By Stephen Gibson[2]

Texas Supreme Court Update
Opinions Issued June 21, 2019

***Frivolous Litigation Sanctions*: Notwithstanding intermediate appellate court decisions to the contrary, the party seeking attorney's fees as sanctions for frivolous litigation has the burden of proving the reasonableness and necessity of the fees allegedly incurred as a result of the frivolous suit, and that amount does not necessarily include all fees for all the services performed in defense of the suit.**

After litigating the merits for five years, defendants in *Naith v. Texas Children's Hospital and Baylor College of Medicine* moved for frivolous litigation sanctions. The trial court agreed the suit was groundless from the beginning and awarded the defendants $1.4 million as recompense for their attorney's fees under either chapter 10 of the Civil Practice & Remedies Code

Although the *per curiam opinion* does not say so, it appears that this amount was virtually all of the defendant's attorney's fees. A previous appeal remanded the case for a determination of the amount of reasonable and necessary attorney's fees. In that proceeding, defense counsel supplied conclusory allegations that they did nothing to prolong the suit or unnecessarily increase their fees. The affidavits did not substantiate that either the hours worked or the rates assessed were reasonable. Nevertheless, the trial court again assessed the entire $1.4 million in attorney's fees as sanctions.

The amount of attorney's fees as sanctions must be confined to those caused by the sanctionable conduct and do not necessarily include all attorney's fees incurred in defending the case.

Defendants urged that the standard burden of establishing reasonableness and necessity applicable to recovery of attorney's fees under fee-shifting statutes as a form of compensation other than damages does not apply when attorney's fees are awarded as punishment as a sanction. The court rejected this argument and the cases on which it was based as a "misunderstanding [arising out] of a holding that there is no right of jury trial on the amount of a sanction." The amount of sanctions must be shown to be reasonable because the sanction cannot exceed the amount necessary to fairly compensate for the sanctionable conduct. Chapter 10 specifically requires sanctions based on attorney's fees be limited to those that are "reasonable." Otherwise, the sanction is impermissibly excessive as imposing punishment for more than the consequences of the sanctionable conduct. Because the affidavits were conclusory, they were no probative evidence.

Remand v. rendition

Ordinarily, when a party fails to present evidence, the appropriate disposition is to render judgment. In this case, however, the court remanded to give the defendants a do-over, presumably because of the lack of clarity in the cases

[2] The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

that reasonableness of the fees caused by the sanctionable conduct was a necessary element of proof in attorney's-fees-as-sanctions cases.

***Real Property*: Estoppel by deed and after-acquired title doctrines only apply to the grantor who conveyed a greater interest than owned and those in the later chain of title. When these doctrines do not apply, the grantees are nevertheless entitled to money damages from the grantors and the successors to the grantor's liabilities under the warranty clause.**

Seven siblings each owned a 1/7 interest in 237 acres. Under a recorded deed, the defendants' father conveyed to his wife a gift of a 1/14th interest in the tract, being one-half of his 1/7th interest. Each of the seven siblings later conveyed under separate general warranty deeds "*all* that certain parcel or tract of land, lying and being situate[d] in [the] [c]ounty" where the tract was located. (Emphasis added). The siblings financed the purchase price for the buyer. The wife was not a party to these deeds and they did not refer to her 1/14th interest.

When the father died, his will devised his assets to a trust under which his wife and defendants' mother enjoyed a life estate. During the mother's lifetime, she negotiated the purchaser's repayments under the purchaser's financing agreement. The mother died intestate and her two sons inherited her 1/14th interest in the tract.

When the sons' outstanding 1/14th interest in the tract was discovered, the purchasers sued the sons for, among other things, breach of warranty. The purchasers and the sons filed cross-motions for summary judgment. Under *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878 (Tex. 1940), and its progeny, a grantor who purports to convey to another a greater interest than the grantor actually owned and those claiming ownership through that grantor are estopped to claim an interest that contradicts the general warranty. In *Trial v. Dragon*, the question was whether the sons could be divested of their ownership interest the father granted their mother *before* the father executed the deed to the purchasers. A unanimous opinion by Justice Green determined that *Duhig*'s estoppel-by-deed did not apply to the sons because the deed to the purchasers was not in the chain of title to their interest in the tract.

Estoppel by deed and after-acquired title doctrines apply only if the deed purporting to convey more than the grantor actually owned is in the chain of title.

The opinion describes the history of the *Duhig* rule's development, explaining that it was applied when a grantor executed a general warranty deed that purported to convey all mineral interests with a reservation of a ½ interest to the grantor. The grantor, however, did not disclose that the previous owner had already reserved a ½ mineral interest. *Duhig* held the grantor breached the general warranty by executing a deed purporting to convey a greater interest than the grantor owned for which the penalty was estopping the grantor from claiming any continued ownership in the interest purportedly conveyed. The *Duhig* opinion suggested this result applied not only to any interest the grantor owned at the time, but also to any interest purportedly conveyed that the grantor later acquired.

Estoppel by deed and after-acquired title doctrines do not apply to the conveyance of an interest before the execution of the deed purporting to convey more than the grantor's actual interest.

The court deemed *Duhig* inapplicable because at the time of the conveyance the grantor in *Duhig* owned the interest necessary to make the grantee whole under the warranty clause. That was not true for the grantor in *Trial*. When the father executed the deed to the plaintiffs, the father had previously conveyed to mother the interest that would have been necessary to satisfy the warranty clause. The sons claimed their interest in the tract through the earlier conveyance to the mother. Therefore, the doctrines of estoppel by deed and after-acquired title did not apply and the sons were not stripped of their interest. Although the sons were the successors in interest to their father's estate, the deed on which the plaintiffs relied to support their estoppel claim was not in the sons' chain of title.

The grantor's heirs are still subject to liability for monetary damages for breach of warranty in a real property deed.

The purchasers were not without a remedy, however. The father's deed to plaintiffs breached the warranty because it purported to convey more than the father owned. Thus, breach-of-warranty liability was established. The only question was the form and extent of the remedy for this breach. The sons could not be stripped of their interest because their father deeded that interest to their mother before executing the deed to the purchasers. But, as their father's heirs, they

were bound by the father's warranty and were liable for damages in an amount to be determined on remand resulting from the breach of that warranty.