

No. 09-0199

In the
Supreme Court of Texas

CONEX INTERNATIONAL CORPORATION

Petitioner/Cross-Respondent,

v.

FLUOR ENTERPRISES, INC. F/K/A FLUOR DANIEL, INC.
AND LESLIE ANTALFFY

Respondents/Cross-Petitioners.

On Petition for Review from the Ninth Court of Appeals
09-07-00100-CV

CONEX'S RESPONSE TO FLUOR'S MOTION FOR REHEARING

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SUMMARY OF THE ARGUMENT

Reversal of the jury's verdict in favor of Conex is not the right result for this case. As all justices on the court of appeals agreed, this is a fact-intensive fight. "The evidence is conflicting, and the jury is the judge of witness credibility. On this record, a reasonable jury could conclude that Fluor proceeded with reckless disregard for the truth in maligning Conex." *Fluor Enter., Inc. v. Conex Int'l. Corp.*, 273 S.W.3d 426, 449 (Tex. App.—Beaumont 2008, pet. filed) (Gaultney, J., dissenting). The majority opinion agrees: "As to Fluor, there is some evidence in the record from which the jury could find that Fluor disparaged Conex in statements five through eight, and that Fluor acted with malice, [but the evidence] is too weak to support the judgment . . ." *Id.* at 440. (Kreger, J.). In short, there is evidence supporting the jury's verdict.

Fluor's rehearing motion presumes that piecemeal rendition of some damage elements, rather than remand of the entire case, is the only appropriate disposition. However, its arguments fall flat when, as all justices on the lower court agreed, the record has substance and support for the jury verdict. A partial remand would result in a piecemeal re-trial of indivisible causes of action.

In asking for rehearing, Fluor repeats the same "no evidence" arguments it has briefed before. And as it always has, Fluor refuses to accept the governing standard of review or to acknowledge the inconvenient evidence against it that fills the record. Conex also has briefed this evidence before, and—in 15 pages—Conex will repeat some of it again. However, after reading these 15 pages, no one should think that the evidence recited reflects the entire record. There is—at least—some evidence of every element of

Conex's causes of actions. If the Court grants review, both petitions would be presented, and the whole case would need to be decided. Barring full review of the case, a remand of the entire case is the only appropriate disposition.

ARGUMENT

I. Rendition of Judgment Would Be Improper for Lost Profits Because Some Evidence Supports Conex's Lost Profits Claim.

A. The correct disposition for factual insufficiency reversals is a remand for a new trial.

Although Conex disputes the conclusion that the evidence in this 50+ volume record is factually insufficient, a remand is the appropriate disposition for the court of appeals' factual-sufficiency reversal. When a factual sufficiency point is sustained, a court of appeals' only option is to reverse and remand for a new trial. *Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 668-69 (Tex. 1996). "When the court of appeals holds that the evidence is factually insufficient to support a jury finding or trial court finding, the court of appeals must remand the case for a new trial." 6 ROY W. McDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 44:5 at 1134 (2d ed. 1998); *see also Sage Street Associates v. Northdale Const. Co.*, 937 S.W.2d 425, 428 (Tex. 1996)

B. Inseparable claims cannot be remanded piecemeal for re-trial.

"It is unusual for an appellate court to limit the remand of a jury case." 6 McDONALD & CARLSON, TEXAS CIVIL PRACTICE § 34:4. The Committee on Trial Practice of the American Bar Association agrees that "[t]he power to grant a partial new trial should exist but . . . should be sparingly exercised . . . and then only where the several issues are clearly and fairly separable." *Id.*, vol. 5 § 28.43 & n. 418. "It is well

settled that [the rule on partial remand] does not contemplate the trial of an indivisible cause of action by piecemeal.” *Waples-Platter Co. v. Commercial Standard Ins. Co.*, 156 Tex. 234, 237, 294 S.W.2d 375, 377 (1956). When the issue “concerns an appellate court’s authority to limit the scope of its remand,” the court must recognize that “the Rule . . . does not authorize a partial reversal and remand unless the issues are severable.” *Otis Elev. Co. v. Bedre*, 776 S.W.2d 152 (Tex. 1989). Indeed, sometimes it is unnecessary even to decide about severance because the issues may be “so intertwined that a severance would be unfair to the parties.” *Woods v. Littleton*, 554 S.W.2d 662, 672 (Tex. 1977). Here, no separable issues are presented because the issues address elements of an indivisible cause of action, are significantly intertwined, and neither lost profits nor exemplary damages can be remanded in piecemeal fashion.

C. Conex’s lost-profits claim is not separable and cannot be tried piecemeal without unfairness to the parties.

1. Lost profits damages are an element of the entire damages claim and must be remanded.

The elements of Conex’s business disparagement and tortious interference claims include both liability and damages. *Hurlbut v Gulf Atl. Life Ins. Co.*, 749 S.W.2d 762, 766 (Tex. 1987) (special damages); *Baty v. ProTech Ins. Agency*, 63 S.W.3d 841, 859-60 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (actual harm or damages). Liability and damages cannot be tried separately because they are indivisible elements of a single cause of action. *Otis Elevator Co.*, 776 S.W.2d at 153; *Waples-Platter Co. v. Commercial Standard Ins. Co.*, 294 S.W.2d 375 (Tex. 1956). If not affirmed outright, Conex’s damages should be retried alongside Conex’s liability claims.

2. As Fluor's own expert agreed, Conex proved lost net profits—just as the law requires.

Fluor's assertions are flatly wrong that proof of the lost profits is based on unreliable expert testimony. Indeed, Fluor's own expert supports the damages proof irrespective of any expert testimony adduced by Conex. Fluor's expert approved the damages methodology used by Conex. *See* RR 29:73-75. Fluor's expert agreed that to find lost net profits, you can compare actual *total* revenues and expenses to expected *total* revenues and expenses (that is, you can compare \$60 million in actual total revenues less total expenses of \$50 million with expected total revenues of \$66 million less total expenses of \$55 million). Alternatively, you can get to the identical result by considering only expected *increased* revenues and expected *increased* expenses, which proves the same lost net profits. Because Conex's total revenues exceed its total costs, the two methods of calculating lost net profits will always yield the same result.

There is no problem with this methodology, and the record quickly degenerates into a fight about how *many* increased costs should be counted to generate certain revenues. Fluor asserts that Conex should have subtracted fixed overhead costs, but its expert agreed that fixed overhead costs should not be deducted in calculating Conex's net profits. RR 30:17. Fluor's expert merely criticized Dr. Hawkins (and the Duplisseys) for failing to subtract all the variable costs Fluor's expert believed would have been incurred. *See* RR 29:37-39, 86-87; 30:13-14. This was a fact fight the jury was free to resolve in Conex's favor. *See SAS & Assoc., Inc. v. Marketing Servicing, Inc.*, 168 S.W.3d 296, 300 (Tex. App.—Dallas 2006, pet. denied).

3. Conex's lost profits are not speculative.

Conex was an established business making a profit when Fluor disparaged Conex and interfered with its contract. RR 19:15, 30. It had been a profitable company for nearly two decades, working profitably for Fina since at least 1988. RR 5:95-97; 19:30. John Duplissey, Conex's founder, and Jimmy Duplissey, Conex's President, produced the company's business records that detailed Conex's work at the Fina plant between 1991 and 2001—the decade preceding Fluor's tortious conduct. *See* RR 5:86-87, 91-92; PX 18, 28; RR 20:10, 12. Every contract was identified, the revenues received on every contract were identified, the total costs associated with every contract were identified, and every corresponding profit margin was identified. *Id.* John Duplissey explained that between 1994 and 2001, Conex's average annual revenues on Fina work were \$7.5 million, with average annual costs of \$5.85 million, and average annual profits of about \$1.65 million. RR 20:14-15; PX 28. Following Fluor's disparagement and interference, between 2001 and 2006, Conex's average annual revenues from Fina dropped to only \$1.1 million, with annual profits averaging \$300,000. RR 20:16-18. The math was simple. On average, Conex's lost profits on Fina work totaled \$1.35 million per year—without considering inflation or increase in business. RR 20:19-20.

Conex has worked in every refinery in Jefferson County, and it continues to work in every refinery save one—the Fina refinery. RR 19:35-36. Conex has done more capital work in the Jefferson County area than anyone else. RR 19:37. Just since 1993, Conex has been involved in the construction of 12 refinery units. RR 19:37. Moreover, Conex has experience working on the same type of coker unit project as Fina's DCP.

Conex is working now on Motiva's expansion project. RR 20:21. Conex's portion of the Motiva work amounts to \$1 billion. RR 11:80, 20:21-22. Conex has 200 people on the job right now and will grow to approximately 1000 people on the job. RR 20:40.

John Duplissey estimated that the available construction work on the DCP would total only \$425 million and that Conex's portion of that work would amount to roughly \$260 million. RR 20:28. That is only about a fourth of the size of Conex's work on the Motiva expansion. *See* RR 20:21-22. Conex's profit on the DCP—over the course of four or five years—would be “somewhere in the neighborhood of \$73 million.” RR 20:29. Conex has the ability, the business model, and the capacity to earn profits of \$73 million on \$260 million worth of work. RR 20:31. In 2006 alone, Conex had gross revenues of over \$150 million. RR 19:15. Fluor's engineers who are involved with designing and engineering the DCP estimated a cost “well in excess of one billion dollars”—approximately \$1.5 billion. RR 23:40; 27:16. There is nothing speculative about Fluor's project cost estimates.

Conex need not prove that it had a long-term contract with Fina guaranteeing a given profit. *See, e.g., Edmunds v. Sanders*, 2 S.W.3d 697, 705-06 (Tex. App.—El Paso 1999, pet. denied) (“to recover lost profits, a party must show *either* a history of profitability *or* the actual existence of future contracts”). “It is not necessary to prove that the contract would have certainly been made but for the interference; it must be reasonably probable, considering all of the facts and circumstances” *Hill v. Heritage Res., Inc.*, 964 S.W.2d 89, 109 (Tex. App.—El Paso 1997, pet. denied); *see also* RESTATEMENT (SECOND) OF TORTS § 774A, cmt. c (1977) (court may consider

defendant's wrongs as affecting plaintiff's proof). Conex proved its lost profits by "show[ing] the amount of business done by the plaintiff in a corresponding period of time not too remote, and the business during the time for which recovery is sought." *Texas Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 279 (Tex. 1994). Both Fluor's own expert and Conex's owners support the lost profits verdict, and if those damages are not affirmed outright, a new trial is appropriate.

4. There is ample evidence to prove causation of lost profits.

Nor can the lost-profits proof be challenged successfully on causation grounds. Conex's causation proof is almost identical to the evidence in *Prudential Insurance Company v. Financial Review Services, Inc.*, 29 S.W.3d 74 (Tex. 2000). Likewise here, "[b]efore the turnaround, Conex was bidding on approximately \$12 million per year in Fina jobs on a business model under which Conex obtained 62% of the work. Since 2002, the average amount of work that Conex has done for Fina is about half of the lowest year since 1988." *Fluor Enter.*, 276 S.W.3d at 448; RR 5:95-99; 11:84-85; 19:105-106; 20:17. This proves causation under *Prudential*. See also *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 733 (Tex. 1984).

The testimony of Fina's John Carrens is legally sufficient evidence of causation. According to him, "[i]t was the treatment of asking for extras for this post-weld heat treating and the manner that was put on me. . ." that caused him to reject Conex on future work. RR 14:84-85; PX 17. Without Fluor's misrepresentations, Conex never would have been forced to ask for field change orders. See *Prudential Ins.*, 29 S.W.3d at 83; *Johnson v. Baylor Univ.*, 188 S.W.3d 296 (Tex. App.—Waco 2006, pet. denied).

Moreover, Carrens was unequivocal about the reasons Fina would not hire a contractor like Conex. RR 13:6-7; 13:73-74; 14:4; 14:96. Fina does not “want to hire contractors that are not able to do the work that we ask [them] to do” RR 14:4-5; does not “want to hire contractors who create problems by not doing things right;” does not “want to hire contractors who damage Fina’s equipment by using improper procedures;” does not “want to hire contractors who walk away from a job thinking it was done successfully when it actually was not;” does not “want to hire contractors who use procedures which create very high residual stresses in highly concentrated configurations;” and does not “want to hire contractors who use procedures which will likely lead to loss of creep life.” *Id.* RR 14:4-5. Or, put another way, each of the eight disparaging statements made by Fluor about Conex (and listed in the charge) directly undermined Conex’s relationship with Fina. This evidence proves causation.

Conex also specifically eliminated any phantom “alternative causes” for Conex’s lost profits model. “We used to get an average of 65, 75 percent of their work.” RR 5:95. Following the 2001 turnaround and Fluor’s efforts to discredit Conex, “[n]ow I think we’re getting around 9 percent.” *Id.* The amount of work that Fina has awarded Conex has “been down . . . by a lot.” RR 11:85. Nothing has changed in Conex’s bidding or work: it uses the same estimators to prepare bids, RR 5:99; 11:84-85, the same estimating procedures, RR 11:84; 20:17, and Conex uses the same price structure. RR 11:84. This evidence proves causation by eliminating alternative causes of Conex’s lost profits.

All this evidence proves Conex’s lost profits. Moreover, so does Dr. Hawkins’ testimony, as Conex has briefed elsewhere. *See* Conex Resp. Br. at 29-31. Fluor’s rehearing motion should be denied.

II. The Court of Appeals Did Address the Exemplary Damages Claims, and Partial Remand of Those Claims Would Be Improper.

Ignoring numerous cases that have directly addressed partial remand of exemplary damages under Rule 44.1, Fluor argues that the court of appeals failed to decide the merits of challenges to exemplary damages. *See* Fluor Reh'g Motion at 8-14. Fluor's arguments about rendition are again incorrect, and the Court should reject them.

The court of appeals simply held that when remanding claims for intentional business disparagement, intentional interference with an existing contract, and intentional interference with prospective business relations—all claims requiring proof of scienter or malice—the issue of exemplary damages also should be remanded. The court of appeals' decision is neither shocking, nor unprecedented, nor erroneous.

In *Romero v. KPH Consolidated, Inc.*, 166 S.W.3d 212 (Tex. 2005), this Court initially held that Romero failed to prove a malicious credentialing claim. The Court then considered what to do with Romero's separate cause of action for negligence. According to the Court, the jury's erroneous malicious-credentialing finding also "tainted" the jury's "punitive damages findings." 166 S.W.3d at 230-31. "[F]or that reason alone," the this Court held that "a new trial on the entire negligence claim is required." *Id.* at 231 (citing Rule 61.2, the supreme court equivalent of Rule 44.1); *see also George Grubbs Enter., Inc. v. Bien*, 900 S.W.2d 337 (Tex. 1995).

The courts of appeals consistently reach the same result under Rule 44.1. As those courts recognize, "there is no independent cause of action for exemplary damages. They are simply an element of damages recoverable under a cause of action." To grant Fluor relief here, a plethora of case precedent would have to be overruled, and there is nothing

compelling to warrant that drastic action. *See, e.g. Robbins v. Payne*, 55 S.W.3d 740, 747 (Tex. App.—Amarillo 2001, pet. denied); *accord Polley v. Odom*, 957 S.W.2d 832, 841 (Tex. App.—Waco 1997, judgm’t, but not opinion, vacated) (“Gross negligence is not a separable and independent cause of action.”); *Prati v. New Prime, Inc.*, 949 S.W.2d 552, 557 (Tex. App.—Amarillo 1997, pet. denied) (“gross negligence is not a separate and independent cause of action”). Rule 44.1 prohibits a partial remand of liability, damages, and exemplary damages.¹

Fluor’s request for a partial remand excluding exemplary damages is improper. The overwhelming weight of authority holds that exemplary damages are an inseparable part of the larger tort-liability cause of action, and the overwhelming weight of authority rejects Fluor’s request for a partial remand and a piecemeal result. There is no authority for remanding *less* than the entirety of a single cause of action. Because the court of appeals remanded Conex’s tortious interference and business disparagement claims, Rule 44.1 requires that the inseparable exemplary damages issues should also be remanded.

¹ *See Telecheck Servs., Inc. v. Elkins*, 225 S.W.3d 731, 737 (Tex. App.—Dallas 2007, no pet.) (“[T]he issues of malice and exemplary damages are not separable from the remainder of the case.”); *Williams v. Lifecare Hosp. of N. Tex., L.P.*, 207 S.W.3d 828, 834 (Tex. App.—Fort Worth 2006, no pet.) (“[T]he issues of malice and exemplary damages . . . are not ‘separable’ from those of the remainder of the case.”); *Peshak v. Green*, 13 S.W.3d 421, 428 (Tex. App.—Corpus Christi 2000, no pet.) (“Because we do not believe the issues of malice, which would support a finding of punitive damages, and liability for defamation can be separated without unfairness to the parties, we remand this entire cause for new trial.”); *Polley v. Odom*, 957 S.W.2d at 941 (“Since we have remanded the negligence, we also remand the gross negligence claim. A partial remand is improper unless the issues are severable.”); *Prati v. New Prime, Inc.*, 949 S.W.2d 552, 557 (Tex. App.—Amarillo 1997, pet. denied) (disagreeing that “gross negligence is a separate cause of action from an action for ordinary negligence” and remanding “the cause” for a new trial).

A. Fluor perpetrated a fraud, supporting punitive damages.

“Fraud occurs when a party makes a material misrepresentation.” CR 502. Conex proved that Fluor’s emails contained repeated lies, which were “made . . . recklessly without any knowledge of the truth and as a positive assertion.” CR 502. Fluor clearly intended that Fina act on its false statements, CR 502, because they were made so that Fina would use Fluor’s PWHT procedures. PX36 at 76 (“The objective of this report is to develop a spot post weld heat treatment procedure.”).

By developing those PWHT procedures, Fluor wedged itself between Conex and Fina as the only credible alternative to “some vendors [who] may have ignored the [PWHT] evaluation requirement because it was difficult to do.” *Id.* at 75. Fluor’s proposal was presented as more thorough than Conex’s “slightly convoluted philosophy on how to proceed.” *Id.* at 73. These lies were proven to be false through expert testimony. *E.g.* RR 9:36-37. Fluor never told Fina that Fluor’s modeling work was wrong, and Fina relied on Fluor’s false and misleading work. RR 4:131; 17:37. Fluor’s own expert called such reliance “reasonable.” RR 17:37-38. Because the fraud element of the tortious interference claim is proven, rendition of judgment on that single element of the intertwined tortious interference claim would be erroneous.

B. Legally sufficient evidence supports the jury’s malice finding.

There is ample evidence to support the jury’s finding that “the injury to Conex resulted from a specific intent to cause substantial injury to Conex on the part of Fluor.” CR 512. At a minimum, there is some evidence to support the jury’s finding, and given the dictates of Appellate Rule 44.1, remand of the entirety of the malice claim is required.

As it has throughout this appeal, Fluor ignores the charge’s instruction that the jury could consider *not merely* acts or omissions of management-level employees *but also* acts and omissions “authorized by” management-level employees, and acts and omissions “ratified or approved” by management-level employees. CR 512. By their very nature, ratification and approval must occur after the initial bad acts, and by their very nature ratification and approval can involve different actors than those committing the original bad acts. Thus, in reviewing the evidence, an appellate court should consider all the evidence tending to demonstrate that Conex’s injury—unpaid change orders and loss of Fina work—resulted from Fluor’s specific intent to cause Conex substantial injury. There is evidence that it did; Mr. Antalffy’s acquittal does not end the analysis.

Fluor has every reason to injure Conex’s reputation: Fluor pleaded it was a “competitor[]” of Conex. CR2:246. Its competitors are companies that do similar work, including construction. RR 27:10-11; 23:14-15. Fluor does turnaround and construction work itself, RR 23:14-15, and Fluor owns a construction subsidiary called P2S. RR 27:22. The vice president of Fluor admitted that P2S and Conex would be competitors of each other. RR 27:24. Moreover, Fina awarded Fluor “the contract to engineer, procure, and *construct*” the Deep Conversion Project. RR 11:21 (emphasis added).

Fluor’s interference continues to date with the DCP project, as Fluor has continued to interject itself between Fina and Conex. Fluor put Conex on its “warning and alert list” and coordinated with Fina to ensure that Conex was not invited to the initial DCP contractors meeting. RR 15:9; 15:23. It was substantially certain Conex would lose future work when Fluor advised Fina to take Conex off the invitee list for the DCP

information meeting. RR 15:23; 18:46-47, 50-51. After Fluor blackballed Conex on the “warning and alert list,” Fina removed Conex from—but retained P2S on—the list of companies invited to an informational meeting on the \$1.5 billion Deep Conversion Project. RR 18:24-36; PX42, 48.

Fluor has never removed Conex from its so-called “watch” list. Fluor made mistakes, blamed them on Conex, disparaged Conex, and to this very day continues to blackball Conex. This is sufficient evidence that the injury to Conex resulted from a specific intent to cause substantial injury to Conex considering the “acts or omissions ratified or approved by a management-level employee of Fluor.” CR 512.

As this Court has observed in a fraud case, “a party’s intent may be inferred from his subsequent acts.” *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986). The jury considered Fluor’s on-going conduct, including its listing of Conex on its “watch” list; its refusal to inform Fina of its “mistakes;” and its blackballing of Conex’s participation in the DCP. All of this evidence supports the finding that Fluor’s conduct in 2001 has been ratified and approved by management-level employees, and that Conex’s injury—its loss of Fina work—has resulted from Fluor’s specific intent to injure Conex.

In asserting that the court of appeals refused to address its arguments regarding exemplary damages, Fluor ignores the holdings the court of appeals made in response to Fluor’s numerous challenges to the jury’s business disparagement and intentional interference findings. Malice is an element of Conex’s business disparagement claim. *See* CR 500-02 (jury charge question 2). Specifically, Fluor published false and disparaging statements about Conex “knowing the statement to be false or with reckless

disregard for the statement's truth or falsity, or made the statement with ill will, or made the statement with an intent to interfere with the plaintiff's economic interest." *Id.* "As to Fluor, there is some evidence in the record from which the jury could find that Fluor disparaged Conex in statements five through eight and that Fluor acted with malice, . . . [but the evidence] is too weak to support the judgment . . ." *Fluor Enters., Inc. v. Conex Int'l Corp.*, 273 S.W.3d 426, 440 (Tex. App.—Beaumont 2008, pet. filed).

Similarly, Conex's claim for intentional interference with prospective business relations required scienter. CR 502-04 (jury charge question 3). As the court of appeals recognized, Fluor also challenged the evidence supporting this finding. *Fluor*, 273 S.W.3d at 441. And the court of appeals again concluded, "that the evidence [of disparagement] is too weak to support the . . . findings that Fluor acted with knowledge of the falsity of the statements or with reckless disregard to their truth." *Id.* at 442.

The court of appeals addressed the issue of Fluor's intent for a third time in response to Fluor's attack against the jury's finding of intentional interference with an existing contract. The court of appeals once again concluded that "the jury's finding is supported by legally sufficient evidence on the issue of Fluor's intent." *Id.* at 444. Finally, Fluor argued that it had established conclusively that it acted with "an objectively well-grounded and justifiable belief in the right to engage in the conduct that constitutes interference." *See* CR 505 (jury charge question 4). The court of appeals disagreed, holding that "there was some evidence in the record from which the jury could reject Fluor's assertion that it acted in objective good faith." *Fluor*, 273 S.W.3d at 445. The court of appeals did not err in remanding the issue of liability for punitive damages.


PRAYER

Fluor's motion for rehearing should be denied. Conex also asks for all other relief to which it is entitled.

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CERTIFICATE OF SERVICE

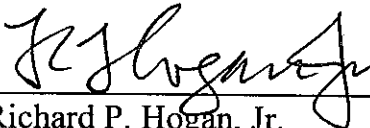
I certify that a true and correct copy of the foregoing instrument was served in accordance with Rule 9.5 of the Texas Rules of Appellate Procedure.

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