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.

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Texas Supreme Court Decisions

Chapman Custom Homes, Inc.

Opinion delivered August 22, 2014
13-0776, 445 S.W.3d 716

Synopsis

The Texas Supreme Court held that the economic loss rule did not bar a landowner's claims against a plumber for failing to install a hot water heating system properly.

Factual Background and Trial Court Proceedings:

Chapman Custom Homes, Inc. ("Chapman") contracted with Michael P. Duncan, the trustee of the M.B. Duncan trust (the "Trust"), to build a house on the property owned by the trust. In turn, Chapman Contracted with Dallas Plumbing Company ("Dallas") to put in the plumbing of the house. After the home was finished, plumbing leaks allegedly caused extensive damage to the structure of the house.

Chapman and the Trust sued the plumber, alleging claims for breach of contract, breach of an express warranty, and negligence. Chapman and the Trust's Second Amended Petition alleged that the Dallas' failure to install the hot water heating system properly resulted in water flooding the house and causing damages to the structure.

Dallas denied liability and moved for summary judgment, which the trial court granted.

Court of Appeals:

The Fifth Court of Appeals (Dallas) affirmed the trial court's decision. The court of appeals held that the Trust could not recover for the trust's damages, even though it owned the damaged property, because it was not in privity of contract with Dallas—the trustee of the Trust was. The court of appeals also found that the Chapman could not recover against Dallas, because Chapman did not own the land and thus had no compensable injury against Dallas.

Finally, and more pertinent to the discussion of this case, the court concluded that the pleadings only asserted facts supporting breach of contract duties and that Chapman and the Landowner's negligence claims were therefore untenable.

Texas Supreme Court's Holding:

The Texas Supreme Court disagreed with the Fifth Court of Appeals.

The Court reasoned it had previously observed that a common law duty to perform with skill and care accompanies every contract and that a parties failure to meet this duty may result in liability under tort, contract, or both. (*citing Montgomery Ward & Co. v. Scharrenbeck*, 204 S.W.2d 508, 510 (Tex. 1947). The court also likened the situation in *Coulson v. Lake L.B.J. Mun. Util. Dist.*, 734 S.W.2d 649, 651 (Tex. 1987), where a defendant heater repairman was found liable for negligence in burning down the plaintiff's home when he performed his work poorly.

Considering these two cases, the court observed:

> The circumstances here are very similar. Having undertaken to install a plumbing system in the house, the plumber assumed an implied duty not to flood or otherwise damage the trust's house while performing its contract with the builder. Although the court of appeals views this

> property damage as a mere economic loss arising from "'the subject [matter] of the contract itself,'" 446 S.W.3d at 35 (*quoting Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986)), and purports to apply the economic loss rule as a bar to any tort claim, the rule does not apply here.

The court further reasoned that the economic loss rule is generally only applicable when "the harm consists only of the economic loss of a contractual expectancy."

As such, the court found that the economic loss rule was inapplicable to bar Chapman and the Landowner's claims given that "the damages allegedly caused by the breach of the duty [assumed in the plumbing contract] extend beyond the economic loss of any anticipated benefit under the plumbing contract.

El Paso Marketing, L.P. v. Wolf Hollow I, L.P.

Opinion delivered November 21, 2014
13-0816, 450 S.W.3d 121

Synopsis

The Texas Supreme Court held that a prior ruling barring consequential damages did not apply to an operator's claim against supplier seeking replacement power damages.

Factual Background and Trial Court Proceedings:

El Paso Marketing, L.P. ("El Paso"), the gas supplier for a power plant owned by Wolf Hollow I, L.P. ("Wolf Hollow"), sued Wolf Hollow seeking a declaration construing the contractual obligations of a Supply Agreement between the two parties. In response, Wolf Hollow filed a counterclaim for breach of contract against El Paso, asserting that El Paso had breached the supply agreement in failing to provide gas pursuant to the contract. El Paso and Wolf Hollow also brought claims against Enterprise Texas Pipeline LLC ("Enterprise") for negligence.

The trial court granted summary judgment for El Paso and Enterprise, finding that four gas delivery interruptions were excused under the *force majeure* clause of the Supply Agreement and that damages sought by Wolf Hollow against El Paso were consequential damages prohibited by the Supply Agreement.

The trial court also rendered declaratory judgments, finding that (1) four service interruptions were excused by the contract's force majeure clause, (2) recovery for Wolf Hollow's gas quality claim was limited to the assignment of any claim El Paso had against Enterprise under Section 14.1 of the Supply Agreement and (3) the default and remedies provision of the Supply Agreement did not apply to Wolf Hollow's gas quality claim.

Prior Appellate Proceedings:

The Fourteenth Court of Appeals agreed with the trial court holding that Wolf Hollow's claims against El Paso were unrecoverable consequential damages waived by the supply agreement. Having found this, the court of appeals declared that the trial court's declaratory findings were moot.

The Texas Supreme Court found that although there was a consequential damages waiver in the Supply Agreement, provisions relating to the purchase of replacement power "may" create an independent right of recovery regarding those types of damages. Accordingly, the Texas Supreme Court remanded the proceedings to the Fourteenth

Court of Appeals on the reasoning that the Court of Appeals had erred in finding the trial court's declaratory judgment moot by operation of the consequential damages clause.

Upon remand, the Fourteenth Court of Appeals affirmed the trial court's finding that the service interruption claims were barred by the *force majeure* provision of the Supply Agreement. However, the Fourteenth Court of Appeals refused to rule on the trial court's other declaratory rulings concerning Wolf Hollow's gas quality claims, based on the Texas Supreme Court's prior statement that "nothing in section 14.1 suggests that [Wolf Hollow] cannot sue El Paso for breach of the Supply Agreement in allowing poor gas to be delivered."

Texas Supreme Court's Holding:

The Texas Supreme Court stated it believed the court of appeals "felt itself too constrained by their prior decision." The Texas Supreme Court noted that "we did not hold that Wolf Hollow would necessarily prevail in obtaining replacement power damages in its gas quality claim" and clarified that its prior decision merely "reversed the court of appeals judgment insofar as it deleted the trial court's 'declarations as moot . . . .'"

Accordingly, the Texas Supreme Court held that the Court of Appeals erred in finding that its prior decision regarding the consequential damages provisions precluded it from ruling on the trial court's declaratory findings regarding Wolf Hollow's gas quality claims and remanded the proceedings to the Fourteenth Court of Appeals to assess those claims on the merits.

National Property Holdings, L.P. v. Westergren

Opinion Delivered January 9, 2015
13-0801, 453 S.W.3d 419

Synopsis:

Examining a dispute regarding the enforceability of a settlement agreement between a seller of an option to purchase 190 acres—and its consultant—and the buyer of the option, the Texas Supreme Court found that (1) the seller did not justifiably rely on a consultant's representations regarding the contents of the release, (2) the partial performance exception did not apply to allow enforcement of an oral contract concerning property, (3) the seller did not breach the mediated agreement settling the prior action by bringing the lawsuit, and (4) the seller did not breach the release agreement by bringing the action.

Factual Background &Prior Proceedings:

[As a clarification, the following facts were considered by the Texas Supreme Court in light of the fact that the trial court granted a judgment notwithstanding a jury verdict in favor of Gordon Westgren (see below). As such, the court credited evidence favoring the jury verdict in favor of Westergren and disregarded contrary evidence that did not.]

Gordon Westergren entered into an option contract to purchase a 190 acre tract of land. When he found out that the owner had later entered into two similar option contracts with two other interested buyers. Westergren sued the owner and the two other buyers and filed a *lis pendens* against the property preventing any further development or sale of the property. The three defendants appeared and filed counterclaims.

During the pendency of the litigation, several other developers, including National Property Holdings (NPH), were also interested in acquiring the property, but could not pursue it during the pendency of the litigation. In an attempt to overcome the obstacle, Russell Plank, NPH's consultant, contacted Westergren's attorney and offered to pay Westergren's attorney's fees in the litigation. When Westergren asked why NPH would make the offer to pay attorney's fees, Plank stated it was because they were "going to be partners."

When the lawsuit went into mediation, Plank attended the mediation on behalf of NPH. Although NPH was not a party to the suit, it agreed to purchase the property at issue, and all of the parties agreed to release their claims in the lawsuit. This agreement was memorialized in a written mediated settlement agreement (MSA). Separately, Plank orally promised Westergren that he would become a partner with Plant and his brother Michael, would receive $1 million, and would receive an interest in profits from NPH's development and future sale of the property. The MSA did not memorialize the details of this oral agreement. After Westergren released the *lis pendens* and the suit was dismissed, NPH and its affiliate purchased the 190 acre tract.

When Westergren asked for his $1 million share, Plank replied that NPH could only pay $500,000. Subsequently, Plank and Westergren met. During the meeting Plank presented a check for $500,000 and asked that Westergren sign a document titled "***AGREEMENT AND RELEASE***." The release stated that Westergren relinquish his rights in the property and all claims against NPH, Michael Plank, and other parties in exchange for the $500,000 payment. Without reading the agreement, Westergren signed the agreement in front of a notary and accepted the check.

Several months later, when Westergren realized that he was not receiving any further payments, he reviewed the release and discovered the true nature of what he had signed. When Plank, NPH, Michael Plank (the "Plank Parties") refused to make further payments, Westergren filed an action in the trial court. In the action, Westergren brought claims for breach of oral contract, breach of partnership duties, common law and statutory fraud, and attorney's fees. Conversely, the Plank Parties claimed that Westergren had released all claims by signing the release and that the oral agreement was unenforceable under the statute of frauds.

The jury found in favor or Westergren on all of Westergren's claims. However, the trial court subsequently granted the Plank Party's judgment notwithstanding the verdict, entered a take nothing judgment as to all parties, and assessed costs against Westergren. Westergren appealed and the Plank parties filed cross-appeals.

Court of Appeals:

The Fourteenth Court of Appeals overturned the trial court's findings, concluding that (1) an oral contract existed between Westergren and Plank, (2) Plank breached the oral contract, (3) NPH paid the $500,000 pursuant to the oral contract, (4) this partial performance excepted the oral contract from the statute of frauds, (5) Plank fraudulently induced Westergren to sign the release, and (6) Westergren did not breach the MSA or the release by suing the Plank parties.

The Plank Parties appealed to the Texas Supreme Court.

Texas Supreme Court's Holding:

In the appeal, the Plank parties first argued that there was no evidence to suggest that Westergren was fraudulently induced into signing the MSA. The Texas Supreme Court agreed.

While acknowledging that it had to accept as true the fact that Plank had made several misrepresentations to Westergren regarding the content and effect of the release, the court found that Westergren's reliance on Plank's representations were not justifiable, given Westergren's choice to refrain from reading the release before signing it. The court reasoned:

> The court of appeals concluded that Westergren did not have an adequate opportunity to review the release. Under these facts, we disagree. Westergren's testimony conclusively established that he had ample opportunity to read the release but instead chose to rely solely on Plank's representations because he was "in a hurry" and did not have his reading glasses with him. Yet he acknowledged that he could have used the magnifier on his watch or had someone read the document to him, and no evidence indicates that anyone prevented him from doing so.
>
> * * *
>
> Here, Westergren's decision not to read the release and instead to rely on Plank's representations because he did not have his glasses and was "in a hurry" was not justifiable.

Further, the Texas Supreme Court found that the oral agreement between Westergren and Plank was unenforceable under the statute of frauds. The court reasoned that "'a contract for the sale of real estate' is unenforceable unless it is in writing and signed by the person to be charged." Moreover, the court rejected Westergren's argument that the "partial performance exception" was applicable despite the application of the statute of frauds:

> [O]ne of the exception's requirements is that the performance on which the party relies must be "unequivocally referable to the agreement." In other words, the purpose of the alleged acts of performance must be to fulfill a specific agreement. If the evidence establishes that the party who performed the act that is alleged to be partial performance could have done so for some reason other than to fulfill obligations under the oral contract, the exception is unavailable.
>
> * * *
>
> Contrary to Westergren's arguments, the payment cannot be unequivocally referable to the oral contract, because the release that Westergren signed expressly states that it was made in exchange for Westergren's agreement to the release.

Finally, the Texas Supreme Court found that Westergren had not breached the MSA or the release between Westergren, given that neither of the documents included a covenant not to sue, *i.e.* language barring Westergren from bringing suit or stating that a party would breach the release in doing so.

Hooks v. Samson Lone Star, Limited Partnership

Opinion Delivered January 30, 2015
12-0920, 457 S.W.3d 52

<u>Synopsis</u>

While public records may under certain circumstances establish a lack of diligence in the discovery of fraud as a matter of law, public records that are themselves tainted by fraud can provide no conclusive proof.

Factual Background and Trial Court Proceedings

Charles G. Hooks III ("Hooks") and Samson Lone Star Limited Partnership ("Samson") entered into a number of oil and gas leases in 1999. A lease between Hooks as lessor and Samson as lessee in Jefferson County, Texas prohibited pooling and contained "offset obligations" providing that if a gas well was completed within 1,320 feet of Hooks' lease line but was not unitized with Hooks' acreage, then Samson would either drill an offset well, pay Hooks compensatory royalties, or release the offset acreage.

In 2000, Samson drilled a well within the 1,320 foot protected zone. Instead of complying with the original offset obligations, however, Samson approached Hooks about amending the Jefferson County Lease in 2001 to pool into a unit associated with the new well. As a part of this request, Samson provided to Hooks a plat that incorrectly placed the well's bottom hole outside the protected zone. Samson also submitted a plat with the same false information to the Railroad Commission that was filed as a public record. Older Railroad Commission records, however, contained a directional survey and attached plat that correctly placed the bottom hole within the protect zone.

Eventually discovering the fraud, Hooks subsequently sued Samson in 2007, alleging that Samson deprived him of royalties by misrepresenting the well's bottom-hole location and fraudulently induced Hooks to amend the lease and pool. The jury determined that Hooks discovered the fraud less than four years before filing suit. The trial court accordingly concluded that the claims were not barred by limitations.

Court of Appeals

The First Court of Appeals reversed the trial court's judgment, concluding that the fraud should have been discovered as a matter of law more than four years before the mineral owner filed suit because the relevant information was available in the Texas Railroad Commission's public records.

Texas Supreme Court's Holding

Before the Texas Supreme Court, the central issue on appeal was whether the records on file with the Texas Railroad Commission established that the fraud should have been discovered, as a matter of law, more than four years prior to the filing of suit, barring Hooks' claims under the applicable statute of limitations While acknowledging that limitations does not start to run on a fraudulent inducement claim until the fraud with respect to the contract is discovered or through the exercise of reasonable diligence should be discovered and that the determination of reasonable diligence is generally an issue of fact, the Court cited its prior decisions in *Shell Oil Co. v. Ross*, 356 S.W.3d 924 (Tex. 2011) and *BP America Production Co. v. Marshall*, 342 S.W.3d 59 (Tex. 2011) for the proposition that a court may determine the issue of reasonable diligence as a matter of law in certain circumstances. In both the *Ross* and *Marshall* opinions, reasonable diligence required sophisticated lessors to acquaint themselves with readily accessible and publicly available information from Railroad Commission records. In both cases, claims were found to be barred by the applicable statute of limitations as a result of the Court finding that

claimants' failed to exercise reasonable diligence, as matter of law, because of constructive notice provided by documents in the public record.

In a departure from these cases, the Court distinguished the current case from these prior opinions because of the fraud inherent in Samson' submission of a fraudulent plat to the Railroad Commission:

> Hooks correctly identifies an important distinction: in those cases, the public record itself was not tainted by the fraud. We have not previously considered whether reasonable diligence would uncover correct public Railroad Commission filings when more recent filings contain false information.

Although reasonable diligence should lead to information in the public record, the Court held that when a defendant's fraudulent misrepresentations extend to the public record itself, earlier inconsistent filings cannot be used to establish, as a matter of law, that reasonable diligence was not exercised. Instead, reasonable diligence remained a question of fact for the factfinder.

American Star Energy and Minerals Corporation v. Stowers

Opinion delivered February 27, 2015
13-0484, 58 Tex. Sup. Ct. J. 401

Synopsis

The Texas Supreme Court found that a judgment creditor's claim against a partnership began to run at the time that a final judgment was entered against the partnership.

Factual Background and Trial Court Proceedings:

Four partners (the "Partners") formed S & J Investments, a Texas general partnership, to invest in and manage certain oil and gas properties. S & J and American Star Energy were parties to an agreement that concerned the operation of those properties.

In the early 1990s, American Star sued S&J for breach of the agreement between the parties. In the first trial, American Star prevailed on its claims against S & J. S & J appealed the judgment and the court of appeals reversed in part and remanded the case to the trial court. In 2007, the trial court again awarded American Star a judgment against S & J, and S & J again appealed. The Amarillo Court of Appeals affirmed the judgment and the Texas Supreme Court denied review. Consequently, the judgment American Star's judgment was not finalized against American Star until 2009.

Under the second judgment S & J owed American Star $227,884.46, but S & J was not sufficiently capitalized to satisfy the debt. Given the undercapitalization, American Star brought an action against the Partners individually.

The Partners asserted that the four-year-statute of limitations applicable to breach of contract actions barred American Star's claims against them, given that American Star could have sued the Partners at the same time it brought its original suit against S & J in the early 90s. Conversely, American Star argued that the Partners owed no obligation until the judgment against S & J became final in 2009, and that the statute of limitations didn't begin to run until that time.

At the summary judgment stage, the trial court agreed with the Partners that the statute of limitations had expired and ordered that American Star take nothing. The Amarillo Court of appeals affirmed the trial court's judgment, holding that the statute of limitations began when the breach-of-contract claim initially accrued against the partnership.

American Star appealed to the Texas Supreme Court.

<u>Texas Supreme Court's Holding:</u>

The Texas Supreme Court reversed the holding of the Amarillo Court of Appeals.

The Texas Supreme Court reasoned that under the Texas Revised Partnership Act ("TRPA"), codified in the Texas Business Organizations Code, "a partner remains 'jointly and severally liable for all obligations of the partnership.'" The court noted, however, that a creditor could "not seek satisfaction of a judgment against a partner until a judgment is rendered against the partnership." Further, the court noted that the TRPA requires that "the judgment against the partnership must go unsatisfied for ninety days before a creditor may proceed against the partner and his assets."

Moreover, the court explained:

[T]he only obligation for which a partner is really responsible is to make good on the judgment against the partnership, and generally only after the partnership fails to do so.

* * *

> The significance of joint and several liability in the partnership context is that once that the prerequisites are met, a creditor can seek the whole debt from one party and is not required to join all the partners, obtain judgments against them, or apportion liability among them . . . . This scheme defers a partner's liability, and as a result a creditor cannot seek a judicial remedy from a partner until these prerequisites are met. Because a creditor's rights against a partner do not arise when the partnership incurs an obligation, we define accrual as occurring when those rights arise.

(internal citations omitted).

The Court further likened the partnership/partner obligation to that of an indemnitor and indemnitee, in which "'an indemnitee may bring a claim against an indemnitor before the judgment is assigned against the indemnitee'—before the cause of action accrues and before limitations begin to run."

Accordingly, the court found that American Star's claims against the Partners had not accrued until the judgment against the Partnership was final, determined that American Star's claims had been filed within the limitations period, and reversed and remanded to the trial court.

State of Texas v. Clear Channel Outdoor, Inc.

Opinion Delivered April 24, 2015
13-0053, 2015 WL 1870306

<u>Synopsis</u>

The Texas Supreme Court found that a billboard may, in some cases, constitute a fixture to be valued with the land in computing compensation owed for condemnation of property. While advertising business income generated by the billboard is

to be reflected in the valuation of the land, the loss of business generated by the billboard is not compensable and cannot be used to determine the value of the billboard structure.

Factual Background and Trial Court Proceedings:

The case arose out of the state's condemnation of two adjoining parcels of land to widen Katy Freeway near downtown Houston. Prior to the condemnation, the owners of the two parcels had leased the property to Clear Channel Outdoor, Inc. ("Clear Channel") for outdoor advertising. Clear Channel constructed on each parcel a billboard, arranged in a "V" formation so as to be visible to traffic traveling on the freeway in both directions. Each billboard consisted of a large sign face supported by six wooden poles, embedded deeply into the ground to withstand hurricane-force winds.

The State took the position that its condemnation of the land did not include the billboards, as they were personalty which could be removed. Although Clear Channel had the right under its lease to remove the billboards, the signs could not be removed from the property and relocated as usable structures. The billboards were dismantled and destroyed after the State notified Clear Channel that the signs would have to be removed. Clear Channel dismantled the signs, cut the poles into pieces, and removed the materials from the property, at the State's expense.

Consistent with the State's position that the billboards constituted removable property not included in the condemnation, the special commissioners' awards to the landowners and Clear Channel for their respective fee simple and leasehold interests in the condemned property did not include compensation for the billboard structures themselves. Clear Channel and the landowners objected to the awards, and Clear Channel asserted counterclaims for inverse condemnation of the billboard structures. The State sought dismissal of the counterclaims, contending that Clear Channel's right under the leases to remove the signs established that they were not fixtures, but personalty. The trial court denied the State's request to dismiss the counterclaims. Upon the State's interlocutory appeals, the court of appeals affirmed.

The State settled with Clear Channel and the landowners for the compensation owed for their interests in the realty condemned. According to the State, the settlements accounted for all that had been taken in the condemnation, as it accounted for the value of the property's location for use in outdoor advertising and the permits allowing the site to be used for that purpose. Clear Channel maintained that it was entitled to separate compensation for the billboard structures. While continuing to dispute Clear Channel's entitlement to compensation for the billboards, the State asserted that, if Clear Channel were owed such compensation, it should be limited to the actual costs in building the signs. Clear Channel argued it should be compensated for the value of the billboards based on the business revenue they generated.

Each party's experts testified at trial as to their valuation of the billboards. The State's expert valued the billboards at $25,000 each, representing the replacement cost of the structures less depreciation. Clear Channel's expert used several different valuation methods to estimate the structures as a business. Utilizing the same cost approach as the State's expert, Clear Channel's expert calculated a value of $15,000 per billboard. However, when accounting for the business

revenue from the signs, Clear Channel's expert determined the value of the billboards to be over $700,000.

At trial, the jury found that the fair market value of Clear Channel's billboards was $268,235.27. The trial court rendered judgment on the verdict less a credit for the amount Clear Channel had already received based on the commissioners' award.

Court of Appeals:

The First Court of Appeals (Houston) affirmed, and the Texas Supreme Court granted the State's petition for review.

Texas Supreme Court's Holding:

The Texas Supreme Court rejected the State's contention that Clear Channel's right under the lease to remove the billboards was determinative of the signs' status as personalty. Citing United States Supreme Court precedent in *Almota Farmers Elevator & Warehouse Co. v. United States*, the Texas Supreme Court noted that the fair market value of a leasehold interest cannot exclude the likelihood that the lease would be renewed, and therefore a tenant's right to remove improvements when the lease ends cannot be invoked by a condemnor to limit compensation for the taking. Additionally, under the Texas Supreme Court's own test established in *Logan v. Mullis*, "[w]hen an improvement to land… cannot be removed except in useless pieces, it is almost certainly a fixtures under *Logan*… even if the tenant has a legal right to the pieces."

According to the Court, the *Logan* test turns on "the realities of the situation," and whether a unified fee-holder would have intended the improvements to become a permanent part of the land. This intent is evidenced by "the mode and sufficiency of annexation" and the "adaptation of the article to the use or purpose of the realty." The Court found such intent to be clearly evident in this case. Noting that the billboards were so firmly embedded in the earth that removal required that the poles be cut and the signs dismantled, and that the signs were perfectly suited to the use of the realty in advertising alongside a busy freeway, the Court concluded as a matter of law that the holder of a unified fee would intend that the billboard structures become a part of the real estate.

Although the billboards were fixtures, the Court reasoned that, due to the State's refusal to pay compensation for them, the signs had to be valued separately. However, the Court opined that separate valuation "can add nothing different to the overall compensation due," under the "undivided-fee rule." Pursuant to this rule, "when real property has been carved into different interests, the property is valued for condemnation purposes as if it were owned by a single party." Accordingly, the Court concluded that income from a business operated on the property is not recoverable, and should not be included separately from the land. The mere fact in this case that the billboards had been valued separately from the land did not create an additional right to compensation for lost business income.

While acknowledging that capitalizing income from the use of property is an acceptable way to value income-producing property, the Court noted that the property for which Clear Channel had utilized this method—its billboard advertising operations—was not the property taken. The State took only the land and the billboard structures, while Clear Channel remained free to operate its business elsewhere. The desirability of the location for billboard advertising, the Court stated, was presumably

taken into account in the form of the rents the landowner could command from those seeking to advertise there. However, even if these factors were not included in the settlement, the Court found that the settlement agreement foreclosed their further consideration.

Thus, the Court concluded that only the billboard structures remained to be valued, and such value may only be calculated on the basis of cost. Accordingly, the Court held that Clear Channel was not entitled to the higher value of the structures based on the income from its advertising operations. The Court held that evidence of that income was inadmissible, and its admission had "clearly resulted in an erroneous verdict." The Supreme Court reversed the judgment of the court of appeals, remanding the case to the trial court for further proceedings.

<u>Practice Pointers:</u>

1) Look to *Urban Renewal Agency v. trammel*, 407 S.W.2d 773, 774 (Tex. 1966) for further explanation of proper valuation and apportioning of compensation in condemnation proceedings for property subject to a lease.

Phillips v. Carlton Energy Group, LLC

Opinion Delivered May, 8, 2015
12-0255, 2015 WL 2148951

<u>Synopsis</u>

Acknowledging that the law need be no more skeptical of claimed market losses than the market itself, the Texas Supreme Court held that testimony regarding an actual offer by a wiling buyer to a willing seller was some evidence of fair market value when projected profits are considered in determining the value of a mineral prospect.

<u>Factual Background and Trial Court Proceedings</u>

In October of 2000, the Republic of Bulgaria granted CBM Energy Limited ("CBM") a three-year concession to explore for coalbed methane in an unproven, Bulgarian field. Because CBM could not fund the project itself, it sought out investors. Ultimately, Carlton Energy Group, LLC ("Carlton") partnered with CBM, providing direct investment in the project and attempting to find additional investors. The attempts by Carlton to find additional investors, however, proved unfruitful.

Separately, one potential investor, D.W. Mitchell, asked a University of Oklahoma professor that served as a leading expert on oil and gas reservoirs, Dr. Henry Crichlow, to evaluate the Bulgarian project. Because Dr. Crichlow's forecast of the project's viability was favorable, Mitchell gave Crichlow's report to Gene Phillips, a Dallas businessman who expressed interest in the project. Carlton offered Phillips a 10% interest in the project for $8.5 million, which would cover Carlton's obligations to CBM and leave Carlton with a 38% interest in the project. Phillips's signed a proposed agreement with Carlton.

Two weeks following the agreement between Carlton and Phillips, Dr. Crichlow became even more convinced of the economic potential of the Bulgarian project and urged Phillips to formally withdraw from his agreement with Carlton and take over Carlton's position with CBM. Phillips moved quickly to supplant Carlton in the Bulgarian project, securing a deal with CBM via business entities he owned and cutting out Carlton.

An initial round of litigation between CBM and the Phillips entities eventually ensued regarding management and control of the project. This litigation along with other difficulties hampered the project, ultimately resulting in delays and eventual termination of the concession by the Bulgarian government. Phillips lost $13 million invested in the project as a result.

In December of 2006, Carlton sued Phillips and his business entities involved in the Bulgarian project for breach of the proposed agreement between Carlton and Phillips and tortious interference with contract between CBM and Carlton.

Carlton claimed damages for the loss of its 38% interest in the project. To prove the fair market value of that interest, Carlton offered three models at trial. First, testimony by a Dr. Pete Huddleston drawing from the reports and projection prepared by Dr. Crichlow was presented to prove a potential range in value for the gas in the ground as forecast by Dr. Crichlow. Second, Dr. Huddleston estimated the value of the project, extrapolating projections based on potential wells to be drilled only in the vicinity of an already drilled exploratory well. Third, Dr. Huddleston assumed that Philip's agreement to pay Carlton $8.5 million for a 10% interest in the project showed that the value of the entire project was $85 million—$82 million plus the $ 3 million cost of drilling the three required wells—making the value of a 38% interest $31.16 million.

The jury returned a verdict for Carlton, finding Phillips breached the contract with Carlton and tortiously interfered with the Carlton-CBM contract. The jury found that the fair market value of Carlton's interest in the Bulgarian project at the time of breach and the tortious interference was $66.5 million.

The trial court refused to render judgment for the $66.5 million in actual damages found by the jury and suggested a remitter to $31.16 million. Carlton accepted the remitter in lieu of a new trial, but reserved the right to seek a higher amount on appeal

Court of Appeals

The First Court of Appeals reversed the trial court's judgment in part and rendered judgment on the verdict, awarding Carlton the $66.5 millions actual damages found by the jury.

Texas Supreme Court's Holding

Before the Texas Supreme Court, the key issue on appeal concerned whether the evidence of the fair market value of Carlton's lost 38% interest was too speculative to support the jury's award of damages. The Court first acknowledged that "lost profits" can only be recovered when the amount is proven with reasonable certainty. It then determined that this requirement of reasonable certainty of proof should apply not only when lost profits are sought as damages themselves, but also when lost profits are used to determine the market value of property for which recovery is sought.

A context specific approach to applying the reasonable certainty test in the current case was adopted. While acknowledging that "wildcatting" is an inherently speculative business, the Court nonetheless found that determination of fair market value via lost profits could still be accomplished:

> But when evidence of potential profits it used to prove the market value of an income-producing asset, the law should not require greater certainty in projecting those profits than the market itself would.

> The reasonable certainty requirement serves to align the law with reality by limiting a recovery of damages to what he claimant might have expected to realize in the real world had his rights not been violated; the requirement should not be used to deny a claimant damages equal to the value the market would have placed on lost property. The prospect of winning millions in the lottery is too small to support any award of potential proceeds for, say, theft of a ticket; still the ticket, itself has some value—the price it commands on the market. The law is wisely skeptical of claim of lost profits from untested ventures or in unpredictable circumstances, which in reality are little more than wishful thinking. But the law need be no more skeptical of claimed market losses than the market itself.

2015 WL 2148951 at *10.

Applying this approach to the valuation of Carlton's lost 38% interest in the Bulgarian project, the Court analyzed the three proposed valuation models proffered by Carlton. It first dismissed the value of gas in the ground model built off of Dr. Crichlow's reports, finding that the broad calculations and sweeping assumptions that did not include a basis for assessing the risks inherent in the venture nor provide a definite value, but instead a range of values could not support the jury's $66.5 million finding.
The second valuation model that projected production based on an existing exploratory well and assumed factors such as success rates and production volumes without supporting evidence beyond the parties' agreements was similarly rejected as resting on the same conjecture as the first gas-in-the-ground model. This second model also only offered a range of values rather than arriving at a definitive value.

In contrast to the first two models, the Court held that the final model that based the value of Carlton's 38% interest in the project based on Phillips' agreement to pay Carlton $8.5 million for a 10% interest constituted some evidence to support the jury's verdict. The key consideration in the Court's analysis was that the third valuation model was based on an actual offer by a willing buyer to a willing seller as opposed to the unverifiable assumptions present in the prior models. In this third model, those assumptions were subsumed in the assessment of the data by real investors in a market in which such interests are sold.

While the Court held that his third model provided some evidence to support the jury's verdict, it left the door open for Phillips to challenge the award as against the great weight and preponderance of the evidence, an issue it left to the court of appeals, based upon amount the lack of additional investment interest and the amounts other investors were willing pay.

Texas Supreme Court Oral Arguments

Plains Exploration & Production Co. v. Torch Energy Advisors, Inc.

Oral argument occurred February 24, 2015
Case No. 13-0597
Houston [1st District] Court of Appeals Opinion, 409 S.W. 3d 46

Issues Considered:

(1) Whether particular rights were retained by a party conveying mineral interests to the federal government under a mineral lease.

(2) Whether a party retains its rights in certain assets excluded by the mineral lease under an equitable right of recovery (money had and received).

Cade v. Cosgrove

Oral argument occurred March 24, 2015
Case No. 14-0346
Fort Worth Court of Appeals Opinion, 430 S.W. 3d 488

Issues Considered:

(1) Absent fraud or imposition, should a grantor of an unambiguous deed containing an obvious omission of a reserved interest be charged as a matter of law with knowledge of the contents of his deed on the date of execution?

(2) Assuming a party may negligently convey its mineral estate and still assert breach of contract, tortious interference, and civil theft claims against another party, did those causes of action accrue when the party asserting the action Cades were authorized to seek a judicial remedy?

Kachina Pipeline Company, Inc. v. Lillis

Oral argument occurred March 24, 2015
Case No. 13-0596
Austin Court of Appeals Opinion, 2013 WL 3186261 (not reported)

Issues Considered:

(1) Whether a pipeline company was entitled to charge a gas producer in for downstream compression services at a plant that predated the contract.

(2) Whether the producer was precluded by the contract's first-refusal option from building its own pipeline to deliver gas to a processing plant (and thereby bypassing the pipeline company).

State Courts of Appeals

Jetall Companies, Inc. v. Four Seasons Food Distributors, Inc.

2014 WL 6601213, (Tex. App.—Houston [14th Dist] 2014)

Synopsis:

Assignor cannot assign more rights than he has and an assignment that is void *ab initio* cannot give rise to a tortious interference claim

Overview

Jetall and Four Seasons were competing bidders seeking to purchase real property from PMCF Properties at an auction. Four Seasons, which was the successful bidder (Jetall the second highest), entered a contract with PMCF Properties, and deposited $300,000 in earnest money. However, before closing, Four Seasons reconsidered. Rather than breach, it attempted to assign its contractual rights to Jetall; however, the underlying purchase agreement contained an anti-assignment clause giving PMCF Properties sole and absolute discretion to consent to the assignment. It did not. Thus, the Jetall-Four Seasons deal fell through and Four Seasons went through with the property purchase.

Jetall then sued Four Seasons for breach of contract (the assignment agreement) and Four Season's vice-president for tortious interference. Four Seasons and its vice-president sought traditional summary judgments, which the trial court granted. This appeal ensued.

Jetall contended that (1) the contract at issue was the Jetall-Four Seasons assignment, not the Four Seasons-PMCF Properties purchase agreement; (2) the Jetall-Four Seasons assignment was not in and of itself void *ab initio*; and (3) Four Seasons could not rely on a contract to which Jetall was not a party to nullify and void the the Jetall-Four Seasons assignment agreement. The Fourteenth Court of Appeals disagreed, finding that Jetall's contentions assumed that Four Seasons agreed to sell Jetall the PMCF property. However, all the Jetall-Four Seasons assignment agreement did was to give to Jetall the rights Four Seasons had to purchase the property under the original Four Seasons-PMCF Properties purchase agreement, which contained the anti-assignment clause.

From this finding, the Fourteenth Court of Appeals ruled: (1) Four Seasons could not assign, nor could Jetall obtain, greater rights than Four Seasons had received under the purchase agreement; (2) Jetall's reliance on *Frankfurt v. Decker* (a misrepresentation case in which the could held that the lessor could not enforce the terms of his lease on his sublessor) was misplaced as *Frankfurt* dealt with a lease (not an assignment), the sublease did not incorporate the lease, and Jetall did not claim that Four Seasons misrepresented the purchase agreement (which would have been a tough sell as PMCF Properties gave Jetall an identical purchase agreement in advance of the auction); (3) the Four Seasons assignment was not wrongful, rather, it was a nullity; and (4) a void contract cannot serve as a basis for a tortious interference claim.

Note: No motion for rehearing was filed. No petition for review was filed. Deadlines have passed. Opinion appears to be final.

Flagstar Bank, FSB v. Walker

451 S.W. 3d 490 (Tex. App.—Dallas 2014)

Synopsis:

Formal fiduciary duty requires a recognized relationship or a legal document creating the duty with specific instructions; while informal fiduciary duty in a business transaction requires a special relationship of confidence and trust that existed before and apart from the transaction itself. Neither a formal nor an informal fiduciary duty existed between the lender and the title agent in this case. Bailment requires an agreement that a specific purpose will be realized and liability is based on a negligence standard.

Overview:

Flagstar brought suit against CTS for misappropriation of funds in a real estate transaction. Flagstar provided "warehouse loans" to Excel for the purpose of Excel providing mortgages to homebuyers. Flagstar also repurchased some of the mortgages through a "purchase agreement," which gave Flagstar a continuing interest in those mortgages. Excel underwrote mortgages to 40 properties in Florida, which were presented to Excel by Loomis. In turn, Loomis required that Lender Services (and its principal, Gekko) serve as the escrow agent. Lender Services subcontracted the title work to CTS, and First American Title Insurance (the title insurer) appointed CTS as the title agent. Ultimately, as the individual deals were about to close, Flagstar wired the funds in CTS's "escrow" account. CTS took out its fees and the title insurance premium and then wired the remainder to Lender Services. Notably, before wiring the remaining fund to Lender Services, CTS did not pay off the pre-existing liens on the properties. Lender Services absconded with all the remaining funds. Seeking to recover the value of the unpaid liens, Flagstar sued CTS for breach of fiduciary duty and bailment, among other theories. (It sued Gekko and Lender Services in separate litigation and obtained a $27 million default judgment.)

Flagstar focused its arguments on the formal fiduciary duty. The court acknowledged that an escrow agent owes a fiduciary duty as a matter of law, including the duty to exercise a high degree of care to conserve the money received and pay only those entitled to receive it. However, "an escrow agent must be appointed through a specific legal document that imparts a specific legal obligation" and neither the document nor the specific instructions existed in this case.

Flagstar asserted that, while not the escrow agent (Lender Services was the escrow agent), CTS *functioned* as an escrow agent and pointed to a constellation of evidence to show this effective status. For instance, CTS conceded that: it never before received all the mortgage money while only doing the title work (receiving all the funds being an indication it was an escrow agent); the money was wired into CTS's "escrow" account; CTS was listed on certain documents as the "closer" (a term usually reserved for the escrow agent); other HUD forms listed CTS as the "sub-escrow" agent; CTS did more than just the title work, including some of the escrow agent's work; CTS solicited Flagstar's business and positioned itself to serve as an escrow agent; and, based on industry custom and practice, Flagstar reasonably expected that CTS would pay the liens before forwarding the remaining funds to Lender Services. The court was not persuaded, particularly given some contrary evidence on each point.

The court factually distinguished two case *City of Fort Worth v. Pippen* (a title agent held liable for improperly paying out fund where it had been given specific instructions on whom to pay) and *NETCO v. Montemayer* (a case holding a title agent liable as it was serving in a dual capacity, i.e. both as escrow and title agent). Here, CTS had been given

no specific instructions and was not acting in a dual capacity.

With regard to bailment, the court set forth the basic elements:

> To create a bailment, there must be (1) delivery of personal property from one person, the bailor, to another, the bailee, for a specific purpose; (2) acceptance of delivery by the bailee; (3) an express or implied contract between the parties that the specific purpose will be realized; and (4) an agreement between the parties that the property will be either returned to the bailor or dealt with according to the bailor's direction. To establish a bailment relationship, the evidence must demonstrate that the entity sought to be charged as bailee knew that it was assuming such relationship and responsibilities before it will be charged with the duties of bailee.

Id. at 505. However, here there was no express bailment agreement. Flagstar asserted an implied bailment contract. The court noted that:

> A bailment relationship is governed by principles of negligence. That is, a bailment contract gives rise to a duty on the part of the bailee to take reasonable care in safeguarding the property that is the subject of the bailment. Thus, even if there was a bailment contract, Flagstar was still required to prove that CTS breached its duty to exercise reasonable care to protect the funds.

Id. Without deciding whether an implied bailment contract existed, the court concluded that any implied bailment agreement would not have given rise to liability as the jury returned a verdict that CTS was not negligent.

Note: No motion for rehearing was filed. No petition for review was filed. Deadlines have passed. Opinion appears to be final.

Abel v. Alexander Oil Company

2014 WL 6851587 (Tex. App.—Houston [14th Dist.] 2014)

Synopsis:

Guaranty strictly construed and, therefore, limited to sole proprietorship's debts, but not to individual's debts.

Overview:

John Steele operated a trucking business, John Steele Trucking, as a sole proprietorship. In that capacity, he bought fuel from Alexander Oil Company (AOC). In 2006, AOC required that John's mother, Rena Abel, sign a personal guaranty for the debts of John's company. In 2008, John's enterprising wife created a limited liability company, John Steele Trucking, L.L.C., and transferred all assets of the sole proprietorship into the LLC. Likewise, John became an employee of the LLC and the sole proprietorship effectively stopped doing business. As an LLC, the business grew. Although John's wife notified many entities (including TxDOT and their insurer) of the changes, nobody informed AOC. John, personally as well as his fleet, continued to buy fuel from AOC. In 2010, the business began experiencing difficulties. John's wife met with AOC and, at this meeting, advised of the change in the business organization. At that time, AOC made John, his wife, and the LLC sign guarantees. However, AOC did not require Abel to guarantee the debts of the LLC. By the end of 2010, the debt was over $230,000; however, the oldest unpaid invoice

dated from 2009, over a year after the conversion from the sole proprietorship to the LLC.

AOC brought suit on account against John, his wife, the LLC, and Abel. In her answer, Abel denied the debt and pled the affirmative defenses of novation and material alteration. At trial, the jury found favorably for Abel on both defenses; however, the trial court granted a JNOV and entered judgment against debts accrued by John personally as an agent for an undisclosed principal between 2009 and the 2010 meeting at which AOC learned of the business reorganization.

Applying the rule of *strictissimi juris,* (i.e. "a guarantor may require that the terms of his guaranty be strictly followed, and that the agreement not be extended beyond its precise terms by construction or implication"), the court noted that Abel guaranteed only the sole proprietorship, not John's personal debts. 2014 WL 6851587 at *4-5. In 2009 and early 2010, his debts were personally incurred as an agent for an undisclosed principal, not incurred for the sole proprietorship. Thus, Abel did not guarantee those debts.

Note: No motion for rehearing was filed. No petition for review was filed. Deadlines have passed. Opinion appears to be final.

White v. Zhou Pei

452 S.W. 3d 527 (Tex. App.—Houston [14th Dist.] 2014),

Synopsis:

Fraud by non-disclosure: Shareholders entitled to corporate information and supplying some, but not all information, was misleading. Defendant not entitled to settlement credit under Chap. 33 as no finding of responsibility of settling parties and Defendant waived right to seek common law one satisfaction rule credit.

Overview:

This case involves a corporate divorce. Taurus Manufacturing had four shareholder, each of whom was on the board of directors and two were officers. The company had never turned a profit. It achieved enough success to begin paying shareholders (who were also employees) salaries, but not enough success to pay the deferred salaries. In March 2004, Taurus manufacturing had debts and the four shareholders personal guarantees were up for renewal, but the two non-officer shareholders refused to renew their guarantees.

At a March 2004 board meeting, the four shareholder/directors discussed possible buy-out options (the two shareholder/officers buy-out the non-officer shareholders and vice-versa). The officer shareholders formed a new corporation (Optimas) and began working on an asset purchase agreement to allow Optimas to buy out Taurus. At about this time, one of the non-officer shareholders' attorney sent a letter to officers seeking information to pursue a buyout. The officer supplied some of the requested information, but not all and admitted that he did not send all of the information, as it might have caused the non-officer shareholder to scuttle the planned Optimas-Taurus buy-out.

Eventually, Optimas and Taurus entered the asset purchase agreement and, through a series of transactions, three more Optimas entities, in which the "Able Defendants" were investors, bought the assets of the preceding Optima entity.

The case proceeded to a jury trial. On the first day of trial, the non-officer shareholder plaintiffs settled with the Able Defendants.

Eventually, the plaintiffs obtained a jury finding on fraud by non-disclosure; however, the defendants did not submit the liability of the settling defendants. The trial court entered judgment for the plaintiffs and refused to give a settlement credit as there was no percentage fault attributed to the settling defendants. All parties appealed.

On the fraud by non-disclosure, the officer shareholders argued that a confidential or fiduciary relationship had to exist; however, the court recognized four situations in which a duty to disclose arises:

> (1) when the parties have a confidential or fiduciary relationship; (2) when one party voluntarily discloses information, which gives rise to the duty to disclose the whole truth; (3) when one party makes a representation, which gives rise to the duty to disclose new information that the party is aware makes the earlier representation misleading or untrue; or (4) when one party makes a partial disclosure and conveys a false impression, which gives rise to a duty to speak.

452 S.W. 3d at 539. The concealed information must be material, *i.e.* of such a nature that a reasonable person would attach importance to it and would be induced to act on it in determining his choice of actions in the matter. *Id.* The court noted that a shareholder has a right to inspect corporate documents. And, while a fiduciary or confidential relationship did not necessarily exist, the officer shareholders were guilty of providing incomplete information that created a substantially false impression and failed to provide the full truth concerning Taurus's status.

The officer shareholders next argued that the non-officer shareholders did not suffer "injury as a result of acting without knowledge of the undisclosed facts;" however, the court noted that acting can encompass both affirmative action as well as forbearance. Had the non-officers known of the pending asset purchase agreement, they would have taken action to prevent it or reverse it.

The court reversed the plaintiff's damages for breach of fiduciary duty were outside the range of any evidence presented and duplicative of damages awarded on the fraud claim. The court cited existing case law for the proposition that "[T]he jury may not 'pull figures out of a hat.' However, it is well-settled that, when the evidence supports a range of values, as opposed to two distinct options, a finding within that range is an appropriate exercise of the jury's discretion." *Id.* at 542.

The officer shareholders complained that the trial court refused to apply a settlement as required by Tex. Civ. Prac. & Rem. Code § 33.012(a),(b). The majority noted that Chapter 33 applies only if the defendants obtained a proportionate responsibility percentage finding, which they did not submit. The dissent, which wrote only on this issue, pointed out that a recent Texas Supreme Court "contains judicial dicta construing section 33.002(a) to mean that Chapter 33 applies to any cause of action based on tort, without any requirement of a percentage-of-responsibility finding." *Id.* at 551. Thus, the dissent would have allowed the settlement credit under § 33.012. Alternatively, the defendants argued that, where Chapter 33 does not apply, the common law one satisfaction rule does and mandates a settlement credit. Unfortunately, this issue was not preserved on appeal.

Note: No motion for rehearing was filed. No petition for review was filed. Deadlines have passed. Opinion appears to be final.

Practice Pointer: No. 1

In any tort case, always plead, prove, and submit settling parties and responsible third parties proportionate responsibility to the jury. If for any reason you are prohibited from doing so, seek a common law one satisfaction rule credit.

Grant Prideco, Inc. v. Empeiria Conner LLC

2015 WL 1405903 (Tex. App.—Houston [14th Dist] 2015)

Synopsis:

Stock purchase indemnity provision: "arose" is broader than "accrued."

Overview

Grant Prideco bought the stock of Aggregate Plant Products Company from Empeiria Conner. The Stock Purchase Agreement contained a provision requiring Empeiria Conner to indemnify Grant Prideco for:

> "[a]ny Claims of Product Liability for which the facts, events and circumstances with respect to such Products Liability Claim first arose prior to the Closing Date ('Product Liability Claim')."

2015 WL 1405903 at *3. Grant Prideco sought indemnity for a lawsuit filed by a product liability claimant whose accident occurred after the closing date. The parties filed countervailing motions for summary judgment and the trial court (1) granted Emeiria Conner's motion, apparently agreeing with its interpretation that the provision terms "first arose" was synonymous with accrue and (2) denying Grant PrideCo's motion, apparently rejecting its position that "fact, events and circumstances … first arose" could include actionable conduct occurring before the closing date.

The majority did not find the provision ambiguous. Instead, citing case law defining "accrued" and other defining "arose," it concluded that "arose" is broader than "accrue", rejected Empeiria Conner's argument that arose is synonymous with accrue, but found that Grant Prideco failed to prove conclusively when the facts, events and circumstances first arose. The dissent would find that the language is ambiguous (pointing out the repeated use of the article "the" instead or an alternative "any") and require the finder of fact to determine its meaning.

Note: No motion for rehearing was filed. No petition for review was filed. Deadlines have passed. The court's mandate was due to be issued the date (May 28, 2015) the editors last reviewed this case. Opinion appears to be final.

Childress Engineering Services, Inc. V. Nationwide Mutual Insurance Company

456 S. W. 3d 725 (Tex. App.—Fort Worth 2015)

Synopsis:

Breach of Contract (failure to indemnify) against engineering firm does not require certificate of merit under TCPRC §150.002

Overview:

Meritage Homes contracted with Childress Engineering to provide design and engineering specifications for home

foundations. The contract included a provision requiring Childress Engineering to indemnify Meritage Homes. After a homebuyer brought a suit against Meritage Homes alleging a defective foundation, Childress Engineering refused to honor its indemnity obligations. Nationwide, Meritage Homes insurer, brought a separate action to enforce the indemnity provision. Childress Engineering moved to dismiss for lack of a certificate of merit under Texas Civil Practice & Remedies Code §150.002. The trial court agreed with Nationwide's position that §150.002 was not intended to cover indemnity claims. This accelerated appeal ensued.

Relying heavily on a previously decided breach of contract case interpreting the 2005 version of the statute and ruling that such cases do not require a certificate of merit, the Fort Worth Court of Appeals held that indemnity claims under the current version of the statute also do not require a certificate of merit. The court noted that (1) courts are perfectly capable of determining the merits of contract claims without a certificate or other expert opinion and (2) a breach of contract does not arise from the engineer's provision of professional services, as required by the statute. The court also noted that the Texas Supreme Court had recently held that defendants and third-parties need not file a certificate of merit. (See the discussion of *Jaster v. Comet II Constr, Inc.,* 438 S.W.3d 556 (Tex. 2014) in the TADC Fall 2014 Commercial Law Newsletter, Pg. 16.)

Note: No motion for rehearing was filed. No petition for review was filed. Deadlines have passed. Mandate has issued. Opinion appears to be final.

Sanders Oil & Gas GP, LLC v. Ridgeway Electric

2015 WL 590874 (Tex. App.—El Paso 2015)

Synopsis:

Actual and apparent authority proved to establish agents power to enter contract for one of two defendants, but not the other.

Overview:

R Ridgeway Electric sued Sanders Oil & Gas Ltd. ("Ltd.") and Sanders Oil & Gas GP LLC ("LLC") for breach of contract on unpaid invoices arising from work Ridgeway Electric performed at the request of Johnson. Johnson identified himself as an employee of Sanders Oil, which he knew was owned by Gail Sanders, but otherwise could not identify the corporate entity. Some invoices sent to Gail Sanders at Sanders Oil Inc. were paid. Most were not. Evidence at trial showed that Gail Sanders was the CEO of Ltd., but no evidence showed her relationship with LLC. At trial, the jury found that Johnson had actual or apparent authority to entered into an oral agreement on behalf of both LLC and Ltd and split the damages between the two entities.

On appeal, Ltd and LLC (strangely represented by the same attorney) raised numerous issues, including agency, existence of a valid contract, breach of the contract, consent to the essential terms of the contract, and apportionment of damages. The El Paso Court of Appeals gives a hornbook recitation of the law of actual (both expressed and implied) and apparent authority and, applying the same, found that Johnson had both actual and apparent authority to enter the agreement for Ltd, but not for LLC. Therefore, the El Paso Court of Appeals affirmed the judgment against Ltd. (for half of the past due invoices), but reversed and rendered the judgment on the breach of contract claim against LLC (on the other half of the unpaid invoices).

Note: A motion to extend the deadline for filing a motion for rehearing was granted extending the deadline until April 13, 2015. No motion for rehearing was filed. No petition for review has been filed. However, as of the last time the editors checked the El Paso Court of Appeals website, the petition had not been reported to be filed. Additionally, the Appellants counsel, who obtained the extension, has since withdrawn. Mandate had not yet issued.

Practice Pointer: No. 1

The appeal was considered on legal sufficiency grounds. At least one point of error raised factual insufficiency, but neither the briefing nor the prayer raised factual sufficiency. Therefore the court of appeals did not consider it. *See* Fn. No. 3 2015 WL 590874 at *8. If you preserve and raise a point of error, be sure to follow through with briefing, record citations, and prayer.

Miller v. Argumaniz

2015 WL 595468 (Tex. App.—El Paso 2015)

Synopsis:

Statute of frauds was plead only as to breach of contract and not fraud and breach of fiduciary duty; lost profits are recoverable under a breach of fiduciary duty theory, but property market value is not lost profits; owner's market value opinion given under the "property owner rule" can be based on a 4 year old appraisal; and common law fraud will not support an award of attorneys' fees.

Overview:

Argumaniz owned an interest in a warehouse, but was having difficulty covering the note on it. She formed a company with Miller with both being officers, directors, and sole shareholder. Miller orally agreed to finance the warehouse's purchase and then transfer it into the company. Instead, Miller purchased the note and subsequently foreclosed, never tendering the warehouse to the company. Argumaniz, individually and for the company, sued Miller claiming fraud, breach of fiduciary duty, and breach of contract.

1) Statute of frauds is an affirmative defense that must be pled and an allegation in an MSJ will not suffice. Here, Miller pled statute of frauds, but did so specifically as to the breach of contract claim, not the fraud and breach of fiduciary duty claims. Miller received a partial summary judgment finding that the statute of frauds barred the breach of contract claim. However, the El Paso Court of Appeals found that Miller waived the argument that statute of frauds barred Argumaniz's fraud and breach of fiduciary duty claims.

2) Past and future lost profits are recoverable under breach of fiduciary duty theory, if shown to be natural and probable consequence and if supported by objective facts, figures, and data. Argumaniz presented no such data; rather, she argued that the property's market value equated to lost profits. Damages for lost profits are for the loss of the company's income, not the value of property promised but not delivered (Further, this would have amounted to a double recovery as the jury awarded the property value as the economic damages under Argumaniz's fraud recovery.) And, proof of lost rent is not evidence of loss profits. Rents are gross revenue, not net profits.

3) Miller did not dispute that Argumaniz could recover her loss of interest in the property, if she could show the market

value and the extent of her interest in the property. The El Paso Court of Appeals found that the "property owner rule" allowed Argumaniz to testify on the property value based on a 13 year old appraisal (although only 4 years prior to the foreclosure at issue, although recognizing that an appraisal performed closer to the date of foreclosure would have been given more weight), which was hearsay (however, like an expert, she could rely on hearsay). The court also held that extent of her ownership interest (there were several owners) goes to the amount of damages, not the existence of damages. Miller raised only a legal sufficiency challenge to the damages, arguing that Argumaniz had not shown them with the requisite reasonable certainty, but the court found that the reasonable certainty requirement applied only to lost profits, not fraud damages. Further, the court noted that Miller was really complaining about excessive damages; however, excessive damages are raised by a factual sufficiency challenge, which Miller had not made.

4) Common law fraud will not support an award of attorneys' fees. Although Argumaniz plead a cause of action for statutory fraud on a transaction involving stock in a corporation under Texas Civil Practice & Remedies Code § 27.001, the fraud upon which the jury was charged and Argumaniz recovered was common law. Therefore, the judgment would not support an award of attorneys' fees.

Note: The motion for rehearing was denied on May 14, 2015. A motion to correct the judgment was filed on May 18, 2015. The deadline for filing a petition for review has not yet passed as of June 1, 2015.

Karns v. Jalapeno Tree Holdings, LLC

2015 WL 737926 (Tex. App.—El Paso 2015, pet. rev. filed)

Synopsis:

Letters of Intent can be enforceable, although this one was not due to an unfulfilled condition precedent.

Overview:

Karns, who owns the El Fenix restaurant chain, sought to purchase the Jalapeno Tree chain. The parties reached a Letter of Intent ("LOI") the deal fell apart. Karns sued Jalapeno Tree for breach of the LOI. The case was tried by a special judge, who entered a take nothing verdict in favor of Jalapeno Tree.

"We hold that the LOI created an enforceable agreement similar to an option contract that froze the status quo between the parties for a period of time, prevented Jalapeno Tree from engaging in outside negotiations, and required both parties to further negotiate the terms of a nascent future contract in good faith. We also hold that the trial court's finding that Jalapeno Tree fulfilled its obligations under this agreement by negotiating in good faith is supported by legally and factually sufficient evidence. Finally, we conclude that even if the LOI outlined all essential terms of sale and would have otherwise bound Jalapeno Tree, no enforceable sales contract formed because the LOI's plain language shows that completion of the underlying transaction hinged on an unfulfilled condition precedent: the achievement of a subsequent, definitive agreement." 2015 WL 737926 at *3.

Note: Karns filed his petition for review on May 7, 2015.

Practice Pointer: No. 1

This case involved the use of a special judge under TCPRC Chap. 151, which allows the parties to agree to have the case or issues in the case tried by certain qualified former or retired judges. HB 1923, which deals with Chapter 151 and passed the Senate when last checked, does not significantly change the provisions of this chapter.

Heritage Constructors, Inc. v. Chrietzberg Electric, Inc.

2015 WL 3378377 (Tex. App.—Texarkana 2015)

Synopsis:

Statute of frauds bars stated to take greater than one year, even if possibly could be performed in less than a year. Statute of fraud bars recovery of benefit of the bargain, but not reliance damages, sought in promissory estoppels and fraud claims. Likewise, benefit of the bargain damages are not recoverable in negligent misrepresentation claims; rather, there must be an injury independent of the breach of contract.

Overview:

TexAmerica planned to build a water treatment facility. Heritage bid on the job as a prime contractor. As part of its bid package, Heritage relied on Chrietzberg, the lowest bidder for the electrical work. When time came to sign the subcontract, Chrietzberg backed out requiring Heritage to use the next lowest bidder at an increased cost of $177,000. Heritage sued Chrietzberg claiming breach of contract, promissory estoppel, and negligent misrepresentation. The jury returned a verdict finding against Chrietzberg on all counts and awarding $177,000 on the first two counts and $0.00 damages on the negligent misrepresentation count.

On appeal, the Texarkana Court of Appeals affirmed "[t]he take-nothing judgment favoring Chrietzberg and the denial of Heritage's claims for negligent misrepresentation, but reverse the judgment favoring Heritage and render a take-nothing judgment, because (1) the statute of frauds bars Heritage's claim for breach of contract, (2) there is no evidence of damages recoverable based on promissory estoppel, (3) denying Heritage's claims for negligent misrepresentation was proper, and (4) Heritage's recovery of attorney fees also fails." 2015 WL 3378377at *1.

With regard to the statute of fraud issue, there was no one single, comprehensive signed document, The documents on which Heritage relied did not even name Heritage, and the TexAmerica plans and other documents all contemplated a 19 month project beginning a couple of months after the bidding process. Heritage tried to show that the series of documents and communications constituted a contract satisfying the statute. However, the Texarkana Court of Appeals disagreed and recited the following standards:

a. "[T]here must be a written memorandum which is complete within itself in every material detail, and which contains all of the essential elements of the agreement, so that the contract can be ascertained from the writings without resorting to oral testimony."
b. "If more than one writing exists, it is not sufficient that they refer to the same transaction, there must be an express reference to the agreement in the signed writing that incorporates the unsigned writing."

c. "[T]he reference to the first document contained in the second document must give sufficient details of the terms of the agreement embraced in the first document to satisfy the statute of frauds."

d. "Further, if the agreement explicitly fixes a time for performance greater than one year, the mere possibility that it may be performed within one year is not enough to satisfy the statute."

e. "[T]he writings must be complete in every material detail and contain all of the essential elements of the agreement so that the contract can be ascertained from the writings without resorting to oral testimony. One of the essential elements of the agreement is that it identify the parties to the agreement."

Id. at *3-4 and 6 (internal citations omitted). Heritage sought to avoid the statute of frauds using the partial performance exception, but the court refused to accept this characterization noting:

> To overcome the operation of the statute, the performance "must be unequivocally referable to the agreement and corroborative of the fact that a contract actually was made." In addition, this exception is enforced only when "denial of enforcement would amount to a virtual fraud in the sense that the party acting in reliance on the contract has suffered a substantial detriment, for which he has no adequate remedy, and the other party, if permitted to plead the statute, would reap an unearned benefit."

Id. at *6 (internal citations omitted). In this case, Heritage would be the party acting in reliance and was required to show how it relied to its own detriment; however, it only pointed to acts of Chrietzberg, not to any action Heritage took.

With respect to promissory estoppel, the court ruled that only reliance damages, not benefit of the bargain or lost profits, are recoverable. Cases to the contrary cited by Heritage were either not on point or pre-dated Texas Supreme Court opinions in *Haase* and *Sonnichsen*. Heritage submitted the breach of contract and promissory estoppel damages in the same issue and there was no evidence distinguishing its promissory estoppel damages from its benefit of the bargain (i.e. breach of contract damages. For similar reasons, Heritage could not recover on its negligent misrepresentation claim.

Note: No motion for rehearing was filed. No petition for review was filed. Deadlines have passed. Mandate has issued. Opinion appears to be final.

Arbor Windsor Court, Ltd. v. Weekley Homes, LP

2015 WL 1245548 (Tex. App.—Houston [14th Dist.] 2015)

Synopsis:

Arbor entered into an agreement to buy land and develop 32-35 lots that Weekley would buy. Arbor financed the purchase price and secured the loan with deeds of trust for the land. Arbor and Weekley set a rolling schedule for development and purchase of the lots. Weekley fell behind on the purchases. Arbor was therefore unable to service the loan and went into default. Arbor communicated the default with Weekley in hopes of jointly working out a cure. At Weekley's VP's request, Arbor did not send Weekley the notice of default. Arbor and Weekley did not cure. The bank foreclosed

and Weekley snapped up the remaining 17 lots at auction.

Overview:

Arbor sued the bank to enjoin foreclosure and filed a *lis pendens*, Weekley intervened after foreclosure to quiet title, Arbor counterclaimed against Weekley for breach of contract, and Weekley countered with its own claim against Arbor for breach of contract. At trial, the jury found in answer to Question No. 1 that Arbor had not performed a condition precedent (providing 15 notice of default), did not answer (due to a faulty predicate) Question No. 2 as to any excuse for failing to perform a condition precedent, found in answer to Question No. 3 that Weekley had failed to comply with the agreement (an instruction gave four possible excuses), and found in answer to Question No. 4 that Arbor had not failed to comply with the agreement (an instruction gave the same four possible excuses). Both parties moved for judgment. The trial court denied Arbor's and granted Weekley's. The sole bais for Weekley's motion was that the failure to perform a condition precedent barred Arbor's recovery. Thus, the primary issue on appeal was whether the agreement's notice provision constituted a covenant or a condition precedent.

The majority, noting that this was the first case construing a provision that couples "covenants and agrees" with "prior to," sided with Arbor explaining:

a. Texas law disfavors conditions precedent.
b. "[T]he Texas Supreme Court instructs that '[i]n construing a contract, forfeiture by finding a condition precedent is to be avoided when another reasonable reading of the contract is possible'."
c. "To glean the parties' intent to create a condition precedent, we look for conditional language such as 'if,' 'provided that,' or 'on condition that.' Our task is to construe the entire agreement, and that task is not altered by the parties' use of "magic words" in the contract or the absence of such words."
d. Conditioning some obligations does not condition others; the condition precedent must be linked to the obligation at issue.
e. "Covenants and agrees" are not dispositive and do not foreclose the provision being a condition precedent.
f. Concluding the provision is a condition precedent does not lead to an absurd result as this is a condition to perform an obligation in an existing agreement as opposed to a condition precedent to formation of the agreement.
g. Looking at the agreement in its entirety, other provisions support this interpretation as they alternatively (a) create other conditions precedent and (b) demonstrate that the parties knew how to draft a provision avoiding a condition precedent.(the absence of such language in the provision at issue suggests the intent to make a condition precedent).

2015 WL 1245548 at *3-4.

On the other hand, the dissent, in a point by point refutation of the majority that exceeded the majority's length, concluded that the provision created a covenant only, not a condition precedent.

> To hold that "Seller and Purchaser covenant and agree" is a condition precedent ignores the plain words used. The language does not set up an event which must occur before there is a right to performance. At best, the language sets a timeframe for a party to cure a default, prior to pursuing the return/release of earnest money, extending time for performance, or seeking specific performance. Further, the provision does not preclude a breach-of-contract action in the event there is no notice—it merely requires that the defaulting party cure the default before the non-defaulting party pursues the remedies in the Agreement.

Id. at 12. Notably, the identified remedies in the agreement were only retaining the earnest money and terminating the agreement. Further, the agreement did not limit Arbor to the identified remedies. Thus, it was free to file a breach of contract suit and was not required to provide notice before doing so. The dissent also noted that abatement is the usual remedy for failure to provide notice, but Weekley never raised lack of notice, never sought abatement, and showed no harm resulting from lack of notice.

Note: Motion for reconsideration *en banc* filed April 22, 2015. No action had been taken on the motion as of May 31, 2015.

Practice Pointer: No. 1

Great case to start your condition precedent research.

Kaldis v. Crest Finance

2015 WL 1120968 (Tex. App.—Houston [1st Dist.] 2015)

Synopsis:

Business Line of Credit, like a credit card, is an open account, not a debt for the purposes of the statute of limitations and, therefore, TCRPC §16.004(c) and not §16.004(a)(3) applied. Parties did not cease doing business until creditor notified debtor that account was closed.

Overview:

Kaldis took out a $50,000 business line of credit from Wachovia in May, 2007. He made timely payments through August, 2008. Thereafter, he made no more payments. Wachovia sent monthly invoices from September through December, 2008, showing increasing balance on the account (due to application of late fees to the account balance), late fees, and decreasing available credit. Beginning in November, 2008, the invoices further notified Kaldis that funds access had been terminated. In January, 2009, Wachovia closed the account. In March, 2009, Wachovia wrote off the account. Thereafter, Wachovia assigned the account to Crest Finance, which filed suit in December, 2012.

Kaldis appeared and pled a statute of limitations defense claiming that the Crest Finance had brought a suit on a debt, which would be governed by Texas Civil Practice & Remedies Code §16.004(a)(3) and, therefore, accrued no later than August 2008. Crest Finance provided testimony that the line of credit was a revolving account whose terms could be modified and, therefore, the line of credit was an open account governed by Texas Civil Practice & Remedies Code §16.004(c), which permits suit in four years from when the parties cease doing business.

The Houston Court of Appeals recited the elements of an open account as "(1) transactions between parties, (2) creating a

creditor-debtor relationship through general course of dealing, (3) with the account still being open, and (4) with the expectation of further dealings." 2015 WL 1120968 at *4. The court determined that the testimony at trial proved an open account and sided with Crest Finance. Therefore, the court ruled that, under the facts of this case, the cause of action on the open account accrued no earlier than January, 2009, when Wachovia closed the account.

Note: Motion for rehearing denied May 14, 2015. Appellant's motion to withdraw as counsel granted on May 28, 2015. Motion for reconsideration *en banc* was due May 29, 2015. A search on May 31, 2015, did not reflect its filing. Petition for review due June 28, 2015. However, given that one of the grounds for the motion to withdraw was non-payment, Kaldis may have difficulty finding an attorney to pursue his defense further.

CTL/Thompson Texas, LLC v. Starwood Homeowner's Association, Inc.

2015 WL 1407716 (Tex. App.—Fort Worth 2015, pet. filed)

Synopsis:

TCPRC Chap. 150 Certificate of Merit may be dismissed without prejudice.

Overview:

Starwood brought a professional services action against CTL, an engineering firm. The district court denied CTL's motion to dismiss for failure to comply with the certificate of merit requirements of Texas Civil Practice & Remedies Code §150.002. CTL appealed, and Starwood subsequently non-suited its claims. The court of appeals, 352 S.W.3d 854, dismissed the appeal as moot. CTL filed a petition for review, and the Texas Supreme Court, 390 S.W.3d 299, reversed and remanded for consideration of the motion to dismiss. On remand, the court of appeals reversed the denial of the motion and remanded for a determination of whether the dismissal should be with or without prejudice. The district court entered order dismissing the action without prejudice. Thereafter, Starwood re-filed its claims in a new action (and with a new and improved certificate of merit, the adequacy of which CTL did not challenge). The district court, denied CTL's motion to dismiss based on the insufficiency of the original certificate of merit. CTL appealed. In a split decision, the court of appeals affirmed. On May 11, 2015, CTL filed its petition for review with the Texas Supreme Court.

The majority reasoned:

> The plain language of section 150.002(e) provides that a certificate-of-merit dismissal "may be with prejudice." Tex. Civ. Prac. & Rem. Code Ann. § 150.002(e) (West 2011). "May," when used in a statute, indicates that the provision is discretionary, not mandatory. Tex. Gov't Code Ann. § 311.016(1) (West 2013). . . . The plain language of section 150.002(e) authorizes a dismissal without prejudice; we reject CTL's contention that a dismissal without prejudice entitles CTL to an automatic dismissal of subsequently refiled claims.

2015 WL 1407716 at *2. The majority found this consistent with *TIC N. Cent. Dallas 3, L.L.C. v. Envirobusiness, Inc.,* 2014 WL 4724706, (Tex. App.–Dallas 2014, pet. filed), which rejected similar arguments in reaching its decision that the plaintiff could dismiss its petition without prejudice and file a certificate of merit with its re-filed petition.

The dissent argued that statutory interpretation does not permit dismissal without prejudice. If the intent was to permit professional engineering firms to efficiently extricate themselves from litigation, then this suit is proof positive that allowing dismissals without prejudice frustrate the statutory intent as:

> Thus, this case has involved no less than four different district courts, two different appellate courts, three different plaintiff's petitions, and over four years of litigation. The legislature could not have intended section 150.002 to operate in such an inefficient manner.

Id. at *4.

Note: As mentioned in the blurb, CTL filed its petition for review on May 11, 2015. We would also note that the Texas Supreme Court requested responses to both petitions for review in *TIC N. Cent. Dallas 3, LLC v. Envirobusiness, Inc.* This could make a good companion case.

ConocoPhillips Company v. Noble Energy, Inc.

2015 WL 1456444 (Tex. App.—Houston [14th Dist.] 2015)

Synopsis:

Exchange Agreement, by which two oil companies swapped Louisiana oil leases, was an Executory Agreement as defined by Bankruptcy Code §365 and, as such, was assigned to Noble's predecessor obligating Noble to defend and indemnify ConocoPhillips.

Overview:

In 1964, ConocoPhillips' predecessor leased portions of the Johnson Bayou field in Cameron Parish, Louisiana. In 1994, ConocoPhillips' predecessor entered an Exchange Agreement with two companies (Alma and TPIC) swapping Louisiana leaseholds by assigning their interests and then indemnifying the assignee. Alma's operating affiliate operated the field for 5 years and then Alma and the affiliate sought Chapter 11 bankruptcy. As part of the bankruptcy, Noble's predecessor purchased number of Alma's assets through an "Asset Purchase Agreement." Eventually, in 2010, Cameron Parish School Board and the State of Louisiana sued ConocoPhillips, among others, for environmental damage. ConocoPhillips sued TPIC and Noble for breach of contract and seeking indemnity. Conoco Phillips obtained a summary judgment against TPIC. However, the trial court agreed with Noble and granted it a summary judgment holding that it had no liability for the indemnity obligations undertaken by Alma in the Exchange Agreement. ConocoPhillips appealed.

The Houston Court of Appeals began by noting that indemnity agreements are construed under normal rules of contract construction and then proceeded to untangle various contracts. It recognized that, in certain successor-liability contexts:

> "a purchaser of assets does not necessarily automatically assume liabilities and obligations of the seller . . . . Moreover, in the context of assignment of a contract, the assignee only can be held liable under the predecessor's contract if the assignee expressly or impliedly assumes the predecessor's contractual obligations.

2015 WL 1456444 at *9. The court determined that the penultimate question was

whether the Exchange Agreement constituted an executor contract under § 365 of the Bankruptcy Code (the exclusive provision for dealing with executor contracts in bankruptcy.) The court explained:

> Although the bankruptcy code does not define "executory contract," "[c]ourts applying § 365(a) have indicated that an agreement is executory if at the time of the bankruptcy filing, the failure of either party to complete performance would constitute a material breach of the contract, thereby excusing the performance of the other party." *Murexco Petroleum,* 15 F.3d at 62–63 & n. 8 (noting that source of this definition "is a two-part article by Professor Vern Countryman, *Executory Contracts in Bankruptcy: Part I,* 57 Minn. L.Rev. 439, 458–62 (1973), and *Executory Contracts in Bankruptcy: Part II,* 57 Minn. L.Rev. 479 (1974)"); *see Potomac Electric,* 378 F.3d at 518 n. 3 ("Section 365(a) does not define executory contract, but the legislative history of that section indicates that the term means a contract 'on which performance is due to some extent on both sides.' "). "Whether an obligation is material is tested at the time of the filing of the bankruptcy petition." *Safety–Kleen,* 410 B.R. at 167; *see Murexco Petroleum,* 15 F.3d at 62.

Id. at *13. Further, the court noted that:

> [I]t is well-settled that an executory contract cannot be assumed in part and rejected in part. *Stewart Title Guar. Co. v. Old Republic Nat'l Title Ins. Co.,* 83 F.3d 735, 741 (5th Cir.1996) (per curiam). That is, "[w]here the debtor assumes an executory contract, it must assume the entire contract, *cum onere* —the debtor accepts both the obligations and the benefits of the executory contract." *Century Indem.,* 208 F.3d at 506.

Id. Using these criteria and a detailed analysis of the contracts at issue, the court concluded that the Exchange Agreement was an executory agreement assigned to Noble in the Asset Purchase Agreement. Thus, the court reversed the summary judgment against Noble and rendered judgment that Noble owed ConocoPhillips defense and indemnity.

Note: Motion for rehearing and motion for *en banc* reconsideration filed May 12, 2015.

Practice Pointer: No. 1

This case also discusses withdrawal of admissions.

United Medical Supply Company, Inc. v. Ansell Healthcare Products, Inc.

___ S.W. 3rd ___, 2015 WL 1544093 (Tex. App.—Dallas 2015)

Synopsis:

Under Chapter 82, addressing innocent seller indemnity, the seller did not need to sue all of the manufacturers or segregate its costs and expenses incurred by manufacturer. It could sue one manufacturer and recover all of its damages.

Overview:

Certain persons alleging injuries from repeated use of latex gloves sued various manufacturers and sellers, including United Medical ("UM"), a seller, and Ansell, a manufacturer. UM filed cross-actions against

the sellers for indemnity under the Texas Civil Practice & Remedies Code §82.002. The indemnity cross actions were severed from the underlying suit. Eventually, UM determined that it sold Ansell gloves to the injured parties' facility, but could find no proof that it sold other manufacturers' gloves to the facility. Therefore, it dismissed the other manufacturers. Ansell argued for a heightened pleading requirement in the underlying plaintiffs' petition (requiring that each manufacturer be linked to the seller) and that the seller either (a) sue all manufacturers or (b) at least segregate the costs and expenses related to each. The court of appeals rejected these arguments, relying in part on *Ansell Healthcare Prods, Inc. v. United Medical,* 355 S.W.3d 736, 742 (Tex.App.–Houston [1st Dist.] 2011, pet. denied), in which the same parties raised the same arguments.

The Dallas Court of Appeals explained *Owens & Minor* did not support Ansell's position:

> In a five to four decision, the Supreme Court held that Section 82.002 does not require a manufacturer to defend a seller for products that it did not manufacture and therefore a manufacturer satisfies its statutory duties by offering to defend and indemnify a seller only for costs associated with its own products.

2015 WL 1544093 at *2. The court also recognized that "the purpose of the statute is to protect innocent sellers by assigning responsibility for the burden of products-liability litigation to product manufacturers." *Id.* Requiring a heightened pleading requirement, suing all manufacturers, or segregation of costs and expenses would not further the statute's purpose.

Rejecting Ansell's argument for a heightened pleading requirement, the court said: "It necessarily follows that the pleadings need not allege the seller sold a particular manufacturers' product before a statutory duty to indemnify can arise." *Id.* at *4.

In refusing to require segregation of damages attributable to various manufacturers' products, the court relied on Justice Brister's concurring opinion in *Owens & Minor,* quoting:

> Specifically, he explained that even in a multi-manufacturer case, a seller would still be entitled to recover from any manufacturer "every dime" incurred as if that manufacturer had been the only one sued, which he opined would usually be "most of the dimes." *Id.* Justice Brister further expressly disagreed that a seller must pursue indemnity from each and every manufacturer, rather than picking one or a few, or that expenses must be assessed "pro rata" among the manufacturers sued. *Id.* at 491.

Id. at *6. Accordingly, the Dallas Court of Appeals reversed and remanded the trial court's judgment.

Note: (1) Case was sent to publisher May 11, 2015; and (2) Texas Supreme Court granted extension of time to file a petition for review on May 19, 2015.

Practice Pointer: No. 1

Based on these two opinions, if you represent manufacturer and you believe there are other manufacturers that share the Chapter 82 indemnity burden, you should consider bringing them in by third-party action.

Practice Pointer: No. 2

Factually, this was a difficult case for Ansell given that UM could only find evidence of its sales of Ansell gloves to the facility at issue. Regardless of the underlying suit's plaintiffs' pleading, one would think that the actual facts would be quite persuasive and the courts would want to err on the side substance over form.

Azz Incorporated v. Morgan

2015 WL 1623775 (Tex. App.—Fort Worth 2015)

Synopsis:

Uncertainty may exist in the amount of lost profits, but uncertainty may not exist as to the fact of the injury, *i.e.* whether there would be any lost profits at all.

Overview:

Azz sued competitors in the steel galvanizing business alleging misappropriation of trade secrets, breach of fiduciary duty, and breach of contract. The jury failed to find for Azz on its misappropriation of trade secrets and breach of fiduciary duty claims. While the jury found for Azz on its breach of contract claim, it failed to award damages. On appeal, the court summarized the evidence by saying:

> Thus, here, there is evidence from which the jury could have concluded that AZZ suffered no objective past lost-profits injury other than loss of a mere hope that Interstate Steel would continue to send some or all of its galvanizing business to AZZ despite the lack of a contractual relationship between Interstate Steel and AZZ.

2015 WL 1623775 at *7. This evidence would have made Azz's expert's testimony speculative. Uncertainty exists as to the fact of an injury (the loss of the customer's business) from the breaches, which is fatal to recovery, as distinguished from situations where uncertainty existed only as to exact amount of lost profits damages, which will not defeat recovery.

The trial court's judgment is affirmed.

Note: Opinion delivered April 9, 2015. No motion for rehearing filed. No petition for review filed. Deadlines appear to have passed. Opinion should be final.

Attorneys' Fees under Chapter 38

Synopsis:

HB 230 pending (likely dies) in Senate committee; Federal court extends *Fleming & Associates* to LLCs.

Overview:

In our Spring 2014 newsletter, pg. 26, we reported on *Fleming & Associates, LLP v. Barton*, 425 S.W.3d 560 (Tex. App.–Houston [14 Dist.] 2014, rev. denied).

Since that decision, Texas House passed HB 230, which would have amended § 38.001 to allow recovery of attorneys fees against LPs and LLPs. However, the bill stalled in the Senate State Affairs Committee and does not look like it will voted on in time. In the meantime, Fleming & Associates has been cited with approval by other Texas courts of appeal. See: *Petrohawk Properties, L.P. v. Jones*, 455 S.W.3d 753, 758 (Tex. App.-Texarkana 2015, petition for review filed). Meanwhile, at least one federal court has extended *Fleming & Associates* to include LLCs. *See Hoffman v. L & M Arts*, 2015 WL 1000838 (N.D. Tex. 2015, appeal pending).

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