TADC Commercial Litigation Newsletter

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This newsletter is intended to summarize significant cases and issues impacting Texas commercial litigation 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.

Evidence of "malice" is essential when seeking punitives under the exception to Texas' at-will employment doctrine—

Safeshred, Inc. v. Martinez

Opinion delivered April 20, 2012
2012 Tex. LEXIS 337 (Tex. 2012)

In this case, the Texas Supreme Court clarifies the nature and scope of an employee's cause of action against an employer for the employee's termination due to the employee's refusal to perform an illegal act. The Court concludes that, in order for an employee to recover punitive damages from an employer, there must be more than just proof that the employer knew the underlying act asked of the employee was illegal. *The employer must know—at the time it fired the employee—that the law did not permit the employer to fire the employee for refusing to perform the illegal act.*

Because there was no proof the employer in *this* suit had such knowledge, the exemplary damages awarded by the trial court was reversed.

Factual and Procedural Summary:

Louis Martinez worked for Safeshred in October 2007 as a commercial truck driver, hauling loads of cargo between Dallas, San Antonio, Houston and Austin.

Prior to each haul, he was required to perform a pre-trip inspection of the truck to confirm its compliance with relevant safety regulations. He repeatedly discovered safety violations in the vehicle he was asked to drive (especially with regard to cargo placement and securement), but was consistently ordered to drive the truck anyway.

On one such incident, Martinez was stopped by a DPS officer and cited for improper cargo placement. He was ordered by the officer not to drive the truck again until the defects were remedied.

When asked by Safeshred to drive the truck without making the remedies, he refused to do so and was assigned to administrative duties while Safeshred supposedly sought to bring the truck into compliance.

A week later, Martinez was again asked to drive the truck. Although he still had concerns, he complied. On his second trip after commencing to drive the alleged "remedied" truck, Martinez drove a few miles, felt his cargo shift, feared for his safety, and returned to his employer's place of business. When he was told to either drive the truck or he would be fired, he refused to drive the truck and was terminated.

Subsequent to his firing, Martinez brought a wrongful termination suit against Safeshred, seeking lost wages, mental anguish damages, and exemplary damages.

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The jury awarded $7,569.18 in lost wages, $10,000 in mental anguish, and $250,000 in exemplaries (which the judge reduced to $200,000 per statutory requirements).

The court of appeals found the evidence insufficient to support the mental anguish damages, but affirmed the awards for actual damages and exemplaries.

The Texas Supreme Court disagreed with the appellate court's findings on the punitive damages, however, and reversed.

The Texas Supreme Court's holdings:

The Supreme Court began its analysis by acknowledging that it has long been established in Texas that employment for an indefinite term may be terminated "at will" and for any reason by the employer.

In 1985, however, the Texas Supreme Court recognized a narrow exception to the "at-will employment doctrine" when it determined that employees could sue their employers if they were discharged "for the sole reason that the employee refused to perform an illegal act." *Sabine Pilot Service, Inc. v. Hauck,* 687 S.W.2d 733, 735 (Tex. 1985).

The exception, noted the Court, prevents employers from forcing employees to choose between illegal activities and their livelihoods.

In *Safeshred*, the Court agreed with the appellate court that it is proper that an employee be permitted to seek exemplary damages in a *Sabine Pilot* suit. Such cause of action sounds in tort, said the Court, and allows for punitive damages upon presentation of proper proof.

But the Court did *not* agree with the Third Court of Appeals' determination of what constitutes the "legally-sufficient evidence of malice" that entitles an employee to punitive damages.

The type of malice required to support a finding of punitive damages is *not* evidence that suggests the employer *intended* to fire the employee or that the employer *knew* the underlying act it asked the employee to perform was wrong, said the Court. If so, then every *Sabine Pilot* claim would warrant punitive damages.

Rather, the malice required in a *Sabine Pilot* case is something "independent and qualitatively different" from the compensable harm associated with the wrongful termination. It is knowledge that the employer knew, by firing the employee, that it was committing an illegal act that would cause *additional* harm (like interference with the employee's future employment or harassment) or terminating the employee knowing it is unlawful to do so.

Because Martinez did not submit evidence of *this* type of harm, ruled the Court, there was no support for a finding of malice and the Third Court of Appeals' decision insofar as it affirmed the award of exemplary damages had to be reversed.

# # #

"Cost to repair"—and not "diminished value"—is the appropriate measure of damages for a breach of duty under a build-to-suit lease agreement.

Ashford Partners, Ltd. v. ECO Resources, Inc.

Opinion delivered April 20, 2012
55 Tex. Sup. J. 603 (Tex. 2012)

In this case, a trial court awarded a commercial tenant damages for a landlord's breach of a construction-related duty under a build-to-suit lease agreement.

The tenant sued, asserting that the landlord's failure to adhere to construction plans resulted in a "substandard" building, diminishing the value of the tenant's leasehold.

The landlord disagreed, contending that the appropriate measure should be the "cost to repair" the building. *(cont. on next page)*

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Although the First Court of Appeals sided with the tenant, concluding that "diminished value" was the appropriate measure of damages for such breach, the Supreme Court disagreed. It reversed, based on its conclusion that the "cost to repair" was the proper measure.

Factual and Procedural Summary:

In March 2001, ECO Resources, Inc., a provider of water and wastewater treatment services, signed a lease with TA/Sugar Land-ECO, Ltd. ("TASL") for construction of a 32,000 sq. ft. office building and laboratory. While the building was under construction, TASL agreed to sell the property to Ashford Partners, Ltd.

The Ashford/TASL earnest money contract provided that the ECO lease would be assigned to Ashford within 30 days after it commenced. ECO's lease was to begin when the building was substantially complete and a certificate of occupancy issued. The tenant was responsible for inspecting the construction and providing the punch list.

The lease further provided that, subject to the landlord's completion of such punch list items, the taking of possession by Lessee would "be deemed to conclusively establish that the buildings and other improvements had been completed in accordance with the Plans, that the premises were in good and satisfactory condition and that the Lessee . . . accepted such buildings and other improvements."

On September 28, 2001, ECO accepted the building as substantially complete, submitting an eight-page punch list. About the same time, ECO received formal notice of the pending sale and, as its lease required, returned a verification (or "estoppel certificate") of the lease's validity and other matters.

Two weeks later, Ashford became ECO's landlord. Four days after that, the deadline for completing ECO's punch list expired, with at least one repair not having taken place. That one repair was the requirement for "caulking between the tilt wall panels under-grade."

Approximately two years later, ECO began having problems with the building. Ashford hired engineers to investigate and it was determined that water had collected under the foundation. The cause was traced to the failure to caulk between the tilt wall panels below-grade (the omitted repair on ECO's punch list).

Ashford spent $313,000 to make repairs and correct the problem and then sued the construction contractor that TASL had used on the project. Ashford also joined ECO as a defendant, seeking a declaratory judgment that the building was structurally sound and that ECO was not entitled to a reduction in rent. ECO counter-claimed for breach of the lease, including breach of the duty to construct the building according to plans.

Ashford settled with the contractor and dismissed its suit against ECO. ECO, however, did not abandon its claim against Ashford and the case proceeded to trial. At trial, the jury was asked three questions:

(1) Did Ashford fail to comply with the Lease by failing to cause the leased space to be constructed pursuant to the plans?
(2) Did Ashford fail to comply with the Lease by failing to maintain the foundation of the leased space in good repair? and
(3) What sum of money would fairly and reasonably compensate ECO for damages?

The jury answered "yes" to the first question, but "no" to the second. With regard to the third, the jury was instructed to base its award, if any, on the difference "between the rent required under the Lease and the rental value of the leased space in its actual condition." The jury found the diminished value of the lease to be $1,027,704. Adding interest and attorney's fees, the trial court rendered a total judgment of $1,494,462 to ECO. Ashford appealed.

The court of appeals affirmed the trial court's judgment, but the Texas Supreme Court reversed.

The Texas Supreme Court's holdings:

On appeal, Ashford argued the trial court's judgment was erroneous because there was no evidence that

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Ashford had breached its duty under the lease, nor evidence that ECO suffered any damages as a consequence of such breach.

Ashford argued it did *not* breach any construction-related duty because the construction was complete before it became ECO's landlord. Moreover, even assuming construction-related duties remained, said Ashford, the assignment of the lease – in conjunction with ECO's signed estoppel certificate – cut off any such duties. Finally, even if the estoppel certificate did not cut off the remaining construction-related duties, said Ashford, there was no evidence that ECO suffered any damages when the "appropriate measure" of damages was applied.

The Supreme Court rejected Ashford's first two arguments regarding its construction duties and the effect of the estoppel certificate. With regard to Ashford's third argument, however—which complained that the jury instruction submitted an erroneous measure of damages—the Court agreed with Ashford.

The court of appeals had focused on the basic nature of the landlord-tenant relationship, concluding that the measure of damages for breach of a real-estate rental agreement was the difference between the agreed rental and "reasonable-case" market value of the leasehold. As such, it had reasoned that the cost-of-repair would benefit only the property owner and that the only way to compensate ECO for its loss was to use the difference-in-value measure.

The Supreme Court reasoned differently, however. It reasoned that, under a build-to-suit lease, the lessor "wears two hats, functioning as both the tenant's construction contractor and landlord." Under this arrangement, said the Court, "the property owner agrees to construct a building to the tenant's specifications, and the tenant agrees to lease the building for a term sufficient to permit the owner a profit."

Although Ashford apparently intended to assume only the latter role, the assignment and estoppel certificate failed to eliminate some lingering construction-related issues.

The Court pointed out that the doctrine of "substantial completion" generally controls the measure of damages for failure to make repairs or complete construction. It is the "legal equivalent of full compliance less any offsets for remediable defects."

But once a construction project has been "substantially completed," the damages for errors or defects in construction "is the cost of completing the job or of remedying those defects that are remediable" without impairing the building as a whole. That is because "substantial completion" implies that the parties have been given the object of their contract and that any omissions or deviations can be remedied.

When the contractor has failed to "substantially comply" with the contract or when repairs will impair the structure or materially damage it, however, then the "difference-in-value" measure of damages may apply.

Here, Ashford argued that construction was "substantially complete" because ECO occupied the building and had ostensibly accepted it (subject to the punchlist, which was capable of remedying the problems). ECO argued Ashford's repairs failed to fix the problem and, even after repairs, the foundation was unstable and continued to heave.

The Court pointed out that the jury did not find Ashford's repairs to be ineffective. In fact, when asked whether Ashford had failed to "maintain" the foundation in good repair, the jury answered "no."

The Court concluded that the cost of repair, therefore, should be the appropriate measure of damages to *remedy* the omitted item on the "substantially-completed" building. Because Ashford made these repairs at no cost to ECO, the Court concluded that ECO had suffered no damages under the appropriate measure. Additionally, because ECO was not entitled to damages under its alleged breach-of-contract claim, it could not receive attorney's fees. As such, the Court reversed the lower court's decision and rendered judgment that ECO take nothing.

# # #

While lack of a jurat on an affidavit is not reversible error, there still must be proof in a purported affidavit that the affidavit was "sworn to" —

Mansions in the Forest, L.P. & The Estates–Woodland, L.P. v. Montgomery County, Texas

Per Curium Opinion delivered April 20, 2012
55 Tex. Sup. J. 624 (Tex. 2012)

In this case, the Texas Supreme Court reverses a Ninth Court of Appeal's ruling that lack of a jurat is a substantive defect in an affidavit. While the Texas Government Code requires an affidavit to be *sworn* to, said the Court, it does not require that there be an *attestation* by an authorized officer that the affidavit was sworn to.

Factual and Procedural Summary:

This case arose out of property owned by The Mansions in the Forest, LP and The Estates–Woodland, L.P. (collectively "Landowners") in Montgomery County, Texas. The property was seized by the County through its eminent domain power for the purpose of widening a particular road.

To ensure the Landowners were properly compensated, the County assessed the market value of the land; determined the diminution in value of the Landowners' remaining property; and assessed a total sum of $345,215 to be paid to the Landowners for damages caused by its seizure. The County deposited this amount into the court registry; the trial court issued a writ of possession; the Landowners filed objections to the amount paid by the County; and the County moved for summary judgment, arguing the Landowners had offered no evidence of damages, or alternatively, that the only competent evidence was the County's report, which valued the property at $326,215.

In response, the Landowners filed an affidavit from the vice president of the Mansions and Estates. In it, the vice president asserted that the County should have paid at least $800,000 for the seized land and diminution in value of the remaining land.

The affidavit contained no statement in which the affiant swore to the truth of his testimony and the notary's certification stated only that the affiant "acknowledged," rather than "swore," to his statements.

The County objected to the affidavit, claiming it was untimely and conclusory. It did *not* object to the lack of a jurat in the affidavit.

The trial court sustained the County's objections; excluded the affidavit; granted the County's motion for summary judgment; and ordered the Landowners receive $326,215. When the Landowners appealed, challenging the exclusion of the affidavit, the County raised two *new* complaints—namely, that the affidavit lacked a jurat and was not sworn to or given under oath.

The court of appeals affirmed the trial court's ruling based on the jurat argument, holding that lack of a jurat is a defect in substance and so can be raised for the first time on appeal.

The Texas Supreme Court disagreed, however, concluding that there is no statutory requirement that an affidavit contain a jurat. Despite this ruling, the Supreme Court nevertheless agreed that the purported affidavit was improper. That is because the affidavit did not contain a statement that the affiant was "swearing" to the truth of the matters therein. Without being sworn to, the affidavit was not an affidavit, said the Court.

But because the County did not complain that the purported affidavit was not sworn to until after the appeal was filed, said the Court, the County failed to preserve error. As such, the affidavit could not be considered improper *based on a substantive defect* and the appellate court's ruling had to be reversed.

The Texas Supreme Court's holdings:

The Texas Government Code defines an "affidavit" as a "statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office." TEX. GOV'T CODE §312.011(1).

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When an affidavit meets the Code's requirements, it is proper summary judgment evidence if it complies with Texas Rule of Civil Procedure 166a(f).

When a written statement does not meet this basic definition, it is "no affidavit at all."

A jurat, on the other hand, is a certification by an authorized officer stating that the writing was sworn to before the officer. Typically it indicates that an officer of the court administered an oath or affirmation to the signer, who swore to, or affirmed, the contents of the document.

According to the Texas Supreme Court, while the Government Code requires that an affidavit be sworn to—and a jurat is normally included to prove that the written statement was made under oath before an authorized officer—the Code does not require that there actually be a jurat or clause stating that the writing was sworn to before the officer *(i.e.* an attestation to the oath).

When an affidavit lacks a jurat, then other evidence must be present to show that the affidavit was sworn to before an authorized officer and thus satisfies the Code's definition of "affidavit."

Here, said the Texas Supreme Court, there was nothing in the purported affidavit to show that the Landowners' affidavit was sworn to; thus, it was not an affidavit and should not have come into evidence to support the Landowners' position.

Nevertheless, because the County did not preserve error on this issue—and did not complain that the purported affidavit was unsworn until its responsive brief—the County *waived* the issue of the affiant's failure to swear and this could not be considered on appeal.

As a consequence, the case had to be reversed upon appeal and remanded back to the Court of Appeals for further proceedings.

# # #

A "jury trial waiver" agreement is enforceable between an employer and an at-will employee because an employer has the right to terminate the at-will employee and a threat to exercise that right is not coercion.

In re Frank Kent Motor Co. d/b/a Frank Kent Cadillac

Opinion delivered March 9, 2012
55 Tex. Sup. J. 4411 (Tex. 2012)

In this original proceeding, the Texas Supreme Court granted mandamus relief to enforce a jury waiver agreement between an employer and an at-will employee. The Court disagreed with the lower court that the employer's threat to exercise its legal right (the right to terminate the employee) amounted to "coercion" that invalidated the contract.

Factual and Procedural Summary:

Steven Valdez, real party in interest, was an "at-will employee" at Frank Kent Motor Co. d/b/a as Frank Kent Cadillac ("Frank Kent") for more than 28 years. On April 4, 2008, Valdez signed Kent Motors' Employee Handbook Acknowledgement and Mutual Waiver of Jury Trial (Jury Waiver). He had previously been approached about signing it, but had not signed it. When his supervisor warned him he would lose his job if he failed to do so, he signed.

The waiver stated that:

> I agree that, with respect to any dispute between [Frank Kent] and me, to resolve any disputes between us arising out of, or in any way related to, the employment relationship (including, but not limited to, employment and discontinuation of employment) before a judge without a jury.[FRANK KENT] AND EACH EMPLOYEE THAT SIGNS THIS ACKNOWLEDGEMENT, RECEIVES A COPY OF THIS HANDBOOK, HAS KNOWLEDGE OF THIS POLICY, AND CONTINUES TO WORK FOR [FRANK KENT] THEREAFTER, HEREBY WAIVES [THE] RIGHT TO TRIAL BY JURY AND AGREES TO HAVE DISPUTES ARISING BETWEEN THEM RESOLVED BY A

JUDGE AND A COMPETENT COURT SITTING WITHOUT A JURY. (Emphasis in original)

Almost a year after signing the waiver, Valdez was terminated from his employment with Frank Kent. He sued, alleging age discrimination, and made a jury demand. Frank Kent filed a motion to strike the jury demand, arguing that Valdez had waived his right to a jury trial.

Valdez responded by saying the waiver "was not signed under circumstances which were 'knowing, voluntary and intelligent' and cannot be enforced." Valdez reached this conclusion by applying the factors listed in *Mikey's Houses LLC v. Bank of America, N.A.*, 232 S.W.3d 145, 193 (Tex. App.—Fort Worth 2007, no pet.) Valdez attached an affidavit in which he claimed he did not want to sign the waiver, but did so to avoid losing his job of over 28 years.

The trial court denied the motion to strike the jury demand and the court of appeals in Fort Worth denied mandamus relief. The Texas Supreme Court, however, concluded differently. It determined that, because an employer has the legal right to terminate an at-will employee, a threat to exercise that legal right cannot amount to coercion that would invalidate the waiver. As such, it granted mandamus relief directing the trial court to grant Frank Kent's motion to strike Valdez's jury demand.

The Texas Supreme Court's holdings:

The Texas Supreme Court began its analysis by acknowledging that a "coerced" jury waiver agreement is invalid. It disagreed, however, that Frank Kent's threat to exercise its legal right amounted to "coercion" that would invalidate the waiver.

According to the Supreme Court, an employer does not coerce an at-will employee by demanding that the employee accept new dispute resolution procedures.

It is well-established that the at-will employment relationship is governed by specific rules, it pointed out. When the employer notifies an employee of changes in employment terms, the employee must accept the new terms or quit. *Hathaway v. General Mills, Inc.* 711 S.W.2d 227, 229 (Tex. 1986).

That is why, for example, it is not procedurally unconscionable to premise continued employment on acceptance of an arbitration plan. *In re Halliburton Co.*, 80 S.W.3d 566, 572 (Tex. 2002))(orig. proceeding)(rejecting an argument that an arbitration agreement was procedurally unconscionable because the employer used its "superior bargaining position to coerce potential employees").

In rebuttal, Valdez asserted that the analysis in *Halliburton* did not apply because arbitration was legislatively and judicially favored and there was no corresponding policy for waivers of a jury trial.

The Supreme Court disagreed, however, finding no reason to treat the effect of the at-will employment relationship on a jury waiver any differently from its effect on an arbitration agreement. "Arbitration removes the case from the court system almost altogether, and is every bit as much of a surrender of the right to a jury trial as a contractual jury waiver," said the Court. Additionally, refusal to allow the enforcement of a jury waiver in the context of the at-will employment relationship would create a practical problem for employers, said the Court.

Since employers can fire at-will employees for almost any reason, said the Court, failure to enforce jury waivers would force employers to fire *all* employees to implement new dispute resolution procedures and then force them to rehire the employees who signed the waiver. By applying the analysis in *Halliburton*, said the Court, the Court would discourage such unnecessary firings.

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