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DAMAGES

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DAMAGES awarded by juries often make headlines. Indeed, the 1992 presidential campaign thrust so-called "excessive" damage awards and the effects of those awards on the operating costs of professionals and businesses to center stage. What the Texas courts have written about the law of damages, however, is often overlooked. During the Survey period, damages law has received significant treatment by the Texas courts. Important decisions included issues of punitive damages, mental anguish damages, liquidated damage clauses, the recovery of lost profits, the so-called "zero damages" rule, and damages for intentional infliction of emotional distress. This Article reviews recent Texas cases on the substantive issues of damages.

I. PUNITIVE DAMAGES

Perhaps the most frequently litigated component of Texas damage awards in recent years has been those amounts awarded by juries as punitive damages. Courts have increasingly scrutinized these awards as a result of attacks upon their constitutionality under both the United States and Texas Constitutions. Several important cases decided by appellate courts during the Survey period have related to exemplary damages and, more specifically, to the procedures used by Texas courts in reviewing such awards.

A. ATTACKS ON PUNITIVE DAMAGE AWARDS UNDER THE DUE PROCESS CLAUSES OF THE UNITED STATES AND TEXAS CONSTITUTIONS

Recently, Texas courts have attacked punitive damage awards on the grounds that they violate the due process clauses of both the United States and the Texas Constitutions. Since the U.S. Supreme Court's ruling in *Pacific Mut. Life Ins. Co. v. Haslip*,¹ how the common law method of awarding

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1. 111 S.Ct. 1032 (1991). *Haslip* held that although imposition of punitive damages in a particular case might be subject to constitutional attack, the common law method of assessing punitive damages is not per se unconstitutional under the due process clause, which requires only that defendants be protected from arbitrary and excessive verdicts through jury instructions and meaningful judicial review. *Id.* at 1035. Although the Supreme Court held that the

punitive damages under Texas law will fare when subjected to a renewed due process challenge has been much discussed. Although several appellate courts have set forth opinions touching upon these issues,² the Texas Supreme Court had not granted a writ of error to review a due process attack on a punitive damage award until *Transportation Ins. Co. v. Moriel*³ which is currently pending.

Moriel involved an appeal from a judgment based upon a jury award to an injured worker of \$101,000 in compensatory damages and \$1 million in punitive damages. The underlying claim resulted from an insurance company's breach of its duty to deal fairly and in good faith with reference to a prior worker's compensation claim. The El Paso court of appeals held that the verdict fit properly within the five guidelines set forth in *Alamo National Bank v. Kraus*,⁴ and held that the \$1 million exemplary damages award was not excessive or unreasonably proportional to the actual damages.⁵ The Texas Supreme Court granted a writ of error on several points to consider these arguments in light of the United States Supreme Court's decision in *Pacific Mut. Life Ins. Co. v. Haslip*. Specifically, the Court granted a writ of error to determine: (1) whether the \$1 million award of punitive damages is excessive as a matter of law and violates the limits set forth in section 41.006 of the Texas Civ. Prac. & Rem. Code; (2) whether the \$1 million award of punitive damages violates the due process clauses of the United States and Texas Constitutions; and (3) whether Texas procedure lacks adequate safeguards against arbitrary and excessive awards in violation of the due process clauses of the United States and Texas Constitutions.⁶

On similar constitutional grounds, the Texas Supreme Court granted a writ of error to review the court of appeals opinion in *General Chemical Corp. v. De La Lastra*.⁷ In this case, two brothers who were commercial fishermen sustained sulfur dioxide poisoning and died of asphyxiation after applying sodium metabisulfide to recently caught shrimp to preserve their color. The brothers' parents sought damages from the manufacturer of the chemical used on the shrimp based on strict liability, negligence and gross negligence in the manufacturing, packaging, distributing and the selling of products. At trial, the jury rendered judgment for the parents and the estates of their sons and awarded the parents \$5,502,500.00 as damages for the death of Gustavo, \$1 million damages to his estate and \$15 million as exemplary damages. The jury awarded actual damages and \$15 million exemplary damages for the death of the other son, Jose.

The Corpus Christi court of appeals, in reviewing this verdict, held that

Alabama method for awarding punitive damages did not violate the due process clause of the United States Constitution, the question remains open as to whether the Texas method and procedural safeguards for awarding punitive damages are constitutional.

2. See, e.g., *General Motors Corp. v. Saenz*, 829 S.W.2d 230, 240-42 (Tex. App.—Corpus Christi 1991, writ granted).

3. 814 S.W.2d 144 (Tex. App.—El Paso 1991, writ granted).

4. 616 S.W.2d 908, 910 (Tex. 1981).

5. *Moriel*, 814 S.W.2d at 151.

6. 35 Tex. Sup. Ct. J. 205 (Dec. 14, 1991).

7. 815 S.W.2d 750 (Tex. App.—Corpus Christi 1991, writ granted).

the manufacturer "was not deprived of its due process by the imposition of exemplary damages against it and that the current system of imposing exemplary damages in Texas does not violate the Texas and United States Constitutions."⁸ The Texas Supreme Court granted a writ of error on several grounds related to the punitive damages award, including whether the present Texas system and practice with respect to exemplary damages denies rights to due process guaranteed under the United States and Texas Constitutions.⁹

Consequently, based upon the writs of error granted in both *Transportation Ins. Co. v. Moriel* and *General Chemical Corp. v. De La Lastra*, the Texas Supreme Court has properly framed before it the issue of whether the Texas method of determining punitive damages awards violates due process.¹⁰

B. STANDARDS FOR REVIEWING PUNITIVE DAMAGES AWARDS

Some of the constitutional attacks made on the Texas method for determining punitive damages are based upon an argument that the jury has excessive discretion in making these awards. Under current Texas procedure, this discretion is reviewable by examining a punitive damage award under certain guidelines. Specifically, the factors to be considered by a court in determining whether a jury award of exemplary damages is reasonable include:

- the nature of the wrong;
- the character of the conduct involved;
- the degree of culpability of the wrongdoer;
- the situation and the sensibilities of the parties concerned; and
- the extent to which such conduct offends a public sense of justice and propriety.¹¹

Although this standard is consistently quoted by appellate courts in reviewing punitive damage awards challenged on the grounds of excessiveness, the Texas Supreme Court's opinion in *Lunsford v. Morris*,¹² holding that the financial ability of a defendant is relevant and may be considered by a jury in its determination of the amount of punitive damages to be awarded,¹³ has caused some confusion as to both the proper standard of review of punitive damage awards and the instructions concerning punitive damages to be given to a jury prior to its deliberations.

During the Survey period, one court, in light of the *Lunsford* holding,

8. *Id.* at 760.

9. 35 Tex. Sup. Ct. J. 508, 509 (Feb. 29, 1991).

10. See also *Commonwealth Lloyd's Ins. Co. v. Thomas*, 825 S.W.2d 135, 149-50 (Tex. App.—Dallas 1992, writ dism'd by agr.) (holding that under the instructions to the jury, "the jury's award of punitive damages was less susceptible to a due process challenge than the award involved in *Haslip*").

11. *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981); *Wright v. Gifford-Hill & Co., Inc.*, 725 S.W.2d 712, 714 (Tex. 1987).

12. 746 S.W.2d 471 (Tex. 1988).

13. *Id.* at 472-73.

treated the appellate review of a punitive damages award in a manner separate from the review based upon the *Alamo* factors. In *Transmission Exchange Inc. v. Long*,¹⁴ the Houston court of appeals treated its review of a punitive damage award as requiring a two-step analysis.¹⁵ Beginning with a review of the *Alamo* factors to determine if the award was excessive under those standards, the court next turned to the *Lunsford* holding in stating that "[t]he supreme court has recognized another test of the reasonableness of punitive damages."¹⁶ After *Long's* analysis, it appears proper for a court to review a punitive damage award under the *Alamo* factors, and then separately, under a net wealth analysis to determine whether the jury acted reasonably.

C. JURY INSTRUCTIONS IN PUNITIVE DAMAGE CASES

Jury instructions, relating to the proper elements to be considered in awarding punitive damages, are another method by which a jury's discretion is held in check. In the Survey period, one Texas court attempted to reconcile the factors articulated in *Alamo Nat'l. Bank* and *Lunsford* by adding a sixth factor to the general *Alamo* test. Specifically, the Waco court of appeals held that because evidence of net worth is admissible for the jury's consideration under *Lunsford*, "the net worth of the defendant" should be added as a sixth consideration to the standard of review.¹⁷ Similarly, two courts held that the size of the award needed to deter similar wrongs in the future, is an additional instruction which should be given to the jury.¹⁸ This instruction implicitly recognizes that the net wealth of the defendant, discoverable under *Lunsford*, should also be considered in determining the size of the punitive damage award.¹⁹

D. BIFURCATION

Based on its potential as a further procedural safeguard, there has been much discussion concerning the possibility in proper cases of bifurcating the liability determination from the punitive damage determination, as suggested by Justice Gonzales in *Lunsford*.²⁰ The argument supporting bifurcation is based upon the perceived danger that evidence of a defendant's net wealth could have an effect upon a jury's liability findings.

14. 821 S.W.2d 265 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

15. *Id.* at 273.

16. *Id.*

17. *Beverly Enterprises of Texas, Inc. v. Leath*, 829 S.W.2d 382, 388 (Tex. App.—Waco 1992, n.w.h.).

18. *Transportation Ins. Co. v. Moriel*, 814 S.W.2d 144, 150 (Tex. App.—El Paso 1991, writ granted); *Commonwealth Lloyd's Ins. Co. v. Thomas*, 825 S.W.2d 135, 149 (Tex. App.—Dallas 1992, writ dism'd by agr.). These courts also added "the frequency of the wrongs committed" as an additional consideration to the standard five *Alamo* factors in the instructions that were submitted to the juries. *Moriel*, 814 S.W.2d at 150. *Thomas*, 825 S.W.2d at 149.

19. Some authority suggests that this element was a proper consideration in reviewing punitive damage awards prior to the five factors articulated in *Alamo National Bank v. Kraus*. See *Southwestern Inv. Co. v. Neeley*, 452 S.W.2d 705, 707-08 (Tex. 1970).

20. 746 S.W.2d 471 (Tex. 1988).

Although there was apparently no objection at trial to the denial of bifurcation, the El Paso court of appeals in *Moriel* discussed this issue. The Court favored the bifurcation method in stating:

In the proper case upon motion to the trial court, a bifurcated trial would allow evidence, without undue prejudice, of what steps a defendant has taken to prevent future wrongs of a similar nature to be considered, other mitigating circumstances, along with the evidence of a defendant's ability to pay punitive damages. Surely our system of justice will not suffer if an element of damage, which often represents the major portion of money damages awarded, is carefully scrutinized through relevant and material evidence.²¹

Perhaps the Texas Supreme Court will address the bifurcation issue when it resolves other issues related to exemplary damages in *Moriel*, which is now before it.

E. DETERMINING ACTUAL DAMAGES AS A BASIS FOR AN AWARD OF PUNITIVE DAMAGES

Under Texas law, punitive damages are not recoverable absent an award of actual damages. During the Survey period, one court held that "[a]lthough the judgment did not provide for actual damages in a sum certain, this [holding] is not tantamount to a judgment of 'no damages.'"²² In this case, the trial court ordered that the damages due the plaintiffs be determined through an accounting of all expenses and revenues since the date of a new lease. On appeal, the Fort Worth court of appeals held that this relief, in addition to equitable relief of rescission of the lease and cancellation of Dearing's executive leasing rights, was sufficient to support an award of punitive damages.

II. MENTAL ANGUISH DAMAGES

During the Survey period, Texas courts made several significant decisions concerning mental anguish damages. For example, in *Federal Land Bank v. Sloane*,²³ the Texas Supreme Court discussed a jury award that included damages for mental anguish based upon a negligent misrepresentation that a loan application had been approved. The Court held that mental anguish damages are not recoverable based on a claim of negligent misrepresentation.²⁴ In so holding, the Court noted no trend to reject the pecuniary loss rule in what is essentially a commercial tort.²⁵

21. *Moriel*, 814 S.W.2d at 151. Cf. *Leath*, 829 S.W.2d at 387 (holding the trial court's failure to grant a request for a bifurcated trial and in admitting evidence of the defendant's net worth before the jury had found it guilty of gross negligence was not an abuse of discretion).

22. *Dearing, Inc. v. Spiller*, 824 S.W.2d 728, 734 (Tex. App.—Fort Worth 1992, writ denied).

23. 825 S.W.2d 439 (Tex. 1991).

24. *Id.* at 442-43 (citing Restatement (Second) of Torts § 552B (1977)).

25. *Id.* at 443. The parties did not raise and the Court explicitly did not "resolve whether other sections of the Restatement allow recovery of mental anguish damages for negligent torts." *Id.* at 443 n.4.

Furthermore, during the Survey period, the El Paso court of appeals discussed the level of distress necessary to entitle a plaintiff to an award for mental anguish. In *Worsham Steel Co. v. Arias*,²⁶ an employee, who had brought a wrongful discharge action against his employer, testified that the firing had made him "very sad." The court held that this testimony standing alone was insufficient to meet the relatively high degree of mental pain that is required under Texas law.²⁷ The court discussed testimony that had historically supported mental anguish damages. The court noted, however, that physical injury is no longer a prerequisite for recovery based on mental anguish,²⁸

Texas courts have interpreted the definition of mental anguish to mean that recovery is warranted in such cases where the plaintiff's *mental pain has risen to such a level that it has rendered him incapable of dealing with everyday activities*. For instance, as a result of mental pain, the plaintiff suffers from a myriad of negative emotions. Some of these emotions may manifest themselves in such a way as to make it difficult for the plaintiff to eat, sleep, work, socially interact or carry on any other activity which, until the time of the alleged injury, he could accomplish on a day-to-day basis without difficulty.²⁹

As a result, the *Arias* court articulated as high a standard for recovering mental anguish damages as could be set without requiring an accompanying physical injury.

III. LIQUIDATED DAMAGES

In *Phillips v. Phillips*,³⁰ the Texas Supreme Court considered the enforceability of an unusual partnership agreement. Henry and Martha Phillips were married for 32 years. When they divorced, they created a limited partnership to control their oil and gas holdings. The partnership agreement contained a liquidated damages clause that required a breaching partner to pay ten times any actual damages incurred. Martha eventually sued Henry for breach of contract and breach of his fiduciary duty as a partner.

The court held that the provision was an invalid penalty on its face; thus, it was not enforceable.³¹ The court reasoned that the clause did not satisfy the *Stewart* test,³² a two pronged analysis long used in Texas to determine the enforceability of a liquidated damages clause. First, actual damages were capable of estimation in this instance since the operation of the clause *presumed*, by its terms, the existence of actual damages. Second, the provision failed to forecast reasonably "just compensation." With neither prong of *Stewart* satisfied, the damages clause failed.

26. 831 S.W.2d 81 (Tex. App.—El Paso 1992, no writ).

27. *Id.* at 87.

28. *See* St. Elizabeth Hosp. v. Garrard, 730 S.W.2d 649, 654 (Tex. 1987).

29. *Arias*, 831 S.W.2d at 86 (emphasis added).

30. 820 S.W.2d 785 (Tex. 1991).

31. *Id.* at 789.

32. *Stewart v. Basey*, 245 S.W.2d 484 (1952).

IV. LOST PROFITS AND FUTURE DAMAGES

During the Survey period, Texas courts issued decisions that impacted two types of inherently speculative damages, lost profits and future damages. Several cases merit mention in this regard as the Texas courts seek to reconcile the need for reasoned appellate review with the need to give suitable deference to the jury's calculations.

Sandare Chemical Co., Inc. v. Wako International, Inc.,³³ involved an agreement relating to the production of a medical diagnostic test. Sandare sued Wako and Nuclear Diagnostic, Inc. alleging, inter alia, that Wako breached the agreement and that Nuclear interfered with its contractual rights. Nuclear counterclaimed that Sandare tortiously interfered with its contractual relations with Wako. Nuclear received a money judgment; Sandare took nothing. The primary point of error on appeal concerned Sandare's argument that Nuclear had not adduced evidence sufficient to prove monetary damage. Sandare argued that Nuclear suffered no lost profits as a result of Sandare's interference, and therefore, was not entitled to damages.

In an apparent case of first impression, the court concluded that the damage award was appropriate under an unjust enrichment theory even though the record contained no direct evidence supporting lost profits. The court stated "[a]n unjust enrichment measure of damages is appropriate for a wilful interference with contractual relations, at least where the plaintiff's lost profits are not readily ascertainable."³⁴ The *Sandare* court also reasoned that when a plaintiff's lost profits were not readily ascertainable "evidence of the defendant's profits [*i.e.*, unjust enrichment] may . . . constitute evidence of the plaintiff's lost profits."³⁵

The proper measure of profit damages under Texas law is *net* profits or "that which remains in the conduct of a business after deducting from its total receipts all of the expenses incurred in carrying on the business."³⁶ Such profits need not be calculated with exactitude; proof establishing a reasonable certainty is all that is required.

The quantum of proof necessary to sustain an award of lost profits was an issue that arose in *Southwestern Bell Media, Inc. v. Lyles*.³⁷ The trial court entered a damage award for Lyles. Lyles claimed that Southwestern violated the Deceptive Trade Practices Act since it had failed to list him in the yellow pages causing his bail bond company to lose profits.

Southwestern Bell argued that expert testimony was required to prove Lyles's lost profits. The court rejected this notion, finding that "[a]n award of lost profits must be based upon objective facts, figures, or data from which

33. 820 S.W.2d 21 (Tex. App.—Fort Worth 1991, n.w.h.).

34. *Id.* at 23.

35. *Id.* at 24.

36. *Travel Masters, Inc. v. Star Tours, Inc.*, 830 S.W.2d 614, 620 (Tex. App.—Dallas), *rev'd on other grounds*, 827 S.W.2d 830 (Tex. 1991).

37. 825 S.W.2d 488 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

the amount of lost profits" can be determined with reasonable certainty.³⁸ "[W]hile expert opinion evidence *may* be offered to prove up the amount of lost profits, in the absence of highly technical issues, the cases do not *require* an expert's opinion to support an award of lost profits."³⁹ The "highly technical" language is not defined by the court, leaving open the possibility that failure to provide expert testimony, in the right case, could be fatal to a damage award.⁴⁰

Like an award of damages for lost profits, a damage award for future damages in a personal injury case is necessarily speculative. The appellate courts, however, remain hesitant to disturb a jury's finding, even in the case of a substantially speculative award. The defendant in *Pipgras v. Hart*⁴¹ challenged the jury's award of damages for future physical impairment. On its face the award to a four year old plaintiff seemed not only speculative, but also duplicative of a separate award of \$500,000 for lost earning capacity. The court, however, noted that future physical impairment can be a distinct and separate loss if the plaintiff demonstrates that "his physical impairment extends beyond any impediment to earning capacity and beyond pain and suffering so that it produces a distinctly separate loss."⁴² The court affirmed a finding of future impairment that was 20 percent of the pain and suffering award and 10 percent of the lost earning capacity award.⁴³

Nonetheless, the proper basis for an award of future damages is not without limits. During the Survey period, a Fort Worth appellate court rejected the plaintiff's contention that he was entitled to a separate instruction on future loss of "intellectual ability." The court noted that injury to intellectual ability (in this case, organic brain syndrome) overlaps the damages category of loss of earning capacity and physical impairment.⁴⁴

V. ZERO DAMAGES RULE

In a 1991 article, Justice Raul Gonzalez wrote that "[t]he incompatibility of the zero damages rule with supreme court standards of evidentiary review, combined with the supreme court's consistent enforcement of those guidelines . . . signals its demise."⁴⁵ The Texas courts have generally agreed with this assessment and the zero damages rule, which required that a jury award something for each and every element proved, has lost its vitality in Texas.

38. *Id.* at 498.

39. *Id.* at 499.

40. The *Lyles* court cited *County Management, Inc. v. Butler*, 650 S.W.2d 888 (Tex. App.—Austin 1983, writ dism'd by agr.) as an example of a case requiring expert testimony to establish lost profits. That case involved a determination of damages involving undrilled wells and lost oil and gas leases.

41. 832 S.W.2d 360 (Tex. App.—Fort Worth 1992, writ requested).

42. *Id.* at 366.

43. *Id.*

44. *Johnson v. King*, 821 S.W.2d 425, 427 (Tex. App.—Fort Worth 1991, writ denied).

45. Justice Raul A. Gonzalez & Rob Gilbreath, "Appellate Review of a Jury's Findings of Zero Damages," 54 *Tex. B. J.* 418, 420 (May 1991).

In *Pilkington v. Kornell*,⁴⁶ the jury found for the plaintiff on a negligence claim but refused to award any damages for past and future pain and suffering, lost earning capacity, or physical impairment. The plaintiff, relying on the zero damages cases, argued that a remand on these issues was required. The Dallas court of appeals rejected this argument⁴⁷ and reviewed the zero damage finding under the "great weight and preponderance" standard of review.⁴⁸ Because the jury's finding of zero damages was not against the great weight and preponderance of the evidence, the court affirmed the jury's findings.⁴⁹

The *Pilkington* rationale makes sense and is consistent with the standards for appellate review of factual issues. Although the zero damages rule may have some visceral appeal, it lacks any intelligent basis. The appellate courts are comfortable in applying the great weight and preponderance test and, in the appropriate case, will conclude that a jury's failure to award some element of damage is against the great weight of the evidence at trial.⁵⁰

VI. INTENTIONAL INFLICTION

Texas courts have consistently taken a conservative approach to damage awards for intentional infliction of emotional distress and the Survey period was no exception. In *Horton v. Montgomery Ward & Co., Inc.*,⁵¹ the San Antonio court affirmed summary judgment for an employer on an intentional infliction claim. The court observed that an intentional infliction claim is difficult to prove, especially in the employer/employee setting. The court characterized the employer's actions, which included placing a rattlesnake rattler in plaintiff's desk and drawing mustaches on pictures of the plaintiff's family, as "nothing more than an exchange of insults, indignities, annoyances, and other trivialities which, as a matter of law, do not rise to a level of extreme and outrageous conduct."⁵² The court distinguished this conduct from cases in which Texas courts have found extreme conduct in an employment setting: one case involved sexual harassment⁵³ and the other involved an attempt to frame the employee as a thief.⁵⁴

46. 822 S.W.2d 223 (Tex. App.—Dallas 1991, writ denied).

47. *Id.* at 225 n.1.

48. *Id.* at 225.

49. *Id.* at 231.

50. For example, in *Hill v. Clayton*, 827 S.W.2d 570 (Tex. App.—Corpus Christi 1992, no writ), the appellate court reversed a judgment of damages on the ground that it was so small as to be "clearly wrong and manifestly unjust." *Id.* at 573. In a personal injury case, the jury awarded only \$2,500 in damages even though the uncontroverted testimony showed plaintiff's medical damages alone to be almost \$9,000. Conversely, the Texas courts have been comfortable adjusting actual damage awards downward through the use of remittitur. See, e.g., *Dougherty v. Gifford*, 826 S.W.2d 668, 681 (Tex. App.—Texarkana 1992, no writ) (excessive award of actual damages cured by remittitur).

51. 827 S.W.2d 361 (Tex. App.—San Antonio 1992, writ denied).

52. *Id.* at 370.

53. *Bushell v. Dean*, 781 S.W.2d 652, 658 (Tex. App.—Austin 1989), *rev'd on other grounds*, 803 S.W.2d 711 (Tex. 1991).

54. *Dean v. Ford Motor Co. Credit Co.*, 885 F.2d 300, 307 (5th Cir. 1989).

CONCLUSION

The substantive law of damages in Texas is far from static. The Survey period saw changes in the type and amount of damages recoverable under Texas law. Moreover, with significant punitive damage issues currently before the Texas Supreme Court, the availability and reviewability of such awards will likely be of continuing interest in the months ahead.