TADC Commercial Litigation Newsletter

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Co-Editors: John Bridger & Jason C. McLaurin

Strong Pipkin Bissell & Ledyard L.L.P.

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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

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In re Nat'l Lloyds Ins. Co.	Whether this Court should adopt a blanket rule prohibiting discovery of an opposing party's non-privileged attorney's fee information in every case. Whether on the specific record presented, the trial court abused its discretion by compelling the production of relevant, non-privileged attorneys' fee billing records, when the Relators: (1) have challenged the attorneys' fees sought by the Plaintiffs, (2) have designated one of their defense attorneys as their testifying expert on attorneys' fees, and (3) previously have argued that their attorney's fees and billing practices should be considered by a jury in deciding the reasonableness of another MDL plaintiff's fee request. Whether the trial court abused its discretion by overruling Relators' assertions that their attorneys' billing rates and amounts billed and paid were privileged.	13

Texas Courts of Appeals Decisions

NeuroTex take nothing from Pierce and Syndergy. NeuroTex appealed. The Tyler Court of Appeals affirmed in part, reversed in part, and remanded back to the trail court for further proceedings.
On December 13, 2005 Pierce went to work for NeuroTex. As a condition of his employment Pierce signed an employment agreement. Under the terms of the employment agreement NeuroTex agreed to employee Pierce to provide intraoperative texting/monitoring (IOM) services. The term of the agreement was indefinite; the agreement specified an initial employment period (term) of ninety days with automatic extensions of the agreement for thirty day periods unless either party gave fourteen days written notice of intention to terminate the agreement upon expiration of the current thirty day period (i.e. not to renew employment for the following calendar month). The agreement described circumstances under which NeuroTex could terminate Pierce's employment for cause at any time during a thirty day term.

The employment agreement also contained an NDA in which Pierce agreed not to compete with NeuroTex in eleven (11) counties surrounding the DFW Metroplex for five (5) years after the expiration or termination of the employment agreement. The NDA also required Pierce not to divert or attempt to divert any existing business for a period of (2) years after expiration or termination of the employment agreement. The employment agreement also contained training agreement in which NeuroTex agreed to spend money training Pierce to perform IOM services. NeuroTex paid for Pierce's additional training and by May 2006, about five months after going to work for NeuroTex, Pierce had obtained two (2) additional board certifications in providing IOM services (Pierce only had one board certification at the time he started working for NeuroTex). Now being triple board certified, Pierce continued to work for NeuroTex providing IOM services for the next seven (7) years until he resigned on October 15, 2013. Upon his resignation Pierce went to work for Synergy providing IOM services in the eleven (11) counties surrounding the DFW Metroplex.

Southwestern Energy Production Company v. Berry-Helfand,

491 S.W.3d 699 (Tex. 2016)

Synopsis:

In this trade-secret misappropriation case, the principal issues were (1) whether there was sufficient evidence to support the jury's actual-damages awards based on a 3-percent reasonable-royalty calculation applied to profits; (2) whether a limitations defense barred the misappropriation claim as a matter of law; and (3) whether equitable disgorgement is available for misappropriation and breach of a non-fiduciary duty of confidence.

Factual Background and Trial Court Proceedings:

Toby Berry-Helfand ("Helfand"), an experienced reservoir engineer, worked full time for nearly seven years analyzing data on East Texas oil-and-gas formations to identify locations in the James Lime reservoir where gas production could be enhanced with horizontal drilling. The purpose of the data analysis was to identify the "sweet spots" for drilling and production from the James Lime reservoir.

Over the years, Helfand collaborated with two geologists: Gery Muncey, who worked with Helfand from 1998 to 2001, and Leon Wells, who worked with Helfand from 2003 to 2005.

Helfand's sweet-spot methodology was first put to the test in 2000 when she and Muncey partnered with David Michael Grimes and Grimes Energy to drill a prospect in Nacogdoches County. The well was not successful. Muncey and Helfand parted ways the following year.

Helfand continued to pursue her James Lime research until she was offered assistance by Wells in 2003. Working together under the name of "Team Works," Helfand and Wells refined the "sweet spot" methodology and continued to develop their "play" in the James Lime reservoir.

In 2004, Helfand and Wells decided to generate interest in the James Lime play by acquiring a drill-ready prospect as a sample of their play and then market the prospect to exploration companies with deep pockets and the technical ability to develop their sweet spots. One of those prospects, SEPCO, showed interest.

Before Team Works would disclose any information, however, SEPCO was required to execute a confidentiality and non-compete agreement. The agreement required SEPCO to maintain the confidentiality of Team Work's information and return any confidential information sent to SEPCO. SEPCO also agreed not to compete with Team Works in the area of interest (James Lime) for one year. After SEPCO executed the confidentiality and non-compete agreement, Team Works provided detailed information about the sweet spot prospects throughout the James Lime play.

Within days after the meeting, SEPCO negotiated an exclusive evaluation period. During the period, Team Works provided additional information to SEPCO, which SEPCO reportedly used to evaluate the deal's economic feasibility. However, time passed with no offer from SEPCO. When SEPCO's exclusivity period expired, Helfand began marketing the play to other companies.

Though, Helfand still hoped to make a deal with SEPCO, she needed the materials she had sent SEPCO to market the deal to other companies. Helfand requested that the documents in SEPCO's possession be returned. Despite the existence of the confidentiality agreement, SEPCO apparently kept at least some of Team Works's confidential documents.

Ultimately, Team Works closed a deal with Petrohawk, whereby Petrohawk bought interests in the play owned by Team Works and executed a Prospect Identification Agreement covering Angelina, Nacogdoches, and Shelby Counties. Under the agreement, Helfand averaged a 3% overriding royalty on "hundreds and hundreds" of leases for the play.

While Helfand was engaged with Petrohawk, SEPCO pursued a James Lime play of its own. After ostensibly returning Helfand's data, SEPCO launched an aggressive acquisition of lease interest and actively pursued drilling in the areas Helfand had identified as sweet spots. Many of those activities took place during the one year non-compete period defined in the confidentiality agreement.

After 6 years of drilling in the sweet spots. SEPCO's wells had an almost 100% success rate and generated an undisputed $381.5 million in production revenue.

While SEPCO was pursuing James Lime, Helfand was engaged in litigation over alleged misuse of her proprietary drilling information in another portion of the James Lime Play. In 2006, Helfand sued her ex-partners, Wells and Grimes, as well as others for misappropriation of trade secrets, fraud, conversion, breach of fiduciary duty and breach of contract. In February, 2009 Helfand sued SEPCO for misappropriating her trade secrets, breach of the confidentiality agreement, fraud, breach of fiduciary duty, and statutory theft of trade secrets, claiming that she had discovered SEPCO's bad acts through discovery in the existing litigation.

All defendants settled before the November 2010 trial date except Wells (Helfand's ex-partner) and SEPCO. The jury absolved Wells.

At trial SEPCO attributed its James Lime success to independent efforts, disputed having access to trade secrets from Helfand that would have identified the sweet spots, and that SEPCO had ongoing operations in East Texas before Helfand's February 2005 presentation.

The jury didn't buy what SEPCO was selling, and found SEPCO liable on all claims. With respect to damages, the jury valued Helfand's trade secrets at $11.445 million and awarded that amount on the breach-of-contract, breach-of-fiduciary-duty, theft, and fraud claims. The actual damages awarded were equivalent to 3% of the $381.5 million in "profits made by [SEPCO] as a result of the misappropriation of trade secrets."

Post Verdict, the trial court ordered an accounting and added an additional $23.89 million in equitable disgorgement of profits. After adding another $4.6 million in attorney's fees and pre-and post-judgment interest, the final judgment against SEPCO totaled more than $40 million.

Court of Appeals:

On appeal to the Twelfth Court of Appeals, SEPCO challenged the sufficiency of the evidence to sustain the jury's liability and damages findings, the jury's finding that

Helfand did not discover her claims until January 2009 (statute of limitations), exclusion of Helfand's prior pleadings against the settling defendants, several aspects of the jury charge, and the equitable disgorgement award. In a conditional cross-appeal Helfand argued that the disgorgement award was too low because SEPCO's accounting was fundamentally flawed and understated SEPCO's elicit gain.

The court of appeals reversed and (1) rendered a take nothing judgment on the breach-of fiduciary duty, fraud, breach-of-contract, and theft-of-trade-secret claims on evidentiary grounds, (2) held equitable disgorgement was not available as a matter of law because SEPCO did not owe Helfand a fiduciary duty (3) rejected SEPCO's challenges to the jury charge and the exclusion of Helfand's prior pleadings and (4) affirmed the $11.445 million actual damages award for misappropriation of trade secrets.

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

Misappropriation of Trade Secrets

The Texas Supreme Court first discussed Helfand's cause of action for the misappropriation of trade secrets.

SEPCO argued that the evidence was legally insufficient to sustain the jury's finding of $11.445 million in damages and contended that the testimony of Helfand's expert was unreliable, should have been excluded, and that there was therefore no evidence to support the damages awarded. Helfand countered that the expert's testimony was sufficiently reliable and that SEPCO failed to object to the testimony at trial. Moreover, they argued that even if the expert's testimony were to be deemed inadmissible, that record bore more than sufficient evidence of the $11.445 million in actual damages.

Ultimately, the Court agreed that Helfand's expert's testimony provided evidence of actual damages sufficient to support the award for trade-secret misappropriation, but that the expert had applied a faulty methodology that led to an inflated calculation of damages. Particularly, the court found that Helfand's expert had incorrectly interpreted Helfand's agreement with Petrohawk to constitute proof that Helfand would have been entitled to a 3% interest in SEPCO's profits. However, the court acknowledged that the expert's testimony was nonetheless sufficient to support an award of actual damages, although less than those awarded, and remanded the case for new trial on this point.

Statute of Limitations

SEPCO also argued that Helfand's claims for misappropriation of trade secrets was barred by the 3-year statute of limitations as a matter of law.

The court noted that a cause of action for trade-secret misappropriation accrues when the trade secret is actually used." However, the court also noted that the discovery rule applied to trade-secret misappropriation claims and that the statute of limitation therefore did not begin to run until Helfand knew or should have known of facts that in the exercise of reasonable diligence would have led to the discovery of the misappropriation.

Although the court acknowledged that SEPCO put forth evidence that amounted to "surmise suspicion, and accusation" that Helfand knew of its use of her trade secrets prior to February 17, 2006 (three years before the lawsuit was filed), it found that such evidence was insufficient to establish that Helfand had missed the deadline to file the action as a matter of law. Accordingly, the court rejected SEPCO's argument.

Breach-of-Contract Damages

As discussed above, the intermediate appellate court overturned the jury's finding of breach of contract on the basis that there was nothing in the record "showing that Helfand sustained a specific injury from the breach." The Texas Supreme Court noted that "fairly characterized, the court of appeals held 'value of a trade secret' . . . is not a proper measure of damages."

The Texas Supreme Court overturned the intermediate appellate court on procedural grounds. The court noted that although SEPCO objected at the charge conference that the contract-damages submission "doesn't look like a proper measure of damages for breach of contract," SEPCO abandoned the argument in the intermediate appellate court. Consequently, the court found that the reversal of the trial court's judgment on the basis upon which the appellate court relied (value of a trade secret' . . . is not a proper measure of damages) was improper. The court likewise rejected a new argument brought by SEPCO claiming that the trial court had improperly rejected SEPCO's submitted instructions concerning the breach of contract charge.

Accordingly, the court found that the breach of contract damages question must likewise be remanded because the evidence available did not support the entire amount of the award.

Disgorgement Award

The Texas Supreme Court did not address the issue of disgorgement, given that it chose to remand on insufficiency of evidence to support all of the damages. However, the court noted that they had not expressly limited the remedy to fiduciary relationships as argued by SEPCO and adopted by the intermediate appellate court.

KBMT Operating Co., L.L.C. v. Toledo,

492 S.W.3d 710 (Tex. 2016)

<u>Synopsis:</u>

In a defamation case based on a news report concerning a reprimand issued by the Texas Medical Board after an official proceeding, the Texas Supreme Court held that to pursue such an action a private individual must show that the gist of the report in question was not a fair, true, and impartial account of the official proceeding, and that such a showing may not be based on evidence of facts outside of the official proceeding.

<u>Overview:</u>

Minda Lao Toledo ("Toledo") is a Port Arthur physician. She was disciplined by the Texas Medical Board ("Board") for "unprofessional conduct." The Board issued a two-sentence press release announcing the disciplinary action, which stated that Toledo "behaved unprofessionally when she engaged in sexual contact with a patient and became financially or personally involved with a patient in an inappropriate manner." The press release further stated that Toledo had entered into an agreed order requiring her to complete ethics training, pass a professionalism course, and pay $3,000 as an administrative penalty.

Separately, Toledo's profile on the Board's website included the text of the press release and also stated that Toledo was born in the Philippines, had been practicing in Texas for five years, and listed a Port Arthur address. Further, her profile contained a link to the agreed order. The order stated that Toledo 51 years old and "primarily engaged in the practice of pediatric medicine." It went on to explain that Toledo "used her medical license to obtain testosterone and human growth hormone for JC while she was in an intimate relationship with him" and that she "accepted gifts from JC during the time she was treating him."

KBMT, an ABC-affiliated television station in Beaumont, aired a 30-second report of the Board's action, stating:

> A Port Arthur pediatrician has been punished by the Texas Medical Board after the Board found she engaged in sexual contact with a patient and became financially involved with a patient in an inappropriate manner. Dr. Minda Lao Toledo will have to complete sixteen hours of continuing medical education, including eight hours of ethics and eight hours of risk management, and pay an administrative penalty of three thousand dollars. Toledo is a native of the Philippines and has been practicing in Texas for five years.

KBMT ran this report 4 times in 24 hours; however, in the last of the 4 instances the news anchor added that Toledo's patient "was an adult."

Toledo sued KBMT for defamation, alleging that by stating she was pediatrician and failing to state that "JC" was an adult, falsely implied that the patient at issue was a child. KBMT moved for dismissal under the Texas Citizens Participation Act (the "TCPA"), which allows for the early dismissal of a legal action implicating free speech rights unless the claimant can establish "each element of her claim with clear and specific evidence." The trial court denied KBMT's motion and the intermediate appellate court affirmed, finding that Toledo had established a prima facie case of defamation.

The Texas Supreme Court granted KBMT's petition for review and reversed and remanded the matter for further proceedings. Writing for the majority, Chief Justice Hecht, joined by Justices Green, Guzman, Lehrmann, Devine, and Brown, held that "a private individual who sues a media defendant for defamation over a report on official proceedings of public concern has the burden of proving that the gist of the report was not substantially true—that is, that the report was not a fair, true, and impartial account of the proceedings." Holding further, the Court stated that this "burden is not met with proof that the report was not a substantially true account of the actual facts outside of the proceeding." In this case, the Court determined that because Toledo failed to present evidence establishing a prima facie case that KBMT's report was false, which is an element of her claim, the TCPA required that her action be dismissed.

In arriving at this conclusion, the Court noted that the TCPA applies when a suit is based on the exercise of free speech rights, and when applicable, such an action must be dismissed unless the claimant "establishes by clear and specific evidence a prima facie case for each essential element of the claim in question." Without much analysis, the Court determined that Toledo's defamation suit implicated the TCPA.

The Court then made clear that while common law dictated that truth was a defense to defamation, the United States Supreme Court shifted the burden of the truth defense to the claimant, making it an essential element of a defamation cause of action for the claimant to prove that the speech at issue was false. It noted that if a statement is substantially true, then it is not false. The test for determining whether a report is substantially true is whether the "broadcast taken as a whole is more damaging to the plaintiff's reputation than a truthful broadcast would have been." According to the Court, this test requires determining the import of the broadcast as a whole—its gist—and comparing it to a truthful report.

The Court then set about framing the issue. Because the story at issue here was based on an administrative penalty issued by the Board, the Court found that the "truthful report" that the "gist" of the broadcast must be compared to is an official proceeding of the Board. In arriving at this conclusion, the Court noted that a statutory privilege was implicated under these facts. That statutory privilege allows the media to report on official proceedings without regard for whether the information in those proceedings is actually true. Therefore, the gist of an allegedly defamatory broadcast must be compared to a truthful report of the official proceeding, not the actual facts.

Although the statute is an affirmative defense, the Court noted that United States Supreme Court jurisprudence shifting the truth defense burden also shifted the burden as to this privilege. Thus, now, the defendant has the burden to prove the applicability of the privilege—that the defendant is part of the media and that the statements complained of were related to an official proceeding—while the claimant has the burden to prove the statements were false.

Putting all of this together, the Court rejected Toledo's contention that the gist of the news report was that she had sexual contact with a child because it identified her as a pediatrician and stated that she had been punished for having sexual contact with a patient. The Court determined that any ordinary listener would know better than to believe this was the case. In comparing the Broadcast to the Board proceedings, the Court determined that the broadcast cast her in no worse light than the proceedings themselves.

In a scathing dissent, Justice Boyd, joined by Justices Johnson and Willet, disagreed with the majority that no ordinary listener could have concluded from the broadcast that Toledo had engaged in sexual conduct with a child. The dissent chastised the majority for ignoring actual evidence of such confusion and for substituting their belief with what ordinary citizens could have believed. The dissent also argued that the majority went beyond what the decision required, and made pronouncements of law that were unnecessary and not analyzed with the scrutiny required in such a free speech case.

Doris Forte v. Wal-Mart Stores Inc.,

479 S.W.3d 460 (Tex. 2016)

Synopsis:

Certified question from the Fifth Circuit Court of Appeals. Plaintiffs sued Wal-Mart claiming it violated the Texas Optometry Act by prescribing office hours for optometrists. Plaintiffs did not seek actual damages, but were awarded $3.9 million in civil penalties under the Act. The question to the Texas Supreme Court was whether the Chapter 41 of the Texas Civil Practice and Remedies Code applied. The Court held that the civil penalties here were exemplary damages for purposes of Chapter 41.004(a). Because the Plaintiffs did not recover actual damages, Chapter 41 would bar recovery. The dissent argued that the certified questions should not have been answered as they were based on the premise that the Texas Optometry Act authorizes a private person to sue for civil penalties.

Factual Background and Trial Court Proceedings:

The Texas Optometry Act prohibits commercial retailers of ophthalmic goods from attempting to control the practice of optometry. In 1995, the Texas Optometry Board advised Wal-Mart that its minimum office-hour requirement violated the Act. Wal-Mart dropped the requirement and changed its lease form, allowing an optometrist lessee to insert daily hours of operation and providing that it would "retain no control whatsoever over the manner and means by which the [optometrist] performs his/her work." In the Board's view, these changes were not sufficient to comply with the Act. In 2003, the Board notified Wal-Mart that it was violating the Act simply by informing optometrists that customers were requesting longer business hours.

In 2007, four optometrists sued Wal-Mart alleging that Wal-Mart had instructed them what hours they should include in the lease and that they were pressured to work longer hours. The district court instructed the jury that the Optometrists "do not claim that they have suffered any physical or economic damages [and] only seek to recover civil penalties." The jury awarded the Optometrists $3,953,000 in civil penalties—$1,000 for every day the Optometrists had operated under the leases, the maximum penalty allowed by the Act. The jury also awarded the Optometrists $763,854 in attorney fees. Post-verdict, the court ordered a remittitur, which the Optometrists accepted, reducing the civil penalty to $400 per day, totaling $1,396,400.

Court of Appeals:

On appeal to the Fifth Circuit, Wal-Mart contended that its conduct did not violate the Act and argued that the Optometrists' suit was for "damages" within the meaning of Chapter 41 of the Civil Practice and Remedies Code, and that the penalties awarded the Optometrists were exemplary damages as defined by that statute. The penalties therefore could not be awarded absent a recovery of "damages other than nominal damages." The Fifth Circuit rejected the first argument, but initially agreed with Wal-Mart that Chapter 41 applied. On rehearing, however, the Court noted that the Texas Supreme Court had not decided the issue, and certified the following questions:

1. Whether an action for a "civil penalty" under the Texas Optometry Act is an "action in which a claimant seeks damages relating to a cause of action" within the meaning of Chapter 41 of the Texas Civil Practice and Remedies Code.

2. If civil penalties awarded under the Texas Optometry Act are "damages" as that term is used in Tex. Civ. Prac. & Rem. Code § 41.002(a), whether they are "exemplary damages" such that Tex. Civ. Prac. & Rem. Code § 41.004(a) precludes their recovery in any case where a plaintiff does not receive damages other than nominal damages.

Texas Supreme Court's Holding:

The Court initially addressed whether the certified question should be answered. The State of Texas as amicus curiae argued that the Act did not authorize a private suit for penalties. It argued that the "remedies" authorized in section 351.605 were not civil penalties and that actions for civil penalties could only be brought by the Attorney General or the Board. The Court noted that Wal-Mart characterized the State's argument as "interesting" and the Optometrists dismissed it as "wrong."

After considering whether it should refuse to answer the certified questions as it assumed there was a private cause of action, the Court concluded that the best course was to assume the availability of the cause of action and address the issue raised.

The Court reviewed Chapter 41 and noted that it applies to "any action" in which exemplary damages are sought and that most of Chapter 41 governs and limits the recovery of exemplary damages. Chapter 41, however, does not refer to civil penalties. It noted that Chapter 41 was enacted to restrict and structure the recovery of exemplary damages and limits the amount of exemplary damages relative to compensatory damages. Importantly, it precludes an award of exemplary damages if the only nominal damages are awarded.

Next the Court noted that Chapter 41 only provides an exception to the restriction under four specified statutes and that the Texas Optometry Act was not one of those statutes. It concluded that the penalties under the Act left open the "possibility of a wide, standardless range of permissible penalties that makes civil penalties much like exemplary damages when they were limited only by constitutional and common-law principles. This uncertainty, verging on arbitrariness, is precisely what Chapter 41 addresses." Given the broad reach of Chapter 41, the Court concluded that it could not "read in" an exception to the Texas Optometry Act.

Having determined that Chapter 41 applied, the Court concluded that civil penalties under the Texas Optometry Act were exemplary damages for purposes of Section 41.004(a).

It then answered "yes" to the second certified question. Because the Optometrists recovered no other damages, Chapter 41 barred recovery of the civil penalties as exemplary damages.

The dissent argued that the certified questions should not have been answered and it appeared clear that they were based on the premise that the Texas Optometry Act created a private cause of action for civil penalties. The majority argued the decision would therefore cause confusion and a waste of judicial resources. Further, if the questions were to be answered, the dissent would conclude that civil penalties are not damages or exemplary damages under Chapter 41.

On October 27, 2016, the Fifth Circuit vacated the district court's judgment regarding damages and remanded the case to the district court to determine whether the Plaintiff Optometrists were still entitled to attorneys' fees.

In re Nationwide Insurance Company,

494 S.W.3d 708 (Tex. 2016)

Synopsis:

Writ of Mandamus to consider order denying a motion to dismiss based on a contractual forum-selection clause. The plaintiff agent sued Nationwide for breach of contract, fraud and occupational disparagement in Travis County. His contract with Nationwide contained a forum-selection clause providing that the forum for any disputes would be Franklin County, Ohio. Nationwide pursued discovery for two years in Travis County before moving to dismiss the case because of the forum-selection clause. The trial court denied the motion. The Supreme Court concluded that even assuming that Nationwide's conduct substantially invoked the judicial process, there was no evidence of prejudice or unfair advantage at the time of the trial court's ruling. It found an abuse of discretion for not enforcing the forum-selection clause.

Factual Background and Trial Court Proceedings:

The Plaintiff Besch formerly worked with Nationwide Insurance Company as an independent agent. After the relationship ended, he sued Nationwide for breach of contract, fraud, and occupational disparagement. The allegations focused on a particular contract with Nationwide that called for disputes to be resolved in Franklin County, Ohio.

Nationwide defended the suit for approximately two years before filing a motion to dismiss based on the forum-selection clause. During that period Nationwide conducted pre-trial discovery into the merits of the case, including serving requests for disclosure, interrogatories, requests for production, and requests for admission. In addition to filing its answer, during this time it also filed a counterclaim, special exceptions, and a Rule 91a partial motion to dismiss.

When Nationwide sought to enforce the forum-selection clause, Besch claimed waiver and that the delay had cause prejudice because his contract claim, although viable in Texas, was now barred under Ohio law. In response, Nationwide agreed to waive enforcement of the contractual-limitations clause. The trial court, however, rejected the waiver as untimely. It concluded that Nationwide's conduct in Texas was substantial and concluded that Besch could "suffer the ultimate prejudice" were the Texas litigation to be dismissed because Besch's contract claim was now barred in Ohio. The court accordingly denied the motion to dismiss, finding that Nationwide waived its right to enforce the forum-selection clause by substantially invoking the litigation process to Besch's prejudice.

Court of Appeals:

Nationwide petitioned the court of appeals for mandamus relief, but the court denied its petition.

Texas Supreme Court's Holding:

The Texas Supreme Court reviewed the controlling authority regarding whether a party has substantially invoked the judicial process such that waiver has occurred. Citing *Perry Homes*, the Court said that it is a question of degree judged from the totality of the circumstances and noted that when a party chooses to file a lawsuit in a forum different from the one contractually agreed to, it cannot complain about any duplication of time or efforts that resulted from that choice.

The Court looked at what must occur for there to be waiver. It noted that the test for waiver in this context is similar to estoppel. To bar a party from asserting a claim or defense, a representations must have induced action or forbearance of a definite and substantial character. Applying that test for waiver, the Court we concluded that Besch never actually suffered the prejudice of which he complains. Because Nationwide had voluntarily waived the contractual-limitations period, the contract claim was not lost. Therefore on that issue, the trial court accordingly abused its discretion in refusing to enforce the forum-selection clause on the basis of this alleged prejudice.

Besch also claimed prejudice because his fraud claim was also barred by limitations in Ohio. At the hearing on the motion to dismiss, Nationwide told the trial court that it would waive the limitations defense on the contract claim that was already barred in Ohio. However, it informed the trial court that the fraud claim was not barred, but would be in seven months. The statute of limitation on fraud ran during the pendency of the mandamus and before the Supreme Court ruled.

The Supreme Court concluded that Besch had a reasonable opportunity to preserve this claim in Ohio. It did not become barred until several months after Nationwide asserted its rights under the mandatory forum-selection clause. It found important that Nationwide not only waived its right to enforce the contractual-limitations clause but at the hearing on the motion to dismiss had pointed out that the limitations period for tort claims had yet to expire and had alerted Besch in its pleadings that his tort claims would not become barred under Ohio law until September 2015.

The Court rejected Besch's argument Nationwide had used the Texas lawsuit and mandamus proceedings "to gain an unfair tactical advantage by purporting to remove one aspect of Mr. Besch's prejudice with one hand (contractual limitations) and stealthily maneuvering to maintain a different type of prejudice with the other (statutory limitations)." Further, the court found that Nationwide's pursuit of mandamus relief did not evidence an intent to waive to waive the forum-selection clause. A party has a legal right to pursue relief based on the existence of a mandatory forum-selection clause and waiver of the underlying contractual right must be premised on something other than its assertion.

Further, the Court noted that Besch did not assert the potential loss of his fraud claim as a basis to deny Nationwide's dismissal motion, and that the trial court's order did not mention this future prejudice as a basis for denying Nationwide's motion. Then it went further saying that even had Besch raised the matter, it would not have demonstrated the existence of prejudice or an unfair advantage. The alleged prejudice would only have been that Nationwide's delay left Besch a mere seven months in which to file his fraud claim in Ohio before limitations expired.

The Supreme Court conditionally granted the petition for writ of mandamus and directed the trial court to enforce the parties' forum-selection clause and vacate its order denying Nationwide's motion to dismiss.

The dissent argued that the majority gave "short shrift to the efficacy of Nationwide's purported cure." It was concerned that prejudice was not cured on "counsel's mere say so.” The majority was setting precedent that there need not be proof of cure, only an offer of one.

Regarding the fraud claim, it took issue with the majority with the focus on the fact that limitations had not yet run at the time of the dismissal hearing and that it was not an explicit basis for the trial court's order. It felt that the trial court’s finding of prejudice and its order was broad. The dissent believed that the majority Court improperly changed the focus of the analysis to whether a party has a right to take action. Invariably, parties have the right to defend themselves and seek relief due to them, but that does not preclude a party from waiving a forum-selection clause through substantial invocating the judicial process. It believed that Nationwide's conduct induced Besch to rely on his Texas filings to his detriment.

Texas Supreme Court Oral Arguments

Pedernal Energy, L.L.C. v. Bruington Eng'g, L.T.D.,

Oral argument on September 14, 2016
Case No. 15-0123
Fourth Court of Appeals Opinion,
456 S.W.3d 181
(Tex. App.—San Antonio 2014, pet. filed)

Issues Considered:

1. Section 150.002(e) of the Civil Practice & Remedies Code expressly provides that a dismissal for failing to file a certificate of merit with the initial complaint in an action against a covered professional "may be with prejudice." A divided court of appeals—in an opinion that conflicts with the Dallas and Fort Worth Courts of Appeals—found that a dismissal under §150.002(e) must be with prejudice. Did the court of appeals correctly construe the statute, or does a trial court have the discretion to dismiss a claim under Chapter 150 without prejudice?

2. A death–penalty sanction, including dismissal, is one that adjudicates a dispute without regard to the merits and should only be imposed in exceptional cases when they are clearly justified and when no apparent lesser sanction would promote compliance. Does the dismissal with prejudice of a complaint under Chapter 150 of the Civil Practice & Remedies Code constitute a death penalty sanction? If so, was the court of appeals' dismissal with prejudice constitutional?

Levinson Alcoser Assocs., L.P. v. El Pistolón II, Ltd.,

Oral argument on November 7, 2016
Case No. 15-0232
Thirteenth Court of Appeals Opinion

Issues Considered:

1. Civil Practice and Remedies Code Section 150.002 requires plaintiffs in certain actions against licensed or registered professionals to file a "Certificate of Merit" affidavit with the petition. The statute requires certain contents of the affidavit and certain qualifications of the affiant. The primary issue here pertains to content. The secondary issue pertains to qualifications.

    a. Content - Section 150.002 requires that the affidavit set forth (1) the professional's negligence or other wrongdoing, and (2) the "factual basis" for that assertion. The main question presented here is whether this affidavit sets forth its "factual basis."

    b. Qualifications - Section 150.002 requires that the affiant be "knowledgeable in the area of practice of the defendant." The main question presented here is whether that needs to be established by the face of the affidavit (as opposed to the record at large).

    c. Disposition - If the Court were to reverse by holding that this affidavit did not satisfy the statute, it would necessarily be overruling lower court precedents and making significant new law. In that event, the final question presented would be whether to remand in the interests of justice under Texas Rule of Appellate Procedure 43.3.

In re Nat'l Lloyds Ins. Co.,

Oral argument set for February 7, 2017
Case No. 15-0591
Thirteenth Court of Appeals Opinion,
2015 Tex. App. LEXIS 7185

Issues Considered:

1. Whether this Court should adopt a blanket rule prohibiting discovery of an opposing party's non-privileged attorney's fee information in every case.

2. Whether on the specific record presented, the trial court abused its discretion by compelling the production of relevant, non-privileged attorneys' fee billing records, when the Relators: (1) have challenged the attorneys' fees sought by the Plaintiffs, (2) have designated one of their defense attorneys as their testifying expert on attorneys' fees, and (3) previously have argued that their attorney's fees and billing practices should be considered by a jury in deciding the reasonableness of another MDL plaintiff's fee request.

3. Whether the trial court abused its discretion by overruling Relators' assertions that their attorneys' billing rates and amounts billed and paid were privileged.

Texas Courts of Appeals Decisions

Youngkin v. Hines,

No. 10-15-00194-CV, 2016 WL 3896494 (Tex. App.—Waco July 13, 2016, no pet.)

Synopsis:

Attorneys actions were not protected under the Texas Citizens Participation Act or the litigation privilege because there was sufficient evidence to establish a prima facie case against the attorney for fraud and conspiracy.

Overview:

In the underlying lawsuit, Bill Youngkin ("Youngkin") represented Buetta and Rajena Scott (the "Scotts") related to ownership of 45 acres of land that was part of a larger 285-acre tract of land in Brazos County, Texas. One of the defendants in that action was Billy G. Hines, Jr. ("Hines"), who also claimed ownership in the 45 acres. During trial, the parties announced a settlement and the terms of that settlement were read into the record. The settlement called for Buetta and Rajena Scott to transfer their interest in the 45 acre tract to Hines and the remaining Heirs in exchange for Hines transferring his interest in the surface rights of the larger 285-acre tract to the Scotts. This announced settlement was subsequently memorialized by a Rule 11 agreement, which was signed by Hines, his attorney, and Youngkin.

Hines transferred his interest in the 285-acre tract to the Scotts. However, with Youngkin's help the Scotts transferred their interest in the 45-acre tract to "Curtis Capps, Trustee" which prevented them from following through on the settlement agreement. As a result, Hines filed suit against the Scotts as well as Youngkin, asserting causes of action against the latter for fraud and conspiracy.

In response, Youngkin filed a motion to dismiss under the Texas Citizens Participation Act (the "TCPA"). The trial court denied Youngkin's motion. Youngkin appealed.

On appeal, the Waco Court of Appeals set forth the two-part test for determining whether the TCPA applies to and ultimately requires the dismissal of a claim. First, the movant has the burden to prove by a preponderance of the evidence that the claimant's allegation is based on, relates to, or is in response to the defendant's exercise of the right of free speech, the right to petition, or the right of association. If the first step is established, the burden then shifts to the claimant to establish by clear and specific evidence a prima facie case for each essential element of the claim in question. Further, the court must dismiss a legal action if the moving party establishes all of the essential elements of a valid defense by a preponderance of the evidence.

In this case, the court determined that Youngkin established that the TCPA applied to Hines's claims against him. It recognized that the right to petition includes in-court communications. It also found that the majority of Hines's claims against Youngkin were based on Youngkin's settlement statement on the record at trial.

In moving to the second part of the test, the court noted that clear and specific evidence includes circumstantial evidence, and that a prima facie case refers to evidence sufficient as a matter of law to support a given fact if it is not rebutted or contradicted, but is the minimum quantum of evidence necessary to support a rational inference that the allegation is in fact true. At the same time, the court also analyzed Youngkin's litigation privilege affirmative defense.

The court determined that the evidence, viewed in the light most favorable to Hines, shows that Hines entered into a settlement agreement with the Scotts to, in part, convey the 45-acre tract to Hines and the remaining heirs. Instead, the Scotts, with Youngkin's help, conveyed the property to Capps, who then filed suit to title on the property against Hines with Youngkin as his attorney. The court determined that there was clear and specific evidence supporting each essential element of Hines's fraud and conspiracy claims against Youngkin. Thus, dismissal under TCPA was not appropriate. Further, the court determined that Youngkin did not establish the essential elements of his litigation-privilege defense because it was only supported by his bare assertion that he was acting as the Scott's attorney when the in-court communications were made.

Practice Pointer:

Youngkin's lawyer in the suit made personal attacks against Hines's counsel, referring to them as "unscrupulous lawyers" and claiming they were guilty of "dirty lawyering" and "casual dishonesty." The court of appeals did not appreciate these comments, and in a footnote stated that they "unfortunately must address the unprofessional comments made by Youngkin's attorney in his reply brief." The court continued, stating that such comments "have no place in an appellate brief, and they blatantly violate several provisions in the Texas Lawyer's Creed pertaining to civility and courtesy." When drafting briefs always consider the Texas Lawyer's Creed and remember that although our profession is contentious, we must remain civil and professional. Negative comments concerning opposing counsel usually add nothing to the matter at hand and, as the court made clear, only reflect poorly on the author.

The Petroleum Workers Union of the Republic of Mexico v. Gomez,

No. 14-14-00807-CV, 2016 WL 4706466 (Tex. App.–Houston [14th Dist.]

Synopsis:

A Bahamian oil importer and a Texas attorney brought action against a Mexican labor union for breach of contracts to divide funds in a bank account that had been frozen by the United States government, and sought specific performance of a contract provision reviving a previously released Texas default judgment against the union. Union counterclaimed against importer and attorney for fraud, conspiracy, wrongful garnishment, and breach of fiduciary duty. The Court of Appeals affirmed the trial court's Judgment in part favorable to the importer and the attorney but awarding no monetary damages and denying all relief sought by the Union through its counterclaims.

Overview:

In 1984 a Texas attorney, David Black, and businessman, Billy Flanagan, approached certain Mexican individuals purportedly representing The Petroleum Workers Union of the Republic of Mexico (the "Union") about a deal to ship unrefined oil from Mexican refineries to Texas refineries for processing. Negotiations among these individuals resulted in an agreement through which a Bahamian oil trading corporation was formed, Arriba Limited ("Arriba") which in turn contracted with the Union for the oil. The terms of the agreement guaranteed that a minimum of 6 million barrels of residual oil would be conveyed. The contract was never performed and some evidence suggests that under Mexican law the Union was never legally authorized to enter into such a contract. When the terms of the contract were not fulfilled, Arriba filed a lawsuit against the Union in June 1985 in Harris County. The Union did not answer the lawsuit and Arriba took a default judgment of over $92 million in 1986. Thus began 30 years of litigation, resulting in this case and others. Over the course of the litigation, the players changed in no small part due to scandals in Mexico surrounding the Union, which became known as "Pemexgate".

At some point before May 2002, $43 million made its way from Mexico into a New York bank account, apparently embezzled as a part of the "Permexgate" political scandal. It is unclear if the funds belonged to the Union or the Mexican government, but when they discovered the account, Arriba and Ryerson sought to garnish the money. At the behest of the Mexican government in May 2002, the United States government obtained a restraining order freezing the $43 million. Nevertheless, in 2004 Arriba and Ryerson, then the Union's attorney, attempted to resolve their differences through a settlement agreement known as the Garnished Funds Agreement. The trial court had dissolved the writs of garnishment in 2006 but made no finding that the writs of garnishment had been wrongfully obtained. Ultimately, the funds were released to the U.S. government in 2008 and returned to Mexico.

In the present lawsuit Arriba seeks monetary damages for breach of the Garnished Funds Agreement. Arriba was joined by the former Union's attorney, Carlos Ryerson, seeking monetary damages for a separate agreement and attorney fees. The Union was the sole defendant. The trial court, based on various jury findings, ruled in favor of Arriba and Ryerson as to enforcement of one provision of the Garnished Funds Agreement but ultimately ruled that neither Arriba nor Ryerson were entitled to monetary damages. Again, based on jury findings the trial court ruled against the Union on all of its counterclaims.

Though the 14th Court's opinion addresses several evidentiary and procedural issues, the key issues from a commercial litigation perspective focus on three of the Union's points of appeal regarding the Garnished Funds Agreement. The Union's representatives who signed the agreement were their attorney, Ryerson, and Alvarez, whose identity is never fully explained. The receiver James Gomez signed the agreement on behalf of Arriba.

Relying in its first attack on the validity of the Garnished Funds Agreement, the Union argued that neither Ryerson nor Alvarez had actual authority as the Union's agent to negotiate and sign the agreement. Citing the principle that actual authority denotes authority that a principal intentionally confers upon an agent or implies authority to the agent to do whatever is reasonably necessary and proper to carry out the agent's express powers, the Court found evidence supporting both Ryerson's and Alvarez's authority to enter into the agreement. This was based on two powers of attorney for Ryerson and Alvarez, as well as Ryerson's trial testimony as to his extensive dealings as the Union's lawyer with various representatives of the Union over many, many years. Interestingly, the Court also relied on Arriba's counsel's testimony that during the negotiations for the Garnished Funds Agreement he had extensive dealings with Ryerson as the Union's attorney and that it was "ridiculous" to suggest Ryerson was not representing the Union.

In the next attack on the validity of the Garnished Funds Agreement, the Union asserted that it failed due to a lack of consideration. Noting that lack of consideration of a contract is an affirmative defense and is a question of law for the Court, the Court held that because Arriba was actively pursuing claims that could potentially have resulted in a loss of millions of dollars to the Union, entering into the Garnished Funds Agreement as a settlement of that garnishment claim clearly benefitted the Union. The Court noted a recent holding in another Texas Court of Appeals which discussed forbearance of suit as consideration for a settlement agreement.

Finally, the Union attacked the validity of the Garnished Funds Agreement by asserting that Ryerson, as the Union's attorney, breached his fiduciary duty to the Union's detriment by entering into the agreement. The Court notes that an attorney owes fiduciary duties to a client as a matter of law, further noting that the elements of a claim of breach of fiduciary duty against an attorney are (1) the existence of a fiduciary relationship, (2) a breach of a fiduciary duty by the attorney defendant, and (3) resulting damages to the plaintiff. Nevertheless, the Union argued that Ryerson was not the Union's attorney at the time he negotiated the Garnished Funds Agreement. Essentially, this argument negated the first element of the breach of fiduciary duty claim. Acknowledging its holding as to the lack of consideration claim, the Court found that there was no evidence that Ryerson negotiated the agreement to the Union's detriment.

Arriba and Ryerson cross-appealed, arguing that the trial court had misconstrued the Garnished Funds Agreement. Noting that the construction of an unambiguous written contract is a question of law, the Court held that Arriba had failed to demonstrate a breach of the agreement or an injury resulting from the breach that entitled it to monetary damages.

The 14th Court affirmed the relief granted by the trial court in favor of Arriba. The trial court declared pursuant to one provision of the Garnished Funds Agreement that Arriba was entitled to enforce the 1986 Judgment against the Union anywhere except Mexico. As Arriba's attorney observed, an empty victory, given that the Union had no assets except in Mexico.

A petition for review purportedly due October 24, 2016 has not been filed.

Bishop v. Creditplex Auto Sales L.L.C.,

No. 05-15-00395-CV, 2016 Tex. App. LEXIS 6719 (App. June 23, 2016)

Synopsis:

This case addresses the effect on an "AS IS" statement in a consumer used car sale contract. The trial court entered a directed verdict in favor of seller based on the "AS IS" language in the contract. Traditionally, Texas courts have uniformly held that an "AS IS" disclaimer is effective, even though the consumer-buyer may be disadvantaged.

The Appellate Court overturned the directed verdict based the fact that an "AS IS" clause can be negated (1) when there is fraud involved in the transaction; and, (2) if there is a disparity in the parties bargaining positions that involve an "AS IS" boiler plate clause.

Overview:

This dispute is over the purchase of 2010 Kia Forte by Christin Bishop ("Bishop") from Creditplex Auto Sales L.L.C. ("Creditplex") in February of 2012. Creditplex had actually bought the car at auction for $9,210 in October of 2011 from Manheim, who disclosed that the car had "frame/unibody damage." Bishop needing a gently used car went car shopping and ended up at Creditplex discussing buying a car from Tammy Gabbert ("Gabbert"), a salesperson for Creditplex. Bishop focused on the Forte which had a window sticker noting "AS IS." Gabbert made certain representations to Bishop including that the Forte would be a good car and that it would be "good on gas" and that Bishop could try to trade the car in for something bigger "after paying on it for about a year or so." However, Gabbert failed to inform Bishop that the car had been in a wreck and suffered frame and body damage.

Bishop eventually purchased the car as a co-buyer with her mother, Cynthia Bishop, for $15,800. Bishop did not have the car inspected or obtain a Carfax report prior to buying. Bishop attempted to trade in the car approximately a year after she purchased the vehicle from a dealership, who refused to take the care because of the frame damage.

As a result, Bishop brought suit against Creditplex and its general manager and part owner, Larry Jackson, for violating the Deceptive Trade Practices Act for failure to disclose pivotal information she needed in order to make an informed decision. One claim was for violation of Section 17.46(b)(24) for failing to disclose known information about the car to her, and the other for violation of Section 17.50(a)(3) for committing an unconscionable action or course of action. The case was tried to a jury. After Bishop rested her case, Creditplex moved for directed verdict arguing solely that the as-is clause negated causation as a matter of law. The trial court granted the motion and signed a take nothing judgment against Bishop. Bishop appealed.

Court of Appeals:

The Court of Appeals reversed the trial court's judgment and remanded the case for further proceedings consistent with its opinion. In making its decision, the court relied on the leading Texas Supreme Court case, *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*, 896 S.W. 2d 156 (Tex. 1995) and other appellate decisions on "AS IS" clauses.

The *Prudential* court stated that an as-is clause is not always outcome determinative. It gave two examples of specific situations in which an as-is clause in not conclusive: (1) a buyer is not bound by an agreement to purchase something "as is" that he is induced to make because of a fraudulent representation or concealment of information by the seller; and, (2) a buyer is not bound by an "as is" agreement if he is entitled to inspect the condition of what is being sold but is impaired by the seller's conduct. The Texas Supreme Court then said an as-is clause also can be unenforceable based on the "nature of the transaction and the totality of the circumstances surrounding the agreement." It opined that an "as is" agreement freely negotiated by similarly sophisticated parties as a part of the bargain in an arm's-length transaction has a different effect than a provision in a standard form contract which cannot be negotiated and cannot serve as the basis of the parties' bargain. Thus, an as-is clause may not be controlling if it appears in a standard from contract that cannot be negotiated nor serve as the basis of the parties bargain, particularly if the parties are not equally sophisticated.

Nature of the Transaction and the Totality of the Circumstances of the Agreement:

Based on the Prudential holding, the Court of Appeals held that the evidence raised a genuine fact issue whether the "AS IS" clause was enforceable based on the totality of the circumstances surrounding the transaction. This Court noted that the parties did not occupy equal bargaining positions. Creditplex was experienced in the used car business since 1985. Bishop, by contrast, had never worked in the automotive industry. She had bought a used before, but she had never financed one before. When she bought the Forte, Bishop did not negotiate the price; she just told Gabbert what kind of payments she needed, and Gabbert told her which vehicles she could afford. This Court concluded that Bishop was unsophisticated compared to Creditplex. Second, the "AS IS" clause's terms and context were more boilerplate language than actual bargaining as in Prudential. The Court noted that the "AS IS" language was on the window sticker and actually the as-is sticker was required by law and appeared on every used vehicle that was being sold. Therefore, the Court held that the boilerplate nature of the clause weighed against its enforceability.

Fraudulent Representations or Concealment:

This Court also held that the as-is clause did not conclusively negate causation because the evidence raised a fact issue regarding whether Creditplex's fraudulent representation or informed concealment induced Bishop to buy the car. The buyer resisting the "as-is" clause must prove the elements of common law fraud regarding the condition of the property being sold in order to overcome the clause. The elements of fraud are (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, he knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the defendant made the representation with the intent that the plaintiff should act on it; (5) the plaintiff acted in reliance on the representations; and, (6) the plaintiff thereby suffered injury. *Baleares Link Express, S.L. v. GE Engine Servs. – Dallas, LP*, 335 S.W.3d 833, 839 (Tex. App.–Dallas 200, no pet.)

This Court agreed with Bishop that there was evidence of fraudulent misrepresentation because the testimony reflected that Gabbert told Bishop that the Forte was a good car and that she would be able to bring it back and trade it on a different car after making payments for a year. The falsity was that Bishop was would not have been able to make the trade because of the "frame damage." Therefore, the Court held that a reasonable jury could conclude that the Gabbert's representations were material, meaning that a reasonable person would attach important to the representation and would be induced to act on it. Further, the Court held that the evidence raised a fact issue regarding whether Creditplex knew the representation were false. In this case, Jackson new that the car had sustained unibody damage in a prior wreck. Further, the Court was of the opinion that Bishops's testimony as a whole created a reasonable inference that she relied on Gabbert's representation and would not have bought the Forte but for Gabbert's statement that she could trade it in after making payments for a year. There was no doubt that vehicle was worth less because of the undisclosed accident. Thus, the Court of Appeals held that Bishop raised a genuine fact issue regarding the fraudulent representation exception to the as-is clause.

The lesson from this case is that a seller cannot just simply put a boiler plate "AS IS" disclaimer in a contract for it to be valid. The clause will be voided if there is a major deception of which the buyer was unaware and there is a major bargaining disparity between the parties.

Guam Industrial Services Inc. dba Guam Shipyard v. Dresser-Rand Co.,

No. 01-15-00842-CV, (Tex. App.—Houston [1st Dist.] 2016, no pet.)

Synopsis:

An arbitration agreement specifying a particular forum constitutes consent to jurisdiction for the *limited* purpose of compelling arbitration, but does not constitute consent to personal jurisdiction for a lawsuit that seeks adjudication of claims on the merits.

Overview:

Dresser-Rand sued Guam Shipyard for breach of contract for Guam's failure to pay for repairs and restoration of a vessel, contending that the trial court had personal jurisdiction over Guam Shipyard because an arbitration provision in the contract "operated as a forum-selection clause." Guam Shipyard filed a special appearance contesting personal jurisdiction.

Analysis:

An arbitration agreement is a type of forum-selection clause, whereby parties agree in advance to submit their disputes for resolution within a particular jurisdiction. However, when a party agrees to *arbitrate* in a particular forum, the court may exercise personal jurisdiction over the parties for the *limited* purpose of compelling arbitration.

Holding:

The arbitration provision in the subject contract does not constitute consent to personal jurisdiction in state court for a lawsuit that seeks adjudication of claims on the merits.

Goodman v. Compass Bank,

05-15-00812-CV, 2016 WL 4142243 (Tex. App.—Dallas 08/03/2016)

Synopsis:

Turnover orders need not specify the property to be turned over, categories will suffice. Thereafter, the judgment debtor has the burden to identify exempt property. A turnover order may be used by a judgment creditor to obtain LLP, LLC, and other corporate entity proceeds after distribution to the judgment debtor eliminating the need for a charging order, which would be the exclusive means of requiring the LLP, LLC, or other corporate entity to make the distribution directly to the judgment creditor. Further, the judgment creditor need not institute a separate action to obtain a charging order.

Overview:

Compass Bank obtained a judgment against Goodman on a guaranty agreement after foreclosing on two pieces of property resulted in a deficiency. After an unsuccessful appeal by Goodman, Compass Bank obtained a turnover order. Goodman again appealed raising numerous points of error regarding the turnover order and the trial court's award of attorneys' fees.

With respect to the turnover order, the court of appeals found that the identification of categories of non-exempt property in the turnover order satisfied the turnover statute, citing Texas Civil Practice & Remedies Code §31.002(h), which does not require specific identification of the non-exempt property in the turnover order. Further, Goodman, the judgment debtor, had the burden to prove that the assets identified by Compass Bank were exempt from execution. Additionally, the order specifically stated that it was not intended to cover exempt assets. Likewise, Goodman's complaint that he had to turnover bank statements was overruled as the court of appeals, citing §31.002(b)(1), noted that the statute specifically allows for the trial court to order production of documents related to the property subject to the order. The court of appeals construed the turnover order's language as limiting its reach to property in which he held a present or future right at the time of the order, not extending it reach to after acquired property, and thus consistent with the turnover statute's authority under §31.002(a). While the turnover statute does not specifically provide for an accounting, it does allow for a "judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction of the judgment" and an accounting would therefore be within the statute's scope.

In a charging order based on Texas Business Organizations Code §§101.112 and 153.256 (the charging statutes), a court "charges" a membership or partnership interest such that distributions to which the judgment debtor would otherwise be entitled are made as directed by the court. Entry of a charging order is the exclusive remedy by which a judgment creditor may satisfy a judgment out of the judgment debtor's membership interest in a limited liability company or partnership interest. However, nothing in the plain language of sections 101.112 and 153.256 precludes a judgment creditor from seeking the turnover of proceeds from a limited liability company or partnership distribution after that distribution has been made and the proceeds are in the judgment debtor's possession. Further, the judgment creditor need not institute a separate action to obtain a charging order.

Seabourne v. Seabourne,

493 S.W. 3rd 222
(Tex. App.—Texarkana 2016)

Synopsis:

In a breach of contract suit arising from an agreed divorce decree's provision regarding college tuition payment, the failure to include more express language of the parties' intent (specific amounts, in-state or out-of-state tuition, specific colleges) does not create an ambiguity. Further, an agreed divorce decree is treated as a contract the breach of which will support the award of attorneys' fees under Chapter 38.

Overview:

Danese and Thomas Seabourne entered into an agreed divorce decree, which included splitting college tuition. Thomas did not reimburse Danese for his half of the tuition she paid. Danese brought a breach of contract claim against Thomas. The trial court entered a judgment in Danese's favor awarding her tuition, attorneys' fees, and court costs.

Thomas contended that the college-tuition provision of the decree was ambiguous. Like any agreed judgment, an agreed divorce decree is construed in accordance with the rules of contract interpretation. Ambiguity is a question of law for the court to review de novo. The court will attempt to ascertain the intent of the parties. The entire writing is examined in an effort to give effect to all its provisions. If the contract can be given a definite legal meaning, it is not ambiguous, and it will be enforced as written. Conversely, if the contract is capable of more than one reasonable interpretation, then it is ambiguous. The lack of a specific amount or acknowledgement of the possibility of out-of-state tuition did not render the provision ambiguous. The parties agreed to each pay half of the college tuition without restriction and regardless of amount or college. The failure to include more express language of the parties' intent does not create an ambiguity.

Danese offered two exhibits setting forth the amount to college tuition. One of the two was more detailed and set forth a slightly lesser amount. However, Thomas did not object to the second exhibit, which was more general and set forth a slight greater amount. Under the circumstance, there is some evidence to support the trial court's award of the greater amount.

An agreed divorce decree is treated as a contract the breach of which will support the award of attorneys' fees under Texas Civil Practice & Remedies Code §38.001(8). The court of appeals recognized that Danese Seabourne had presented her claim, no payment was tendered, and she prevailed on her claim. Thus, she was entitled to attorneys' fees.

United Services Automobile Association v. Hayes,

2016 WL 4536333
(Tex. App.—Hou. [1st Dist.] 2016)

<u>Synopsis:</u>

A statutorily required notice letter could be construed as an offer of settlement as opposed to a demand for the purpose of defeating the defendant's affirmative defense of excessive demand to plaintiff's attorneys' fees claim. Factoring overhead and risk of doing business into ones' hourly rate does not inflate the award to impermissibly recover costs otherwise prohibited. Testimony estimating a percentage of fees attributable to causes of action for which attorneys' fees are not recoverable must focus on discrete legal tasks (drafting pleadings, answering discovery, questions at a deposition, etc.) and not on the intertwined facts of the case.

<u>Factual Background and Trial Court Ruling/Verdict:</u>

The Hayeses owned a home insured by USAA and damaged during Hurricane Ike. USAA disputed the causes of the damages. The parties disputed the extent of the damages. USAA eventually paid $24,000 toward the claim. Dissatisfied, the Hayeses filed suit alleging breach of contract and violations of the Texas Insurance Code. The jury awarded the Hayeses $25,000 for property damage, $2,000 for USAA's failure to comply with its duty of good faith, $30,000 knowingly violation the Texas Insurance Code, and $237,500 for trial and $50,000 for appellate attorneys' fees. (The court also awarded $56,421.65 in court costs.)

USAA moved for JNOV on numerous points. Based on USAA motion, the trial court threw out the jury's findings on the value of interior damage ($5,000), the failure to comply with its duty of good faith ($2,000), the knowing violations ($30,000), and, due to a finding of an excessive pre-suit demand, the attorneys' fees for trial ($237,500). The court left the remainder of the verdict intact, including finding of breach of contract and violations of the Texas Insurance Code, and entered judgment. USAA appealed and the Hayes cross-appealed.

Court of Appeals Ruling:

With respect to USAA's assertion that there was no evidence of a breach of contract as the Hayeses suffered no direct physical loss as defined by the policy (no proof the winds of Ike unsealed the roof shingles), the Houston Court of Appeals found ample evidence supporting the jury's breach of contract finding. [Note: The court of appeals agreed with the Hayeses that the breach of contract damages as well as attorneys' fees were equally supported by the unchallenged Texas Insurance Code violations.]

Excessive demand is an affirmative defense to an attorneys' fees claim. However, USAA did not submit a jury question or instruction on excessive demand. Therefore, it was required to establish the fact conclusively. The court of appeals noted that a demand is not excessive simply because it is greater than the amount eventually awarded by the fact finder (citing a case in which an unliquidated demand of $125,000 was found not to be excessive even though jury awarded only $1,000). However, the court of appeals conversely noted that a claim for an amount appreciably greater than that which a jury later determines is actually due ... may indeed be some evidence of an excessive demand. The dispositive question in determining whether a demand is excessive is whether the claimant acted unreasonably or in bad faith. Further, application of the excessive-demand doctrine is limited to situations in which a creditor has refused a tender of the amount "actually due" or has clearly indicated to the debtor that such a tender would be refused. The court of appeals ruled that the Hayeses' notice letter sent pursuant to Texas Insurance Code chapter 541 could be construed as either a demand (i.e., take it or leave it or a demand to pay in full) or an offer of settlement (i.e., a solicitation to engage in negotiations and offer to concede some right) and, thus, was insufficient to prove as a matter of law that it was a "demand". Accordingly, the trial court erred in granting the JNOV as to trial attorneys' fees. [Note: This ruling drew a dissenting opinion in part based on the dissenting judge's review of the record indicating that the parties agreed to submit the excessive demand issue to the court post-verdict thereby making the judge the fact-finder and removing the issue from the JNOV and flipping the appellate review standard.]

USAA further complained that the Hayeses attorneys' fees impermissibly increased their hourly rates to recover certain costs, such as overhead, expert witness fees, and transcript fees, which are not recoverable as a matter of law. However, the court of appeals noted that the Hayeses attorney expressly testified that the attorney's fees at issue did not include expenses for expert witnesses or transcripts. He explained that the law firm must pay its overhead out of the revenues it generates, that is, from the fees its attorneys earn. Hourly market rates for attorneys necessarily take into consideration such factors as salaries, overhead, the costs of support personnel, and incidental expenses. He further explained that his rates were higher than attorneys representing insurance company as the latter get paid hourly rates plus expenses, whereas his firm's cost of doing business is higher and represents greater risk. "Nothing in the complained-of testimony suggests that [the Hayeses' attorney] 'inflat[ed]' his rates in this case in order to recover overheard, expert witness fees, or transcript fees."

While the Hayeses' attorney submitted a "fee recap" (presumably a summary of contemporaneously recorded time), it did not contain any sort of reduction or segregation of time for causes of action for which attorneys' fees are not recoverable. However, the Hayeses' attorney explained that the various causes of action were intertwined and estimated that 5% of their time was attributable solely to the causes of action for which attorneys' fees are not recoverable. The party seeking attorneys' fees has the burden to prove it has properly segregated them. The court of appeals noted:

> "Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated." Where segregation is required, attorneys are not required to "keep separate time records when they drafted the fraud, contract, or DTPA paragraphs of [the] petition. Rather, "an opinion [will] suffice[ ] stating that, for example, 95 percent of their drafting time would have been necessary even if there had been no fraud claim."

[Internal citations omitted.] Despite the Hayeses' assertion that their attorney had satisfied this standard, the court of appeals pointed out that:

> However, the record reveals that [the Hayeses' attorney] did not opine regarding the fees attributable to the Hayeses' specific claims in this case. Rather, he testified that he simply "always" estimates "five percent." Although an opinion stating that, "for example, 95 percent of ... drafting time would have been necessary even if there had been no fraud claim" will suffice, [the Hayeses' attorney] did not demonstrate that he took into account any of the actual work performed or the claims made in the Hayeses' case. *See Chapa,* 212 S.W.3d at 314 & n. 83; *see also 7979 Airport Garage, L.L.C.,* 245 S.W.3d at 506 (holding segregation of fees requires some consideration of component tasks).

However, as unsegregated fees are some evidence of segregated fees, the court of appeals remanded the case for a new trial on attorneys' fees.

Current Status:

USAA's motion for extension of time to file petition for review granted on October 13, 2016, and its petition is now due November 14, 2016.

Practice Pointers:

No. 1 Be careful what you ask for. The fine line between notice and demand was not answered by this case due to the standards of review; rather, the court only found that the letter could have been an offer of settlement. Likewise, while the case law suggests that a $125,000 demand was not excessive in light of a $1,000 recovery, that was likely a very fact specific determination. Here, the demand/notice sought almost $400,000 in damages exclusive of attorneys' fees and the plaintiff recovered $25,000 (arguably $57,000 with bad faith and knowingly awards by the jury). That would seem excessive to this author. The Texas Supreme Court granted USAA an extension of time to file its petition and this issue may well be part of its appeal.

No. 2 If you are seeking attorneys' fees, keep contemporaneous time records, introduce them (or a summary), segregate tasks that are solely directed at non-recoverable causes of action and estimate the percentage of additional time required to perform intertwined tasks, and do not try to recover expert fees, transcript costs, or other direct litigation costs, although you can consider routine overhead and risk of success (if operating on a contingency fees) as a basis of your hourly rate. And, when testifying, make your examples of segregation task based, i.e. drafting the fraud portion of the petition only took a few additional minutes, less than 5% of the time to draft the petition, as the fact portion was part of the common factual background section. If you give several concrete examples based on the legal task and explain that you have reviewed the entire time record with a similar focus, then you should have a foundation to extrapolate to a percentage of the entire bill.

Kartsotis v. Bloch,

2016 WL 4582208
(Tex. App.—Dallas 2016)

<u>Synopsis:</u>

Interpreting contracts that incorporate other documents by reference requires construing all the documents in their entirety. Recitals are not strictly part of the contract and certainly do not control over operative provisions. Where in conflict, specific provisions control over general provisions. Failure to mitigate must be performed with reasonable efforts (at a trifling expense or reasonable exertion) and requires proof lack of diligence and proof of the increased damages due to the failure to mitigate. Repudiation must be definite, absolute, and unconditional. Chapters 37 and 38 provide for recovery of attorneys' fees, but not expenses.

<u>Factual Background and Trial Court Ruling/Verdict:</u>

This case involves who owes the secondary obligations (indemnities and contribution) for real estate development loans and liabilities after the primary debtors failed to pay. The parties entered a series of contracts, including a Contribution and Indemnity Agreement (CIA) and a Guaranty Bank Agreement (GBA). Kartsosis sued Bloch for Bloch's failure to pay his share of the Guaranty Bank Loan as required by the GBA and Bloch counterclaimed seeking reimbursement of payments made under the CIA as well as for declaratory relief concerning the parities rights and obligations under the CIA and for attorney's fees.

The parties filed countervailing summary judgments. The trial court signed a judgment that awarded judgment for Kartsotis against Bloch on Kartsotis's GBA claims and for Bloch against Kartsotis on Bloch's contribution and reimbursement CIA claims. The trial court, among other relief, also awarded both parties attorneys' fees, netted the total sums due each party, and gave Bloch a net judgment against Kartsotis for $200,982.93 plus contingent appellate attorneys' fees and interest. Both parties appealed.

Court of Appeals Ruling:

The court of appeals first considered the trial court's summary judgment in Bloch's favor on the CIA. In began by interpreting that document in conjunction with its Exhibit A "Existing Obligation" and the GBA, which excluded the GBA debt from the CIA's obligations. The court of appeals sought the parties' objective intent as expressed in the entire agreement harmonizing where necessary to give effect o all provisions of the contract and allowing no single provision to be controlling. The court of appeals also recognized that the construction the parties placed on the contract as evidenced by their conduct. Likewise, separate writings may be construed together if the connection appears on the face of the documents by express reference or by internal evidence of their unity. Documents, like Exhibit A, incorporated into a contract by reference become part of that contract and, when a document is incorporated into another by reference, both instruments must be read and construed together. Here, the court of appeals found that the CIA provision set up a four step process for contribution and indemnity with the first step being a calculation that triggers when a Guarantor must make a payment to another Guarantor for payments that the latter made "upon or in respect of the Obligations". The court found that Bloch had not established that he had met the trigger as he had not shown that he had paid more than his share of the primary debtors' obligation. In doing so, the court of appeals rejected Bloch's reliance on recitals, noting that (1) a contract's recitals are not strictly part of the contract, and they will not control the operative phrases of the contract unless the phrases are ambiguous, and (2) the recital was general, while Section 2 was specific and, if a conflict existed between the two, the specific would control over the general. Having so found, the court of appeals reversed the trial court's summary judgment in Bloch's favor on the CIA breach of contract claims.

The court next addressed Bloch's claim for reimbursement of incidental expenses (attorneys fees and other expenses) paid to avoid the guarantors' liability under the CIA. Bloch argued that these were payments made "in respect of" an obligation. The court of appeals disagreed and stated that there is no basis in the CIA, for including Bloch's miscellaneous expense payments when calculating contribution liability under the CIA and holding that a court may not add language to a contract under the guise of interpretation.

With respect to attorneys' fees and expenses, the court of appeals began by rejecting Bloch's claims for expenses noting that the attorney's fees were awarded under chapters 37 and 38, neither of which provide for the recovery of expenses. Additionally, as the court of appeals reversed Bloch's summary judgment on the CIA, he no longer had a right to recover attorneys' fees under Chapter 38. And, while awarding attorney's fees to a non-prevailing party under Chapter 37 is not in itself and abuse of discretion, after a declaratory judgment is reversed on appeal, an attorney's fees award may no longer be equitable and just. Therefore, the court of appeals remanded the attorneys' fees issue to the trial court for further consideration.

On Bloch's cross point on Kartsosis's failure to mitigate, the court of appeals concluded that there is legally no evidence that would support (i) a duty by Kartsotis to agree to a third extension and (ii) a finding that Bloch would have performed had Kartsotis agreed to Bloch's request. The court noted that the mitigation-of-damages rule prevents a party from recovering damages that result from a breach of contract that the non-breaching party could avoid by reasonable efforts, which are those that a party can avoid at a trifling expense or with reasonable exertions. The party raising the failure to mitigate defense must prove lack of diligence as well as the amount by which the damages were increased as a result of the failure to mitigate. At the time that Bloch would have had Kartsotis obtain a third extension, the loan was already in default and there was no evidence that the bank would have granted the extension. The mere evidence that the bank had twice extended the loan is no evidence it would have done so a third time. Further, the GBA had no provision requiring Kartsosis to obtain an extension.

Blochalso contended that Kartsosis repudiated the CIA and the GBA incorporates the CIA by reference, Kartsotis repudiated the GBA. The court of appeals rejected that argument citing case law for the proposition that a party repudiates a contract if the party manifests, by words or actions, a definite and unconditional intention not to perform the contract according to its terms and that refusal to perform must be absolute and unconditional. The court determined that, even if Kartsosis had repudiated the CIA, repudiation of the CIA does not by implication, establish repudiation of the GBA as the whole point of the GBA's incorporation of the CIA was to make clear that the bank loan was excluded from the CIA's terms.

Current Status:

The court's substituted decision was issued on September 22, 2016. The time for motions for rehearing has passed. However, the time for filing a petition for review does not run until November 7, 2016.

Practice Pointers:

No. 1 If you want to recover for incidental expenses related to the contract, such as those related to servicing or avoiding the debt or the contract (including attorneys' fees, accounting fees, maintenance of the property, etc.) as opposed to incidental expenses related to the subject litigation, you should make provision for them in the contract. Likewise, if you want to recover your expenses related to the subject litigation (including expert fees, copy costs, etc.), you need to expressly provide for those in the contract as neither Chapter 37 nor Chapter 38 provide for them.

No. 2 The space constraints of appellate briefing make including every detail difficult. However, if you are complaining about certain damages, in this case expenses, you must specifically identify those damages. An appendix identifying the specific items that added up to the $44,565.50 in unrecoverable litigation expenses with record citations may have been all Kartsosis needed to eliminate these damages on a reverse and render.

Alma Investments, Inc. v. Bahia Mar Co-Owners Assoc., Inc.,

13-14-00428-CV, 2016 WL 3365812
(Tex. App.—Corpus Christi 06/16/2016)

Synopsis:

The Corpus Christi Court of Appeals resolves a conflict in the courts of appeals by ruling that, as a general matter, pre-judgment interest is not recoverable on attorneys' fees; however, an exception to that general rule exists and pre-judgment interest is recoverable on attorneys' fees paid prior to the entry of judgment.

Factual Background and Trial Court Ruling/Verdict:

This is part of never ending litigation over a condominium complex on South Padre Island over unpaid maintenance association fees paid by the Co-Owner to Alma and, in turn, owed to Bahia. Prior to trial, the court entered death penalty sanctions against Alma for discovery abuse, striking its pleadings and granting the co-owner a default judgment as to liability. Only damages and attorneys' fees were tried resulting in an award of approximately $450,000 in maintenance fees and $291,000 in attorneys' fees through trial and an additional $50,000 in appellate fees.

Court of Appeals Ruling:

After affirming the death penalty sanctions, the court of appeals turned to the attorneys' fees issue. Alma complained that the Co-Owner was not entitled to attorneys' fees as part of its declaratory relief under Chapter 37. On this point, the court of appeals found the dispositive question to be whether the Co–Owners properly asserted a claim for declaratory relief under Chapter 37 of the civil practice and remedies code, which would entitle them to attorneys' fees. The court of appeals recognized that, when a party pursues an action for declaratory relief, the trial court may award costs and reasonable and necessary attorney's fees as are equitable and just. However, the Declaratory Judgments Act cannot be invoked when it would interfere with some other exclusive remedy or some other entity's exclusive jurisdiction. Additionally, a party cannot use the Declaratory Judgment Act as a vehicle to obtain otherwise impermissible attorney's fees. In its live pleading, the Co-Owner requested two declarations showing it sought relief separate and apart from other actions, thus entitling it to attorneys fees under Chapter 37.

This litigation was eight years old at the time of trial and the Co-Owners had been paying their attorneys' fees on an ongoing basis. The court of appeals recognized a split in authority between its sister courts (Dallas saying never under any circumstances and three other courts taking a less rigid view and allowing) and silence from the Texas Supreme Court. The Corpus Christi Court of Appeals resolves the conflict by ruling that, as a general matter, pre-judgment interest is not recoverable on attorneys' fees; however, an exception to that general rule exists and pre-judgment interest is recoverable on attorneys' fees paid prior to the entry of judgment.

Practice Pointers:

No. 1 If seeking fees and you have a hybrid fee arrangement involving a retainer plus a percentage, be sure to segregate the fees (paid and to be paid) and consider requesting two separate lines on the through trial fees. Alternatively, consider how you will make a record that will support recovery of pre-judgment interest on those fees paid.

No. 2 If defending against paid fees, develop a record of when the fees were paid and try to reduce the interest to only the time since actual payment occurred (even if plaintiff has been paying monthly). This may require a lot of accounting, but in larger cases it could save considerably on pre-judgment interest. For example, *Alma Investments* was 8 years old at the time of trial. If some of the fees were paid in the last year, you would not want to pay 40% (8 years time 5% per year) on the fees paid in the last year.

Brinson Benefits, Inc. v. Hooper,

05-15-00123-CV, 2016 WL 3660111 (Tex. App.—Dallas 07/07/2016)

Synopsis:

Even with multiple theories or elements of damages, there is only one prevailing party under §134.005(b) of the Texas Theft Liability Act. Conspiracy is a derivative tort and, if attorneys' fees are recoverable for the underlying tort, then they are recoverable for the conspiracy claim. Segregation of fees looks at the discrete legal services provided, unless the facts and causes of action are so intertwined as to be inseparable.

Factual Background and Trial Court Ruling/Verdict:

Brinson Benefits (Brinson) is an employee benefits advisory firm and Hooper was a former employee. She eventually left Brinson and moved to HMA, a competitor. She took files from Brinson Benefits and some of her clients followed her to HMA. Brinson sued Hooper, Sendelbach (an HMA officer who interviewed Hooper), and HMA for misappropriation of trade secrets, breach of fiduciary duty, conversion, tortious interference, and civil theft. Through a series of directed verdicts and voluntary dismissals, the only claims to proceed to verdict were (1) Brinson's claims against Ms. Hooper for breach of fiduciary duty, tortious interference, and theft of Brinson's property in connection with income she received personally while employed by Brinson; (2) Brinson's claim against Mr. Sendelbach for conspiracy to commit torts other than theft; and (3) Ms. Hooper and Mr. Sendelbach's counterclaims for breach of contract. The jury found Ms. Hooper breached her fiduciary duties to Brinson and committed theft of Brinson's property. As to Mr. Sendelbach, the jury found he did not conspire with Ms. Hooper. The jury found against Ms. Hooper and Mr. Sendelbach on their breach-of-contract claims.

By agreement, the TTLA attorneys' fees issue was submitted to court post-verdict. (The TTLA was the only issue upon which the court could award attorneys' fees.) The trial court entered a judgment ordering Hooper to pay Brinson the damages found by the jury, plus attorney's fees, and ordering Brinson to pay Hooper attorney's fees, and HMA and Sendelbach attorney's fees. Brinson requested findings of fact and conclusions of law and later filed a motion for new trial or to modify the judgment. The court did not act on any of these submissions. Brinson appealed the judgment complaining of the attorneys' fees award.

Court of Appeals Ruling:

The first issue on appeal was availability of attorney's fees to Hooper, Sendelbach, and HMA under the TTLA. This required an analysis of who was the prevailing party. As to Hooper, she argued that Brinson had alleged two TTLA claims against her and that she prevailed on one of the two. Brinson countered that it had but one TTLA cause of action with two sources of damages, one of which was foreclosed by directed verdict. Although recognizing two sister courts of appeals have awarded defendants attorneys when they prevailed on the TTLA claim, but lost on another cause of action, the Dallas Court of Appeals sided with Brinson, found that it had only one claim for which it sought only one jury question, and distinguished *Brown v. Kleerekoper*, a case in which the plaintiff pled two separate theft claims implicating two separate penal code sections for which it sought two separate jury questions. Further, the Dallas Court of Appeals opined that, if it had determined that Brinson had pled two separate TTLA claims, it would still find that Brinson was the prevailing party as the court had awarded it TTLA damages, rejecting the notion that it had to award attorneys' fees to whomever prevailed on a theory by theory basis.

With respect to HMA's and Sendelbach's attorneys' fees award, Brinson argued that it had not sued them under the TTLA, but for a series of common law torts. The appellees pointed out that one of those torts was conspiracy to commit theft. Civil conspiracy is a derivative tort and, if the underlying tort does not entitle a party to attorney's fees, that party may not recover its attorney's fees for conspiracy to commit that tort. To succeed, Brinson would have had to have proven that Sendelbach and HMA were liable for the underlying theft. Thus, HMA and Sendelbach were entitled to attorneys' fees under the TTLA, TEX. CIV. PRAC. & REM. CODE ANN. §134.005(b)

The court of appeals then turned to Brinson's contention that HMA and Sendelbach failed to properly segregate their fees by parsing the work into component tasks. Brinson sued HMA and Sendelbach for various common law torts in addition to the conspiracy claim and, in turn, Sendelbach counterclaimed for breach of contract. Thus, Brinson argued that at least some of the attorneys' fees could not have been directed at the TTLA claim on which they prevailed. HMA and Sendelbach contended that, at its core, Brinson's lawsuit had a single premise, i.e. theft. As such, all of theories had a common set of facts and, therefore, none of the claims could have been segregated from one another, other than the breach-of-contract claim, which was excluded from the application for prevailing party fees. Fees for services that are not recoverable must be segregated, unless the discrete legal services advanced both the recoverable claim and the unrecoverable claim. The need to segregate fees is a question of law, while the extent to which certain claims can or cannot be segregated is a mixed question of law and fact. When the causes of action involved in the suit are dependent upon the same set of facts or circumstances and thus are "intertwined to the point of being inseparable," the party suing for attorney's fees may recover the entire amount covering all claims. The Dallas Court of Appeals concluded that all of Brinson's claims against HMA and Sendelbach arose from a common set of facts and were not segregable. Therefore, it affirmed the trial court's award.

Practice Pointers:

No. 1 In a footnote, the Dallas Court of Appeals noted that Brinson had not adequately teed up the "nuanced" issue of whether pre-suit attorneys' fees are recoverable. However, it did cite to an anti-SLAPP decision in which it had found pre-suit attorneys' fees were recoverable under that case's facts and the wording of the anti-SLAPP statute. If you have a case in which pre-suit attorneys' fees are substantial, raising this segregation argument may be worthwhile. Here, the amount at issue was less that $5,000. One suspects that the paucity in amount resulted in the few words spared to the issue.

No. 2 HMA's and Sendelbach's attorney supported his application for attorneys' fees with a four page affidavit to which he attached over 50 pages of contemporaneous time entries. Attaching your contemporaneous time entries, redacted as need be (but not so much as to make them useless as supporting evidence), can cure any number of issues. Here the court noted that these records allowed it to assess segregability of fees.

No. 3 Once again, a court acknowledges that segregation should be based on tasks, but the analysis is muddled by essentially holding that the common set of facts from which all of the plaintiff's theories flowed made the fees non-segregable. If you are on the side of arguing for fees, stress the commonality of facts. If you are opposing fees, stress tasks and how some part of it can be segregated. Of course, both sides should be mindful of the other argument.

Kennedy Con., Inc. v. Foreman,

No. 14-14-00776-CV,
2016 Tex. App. LEXIS 9993,
(App.—Houston [14th Dist.], Sept. 8, 2016, no pet. h.)

Synopsis:

While the recovery of lost profits does not require an exact calculation, the amount of the loss must be demonstrated with reasonable certainty. Reasonable certainty is a fact-intensive determination that requires, at a minimum, some objective facts, figures, or data from which the amount of lost profits may be ascertained.

Factual Background and Trial Court Ruling/Verdict:

Appellee filed a trespass-to-try-title action against appellant seeking judgment that he was the owner of certain real property in the City of Galveston and further seeking actual damages for lost profits and attorney's fees caused by wrongful possession. The trial court rendered final judgment on the jury's verdict in which it awarded appellee title to and possession of the properties, actual damages of $237,281, reasonable attorney's fee and ordered appellant to remove all improvements placed thereon.

Regarding the actual damage award of $237,281, the only element that the trial court instructed the jury to consider was appellee's lost profits sustained in the past. Appellee did not submit any expert testimony to support his alleged lost profits in the past; instead, he provided testimony to the effect that: (1) his lost-profit damages is based upon the storage of barges; (2) he was familiar with the market for storing barges; (3) it would be reasonable to store ten barges on the land at issue; (4) a reasonable charge to store a barge is $110 per day; (5) there is a market for storing barges; (6) the storage was not going to require any expenses; (7) he could have leased mooring for ten barges every day of the year for the years since suit was filed; and (8) he heard Appellant's counsel say during opening statements that he was seeking $3.4 million in damages and, presuming a period of 96 months between the filing of suit and trial, he believes the amount of damages mentioned was possible.

Court of Appeals Ruling:

The court of appeals held the evidence was legally sufficient to support the jury's findings of prior possession of the subject properties. However, the court found the evidence was legally insufficient to support an award of lost-profits. The recovery for lost profits does not require that the loss be susceptible of exact calculation. However, the amount of the loss must be shown with reasonable certainty, by competent evidence. This is a fact-intensive determination that requires, at a minimum, some objective facts, figures, or data from which the amount of lost profits may be ascertained. A bare assertion that contracts were lost does is not an objective determination of lost profits. To support the recovery, the record must contain evidence sustaining one complete calculation of lost profit defined as damages for the loss of net income, and reflect income from lost business activity, less expenses that would have been attributable to that activity. The damages are based upon net profits, not gross revenue or gross profits. Appellee did not provide an opinion or estimate as to the specific amount of lost profits that he allegedly sustained. Nor did appellee testify regarding any single calculation of lost-profits damages. The judgment was modified to delete the award of these damages.

Practice Pointer:

While an owner of a business can testify regarding its lost profits, the stringent standard applied by the courts in this regard make it imperative that the supporting testimony be founded upon objective facts, figures and data, and not upon subjective evidence of decreased profitability.

Neurodiagnostic Tex., L.L.C. v. Pierce et al.,

No. 12-14-00254-CV, 2016 Tex. App. LEXIS 11754 (Tex. App.—Tyler October 31, 2016, no pet. h.), *reh'g denied*.

Synopsis:

This case involves a non-compete/non-disclosure clause (NDA) in an employment agreement. Former employee (Pierce) resigned his employment with employer (Neurodiagnostic Tex, L.L.C. hereinafter "NeuroTex") went to work for a competitor of NeuroTex, Syndergy IOM, LLC ("Syndergy). NeuroTex sued Pierce for breach of contract and fiduciary duty and sued Syndergy for interference with contract. The trial court held the NDA in the employment agreement was not enforceable and granted summary judgment that NeuroTex take nothing from Pierce and Syndergy. NeuroTex appealed. The Tyler Court of Appeals affirmed in part, reversed in part, and remanded back to the trail court for further proceedings.

On December 13, 2005 Pierce went to work for NeuroTex. As a condition of his employment Pierce signed an employment agreement. Under the terms of the employment agreement NeuroTex agreed to employee Pierce to provide intraoperative texting/monitoring (IOM) services. The term of the agreement was indefinite; the agreement specified an initial employment period (term) of ninety days with automatic extensions of the agreement for thirty day periods unless either party gave fourteen days written notice of intention to terminate the agreement upon expiration of the current thirty day period (i.e. not to renew employment for the following calendar month). The agreement described circumstances under which NeuroTex could terminate Pierce's employment for cause at any time during a thirty day term.

The employment agreement also contained an NDA in which Pierce agreed not to compete with NeuroTex in eleven (11) counties surrounding the DFW Metroplex for five (5) years after the expiration or termination of the employment agreement. The NDA also required Pierce not to divert or attempt to divert any existing business for a period of (2) years after expiration or termination of the employment agreement. The employment agreement also contained training agreement in which NeuroTex agreed to spend money training Pierce to perform IOM services. NeuroTex paid for Pierce's additional training and by May 2006, about five months after going to work for NeuroTex, Pierce had obtained two (2) additional board certifications in providing IOM services (Pierce only had one board certification at the time he started working for NeuroTex). Now being triple board certified, Pierce continued to work for NeuroTex providing IOM services for the next seven (7) years until he resigned on October 15, 2013. Upon his resignation Pierce went to work for Synergy providing IOM services in the eleven (11) counties surrounding the DFW Metroplex.

<u>Overview:</u>

On December 23, 2015 NeuroTex sued Pierce for breach of the NDA, and breach of fiduciary duty. NeuroTex also sued Synergy for tortuous interference with contract (the NDA in the employment agreement between Pierce and NeuroTex). Pierce and Synergy filed traditional and no evidence motions for summary judgment arguing that the NDA was not enforceable. Pierce also argued he did not owe a fiduciary duty to NeuroTex. The trial court granted both defendants' motions and entered judgment that NeuroTex take nothing from Pierce and Synergy.

On appeal NeuroTex argued its summary judgment established the NDA was enforceable as a matter of law. Citing section 15.50(a) of the Texas Business & Commerce Code, the Court held covenant not to compete is enforceable if it is (1) ancillary to or part of an otherwise enforceable agreement at the time the agreement is made and (2) reasonable, not imposing a greater restraint than is necessary to protect the goodwill or other business interest of the employer. The Court further stated that the first element (ancillary or part of an otherwise enforceable agreement) can be broken down into two inquiries: (a) whether there is an "otherwise enforceable agreement," and (b) whether the covenant not to compete is "ancillary to or part of" that agreement at the time the otherwise enforceable agreement was made. The Court held the employment agreement qualified as an otherwise enforceable agreement (satisfying element 1(a)). The Court held that to satisfy element 1(b) (the covenant not to compete must be ancillary or part of the otherwise enforceable agreement established in 1(a)) NeuroTex had to establish two additional elements: (i) the consideration given by NeuroTex in the agreement is reasonably related to an interest worthy of protection and (ii) the covenant not to compete was designed to enforce NeuroTex's consideration or return promise in the agreement. The Court noted that the summary judgment evidence established Pierce possessed an EEC certification that only allowed him to work with patients in a clinical setting before he began to work for NeuroTex, and that following his NeuroTex training he received board certifications for REPT and CNIM allowed him to work with patients in an operating room. The Court held the summary judgment supported the first element of section 15.50(a), that the NDA is ancillary to or part of an otherwise enforceable agreement at the time the agreement was made.

The Court's analysis then turned to the second element, i.e. the reasonableness of the restriction imposed in the NDA. The Court recited various rules of law for guidance to the trial court on remand. The Court pointed out that a covenant not to compete that is found to impose a greater restraint than necessary is not invalidated but rather the trial court must reform the covenant to make the restraint reasonable. The Court also pointed out that a covenant not to compete that is not necessary to protect the employer's legitimate business interests cannot be reformed. The Court observed that Pierce's motion for summary judgment did not argue that the covenant not to compete is wholly unnecessary to protect NeuroTex's legitimate business interest, and held that the trial court granted relief beyond that which was expressly asserted in Pierce's summary judgment motion when it granted summary judgment Pierce's motion and ordered NeuroTex take nothing from Pierce. The Court reversed the take nothing judgment in favor of Pierce on the breach of contract claim and remanded to the trial court to determine whether the limitations in the covenant not to compete are reasonable and, if they are not, reform the agreement as necessary. The Court also reversed the take nothing judgment against Pierce on the breach of fiduciary claim, merely holding that Pierce's motion did not state the elements as to which there is no evidence in the breach of fiduciary duty claim.

With respect to the tortuous interference with contract claim against Synergy, the Court affirmed that NeuroTex did not produce any evidence that Synergy's breach caused injury to NeuroTex. The Court analyzed several procedural errors raised by NeuroTex but ended up affirming the trial court's take nothing on NeuroTex's interference of contract claim against Synergy.

Practice Pointers:

There are three. **First**, if you represent an employer seeking to enforce a non-compete agreement, always include a request that the court reform the non-compete agreement in the event the court finds it to impose a greater restraint than necessary. **Second**, if you represent an employee or the company sued for interfering with the non-compete by hiring the employee, include an argument that the non-compete covenant is unenforceable because it is wholly unnecessary to protect the employer's (plaintiff's) business interests. **Third**, when asserting a no-evidence motion for summary judgment be specific in stating the element(s) as to which there is no evidence and further state that there is no evidence of that element (or those elements).

Thomas v. Miller,

No. 06-15-00095-CV,
2016 Tex. App. LEXIS 8322
(Tex. App.—Texarkana August 4, 2016, no pet.)

Synopsis:

This case involves an oral executory contract for the sale of land. The jury found that the owner of the property, Appellant Thomas, entered into an oral contract to sell property to Appellee Miller and found that Miller performed his duties pursuant to the oral contract and relying on the oral contract made substantial improvements to the property by repairing the dilapidated house and repairing the water well, all with Thomas' knowledge and consent. The trial court entered judgment for money damages in favor of Miller against Thomas and Thomas appealed. The Texarkana Court of Appeals affirmed (with a minor modification of the trial court judgment to remove Miller's wife as a judgment creditor).

Overview:

In 2004 Bobby Miller and his then girlfriend, Thyra Miller, moved into a badly dilapidated abandoned house on 2 acres in Cass County owned by his brother in law, Leorris Thomas. Miller alleged he and Thomas entered into an oral agreement to purchase/sell the property in exchange for Miller making the mortgage payments on the property. Thomas denied entering into an agreement to sell the property. Rather, Thomas alleges he agreed to lease the property to Miller in exchange for Miller paying the amount due on the mortgage each month. Significantly, Thomas did not require Miller to sign a lease agreement before allowing Miller and his then girlfriend to move into the house on the property. For the next approximately five years Miller paid all the mortgage payments, paid all the property taxes, repaired the water well, and repaired the house. Bobby and Thyra married after moving on the property. Bobby worked overseas from 2008 through 2010. Taking advantage of Bobby's absence, in June 2009 Thomas sent a notice to vacate letter to Thyra Miller. After she refused to vacate Thomas filed a forcible detainer action in Justice Court, which was dismissed for lack of jurisdiction because there was a dispute over title (sidebar: the opinion does not state whether a signed lease agreement would have summarily defeated Miller's claim to title thus preserving jurisdiction for the Justice Court in the eviction case – that issue is open for another day). Even though Thomas did not obtain the desired writ of possession, Thyra Miller felt threatened and moved out of the home before her husband Bobby returned from working overseas. After Thyra moved out Thomas deeded the property to Clay Jiles.

In 2013 Bobby and Thyra sued Thomas for breach of contract and unjust enrichment (note they did not assert a trespass to try title claim, probably due to the Thomas to Jiles deed). Thomas asserted the statute of frauds as a defense. The following facts were deemed admitted because Thomas failed to file timely responses to requests for admissions: that Thomas owned the property in 2004; that Thomas owed a mortgage loan on the property in 2004; that Miller moved onto the property in 2004; that Miller and his wife Thyra occupied the property from 2004 to 2009; that Thomas did not reside on the property during 2004 to 2010; that Miller made payments on a mortgage secured by the property between 2004 and 2010; that Miller made repairs and improvements to the structures on the property between 2004 and 2010; that Thomas did not make any repairs or improvements to the structures on the property between 2004 and 2010; and that Thomas did not have any third parties make improvements to the structures or property between 2004 and 2010. The jury found that Thomas agreed to deed the property to Miller in exchanged for Miller paying off the loan to the bank and that Miller was entitled to lost benefit of the bargain damages in the amount of $10,000 plus $12,000 in attorneys' fees. The trial court entered final judgment and overruled Thomas' statute of frauds JNOV motion. Thomas appealed.

On appeal Thomas argued the evidence was not sufficient to support the jury finding that Thomas and Miller entered into a contract to sell the property (question 1 on the jury charge) or to support the jury finding that Miller met the partial performance exception to the statute of frauds (question 2 on the jury charge). In its analysis the Sixth Court of Appeals first determined that Thomas did meet his burden to demonstrate that the statute of frauds applies. The Court noted this was an oral contract, for the sale of land, that could not be completed within one year, and that did not contain a sufficient property description (after all, it's an oral contract). The Court further noted that the failure to meet the statute of frauds does not end the inquiry, rather it simply shifted the burden to Miller to establish an exception that would removed the oral contract out of the statute of frauds and make it an enforceable contract. The Court cited the following six elements to Miller need to prove to establish the partial performance exception to the statute of frauds: (1) Miller had performed acts unequivocally referable to the agreement (2) that the acts were performed in reliance on the agreement (3) that as a result of the acts Miller had experienced substantial detriment (4) that Miller had no adequate remedy for his loss and (5) that Thomas would reap an unearned benefit such that not enforcing the agreement would amount to a virtual fraud. The Court cited to evidence that led to Miller securing jury findings that Miller paid consideration pursuant to the oral contract, took possession of the property, and made valuable and permanent improvements upon the land with the consent and knowledge of Thomas. The Texarkana Court of Appeals affirmed the trial court Judgment with one modification: because Bobby and Thyra were not married at the time Bobby entered into the oral contract with Thomas, the Texarkana Court of Appeals modified the Trial Court Judgment to remove Thyra from the Judgment.

Mandate issued on October 18, 2016.

Practice Pointers:

Never, <u>ever</u>, <u>ever</u>, allow anyone to move into your property without a lease, no matter how short a period of time and no matter what the circumstances. Similarly, if you are the buyer of real property do not perform until an oral agreement is "papered up."

Siddiquiv. Fancy Bites, LLC, Quick Eats LLC et al.,

No. 14-14-00384-CV, 2016 Tex. App. LEXIS 7906 (Tex. App.—Houston [14th Dist.] July 26, 2016, no pet. h.)

Synopsis:

This case is a claim for breach of fiduciary duties owed by members of a limited liability company.

Overview:

The construction members entered into the construction contracts on behalf of the partnership without input from the operating members. The construction company members also arranged for the construction loans from the bank. The restaurants never made money and the partnership filed for bankruptcy protection. The facts demonstrated the price to build the restaurants (paid to the company owned by the construction company members) were three to four time more than cost. Although not stated in the fact section, the unusually high debt burden contributed to the unprofitability of the restaurants.

All four members personally guaranteed the bank construction loans. After the partnership defaulted on the loans the two construction company members paid the loans and then sued the operating members for their pro-rata share of payments the construction company members made to the bank. The operating members asserted counter-claims against the construction company members for fraud, breach of fiduciary duty, and unjust enrichment. After the trial the court signed a modified final judgment ordering that the construction company members take nothing on their contribution claim against the operating members and that the operating members recover actual damages of $514,428.68 on their claims for breach of fiduciary duty and fraud from the construction company members.

On appeal the construction company members argued there was no evidence of a fiduciary relationship between the construction company members and the operating members. In its findings of fact and conclusions of law the trial court found an informal fiduciary duty existed between the construction members and the operating members, that the construction members breached their duty, and the operating members suffered damages in the amount of $514,482.68 as a result of the breach. The trial court made several findings concerning the construction company member's failure to comply with their fiduciary duties including findings they engaged in self-dealing and overcharged for their construction services. The damages represented the amount the operating members paid toward the partnership indebtedness (under the personal guarantee) plus the amount they paid the construction company members for their membership interests in the LLCs. In its analysis the Fourteenth Court of Appeals recognized a fiduciary duty arises in certain formal relationships or under an informal relationship, and that an informal fiduciary duty may arise from a moral, social, domestic, or purely personal relationship of trust and confidence. The analysis focused on the informal fiduciary duty because the operating members did not argue that members of an LLC owe formal fiduciary duty to each other. The Fourteenth Court of Appeals further recognized that to impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist before and apart from the agreement made the basis of the breach of fiduciary duty lawsuit. The Fourteenth Court pointed out that there was no pre-existing relationship of trust and confidence between the operating members and the construction company members and held the evidence does not support the imposition of an informal fiduciary duty on the construction company members. The evidence cited by the Court included the Restated company and partnership agreements in which the members agreed the construction company members' company would build the restaurants and also allowed the construction company members to enter into construction contracts on behalf of the partnership. The Fourteenth Court reversed the trial court's judgment based on breach of fiduciary duty.

The construction company members were not let of the hook because the Fourteenth Court affirmed liability for fraud in selling the membership interests in the LLCs to the operating members and reformed (lowered) the judgment to award $425,000 – the total amount the operating members paid the construction members for the 50% membership interests in the LLCs. At issue was a representation prior to the sale that real property on which one of the restaurants was built was owned by the partnership at the time of the sale of the LLC membership interests. The real property was owned by the construction company at the time of the membership interest sale. The construction company members subsequently conveyed to the partnership unencumbered title to the real property at no cost to the partnership, which arguably established that the operating company members did not suffer damages. However, in what appears to the author as an attempt to avoid a bad result (i.e. the operating members take nothing) the Fourteenth Court reasoned that the value of the partnership and the LLCs at the time of the sale was zero since neither the partnership nor either of the LLCs owned the property as represented, therefore the representation constituted fraud and damages equaled the total purchase price paid for the 50% membership interests in the two LLCs ($425,000). The construction company members filed a motion for rehearing which was denied on October 6, 2016. Mandate has not yet issued.

Shores Ag-Air, Inc. v. MPH Prod. Co.,

2016 WL 2955066
(Tex. App. [13th Dist] 5/19/16)

Synopsis:

Shores Ag-Air, Inc., a flight services company, made an oral agreement to provide flight services for MPH Production Company in exchange for mineral interests. The parties kept track of the values, and eventually the value of the flight services provided exceeded the value of the mineral interests received by more than $50,000.00. Shores Ag-Air sent a text to MPH stating that they wanted money instead of mineral interests as payment and eventually sued for breach of contract to receive the balance. MPH attempted to pay the balance with mineral interests and obtained a summary judgment based on the defense of tender.

Overview:

The court of appeals reversed, holding that fact issues were created. The first was that the text message requesting payment by cash and the fact that there was a prior cash payment made and accepted created a fact issue over whether the parties had agreed to alter the medium of payment. The other fact issue was created by the lack of sufficient proof that the amount of tender was not less than the total amount of debt. The court held that it was MPH's burden to prove that the value of the tender was at least equal to the amount of the debt. MPH had attempted to support that proposition through affidavits from its attorney and from MPH's owner. The owner's affidavit didn't contain any useful information other than establishing that the letter conveyance of the interest had not been returned. The attorney's affidavit contained more information, suggesting that the mineral interests would pay off the debt within 18 years but did not contain sufficient information as to establish how the attorney had personal knowledge in support of the assertions. Moreover, MPH conceded on appeal that the value of the tender "will always be inherently a question of fact". Based on the issues with the affidavits and MPH's own concession, there was an issue of fact regarding the value of the tender. Accordingly, MPH could not have conclusively proven its affirmative defense as a matter of law.

Practice Pointers:

Tender need not be cash, as the parties can agree to another medium of exchange. Success on the affirmative defense of "tender" requires satisfaction of the burden to establish that the value of the tender is at least equal to the amount of the debt.

Dudley Construction, Ltd., Richard Mark Dudley, and Hartford Fire Ins. Co v. Act Pipe & Supply, Inc.,

2016 WL 3917211, No. 06-15-00045-CV (Tex. App.—Texarkana July 14, 2016, pet. filed).

Synopsis:

Purchase order evidencing different price term from submittal price term was sufficient to sustain jury findings on sworn-account claim.

Factual Background and Trial Court Proceedings:

In its role as supplier to Dudley Construction, Ltd., and Richard Mark Dudley (collectively, Dudley), ACT Pipe & Supply, Inc. ("ACT") helped Dudley on two water and sewer improvement projects in

Bryan-College Station, Texas. After engaging in some give and take over the type of pipefittings that were to be supplied, the parties ended up disputing the cost of materials provided. The dispute was based on whether Dudley agreed to pay the higher prices of $109.71 per 36-inch unit and $82.00 per 30-inch unit of restrain-joint pipe or the lower prices of $95.00 per 36-inch unit and $74.53 per 30-inch unit of slip join pipe. ACT's second submittal quoted the higher prices, while its first submittal quoted the lower prices. Additionally, Dudley signed a purchase order that was ultimately used on the project that used the lower prices rather than the higher prices. ACT, in turn, approved the purchase order with the lower prices, but later contended that the purchase order lower prices were not consistent with the agreement among the parties.

ACT asserted that, during the construction process, the parties had agreed to use the higher prices to offset cost reduction for pipe used in another project and that Dudley inserted the lower price in the purchase order knowing that they did not conform to the parties' agreement which ACT merely overlooked. Dudley denied any such agreement to use the higher prices. After the projects at issue were completed, Dudley sent ACT's invoices, along with invoices from other subcontractors, to the owner for payment who paid Dudley for the full amount of ACT's invoices. Dudley then deposited the money its bank account, but declined to pay ACT for the project because ACT's demand exceeded the lower prices secured by the purchase order.

ACT sued Dudley for, among other theories, suit on sworn-account. After trial yielded jury findings generally favorable to Dudley, the trial court entered judgment notwithstanding the verdict ("JNOV") on ACT's sworn-account claims.

Court of Appeals:

On appeal, the Texarkana Court of Appeals held that, contrary to the trial court's finding, sufficient evidence supported the no-recovery jury finding on ACT's sworn-account claim. ACT's suit on sworn account alleged that Dudley owed $124,071.97 for the projects, relying on the second submittal containing the higher priced to support the justness of the account. Dudley disputed this amount by presenting evidence of the signed purchase order with the lower prices. The Texarkana Court of Appeals determined that this evidence raised a fact question as to the justness of the account which the jury resolved in Dudley's favor. Because the jury's findings were supported by the evidence, the trial court's entry of JNOV was error.

Jafar, et al vs. Mohammed,

No. 14-14-00512-CV,
2016 Tex. App. LEXIS 3706 (Tex. App. Houston 14th Dist. Apr. 12, 2016)

Synopsis:

Involves a dispute regarding the value of a general partnership following the withdrawal of one of its partners. Withdrawing partner, Seraj Mohammed ("Mohammed") filed an action for redemption and other causes of action against continuing partners, Mohammed Jafar, Mohammed Chowdhury and Abdus Sobhan ("Continuing Partners"), seeking redemption value of his partnership interest in Cellmart #1, a cellular phone and accessory store. After MSJs' and a bench trial, the only viable claim was Mohammed's redemption for his 50% interest in Cellmart #1. After evidence was presented on the value of Cellmart #1, the trial court entered a judgment in favor of Mohammed in the amount of $85,000, his 50% partnership interest. Continuing Partners challenged the trial Court's rulings on the following: (1) exclusion of the continuing partners' expert for untimely designation; (2) denial of the continuing partners' motion to exclude the testimony of Mohammed's expert as unreliable, and, (3) award of $85,000 to Mohammed as the redemption value of his partnership interest. The Court of Appeals affirmed the trial's court judgment.

Factual Background:

Mohammed entered into a written partnership agreement with Mohammed for a 30% interest in Cellmart #1. Per the agreement, Mohammed invested $15,000 as a capital contribution. The agreement also gave Mohammed a six-month option to purchase an additional 20% share in the partnership for $5,000, which he timely exercised, thus giving him a 50% interest in Cellmart #1. On May 27, 2010, Mohammed formally withdrew from the partnership. Continuing Partners elected not to close the store and wind down the partnership.

After formally withdrawing, Mohammed sent Continuing Partners a written demand for payment of the redemption value of his partnership interest pursuant to section 152.607 of the Texas Business Organizations Code. There appeared to be some discussion among the parties on how to value the partnership and hiring an appraiser; but, it appears nothing came of these discussions. After another redemption notice went unanswered, Mohammed sued Continuing Partners for redemption, fraud, breach of contract, and breach of partner's duty of loyalty. Continuing partners filed a counterclaim against Mohammed for breach of fiduciary duty, conversion and breach of contract.

The trial court granted partial summary judgment on the issue of liability in favor of Mohammed on his statutory claim for redemption of his 50% interest in Cellmart #1. The trial court also granted Continuing Partners' motion for summary judgment on Mohammed's claims for fraud and breach of duty of loyalty. The suit proceeded to a bench trial to decide Mohammed's claim for breach of contract, Continuing Partners' three counterclaims, and to determine the partnerships value and any additional recovery to which Mohammed was entitled.

The trial court held that Mohammed did not establish his claim for breach of contract and that the Continuing Partners should take nothing on their counterclaims. Based on the testimony of Mohammed's expert witness, the trial court found the fair value of the partnership as of May 31, 2010 was $171,000 and Mohammed's 50% interest was worth $85,500. The Trial court also awarded Mohammed $6,000 for expert witness fees.

Issues Presented On Appeal:

On Appeal, Continuing Partners challenged the trial court's (1) exclusion of their expert for untimely designation, (2) denial of their motion to exclude the testimony of Mohammed's expert as unreliable, and (3) award of $85,000 to Mohammed as the redemption value of his partnership interest.

Analysis of Continuing Partners' Challenges:

(1) Exclusion of Continuing Partners' Expert for Untimely Designation

Continuing Partners first argued that the trial court erred when it excluded their expert for failure to timely designate. They contended that they timely designated their expert prior to the expiration of the discovery deadline. The facts are clear that on July 18, 2012 the trial court signed the original docket control order. A motion for Continuance was granted and extended the trial date to September 2, 2013 and extended discovery to August 23, 2012. However, the order also stated that all other court-ordered deadlines remained in effect, i.e. the original docket control order. However, on June 4, 2013, the trial court issued an amended docket control order providing that Expert Witness designations were required and must be served by the following dates: "(a) 6/14/2013 Experts for parties seeking affirmative relief; and, (b) 07/12/13 all other experts." On August 21, 2013, the trial court again granted a second continuance motion filed by Continuing Partners and entered an Order reflecting that the discovery deadlines were extended to October 4, 2013 and that the new trial date was October 13, 2016. However, what is significant, is that the trial court also crossed out the portion of Continuing Partners proposed order stating "so that [Continuing Partners] may designate their experts ….." Continuing Partners first disclosed their expert witness in supplemental responses to disclosures on September 15, 2013 and did not file their Designation of Experts until October 4, 2013.

The Appellate Court noted that when a party fails to identify a witness timely, that party may not offer the testimony of that witness unless the court finds that (1) there was "good cause" for the failure to timely identify or (2) the failure "will not unfairly surprise or unfairly prejudice the other [party]." Tex. R. Civ. P. 193.6(a). The burden of demonstrating good cause or the lack of unfair surprise or prejudice is on the party seeking to call the witness. Id. 193.6(b). Continuing Partners point to no evidence of good cause or lack of unfair surprise or prejudice. Instead, only argued that the trial court's orders granting the motions for continuance extended their deadline to designate expert witnesses to October 4, 2013. This Court concluded that although Continuing Partners correctly observe that the orders extended the deadline for discovery, they mistakenly believed the orders also extended their deadline for designating an expert. The June 4, 2013 Order was still in place. Because Continuing Partners failed to timely designate their expert and did not present evidence to establish good cause or lack of unfair surprise or prejudice, the trial court corrected granted Mohammed's motion to exclude and overruled Continuing Partners' first issue.

(2) Denial of Continuing Partners' Motion to Exclude Testimony of Mohammed's Expert as Unreliable

In their second issue, Continuing Partners challenged the trial court's denial of their motion to exclude the testimony of Mohammed's expert, Jeffrey Jones, and the trial court's admission of Jones' appraisal report. Continuing Partners sought to exclude Jones' expert testimony on two grounds: (1) Mohammed failed to properly and timely designate Jones as his expert; and (2) the report on which he based his testimony was unreliable and challenged Jones' qualifications. For various appellate issues, this Court only considered whether Jones testimony was reliable.

Continuing Partners challenged the reliability of Jones' expert testimony and the underlying valuation report because Jones

(1) based his report on information pertaining to stores categorized under NAICS code 51322 Telecommunication Systems, which Continuing Partners argue represents much larger, complex stores, such as Sprint, T-Mobil, Verizon, or Cricket; (2) prepared the valuation report on May 8, 2013, which is three years after the determination of the partnership; (3) used many statistics that were not pertinent to the type of store Continuing Partners owned; and (4) did not review the bank records of the business. This Court used the factors suggested by the Texas Supreme Court in *TXI Transportation Co. v. Hughes*, 306 S.W.3d 230, 235 (Tex. 2010) to aid in reliability determination in order to make it decision. These factors include the following: (1)the extent to which the theory has been or can be tested; (2) the extent to which the technique relies upon the subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and/or publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the non-judicial uses which have been made of the theory or technique. Id. Based on the evidence, this Court concluded that Jones' testimony and report were reliable based on Jones testimony that he relied on data that is the same type that those in the field of business valuation rely upon to determine the value of a business like Cellmart #1. Therefore, Continuing Partners' second issue was overruled.

(3) Challenge to Legal Sufficiency of the Evidence Supporting the Trial Court's Finding that Mohammed Should Recover $85,500

Continuing Partners in their third issue, challenged the legal sufficiency of the evidence supporting the trial court's finding that Mohammed should recover $85,000 on his claim for redemption of his 50% partnership interest. The Court noted that since this was a bench trial, it could not encroach upon the fact-finding role of the trial court, who alone determines the credibility of the witnesses, the weight to give their testimony, whether to accept or reject all or any part of that testimony. Instead, the court reviews de novo the trial court's implied legal conclusions supporting the judgment. *Hollingsworth v. Hollingsworth*, 274 S.W. 3d 811, 815 (Tex. App.–Dallas 2008, no pet.).

Continuing Partners first argue that Mohammed wrongfully withdrew from the partnership under Section 152.503(b) of the Tex. Bus. Orgs. Code. This statues notes that a withdrawal is wrongful only if (1) the withdrawal breaches an express provision of the partnership agreement; (2) In the case of a partnership that has a period of duration, is for a particular undertaking, or is required under its partnership agreement to wind up the partnership on occurrence of a specified event, before the expiration of the period of duration, the completion of the undertaking, or the occurrence of the event, as appropriate: (A) the partner withdraws by express will; (B) the partners withdraws by becoming a debtor in bankruptcy; or (C) in the case of partner that is not an individual, a trust other than a business trust, or an estate, the partner is expelled or otherwise withdraw because the partner willfully dissolved or terminated; or (3) the partner is expelled by judicial decree. Tex. Bus. Orgs. Code Section §152.503(b). The Appeals Court concluded the evidence is sufficient to support the trial court's implied findings that Mohammed's withdrawal was not wrongful based on the following: (1) Continuing

Partners did not point to any express provision of the partnership agreement that Mohammed violated by withdrawing; (2) They claim Mohammed withdrew prior to a stated period of duration or the completion of a particular undertaking; and (3) There was no evidence Mohammed was expelled from the partnership by judicial decree.

Continuing Partners also challenged the legal sufficiency of the evidence supporting the trial court's award by pointing to other evidence that conflicted with Jones' $171,000 valuation of the partnership. There was testimony regarding value that was significantly less than Jones value. However, the Court of Appeals held that they must assume that the trial court resolved disputed facts in favor of its ruling and determined whose testimony was believable. Therefore, since Jones' expert testimony valuing the partnership at $171,000 was reliable and provided the trial court with sufficient evidence to support its redemption award, this Court overruled Continuing Partners' third issue.

TXU Portfolio Mgmt. Co., L.P. v. FPL Energy, LLC,

2016 WL 4410252,
No. 05-08-01584-CV (Tex. App.—Dallas Aug. 18, 2016, no pet. h.).

Synopsis:

Attempts to compensate for undelivered goods prior to breach did not constitute "cover" under Texas Business and Commerce Code § 2.712(a).

Factual Background and Prior Court Proceedings:

A contract dispute between TXU Portfolio Management Company, L.P. ("TXUPM") and various wind farm entities ("Wind Farms") reached the Dallas Court of Appeals on remand from the Supreme Court of Texas. The case concerned three contracts requiring the Wind Farms to supply TXUPM with annual quantities of wind generated electricity and related renewable energy credits which the Wind Farms did not deliver. The Texas Supreme Court upheld the Dallas Court of Appeals' previous holding that TXUPM was not responsible for ensuring transmission capacity under the contract, but concluded that liquidated damages provision were unenforceable as a penalty. The Court then remanded the case to determine damages consistent with its opinion.

Court of Appeals:

On remand, the Dallas Court of Appeals' considered whether TXUPM's purchase of energy from other sources throughout the year to account for deficient deliveries from the Wind Farms constituted "cover" under Texas Business and Commerce Code § 2.712(a). Its opinion turned on analysis of two questions the trial court submitted to the jury:

- Question 4 asked the jury to determine TXUPM's market damages for failing to deliver "Renewable Energy," which consists of both wind power generated electricity and its corresponding renewable energy credits; and

- Question 5 asked whether TXUPM covered for the electricity the Wind Farms failed to provide under the Agreements.

Based on a "yes" answer to Question 5, the trial court ruled that TXUPM was precluded from recovering market price based damages. Therefore, it disregarded the jury's $8,900,000 answer to Question 4 and entered a take nothing judgment against TXUPM.

TXUPM argued that the trial court erred in entering a take nothing judgment because the undisputed facts showed that the Wind Farms' defensive cover theory in Question 5 did not apply.

The Dallas Court of Appeals ultimately held that attempts to compensate for undelivered goods prior to breach did not constitute "cover" under Texas Business and Commerce Code § 2.712(a). Accordingly, any electricity TXUPM acquired from other sources to ensure its pre-breach ability to meet its daily customer demands could not be considered evidence of a cover purchase because such transactions occurred *before* there was a contract breach to be remedied. The court's decision turned on statutory construction of Texas Business and Commerce Code § 2.712(a) which unambiguously provides:

> *After a breach* within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

Tex. Bus. & Com. Code § 2.712(a) (emphasis added).

Additionally, since the preceding statutory provision, Texas Business and Commerce Code § 2.711, unambiguously provided that a buyer aggrieved by a seller's failure to deliver a contractually required quantity of goods may *either* effect cover or recover market damages and TXUPM's purchase of additional electricity pre-breach could not constitute "cover", the Dallas Court of Appeals determined, contrary to the trial court, that the award of $8,900,000 in market damages was proper.

Carlton Energy Group, LLC v. Phillips,

2016 WL 4536284, No. 01-09-00997-CV (Tex. App.—Houston [1st Dist.] Aug. 30, 2016, no pet. h.)

Synopsis:

Testimony by expert who determined fair market value of percentage interest of business deal by extrapolating from value of entirety of deal as determined by a willing offer to a willing seller for a different percentage interest of same deal constituted factually sufficient evidence to support $31.16 million award.

Factual Background and Prior Court Proceedings:

This most recent installment in an extensive litigation saga concerned the factual sufficiency of a $31.16 million award of damages.

By way of brief background, CBM Energy Inc. ("CBM"), later acquired by Phillips Oil Interests L.L.C. ("Phillips"), entered into an exploration and prospecting deal with the government of Bulgaria ("Bulgaria Project"). CBM brought in Carlton Energy Group, LLC ("Carlton") as an investor who, in turn, brought in Phillips. CBM ultimately severed its relationship with Carlton and signed on with EurEnergy, a company later revealed to be connected to Phillips, instead. Carlton subsequently filed suit against Phillips for tortious interference with its interest in the Bulgaria Project, eventually winning a jury award of $66.5 million that was later reduced to $31.16 million.

Court of Appeals:

The only issue before the First Court of Appeals was whether factually sufficient evidence supported the trial court's $31.16 million judgment.

According to expert testimony, the $31.16 million award reflected the fair-market value of Carlton's 38% interest in the Bulgaria Project. The expert reached the $31.16 million figure by "simply extrapolating" from an agreement by which Phillips would have paid Carlton $8.5 million in exchange for a 10 % interest in the Bulgaria Project, giving the total project an estimated value of $85 million. Since Carlton had a 38% interest in the $85 million Bulgaria Project at the time of the alleged interference, the experts asserted that $31.16 million was the fair market value of Carlton's 38% interest less $3 million to drill three required wells. In analyzing the foregoing extrapolation analysis, the First Court of Appeals ultimately determined the expert testimony was "not so weak as to render the [$31.16 million] award clearly wrong and manifest unjust."

Fifth Circuit Decisions

JP Morgan Chase Bank, N.A. v. DataTreasury Corp.,

823 F.3d 1006 (5th Cir.)

Synopsis:

Where a licensee with a most favored licensee clause seeks to replace what has become a less-favored lump-sum license payment with a later-granted, more favorable lump-sum payment, the only way to give meaning to the most favored licensee clause is by retroactive substitution of the payment term, granting a refund.

Factual Background and District Court Proceedings:

DataTreasury Corporation ("DTC") held several patents applicable to electronic check-processing systems. When approached by DTC leadership, several banks, including JP Morgan Chase Bank, N.A. ("JPM") declined use of DTC's patented technology and instead created their own check processing system. DTC subsequently sued JPM and several other banks for willful patent infringement. As a part of a settlement between DTC and JPM the parties entered into a license agreement permitting JPM unlimited use of DTC's patented technology going forward. To protect JPM from the risk that DTC would enter into a more favorable license with a later settling defendant, the license agreement included a most-favored licensee ("MFL") clause that provided:

> If DTC grants to any other Person a license to any of the Licensed Patents, it will so notify JPM and JPM will be entitled to the benefit of any and all more favorable terms with respect to such Licensed Patents.

As a part of the MFL, JPM agreed to a $70 million lump sum payment.

After entering the license agreement with JPM, DTC separately entered into several other licensing agreements involving the same patents but at different lump sum prices terms. Notably, DTC entered into such a license agreement with non-party Cathay General Bancorp ("Cathay") with a lump sum price term of $250,000.

In response to the subsequent license agreements, JPM filed suit for breach of contract against DTC, alleging that DTC had entered into subsequent licensee on terms substantially more favorable that those afforded to JPM. JPM contended that its $70 million lump-sum price terms must be retroactively replaced with Cathay's $250,000 lump-sum price terms and the balance refunded.

The district court found that the broadly worded MFL clause in JPM's lump-sum license agreement gave JPM the right to incorporate the more favorable terms in the Cathay lump-sum license agreement because both license were for unlimited use but the Cathay license cost far less. The district court also concluded that the only way to give effect to the MFL clause was to apply the new terms retroactively and refund the amount of overpayment.

<u>Court of Appeals:</u>

The primary issue on appeal addressed DTC's contention that, as a matter of law, an MFL clause cannot be applied retroactively (i.e. – to obtain a refund of amounts previously paid.).

The distinction between running royalties and paid-up lump-sum royalties was central to the case. The Fifth Circuit noted while a great number of cases applied the rule that a licensee invoking an MFL clause may not obtain a refund of amounts paid under a previously applicable running royalty, no reported cased applied the same rule when switching from a paid-up lump-sum license to a more favorable paid-up lump-sum license.

In light of the lump-sum payment paid by JPM, the Fifth Circuit's held that if JPM were to be denied the ability to substitute a later-granted, more favorable payment term, it would render the MFL clause meaningless. Therefore, it upheld the district court's opinion that where a licensee with a most favored licensee clause seeks to replace what has become a less-favored lump-sum license payment with a later-granted, more favorable lump-sum payment, the only way to give meaning to the MFL clause is by retroactive substitution of the payment term and grant a refund.

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