



TADC Commercial Litigation Newsletter

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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.

Buck v. Palmer

*Opinion Delivered August, 31, 2012
2012 WL 3800830*

Synopsis

Reversing the Thirteenth Court of Appeals (Corpus Christi-Edinburg), the Texas Supreme Court held that a mere statement of intent to **dissolve** a **joint venture** at some future time did not constitute an immediate **dissolution** of that venture as a matter of law. Further, the Court held that a seven-month delay in filing a **motion to disqualify** a party's attorney constituted a **waiver** of the right to seek disqualification.

Summary of Proceedings:

The majority interest owner of a joint venture brought claims against the minority interest owner, contending that the minority owner's statements in a 1995 letter amounted to "conclusive proof" of the minority interest owner's intent to dissolve the joint venture and that such statements operated to terminate the venture as a matter of law. The minority owner of a joint venture conversely brought a declaratory-judgment action seeking a declaration of his ownership rights in the joint venture.

The trial court found in favor of the majority interest owner, and the Thirteenth Court of Appeals affirmed. The Texas Supreme Court granted the minority interest owner's petition for review.

Facts:

Robert Buck ("Buck"), G.J. Palmer ("Palmer"), John Thobe ("Thobe") and 1629 Service Corporation ("1629") executed a joint venture to build a marina and yacht club in Port Isabel, Texas. In connection with building the marina, the joint venture borrowed over \$7 million, which was guaranteed by Buck and Palmer. After a series of major storms caused damage to the marina, litigation ensued as creditors sought repayment of loans. Ultimately, the joint venture reached a settlement with the creditors, under which the joint venture's outstanding debt was reduced to a \$600,000 note and the ownership interest between the joint venture owners was reallocated—80% to Palmer and 20% to Buck. After the settlement, the value of the venture's property rose to an estimated \$4 million.

In 1997, Palmer sued Buck, claiming that Buck had previously promised to transfer Palmer his 20% interest in the venture in exchange for a release from liability from

the venture's indebtedness following the settlement with the venture's creditors. Buck denied the existence of the oral contract, sought a declaration that he still owned an interest in the venture, and sought a distribution according to the current value of his share of the venture.

Palmer then filed summary judgment motions claiming that, even if no oral contract was formed, Buck relinquished his interest in the venture by making statements evidencing his intent to dissolve the venture. Palmer's claim that the venture was dissolved was primarily based on language in a 1995 letter, in which Buck stated that he had "no desire to embark into any QID land development scenario with [Palmer]." Palmer claimed that as a result of Buck's statement, the partnership had "conclusively" terminated as a matter of law, and that Buck was only entitled to receive the 1995 value of his 20% interest in the joint venture—which amounted to nothing.

Texas Supreme Court's Holding:

Turning to the Texas Uniform Partnership Act ("TUPA") (succeeded by Title 4 of the Texas Business Organizations Code), the Texas Supreme Court explained that a partnership (joint venture) will only be dissolved "by the express will" of any partner ceasing association with the continued operation of the business. In light of this principle, the court disagreed with Palmer's argument that the 1995 letter automatically terminated Buck's interest in the joint venture. The Court explained that although the 1995 letter was evidence of Buck's intent to terminate the venture, that such evidence did not warrant the finding that the venture was automatically or conclusively dissolved.

The Texas Supreme Court then reviewed the evidence presented by Buck, which tended to negate Palmer's contentions regarding the venture's dissolution. Given this negating evidence, the Court determined that the 1995 letter did not operate to automatically terminate the joint venture as a matter of law and found that the trial court had erred in granting Palmer's motion for summary judgment.

Separately, the court considered Buck's motion to disqualify Palmer's lawyer, which Buck filed after an unexplained seven-month delay. The Texas Supreme Court agreed with the underlying courts that Buck's seven-month delay in filing the motion amounted to a waiver of his right to disqualify Palmer's counsel.

Practice Pointers:

1. Be sure to file a motion to disqualify within a reasonable period of time after the discovery of information demonstrating the basis for disqualification. Failure to do so, in this case waiting seven months to file a motion to disqualify counsel, may result in a waiver of the right to seek disqualification.

Reeder v. Wood County Energy, LLC

Opinion Delivered August, 31, 2012

2012 WL 3800830

Subject to Revision or Withdrawal

Synopsis

Reversing the Twelfth Court of Appeals (Tyler) and the underlying trial court, the Texas Supreme Court held that an **exculpatory clause** in a **Joint Operating Agreement** ("JOA") exempted an oil unit operator from liability-causing conduct that fell short of **gross negligence or willful misconduct**. The court further held that

there was insufficient evidence at trial to support the conclusion that the oil unit operator's conduct rose to the level of gross negligence or willful misconduct.

Summary of Proceedings:

An oil unit operator sought declaratory and injunctive relief against the holders of working interests in oil units in order to clarify and enforce his rights as operator. The working interest holders filed cross actions against the oil unit operator, claiming that the operator had breached the JOA.

After a jury trial, the 402nd Judicial District Court, Wood County, Texas entered a verdict in favor of the working interest holders and against the oil unit operator, declaring that the oil unit operator had breached the JOA and awarding damages to the working interest holders. The Twelfth Court of Appeals affirmed in part and reversed in part.

Facts:

Through his company, Dekrfour, Inc. ("Dekrfour"), David Fry bought a working interest relating to oil units in Wood County, Texas. Eleven days later, Dekrfour entered into a JOA with Secondary Oil Corporation (Secondary), whereby the parties agreed to share existing wellbores in the production of the oil units. Dekrfour also transferred a 85% working interest in the oil units to Secondary, a 10% working interest to Nelson Operating, Inc. ("Nelson") (owned by Fry), and all other interests Dekrfour owned in the wells to Nelson. Subsequently, Wendell Reeder became the oil unit operator when he and his partners acquired 87.5% of the working interest in the unit wells previously transferred to Secondary.

After Reeder had been acting as the operator for some time, he began having difficulties obtaining funding necessary to keep the well in good repair and in compliance with Railroad Commission ("Commission") regulations. This failure eventually led to the Commission's suspension of oil production activities at the oil units.

Reeder filed suit against Dekrfour, Nelson, and Bobby Noble, (the "Fry Interests"), bringing claims for trespass, ouster, conversion, violations of the Theft Liability Act, and for declaratory and injunctive relief. The Fry Interests filed counterclaims against Reeder, arguing that Reeder had illegally produced oil from the wrong unit and that Reeder breached the JOA by failing to maintain production in paying quantities.

In response to the Fry Interests' claims that he had breached the JOA, Reeder pointed to an exculpatory clause in the JOA and contended that he was only liable to the extent his conduct rose to the level of gross negligence or willful misconduct. The exculpatory clause at issue provided:

Operator shall conduct *its activities under this agreement* as a reasonable prudent operator, in a good and workmanlike manner, with due diligence and in accordance with good oilfield practice, but in no event shall it have any liability as Operator to the other parties for losses sustained or liabilities incurred except such as may result from gross negligence or willful misconduct.

(emphasis added). Accordingly, the issues were (1) whether the above-quoted exculpatory clause defined the applicable standard for evaluating whether Reeder breached the JOA; and (2) assuming the exculpatory clause did apply to breach of

contract action, whether the evidence at trial was sufficient to establish that Reeder’s conduct amounted to gross negligence or willful misconduct.

At the trial court level, the jury was instructed to consider whether Reeder’s conduct rose to the level of gross negligence or willful misconduct in conformance with the Reeder’s argument that the exculpatory clause provided the standard under which the jury should evaluate the breach of contract claims asserted by the Fry Interests. Despite this higher standard, the jury concluded that Reeder had breached the JOA.

The Twelfth Court of Appeals came to a different conclusion, disagreeing that the exculpatory clause was meant to provide the standard of care relating to whether Reeder breached the JOA. The Court of Appeals then reversed on the basis that the jury should not have been instructed to consider whether Reeder’s conduct amounted to gross negligence or willful misconduct.

Texas Supreme Court’s Holding:

The Texas Supreme Court disagreed with both the trial court and the Twelfth Court of Appeals, holding that (1) the JOA’s exculpatory clause provided the standard of care applicable to evaluating whether Reeder breached the JOA and (2) that there was insufficient evidence to support the trial court’s finding that the operator’s conduct rose to the level of gross negligence or willful misconduct.

In support of its conclusion that the exculpatory language in the JOA provided the standard of care applicable to breach of contract actions, the Texas Supreme Court examined several versions of similar exculpatory provisions promulgated by the **American Association of Petroleum**

Landmen (“AAPL”) over the years. Although acknowledging that intermediate appellate courts had interpreted earlier versions of AAPL exculpatory clauses to exclude breach of contract actions from their purview, the Texas Supreme Court concluded that a more recent version of the AAPL’s model exculpatory provision—which served as the model for the JOA’s exculpatory provision—operated to broaden the scope of the language to apply to breach of contract actions. In conformance with this reasoning, the Texas Supreme Court reversed the decision of the Twelfth Court of Appeals and found that the JOA’s exculpatory provision provided the standard of care applicable to assessing whether Reeder breached the JOA.

Applying this standard, the Texas Supreme Court also reversed the trial court’s verdict, reasoning that:

An act or omission that is merely ineffective, thoughtless, careless, or not inordinately risky is not grossly negligent. “Only if the defendant’s act or omission is unjustifiable and likely to cause serious harm can it be grossly negligent.” After reviewing the record, we find no evidence that Reeder knew about the peril but did not care about the consequences.

(internal citations omitted).

McGinty and Villas by Design, Inc., v. Hennen

*Opinion Delivered June 29, 2012.
372 S.W. 3d 625*

Synopsis

In this home construction case, the Texas Supreme Court found insufficient evidence

to support the homeowner's **remedial and difference-in-value** damages, the former due to a failure to establish reasonableness and necessity and the latter due to proving the value at the time of trial (six years later) and not at the time of closing.

Summary of Proceedings:

Homeowner (Hennen) brought suit against homebuilder (McGinty Villas) claiming deficient construction and alleging breach of contract, DTPA, and negligence. The jury ruled in favor of homeowner finding both remedial (\$651,000) and difference-in-value (\$262,000) damages, punitive damages (\$750,000), and attorneys' fees (\$200,000). The trial court, 157th Judicial District Court of Harris County, Judge Wilson presiding, entered partial JNOV ruling in effect that homeowner's negligence and DTPA causes of action were barred by limitations (and, in turn, knocking out the award for punitive damages), but entered judgment for homeowner for the remedial damages. Homebuilder appealed and homeowner cross-appealed to the Houston (14th) Court of Appeals, which affirmed the award of remedial damages. Homebuilder petitioned the Texas Supreme Court, which granted review and found insufficient evidence to support the homeowner's remedial and difference-in-value damages, resulting in reversal and rendition.

Facts:

Hennen contracted with McGinty and Villas to build his home. Shortly after moving in, he noticed water leaks and, a few months later, mold, which an inspection showed was pervasive. Hennen proffered an expert who testified that the cost to get rid of the mold and rebuild those areas affected by the remediation would exceed \$651,000. This was based in large part on an insurance

industry computer program that estimates essentially the out of pocket expenses to remediate a residence. With respect to the difference-in-value, Hennen testified that, at the time of trial, his house was worth only \$450,000 to \$475,000; however, without all of these problems, it would be worth \$875,000.

Texas Supreme Court's Holding:

The Court began by recognizing that:

There are two measures of damages for the breach of a construction contract: (1) remedial damages, which is the cost to complete or repair less the unpaid balance on the contract price, and (2) difference-in-value damages, which is the difference between the value of the building as constructed and its value had it been constructed according to the contract.

Remedial costs must be reasonable and necessary. Merely proving what one paid for the services rendered does not prove reasonableness or necessity. There must be an affirmative showing that what was or will be paid is reasonable and necessary. Here, Hennen failed. Although his expert described in some detail how he derived the figures (which Hennen argued proved at least implicitly reasonableness), he failed to say the costs would be reasonable and necessary. The Court relied heavily on an analysis of *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 200 (Tex.2004) and quoting *Mustang* said "Instead, we found it 'well settled that proof of the amounts charged or paid does not raise an issue of reasonableness, and recovery of such expenses will be denied in the absence of evidence showing that the

charges are reasonable.’” 372 S. W. 3d at 627.

The Court then turned to Hennen’s difference-in-value damages of \$262,885.83. (Note: The jury seems to have arrived at this odd number not from the testimony of Hennen, but from a calculation of its own.) The jury was asked to determine the difference in value at the time of closing, but Hennen’s only evidence was the difference in value at the time of trial some 6 years later. The Court found this to be no evidence of value at the time of closing. Nor, as argued by Hennen, would it support an inference by the jury of difference in value at the time of closing based on the current price less the remedial costs, as these are two different types of damages and there is not a direct correlation between the two. (In other words, one cannot subtract remedial damages from market value to achieve the difference in value.)

Practice Pointers:

1. Be careful relying on cross points of error in your brief to raise an issue. If you need to reverse a ruling by the court, file your own appeal. Do not wait to raise it in your brief. In a footnote, the Court states: “Hennen did not petition this Court for review and instead raises ‘cross points of error’ regarding the court of appeals’ limitations holding for the first time in his brief on the merits. Because he did not file a petition for review, Hennen has waived these arguments. *See* Tex. R. App. P. 53.1 (**‘A party who seeks to alter the court of appeals’ judgment must file a petition for review.’**); *Ctr. for Health Care Servs. v. Quintanilla*, 121 S.W.3d 733, 735 (Tex.2003) (per curiam).”

2. While cases frequently decry magic language, it never hurts to use it or to recognize when your opponent has failed to

do so. If Hennen’s expert had merely said that he would incur \$651,000 in reasonable and necessary remedial damages, this verdict might well have stood.

3. Notwithstanding Practice Point No. 2, the Court sidestepped an interesting issue: Villas argued that the remedial cost exceeded the market value of the home at the time of closing and, because remedial damages would result in economic waste, the only recoverable measure of damages is the difference in market value. In its petition for review, Villas cited *Hutson v. Chambliss*, 300 S.W.2d 943 (Tex. 1957) and said:

The line of Texas cases holding that the lesser of the costs of repair or the difference in market value is the correct measure of damages for breach of a construction contract is consistent with the economic waste analysis in *Hutson*. *See, e.g., Hall v. Hubco*, 292 S.W.3d 22, 36 (Tex. App.--Houston [14th Dist.] 2006, pet. denied); *12 *Heritage Housing Corp. v. Ferguson*, 674 S.W.2d 363, 366 (Tex. App.--Dallas 1984, writ ref’d n.r.e); *Jim Walter Homes, Inc. v. Castillo*, 616 S.W.2d 630, 635 (Tex. Civ. App.--Corpus Christi 1981, no writ); *Greene v. Bearden Enterprises, Inc.*, 598 S.W.2d 649, 652 (Tex. Civ. App.--Ft. Worth 1980, writ ref’d n.r.e.).

4. Be mindful of with the damages accrue and develop strategy accordingly.

El Paso Marketing, L.P. and Enterprise Texas Pipeline LLC, V. Wolf Hollow I, L.P.

Opinion Delivered June 15, 2012.

2012 WL 2161545

Subject to Revision or Withdrawal

Synopsis

In this “contort” and consequential versus direct damages case, the Texas Supreme Court (1) reversed the Houston (14th) Court of Appeals’ decision in favor of a power plant operator (Wolf Hollow) allowing a negligence suit to proceed against pipeline transportation service provider (Enterprise), as the Houston (14th) Court of Appeals found that the power plant operator’s damages were not barred by the economic loss rule (2) affirmed the lower court’s ruling finding that the power plant operator’s replacement power damages were consequential, not direct damages, and (3) remanding to the lower court to determine if the power plant operator could recover under the “cover” provisions of the contract.

Summary of Proceedings:

Natural gas provider (El Paso) brought a declaratory judgment action against its customer, power plant operator (Wolf Hollow), seeking declarations that it was not liable for gas quality issues and, eventually, that the four interruptions in service were exempted by a force majeure clause. Wolf Hollow counterclaimed alleging a breach of contract for the quality of the gas and four interruptions in service causing damage to its equipment and forcing shutdowns of the plant. In turn, El Paso brought a third party action against the pipeline transportation services provider (Enterprise) for contribution and indemnity. Wolf Hollow then brought cross-claims directly against

Enterprise for negligence and breach of contract. Judge Ray of the 165th Judicial District Court of Harris County granted El Paso’s and Enterprise’s motions for summary judgment against Wolf Hollow, which appealed those rulings. The Houston (14th) Court of Appeals affirmed the trial court’s ruling in that certain of Wolf Hollows’ damages were consequential and expressly waived by the contracts, but reversing the trial court permitting the negligence claims to proceed as such were not precluded by the economic loss rule. Enterprise and El Paso petitioned the Texas Supreme Court, which granted same and issued this decision. El Paso’s motion for rehearing is pending as of this writing.

Facts:

Wolf Hollow operated a gas fired power plant. It procured its fuel supply through a series of contracts, a Gas Supply Agreement with El Paso and a Gas Transportation Agreement with Enterprise. Wolf Hollow then assigned its interest in the Gas Transportation Agreement to El Paso (the assignment being contemplated by the Gas Transportation Agreement and required by the Gas Supply Agreement).

Wolf Hollow had issues with the quality of the gas, which allegedly caused damage to the power plant’s equipment. Additionally, it complained that there were four interruptions in service, which caused shutdowns in the power plant’s operations necessitating purchase of replacement power to satisfy Wolf Hollow’s customer contracts.

Contractually, Wolf Hollow agreed to waive its consequential damages, other than those expressly provided by the “Cover” provision. The “Cover” provision set up a protocol for handling unexcused interruptions in service. First, upon El

Paso's notification, Wolf Hollow is to purchase replacement gas and recover any extra cost from El Paso. If no such gas is available, then Wolf Hollow may accept El Paso's offer of replacement power. If El Paso is unable to supply replacement power, then Wolf Hollow may purchase replacement power and recover the extra cost from El Paso.

Likewise, the Gas Supply Agreement contained a provision specifying the quality of gas that El Paso delivered to Wolf Hollow and, in the event of delivery of off-spec gas, then El Paso was to assign its claims against Enterprise to Wolf Hollow. Enterprise claimed that the assignment was Wolf Hollow's sole remedy, while Wolf Hollow claimed a right to seek damages (repairs and replacement power while repairs were being affected) for Enterprise's negligence.

The trial court rendered judgment for El Paso and Enterprise, specifically holding that: (1) the four delivery interruptions were each caused by force majeure, excusing El Paso's performance under the Gas Supply Agreement; (2) all damages sought by Wolf Hollow are consequential damages waived by the Gas Supply Agreement (and by the Gas Transportation Agreement); (3) Wolf Hollow's exclusive remedy for its quality claim is an assignment of any claim El Paso has against Enterprise; and (4) El Paso is entitled to declarations regarding force majeure and the exclusive remedy for Wolf Hollow's quality claim.

The Houston (14th) Court of Appeals agreed that the replacement-power damages and plant damages claimed by Wolf Hollow are consequential damages waived in the Gas Supply Agreement. However, the court of appeals held that because Wolf Hollow has no contract with Enterprise, it can sue for negligence and that the action is not barred by the economic loss rule.

Texas Supreme Court's Holding:

Because Wolf Hollow complaints arose from violations of specific terms of the contracts, and not from those obligations imposed by law (i.e. what should a reasonable pipeline do under similar circumstance), the Texas Supreme Court found that Wolf Hollow's claims sounded in contract. Further, a party cannot escape its contractual obligation by assigning the contract to a third party, as Wolf Hollow had done here by assigning the Gas Transportation Agreement to El Paso. Wolf Hollow's must look to its supplier, El Paso, to resolve complaints under the contract (such as interruptions, poor quality, and other gas supply problems).

Wolf Hollow conceded in its briefing that the plant damages were precluded by the consequential damages waiver in the contracts. The Texas Supreme Court rejected Wolf Hollow's argument that the assignment of the Gas Transportation Agreement to El Paso augmented Wolf Hollow's causes of action allowing not only a breach of contract action against El Paso, but also a negligence claim against Enterprise. While Wolf Hollow could bring a breach of contract action against El Paso for delivering poor quality gas, the consequential damages waiver effectively precludes Wolf Hollow's recovery for plant damages from El Paso or Enterprise.

The Court then turned to whether Wolf Hollow could recover replacement power or whether it too was barred by the consequential damages waiver. Quoting from its decision in *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex.1997), the Court explained: "Direct damages are the necessary and usual result of the defendant's wrongful act; they flow naturally and necessarily from the wrong....

Consequential damages, on the other hand, result naturally, but not necessarily....” The Court reasoned that the damages flow from Wolf Hollows contracts with its own customers, not from plant shutdowns due to gas supply problems. Thus, the damages are consequential.

Wolf Hollow next asserted that the consequential damages waiver, by the terms of the parties’ contract, is governed by the Uniform Commercial Code, which defines consequential damages to exclude cover (i.e. “making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.”) However, the Court found that, strictly speaking, the parties’ contracts were for gas, not the power generated from the burning of the gas. Therefore, replacement power is not a substitution for the gas that was the subject of the Contract.

The Court then recognized that parties are at liberty to agree to remedies in addition to or in substitution to those provided by the UCC and the parties did so in the form of the “Cover” provision that set up a protocol for handling unexcused interruptions in service. Contrary to the Houston (14th) Court of Appeals decision, the Texas Supreme Court found there to be some evidence, sufficient to overturn El Paso’s summary judgment, tending to show Wolf Hollow’s compliance with the “cover” provision. Therefore, it remanded the case to determine whether Wolf Hollow could recover the cost of replacement power under the terms of the contract.

Cruz v. Andrews Restoration, Inc.

*Opinion Delivered April 20, 2012
364 S.W. 3d 817*

Synopsis

In a mold related case, the Texas Supreme Court examined (1) the definitions of “**prevailing party**” and “**restoration damages**” under the DTPA and (2) the “**main purpose**” exception to the **statute of frauds**. With respect to the definition of “prevailing party,” the Court found that because no question regarding the consumer’s **reliance** was submitted to the jury, and because the jury did not award damages to the consumer on the first of his two DTPA claims, the consumer was not a “prevailing consumer” as required by the DTPA. Further, analogizing the consumer’s DTPA restoration claim to a claim for **rescission and restitution**, the court found that the consumer could not recover restoration damages because he had not return all benefits received from his bargain. Finally, the court found that the main purpose exception to the statute of frauds applied to the insurer’s oral commitment to pay Andrews Restoration (d/b/a Protech) for use of its dehumidifier while the insurer was considering whether to pay homeowner’s claims.

Summary of Proceedings:

Protech brought suit against Dr. Cruz (homeowner) and Chubb (Dr. Cruz’s homeowner’s insurer) for breach of contract for failing to pay for restoration services Protech rendered. Dr. Cruz and Chubb filed counterclaims against Protech.

Prior to trial, Dr. Cruz filed a motion, and the trial court granted partial summary

judgment, on the grounds that Dr. Cruz was a consumer and that Protech had committed a DTPA violation by failing to include required language in its contract. In a subsequent pre-trial order, the trial court found that \$1,059,940.52 would be necessary to “restore” to Cruz all sums that had been paid to Protech by or on behalf of Cruz.

The matter was tried to a jury in the 193rd Judicial District Court of Dallas County, Judge Ginsberg presiding. The jury found that both Chubb and Dr. Cruz breached the oral agreement with Protech, that the agreement satisfied the “main purpose” doctrine exception to the statute of frauds, and that Protech's damages were \$705,548.02—the amount of its unpaid invoices. Although the jury awarded \$25,000 in contingent attorney's fees for an appeal to the court of appeals and \$15,000 for an appeal to the Texas Supreme Court, the questions to the jury did not address fees relating to trial preparation and trial, and the court entered judgment for these amounts. Post-trial, Protech sought a partial new trial on the issue of attorneys' fees incurred during trial preparation and trial. The trial court denied the requested relief.

The jury rejected all of Chubb' and Dr. Cruz's claims, even those based on the trial court's previous rulings. Question 29 instructed the jury that the trial court had previously found Protech's failure to include the requisite Property Code language to be a false, misleading, or deceptive act that was a producing cause of injury or harm to Dr. Cruz. It then asked what sum of money would reasonably compensate Dr. Cruz for his resulting DTPA damages. The jury answered “\$0.” Accordingly, the trial court ordered that Cruz recover no relief for his Property Code-related DTPA claim.

All parties appealed. In pertinent part, the Dallas Court of Appeals held that despite the trial court's finding that Protech engaged in a deceptive act, Dr. Cruz was not entitled to restoration of consideration because Dr. Cruz had failed to prove that he was entitled to rescission. The Dallas Court of Appeals concluded that Chubb' oral promise to pay Protech was unsupported by consideration and thus barred by the statute of frauds. 323 S.W.3d 564, 574 (Tex. App.—Dallas 2010). Finally, the Dallas Court of Appeals held that Protech was not entitled to a new trial on attorney's fees, having waived its objection to the trial court's failure to submit a question on attorney's fees for preparation and trial. The court of appeals affirmed in part.

The Texas Supreme Court granted Protech's and Cruz's petitions for review. Although using slightly different reasoning, the Texas Supreme Court affirmed the Dallas Court of Appeals' decision with respect to Dr. Cruz's and Chubb' claims as well as Protech's claim for trial preparation and trial attorneys' fees. However, the Texas Supreme Court reversed the Dallas Court of Appeals and found that Protech's claim fit within the main purpose of the statute of frauds thereby allowing recovery.

Facts:

In March 2001, violent storms damaged Dr. Cruz's home causing numerous water leaks that eventually led to mold. Dr. Cruz contracted with Protech to inspect, remove water, clean, and restore the house and contents. Dr. Cruz submitted a claim to his homeowner's insurance carrier, Chubb, which verbally authorized Protech services. However, Chubb repeatedly deferred and delayed making a decision on Dr. Cruz's insurance claim. In the interim, Protech recommended and Chubb authorized the use of dehumidifiers to control the mold levels

in the home pending Chubb's decision. In March 2003, Chubb paid Protech \$250,000, which partially satisfied its invoices. In June 2003, with no resolution of the insurance claim, Dr. Cruz's attorney instructed Protech to remove its equipment. At that point, Protech had outstanding invoices totaling \$705,000. (In November 2003, Chubb tendered its policy limits and, two years later, the house was demolished.)

Texas Supreme Court's Holding:

As the trial court recognized, the Texas Property Code § 41.007(a) mandates language for certain contracts for work involving improvement to homesteads and Protech's contracts omitted that language. Further, this provision of the Property Code is one of DTPA § 17.46 "tie-in" statutes. However, Section 17.50(a)(1)(B) requires that the consumer **rely** on the false, misleading, or deceptive act specifically enumerated in § 17.46. The summary judgment did not find reliance and the subsequent order was silent on reliance as well. Indeed, Dr. Cruz's jury questions on his Property Code claims did not include reliance as an element. Notably, the other DTPA claim question submitted by Dr. Cruz contained reliance as does the Texas Pattern Jury Charge for § 17.46 violations. So, despite a summary judgment and subsequent order seemingly finding liability (although really just consumer status and DTPA violation) and damages for Dr. Cruz in the amount of \$1,059,940.52, he was not a prevailing consumer under this DTPA claim.

Next, the Court addressed Dr. Cruz's DTPA § 17.50(b)(3) claim for restoring money or property illegally acquired. The Court noted that the restoration shares the same root as restitution, which was part of the common law remedy known as "rescission and restitution" (now known by its shorthand

name "rescission"). At common law, rescission requires returning the all parties to the status quo ante. The Court acknowledged that the DTPA did not codify common law and, therefore, not all prerequisites of common law rescission will necessarily apply. However, to the extent possible, each party must return to the other the property and any benefit derived from it. While Dr. Cruz sought to rescind the contract and recover all money paid by him or on his behalf, he refused to surrender the benefits he received. The lack of mutual restoration precluded his claim. The Court rejected Dr. Cruz's arguments for an exception to the mutual restitution rule in this case. First, Dr. Cruz cited case law supporting the proposition that defendant wrongdoing may be a factor bearing on an uncompensated loss in cases in which it is impossible for the claimant to restore the defendant to the status quo ante. The Court distinguished those cases factually by summarily pointing out that this was not a case involving impossibility of restoration. Second, Dr. Cruz argued that the DTPA, being a punitive statute to correct wrongs, permits unilateral restoration to the consumer despite this creating a windfall. However, the Court pointed out that the DTPA language states "any party to a suit" may seek restoration and any party would include both the consumer and the defendant. Based on this language, the Court concluded that DTPA § 17.50(b)(3) restoration contemplates mutual rescission. To complete its analysis on this issue, the Court found that the common law prerequisites of notice and tender were not required in a DTPA restoration claim. Rather, the Court adopted Restatement (Third) Of Restitution and Unjust Enrichment § 54(5), which requires only that the consumer's relief be capable of being reduced by reciprocal restitution.

Next, the Court addressed Protech’s claims, which had been overturned by the court of appeals. Protech and Chubb had no written contracts governing their relationship. Protech relied on an exception to the statute of frauds: the “main purpose” or “leading object” doctrine. The Court explained:

The main purpose doctrine requires that: (1) the promisor intended to create primary responsibility in itself to pay the debt; (2) there was consideration for the promise; and (3) the consideration given for the promise was primarily for the promisor’s own use and benefit—that is, the benefit it received was the promisor’s main purpose for making the promise.

The Court corrected the court of appeals analysis, which looked at who was the primary beneficiary, and stated: “But the question is not who was the primary *beneficiary*, but whether Chubb’s primary *purpose* in promising to pay was to benefit itself.” Here, the Court found that there was sufficient evidence for the jury to find that Chubb’s primary purpose was to buy time to decide whether to pay Dr. Cruz’s insurance claim. Thus, the verbal agreements fit within the exception to the statute of frauds making the oral contract enforceable.

Practice Pointers:

1. If there is a TPJC instruction or issue for you claim or defense, use it unless you can show it is clearly wrong.
2. At or before the charge conference, re-read your questions and issues in the court’s charge. Do not rely on the court’s staff to accurately and completely copy

you’re your issues and instructions. Also, make sure they contain all of the elements of your claim or defense. Here Dr. Cruz failed to include reliance in his questions, and Protech failed to get its pre-trial and trial attorneys’ fees.

3) Be leery of relying on your pre-trial submission of your issues and instructions to preserve error. Here, four days prior to trial, Protech submitted its proposed charge, which included an attorneys’ fees issue that had three lines (one for pre-trial and trial, one for appeal to the court of appeal, and one for appeal to the Texas Supreme Court). Due to an apparent clerical error, the court did not submit the pre-trial and trial line. Protech’s counsel did not specifically object nor did he re-submit the original issue and get it marked refused. Here is the bottom line per the Court:

A charge filed before trial begins rarely accounts fully for the inevitable developments during trial. For these reasons, **our procedural rules require that requests be prepared and presented to the court “within a reasonable time *after* the charge is given to the parties or their attorneys for examination.”** [TEX.R. CIV. P. 273](#) (emphasis added). Notwithstanding our rules, we have held that a party may rely on a pretrial charge as long as the record shows that the trial court knew of the written request and refused to submit it. [Alaniz, 907 S.W.2d at 451–52](#). Thus, error was preserved where a party filed a pretrial charge, and the trial court used the very page from that charge that contained the requested question but redacted one of the subparts

and answer blanks, and the party objected to the omission. *Id.* **Again, trial court awareness is the key.**



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