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.

OVERVIEW OF NEWSLETTER DECISIONS

TEXAS SUPREME COURT DECISIONS		**1**
Fischer v. CTMI, LLC	Contested pending-projects payment provision in asset-purchase agreement held enforceable because its material terms were sufficiently definite to enable a court to determine the buyer's obligation and provide remedy for its breach, particularly as construed in the context of the asset-purchase agreement as a whole.	1
J&D Towing LLC v. American Alternative Ins. Corp.	Owner of personal property that has been destroyed and not just partially damaged may recover loss of use damages in addition to the property's fair market value immediate before the injury.	3
In re Bent	The abuse of discretion standard applies to "merits reviews" of new trial orders just as it does in all mandamus proceedings.	4
Janvey v. Golf Channel, Inc.	Under the Texas Uniform Fraudulent Transfer Act (TUFTA), an asset transferred with "actual intent to hinder, delay, or defraud" a creditor may be reclaimed for the benefit of the transferor's creditors unless the transferee "took [the asset] in good faith and for a reasonably equivalent value." TEX. BUS. & COM. CODE §§ 24.005(a)(1), .009(a). Even without proof of actual intent, an asset transfer may be avoided if the transferor was financially vulnerable at the time of the transaction	5

	and the “value” exchanged was not reasonably equivalent. *Id.* §§ 24.005(a)(2), .006(a). In this fraudulent-transfer clawback action, the asset at stake is consideration of $5.9 million cable television network received from Stanford in exchange for media-advertising services that included commercial air time and sponsorship recognition during sports broadcasts. The issue in this certified-question proceeding is whether the television network must relinquish its compensation *absent proof the transaction benefited the transferor's creditors*. The question arises not because the exchange at issue lacked objective value but because the transferor turned out to be one of the most notorious Ponzi schemes of the modern era.	
<u>TEXAS SUPREME COURT ORAL ARGUMENTS</u>		9
In Re Nationwide Insurance Company of America	Did the trial court abuse its discretion in concluding that the Nationwide waived its right to enforce the mandatory forum-selection clause contained within Besch's agency agreement and denying Nationwide's Motion to Dismiss? Does Nationwide have an adequate remedy by appeal for the erroneous denial of its Motion to Dismiss based on a forum-selection clause?	9
Centerpoint Builders GP, LLC v. Trussway Ltd.	Whether the Court of Appeals erred in reversing the trial court's partial summary judgment in favor of Petitioners regarding Petitioners' entitlement to indemnity from Trussway under Chapter 82 of the Texas Civil Practice and Remedies Code.	7
Cornerstone Healthcare Group Holding, Inc. v. Reliant Splitter, L.P.	When nonresident private equity funds make the decision to buy a business in Texas, are they subject to jurisdiction in Texas in a lawsuit challenging that transaction as unlawful? When nonresident private equity funds buy a business in Texas, can they avoid jurisdiction in Texas by creating a wholly owned subsidiary as their intermediary to complete that transaction? When considering minimum contacts stemming from due diligence conducted in Texas, did the court of appeals (a) improperly substitute its own	10

	fact findings for those of the trial court and (b) err in considering only pre-conduct authorization and ignoring post-conduct ratification?	
TEXAS COURTS OF APPEALS DECISIONS		11
Ginn v. NCI Building Systems, Inc.	The Court of Appeals found that even if statutory fraud is established under § 27.01 of the Texas Business and Commerce Code ("TBCC"); thus allowing for recovery of attorneys fees, the Texas Covenants Not to Compete Act preempts such recovery in a suit to enforce covenants not to compete. The Court of Appeals also found that partial performance does not negate an intent not to perform under a common law fraud claim where there is evidence indicating an intent not to fully perform.	11
Republic Petroleum LLC v. Dynamic Offshore Resources NS LLC	An offshore gas producer had standing to file suit against platform owners, alleging that they breached the parties' production handling agreement by failing to maintain and repair the equipment, and that they charged excessive amounts for repairs made. The trial court erroneously reduced the verdict to the offshore gas producer's proportional interest in the well's production. The judgment was reversed and the matter remanded with instructions to reinstate jury verdict.	12
Am. Dream Team, Inc. v. Citizens State Bank	The Tyler Court of Appeals affirmed the granting of Bank's motion for summary judgment and rendering a take nothing verdict to a real estate firm who had sued the bank on various causes of action stemming from the bank's chargeback after the firm's deposit of a counterfeit check and subsequent wiring of $30,000 to a Tokyo bank account. After finding that several of the firm's common law claims were preempted by the UCC, the court awarded nearly $73,000 in costs and attorney's fees to the bank under a contract provision.	13

Wise Elec. Coop., Inc. v. Am. Hat Co.	Replacement value was found to be the proper measure of damages when no market exists for damaged inventory and such an award does not preclude a further award for lost profits if shown with certainty. The trial court properly admitted an expert salvor's opinion testimony as to the value based on his knowledge, skill, experience, and training and his documentation and evaluation of the hats. Although offset may be allowed, sufficient evidence to account for the exact value of the offset must be shown.	14
Pelco Constr. Co. v. Chambers Cnty.	Trial court made several errors in regards to the granting and denying of several competing motions for summary judgment prayed for by both sides in a complex and hotly contested construction law breach of contract case. The initial errors set the stage for a domino effect that led to the appellate court reversing, in turn, each judgment of the trial court.	16
TransPecos Banks v. Strobach	TransPecos Banks sued Jodi Strobach alleging she was personally liable for a loan the bank had made to her corporation for which she was the president and sole shareholder. In finding she was not personally liable for the debt, the court said her failure to maintain corporate formalities was not dispositive and only a finding of actual fraud would support piercing the corporate veil. The trial court's directed verdict on her behalf was affirmed.	18
The Huff Energy Fund, LP v. Longview Energy Co.	Evidence that a corporation wanted to invest, spent time and money investigating investment, and entered into discussions with land brokers about availability of property held insufficient to establish "expectancy" in breach of fiduciary duty claim based on usurping opportunity.	20
Miramar Petroleum v. Cimarron Eng'g	Tex. Civ. Prac. & Rem. Code Sec. 150 requires that in any action for damages against a licensed professional, the plaintiff file a certificate of merit affidavit with the petition, by a similar licensed professional. Miramar failed to file the certificate of merit and the trial court dismissed the suit without prejudice. When Miramar re-filed, it did not provide a certificate, claiming an exception	21

	under Sec. 150. The trial court dismissed the case with prejudice. The 13th Court of Appeals reversed, holding that while the statute allows a trial court to dismiss with prejudice, once it had originally dismissed without prejudice, Miramar was entitled to refile and utilize the exception regarding the contemporaneous filing of the affidavit.	
Melden & Hunt Inc. v. East Hondo Water Supply Corp.	Tex. Civ. Prac. & Rem. Code Sec. 150 requires that in any action for damages against a licensed professional, the plaintiff file a certificate of merit with the petition by a similarly licensed professional. The certificate of merit affidavit under Chapter 150 does not require that an affiant establish his knowledge through testimony that would be competent or admissible as evidence, nor does it require that the affiant address each element of every cause of action. The function of the certificate of merit is to provide a basis for the trial court to determine merely that the plaintiff's claims are not frivolous and thereby conclude that the plaintiff is entitled to proceed in the ordinary course to the next stages of litigation.	22
Alattar v. Kay Holdings, Inc.	A party's use of an electronic signature on an agreement containing a consent to jurisdiction clause is sufficient to establish consent to personal jurisdiction. Further, the fact that the signor failed to read the agreement is not a basis to set aside the consent to jurisdiction.	23
Samson Lone Star Limited Partnership v. Hooks	This Court was called upon by the Supreme Court to consider the factual sufficiency of the jury's fraud limitations findings, fraud claims, and damages with respect to an oil and gas lease. This Court also had to consider the merits of claim for breach of an offset obligations that also contained a pooling clause in an oil and gas lease. This case was sent back down by the Supreme Court after its ruling that limitations did not bar the Plaintiff's fraud claim due to the discovery rule. The Supreme Court's decision is one of the most important recent decisions handed down with respect to the discovery rule as it relates to oil and gas policy issues.	24

Lopez v. Huron	In order for a defective product claim to brought as a products action pursuant to Section 82.003 of the Texas Civil Practice & Remedies Code, the damages must arise out of personal injury, death or property damage. It is not a products action if the only injury is to the defective product itself. Further, damage to a finished product caused by a defective component does not constitute damage to other property. It is considered a contractual claim if damages are sought for the product itself. Because Huron did not seek damages to "other property," only the product itself, Huron's claim did not meet the requirements for a products action under Tex. Civ. Prac. & Rem. Code Ann. § 82.003.	32
Auz v. Cisneros	Summary judgment evidence (an affidavit) did not conclusively prove reasonable and necessary attorneys' fees, a complaint that could be raised for the first time on appeal. The applicant must provide an allocation of time taken by each attorney on identified tasks.	34
Alanis v. US Bank N.A.	Texas Fair Debt Collection Practices Act sound in tort and are subject to Texas Civil Practice & Remedies Code Chapter 33 proportional and settlement credit reductions. However, where the claimant had no net recovery due to offset from a settlement credit, she could not recover attorneys' fees.	35
Alexander v. Kent	A plaintiff may not recover attorney's fees in a common-law fraud action.	36
Turner v. NJN Cotton Co.	Statute of frauds is avoided by party's admission of a contract's existence. Course of performance or course of dealing is not established by a sole prior transaction. Attorney's fees are recoverable under §38.001(8) (oral or written contracts) in a promissory estoppel claim.	37
Sheldon v. Pinto Technology Ventures LP	Two shareholders of a corporation filed suit seeking redress related to a series of transactions allegedly orchestrated by various parties. The shareholders claimed the transactions diluted their respective stock interests in the corporation. All defendants moved to dismiss the claims based on a	40

	Delaware forum-selection clause contained in certain amended and restated versions of an agreement among the corporation and various shareholders. The trial court dismissed the claims based on the Delaware forum-selection clause. On appeal, we conclude that the trial court erred in dismissing the shareholders' claims because they do not fall within the scope of the forum-selection clause. Therefore, we reverse and remand.	
Crun & Forster Specialty Insurance Co. v. Creekstone Builders Inc.	This declaratory judgment action involves an insurance coverage dispute arising out of a construction-defects verdict obtained in South Carolina against Creekstone SC I LLC, an insured under commercial general liability insurance policies issued by Crum & Forster Specialty Insurance Company ("Crum & Forster"). Prior to the trial of the construction-defects lawsuit, Crum & Forster filed the underlying declaratory judgment action in Harris County against Creekstone SC I LLC and the four additional appellees—Creekstone Builders Inc., Nashville Creekstone LLC, Stephen Keller, and Everett Jackson (collectively, "Creekstone")—seeking a declaration that it had no coverage obligation to Creekstone under the insurance policies at issue. Creekstone moved to dismiss the underlying action, arguing that Crum & Forster had failed to join the plaintiff from the South Carolina construction-defects lawsuit, a necessary party to this suit, and that the case would more appropriately be resolved in South Carolina and thus should be dismissed on *forum non conveniens* grounds. The trial court granted Creekstone's motion on both grounds.	41
SW Loan A, LP v. Duarte-Viera	In a suit on a note with a counterclaim for declaratory judgment, the trial court abused its discretion in awarding attorney's fees on attorney fees on a declaratory judgment counterclaim where that counterclaim did not raise any issues beyond those in the original suit.	44

Swinnea v. ERI Consulting Engr'rs, Inc.	Disgorgement damages are not punitive in nature; thus, an award of such forfeiture damages coupled with an exemplary damage award are not duplicative. To that end, when reviewing an exemplary damage award for excessiveness under Texas law and federal due process, discouragement damages should not be added to the exemplary damage award for purposes of assessing the proportionality of actual/compensatory damages and exemplary damages.	45
Sacks v. Hall	A lawsuit alone will not satisfy the presentment requirement of Texas Civil Practice and Remedies code section 38.002 for the recovery of attorneys' fees under Section 38.001. An oral or written demand that is clear and unequivocal is required.	46

Texas Supreme Court Decisions

Fischer v. CTMI, L.L.C.,

479 S.W.3d 231 (Tex. 2016)

Synopsis

Contested pending-projects payment provision in asset-purchase agreement held enforceable because its material terms were sufficiently definite to enable a court to determine the buyer's obligation and provide remedy for its breach, particularly as construed in the context of the asset-purchase agreement as a whole.

Factual Background and Trial Court Proceedings:

Ray Fischer ("Fischer") owned a tax-consulting business called Corporate Tax Management, Inc. In 2007, Fischer executed an asset-purchase agreement in which he agreed to sell his business to CTMI, L.L.C. ("CTMI"), which buyers Mark Boozer and Jerrod Raymond created to receive the assets and operate the business. The asset-purchase agreement specifically identified the assets that CTMI would acquire, including division of accounts receivable on projects that Fischer had not completed by the closing date. To effectuate the division of accounts receivable for 2007, the agreement included an exhibit that listed each of the then-existing projects and stated the percentage of each project that Fischer completed before the closing date.

In exchange for the business assets, CTMI agreed to pay a total purchase price of $900,000 to be calculated and paid as a series of payments not expressly tied to the $900,000 amount. Specifically, CTMI agreed to pay Fischer $300,000 at the 2007 closing, followed by a series of four annual "earn-out payments," one for each of the years in which Fischer would remain as a CTMI employee and by which Fischer would earn a share of the revenue from all projects that CTMI completed prior to the anticipated end of Fischer's employment on December 31, 2010. The earn-out provision for 2010 required CTMI to make (1) a "minimum payment" of $194,595, due in March 2011, plus (2) an "adjustment" payment due in July 2011, equal to 30% of the amount by which the 2010 business revenue exceeded $2.5 million (the 2010 revenue payment). Unlike earlier year earn-out provisions, however, the 2010 adjustment included additional payments as CTMI collected revenue on projects that were pending but not yet completed at the end of 2010 (the "2010 pending-projects payments clause"). Similar to the method the parties used to allocate accounts receivable on the closing date in 2007, the parties agreed to base the pending-projects payments on the percentage of each project completed as of the end of 2010. Since the parties did not know when they contracted in 2007 which projects would be pending or what percentages of those projects would be completed at the end of 2010, the 2010 pending-projects payments clause provided that, by January 31, 2011, a list of projects pending at the end of 2010 "will be generated with a percentage of completion assigned to each project" and that "[t]he percentage of completion will have to be mutually agreed upon".

At the 2007 closing, Fischer transferred his business assets to CTMI and CTMI paid Fischer the $300,000 owed at closing. In March 2008, CTMI made the required 2007 earn-out payment; but disputes soon arose and CTMI refused make any further payments. In December 2008, the parties asserted claims against each other, the most

relevant of which on appeal involved Fischer's counterclaim alleging that CTMI breached the purchase agreement by failing to pay him on disputed accounts receivables. In response, CTMI asserted that none of the remaining earn-out payment obligations were enforceable because the calculations turned on impermissible "agreements to agree" on completion percentages for pending projects that were not known to the parties at the time of contracting.

In June 2011, the trial court entered judgment, declaring that the 2010 pending-projects payment clause was not an unenforceable agreement to agree.

Court of Appeals:

CTMI appealed. The Dallas Court of Appeals reversed and rendered judgment that the 2010 pending-projects payment clause was an unenforceable agreement to agree that failed for indefiniteness as a matter of law.

Texas Supreme Court's Holding:

The Texas Supreme Court held that the 2010 pending-projects payment clause was sufficiently definite to enable a court to determine CTMI's obligations and to provide a remedy for its breach, therefore rendering it enforceable. Specifically, the Court concluded that the 2010 pending-projects payment clause expressly obligated CTMI to pay Fischer for the value of the projects pending at the end of 2010 and to do so based on the completion percentages of each of those projects. While the agreement did not list the pending projects and their completion percentages by which a court could determine from the agreement's language the actual amounts that CTMI owed, the Court made clear that the law may presume that a reasonable price was intended even if the price was left to be agreed by the parties and they fail to agree.

Key to the Court's decision was the fact that the parties' dealings could be used to give precision to language in the agreement that might otherwise appear indefinite, supporting the enforceability of the clause. When the parties entered in to the purchase agreement, they engaged in exactly the same process with respect to the projects pending at the 2007 closing, apportioning accounts receivable between themselves based on the completion percentages of each project pending on that date. Thus, when the parties agreed to generate a list of projects in progress with a percentage of completion assigned to each as of December 31, 2010, they knew exactly how the process would work because they had just done so with then-existing accounts. Therefore, the Court read the 2010 pending projects clause to require the parties to engage in the same process in January 2011 with respect to outstanding revenues from pending projects as they did in 2007 with respect to accounts receivable on incomplete projects.

In sum, the language providing that the parties "will have to mutually agree" on completion percentages did not render the 2010 pending-projects clause unenforceable because the clause contained all of the terms necessary for a court to enforce it. CTMI expressly agreed to pay Fischer for the pending projects, and in light of the parties' prior conduct regarding the 2007 accounts receivable, the parties' substantial performance of their contractual obligation, and the law's preference to avoid forfeiture, a court could determine CTMI's obligation and provide a remedy by implying a reasonable price based on objective facts and the specific standard to which the parties agreed. Consequently, the Court reversed the judgment rendered by the court

of appeals and reinstated the trial court's judgment.

J&D Towing LLC v. American Alternative Ins. Corp.,

478 S.W.3d 649 (Tex. 2016)

Synopsis:

Owner of personal property that has been destroyed and not just partially damaged may recover loss of use damages in addition to the property's fair market value immediate before the injury.

Factual Background and Trial Court Proceedings:

J&D Towing, LLC ("J&D") lost its only tow truck when a negligent motorist collided with the truck and rendered it a total loss. The question disputed between J&D and the relevant insurance company, American Alternative Insurance Corporation ("AAIC"), and further considered on appeal was whether J&D could recover loss of use damages, such as lost profits, in addition to recovering the fair market value of the truck immediately before the accident.

Relying upon the historical holdings of Texas courts, including the Texas Supreme Court, AAIC argued that Texas law distinguishes between partial destruction and total destruction of personal property, allowing loss of use damages for the former but not the latter. J&D countered that such a distinction was contrary to common sense and was out of step with the majority trend in other jurisdictions permitting recovery of loss of use damages in total destruction cases.

The trial court submitted the question of the proper amount of loss of use damages to the jury over AAIC's objections that Texas law did not permit loss of use damage in total destruction cases, ultimately awarding loss of use damages. The trial court further denied AAIC's JNOV motion.

Court of Appeals:

AAIC appealed. AAIC's argument before the Waco Court of Appeals was simply that Texas law did not permit loss of use damages in total destruction cases. The Waco Court of Appeals held that the trial court abused its discretion in submitting the question to the jury on loss of use damages and further erred in denying AAIC's JNOV motion.

Texas Supreme Court's Holding:

The Texas Supreme Court held that in addition to recovering the fair market value of destroyed property, the owner or subrogated insurer is now able to recover loss of use damages, including damages for lost profits.

The Court began its analysis by emphasizing that full and fair compensation is the chief purpose of damages awards in torts cases. As the Texas courts of appeal were divided on the issue, with the majority prohibiting the additional recovery of loss of use damages, the Texas Supreme Court looked to other jurisdictions for guidance in reaching its decision. In doing so, the Court found a pervasive and compelling sea change in both case law and legal treaties throughout the United States since the mid-twentieth century that presented a clear consensus that loss of use damages were available in total destruction cases.

Qualitatively evaluating these opinions, the Court found the relative uniformity in the reasoning underlying the jurisprudential

landscape particularly persuasive. The first argument almost uniformly adopted by courts throughout the nation was that there is no persuasive logic in distinguishing between partially destroyed and totally destroyed personal property for purposes of loss of use damages. Loss of use damages are incurred as readily when a vehicle is totally destroyed or when it cannot be restored to its prior condition by repair as when the vehicle can be restored by repair. Second, relying on the foundational principle of providing full and fair compensation, courts throughout the land have determined that loss of use damages are necessary for full compensation in both instances of partially destroyed and totally destroyed property.

Thus persuaded by the substantial shift among the nation's courts and that quality of the arguments found therein, the Court joined the modern trend, "hold[ing] that the owner of personal property that has been totally destroyed may recover loss of use damages in addition to the fair market value of the property immediate before the injury."

In Re Bent,

No. 14-1106
2016 WL 1267580 (Tex. 2016)

Synopsis:

The abuse of discretion standard applies to "merits reviews" of new trial orders just as it does in all mandamus proceedings.

Factual Background and Trial Court Proceedings:

In a suit alleging an insurer's mishandling of a Hurricane Ike damages claim, plaintiffs, the Bents, successfully moved for a new trial after a jury split its verdict on the Bents' claims that the insurance company breached their policy and violated the insurance code. The trial court gave five bases in its new trial order: (1) the jury's finding that USAA did not breach the homeowner's policy was contrary to the great weight and preponderance of the evidence; (2) USAA violated the trial court's order in limine regarding the Bents' failure to seek a variance from the relevant Piney Point Village city ordinance; (3) the evidence did not support the jury's award for the diminished value of the Bents' home; (4) the jury improperly failed to award appellate attorney's fees; and (5) the jury's finding as to mental-anguish damages was not supported by a finding that USAA "knowingly" violated the Insurance Code, a predicate for which both sides failed to argue.

Court of Appeals:

The insurer United States Automobile Association ("USAA") petitioned for mandamus relief. Concluding the trial court abused its discretion, Houston's First Court of Appeals provisionally granted a writ of mandamus directing the trial court to vacate is order and render judgment on the jury's verdict after conducting a factual sufficiency review.

Texas Supreme Court's Holding:

Arguing that the trial court acted within its discretion on every basis except one in granting their motion for new trial, the Bents sought relief from the Texas Supreme Court, asserting that the First Court of Appeals erred in conducting a second factual sufficiency review which allowed it to substitute its judgment for the trial court's. Particularly, the Bents asked the Court to clarify its recent empowerment of appellate courts to conduct "merit reviews" of new trial orders in *In re Toyota Motor Sales,*

U.S.A., Inc., 407 S.W.3d 746, 749 (Tex. 2013) when there is no direct conflict between the record and the stated bases for a trial court granting a new trial as in the instant case.

The Texas Supreme Court ultimately refused to directly address the Bents' inquiry, finding instead that that trial court's order was facially insufficient and thereby cutting of the need to conduct a "merit review." However, the Court provided instructional observations as to the standard applicable for "merit reviews" of new trial orders. Importantly, the Court affirmed that it did not announce or otherwise create a new standard of review in *Toyota*. Instead, "merit review" is simply a reference to the new authority granted to court of appeals to consider, in mandamus proceedings, whether the record supports the trial court's rationale for ordering a new trial. The abuse of discretion standard applies to "merit reviews" just as it does in all mandamus proceedings.

Ralph S. Janvey, Receiver for Stanford International Bank Ltd., et al. v. Golf Channel Inc.

Opinion delivered May 1, 2016
No. 15-0489

Synopsis:

Under the Texas Uniform Fraudulent Transfer Act (TUFTA), an asset transferred with "actual intent to hinder, delay, or defraud" a creditor may be reclaimed for the benefit of the transferor's creditors unless the transferee "took [the asset] in good faith and for a reasonably equivalent value." TEX. BUS. & COM. CODE §§ 24.005(a)(1), .009(a). Even without proof of actual intent, an asset transfer may be avoided if the transferor was financially vulnerable at the time of the transaction and the "value" exchanged was not reasonably equivalent. *Id.* §§ 24.005(a)(2), .006(a). In this fraudulent-transfer clawback action, the asset at stake is consideration of $5.9 million cable television network received from Stanford in exchange for media-advertising services that included commercial air time and sponsorship recognition during sports broadcasts. The issue in this certified-question proceeding is whether the television network must relinquish its compensation *absent proof the transaction benefited the transferor's creditors*. The question arises not because the exchange at issue lacked objective value but because the transferor turned out to be one of the most notorious Ponzi schemes of the modern era.

Context:

For nearly two decades, R. Allen Stanford perpetrated a multi-billion dollar Ponzi scheme through Antigua-based Stanford International Bank Limited (Stanford), which sold fraudulent high-yield certificates of deposit to unwary investors. To further the scheme, Stanford used new investors' principal to pay early investors their promised returns, a classic Ponzi-scheme artifice designed to create a false aura of success. By the time the Securities and Exchange Commission uncovered the ruse in 2009, Stanford had bilked investors out of more than $7 billion. After Stanford's assets were seized and placed into receivership, the court-appointed receiver instituted legal proceedings to void asset transfers Stanford made before entering receivership, including suits to recoup payments to various vendors.

In 2005, Stanford initiated a marketing plan targeting new investors in the economic echelon most coveted by the Ponzi scheme, high-net-worth individuals. Part of Stanford's strategy involved marketing

directed at sporting events that skewed favorably to the desired demographic. Among other activities, Stanford became the title sponsor of the Stanford St. Jude Championship, a 2006 Professional Golfers' Association of America (PGA) event broadcasted and covered by Golf Channel. The same year, Golf Channel entered into a two-year agreement with Stanford to provide media-advertising services to augment Stanford's existing tournament sponsorships. Those services were directed at brand awareness and included commercial air time, recognition of Stanford's St. Jude Championship and U.S. Open title sponsorships, and integration of messaging about Stanford's charitable contributions, products and brand during live tournament coverage. In exchange for its services, Golf Channel received payments from Stanford each month of the two-year contract term, except for the last monthly payment, which Stanford failed to make. All told, Stanford paid Golf Channel $5.9 million under the media-services contract, which Golf Channel fully performed. Three years after the services contract expired, the court-appointed receiver and the Official Stanford Investors' Committee (collectively, the Receiver) sued Golf Channel in federal district court to recover all the money Stanford paid under the media-advertising agreement, alleging the payments were made with intent to defraud Stanford's creditors.

The federal district court agreed fraudulent intent was conclusively established because Stanford operated a Ponzi scheme, but granted summary judgment for Golf Channel on its affirmative defense. Citing TUFTA's definition of "reasonably equivalent value," the court opined that, if Golf Channel's services provided any "value," the exchange of value was reasonably equivalent because the transaction was arm's length, in good faith, at fair market value, and in the ordinary course of business. As to the threshold issue of value, the court similarly resolved that matter in Golf Channel's favor. In doing so, the district court rejected the Receiver's argument that there is no "value" unless the transaction leaves the transferor's estate with a tangible asset on which creditors can levy execution. Because value is determined at the time of the transaction, the court explained that transferring consumable goods and services can confer value even though nothing is ultimately left behind for creditors. A contrary rule, the court observed, would sweep too broadly, negating the good-faith defense for vendors such as the electric and water companies that serviced Stanford's facilities. Because Golf Channel's advertising time and services had objective value at the time of the transaction, the federal district court concluded Golf Channel provided reasonably equivalent value for Stanford's contract payments, and refused to categorically presume that vendors incidentally supporting a Ponzi scheme—like utility and office supply companies—provide no value in an otherwise good-faith transaction. In sum, the court concluded that Golf Channel did not actively promote or participate in the Ponzi scheme and, therefore, was an innocent trade creditor that had provided reasonably equivalent value in the form of media-advertising services.

On appeal, the Fifth Circuit initially reversed and rendered judgment in the Receiver's favor, holding that media-advertising services have "no value" to a Ponzi scheme's *creditors* even though the same services might be "quite valuable" to the creditors of a legitimate business, and ordering the television network to return all consideration paid for services rendered. However, on panel rehearing, the Fifth

Circuit vacated its prior opinion. Observing that TUFTA, unlike the model Uniform Fraudulent Transfer Act (UFTA), specially defines the term "reasonably equivalent value" to include consideration having value from a *marketplace* perspective, the Fifth Circuit panel certified the following question to the Texas Supreme Court:

Certified Question:

Considering the definition of "value" in section 24.004(a) of the Texas Business and Commerce Code, the definition of "reasonably equivalent value" in section 24.004(d) of the Texas Business and Commerce Code, and the comment in the Uniform Fraudulent Transfer Act stating that "value" is measured "from a creditor's viewpoint," what showing of "value" under TUFTA is sufficient for a transferee to prove the elements of the affirmative defense under section 24.009(a) of the Texas Business and Commerce Code?

Analysis:

The overarching issue—whether Stanford's payments to Golf Channel may be rescinded and the funds returned to Stanford's estate—turns on the proper construction and application of the terms "value" and "reasonably equivalent value" as used in TUFTA.

TUFTA operates to "prevent debtors from defrauding creditors by placing assets beyond their reach," but it also protects transferees "who took in good faith and for a reasonably equivalent value." In fact, if "a reasonable equivalent has been given in good faith for a transfer or obligation [the transferee has] a *complete defense* although the debtor is shown to have intended to hinder, delay, or defraud creditors." The statute thus establishes a counterbalance that must be given effect in the construction and application of the broadly defined terms "value" and "reasonably equivalent value."

Under a plain reading of TUFTA, value exists when the debtor took consideration that had objective value at the time of the transfer, even if the consideration neither preserved the debtor's estate nor generated an asset or benefit that could be levied to satisfy unsecured creditors. The reasonably equivalent value requirement in section 24.009(a) is thus satisfied if a transferee performs objectively valuable services or transfers goods in an arm's-length transaction at market-value rates. This is not to say, however, that such circumstances are necessary to constitute value, but they are certainly sufficient. The question that lingers is whether TUFTA commands a statutory sleight of hand by which objective value disappears depending on the lens through which the transaction is viewed. In other words, does objectively valuable consideration become valueless based on the true nature of the debtor's business as a Ponzi scheme or the debtor's subjective reasons for procuring otherwise lawful services?

With few exceptions, courts applying fraudulent-transfer statutes conclusively presume actual intent and insolvency when a transfer is made in furtherance of a Ponzi scheme, and some courts have held that satisfaction of the "reasonably equivalent value" requirement depends on the extent to which the transaction preserved the transferor's net worth for the benefit of its *creditors*. Because a Ponzi scheme is a fraudulent endeavor that is driven further into insolvency with each transaction, under this authority, unknowing vendors and service providers have little defense to fraudulent-transfer claims unless the challenged transaction has the potential to

generate or preserve a tangible or leviable asset for the transferor's *creditors*. For consumable goods and services, disgorgement of compensation becomes a veritable certainty without regard to the transferee's good faith or the objective value of the consideration the transferee provided.

In this case, Golf Channel's media-advertising services had objective value and utility from a reasonable creditor's perspective at the time of the transaction, regardless of Stanford's financial solvency at the time. In exchange for its payments, Stanford received not merely speculative, emotional consideration, but accepted full performance of services with objective, economic value that were provided in the ordinary course of Golf Channel's business.

Golf Channel fully performed its contract with Stanford and, indisputably, would have a claim against the estate if Stanford had not paid what it owed for services rendered. In terms of exchanging "value," the circumstances under which Golf Channel entrusted an asset to Stanford and received reciprocal compensation are not materially distinguishable from the situation in which Ponzi-scheme investors obtained repayment of the investment funds they had entrusted to Stanford.

For purposes of the "reasonably equivalent value" requirement in section 24.009(a), proof that an exchange occurred for market-value rates in an arm's-length transaction conclusively establishes that the value exchanged was "reasonably equivalent."

Texas Supreme Court's Holding:

Construing the relevant statutory provisions, we conclude TUFTA's "reasonably equivalent value" requirement can be satisfied with evidence that the transferee (1) fully performed under a lawful, arm's-length contract for fair market value, (2) provided consideration that had objective value at the time of the transaction, and (3) made the exchange in the ordinary course of the transferee's business. TUFTA does not contain separate standards for assessing "value" and "reasonably equivalent value" based on whether the debtor was operating a Ponzi scheme.

Texas Supreme Court Oral Arguments

In Re Nationwide Insurance Company of America, Et Al.

Oral argument occurred February 10, 2016
Case No. 15-0328
Third Circuit Court of Appeals Order,
2015 Tex. App. LEXIS 3302

Issues Considered:

1. Did the trial court abuse its discretion in concluding that the Nationwide waived its right to enforce the mandatory forum-selection clause contained within Besch's agency agreement and denying Nationwide's Motion to Dismiss?

    a. Did the trial court abuse its discretion in determining that Nationwide "substantially invoked" the judicial process?

    b. Did the trial court abuse its discretion in finding that Besch suffered prejudice by the court resuscitating Besch's alleged prejudice after it had been removed by Nationwide?

2. Does Nationwide have an adequate remedy by appeal for the erroneous denial of its Motion to Dismiss based on a forum-selection clause?

Centerpoint Builders GP, LLC v. Trussway Ltd.

Oral argument occurred November 2, 2015
Case No. 14-0650
Beaumont Court of Appeals Opinion,
436 S.W.3d 882

Issues Considered:

1. Whether the Court of Appeals erred in reversing the trial court's partial summary judgment in favor of Petitioners regarding Petitioners' entitlement to indemnity from Trussway under Chapter 82 of the Texas Civil Practice and Remedies Code. This issue necessarily includes the following sub-issues:

    a. Whether the Court of Appeals properly interpreted Chapter 82 of the Texas Civil Practice and Remedies Code, and thus, whether its interpretation conflicts with prior precedent from this Court, including *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893 (Tex. 2010);

    b. Whether Centerpoint, a general contractor who purchases a wooden roof truss and contracts with a subcontractor to install that product as a component of an apartment complex, qualifies as a "seller" under Chapter 82 of the Civil Practice and Remedies Code (See TEX. CIV. PRAC. & REM. CODE ANN. § 82.001(3));

    c. Whether Centerpoint is entitled to indemnity from Trussway, the manufacturer of the allegedly defective product under Chapter 82 of the Civil Practice and Remedies Code (See TEX. CIV. PRAC. &

REM. CODE ANN. § 82.002(a)); and

d. Whether Centerpoint is not independently liable as a matter of law (See TEX. CIV. PRAC.& REM. CODE ANN. § 82.002(a)).

Cornerstone Healthcare Group Holding, Inc. v. Reliant Splitter, L.P.

Oral argument occurred January 12, 2016
Case No. 14-0593
Dallas Court of Appeals Opinion,
2014 Tex. App. LEXIS 6124

Issues Considered:

1. When nonresident private equity funds make the decision to buy a business in Texas, are they subject to jurisdiction in Texas in a lawsuit challenging that transaction as unlawful?

2. When nonresident private equity funds buy a business in Texas, can they avoid jurisdiction in Texas by creating a wholly owned subsidiary as their intermediary to complete that transaction?

3. When considering minimum contacts stemming from due diligence conducted in Texas, did the court of appeals (a) improperly substitute its own fact findings for those of the trial court and (b) err in considering only pre-conduct authorization and ignoring post-conduct ratification?

State Courts of Appeals

Ginn v. NCI Building Systems, Inc.,

472 S.W.3d 802, 2015 Tex. App. LEXIS 8531 (Tex. App.—Houston [1st Dist.] 2015)

Synopsis:

The Court of Appeals found that even if statutory fraud is established under § 27.01 of the Texas Business and Commerce Code ("TBCC"); thus allowing for recovery of attorneys fees, the Texas Covenants Not to Compete Act preempts such recovery in a suit to enforce covenants not to compete. The Court of Appeals also found that partial performance does not negate an intent not to perform under a common law fraud claim where there is evidence indicating an intent not to fully perform.

Overview:

Defendant Kelly R. Ginn ("Ginn") served as executive vice president of operations for plaintiff NCI Building Systems, Inc. ("NCI"). In Ginn's role he was exposed to NCI's confidential and proprietary information. Upon Ginn's resignation from the company he and NCI agreed upon a separation agreement. Under the agreement NCI would retain Ginn as a consultant for one year and continue to pay him his normal salary in return for his agreement to a five-year non-compete, non-solicitation and non-disclosure agreement. Prior to signing the separation agreement, Ginn downloaded a large amount of confidential information onto an external hard drive. While serving as a consultant Ginn developed a business model for a competing business, created several business entities, and solicited NCI employees, customers, and vendors by using confidential information that he downloaded onto his external hard drive. NCI brought suit for breach of non-competition and non-solicitation agreement, fraud, breach of fiduciary duty, and unjust enrichment, seeking damages, injunctive relief, and attorney fees.

The jury found Ginn liable for common-law and statutory fraud, breach of fiduciary duty for copying NCI's confidential information with the intent to use it other than for the benefit of NCI, and unjust enrichment. The trial court granted Ginn's post-judgment motion to disregard the jury's finding of statutory fraud because it did not relate to a transaction involving real estate or stock in a corporation as required by TBCC § 27.01(a).

Court of Appeals:

On appeal, NCI argued that the trial court erred in disregarding the jury's finding that Ginn committed statutory fraud and not awarding attorney's fees because the separation agreement was a transaction involving stock in a corporation. The Court of Appeals found the agreement was a transaction involving stock and held the trial court erred in disregarding that Ginn committed statutory fraud. Since the requirements for statutory fraud were established, NCI argued that it was entitled to recovery of attorney's fees. However, the Texas Covenants Not to Compete Act preempted the recovery of attorneys fees under § 27.01 and did not allow employers to recover attorney's fees in suits to enforce covenants not to compete.

Ginn argued on appeal that the jury's finding of common law fraud could not be upheld because his partial performance under the agreement negated evidence of intent not to perform. The Court of Appeals disagreed, holding partial performance will not negate intent not to perform if there is

other evidence establishing intent not to fully perform. Evidence showing Ginn downloaded confidential information to an external hard drive, created his company's first business plan while a consultant, and marketed his business plan to investors served to establish that he did not intend to fully perform under the agreement.

Republic Petroleum LLC v. Dynamic Offshore Resources NS LLC,

No. 01-14-00370-CV, 2015 Tex. App. LEXIS 9055
474 S.W.3d 424 (Tex.App.—Houston [1st Dist.] August 27, 2015)

Synopsis:

An offshore gas producer had standing to file suit against platform owners, alleging that they breached the parties' production handling agreement by failing to maintain and repair the equipment, and that they charged excessive amounts for repairs made. The trial court erroneously reduced the verdict to the offshore gas producer's proportional interest in the well's production. The judgment was reversed and the matter remanded with instructions to reinstate jury verdict.

Overview:

Plaintiff Republic Petroleum LLC, an offshore gas producer, entered into a Production Handling Agreement with Defendants Dynamic Offshore Resources NS LLC and W&T Offshore Inc., platform owners, to process natural gas from an offshore well. Republic asserts that the platform owners breached their agreement to maintain and repair the platform's processing equipment and charged excessive amounts for the repairs that were made. The platform owners claimed that Republic lacked standing and capacity to seek damages for these breaches because it had assigned its working interest in the well before the claimed breaches occurred, and even if it could sue on behalf of the company in which it had an interest, it did not sue on behalf of the other working interest owners.

The evidence at trial established that Republic continued in its role after ownership of the working interests took place. Republic's capacity to prosecute the suit on behalf of the working interest owners was impliedly found by the jury against the platform owners.

The evidence at trial also showed that the equipment on the platform was old and in disrepair, and that the platform owners overcharged Republic for repairs to the platform's processing equipment. The separator equipment on the platform did not work properly. Shut-ins and downtime occurred frequently, halting production. The platform owners gave their 90-day notice of intent to terminate the contract in the spring of 2009 and did not perform any further maintenance on the equipment from that point forward.

The jury found that the platform owners had breached the agreement, and further found that Republic was entitled to recover compensatory damages for repairs and costs.

Post-trial, the platform owners filed a motion for judgment notwithstanding the verdict, motion for remittitur, and motion to modify the judgment. The trial court initially denied the motions, but on reconsideration signed a modified final judgment that reduced the jury and attorney's fee awards to correspond to the fractional interest in the well's production that Republic owned.

On appeal, Republic challenged the modified judgment. The platform owners cross-appealed, challenging the trial court's denial of their post-trial motions, contending that Republic should take nothing. The Court of Appeals held that the trial court properly denied the platform owners' post-trial motions. The Court of Appeals found that Republic had standing to sue the platform owners and to seek full compensation for the damages caused by the platform owners' breach of the parties' contract, and that the trial court erred in modifying the judgment to reduce the amount of damages awarded by the jury. The Court of Appeals reversed the amended judgment and remanded with instructions to reinstate the jury's verdict and to reconsider attorney's fees.

Am. Dream Team, Inc. v. Citizens State Bank,

481 S.W.3d 725 (Tex. App. Tyler 2015)

Synopsis:

The Tyler Court of Appeals affirmed the granting of Bank's motion for summary judgment and rendering a take nothing verdict to a real estate firm who had sued the bank on various causes of action stemming from the bank's chargeback after the firm's deposit of a counterfeit check and subsequent wiring of $30,000 to a Tokyo bank account. After finding that several of the firm's common law claims were preempted by the UCC, the court awarded nearly $73,000 in costs and attorney's fees to the bank under a contract provision.

Overview:

American Dream Team (ADT) real estate firm in Cedar Creek Lake, Texas, was contacted through its website from a purported prospective home buyer from China with the alleged name of "Yang Hua Lopez" who stated he was an executive of a Chinese iron and steel company who wished to retire in "nice neighborhood in your city and state." An agent with ADT emailed "Lopez" with a list of properties and Lopez chose one within a few hours. Lopez then emailed the agent that he was sending a down payment for $105,000.00. A week later Lopez sent a check for $35,000.00 instead that was drawn on a Canadian bank and sent from a "Mr. Green Sound," the purported account manager for Lopez. ADT's president deposited the check at Citizens State Bank and was told by that a foreign check could take between one and two months to collect. However, ADT was given a provisional credit in the amount of the check, pending collection of the funds. About 20 days later ADT's vice president asked a teller at the bank if the check had cleared and was told it had, although she based this information on nothing more than seeing the (provisional) funds in ADT's bank account. The VP instigated a wire of $30,000.00 to Tokyo that same day in accordance with Lopez' instructions. Two weeks later the check was found to be counterfeit and the bank made a chargeback against ADT's escrow account for the $30,000.00, which was by then unrecoverable.

ADT sued the bank for: negligent misrepresentation and conversion, violations of the Deceptive Trade Practices Act, common law fraud, breach of contract, equitable estoppel and failure to return check, money had and received, and promissory estoppel. The bank counter-claimed for breach of transfer warranties and for its attorney's fees pursuant to its contract with ADT. The bank filed a motion for summary judgment, which was granted on the grounds that the statute of limitations

had run on both the negligent misrepresentation and conversion claims as well as the claims under the DTPA. Of the remaining claims, ADT's breach of contract claim was supplanted by the UCC as codified under Tex. Bus. & Com. Code Ann. § 4.214(a) authorizing the chargeback for the counterfeit check. This preemption also applied in regards to ADT's claim for Money Had and Received. The claim for failure to return check was not analyzed or briefed by ADT in its appeal and therefore was deemed waived. Although the claim in promissory estoppel (detrimental reliance) would also have been preempted by the UCC, the court said that the claim was not available anyway because of the existence of a valid contract, between ADT and the Bank in the form of the deposit agreement. As to ADT's equitable estoppel claim, the Court noted that the first element of such a claim, "a false representation or concealment of material facts," was not present because the bank employee had not made a knowing false representation because the funds were shown to be in ADT's account. A final claim made by ADT was in fraud, which the Bank argued was also preempted by the applicable UCC provisions. The Court said the UCC is not clear as to whether claims in fraud should be allowed, but where no conflict exists between the common law and the UCC, the common law both complements and provides a backdrop for the UCC. The Court then looked to the legislative intent and to a Montana Supreme Court case with a similar fact pattern, that had found common law principles apply to bank communications to a depositor inquiring about check processing. For this reason, the court granted ADT's appeal as to fraud only. The Bank then argued that ADT had shown no evidence the bank had made a "false representation" as a required element of the fraud claim. ADT argued it had at least produced more than a scintilla of evidence and should therefore survive summary judgment. The Court concluded that contextual evidence provided by the bank had transformed ADT's "proof" into no evidence at all and granted the Bank's no evidence MSJ, stating, fraud requires proof of an affirmative misrepresentation and "not simply a misunderstanding." Also, is noted that ADT had disregarded many red flags including implausible names, conflicting messages, inconsistent numbers, contradictory instructions, unusual circumstances, and absence of key documents at face value, which to a reasonable juror would have meant that ADT could not have justifiably relied on a bank teller's one-word response to the VP's question. Since the bank was found to be not liable on all counts, it was entitled to attorney's fees.

Of note: ADT had argued the trial court had disregarded much of the deposition testimony submitted in support of their contentions but that had not been specifically referenced in their response. ADT had made reference to portions of depositions without specifying any page or line and had argued that technology had made word searches word and term searches relatively quick and easy. The court stated that, nevertheless, it should not be compelled to sift through hundreds of pages of depositions to search for evidence and upheld the trial court's disregard of the material.

Wise Elec. Coop., Inc. v. Am. Hat Co.,

476 S.W.3d 671, 677 (Tex. App. Fort Worth 2015)

Synopsis:

Replacement value was found to be the proper measure of damages when no market

exists for damaged inventory and such an award does not preclude a further award for lost profits if shown with certainty. The trial court properly admitted an expert salvor's opinion testimony as to the value based on his knowledge, skill, experience, and training and his documentation and evaluation of the hats. Although offset may be allowed, sufficient evidence to account for the exact value of the offset must be shown.

<u>Overview:</u>

American Hat Company (AHC) sued Wise Electric Cooperative, Inc. (Wise) for damages that occurred to its hat factory as a result of a fire that started when an electrical wire became disconnected from an electric pole and ignited dry grasses at the base of the pole. The fire, which occurred in 2005, consumed 900 to 1,200 acres of land as well as some structures, vehicles and campers in the area. Although the AHC facility did not burn, it suffered intense heat, soot, and smoke damage to its facility and to its entire inventory stock mostly located in containers behind the factory.

The appellate court first reviewed the evidence in regards to the trial court's finding of negligence on the part of Wise and determined it was sufficient. Next, it reviewed the award of damages. The court stated as its primary principle that the owner of the property negligently damaged shall have "actual pecuniary compensation for the loss sustained;" and the valuation applicable when personal property is negligently damaged is typically the difference between the reasonable market value of the property before, versus after, the property was damaged. However, different factual situations could dictate the application of different valuations. It is the plaintiff's burden to show which method of valuation, if other than market value, is appropriate.

In this case, the trial court had settled on replacement value, relying on AHC's offered testimony from various industry experts who said there was no market at all for the smoke damaged hats. Wise offered expert testimony in response that at least some of the hats could be salvaged and the smoke smell removed. AHC had even sold some of the inventory to an Australian buyer was also introduced. This was mitigated, however, by testimony that the sold inventory was actually a type of consignment sale and the money was only recouped after someone sympathetic donated the value back to AHC after it failed to sell and the buyer failed to make its payment. Further, AHC said it was not seeking value for those particular hats. The court further noted that only less than 4% of the hats damaged had been in a state of full completion. The vast majority was in various less than complete stages, and thus, the court reasoned, only a hat manufacturer competitor would be in the market to buy such material. Such a small, limited market was not a satisfactory basis for a fair market value damage model, and also, AHC was the only such manufacturer in its area. Most importantly, however, said the court, was the fact that Wise had not identified any satisfactory evidence that any legitimate post-fire market existed for the pre-finished hats, but even if a market had existed, AHC would not have been in the same position, or even near to the same position, as it would have occupied had the injury not occurred. The court further overruled Wise's challenge to the sufficiency of the evidence relied on by the trial court, noting that even a mere scintilla of legitimate evidence constitutes legal sufficiency. Next, the court turned to Wise's arguments as to the expert appraisals of the value of the hats. Finding

the testimony credible, the Court noted that "the trial court is required to ensure only that the expert testimony is based on a reliable foundation and is relevant to the issues in the case" and "does not determine whether the expert's opinion is correct" citing to rule of evidence 703. Two other facts argued by Wise were likewise found to be non-availing: the fact that the owner of AHC had purchased the business and inventory for $350,000 in a foreclosure sale roughly two years prior to the fire, and the fact that the owner had reported his inventory to be valued at $200,000 for tax purposes the year prior. These facts were not found to be indicators of any actual value. The appellate court thus upheld the trial court's full award of $13,385,969, the replacement value for the hats and materials.

Wise also appealed the award of more than $5 million in lost profit damages, arguing that the full replacement value award should have negated the lost profits claim. The Court rejected this argument as well, noting that future lost profits, if shown with substantial certainty, were not precluded by the award for the replacement value of the lost inventory to the extent such lost profits were not encompassed by the award; again, the evidence introduced at trial was sufficient to uphold the award.

However, the court remanded the case for a new trial to determine the amount of offset that Wise should have been entitled to for a $2,578,067.00 payment made to AHC on its behalf by Wise's insurer. The Court determined there was not enough information in the record to determine if the amount offset was based on sufficient evidence to account for an offset in the full amount that was paid.

Pelco Constr. Co. v. Chambers Cnty.,

2016 Tex. App. LEXIS 5047, *1 (Tex. App. Houston 1st Dist. May 12, 2016)

Synopsis:

Trial court made several errors in regards to the granting and denying of several competing motions for summary judgment prayed for by both sides in a complex and hotly contested construction law breach of contract case. The initial errors set the stage for a domino effect that led to the appellate court reversing, in turn, each judgment of the trial court.

Overview:

Chambers County on the Texas coast was hit hard by Hurricane Ike in 2008 and the Oak Island firehouse was destroyed. The county determined to rebuild the structure and contracted with Pelco Construction Co. (Pelco) as the winning bidder for the project. In dealings with Pelco and to oversee the project, Chambers County utilized its architect, Dannenbaum Engineering Corp. Chambers had also hired the Amundson Consulting, who also had dealings with Pelco. Pelco began construction after meeting with representatives from all three entities and obtaining information as well as assurances, including an assurance from Amundson that FEMA had approved the project and construction was ready to begin.

Pelco began submitting invoices as the work progressed, but was notified by Dannenbaum after sending their second invoice for payment that FEMA, who was to provide significant funding for the project, had not yet approved the design and to cease work immediately. Roughly forty days later, Pelco was given the go-ahead to resume work. Instead, Pelco submitted a

letter of termination of the contract. Pelco then filed suit against Chambers County, Dannenbaum and Amundsen Consulting for breach of contract, a Prompt Payment Act claim, and fraudulent and/or negligent misrepresentation.

Chambers County countersued for breach of contract. Various motions for summary judgment followed.

The trial court release Dannenbaum based on a failure by Pelco to file a certificate of merit in accordance with Tex. Civ. Prac. & Rem. Code Ann. § 150.002(a) because the engineer and architect were licensed, and the claims arose out of the provision of professional services. This was the only decision not overturned at the appellate level. The trial court then granted Chambers County's motion for summary judgment as to liability against Pelco, and also granted Chambers County's motions for summary judgment as to Pelco's breach of contract and Prompt Payment Act claims, denying each. It further granted Amundson Consulting's motions for summary judgment and denied Pelco's fraudulent and negligent misrepresentation claims against Amundson. At trial, the only issue left for the jury was as to damages assessed to Pelco. At the conclusion of trial, the court granted a motion for judgment notwithstanding the verdict and awarded Chambers County its full claim for damages and attorneys' fees against Pelco. Pelco appealed all judgments.

On appeal, the court first noted that Pelco's termination letter obviously constituted material breach of the contract, but if there was a prior material breach by Chambers County, it could have excused Pelco's breach. Pelco's primary argument for prior breach was that Chambers County had failed to pay it for the full amount of the first two invoices it had submitted, paying only 90% of each based on Dannenbaum's certification of only 90% of the work as completed. Chambers County advanced several arguments to show this failure to pay was not a material breach, but first argued that Pelco had failed to respond to its no evidence motion for summary judgment as to this issue and it had therefore been resolved by the trial court and should not be disturbed on appeal. However, the appeals court reviewed the MSJ submitted by Chambers and found it had not specifically addressed this issue in its first MSJ that Pelco had not responded to. It further noted that Pelco had responded its next motion for summary judgment wherein the issue was clearly raised. Chambers County argued that Pelco had "presented no evidence that it was entitled to terminate the Contract under its terms." The appeals court explained that Pelco was under no affirmative burden to prove that it was entitled to terminate the contract, but instead had only to show that Chambers County was in prior breach. And by showing that Chambers County had withheld partial payment without a clear right to do so, then there was at least a fact question for a jury as to whether or not this was a material breach; thus, summary judgment was not appropriate as to Chambers County's MSJ for Pelco's alleged breach. In regards to the trial court's denial of Pelco's MSJ on Chambers breach of contract claim, the court stated that whether or not the breach was material should not have disposed of the issue, because even if the failure to pay the full amount was immaterial, "the non-breaching party is not excused from future performance but may sue for the damages caused by the breach." Thus, in either case, Pelco was entitled to be heard on the matter. Furthermore, the trial court erred in granting summary judgment to Chambers County and against Pelco on its Prompt Payment Act claim because even if there is a bona fide dispute about the amount

owed, the governmental entity is required to notify the party not paid within 21 days of the invoice of the nature of the dispute. Chambers County provided no evidence that it had ever provided Pelco with any notice of a bona fide dispute within the 21 day time period as required under Tex. Gov't Code Ann. § 2251.042(a).

Pelco also appealed the trial court's ruling dismissing its fraudulent and/or negligent misrepresentation claims against Amundson. Amundson argued that its original statements to Pelco were superseded by the agreement between Pelco and Chambers County due to a merger clause in the contract. The court rejected this argument, stating that "a standard merger agreement cannot defeat a fraudulent misrepresentation claim." Further, because there was some circumstantial proof that Amundson made statements intending for Pelco to rely on them and inducing its performance, and because intent is usually a fact question for the jury, summary judgment as to this issue was not appropriate. The concurring opinion agreed with the findings, but also would have granted Pelco's appeal as to a final issue regarding a jury instruction on mitigation the trial court had refused to give to the jury. The majority declined to reach the matter since it had ordered a new trial anyway.

TransPecos Banks v. Strobach,

2016 Tex. App. LEXIS 2968, *1 (Tex. App. El Paso Mar. 23, 2016)

Synopsis:

TransPecos Banks sued Jodi Strobach alleging she was personally liable for a loan the bank had made to her corporation for which she was the president and sole shareholder. In finding she was not personally liable for the debt, the court said her failure to maintain corporate formalities was not dispositive and only a finding of actual fraud would support piercing the corporate veil. The trial court's directed verdict on her behalf was affirmed.

Overview:

Beginning in 1998, TransPecos Bank made several loans to Roger Jones, Strobach's father. The loans were secured by a deed of trust on 220 acres owned by Strobach and an arrangement whereby the bank would receive farm subsidy payments associated with the land. Two later loans were secured by more land. In 2003, Jones fell behind on his loan payments and the bank helped Strobach to design a plan to refinance the loans for her father. The bank recommended Strobach form a corporation, transfer the land used as collateral along with the deeds of trust to the corporation, and then the bank would award a loan to the corporation, again using the land as its collateral along with the subsidy payments from the government. Strobach signed documents provided by the bank to create the corporation and to transfer the land; subsequently the bank issued two loans of $160,000 each to the newly created corporation and to Jones using the already encumbered land as collateral. In 2007 Jones subsidy payments to the bank stopped and Jones, unable to pay, let his loans slip into default. The bank foreclosed on the various tracts of land and then bought them along including the right to receive the subsidy payments. Since this included the lands that had been transferred to the corporation, the corporation was left without any assets and no way to continue to make payments on the 2003 loan. The bank then sent Strobach a letter stating the corporate loan was in default and asking her to cure the default by pledging additional collateral. It threatened to accelerate the note and

demand payment in full if she did not comply. When Strobach failed to reply, the bank made a demand for $31,000, the amount it said was due and owing. The Bank then learned that the corporation's charter had been revoked in 2005 for failure to pay franchise taxes. The Bank sued Strobach and her father in their individual capacities in 2008, but was unable to serve Strobach, so it obtained a judgment against Jones only for $260,000 for damages and amounts still owed. In 2012, the bank filed suit again against Strobach attempting to hold her personally liable for the corporation's loan. Both sides agreed that Strobach had never intended to be personally liable on the loan and could only be found so if a jury determined she used the corporation to perpetrate an actual fraud on the bank for her own direct personal benefit under Texas Business Organizations Code section 21.223. The bank claimed Strobach had fraudulently formed a sham corporation with valueless assets to obtain the 2003 loan with no intention of repaying it. The Bank claimed she had no intention of maintaining the corporation as evidenced by her failure to pay franchise taxes or maintain its charter and failure to maintain corporate formalities. At the close of the Bank's evidence, Strobach moved for a directed verdict that there was no evidence she had engaged in fraudulent conduct. The trial court granted her motion and entered a take nothing judgment in favor of Strobach.

The appeals court reviewed the entire record to determine whether more than a scintilla of evidence of a fact question existed to render the verdict improper. It discussed the common law "alter ego" theory as a basis for disregarding the corporate structure and holding a person individually liable for debts of a corporation, but noted that the legislature had eliminated this theory by adopting Section 21.223 of the TBOC, providing that a shareholder or owner may not be held liable with respect to any contractual obligation on the basis that the holder is or was the alter ego of the corporation. Under the same section the failure to adhere to corporate formalities is no longer considered a valid basis for disregarding corporate structure. The only way a corporate affiliate may be held personally liable is if the obligee demonstrated that the affiliate caused the corporation to be used for the purpose of perpetrating, and did perpetrate, an actual fraud on the obligee primarily for the direct personal benefit of the holder/affiliate. This was expressly stated by the legislature as the sole method for personal liability as codified in Tex. Business Organizations Code § 21.224: "Section 21.223 is exclusive and preempts any other liability imposed for that obligation under common law or otherwise." The court defined actual fraud as involving dishonesty of purpose or intent to deceive," and if this was claimed as misrepresentation, then all the traditional elements of misrepresentation must be present.

In this case, the evidence established that the Strobach's alleged "scheme" to defraud the bank was the plan the Bank itself proposed, created, and sanctioned and there was no evidence that Strobach made any false representations or provided false information to the bank. The bank was aware it was accepting highly encumbered land as collateral and knowingly did so. Finally, the bank was aware the 2003 deed of trust was junior in position and knew that if Jones defaulted on any of his loans the senior deeds would be foreclosed on causing a domino effect that would extinguish the 2003 junior deed. That Strobach had failed to maintain the corporate charter was not evidence of fraud because there was no evidence Strobach ever formally dissolved the corporation and distributed or diverted

assets to defeat the bank's ability to collect. In fact, the Bank collected subsidies for two years after the revocation of the charter in 2005. A corporation does not cease to exist merely because its charter has been forfeited. By statute, the president still had the right to pay her franchise taxes and have the corporate charter reinstated at any time, Tex. Tax Code Ann. § 171.312 (2015). Thus, there was not even a scintilla of evidence that Strobach had used the corporation to perpetuate an actual fraud and the trial court's directed verdict was affirmed.

The Huff Energy Fund, L.P. v. Longview Energy Co.,

482 S.W.3d 184, 2015 Tex. App. LEXIS 12094 (Tex. App. San Antonio 2015)

Synopsis:

Evidence that a corporation wanted to invest, spent time and money investigating investment, and entered into discussions with land brokers about availability of property held insufficient to establish "expectancy" in breach of fiduciary duty claim based on usurping opportunity.

Overview:

Defendants William R. Huff ("Huff") and Rick D'Angelo ("D'Angelo") were two of the directors at Plaintiff Longview Energy Co. ("Longview"). Longview, an oil and gas company, began discussing investment opportunities in Eagle Ford shale in September 2009. At a board meeting in January 2009 an investment proposal in Eagle Ford was not voted on because D'Angelo claimed Huff would not support an investment in Eagle Ford trend acreage. Yet, during a subsequent investigation by Longview it was found Riley—Huff Energy acquired some of the same acreage Longview had considered buying just three days before the January board meeting. Moreover, the acquisition by Riley—Huff was not mentioned at the January board meeting. Longview sued multiple parties including Huff and D'Angelo claiming, among other claims, breach of fiduciary duty by allegedly taking a corporate opportunity that belonged to it.

At trial, one of the liability questions submitted to the jury was whether Huff and/or D'Angelo failed to comply with their fiduciary duty to Longview by taking a corporate opportunity. The jury looked at multiple factors to determine if this was a situation in which a director may not take a corporate opportunity. Most important to this case was whether Longview had an interest or a reasonable expectancy in the opportunity. The jury made affirmative implied findings as to all factors, resulting in a judgment favorable to Longview.

Court of Appeals:

Huff and D'Angelo appealed. The Court of Appeals focused on whether Longview had an expectancy in the Eagle Ford opportunity or whether the purchase of the acreage by Riley—Huff hindered or defeated the plans and purposes of Longview. The Court of Appeals held that the evidence did not rise to the level of an expectancy. Although Longview wanted to invest in the Eagle Ford shale, spent time and money investigating investment opportunities, and entered into discussions with land brokers about acquiring property, these facts did not establish that Longview had an expectancy in the opportunity.

Moreover, the Court of Appeals held that such an opportunity must be something more than a loosely-defined strategy. The Court of Appeals believed that Riley—Huff

Energy's purchase of acreage in Eagle Ford shale did not hinder or defeat Longview's plan to acquire acreage in Eagle Ford since Longview defined its opportunity as a strategy or interest in investing in Eagle Ford. Moreover, the fact that Eagle Ford leases spread over millions of acres and thousands of miles with multiple oil and gas companies other than Longview and Riley—Huff competing for leases meant that Riley—Huff's acquisition of acreage could not defeat Longview's loosely defined plan. Because the Court of Appeals found evidence to be legally insufficient to support the jury's implied findings, the trial court's judgment was reversed and a take-nothing judgment was rendered.

Miramar Petroleum v. Cimarron Eng'g,

No. 13-15-00251-CV, 2016 Tex. App. LEXIS 5340 (Tex. App.—Corpus Christi—Edinburg)
January 7, 2016

Synopsis:

Tex. Civ. Prac. & Rem. Code Sec. 150 requires that in any action for damages against a licensed professional, the plaintiff file a certificate of merit affidavit with the petition, by a similar licensed professional. Miramar failed to file the certificate of merit and the trial court dismissed the suit without prejudice. When Miramar re-filed, it did not provide a certificate, claiming an exception under Sec. 150. The trial court dismissed the case with prejudice. The 13th Court of Appeals reversed, holding that while the statute allows a trial court to dismiss with prejudice, once it had originally dismissed without prejudice, Miramar was entitled to refile and utilize the exception regarding the contemporaneous filing of the affidavit.

Overview:

The Plaintiff Miramar sued Cimarron Engineering LLC over engineering services following a "blow out" of an oil and gas well. Miramar filed its first amended petition naming Cimarron as a defendant and did not attach a certificate of merit. Cimarron filed a motion to dismiss for failure to attach the certificate. Miramar argued that it did not have to file a certificate of merit and the trial court agreed and refused to dismiss. Cimarron filed an interlocutory appeal and the Corpus Christi Court of Appeals determined that Miramar was required to file a certificate of merit and remanded the case for a determination of whether the case should have been dismissed with or without prejudice.

On remand, the trial court entered an order dismissing Miramar's claims without prejudice.

Miramar refilled, but did not attach a certificate, alleging that it only had ten days before the statute of limitations expired and that it was entitled to an exception in the statute allowing it to file its amended complaint and then follow with a certificate of merit within 30 days of filing the complaint. Miramar subsequently filed the certificate of merit before the expiration of 30 days.

On the same day that Miramar filed the certificate, Cimarron filed a motion to dismiss Miramar's newly filed claims with prejudice, alleging that then certificate was untimely, and should have been filed when it first sued Cimarron. Without notice or a hearing, the trial court dismissed the claims against Cimarron with prejudice.

On appeal to the Corpus Christi Court of Appeals, Cimarron argued that Miramar was

required to file a certificate of merit with its first petition. Miramar argued that its refilling was a "newly-filed action" and that it had timely filed a certificate.

The Court of Appeals held that that the trial court had abused it discretion. While the trial court was initially required to dismiss the claims, as a certificate of merit was required, the trial court had the discretion at that time to dismiss with or without prejudice. When it did dismiss the claims, it did so without prejudice. Miramar, therefore was given the opportunity to re-file. The Court noted that when a party re-files after a dismissal without prejudice, the refilling is treated as a new claim. That being the case, the statute clearly provided that when a claim is filed against a professional covered by the statute, if the date of filing is within 10 days of the expiration of the statute of limitations, the plaintiff may file the suit and follow with a certificate within 30 days. Miramar had re-filed within ten days of the statute running and followed with a certificate within the 30 days allotted.

The trial court's judgment was reversed and the case remanded.

Melden & Hunt Inc. v. East Hondo Water Supply Corp.,

No. 13-15-00227-CV, 2015 Tex. App. LEXIS 12716 (Tex. App.—Corpus Christi—Edinburg)
December 17, 2015

Synopsis:

Tex. Civ. Prac. & Rem. Code Sec. 150 requires that in any action for damages against a licensed professional, the plaintiff file a certificate of merit with the petition by a similarly licensed professional. The certificate of merit affidavit under Chapter 150 does not require that an affiant establish his knowledge through testimony that would be competent or admissible as evidence, nor does it require that the affiant address each element of every cause of action. The function of the certificate of merit is to provide a basis for the trial court to determine merely that the plaintiff's claims are not frivolous and thereby conclude that the plaintiff is entitled to proceed in the ordinary course to the next stages of litigation.

Overview:

The Plaintiff East Hondo Water Supply Corp. filed suit against appellant Melden & Hunt, Inc. and other defendant alleging breach of contract, breach of warranty, negligence, and negligent misrepresentation in connection with the design and construction of a water treatment plant. Melden moved to dismiss, claiming that the certificate of merit failed to satisfy the requirements of section 150.002 of the Texas Civil Practices and Remedies Code. The trial court denied the motion and Melden brought an interlocutory appeal. Melden claimed (1) that the certificate of merit did not show the affiant was competent and qualified to testify or was actively in the practice of engineering and (2) the certificate of merit failed to reference each theory of recovery.

Melden argued that the certificate of merit affidavit only contained "conclusory assertions" and did nothing more than establish the affiant to be an engineer. It urged the Court of Appeals to review the Chapter 150 requirements with the same degree of scrutiny normally reserved for competence and admissibility of expert testimony. The Court held that the statute has no such requirement and imposes no particular requirements or limitations as to

how the trial court ascertains whether the affiant possesses the requisite knowledge. In this instance, the affiant's recital of his qualifications and experience were factual statements supporting his conclusion that he was knowledgeable in the defendant's area and competent to testify.

Melden also complained that the affidavit failed to show that the expert was engaged in the practice of engineering and thus failed to meet the specific requirements of the statute. The Court held that the statute did not require that the affidavit contain specific wording. The affidavit provided contained wording that demonstrated the affiant was involved in an active engineering practice and was sufficient.

Melden also argued that the statute required that the affidavit address each theory of recovery for which damages are sought, including each element of each cause of action. The Court disagreed and held that Section 150 does not require that level of specificity. Rather, the function of the certificate of merit is to provide a basis for the trial court to determine merely that the plaintiff's claims are not frivolous and to thereby conclude that the plaintiff is entitled to proceed in the ordinary course to the next stages of litigation.

Regarding negligence claims, Melden claimed that the affidavit failed as it offered no factual basis for the opinions, did not address the standard of care, provided no specific instances of wrongdoing and no discussion of causation. The Court noted that while a certificate of merit must provide a factual basis for the allegations of professional errors and omissions, it need not recite the applicable standard of care and how it was allegedly violated in order to provide an adequate factual basis for the identification of professional errors. Here the affidavit addressed the factual basis of the errors and how they contributed to the problems in the water plant. The factual basis is the key element of a certificate of merit.

The Court held that the trial court did not abuse its discretion in denying Melden's motion to dismiss.

Alattar v. Kay Holdings, Inc.,

2016 Tex. App. LEXIS 259 (Tex. App. Houston 14th Dist. Jan. 12, 2016)

Synopsis:

A party's use of an electronic signature on an agreement containing a consent to jurisdiction clause is sufficient to establish consent to personal jurisdiction. Further, the fact that the signor failed to read the agreement is not a basis to set aside the consent to jurisdiction.

Overview:

Plaintiff, Khaled Alattar ("Alattar") a partner in LY Retail LLC ("LY"), filed a lawsuit against multiple parties, including defendant Kay Holdings, Inc. ("Kay Holdings"). Alattar alleged that the parties used an opportunity to invest in LY as a means of fraudulently acquiring stock of the company in order to artificially inflate the price of its shares and then rapidly sell the shares at the inflated price.

Kay Holdings filed a special appearance challenging the trial court's personal jurisdiction. Kay Holdings submitted an affidavit in support of its special appearance claiming that it (1) had never been domiciled in Texas; (2) did not own property in Texas and never had; (3) did not derive income from Texas and never had; (4) had no bank accounts in Texas and never

had; and (5) did not have any employees or agents in Texas and never had. In response, Alattar argued that Kay Holdings' corporate representative, Robert Wheat ("Wheat"), signed an agreement to purchase the stock involved in the fraudulent scheme and that the agreement included a clause consenting to personal jurisdiction. The trial court granted the special appearance.

Court of Appeals:

On appeal, Alattar argued that personal jurisdiction was established because Kay Holdings' corporate representative signed an agreement containing a clause consenting to personal jurisdiction. Kay Holdings' contended, among other thing, (1) that Alattar did not allege facts sufficient to confer jurisdiction over Kay Holdings in Texas, (2) there was no evidence that the agreement Wheat admittedly signed included a clause consenting to jurisdiction.

The Court of Appeals concluded that Kay Holdings consented to personal jurisdiction in Texas and reversed the trial court's order granting the special appearance. As Alattar's personal jurisdiction allegations were sufficient to overcome the burden of establishing that Kay Holdings was subject to personal jurisdiction in Texas,, the burden shifted to Kay Holdings to produce evidence negating all potential bases for personal jurisdiction. Kay Holdings claimed that Alattar did not produce a signed agreement and therefore did not provide evidence that Kay Holdings consented to jurisdiction. In response, Alattar proferred a copy of a signature page containing Wheat's electronic signature and excerpts from Wheat's deposition in his response to the special appearance. The excerpts from Wheat's deposition showed that he initially denied that the signature was his because it appeared to be an electronic signature. He also stated that he returned signature pages that he did not read.

The Court of Appeals held a party's use of an electronic signature on an agreement containing a consent to jurisdiction clause sufficient to establish consent to personal jurisdiction. Moreover, Kay Holdings failed to present evidence that Wheat did not sign the agreement and Wheat's failure to read the agreement was not a basis to set aside the consent to jurisdiction.

Samson Lone Star Limited Partnership v. Hooks,

No. 01-098-00328-CV, (Tex.App. Dist.14 03/15/2016)

Synopsis:

This Court was called upon by the Supreme Court to consider the factual sufficiency of the jury's fraud limitations findings, fraud claims, and damages with respect to an oil and gas lease. This Court also had to consider the merits of claim for breach of an offset obligations that also contained a pooling clause in an oil and gas lease. This case was sent back down by the Supreme Court after its ruling that limitations did not bar the Plaintiff's fraud claim due to the discovery rule. The Supreme Court's decision is one of the most important recent decisions handed down with respect to the discovery rule as it relates to oil and gas policy issues.

Overview:

A dispute arose between Charles G. Hooks, III and Sue Ann Hooks, as co-trustees under the will of Charles G. Hooks, Sr. ("collectively Hooks") and Samson Lone Star Limited Partnership ("Samson") over the execution of three oil and gas leases, one in Jefferson County, Texas ("the Jefferson

County Lease") and two in Hardin County, TX ("collectively the Hardin County Leases"). All the leases were executed in 2000 and contained buffer-zone provisions requiring Samson to prevent drainage from adjacent lands. If a gas well were completed within 1, 320 feet from the leased tract, Samson was required to either: (1) drill an offset well, (2) pay compensatory royalties, or release the offset acreage. They also contained a "late charge" provision for unpaid royalties and a "most favored nations" clause provided that, under certain circumstances, the royalties payable to Hooks must be elevated to match the highest royalty payable to Samson's other lessors. The Hardin County Leases also contained pooling provisions which were substantially similar to the pooling provisions that have been used in gas leases in Texas since at least the 1950s.

In April 2000, Samson began drilling a well (BSM 1) on a tract adjacent to the Jefferson County Lease. Although the drill-site was outside the buffer zone, the well was directionally drilled so that the bottom was within 1,320 feet from the leased property, which triggered the buffer term provision under the Jefferson County Lease. In July of 2000, a directional survey was completed and filed with the Railroad commission showing that the BSM 1 was within the buffer zone. After the first of the gas sales occurred in late October of 2000, Samson began reconfiguring the BSM 1 pooling unit. A new plat, dated November 16, 2000, incorrectly placed the well's bottom hole at "±1400 scaled" from the Jefferson county Lease. There was inconsistent testimony as to whether the "±" notation implied that there could be as much as a 100-foot margin on the measurements. Some experts and Samson's own Vice President testified that despite the "±" notation, the well showed that it was outside the buffer zones. Others testified that the "±" notation placed the well anywhere from 1300 to 1500 from the Jefferson County Lease. In December of 2000, Samson filed this reconfiguration with the Railroad Commission as part of an application to pool. Samson never contacted Hooks or performed one of the options as required by the buffer-zone provision in the Jefferson County Lease.

In February of 2001, Samson sought to pool the acres covered by Hooks' Jefferson County Lease into a BSM unit. Before agreeing to the pool, Hooks, who is an experienced oil and gas attorney and mineral owner, contacted Samson's landman to find out about the location of the of BSM 1 and about how his property fit into the proposed pooling unit. Hooks would be entitled to significantly more money if the well was located within the buffer zone. The landman told Hooks that the well was about 1,500 feet away from the boundary line of Hooks' Jefferson Count Lease. The landman sent Hook request a copy of the reconfigured plat that was filed with the Texas Railroad Commission in December of 2000 that showed the well to be outside the buffer zone. This plat conflicted with the reconfiguration file with the Railroad commission in December of 2000. Hooks contends that based on the information provided by Samson that the well was outside the buffer zone, he agreed to the pooling on May 25, 2001. It is important to note that before Hooks agreed to the pooling terms, Samson's landman executed the designation of the BSM 1 and recorded it in the County's real property records on March 7, 2001 showing Hooks as participating in the pool for the BSM 1 unit. After Hooks agreed to be included in the BSM 1 unit, Samson sent royalty checks to Hooks for his unit interest and Hooks cashed those checks. The royalty checks did not include compensatory royalties calculated under the

terms of the offset provision in the Jefferson County Lease for a well drilled within the 1, 320-foot buffer zone. After Hooks agreed to pool the acres Jefferson County Lease, Samson drilled a second well the Joyce DuJay No. 1 well ("DuJay 1 well"), within the 1,320-foot buffer zone of Hooks' Jefferson County Lease. The well was completed in January of 2002 and was made part of another pooling unit, the DuJay 1 unit, in which Hooks also participated and from which he received royalties. This well was offset by the BSM 1 unit.

In addition, Samson drilled several wells that also affected the Hardin County Leases. Specifically, in February 2001, Samson completed the Black Stone Minerals A-1 well ("BSMA-1 well") in Hardin County. On March 21, 2001, Samson filed a Unit Designation called the Black Stone Minerals "A" No. 1 Gas Unit ("BSM A-1 unit"), which utilized the leases were the BSM A-1 well was located with Hooks' two Hardin County Leases and other tracts. The pooling agreement included the Hooks' Hardin County Leases. The DuJay 1 well, as noted above, produced from some of the same land designated to the BSM A-1 unit; but, at a lower horizon. Samson amended the BSM A-1 unit designation. Samson also amended and executed and recorded a designation for a new unit, the Joyce DuJay No. 1 Gas Unit ("DuJay 1 unit"). The DuJay 1 unit designated a 571 acre unit with a different name, different leases, different depths and different boundaries from the BSM A-1 unit. Subsequently, Samson drilled DuJay A-1 well and created a separate pooled unit for that well. The Hardin County Leases were likewise pooled into the designated DuJay A-1 unit. However, the BSM 1 and the BSM A-1 well both continued producing within 1320 feet of the DuJay 1 and DuJay A-1 units.

Hooks discovered in 2006 that the well bottomed inside the Jefferson County lease's buffer zone, that triggered the buffer zone provisions. Despite the pooling clause in the Hardin County Leases, Hooks also contended that the same with the BSM 1 and the BSM A-1 with respect to the Hardin County Leases. Hooks joined in an existing suit against Sampson in November 16, 2006 for breach of contract and common law and statutory negligence. In May of 2007, Samson amended the complaint to include fraud. Hooks contended that the four-year statute of limitations applicable to their claims should not apply because Samson had fraudulently induced them to believe that the BSM 1 well was outside the buffer zones.

The case went to trial and the Jury found that Hooks could not have discovered the true facts within the four years and that the discovery rule applied; thereby, giving Hooks the right to sue. The Jury awarded Hooks approximately $21 million in damages. Sampson appealed on eight issues including that Hooks claims were barred by the statute of limitations. Hooks cross-appealed that the trial erred in granting summary judgment on his claim that Samson breached its offset obligations with regard to the two Hardin County Leases. This Appellate Court agreed that the limitations had run to Hooks claims and reversed the trial court's judgment. Hooks appealed to the Supreme Court, who reversed this Court's ruling and upheld the trial court's ruling. The Supreme Court held that there was "some evidence" to support the Jury's finding that the Hooks were delayed by Samson's fraud from bringing the claim earlier. The Supreme Court's decision is one of the most important recent decisions handed down with respect to the discovery rule as it relates to oil and gas policy issues. The Supreme Court sent the

case back to the Houston Court of Appeals to consider the factual sufficiency of the jury's fraud limitations findings, the legal factual sufficiency of the jury findings on Hooks' fraud claims, the damages for Hooks' claim that Samson breached the most-favored-nations clause, and the merits of Hooks' claim that Samson breached its offset obligations under the Hardin County Leases.

Statute of Limitations for Fraud:

Samson challenged the factual sufficiency of the evidence supporting the jury's finding that, exercising reasonable diligence, Hooks could not have discovered his fraud claim until April 2007. The Supreme Court held that the question of when Hooks could have discovered Samson's fraud was properly a question of fact for the jury and that the evidence was legally sufficient to support the jury's finding that Hooks could not have discovered Samson's fraud until April 2007. They then remanded this issue to the Court of Appeals for consideration of the factual sufficiency of the evidence supporting the jury's finding. Accordingly, this Court was required to examine all of the evidence in a neutral light, and set aside the jury's verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986).

Limitations begins when a cause of action accrues. Generally a cause of action accrues when facts come into existence that authorize a party to seek a judicial remedy. However, under certain circumstances the discovery rule comes into play and limitations will not begin to run until the plaintiff "knew or should have known of facts that in the exercise of reasonable diligence would have led to the discovery of the wrongful act." *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d at 216; see also *Hooks v. Samson*, 457 S.W.3d 52, 56-57 (Tex. 2015) (discussing the discovery rule in relation to this case).

One of Samson primary arguments was that there were correct documents filed with the Railroad Commission showing that the well was within the buffer zone. Samson contended that Charles Hooks, as an experienced oil and gas man, should have reviewed all records on file with the Railroad Commission. If done so, Charles Hooks would have learned that the well was within the buffer zone. However, the Supreme Court honed in on this issue argument and stated that "because 'fraud vitiates whatever it touches,' limitations does not start to run until the fraud is discovered or the exercise of reasonable diligence would discover it." The Supreme Court further held "that when the defendant's fraudulent misrepresentations extend to the Railroad Commission record itself, earlier inconsistent filing cannot be used to establish, as a matter of law, that reasonable diligence was not exercised. Instead, reasonable diligence remains a fact question.

Because of the inconsistent evidence, which included the Railroad Commission's documents and testimony concerning the representation of the "±1400," the jury could have determined that Hooks exercised reasonable diligence in requesting information from Samson and that the existence of relevant information buried within conflicting public records did not sufficiently put Hooks on notice of their fraud claim. Therefore, this Court overruled Samson's challenge.

Fraud Claims:

Samson also challenged the legal and factual sufficiency of Hooks' common-law and statutory fraud claims. To prevail on a fraud claim, the plaintiff must prove that the defendant (1) made a material misrepresentation, (2) knew the representation was false or made it recklessly without any knowledge of its truth, (3) intended that the plaintiff would act upon the representation or intended to induce the plaintiff's reliance on the representation, and that (4) the plaintiff justifiably relied upon the representation and thereby suffered injury. *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 217 (Tex. 2011). To prove fraudulent inducement, these same elements of fraud must be established as they relate to a contract. *Coastal Bank SSB v. Chase Bank of Tex., N.A.*, 135 S.W.3d 840, 843 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

Material misrepresentation:

Samson argued that the evidence was insufficient to show that it made an actionable misrepresentation. A material representation is one which "a reasonable person would attach importance to and would be induced to act on … in determining his choice of actions in the transaction in question." *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex. 2011) (*quoting Smith v. KNC Optical, Inc.*, 296 S.W.3d 807, 812 (Tex. App.—Dallas 2009, no pet.). There were two representations made to Hooks directly. Samson's own landman represented to Hooks verbally that the well was approximately 1500 foot from the Jefferson County Lease. Second, Samson provided a plat to Hooks that was marked scaled and had a notation of "±," which meant that the distance was not an exact measurement. Samson contended that the notation meant that there was a margin of error of 100 feet. Therefore, this representation was too indefinite to form the basis of a misrepresentation. However, this Court honed in that Samson was aware that the well was in the buffer zone; yet failed to provide Hooks the directional survey completed that showed the exact location that was completed in July of 2000. Further, Charles Hooks testified that he relied on the information provided by Samson's landman to make his decision on pooling. Based on this evidence, the Court of Appeals concluded that the evidence was factually sufficient to demonstrate the existence of a material misrepresentation.

Intent to induce reliance:

Samson argued that there was no evidence to support it had defrauded Hooks when it supplied the plat. In Texas, courts considering the intent element focus on the defendant's knowledge and intent to induce reliance. *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 578 (Tex. 2001). A party's intent is determined at the time that it makes the complained-of representation; however, intent may be inferred from the party's acts made after the representation. *Aquaplex Inc. v. Rancho La Valencai, Inc.*, 297 S.W.3d 768, 775 (Tex. 2009). Intent to defraud, or intent to induce reliance, does not need direct proof and is often proven by circumstantial evidence. It is customarily a fact issue to be decided by the trier of fact, who must evaluate the credibility of the witness and give weight to their testimony. *Spoljaric v. Percival Tours, Inc.*, 708 S.W. 2d 432, 435 (Tex. 1986).

The Court of Appeals looked to the evidence which showed Samson's motive to be suspect. Samson was aware of the well's position within the buffer zone; yet, instead

of meeting its obligations under the buffer zone provision, Samson sought to pool the acres in the Jefferson County Lease. Samson had to be aware that the payments would be considerably less if the Hooks agreed to the pooling. Despite knowing the location of the well, Samson's landman indicated that the well was 1500 feet away from the lease line and provided a plat showing the hole was "1400±" from the lease. Hooks accepted this to mean that it was outside the buffer zone. Furthermore, The Court weighed the fact that Samson's landman filed documents with the Railroad Commission indicating that Hooks consented to the pooling even before Hooks agreed was circumstantial evidence supporting Samson's intent. Considering Samson's knowledge and the circumstantial evidence of its intent to induce reliance, the Court held that the evidence was legally and factually sufficient to demonstrate intent. In so concluding, overruled Samson' challenge.

Justifiable reliance:

Fraud also requires that the plaintiff show actual and justifiable reliance. *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010). "In measuring justifiability, the Court must inquire whether 'given a fraud plaintiff's individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud[,] it is extremely unlikely that there is actual reliance on the plaintiff's part.'" *Id*. Reliance is not justified if there are "red flags" indicating such reliance is unwarranted. *Id*.

Samson argues that the "±" notation on the plat was a red flag. Since Hooks acknowledged on deposition that he never told Samson's landman why he was inquiring about the location of the well, Hooks could not claim justifiable reliance when he did not ask a question that would require a precise answer. Once again, the arguments were the same as discussed above. Hooks looked to Samson to provide the exact location of the well in order to determine whether it was in their best interest to pool and Samson failed to adequately provide. Based on the evidence, the Court of Appeals concluded that there was sufficient evidence to support the Jury's determination that, given Hooks individual characteristics, abilities, and appreciation of fact and circumstances here, Hooks justifiably relied upon Samson's representation regarding the location of the well.

Fraud Damages:

The Jury awarded Hooks $20,081,638.01 in damages for Samson's fraud. This amount corresponds to the amount of compensatory royalties, including royalty due on formation production and the associated late charges, due under the terms of the Jefferson County Lease for production from the BSM 1 and DuJay 1 wells. Samson argues that there was insufficient evidence supporting the jury's damages award. Hooks argued that upon remittitur for the amount not permitted under the Texas Supreme Court opinion, the damages awarded were factually and legally sound.

Proper measure of damages:

A party may recover actual damages on a successful fraud claim, and "[a]t common law, actual damages are either 'direct' or 'consequential.'" *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 636 (Tex. 2007) (*quoting Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997). Generally Texas law recognizes two measures of direct damages

for common-law fraud: the out of pocket measure and the benefit-of-the bargain measure." *Zorrilla v. Aypco constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015) (*quoting Formaso Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 49 (Tex. 1998). Out of pocket damages are measured by the difference between the value expended versus the value received, thus allowing the injured party to recover based on the actual injury suffered. *Id.* (citing *Formosa Plastics*, 960 S.W.2d at 49). Benefit-of-the-bargain damages are measured by the difference between the value as represented and the value received, allowing the injured party to recover profits that would have been made had the bargain been performed as promised. Id. Consequential damages are damages that result naturally but not necessarily from the wrongful act. *Sonnichsen*, 221 S.W.3d at 636; *Arthur Andersen & Co.*, 945 S.W.2d at 816. Consequential damages are recoverable only if the misrepresentation is a producing cause of the loss, *i.e.* if the losses are foreseeable and directly traceable to and result from the misconduct. *Arthur Anderson & Co.*, 945 S.W.2d at 817.

Samson argued that the lost-income damages found by the jury, reflecting the compensatory royalties and associated late charges, are a contract measure of damages. However, the fact that Hooks' loss was an economic loss related to the subject matter of his contract with Samson does not prevent their recovery of tort damages. The jury was asked to determine the amount of money that would compensate Hooks for the damages proximately caused by Samson's fraud and was told to consider the "[l]ost income to [Hooks] that was the natural, probable, and foreseeable consequence of Samson's fraud." The Court ruled that this was a proper measure of consequential damages, which are recoverable as long as Hooks properly pleaded and proved them. *See Formosa Plastics*, 960 S.W.2d at 49 n.1; *Arthur Andersen & Co.*, 945 S.W.2d at 817.

Samson argues that Hooks failed to properly plead for consequential damages and is thus not entitled to them. However, the Court held that Hooks properly plead for such damages because he pleaded for "damages from injures that were the proximate result of Samson's fraud," and specifically pleaded that those damages were "equal to at least the compensatory royalties [Hooks] would have been due under the Jefferson County Lease in the absence of any purported pooling." Samson then argues that in order for Hooks to recover compensatory damages they had to set aside Hooks consent to the pooling agreement of the Jefferson County Lease into the BSM 1 unit. The Appellate Court disagreed because the filing of the fraud claim after learning of Samson's misrepresentation, demonstrated Hooks intent to pursue a fraud damages rather than ratify or rescind the fraudulently induced pooling agreement. Therefore, Hooks did not specifically need to rescind the pooling agreement.

Sufficiency of the evidence of the amount of damages:

The Court of Appeals had to determine the legal and factual sufficiency of the evidence supporting the jury's award of fraud damages totaling almost $21 million. There is no dispute that Samson drilling of the BSM 1 should have trigged the buffer zone obligation on the Jefferson County Lease and Samson failed to perform pursuant to that agreement. It was held that Samson never paid the compensatory royalties under the Jefferson County Lease because it fraudulently induced Hooks into a pooling agreement, which paid lower royalties. But, the bone of contention related to damages

for the DuJay 1 well. It is undisputed that Samson did not make any fraudulent representation with respect to the DuJay 1 well. However, Hooks presented evidence that the fraudulently procurement of Hooks agreement to pool the Jefferson County Lease into the BSM 1 unit led them to believe that the offset obligations as to the DuJay 1 well were met by the BSM 1 well. Therefore evidence was presented showing the Leases offset obligations and the late charges for unpaid royalties. It was acknowledged that Samson should be credited with royalties that it paid pursuant to the fraudulently obtained pooling agreement.

Contractual late charges as fraud damages:

Two thirds of the almost $21 million dollars awarded in damages were due to the late charges due on unpaid royalties under the contract terms of Hooks' Jefferson County Lease. Samson argued that the late charges were part of the contract and barred by limitations. This Court stated that in fraud cases both direct and consequently damages are available. And consequential damages result naturally but not necessarily from a wrongful act. The Court rejected that the lost-income damages found by the jury, reflecting the compensatory royalties and associated late charges were barred solely because they could also serve as a measure of damages for breach of contract. Just because Hooks' loss was economic did not prevent the recovery of tort damages. No evidence was presented contrary to Hooks' expert that the Lease provided for the payment of the late charges and but for Samson's fraud, Hooks would have been receiving compensatory royalties. Further, if those royalties were not paid, late charges would be assessed. Samson did not provide any argument that these late charges were not a natural, probably, or foreseeable consequence of its wrongful act. Instead, Samson argued that Hooks could only seek prejudgment interest on a fraud claim and not late charges. Since Hooks did not seek prejudgment interest, none should be awarded. The Court of appeals held that the evidence supported the jury's conclusion that the late charges were foreseeable and directly traceable to and resulted from Samson's misconduct, legally and factually.

Hooks' Appeal on Remand:

Hooks argued that he was entitled to compensatory royalties for production from the BSM and BSM A-1 because these wells were located within the buffer zone of the Hardin County Leases. Samson argued that the pooling agreement contained in the Hardin County Leases controlled the determination of calculating acreage and the buffer zones. The arguments rested on the interpretation of the "entire acreage clause," that was a part of the polling clause. Hooks argued that this clause expressly and plainly included pooled acreage as part of the acreage of the leases. Hooks further argued that because the pooled acreage is part of the lease, any producing well completed within the 1, 320 foot buffer zone of the unit triggered the Hardin County Leases offset obligations. On the other hand, Samson argued a narrower interpretation of the entire acreage clause and asserts that the offset obligations are not triggered by wells within 1, 320 feet of a unit boundary but only by wells within 1,320 feet of an unspooled lesser boundary. It relies on language in the offset obligation clause that recognize a distinction between the "leased premises" and the "acreage pooled therewith." The Court of Appeals noted that no Texas court has supported Hooks interpretation of this clause. *See Mengden v. Peninsula Prod. Co.*, 544 S.W.2d 643, 644 (Tex. 1976):

Skelly Oil v. Harris, 163 Tex. 92, 352 S.W. 2d 950, 954 (Tex. 1962). The Court noted that the legal consequence of pooling was that "the entire acreage" constituting the pooled unit should be treated as if it were included in Hooks' Tract. It was not a legal consequence of pooling that all of the offset obligation provisions designed to protect Hooks' tract from drainage – applied to the entire unit. The Court concluded as a matter of law that the drilling of wells within 1,320 feet of the pooling unit did not trigger the offset obligations in the Hardin County Leases.

<u>Conclusion:</u>

The Court of Appeals concluded that the evidence was insufficient to support the trial court's award; but, the evidence was sufficient to support an award of \$17,461,162.57 for fraud damages. The Court suggested a remittitur of \$2,620,475.50 and if Hook agrees within the applicable time frame, this Court would modify the trial court's judgment to reflect its damage calculation. In addition, The Court would modify the post-judgment rate to reflect an 18% rate for past due royalties and a 5% interest rate from other recoveries. If the remitter is not timely filed, then the trial court's judgment will be reversed and the case will be remanded for a new trial.

Lopez v. Huron,

No. 04-15-00327-CV, San Antonio Court of Appeals (02/03/2016)

<u>Synopsis:</u>

In order for a defective product claim to brought as a products action pursuant to Section 82.003 of the Texas Civil Practice & Remedies Code, the damages must arise out of personal injury, death or property damage. It is not a products action if the only injury is to the defective product itself. Further, damage to a finished product caused by a defective component does not constitute damage to other property. It is considered a contractual claim if damages are sought for the product itself. Because Huron did not seek damages to "other property," only the product itself, Huron's claim did not meet the requirements for a products action under Tex. Civ. Prac. & Rem. Code Ann. § 82.003.

Huron was awarded attorneys fees for his breach of implied warranty claims, which were recoverable under Texas law. However, Huron also had to expend attorney fees to defeat Lopez's counterclaims, which were not recoverable under Texas law. The Court held attorneys fees do not need to be segregated between those recoverable and non-recoverable when discrete legal services advance both the recoverable and non-recoverable claims.

<u>Overview:</u>

Adam Huron d/b/a Adam's Mexican Food Products ("Huron") makes and sells masa which is packaged in plastic bags. In 2010, Lopez agreed to supply Huron with plastic bags suitable for packaging the masa. Lopez ordered the plastic bags from A.J. Plastics, who delivered the plastic bags directly to Huron. In November of 2011, one of Huron's customers purchased \$19,273.85 worth of masa and returned it due to spoilage caused by a defect in the plastic bags.

Huron sued both Lopez and A.J. Plastics for breach of implied warranty based in contract. Lopez asserted counterclaims against Huron for breach of contract. The case went to trial and a jury found both Lopez and A.J. Plastics breached the implied warranties of merchantability and fitness for

a particular purpose. Huron was awarded $16,199.07 in damages and the jurors assessed 20% liability on Lopez and 80% liability on A.J. Plastics. The jury did not find Huron liable on any of Lopez's counterclaims. The jury also awarded Huron attorney's fees for prevailing on the warranty claim and for successfully defending against Lopez's counterclaims. The trial entered judgment and Lopez appealed.

Lopez appealed the judgment on the jury's findings of breach of implied warranties because said claim was not a contractual claim; but, was actually a products liability claim under §82.003 of the Texas Civil Practice and Remedies Code. Lopez also appealed the attorney fees decision on the grounds that the award included attorney fees not recoverable and that if the trial court erred in entering judgment on an improper contractual claim, then he should not have to pay any attorney fees. On the other hand, Huron contended that his claim did not fall within the products liability statute; but, was actually a contractual claim. Lopez countered that a nonmanufacturing seller's immunity under section 82.003 is not limited to products liability actions only.

The Court of Appeals first looked at Lopez's claim that the application of Section 82.003 is not limited to a products liability action. The Court disagreed with Lopez and held that Section 82.003 is only applicable to product liability actions. The Court then took on the issue as to whether Huron's action was indeed a products action as defined by §82.003 of the Texas Civil Practice & Remedies Code or whether it was a contractual claim. The Court noted that the Texas Supreme Court and other Courts have long recognized that a breach of implied warranty claim can be either in contract or tort. The Court also noted that the perimeters between these two types of claims are governed by the economic loss rule. In other words, an implied warranty claims is contractual if the only injury is to the defective product itself. It is important to note that this Court and other Texas courts have rejected the argument that damage to a finished product caused by a defective component part constitutes damages to "other property" so as to permit tort recovery for damage to the finished product." However, if damages arise out of personal injury, death, or property damage then it is a product liability action. See Tex. Civ. Prac. & Rem. Code Ann. §82.003. There was no dispute that the plastic bags were defective. The key question in this case turned on whether the plastic bags should be considered a component part of the packaged masa. If so, then the action was based in contract and not in tort.

In determining this key question, the Court of Appeals looked to three cases for guidance on what is considered "other property." Specifically, the Court reviewed the following three cases: *Helen of Troy, L.P v. Zotos Corp.*, 511 F. Supp.2d 703 (W.D. Tex. 2006), *Int'l Flavors & Fragrances Inc. v. McCormick & Co.*, 575 F.Supp.2d 654 (D.N.J. 2008) and *Saratog Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997). The Court was of the opinion that *Helen of Troy, L.P.* was more similar to the facts in this case. In Helen of Troy, L.P., Troy sold kits consisting of a cardboard package that contained an instructional videotape, a flat iron, a mirror, a comb, and five plastic bottles containing various solutions. Troy contracted with Zotos Corp. to supply the plastic bottles that were to be filled by Troy with the various solutions. The plastic bottles leaked, and Troy sued Zotos under various liability theories. In this case, Zotos was aware that the bottles would be components of the kits

to be assembled by Troy. Troy did not claim any damage to any property other than the kits and only sought damages for economic loss. The Court concluded that Troy's claim was not a product liability claim under Texas law because there was not a showing that the defective product caused physical harm or injury to a person or property. The only injury was to the product itself. Therefore, using the Helen of Troy, L.P. analysis, this Court concluded that the plastic bags were component parts of the final product, namely the packaged masa. Accordingly, Huron's claim was not a products action because he did not seek "damages arising out of personal injury, death, or property damage." Therefore, the trial court's verdict was affirmed.

The second issue related to the award of attorneys fees. Lopez contended that if the panel sustained that the action was based on a products liability action, then the award of attorney's fees was not valid. Since the Court overruled Lopez's products liability assertion, then the award of attorney fees was proper. However, Lopez also contended that a portion of the award of attorney's fees was related to Huron's defense of Lopez counterclaims and needed to be segregated since such fees were not be recoverable. Although, the record supported Lopez's contention, the record also supported that the work required to defend the counterclaims also advanced the defense of all other claims. The Court then went on to hold that that segregation is not required when discrete legal services advance both a claim on which attorney's fees are recoverable and a claim on which fees are not recoverable.

Auz v. Cisneros,

477 S. W. 3d 355 (Tex. App.—Houston [14th Dist.] 2015)

Synopsis:

Summary judgment evidence (an affidavit) did not conclusively prove reasonable and necessary attorneys' fees, a complaint that could be raised for the first time on appeal. The applicant must provide an allocation of time taken by each attorney on identified tasks.

Overview:

In a breach of contract case, Cisneros obtained a summary judgment against Auz on a $167,000 note. In support of his Texas Civil Practice & Remedies Code § 38.001 attorneys' fees claim, his attorney filed an affidavit seeking $20,250 in fees for 30 hours of work ($675 per hour), which the trial court awarded in full.

On appeal, Auz argued that Cisneros's attorneys' fees were not supported by legally sufficient evidence. In his affidavit, Cisneros's counsel generally described the worked performed in the case by listing eight categories of work and that he had performed a total of 30 hours of work on the matter; however, he did not submit any time records or other documentary proof. Auz did not object to a "defect" in the affidavit; rather, he raised legal sufficiency for the first time on appeal.

The Houston Court of Appeals agreed that Auz was making a substantive complaint and could do so for the first time on appeal. Contrary to Cisneros's argument, the Houston Court of Appeals held that the El Apple I requirements apply to all cases seeking attorneys' fees pursuant to § 38.001 and other statutes utilizing the lodestar

method, even simple cases such as the one under consideration. The applicant must provide allocation of the amount of time taken by each task. At a minimum, Cisneros' attorney should have allocated the amount of time taken by each of eight identified categories of work.

Practice Pointer No. 1:

Based on the concurring opinion, if you are seeking attorneys' fees by affidavit in support of your motion for summary judgment, read and follow these three Texas Supreme Court cases: *Long v. Griffin*, 442 S.W.3d 253 (Tex. 2014) (per curiam); *City of Laredo v. Montano*, 414 S.W.3d 731 (Tex. 2013) (per curiam); and *El Apple I, Ltd. v. Olivas*, 370 S.W.3d 757 (Tex. 2012).

Practice Pointer No. 2:

If you are seeking attorneys' fees by affidavit in support of your motion for summary judgment, attach a copy of your actual bills with time entries, redacting as necessary and appropriate. The Houston Court of Appeals noted this failure at least twice in the opinion. As the concurrence notes, attaching your bills (or other similar documentation) may be necessary until such time as the Texas Supreme Court adopts "similar flexibility … when addressing a failure to allocate not very many hours to not very many specific tasks in 'the simplest cases.'"

Alanis v. US Bank N.A.,

No. 01-14-00559-CV 2015 Tex. App. LEXIS 11292
(Tex. App.—Houston [1st Dist.] Nov. 3, 2015, reh. denied May 3, 2016)

Synopsis:

Texas Fair Debt Collection Practices Act sound in tort and are subject to Texas Civil Practice & Remedies Code Chapter 33 proportional and settlement credit reductions. However, where the claimant had no net recovery due to offset from a settlement credit, she could not recover attorneys' fees.

Overview:

The trial court entered judgment in favor of Alanis for US Bank's violation of the Texas Fair Debt Collection Practices Act ("FDCPA") and for BAC's common-law fraud, including attorney's fees. [Note: In a wholly separate action, she lost her wrongful foreclosure suit. Thus, the actual foreclosure was not a part of this case.] Alanis appealed in part complaining that the trial court incorrectly applied Texas Civil Practice & Remedies Code Chapter 33 to her claim, which she claimed arose from contract (loan and deed of trust). US Bank and BAC cross appealed claiming the award of attorney's fees improperly included amounts for claims for which attorney's fees were not recoverable and amounts attributable to the claims against a settling defendant.

The Houston Court of Appeals determined that Alanis's FDCPA claims as well as her common law claims sounded in tort and, therefore, Chapter 33 applied requiring a reduction of the damages commiserate with her percentage responsibility. Likewise, the Houston Court of Appeals found that the one satisfaction rule applied to further reduce the damages. Although the US Bank and BAC may not have been joint tortfeasors with the settling defendant, a settlement credit is appropriate when defendants commit technically different acts that result in a single injury.

US Bank and BAC also complained that the jury's award of out of pocket expenses was improper. The appellate court noted that the charge, without objection, did not contain an instruction of the legal definition of out of pocket expenses in a fraud case. So, the Houston Court of Appeals recognized that the jury was therefore free to use the ordinary definition as commonly understood by non-lawyers, *i.e.* outlay of cash or financial loss, as opposed to the legal definition, *i.e.* the difference between the value paid and the value received. However, as this instant case did not involve the actual foreclosure, lost value in the property was not a result of the debt collection violations and, therefore, not recoverable. Likewise, Alanis's loan payments were not financial losses resulting from the debt collection violations.

After striking her damages for out of pocket expenses and applying the proportional reduction and settlement credits, Alanis ended up with no net recovery. In a case of first impression under the FDCPA, the Houston Court of Appeals looked to guidance from cases interpreting the FDCPA's tie-in statute, the DTPA, to determine whether the plaintiff "prevailed" or "successfully maintained an action." The Houston Court of Appeals explained:

> Generally, a party requesting attorney's fees need not obtain a net recovery to be entitled to recover attorney's fees when the opposing party's counterclaim recovery offsets the consumer's recovery. [Citations omitted.] However, this no-net-recovery exception does not apply when a consumer—or, as here, a person seeking attorney's fees under FDCPA—has already settled for an amount greater than the damages found by the jury in the trial against the non-settling defendant. [Citations omitted.]
>
> This is so because, as this Court has held, "[i]t is one thing to allow an attorney's fees award on a successful claim notwithstanding an opposing party's success on an offsetting claim," but it is quite another "to allow attorney's fees on a claim that, although successful, was paid in full before trial." [Citation omitted.] Because Alanis's damages were paid in full under the pretrial settlement with Vericrest, she may not recover attorney's fees here.

2015 Tex. App. LEXIS 11292 at *65-66.

Alexander v. Kent,

480 S.W. 3d 676
(Tex. App.—Fort Worth 2015)

Synopsis:

A plaintiff may not recover attorney's fees in a common-law fraud action.

Overview:

This is a breach of contract and common law fraud case arising from a contract to construct a car lot. The owner (Kent) made interim progress payments based on the contractor's (Alexander) allegedly false payment applications stating subcontractors had been paid for their work. The owner prevailed in a bench trial recovering actual damages and attorneys' fees. The contractor appealed on multiple grounds.

On a factual and legal insufficiency review, the representations in the payment applications that the subcontractors had been paid were, if false, the types of actionable

misrepresentations that would constitute fraud, and were made by the sole owner of the construction contractor who had more than 20 years experience and upon whose word the owner, Kent, could have reasonable relied. The Fort Worth Court of Appeals found (1) ample evidence that Kent's reliance was justified, (2) no evidence that Kent had equal access to knowledge that the subcontractors were not paid, and (3) Alexander's alleged lack of intent to perform irrelevant as Kent did not bring a fraud in the inducement claim.

Alexander also denied that he was personally liable; rather, he argued that, in signing each of the payment applications, he acted strictly in his capacity as president of the company thereby exonerating him from liability. (Note: Kent originally sued both Alexander and his company. However, during the course of the litigation, the company filed for bankruptcy.) Distinguishing *Leitch v. Hornsby*, the Fort Worth Court of Appeals limited that case to its facts, *i.e.* the employer corporation, but not the individual corporate officers, owed a non-delegable duty to provide an employee of the corporation a safe workplace. Rather, the Fort Worth Court of Appeals applied "the general rule in Texas [which] has always been that '[a] corporation's employee is personally liable for tortious acts which he directs or participates in during his employment.'" "Specifically, The law is well-settled that a corporate agent can be held individually liable for fraudulent statements or knowing misrepresentations even when they are made in the capacity of a representative of the corporation."

Holding:

Accordingly, Kent effectively proved his fraud case against Alexander; however a plaintiff may not recover attorney's fees in a common-law fraud action, even when the fraud claim arose from breach of contract. As fraud was his only cause of action, Kent was not entitled to attorneys' fees.

Further, the attorneys' fees Kent expended in hiring a bankruptcy attorney to consider putting Alexander into involuntary bankruptcy were not reliance damages and, therefore, not recoverable in Kent's fraud claim.

Finally, Alexander may not recover the last payment due on the contract as an offset to Kent's damages. First, that debt was owed to the company, not Alexander individually (and the damages accessed were for Alexander's individual fraud, not the company's breach of contract). Second, the right of offset, setoff, or reimbursement is an affirmative defense that must be pled (or it is waived) and proved by the party asserting it. Alexander filed only a general denial and the issue was not tried by consent.

Turner v. NJN Cotton Co.,

No. 11-13-00303-CV, 2015 Tex. App. LEXIS 12181
(Tex. App.—Eastland November 30, 2015, pet. denied)

Synopsis:

Statute of frauds is avoided by party's admission of a contract's existence. Course of performance or course of dealing is not established by a sole prior transaction. Attorney's fees are recoverable under §38.001(8) (oral or written contracts) in a promissory estoppel claim.

Overview:

This is a breach of contract claim resulting from a deal by Turner, a cotton farmer or producer, to sell his cotton crop to NJN

Cotton. The jury found that Turner agreed to sell his entire crop to NJN at a certain price and that it was to be delivered after the harvest (a forward contract); Turner failed to comply with the agreement; Turner admitted that he contracted with NJN for the sale of his crop; NJN did not send Turner a written confirmation of the contract within a reasonable time; Turner received confirmation of the contract and had reason to know the contents of it; and Turner did not give written notice of his objections to the contents of the confirmation within ten days after he received it. The jury assessed damages of $407,607.74 against Turner. It further assessed damages of $3,400 that resulted from NJN's reliance. Finally, the jury found $60,000 in attorneys' fees. The trial court entered judgment on the verdict and denied Turner's counterclaim.

Although NJN and Turner had done business for year, they had previously entered only one signed written forward contract. Their other prior transactions were either through third-parties or were post-harvest oral contracts. In this case, the parties orally agreed to a forward contract in April. NJN prepared a written agreement, which it expected Turner would eventually sign, but NJN did not send the contract to him. In October, NJN notified the gin Turner had used for 50 years (and of which he was president and 20% owner) that NJN had Turner's cotton under contract prompting Turner to seek a copy of the written contract. Believing he could get a better price elsewhere, Turner refused to sign the contract and had his lawyer notify NJN. On the other side of the transaction, NJN had already agreed to sell the Turner cotton to a shipper. Due to Turner's refusal to sell to NJN, it was unable to cover its full obligations to the shipper.

Turner argued that no valid and enforceable contract existed in part due to the statute of frauds requiring that the party against whom enforcement is sought sign the contract. Tex. Bus. & Com. Code Ann. § 2.201(a). However, § 2.201(c)(2) provides an exception to the signature requirement where the party admits the contract exists, which the jury found Turner did. Turner also complained that there was no evidence of a written contract; however, the jury finding were that he agreed to sell and admitted to the existence of a contract. In both cases, the Eastland Court of Appeals noted that the contract could be oral, which require proof of the elements of a contract (offer, acceptance, meeting of the minds, and consent to the terms) other than execution and delivery, all of which may be proved by either circumstantial or direct evidence.

Turner also complained that the court failed to submit a mitigation instruction requiring the jury to consider NJN's failure to "cover." However,

> Under Section 2.711, if a seller fails to deliver goods, a buyer may "cover" and collect damages under Section 2.712, or the buyer may recover damages for non-delivery under Section 2.713. BUS. & COM. § 2.711. The measure of damages under Section 2.712(b) is the difference between the cost of cover and the contract price, together with any incidental or consequential damages, less expenses saved in consequence of the breach by the seller. *Id.* § 2.712(b). The measure of damages for non-delivery under Section 2.713(a) is the difference between the market price at the time when the buyer learned of the breach and the contract price together with

> any incidental and consequential damages provided in Section 2.715, less any expenses saved as a result of the breach by the seller. *Id.* § 2.713(a). A "buyer is always free to choose between cover [under Section 2.712] and damages for non-delivery under [Section 2.713]."

NJN chose delivery damages. Therefore, the trial court did not err in denying the requested instruction. Further, mitigation prevents recovery of those damages the plaintiff could reasonably avoid at a trifling expense and with reasonable effort. The defendant must prove the plaintiff's lack of diligence as well as the amount by which damages were increased due to the failure. Here, Turner did neither. Further, rejecting an offer to sell the crop and place the proceeds into the registry of the court is not relevant to mitigation.

Further, when deciding the correct date on which to affix the market price under delivery damages, Turner argued that the date should be when his attorney notified NJN in November 2010 (the time of anticipatory breach), but NJN argued the date should be February 2011 when it finally realized Turner would not perform and at which time NJN's attorney sent Turner a demand letter. Considering the interplay between Texas Business & Commerce Code sections 2.610, 2.611, 2.711, and 2.713, the Eastland Court of Appeals determined that, in an anticipatory breach, the aggrieved party may wait a "commercially reasonable" time before selecting its remedy. This allows the breaching party to retract its repudiation. In this case, February was within a reasonable commercial time.

Likewise, the trial court did not err in rejecting the instructions for "course of performance" and "course of dealing" as there had only been one prior written forward contract. The Eastland Court of Appeals ruled that one prior dealing does not make a course of dealing or performance.

Finally, Turner argued that NJN had failed to segregate its fees related to breach of contract (a recoverable action under Chapter 38) from its fees related to promissory estoppels (an allegedly unrecoverable action under Chapter 38) and such failure to segregate should result in denial of all of its fees. The Eastland Court of Appeals noted that discrete legal services related only to unrecoverable fees should be segregated, but intertwined fees need not be so in order to recover the entire amount. Further, fees for work done defending against affirmative defenses pled against a recoverable action as well as defending against related counterclaims are also recoverable and need not be segregated. However, the Eastland Court of Appeals noted that, based on prior precedent, fees for promissory estoppel are recoverable under § 38.001(8).

<u>Practice Pointer:</u>

Be clear in your appellate briefing. Here, the Eastland Court of Appeals noted that Turner set forth the standards for both factual and legal sufficiency in his brief; however, his argument addressed only "matters of law." Therefore the appellate court deemed that he had not raised a factual insufficiency point. However, given the recitation of facts, a factual sufficiency review might not have altered the outcome.

Jeffrey J. Sheldon et al. v. Pinto Technology Ventures LP et al.

Opinion delivered September 10, 2015
No. 14-13-01066-CV (14th COA)

Synopsis:

Two shareholders of a corporation filed suit seeking redress related to a series of transactions allegedly orchestrated by various parties. The shareholders claimed the transactions diluted their respective stock interests in the corporation. All defendants moved to dismiss the claims based on a Delaware forum-selection clause contained in certain amended and restated versions of an agreement among the corporation and various shareholders. The trial court dismissed the claims based on the Delaware forum-selection clause. On appeal, we conclude that the trial court erred in dismissing the shareholders' claims because they do not fall within the scope of the forum-selection clause. Therefore, we reverse and remand.

Factual Background:

At all material times, Jeffery J. Sheldon ("Sheldon") and Andras Konya MD PhD ("Konya") (collectively the "Shareholders") owned shares of common stock in IDev Technologies Inc. ("IDev"). IDev and some of its shareholders entered into a shareholders agreement in 2000, which was amended and restated in 2002, 2004, 2006, and 2008. The first two amended and restated agreements contain a Texas forum-selection clause, but the latter two amended and restated agreements contain a Delaware forum-selection clause. Sheldon signed all four of the amended and restated agreements. Konya signed only the first two. Sheldon alleges that, as of early 2010, he owned just over 5% of the total outstanding shares of IDev. Konya alleges that, as of early 2010, he owned about 2.4% of the company's total outstanding shares. The Shareholders allege that as a result of various actions taken in 2010, their holdings in IDev were diluted to the point that the holdings were "essentially eliminated." In 2013, a company announced that it had entered into an agreement under which it would acquire all outstanding equity of IDev for $310 million net of cash and debt.

Following the announcement, the Shareholders filed suit against various venture-capital shareholders in IDev, two individuals who were IDev officers, and two individuals who were IDev directors (collectively the "IDev Parties") in which they complain of actions allegedly taken by the IDev Parties in 2010 that allegedly diluted the Shareholders' IDev holdings.

The IDev Parties moved to dismiss the Shareholders' claims based on the Delaware forum-selection clause contained in each of the post-2004 amended and restated agreements. In response, the Shareholders argued, among other things, that their claims do not fall within the scope of the Delaware forum-selection clause. The trial court granted the IDev Parties' motions and dismissed the Shareholders' claims based on the Delaware forum-selection clause.

Issues Presented:

On appeal, the Shareholders presented three issues: (1) whether Konya can be bound to a Delaware forum-selection clause contained in shareholders agreements he did not sign and which expressly provide they are effective as to a party only upon signing by that party; (2) whether appellees Bill Burke and Chris Owens can take advantage of a

Delaware forum-selection clause contained in amended shareholders agreements they have not executed, which expressly provide the agreements are effective as to a party only upon signing by that party; and (3) whether the Shareholders' claims stemming from duties owed to the Shareholders at common law or by statute "arise out of" the shareholders agreements such that the Shareholders' claims should be subject to the Delaware forum-selection clause.

Analysis:

The amended and restated shareholders agreements dated 2006, 2008, and 2010 each contain a forum-selection clause stating that "the Delaware state courts of Wilmington, Delaware (or, if there is exclusive federal jurisdiction, the United States District Court for the District of Delaware) shall have exclusive jurisdiction and venue over any dispute arising out of this Agreement." Under the unambiguous language of the clause, the parties bound agree that "any dispute arising out of this Agreement" shall be resolved in certain courts in Delaware. The provision is a mandatory forum-selection clause.

However, the claims that the Shareholders actually have asserted are based on violations of general obligations allegedly imposed either by statute or by the common law, and the bases for these claims would exist even if there never had been an agreement between or among any of the shareholders. If, under applicable law, the claims a plaintiff asserts are not within the scope of a forum-selection clause, the existence of unasserted claims that are within the scope of this clause does not cause the asserted claims to fall within the scope of the clause.

Holding:

The Shareholders' claims all arise out of alleged non-contractual, general obligations imposed by law rather than out of the shareholders agreement. The Delaware forum-selection clause applies only to "any dispute arising out of" the shareholders agreement. Under binding precedent from the Supreme Court of Texas, the Shareholders' claims do not fall within the scope of the Delaware forum-selection clause. Therefore, the trial court erred in dismissing these claims based on the clause. We reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

Dissent:

A plain reading of the Agreement confirms that the Shareholders' claims and damages arise out of that Agreement, and are subject to the Delaware forum-selection clause.

Motion for *en banc* reconsideration denied. Petition for Review filed January 4, 2016.

Crum & Forster Specialty Insurance Co. v. Creekstone Builders Inc. et al.

Opinion delivered October 27, 2015
01-14-00907-CV (1st COA)

Synopsis:

This declaratory judgment action involves an insurance coverage dispute arising out of a construction-defects verdict obtained in South Carolina against Creekstone SC I LLC, an insured under commercial general liability insurance policies issued by Crum & Forster Specialty Insurance Company ("Crum & Forster"). Prior to the trial of the construction-defects lawsuit, Crum & Forster filed the underlying declaratory

judgment action in Harris County against Creekstone SC I LLC and the four additional appellees—Creekstone Builders Inc., Nashville Creekstone LLC, Stephen Keller, and Everett Jackson (collectively, "Creekstone")—seeking a declaration that it had no coverage obligation to Creekstone under the insurance policies at issue. Creekstone moved to dismiss the underlying action, arguing that Crum & Forster had failed to join the plaintiff from the South Carolina construction-defects lawsuit, a necessary party to this suit, and that the case would more appropriately be resolved in South Carolina and thus should be dismissed on *forum non conveniens* grounds. The trial court granted Creekstone's motion on both grounds.

Factual Background:

From 2004 to 2006, Creekstone Builders, as a developer, and Creekstone SC I, as general contractor, renovated and converted an apartment complex in Mt. Pleasant, South Carolina, into condominium units. In 2010, the East Bridge Lofts Property Owners Association Inc. ("POA") filed suit in South Carolina state court against numerous defendants, including Creekstone SC I, Everett Jackson, and Stephen Keller,1 and asserted several causes of action, including negligent construction and supervision of the condominium units ("the construction-defects suit"). Crum & Forster, which had issued commercial general liability insurance policies to Creekstone Builders, declined to defend Creekstone in the construction-defects suit.

On May 23, 2014, shortly before the trial in the construction-defects suit began in South Carolina, Crum & Forster filed the underlying declaratory judgment action in Harris County against Creekstone Builders, Nashville Creekstone, Keller, Jackson, and Creekstone SC I ("the underlying action"). Crum & Forster did not name the POA as a defendant. Crum & Forster alleged that it had issued two general liability insurance policies to Creekstone Builders in 2008 and 2009—both of which also included Creekstone SC I, Keller, and Nashville Creekstone as named insureds on the policies—and that an exclusion contained in both policies precluded coverage for the claims asserted against Creekstone in the construction-defects suit. Crum & Forster sought a declaration that, under the two insurance policies at issue, it had no duties or obligations to Creekstone for the claims asserted against it. In its original petition, Crum & Forster alleged that its "statutory home office" was located in Arizona and that its principal place of business was located in New Jersey. It also alleged that Creekstone Builders is a Texas corporation and does business in Texas, that Nashville Creekstone is a Texas company with a principal place of business in Tennessee, and that Creekstone SC I is a South Carolina company with a principal place of business in Texas.

On June 9, 2014, the South Carolina state court entered judgment in favor of the POA and against Creekstone SC I for $22,000,000 in actual damages and $33,000,000 in punitive damages.

On June 24, 2014, the POA, Creekstone SC I, and Creekstone Builders filed suit against Crum & Forster in federal district court in South Carolina ("the federal action"). The POA alleged that, as a judgment creditor of Creekstone SC I, it had standing to sue Crum & Forster to recover proceeds under the insurance policies at issue. Among other claims, the POA, Creekstone SC I, and Creekstone Builders sought a declaration that Crum & Forster was obligated to pay the full judgment in favor of the POA and

that it was required to indemnify Creekstone SC I and Creekstone Builders.

Creekstone then filed a motion to dismiss the underlying action. Creekstone first argued that the trial court should dismiss the underlying action because Crum & Forster did not join the POA as a party. It argued that as the judgment creditor in the construction-defects suit, the POA claimed an interest that would be affected by a declaration in the underlying action and thus was a necessary and indispensable party under Texas Rule of Civil Procedure 39 and the Texas Declaratory Judgment Act.

The trial court granted Creekstone's motion to dismiss on both of the grounds raised: that Crum & Forster failed to join a necessary and indispensable party to the action and that the doctrine of forum non conveniens permitted dismissal of the action. Crum & Forster requested findings of fact and conclusions of law, but the trial court did not file findings and conclusions.

Issues Presented:

In two issues on appeal, Crum & Forster argues that (1) the trial court erroneously determined that the South Carolina plaintiff was a necessary and indispensable party to the underlying action filed in Harris County because its interests are purely derivative of Creekstone's, and (2) the trial court erred in dismissing the case on forum non conveniens grounds because Creekstone offered no evidence to support its argument on that basis at the hearing on Creekstone's motion and the facts of the case support retaining this suit in Texas.

Analysis:

A forum non conveniens determination is committed to the sound discretion of the trial court. When the trial court has considered all of the relevant public and private interest factors and its balancing of these factors is reasonable, the court's ruling deserves substantial deference. A defendant seeking dismissal based on *forum non conveniens grounds* bears a heavy burden in opposing the plaintiff's chosen forum. However, the doctrine affords "substantially less deference" to a non-resident plaintiff's forum choice. Before a case is dismissed on *forum non conveniens* grounds, the defendant must demonstrate that an adequate alternative forum is available to adjudicate the dispute. The "central focus" of a *forum non conveniens* inquiry is convenience. The doctrine permits courts to dismiss a claim based on practical considerations that affect litigants, witnesses, and the justice system. In determining whether to dismiss a case on *forum non conveniens* grounds, a court must consider the public and private interest considerations set out in the United States Supreme Court's decision in *Gulf Oil Corp. v. Gilbert*.

The parties agree that Crum & Forster, which has a home office in Arizona and a principal place of business in New Jersey, is a non-resident plaintiff and that Creekstone Builders, one of the five defendants in the underlying action, is a Texas entity. Although Crum & Forster alleged in its original petition in the underlying action that Creekstone SC I was organized under the laws of South Carolina but had a principal place of business in Texas, Creekstone alleged in the federal action, which it attached as evidence to its motion to dismiss, that Creekstone SC I "is a South Carolina limited liability company."

Creekstone Builders is a Texas entity, and Crum & Forster's broker for the insurance policies at issue was located in Texas.

However, Crum & Forster itself, the plaintiff in the underlying action, is not a resident of Texas. Thus, its forum choice is entitled to "substantially less deference" than if it were a Texas resident.

Holding:

We conclude that the trial court had sufficient evidence before it such that it could reasonably determine that the private interest factors weighed in favor of dismissing the case to be heard in South Carolina, and that the balance of public interest factors also weighed in favor of dismissing the underlying action. We therefore hold that Creekstone met its *forum non conveniens* burden and that the trial court did not abuse its discretion by dismissing the underlying action on *forum non conveniens* grounds. We affirm.

SW Loan A, L.P. v. Duarte-Viera,

04-15-00255-CV 2016 Tex. App. LEXIS 1534
(Tex.App.—San Antonio, February 17, 2016)

Synopsis:

In a suit on a note with a counterclaim for declaratory judgment, the trial court abused its discretion in awarding attorney's fees on attorney fees on a declaratory judgment counterclaim where that counterclaim did not raise any issues beyond those in the original suit.

Overview:

This is a suit on three personal guaranty agreements backing a loan for an apartment complex. The apartment complex defaulted, and the loan holder sought to collect on the personal guaranty agreements. The jury found that the apartment complex had not defaulted and awarded the defendants attorneys' fees on their counterclaims. In a transaction involving a loan, promissory note, deed of trust, and guaranty agreements, the lender did not need to offer into evidence the actual promissory note (or the notice of assignment or calculation of damages) where there was adequate testimony regarding it.

Further, as the defendants' counterclaim for declaratory judgment did not present issues beyond those raised by the plaintiff or with greater ramifications than the original suit, the defendants were not entitled to recover attorneys' fees. Specifically, the San Antonio Court of Appeals explained:

> The Declaratory Judgments Act is not available to settle disputes already pending before a court. [Citation omitted.] Therefore, a declaratory judgment counterclaim is not properly brought when the issue raised is already a part of the plaintiff's case. *See id*. An exception to this rule exists when a defensive declaratory judgment presents issues beyond those raised by the plaintiff, or when it has greater ramifications than the original suit. [Citation omitted.] "[I]t is an abuse of discretion to award attorney's fees under the Uniform Declaratory Judgments Act if the claim for declaratory relief is urged solely as a vehicle to obtain attorney's fees."

2016 Tex. App. LEXIS 1534 at *25.

Practice Pointer:

If your bring a claim based on a promissory note and you request a jury issue specifically asking whether the defendant complied with

the promissory note, you should offer the promissory note as an exhibit, even if it is not entirely necessary.

Swinnea v. ERI Consulting Engr'rs, Inc.,

481 S.W.3d 747 (Tex. App.—Tyler 2016, no pet. history)

Synopsis:

Disgorgement damages are not punitive in nature; thus, an award of such forfeiture damages coupled with an exemplary damage award are not duplicative. To that end, when reviewing an exemplary damage award for excessiveness under Texas law and federal due process, discouragement damages should not be added to the exemplary damage award for purposes of assessing the proportionality of actual/compensatory damages and exemplary damages.

Overview:

J. Mark Swinnea ("Swinnea") and Larry Snodgrass ("Snodgrass") were equal owners of ERI Consulting Engineers, Inc. ("ERI"). In the late summer of 2001, Snodgrass and ERI purchased Swinnea's interest in ERI, with the agreement that Swinnea was to remain an ERI employee for six years, during which time he was not to compete with ERI. Notwithstanding this agreement, the next year Swinnea's wife formed Brady Environmental, Inc., which competed directly with ERI. Snodgrass and ERI sued Swinnea for statutory fraud in a real estate and stock transaction, common law fraud, breach of the noncompete clause, and breach of fiduciary duty.

Following a bench trial, the trial court found that Snodgrass and ERI were entitled to recover $1,020,700 in combined forfeiture (discouragement) and actual damages and $1,000,000 in punitive damages, in addition to attorneys' fees. On appeal, the monetary awards were deleted and judgment was rendered that Snodgrass and ERI take nothing. That ruling was reversed by the Texas Supreme Court and remanded to the appellate court for further consideration. The appellate court suggested a remittitur of a portion of the actual damage award and remanded the case to the trial court for further consideration of the forfeiture award. On remand, the trial court determined that ERI and Snodgrass were entitled to recover actual damages in the amount of $178,601.05, discouragement in the amount of $720,700, exemplary damages in the amount of $1,000,000, attorneys' fees, pre- and post-judgment interest, and costs of court. Swinnea again appealed the trial court's award.

Among other things, Swinnea argued that the discouragement award was improper, and that even if it was proper, it was punitive and Snodgrass could not recover both a punitive discouragement award and an exemplary damage award. The appellate court disagreed. First, it found that the discouragement award was proper because actual damages are not a prerequisite for discouragement of contractual consideration. Second, the court found that Snodgrass and ERI were not seeking to rescind the contract, but had instead sued on a breach of fiduciary duty theory; as such, restitution damages, including reciprocal restitution to Swinnea, would not be proper. Third, the court held that because discouragement is not punitive in nature, an award of equitable discouragement coupled with an award of exemplary damages is not duplicative. Further, because discouragement damages are not punitive, the court need not evaluate the damages for excessiveness applicable to punitive damage awards. Finally, the court

found that the trial court's determination as to the amount of forfeiture damages was not an abuse of discretion, based in part on the fact that Swinnea's objective with respect to the transaction at issue was the financial destruction of ERI and Snodgrass.

Swinnea also challenged the punitive damage award for excessiveness, claiming it was not reasonably proportioned. The court reviewed the following factors in considering the proportionality of the actual and exemplary damage awards: (1) the nature of the wrong, (2) the character of the conduct involved, (3) the degree of culpability of the wrongdoer, (4) the situation and sensibilities of the parties concerned, and (5) the extent to which such conduct offends a public sense of justice and propriety. The court rejected Swinnea's argument that the discouragement damages must be added to the punitive damages when considering proportionality. Instead, the discouragement damage award was added to the actual damage award and compared against the exemplary damage award. After reviewing these factors, and based on the serious and intentional nature of Swinnea's conduct, the court found that the exemplary damage award was reasonably proportioned.

Similarly, when considering whether the exemplary damage award offended due process, the court considered a number of factors, including (1) the degree of reprehensibility of Swinnea's conduct, (2) the ratio between exemplary damages and compensatory damages, and (3) the difference between the punitive damage award and the civil or criminal penalties authorized or imposed in comparable cases. Again, when calculating the ratio between compensatory and exemplary damages, the court did not include disgorgement damages with the exemplary damage award. Ultimately, the court found that the exemplary damage award did not violate federal due process protections.

Sacks v. Hall,

481 S.W.3d 238 (Tex. App.—Houston [1st Dist.], pet. filed)

Synopsis:

A lawsuit alone will not satisfy the presentment requirement of Texas Civil Practice and Remedies code section 38.002 for the recovery of attorneys' fees under Section 38.001. An oral or written demand that is clear and unequivocal is required.

Overview:

Deana Sacks ("Sacks") sued her former orthodontist, Thomas Hall and his professional association ("Hall") for breach of contract, negligent misrepresentation, fraud, violations of the Texas Deceptive Trade Practices Act, and medical negligence. The medical negligence claim was later dropped. Hall counterclaimed against Sacks for bad faith, fraudulent inducement, and breach of contract. The entire matter stemmed from Hall's treatment of Sacks.

When Sacks first visited Hall about straightening her teeth, Sacks was advised that she needed to go to her regular dentist to get medically cleared for braces. Sacks failed to visit her dentist. Instead, she returned to Hall and signed a contract related to her orthodontic care. She agreed to pay $5,995 for this care.

After some time, Sacks began experiencing pain in her mouth. She had to get a number of root canals stemming from pre-existing dental problems. Because of these procedures, she could not wear her straitening trays because of the pain.

Further, because the shape of certain of her teeth changed after the root canal procedures, the mold taken of her mouth to build the trays was no longer useable. Sacks informed Hall that she no longer wanted to treat with him and demanded her medical records so she could transfer to another orthodontist. A day after making this demand, Hall's office manager told Sacks that her insurer refused to pay $1,220 for her treatment, and that Sacks should call them to clear up the issue.

The case went to trial. The jury found that Hall had not made a negligent misrepresentation; engaged in any false, misleading, or deceptive act or practice; or breached the parties' contract. However, the jury found that Sacks had breached the contract and awarded $1,220 in actual damages, $35,000 in trial level attorneys' fees, and $45,000 in conditional appellate attorneys' fees. Sacks appealed.

One of the issues that Sacks complained of on appeal was the attorneys' fee award. Sacks contended that Hall could not recover attorneys' fees because he had failed to plead and prove that Hall had presented his breach of contract claim to her and that she had failed to tender performance. Presentment is a perquisite to recover attorneys' fees under Texas Civil Practice and Remedies Code section 38.001.

Hall argued that he had satisfied the presentment issue by telling Sacks in January 2007 that he refused to treat her any longer unless she paid more money and by giving her a copy of his internal ledgers showing an account balance. But the court rejected both of these points.

With respect to the conversation between Sacks and Hall regarding additional payments, the court found that other conversations between the two negated any value the January conversation may have held. For example, the record was replete with evidence that Hall also offered Sacks a partial refund, that Hall would not have sued Sacks but for the fact she sued him first, and that Hall never actually asked for the $1,220 directly from Sacks. Instead, his office manager merely instructed Sacks to work the issue out with her insurer.

As to the internal ledgers, the court found that they were also insufficient because they were only given to Sacks because she demanded a copy of her file; they were internal documents Hall used for his accounting. Moreover, the ledgers had a number of different balances on them, none of which were $1,220.

Finally, the court rejected Hall's claim that the lawsuit itself was sufficient to satisfy the presentment requirement. A lawsuit alone is insufficient, unless coupled with discovery such as Requests for Admission on the specific issue.

While the court upheld all other aspects of the underlying judgment, it deleted the attorneys' fees award in favor of Hall.

Practice Pointer:

Before filing a counter-claim for breach of contract, send a letter to opposing counsel with a demand that satisfies the presentment requirement.

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