
No. 09-0199

IN THE SUPREME COURT OF TEXAS

FLUOR ENTERPRISES, INC., f/k/a FLUOR DANIEL, INC.
Petitioner,

v.

CONEX INTERNATIONAL CORPORATION,
Respondent.

On Appeal from the Ninth Court of Appeals at Beaumont, Texas
Cause No. 09-07-00100

**FLUOR'S REPLY TO CONEX'S RESPONSE
TO MOTION FOR REHEARING**

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RECORD REFERENCES

The record and briefing will be referred to as follows:

Reporter's Record (Volumes 1-34, 53-54)	[volume]:[page]
Fluor's Brief on the Merits as Petitioner	F-Pet-Br:[page]
Brief on the Merits of Respondents Fluor and Leslie Antalffy	F-Res-Br:[page]
Fluor's Reply Brief as Petitioner	F-Reply-Br:[page]
Fluor's Motion for Rehearing	F-Mtn:[page]
Conex's Response to Fluor's Motion for Rehearing	C-Resp:[page]

Emphasis added herein unless otherwise stated.

INTRODUCTION

Fluor’s motion for rehearing focused on two critically important issues that are raised on the face of the Court of Appeals’ opinion and that have not been, but should be, addressed by this Court: (1) whether Texas intermediate appellate courts are *required* to address rendition complaints as to particular claims or damage elements (such as exemplary damages or lost profits) before remanding a case for new trial; and (2) whether rendition of judgment on lost profits is *required* where the case has been fully tried on the merits but the claimant fails to adduce reliable expert testimony on lost profits. If there were any question about whether these issues are important to Texas jurisprudence and should be answered by this Court now, this Court need look no further than Conex’s response to Fluor’s motion for rehearing (“C-Resp”).

Conex proclaims that “piecemeal rendition of some elements of damages” is not allowed in Texas. C-Resp:1. Conex says that a Texas appellate court *cannot* (a) reverse and render judgment in part (*e.g.*, on exemplary damages or lost profits) and (b) remand the remaining part of the case for a new trial. Indeed, in Conex’s view of the world, once an appellate court decides that *any part of the case* must be remanded for a new trial, that court must automatically remand the entire case for a new trial, including all elements of actual damages and exemplary damages – even if no evidence supports particular damage elements or claims. This Court should grant review and hold that Texas appellate courts not only have the power, but the duty, under TEX. R. APP. P. 43.3, to reverse and render judgment on each and every part of the case for which there is no evidence, even if other parts of the case must be remanded for new trial.

As Justice Gaultney opined in his dissenting opinion, judgment should have been rendered on the elements of exemplary damages (\$30 million) and lost profits (\$67 million). There is no basis in law or policy for Conex’s proposed “no piecemeal rendition” rule, which gives plaintiffs who fail to adduce legally sufficient evidence of claims or damage elements endless second chances to prove their case. Such a rule is anathema to the fair and efficient administration of justice in Texas.

I. CONEX’S RESPONSE HIGHLIGHTS WHY THIS COURT SHOULD GRANT REVIEW AND HOLD THAT, BEFORE REMAND, APPELLATE COURTS MUST ADDRESS ALL RENDITION COMPLAINTS, INCLUDING THOSE ON EXEMPLARY DAMAGES.

A. The Issue Is Cleanly Raised: Can Appellate Courts Render Judgment on Exemplary Damages and Remand Liability for New Trial?

Conex’s response, on its face, highlights the important procedural question raised by this case: Is Fluor correct that TEX. R. APP. P. 43.3 *requires* Texas appellate courts, before remanding a case, to address all rendition complaints on all parts of the case and, where those complaints are meritorious, to render judgment on claims or elements of damages such as exemplary damages and lost profits? Or instead, is Conex correct in arguing that TEX. R. APP. P. 44.1(b), dealing with “partial new trials,” *prohibits* Texas appellate courts from rendering judgment on parts of the case (particularly exemplary damages and lost profits) and then remanding other parts of the case for a new trial?

Conex erroneously posits that Texas law bars “piecemeal rendition” as to any part of the case. But Conex has no answer for, and wholly ignores, Rule 43.3. As this Court has repeatedly held, Rule 43.3 mandates that Texas appellate courts afford a litigant the greatest relief possible by addressing rendition points *before* remanding the case for new

trial. *See Bradleys' Electric v. Cigna Lloyds Ins. Co.*, 995 S.W.2d 675, 677 (Tex. 1999); *Lone Star Gas Co. v. Railroad Comm'n*, 767 S.W.2d 709, 711 (Tex. 1989).¹

Conex also ignores TEX. R. APP. P. 43.2(c), which provides that a court of appeals may “reverse the trial court’s judgment in whole or in part and render the judgment that the trial court should have rendered.” It would be absurd to suggest that a trial court could not render judgment on exemplary damages and/or lost profits (on motion for directed verdict) and then submit liability for other actual damages to the jury. Yet under the rule Conex proposes, an appellate court would be prohibited from rendering the judgment the trial court “should have rendered” because, according to Conex, the appellate court cannot render judgment on exemplary damages and/or lost profits and then remand for a new trial on liability for any remaining actual damages elements.

Conex distorts the prohibition against “piecemeal trials,” *see* TEX. R. APP. 44.1(b), erroneously converting that rule into a prohibition against what Conex calls “piecemeal rendition.” As Fluor has explained, Rule 44.1(b) prevents an appellate court from affirming in part and *remanding in part* when the part of the case that would ordinarily be affirmed is not fairly separable from the part of the case infected by reversible trial “error.” That is the teaching of *Romero v. KPH Consolidated, Inc.*, 166 S.W.3d 212 (Tex. 2005). *Romero* stands for the unremarkable proposition that an appellate court cannot affirm an award of actual damages and order a *new trial on exemplary damages*

¹ The exceptions in Rule 43.3, which allow a Court to remand even where rendition would ordinarily be required, are not implicated here. Where, as here, a party has been given a full and fair opportunity to try its claims for exemplary damages and lost profits but has failed to adduce legally sufficient evidence to support those claims, it is not “necessary” or “in the interests of justice” to remand those damage elements merely because another damage element must be remanded for new trial. *See* F-Pet-Br:14-16; F-Reply-Br:9-11. Conex has never asserted that it was unable fairly to try exemplary damages or lost profits or that the interests of justice require a new trial.

alone. F-Pet-Br:17-19; F-Reply-Br:11-12. Nor, for that matter, can an appellate court affirm an award of exemplary damages and remand solely for a *new trial on liability*.

But Fluor's petition does not ask this Court to affirm any part of the trial court judgment, much less to affirm in part and remand in part. Fluor's petition involves the requirement of Rule 43.3 that the appellate court must address *rendition* complaints. Rule 44.1(b) does not speak to an appellate court's duty to address rendition complaints or answer whether an appellate court can render in part and *remand in part*. F-Pet-Br:17-20; F-Reply-Br:11-14. None of this Court's decisions on piecemeal trials prohibits an appellate court from (1) rendering judgment on exemplary damages and/or on lost profits and (2) remanding, for new trial, liability for any remaining actual damages elements. *See Munoz v. State Farm Lloyds*, 2008 WL 4533932, *2-3 (S.D. Tex. 2008).

Under Conex's proposed rule prohibiting "piecemeal rendition," the only way an appellate court can render judgment on exemplary damages, lost profits – or any part of the case – is if the court renders judgment on the *entire case*. But such a rule would undermine the fair and efficient administration of justice. This Court and other Texas appellate courts have not hesitated to render judgment in part (on exemplary damages or actual damages elements) and remand in part. *See City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 74 (Tex. 2000); *Durham Transp., Inc. v. Valero*, 897 S.W.2d 404, 417 (Tex. App.—Corpus Christi 1995, writ denied); *Sorbus, Inc. v. UHW Corp.*, 855 S.W.2d 771, 776 (Tex. App.—El Paso 1993, writ denied); *St. Paul Guardian Inc. Co. v. Luker*, 801 S.W.2d 614, 623 (Tex. App.—Texarkana 1990, no writ). These cases belie Conex's proposed rule prohibiting "piecemeal rendition" by Texas appellate courts.

B. As Justice Gaultney Recognized, There Is No Evidence of Any “Intent to Injure” by Fluor and Judgment Should Have Been Rendered on the Exemplary Damages Award.

Although Conex maintains that the Court of Appeals properly refused to address the merits of Fluor’s rendition complaint on exemplary damages (C-Resp:9-10), Conex nevertheless contradictorily proclaims that the “Court of Appeals *Did* Address the Exemplary Damages Claim.” C-Resp:9. But the Court of Appeals expressly stated that it was remanding exemplary damages for new trial “without deciding the merits” of Fluor’s no evidence complaint concerning the jury’s “specific intent to injure” finding – which is the only predicate for exemplary damages in this Charge and verdict. F-Mtn, App-A:21

It does not matter whether the Court of Appeals held (erroneously) that there was some evidence of a *lesser* mental state, such as the type of “malice” required for disparagement or the “intent to interfere” required for tortious interference. The problem is that the Court of Appeals nowhere addressed whether there is legally sufficient evidence of the higher “specific intent to injure” predicate for exemplary damages.

Justice Gaultney, in dissent, *did* address Fluor’s no evidence complaint on exemplary damages, and would have held that there is no evidence that Fluor acted with a specific intent to injure Conex. Even though Justice Gaultney believed (incorrectly) that there was evidence of “reckless disregard” malice by Fluor for purposes of disparagement, Justice Gaultney recognized that proof of “reckless disregard” is not evidence of the higher, “specific intent to injure” predicate for exemplary damages.

Conex once again claims that it proved Fluor’s specific intent to injure with evidence that: (1) in 2003 (two years after the alleged tortious conduct) Fluor acquired a

subsidiary that could potentially compete with Conex; and (2) in 2006 (five years after the alleged tortious conduct) Fluor put Conex on an internal “watch list” used by Fluor to identify companies that are suing Fluor. C-Resp:12-13. Merely being a competitor does not prove specific intent to injure. Surely one could not prove specific intent to injure by evidence that, *several years after* the alleged tortious conduct, Fluor acquired a subsidiary that could potentially compete with Conex. *See* F-Pet-Br:22-23; F-Reply-Br:17.

Nor can Conex prove specific intent to injure based on Fluor’s decision, five years after the alleged torts, to place Conex on Fluor’s internal watch list for companies that are suing Fluor. Even if subsequent acts can, in some circumstances, prove “intent,” *see Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986), no case supports the notion that these particular events, which occurred years after the alleged tortious conduct, are evidence that Fluor had a specific intent to injure Conex in 2001.

Conex finally contends (for the very first time) that the jury’s “fraud” findings, subsumed in the liability question for tortious interference with prospective business relations, will support an award of exemplary damages. C-Resp:11. But under the Charge and verdict, exemplary damages were specifically predicated on the jury’s “specific intent to injure” finding in Question 11.² Thus, the exemplary damages cannot be sustained absent evidence that Fluor acted with a specific intent to injure Conex. Because Conex has no evidence that Fluor acted with a specific intent to injure Conex, judgment must be rendered for Fluor on Conex’s exemplary damages claim.

²In any event, Justice Gaultney correctly recognized that Conex never pleaded fraud as a basis for liability. F-Mtn, App-A:23 And Conex certainly never pleaded, much less requested submission of, fraud as a basis for recovering exemplary damages.

II. ANOTHER IMPORTANT ISSUE: IS RENDITION REQUIRED WHEN THE EXPERT TESTIMONY ON LOST PROFITS EVIDENCE IS UNRELIABLE?

The Court of Appeals held that the testimony of Conex's lost profits expert Dr. Hawkins *was unreliable*, but then failed to render judgment on the lost profits. The legal question thus presented is whether the failure to adduce reliable expert testimony on lost profits requires rendition of judgment – just as rendition would be required for unreliable expert testimony in other contexts. *See* F-Mtn:5-7. The Court of Appeals held that rendition was not proper because, according to the Court of Appeals, the testimony of Conex's owners, the Duplisseys, that Conex's average yearly revenues from Atofina declined after the 2001 Turnaround, was some evidence of the "fact" of injury.³

Conex cannot skirt the rules requiring *reliable* expert testimony by hiding behind the lost profits testimony of Conex's owners, the Duplisseys. After all, the Duplisseys simply parroted the unreliable testimony of Conex's expert Hawkins. Business owners are qualified to testify about lost profits only where they have specialized knowledge about their business and thus are deemed "experts" under the rules of evidence. *See LaCombe v. ATO, Inc.*, 679 F.2d 431, 433 & n.4 (5th Cir. 1982). But "all" expert testimony must be reliable under Texas law, including expert lost profits testimony. *See Gammill v. Jack Williams Chevrolet*, 972 S.W.2d 713, 722-26 (Tex. 1998). Unreliable expert testimony is no evidence, whether it comes from the Duplisseys or Dr. Hawkins.

³ Causation of lost profits cannot be proven by a mere decline in market share. *See Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 487 (5th Cir. 2000) (Texas law). And the plaintiff's own testimony cannot prove causation in fact of lost profits. *See Haynes & Boone v. Bowser Bouldin*, 896 S.W.2d 179, 181-82 (Tex. 1995). Nor, contrary to Conex's suggestion, is causation proven by the testimony of Atofina's John Carrens. As Fluor has explained, Carrens testified that nothing Fluor did caused him not to want to hire Conex, and his answers to hypothetical questions do not establish that but-for Fluor's alleged disparaging statements, Conex would have received the same average yearly revenues (or 60% of all Atofina work) that Conex received prior to the 2001 Turnaround. Carrens does not even control all or substantially all of Atofina's work. *See* F-Pet-Br:33-34, 37; F-Reply-Br:21-22 & n.7.

The Court of Appeals was correct in holding that Conex's expert testimony was unreliable for multiple reasons. First, in his before/after method, Hawkins admittedly failed to rule out alternative causes for the decline in Conex's average yearly revenues from Atofina. F-Mtn, App-A:21. Fluor's expert testified that, to use a before/after methodology, one would have to exclude alternative plausible causes. 29:70.⁴

Second, the Court of Appeals recognized that, in computing lost profits, Conex made no deduction for fixed costs and overhead. F-Mtn, App-A:21. As a result, Conex's expert Hawkins testified only to lost *gross* incremental profits, which as a matter of law are not lost "net" profits. ("Net profits" was the measure of damages submitted in the Charge). This is yet another reason why Conex's expert testimony was unreliable.

Third, the Court of Appeals correctly held that Hawkins failed to use one complete calculation of lost profits by adding, to the before/after "average amount" of lost profits, another \$50 million in profits Conex hypothesized it would lose on the future Deep Conversion Project (DCP). F-Mtn, App-A:21 Judge Gaultney correctly concluded, in dissent, that the lost profits computed for the DCP were speculative as a matter of law.

In sum, Court of Appeals concluded (properly so) that Conex's expert testimony was unreliable, but expressly held that rendition is not appropriate for such unreliable expert testimony. This Court should grant review to address whether rendition is required where, as here, expert testimony on lost profits is unreliable.

⁴ The Duplisseys' testimony that Conex was using the same bidders does not even purport to exclude any "external" cause for the decline in Conex's revenues, such as the emergence of other companies whose bids were *more competitive* than Conex's bids. Atofina's contract manager Rusty Crow reviewed Conex's bids in the post-2001 time frame and he testified that, even though Conex was invited to bid on 70% of the work put out for bid by Atofina, Conex's bids were not as competitive as the winning bids. 26:65, 72-74, 78-80.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2010, a true and correct copy of the foregoing Response to Conex's Petition for Review was served on all counsel of record for Conex at the addresses listed below by hand delivery and/or certified mail, return receipt requested.

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