

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.

Reply in Support of Rehearing

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Brief of the Reply Arguments

I. Swinnea Contests Liability.

In all of its rehearing response, ERI does not seriously dispute either the test determining if liability is contested – whether the defendant contested liability in the trial court, *see Estrada v. Dillon*, 44 S.W.3d 558, 562 (Tex. 2001) – or that as measured by this test Swinnea contests liability in this case. In fact other than a passing phrase tucked into a footnote, Response at 2 n. 2, ERI avoids the matter altogether.

Had the Court perceived that liability was contested, Swinnea is convinced the initial decision would have declared a new trial on the full case. Try as it might, ERI offers no plausible reason why the Court should not now do so, to wit:

II. ERI Ignores the Reasons Why the Retrial of Equitable Relief Will Require a New Trial Encompassing the Entire Case Against Swinnea.

ERI characterizes the rehearing motion as seeking a mere “partial new trial.” That is categorically wrong. Whereas ERI would instruct the trial court – which did not participate in the prior proceedings – to originally assess equitable relief simply by reading the record of the prior trial (as one might prepare to summarize a book), Swinnea seeks an actual new trial, upon all elements of the claims against him. No less is required. Appellate Rules 44.1(b) and 61.2, which limit partial new trials to matters that are “separable without unfairness,” forbid just such piecemeal retrial of indivisible causes of action as ERI proposes. TEX. R. APP. P. 44.1(b), 61.2. *Waples-Platter Co. v.*

Comm. Standard Ins. Co., 294 S.W.2d 375, 377 (Tex. 1956). To this end, the rules’ separable-without-unfairness requirement consistently is interpreted to mean “severable” without unfairness. See *Otis Elevator Co. v. Bedre*, 776 S.W.2d 152, 153 (Tex. 1989)(interpreting former TEX. R. APP. P. 81(b)(1)); *Double Ace, Inc. v. Pope*, 190 S.W.3d 18, 27 (Tex. App.–Amarillo 2005, no pet.)(counterclaims were not severable without unfairness to parties under TEX. R. APP. P. 44.1(b)); see also Michol O’Connor & Alessandra Z. Beavers, TEXAS CIVIL APPEALS (2010-2011), p. 48 (2010). To be severable without unfairness, a matter must at a minimum encompass distinct causes of action, and those causes of action must not be intertwined. E.g., *Waples-Platter Co.*, 294 S.W.2d at 377; *Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 219-20 (Tex. 1968) (while separate defenses could be tried separately, cause of action for temporary injunctive relief was indivisible and thus not severable or triable in a piecemeal fashion; “We have often condemned piecemeal trials of indivisible causes of action”).

Because it is but one element of a larger, indivisible cause of action, the matter of equitable relief cannot be remanded and retried apart from liability, actual damages, and (in this case) punitive damages. *Waples-Platter Co.*, 294 S.W.2d at 377.¹As we have said,

¹Apart from a footnote proposing that bench trials might be excepted from the applicable rules, ERI does not challenge this. There is no basis for any such exception. The Rules’ text does allow for it, nor do the relevant judicial decisions. Rather, the rules and decisions determine the scope of remand based on the character of the matter remanded, not the identity of the finder of fact. See TEX. R. APP. P. 44.1(b); *Waples-Platter Co.*, 294 S.W.2d at 377. The policy considerations that underlie these Rules – chiefly the principle that causes of action should not be tried piecemeal – apply equally whether trial is to a jury or to a court. Nor is this proceeding, which lacks the opportunities for reflection, recommendation, and public comment built into the rules revision process, a suitable vehicle for effecting the rule amendment that would be required to implement ERI’s proposed exception.

with no dispute from ERI, the *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) forfeiture factors in this case will overlap and inextricably intertwine with matters of liability, actual damages, and punitive damages. Mot. Rhg at 12. Indeed, these matters are far more intimately related than the matters of liability and damages in, for example, a personal-injury case or a breach-of-contract case – matters that Rules 44.1(b) and 61.2 declare inseparable as a matter of law. In assessing the *Burrow* factors, the trial court invariably must retry the nature, extent, character and culpability of the breach and carefully examine the gains, if any, to Swinnea and the harm to ERI. That court will have no way to discern whether or to what extent the matters it considers as bases for equitable relief were embraced by the prior court in finding Swinnea liable or in determining actual or punitive damages. For precisely such reasons, ERI’s proposal for remand without actual retrial (which might do for correcting ministerial errors such as the mechanical miscalculation of prejudgment interest) ill fits the initial decision of equitable relief by a court of original jurisdiction.

III. ERI’s Remaining Attacks are Mere Diversions.

ERI postulates that Swinnea’s grounds for remand hinge on the determination of lost profits. Response at 1. That is nothing but an attempt to rewrite the rehearing grounds. The rehearing motion not only declares that a new trial is necessary because of the reversal as to equitable relief, Mot. Rhg. at 1, but offers a thirteen-page discussion explaining why the reversal as to equitable relief requires retrial of the entire cause. The

lost-profit award, in contrast, supports an alternative ground for rehearing stated in a single-paragraph argument at the end of the motion. Mot. Rhg. at 14.

As for ERI's attack upon Swinnea's factual-insufficiency ground, it is a classic red herring. The absence of legally sufficient evidence to support the entire lost-profits award of itself is a sufficient basis upon which to remand the entire cause for a new trial. *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 51 (Tex. 1998) (“[B]ecause there is no legally sufficient evidence to support the entire amount of damages, but there is some evidence of the correct measure of damages, we reverse the judgment of the court of appeals and remand the cause for a new trial.”). ERI is thus wrong to allege that the “possibility for remittitur” is the only means “that could yield a new trial.” Rhg. Response at 4.²

²Although not necessary to a full-case remand for new trial, the fact is Swinnea preserved his factual-insufficiency challenge to the lost-profits award. Swinnea's issues in the court of appeals specifically inquired whether “there was no evidence or factually insufficient evidence that ERI was less profitable” on account of the alleged breach. Appellant's Br. at xiii. All arguments attacking the lost-profit award appear under a major heading that “[t]here is no evidence (or alternatively factually insufficient evidence) that ERI suffered any” loss of profit. *Id.* at 4. The brief's conclusion and prayer sought remand of “all claims for a new trial.” *Id.* at 50. And the relevant argument, which thoroughly addressed all the lost-profit evidence, subsumed the proof's factual insufficiency. *Id.* at 11-25. One properly may allege legal and factual insufficiency in the alternative and preserve both issues in a single discussion under the more rigorous legal insufficiency standard. *See, e.g., Bass v. Walker*, 99 S.W.3d 877, 882 (Tex. App.—Houston [14th Dist.] 2003, pet. granted) (issue stated as “is the evidence legally sufficient or, alternatively, factually sufficient to support the trial court's finding that this shareholder derivative suit was brought without reasonable cause under article 5.14F of the Texas Business Corporation Act?”); *Spethmann v. Anderson*, 171 S.W.3d 680, 696 (Tex. App.—Dallas 2005, no pet.) (discussing both legal and factual sufficiency of damage proof in a single, consolidated argument); *Roman Cos., Inc. v. Southwest Tenant Const., Inc.*, 1999 WL 97545, *2 (Tex. App.—Houston [1st Dist.] 1999, Feb. 18, 1999, no pet.) (point of error stating that the evidence was legally insufficient or, alternatively, factually insufficient “raise[d] both ‘no evidence’ or legal insufficiency and factual insufficiency complaints”). Moreover, in attacking the support for the lost-profit award, Swinnea challenged all relevant findings of fact. *See Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982) (citing Calvert, “No Evidence” and “Insufficient Evidence” Points of Error, 38 TEX. L. REV. 361 (1960)).

ERI is equally wrong in its remaining attack upon the Court's remittitur ruling. Appellate Rule 46 provides "for remittitur orders by the courts of appeals, but makes no similar provision for this Court." *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 310 (Tex. 2006). Thus, when this Court finds evidentiary support for some amount of damage recovery but not the entire amount awarded at trial, the Court if not required to remand to the trial court (as in this case) should remand to the court of appeals to determine an appropriate remittitur. *Id.* The limitation of this Court's jurisdiction to questions of law prevents the Court from considering remittitur unless the damages have been established as a matter of law. *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 51 (Tex. 1998) (We conclude [] that, because we are limited to considering questions of law, we [can] only consider a remittitur under such circumstances if the damages . . . [have] been established as a matter of law").

Conclusion and Prayer

For the reasons stated here and in the his motion for rehearing, Swinnea prays that the Court would grant rehearing and would (1) revise its opinion and judgment to state that Swinnea contests liability and (2) remand all causes of action against Swinnea to the district court for new trial.



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Certificate of Service

The undersigned hereby certifies that a true copy of the foregoing reply in support of rehearing was served upon counsel of record of all parties to the above cause in accordance with the applicable Rules of Civil Procedure on this the 20th day of July, 2010.

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