those documents before deciding whether to compel or deny production." The trial court abuses its discretion in refusing to conduct an *in camera* inspection when such review is critical to the evaluation of a privilege claim.

COURT OF APPEALS COULD NOT CONSIDER EXPERT'S CAUSATION TESTIMONY FROM BILL OF EXCEPTIONS WITHOUT HAVING FIRST DETERMINED THAT THE TRIAL COURT ERRED IN REFUSING TO ADMIT EXPERT'S TESTIMONY

Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572 (Tex. 10/27/2006)

In this truck accident case the trial court excluded expert testimony as to what caused a post-accident fire that burned the truck and the driver. After excluding the expert testimony because it was not reliable, the trial court granted summary judgment. The court of appeals reversed. The Supreme Court held that the court of appeals erred in considering testimony from the bill of exceptions in evaluating the trial court's exclusion of the expert's causation testimony.

The trial court granted the defendant's motion to exclude the expert's testimony as to causation. The plaintiffs later moved the trial court to reconsider its decision. The trial court denied the motion but allowed the plaintiffs to have the expert testify again to create a bill of exceptions. The court signed an order excluding the causation portion of the expert's testimony from being considered as evidence at any trial or hearing because it was not sufficiently reliable. The defendant's motion for summary judgment was granted.

The court of appeals reversed the summary judgment, concluding that the trial court abused its discretion in excluding the expert's causation testimony and also concluding that the expert's testimony provided some evidence of causation. The court of appeals' opinion indicated that in reaching its decision it considered the expert's testimony from both the *Robinson* hearing and the bill of exceptions.

The Supreme Court concluded that the trial court did not abuse its discretion in excluding the expert's testimony on causation and that the court of appeals erred in considering testimony from the bill of exceptions in evaluating the trial court's exclusion of the expert's causation testimony. The purpose of a bill of exceptions is to allow a party to make a record for appellate review of matters that do not otherwise appear in the record, such as evidence that was excluded. The court of appeals' opinion indicates that it considered the expert's bill of exceptions testimony in evaluating the admissibility of his opinions even though the trial court did not.

The court of appeals erred in considering the expert's expert causation testimony from the bill of exceptions without having first determined pursuant to properly assigned error that the trial court erred in refusing to admit the expert's testimony.

BEWARE OF TRAP IN APPEALS FROM CASES FIRST HEARD BY MASTERS OR ASSOCIATE JUDGES

Hebisen v. Clear Creek Independent School District, 217 S.W.3d 527 (Tex. App.–Houston [14th Dist.] 10/10/2006).

This appeal arose from a suit to recover delinquent personal property taxes. The trial court referred the matter to a tax master, who took evidence and issued a report. Appellants, who were attorneys, appealed to the trial court. By filing an appeal to the referring court challenging only part of the master's report, the appealing party concedes that the master was correct as to the unchallenged part, and therefore the referring court has "no occasion" to inquire into evidence on the unchallenged issues. The referring court held a bench trial and heard evidence, but no reporter's record was made of the trial de novo. The trial court found against the appellants, who then appealed to the court of appeals asserting "no evidence" issues as to matters raised before the master but not the trial court. Because there was no record of the trial court hearing, the court of appeals assumed the missing record contained sufficient evidence to support the trial court's judgment in favor of the taxing authority.

In explaining its decision, the court of appeals looked to other contexts in which cases are referred to and first heard by masters. When parties appeal from an associate judge's findings in a family law case, evidence is heard de novo by the trial court only on objected-to issues. The master's findings are conclusive on any unobjected-to issues and the trial court "has no occasion to inquire into the evidence heard by the master." This conforms to century-old case law concluding reports issued by auditors or masters appointed under the Texas Rules of Civil Procedure are conclusive on all unobjected-to issues.