

No. 07-1042

In The
Supreme Court of Texas

ERI CONSULTING ENGINEERS, INC. AND LARRY G. SNODGRASS,

Petitioners

v.

J. MARK SWINNEA, BRADY ENVIRONMENTAL, INC.,
AND MALMEBA COMPANY, LTD.

Respondents.

*On Appeal from the Twelfth Court of Appeals at Tyler
Court of Appeals No. 12-05-00428-CV*

PETITIONERS' RESPONSE TO MOTION FOR REHEARING

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TO THE HONORABLE SUPREME COURT OF TEXAS:

With all respect due very able opposing counsel, all of the complaints raised by Swinnea in his Motion for Rehearing will be resolved if the Court revises its opinion to delete any reference to a remand to the court of appeals and revises its judgment to provide for a full remand to the trial court as follows:

The court of appeals' judgment is reversed and the cause is remanded to the trial court for reconsideration of its equitable forfeiture, lost profit damages, and exemplary damages awards in light of the existing record, the unchallenged findings of fact and conclusions of law, and this Court's opinion.

Neither a remand to the court of appeals nor a partial new trial is necessary – the subject of section I of Swinnea's Motion for Rehearing. Nor is piecemeal reconsideration of any award warranted – the subject of sections III and IV of Swinnea's Motion.

I. Because Swinnea did not challenge the factual sufficiency of the evidence to support the lost profit damages award in the court of appeals as a matter of law, the cause should not be remanded to that court.

The two sentences in the Court's opinion that give rise to section I of Swinnea's Motion for Rehearing are the following:

Therefore, we reverse the court of appeals' judgment that ERI recover no lost profit damages and remand the case to that court for further proceedings. Should the court of appeals fail to arrive at a disposition concerning remittitur, it may remand for a new trial on lost profit damages
.....

ERI Consulting Eng'rs, Inc. v. Swinnea, No. 07-1042, 2010 WL 1818395, at *10 (Tex. May 7, 2010) (hereinafter "Op."). Based on the second sentence, Swinnea argues that the Court has ordered a "partial remand," contrary to Texas Rule of Appellate Procedure

44.1(b)¹, which precludes a remand for a new trial on unliquidated damages when liability is contested. (Mot. at 1.) Swinnea then argues that, for purposes of Rule 44.1(b), liability is contested if it was contested in the trial court, regardless of whether it was contested on appeal.² (Mot. at 1-8.) The flaw in Swinnea’s analysis is that it assumes that the first sentence – ordering a remand to the court of appeals – represents a correct disposition of the lost profit damages award. It does not.

Rule 60.2(d) authorizes this Court to “reverse the lower court’s judgment and remand the case for further proceedings.” TEX. R. APP. P. 60.2(d). Pursuant to that rule, the Court reversed the court of appeals’ judgment insofar as it reversed the trial court’s forfeiture awards of the contractual consideration for the buyout and “direct[ed] the court

¹ All rule references are to the Texas Rules of Appellate Procedure.

² Although Swinnea argues that Rule 44.1 “applies to bench-trying proceedings” (Mot. at 9), he cites in support of that assertion only courts of appeals’ authority. (Mot. at 4 n.2 (citing *Okorafor v. Lewis*, 2010 WL 1343125 (Tex. App.—Houston [14th Dist.] Apr. 6, 2010, no pet. h.); *Rosales v. Williams*, 2010 WL 457536 (Tex. App.—Houston [1st Dist.] Feb. 11, 2010, no pet. h.); *United Sav. Ass’n of Tex. v. Villanueva*, 878 S.W.2d 619 (Tex. App.—Corpus Christi 1994, no pet.); and *Lifshutz v. Lifshutz*, 61 S.W.3d 511 (Tex. App.—San Antonio 2001, pet. denied)).)

To the knowledge of the undersigned, this Court has not addressed whether the rule applies in the context of a bench trial. See *Willis v. Donnelly*, 199 S.W.3d 262, 269 (Tex. 2006) (jury trial on breach of contract and fiduciary duty claims); *Estrada v. Dillon*, 44 S.W.3d 558, 559-60 (Tex. 2001) (jury trial on personal injury claim); *Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 666 (Tex. 1996) (jury trial on breach of warranty and DTPA claims); *Otis Elevator Co. v. Bedre*, 776 S.W.2d 152, 152-53 (Tex. 1989) (jury trial on negligence and strict liability claims); *Houston Natural Gas Corp. v. Janak*, 422 S.W.2d 159, 159 (Tex. 1967) (jury trial on fraud claim); *Iley v. Hughes*, 311 S.W.2d 648, 649 (Tex. 1958) (jury trial on personal injury claim); *Waples-Platter Co. v. Commercial Standard Ins. Co.*, 294 S.W.2d 375, 376 (Tex. 1956) (jury trial on subrogation claim); *Fisher v. Coastal Transp. Co.*, 230 S.W.2d 522, 522-23 (Tex. 1950) (jury trial on negligence claim); *Luling Oil & Gas Co. v. Humble Oil & Ref. Co.*, 182 S.W.2d 700, 700-01 (Tex. 1944) (per curiam) (jury trial on fraud claim); *Tex. Emp’rs’ Ins. Ass’n v. Lightfoot*, 162 S.W.2d 929, 929 (Tex. 1942) (jury trial on workers’ compensation claim).

Petitioners recognize that the Court has previously held in a case involving a jury trial on a subrogation claim that permitting a partial remand must come from an amendment to the rule. *Waples-Platter*, 294 S.W.2d at 377. Nonetheless, the Court may wish to consider whether Rule 44.1 should apply when unliquidated damages awarded by the trial court, rather than a jury, are reversed on appeal and liability was not contested on appeal. The rationale underlying the rule is that “[t]he jury should have the entire case before it in reaching its verdict on the issues involved,” *Fisher*, 230 S.W.2d at 525, and the policy against piecemeal litigation of an indivisible claim. *Waples-Platter*, 294 S.W.2d at 377. Although both the reasoning and the policy support application of the rule in the context of a jury trial because, as a practical matter, the jury that heard the liability portion of the case cannot be reconstituted to hear the damages portion on remand, neither would seem to support application of the rule in the context of a bench trial; a trial judge can simply reconsider the damage awards in light of the existing record.

of appeals to remand the case to the trial court for consideration of [the pertinent] factors upon resolution of the issues remaining for the court of appeals.” *Op.* at 6. Contrary to the assumption of Swinnea’s Motion for Rehearing (*see* *Mot.* at 10), the Court did not order that the trial court should conduct a new trial on Petitioners’ claims for equitable relief. Presumably, the trial court will reconsider the awards for equitable relief based upon the existing record, the unchallenged findings of fact and conclusions of law, and this Court’s opinion. It would certainly benefit the parties and the trial court if the Court clarified its opinion on this point.³

The Court did not likewise direct the court of appeals to remand the claim for the lost profit damages award to the trial court for reconsideration on the same basis because, as explained in footnote 2, the Court believed that “certain issues that remain as a result of our holdings in this case are properly before the court of appeals on remand, precluding us from remanding the case directly to the trial court.” *Op.* at 6 n.2. However, because this Court has already determined that the evidence is legally sufficient to support an award of lost profit damages of \$178,601.05, *id.* at 8, the only issues the court of appeals could conceivably decide on remand are (1) whether Swinnea preserved a challenge to the factual sufficiency of the evidence to support the trial court’s award of lost profit damages, *id.* at 10; and (2) if so, “the possibility for remittitur on lost

³ Swinnea also appears to believe that only the trial judge who initially tried this case – now retired Judge Cynthia Kent – can conduct the necessary reconsideration of the awards. (*Mot.* at 14.) But that is contrary to Texas law, which permits any district court judge to sit for any other. *See* TEX. CONST. art. V, § 11; TEX. GOV’T CODE § 24.303. Therefore, whether Judge Kent’s successor, Judge Christi Kennedy, chooses to reconsider the awards or whether Judge Kennedy decides to transfer the case to another judge to reconsider the awards is irrelevant.

profit damages.”⁴ *Id.* at 8. And it is only that “possibility for remittitur” that could yield a new trial. But that “possibility for remittitur” – and therefore the possibility of a new trial – is obviated if this Court decides the preservation issue as a matter of law. The Court can do so based solely upon a review of Swinnea’s brief in the court of appeals. And the Court should do so to foreclose a second trial and, as a result, promote judicial economy.

Swinnea’s brief in the court of appeals challenged the award of lost profit damages in sections I(B) and (C) on the following eight grounds:

- B. There is no evidence (or alternatively factually insufficient evidence) that ERI suffered any net economic loss from the demise of the Merico relationship.
 - 1. The plaintiffs made no credible attempt to value ERI or the redeemed shares.
 - 2. The finding that ERI’s goodwill was destroyed contradicts the evidence.
 - 3. The damage calculations fail to track the indisputable benefits of the AQA relationship and are thus incompetent and incomplete.
 - 4. The income and profits that Merico might have generated were utterly speculative.
 - 5. In contrast to ERI’s actual success, the judgment awards imply – implausibly – that the redeemed stock had a *negative* value.
- C. The “loss of income” award is unsustainable for yet other reasons.
 - 1. The award incorporates an improper measure of damage.
 - 2. The award is speculative.

⁴ Until the trial court has reconsidered these awards, there is simply no point in the court of appeals reviewing Swinnea’s complaint that the trial court’s initial award of \$1 million in exemplary damages was excessive. (*See Swinnea’s Ct. App. Br.* at 40-48.)

3. In any event, Snodgrass would not have standing individually to recover any “loss of Merico income.”

(See Swinnea’s Ct. App. Br. at 11-31 (Tab 1).) Of these eight grounds, one challenged Snodgrass’s standing (*id.* at I(C)(3)) – a point that was overruled by the court of appeals and not brought forward to this Court. (See *Swinnea v. ERI Consulting Eng’rs*, 236 S.W.3d 825, 833 (Tex. App.—Tyler 2007); Resp.’s Br. in Resp. to Pet. for Rev.) Of the remaining seven grounds, five challenged the existence of and Petitioners’ methodology for calculating lost profit damages. (See Swinnea’s Ct. App. Br. at I(B)(1), (2), (3), (5); I(C)(1).) These issues were squarely decided by this Court:

ERI’s method for proving its lost profits in a reasonably certain amount – establishing its lost revenue with comparative evidence from a recent time period, and establishing its profit margin on that revenue by competent testimony of its owner – was legally adequate under *Holt Atherton*.

....

[A]ssuming a 30% profit margin on the work from Merico, Snodgrass’s maximum profit margin estimate, the damages award would be . . . \$178,601.05 for the 33-month period at issue when ERI’s profits from Merico declined.

Op. at 7-8. Thus, the Court held that the evidence is legally sufficient to support the trial court’s lost profits award to the extent of \$178,601.05 and, in so doing, resolved six of Swinnea’s eight challenges to the lost profit damages award. *See also id.* at 8-9 (rejecting Swinnea’s argument that lost profit damages award must be offset by the amount that ERI gained by doing business with Air Quality Associates); *id.* at 9-10 (rejecting Swinnea’s arguments that ERI’s lost profit damages analysis should have deducted “overhead costs and other unspecified expenses” and his causation argument).

Of Swinnea’s remaining two grounds for attacking the trial court’s lost profit

damages award in the court of appeals, neither constituted a factual sufficiency challenge as a matter of law. In section I(B)(4) of his brief in the court of appeals, Swinnea argued that the trial court's lost profit damages award was "utterly speculative" because Petitioners were required and failed to identify specific contracts that were lost. (Swinnea's Ct. App. Br. at 23.) But this argument concerns the proper methodology for calculating lost profit damages and was implicitly rejected in the Court's holding that "ERI's method for proving its lost profits in a reasonably certain amount . . . was legally adequate under *Holt Atherton*." Op. at 7.

In section I(C)(2) of his brief in the court of appeals, Swinnea recognized the evidence of the lost Merico income and Snodgrass's testimony regarding ERI's 25-30% profit margin, but still argued that Petitioners "failed to present evidence on which to base a complete damage calculation"; therefore, Swinnea argued, "there can be no non-speculative award of lost income damages, regardless of the award's magnitude." (Swinnea's Ct. App. Br. at 30.) This argument was also squarely rejected by the Court in its holding that "ERI proved lost profit damages" Op. at 8.

In short, none of Swinnea's challenges to the lost profit damages award in the court of appeals remotely advanced the proposition that the trial court's lost profit damages award was "so against the great weight and preponderance of the evidence as to be manifestly unjust"⁵ – a factual sufficiency challenge; they simply reiterate that the award was not supported by any competent evidence – legal sufficiency challenges. *See*

⁵ *In re King's Estate (King v. King)*, 244 S.W.2d 660, 661 (1951); *see generally* Robert W. Calvert, "No Evidence" and "Insufficient Evidence" *Points of Error*, 38 TEX. L. REV. 361, 368 (1960).

id.

Because Swinnea has only ever challenged the methodology for calculating Petitioners' lost profit damages and the legal sufficiency of the evidence to support the trial court's lost profit damages award – challenges this Court has addressed and rejected – there is simply no basis upon which to remand this case to the court of appeals. And eliminating a remand to the court of appeals eliminates any possibility of a remittitur-occasioned new trial.

Because Swinnea did not – as a matter of law – preserve a challenge to the factual sufficiency of the evidence to support the trial court's lost profit damages award – this Court's judgment should reverse the court of appeals' judgment and remand the cause to the trial court with instructions to reconsider its lost profit damages award in light of the existing record, the unchallenged findings of fact and conclusions of law, and this Court's opinion.

II. A full remand to the trial court resolves Swinnea's remaining complaints.

If the Court reverses the court of appeals' judgment on the lost profit damages award and remands that claim to the trial court for reconsideration in light of the existing record, the unchallenged findings of fact and conclusions of law, and the Court's opinion, the claim for lost profit damages will be “reunited” with the claims for equitable forfeiture, which the Court has already directed be remanded to the trial court for reconsideration (Op. at 5-6), as well as the claim for exemplary damages, which the trial court obviously must reconsider in light of changes to the forfeiture and lost profit damages awards. By ordering a full remand to the trial court, the Court will resolve

Swinnea's complaint that "a remand limited to equitable relief could not be accomplished without unfairness." (Mot. at 9-14.)

CONCLUSION AND PRAYER

Swinnea obviously wants a new trial before a new judge – a second chance to convince someone that he did not fraudulently induce his partner of ten years to buy him out of their business, ERI, for almost \$500,000, while simultaneously planning to form a new business that would ensure that he could later buy ERI back for 50¢ on the dollar. That he wants a second chance is not surprising. But nothing has changed. The historical facts are what they are and are contained in the existing record. And Swinnea has already had a fair trial on those facts and is not entitled to another. He has also had a fair chance on appeal to challenge the judgment. That he chose to limit his appeal to legal challenges is not the responsibility of Petitioners or of this Court. Now, finally, Swinnea must be made to accept the consequences of the choices he made – the decision he made to swindle his partner, the appellate strategy he chose.

Petitioners therefore respectfully pray that this Court (1) deny Swinnea's Motion for Rehearing; (2) revise its opinion to reflect that a remand to the court of appeals is not warranted because Swinnea did not challenge the factual sufficiency of the evidence to support the lost profit damages award; and (3) clarify that the cause is remanded to the trial court to reconsider the equitable forfeiture, lost profit damages, and exemplary damages awards in light of the existing record, the unchallenged findings of fact and conclusions of law, and this Court's opinion. Petitioners further respectfully request all other relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Texas Rule of Appellate Procedure 9.5, I certify that a copy of the foregoing was served by United States mail on July 8, 2010, upon the following counsel for Respondents:

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