

TADC APPELLATE LAW NEWSLETTER

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Federal Deposit Ins. Corp. v. Lenk, 361 S.W.3d 602 (Tex. 2012)

Issues that originate at the trial-court level will not be reviewed by the Supreme Court if the issue was not properly raised in the court of appeals.

Both parties moved for summary judgment, with Lenk also requesting that her attorneys' fees claim be decided later. The trial court granted the Bank's motion for summary judgment and denied Lenk's. A Mother Hubbard clause denied Lenk's claim for attorneys' fees.

Lenk appealed, but did not raise the issue of attorneys' fees. The court of appeals reversed the trial court and rendered judgment in Lenk's favor. Only on rehearing did Lenk complain about the denial of her attorneys' fees claim.

Lenk filed a cross-petition in the Supreme Court, seeking to have the case remanded for a determination of her attorneys' fees. The Supreme Court denied review, because Lenk did not properly raise the issue of attorneys' fees in the court of appeals.

Thota v. Young, 366 S.W.3d 678 (Tex. 2012)

No *Casteel* error when a broad-form question in a single-theory-of-liability case includes both an improper

defensive theory and an improper inferential-rebuttal instruction.

In this medical-malpractice case, Young objected to the inclusion of a contributory-negligence instruction in the broad-form liability instruction. The broad-form question had two separate answer blanks where the jury could find whether Dr. Thota or Young were negligent. The instruction as to Dr. Thota's negligence also included an instruction on "new and independent cause." After the jury found Young negligent and Dr. Thota not negligent, the trial court entered a judgment that Young take nothing.

The Supreme Court held that *Casteel's* presumed-harm analysis does not apply, since the separate answer blanks for Young and Dr. Thota allowed the court to determine whether the jury found Dr. Thota negligent. Because the Supreme Court was able to determine that the improper theory was not the sole basis for the jury's finding, the court held that the presumed-harm analysis was not appropriate and that the alleged errors were harmless under a traditional harm analysis.

Arvizu v. Estate of Puckett, 364 S.W.3d 273 (Tex. 2012)

Fatal conflict exists only when there is a jury finding that requires the entry of a judgment different than the judgment actually entered.

The plaintiffs were injured in a collision with a truck driven by Cantu, an employee of Montgomery County Auto Auction ("MCAA"). The truck was owned by Puckett Auto Sales. The parties stipulated to Cantu's negligence, leaving vicarious liability as the only jury issue. The jury found that Cantu

was an agent of both MCAA and Puckett.

The court of appeals found a fatal conflict in these findings because MCAA and Puckett could not have simultaneously controlled Cantu's conduct. The Supreme Court reversed, reasoning that any potential conflict was not fatal to the judgment because the jury findings supported a judgment against Puckett based on subagent liability.

***Freedom Communc'ns, Inc. v. Coronado*, 372 S.W.3d 621 (Tex. 2012)**

Appellate courts have no jurisdiction to review the merits of a decision that is void because the judge took a bribe.

The trial judge, Abel Limas, denied Freedom's motion for summary judgment in this defamation case. Freedom brought an interlocutory appeal, but the court of appeals affirmed. After the appeal, Limas admitted to accepting an \$8,000 bribe from plaintiffs' counsel.

The Supreme Court noted that appellate courts do not have jurisdiction to address the merits of void orders, but merely have jurisdiction to determine if the order is void. Because Limas's self-interest (in accepting the bribe) disqualified him from the case, his ruling on the summary-judgment motion was void. Therefore, the court of appeals erred in addressing the merits of the summary-judgment order because there was no appellate jurisdiction beyond declaring the order void.

***Paradigm Oil, Inc. v. Retamco Operating, Inc.*, 372 S.W.3d 177 (Tex. 2012)**

Litigants are not required to reargue an issue that was decided in a prior

appeal in order to preserve that issue for review by the Supreme Court.

The trial court struck Paradigm's answer as a sanction for discovery abuse. This sanction was upheld on appeal, and Paradigm was not allowed to participate in later proceedings about damages.

At later trials on damages, Retamco was awarded \$45.6 million in actual and punitive damages. This judgment was reversed in a second appeal. After another trial, judgment was entered against the defendants for \$35 million. This award was largely upheld by the court of appeals.

Paradigm appealed to the Supreme Court, contesting the decision made in the first appeal that excluded it from the subsequent trials. Retamco argued that Paradigm failed to preserve the issue by not arguing this issue in the subsequent appeals.

The Supreme Court rejected Retamco's argument, relying largely on the law-of-the-case doctrine. The Supreme Court held that in subsequent appeals, parties are not required to reargue a previously decided issue in order to preserve that issue for review by the Supreme Court.

***Bison Bldg. Materials, Ltd. v. Aldridge*, ___ S.W.3d ___, No. 06-1084, 2012 WL 3870493 (Tex. Aug. 17, 2012)**

Court orders directing arbitral bodies to consider additional fact questions are not appealable.

After being injured on the job, Aldridge signed a "Post Injury Waiver and Release," in exchange for receiving certain benefits from Bison. He later filed a demand for arbitration, seeking damages for lost wages and expenses.

The arbitrator dismissed the claims based on the waiver and release, and Aldridge asked the trial court to set aside that decision. The trial court confirmed in part and vacated in part, determining that “fact questions” were still at issue.

The Supreme Court held that the trial court’s order was not an appealable final order because it did not contain finality language or dispose of all claims and parties, but instead, ordered consideration of open fact issues. Additionally, no statute created jurisdiction over this type of appeal as an interlocutory appeal.

***In re United Scaffolding, Inc.*, ___ S.W.3d ___, No. 10–0526, 2012 WL 3800214 (Tex. Aug. 31, 2012)**

In granting a new trial, a trial court must identify specific and valid reasons for the new trial.

The trial court granted the plaintiff a new trial “in the interest of justice and fairness.” The trial court later amended its order by adding three alternative reasons for granting the new trial. Each alternative reason was followed by the words “and/or.”

On mandamus, the Supreme Court held that the trial court’s amended order was not sufficiently specific. The Court rejected the use of “and/or” in the order, because it “[left] open the possibility that ‘in the interest of justice and fairness’ [was] the sole rationale.” Because “in the interest of justice and fairness” is not a sufficiently specific reason for granting a new trial, the Court directed the trial court to amend its order.

***PNS Stores, Inc. v. Rivera*, ___ S.W.3d ___, No. 20–1028, 2012 WL 3800817 (Tex. Aug. 31, 2012)**

Judgments can be challenged collaterally when a failure to establish personal jurisdiction violates due process.

PNS filed a bill of review to set aside a default judgment, and argued that the judgment was void due to errors in service of process. The trial court rejected this argument, and the court of appeals held that the judgment was merely voidable and therefore could be attacked only directly.

Citing *Peralta v. Heights Medical Center*, 480 U.S. 80 (1988), the Texas Supreme Court reversed. In *Peralta*, the Court held that “a judgment entered without notice or service is constitutionally infirm” and must, therefore, be subject to some form of attack. Void judgments can be attacked either directly or collaterally, whereas judgments that are merely voidable can be attacked only directly. The Texas Supreme Court held that a judgment is void and can be challenged collaterally when the exercise of personal jurisdiction violates due process.

***Rusk State Hosp. v. Black*, ___ S.W.3d ___, No. 10–0548, 2012 WL 3800218 (Tex. Aug. 31, 2012)**

Appellate courts can hear claims of immunity that are raised for the first time on interlocutory appeal.

In an interlocutory appeal, the Hospital argued, for the first time, that it had sovereign immunity in this wrongful-death suit. The court of appeals held that this argument was waived because it was not presented to the trial court.

The Supreme Court reversed and held that appellate courts are not precluded from hearing claims of sovereign immunity that are raised for the first time on interlocutory appeal.

Texas Comm'n on Human Rights v. Morrison, ___ S.W.3d ___, No. 11-0644, 2012 WL 3800884 (Tex. Aug. 31, 2012)

***Casteel* error may be preserved without specifically mentioning *Casteel*.**

The jury charge asked whether TCHR took an “adverse personnel action” against Morrison. “Adverse personnel action” was not defined. TCHR objected to the instruction, arguing that “the charge lumped TCHR’s different actions together” and “that it would not be possible to determine what adverse acts would form the basis of the jury’s verdict.”

On appeal, TCHR argued that the charge allowed for a finding of liability on invalid legal theories. The court of appeals found that TCHR waived its objection by not raising a specific objection on *Casteel* grounds.

The Supreme Court reversed, holding that “*Casteel* error may be preserved without specifically mentioning *Casteel*” and that an objection to a jury charge must ensure only that “the trial court was sufficiently put on notice and aware of [the party’s] objection.”

Cunningham v. Haroona, ___ S.W.3d ___, No. 02-07-00231-CV, 2012 WL 3599843 (Tex. App.—Fort Worth Aug. 23, 2012, no pet.)

A trial court’s understanding of a party’s objections to the jury charge is all that is required to preserve error.

The Cunninghams obtained jury findings against three defendants for wrongful death, but the jury found no liability as to the other four defendants, including Dr. Haroona, in a survival action. The Cunninghams appealed, alleging that the trial court erred in not submitting separate liability questions, as he had requested.

Dr. Haroona argued that the Cunninghams waived error by submitting a requested charge that was not in correct form and that the Cunninghams’ reference to their requested charge was insufficient to put the trial court on notice of a potential error in the charge. The court of appeals disagreed, holding that “[t]he trial court clearly understood the Cunninghams’ complaint, and this is all that was required.”