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Defamation v. Business Disparagement: *Statements that attack product quality without implying a lack of integrity or reprehensible conduct are business disparagement, not defamation. Recovery for business disparagement is generally only for economic loss, not general reputational injury.*

Legally Insufficient Damages Evidence: *Expert testimony based on assumptions not supported by the evidence and damages calculations that do not conform to accepted methodology will not support a verdict.*

In *Innovative Block of South Texas, Ltd. v. Valley Builders Supply, Inc.*, a unanimous court reversed a judgment for defamation rendered after a jury trial. According to the court, the case should have been submitted as business disparagement, not defamation. Because of the distinction between these related, but distinct, theories as to both liability elements and damages recoverable, the court ruled there was no evidence to support recovery under the correct theory and, therefore, rendered a take-nothing judgment.

After going out of business, Valley Builders sued its upstart competitor, Innovative Block, for bad-mouthing the quality of Valley's products, but not Valley Builder's business practices. Valley pleaded for recovery on theories of both defamation and business disparagement. At the charge conference, Valley elected to only request submission of defamation as its sole ground of recovery despite Innovative's objection the case should be submitted as one for business disparagement.

Defamation concerns injury to character and reputation, but statements concerning quality or products or services that imply no lack of integrity or reprehensible conduct are business disparagement for which only special damages are generally recoverable.

A unanimous court agreed in an opinion penned by Justice Devine. Both defamation and business disparagement "involve harm from the publication of false information" but defamation protects character. Among other differences, defamation only requires negligence. Business disparagement requires knowledge of falsity and intent to harm. In addition, proof of defamation carries with at a presumption of general damages. Business disparagement, on the other hand, does not. The court concluded that because the derogatory statements were only about Valley's products and not defamatory about Valley itself, they were disparaging but not defamatory. Moreover, Valley's expert testimony did not support recovery of either general or special damages.

The opinion then turned to the expert testimony concerning its damages to ascertain whether there was sufficient proof of either general or special damages recoverable on a defamation theory. It examined in detail the expert's "Quasi-Monte Carlo" method of calculating damages. That method began with a "high end" and "low end" estimate of lost profits and then applied arbitrary percentages lacking support in any data to each estimate to create four "scenarios" for assessing the amount of lost profits to attribute to Innovative's statements from which the expert witness calculated an damage range. Innovative timely but unsuccessfully objected to this testimony as lacking a reliable foundation. The court agreed, declaring that the expert "simply made those numbers up" with no evidentiary basis. While doubting the validity of the "Quasi-Mote Carlo" methodology, the court noted that the expert's application did not comply with that message and that his "calculations were based on unreliable, irrelevant data that had little to do with the actual case that was tried." But beyond this unreliability, the court deemed the damage testimony fatally flawed because it "conflate[d] special and general damages by substituting hypothesized special damages as … proxy for Valley's general damages and noneconomic harm." Thus, the court deemed the expert's testimony "no evidence of any quantifiable harm to Valley's reputation, nor … evidence of any special damages."

The testimony of Valley's damages experts lacked probative value because it was based on calculations that were not consistent with the type of called for by the specified calculation method and were based on assumptions not supported in the factual testimony.

Valley also adduced testimony from a different witness about its special damages due to Innovative's negative comments a Valley customer. That testimony was also deemed without probative value. The majority acknowledged that special harm from loss of a business opportunity may indicate reputational harm, but it characterized statements about the quality of Valley's products due to an isolated situation neither defamatory per se because they did not imply lack of integrity or reprehensible conduct. The expert's damage calculation of special damages was defective because the value of the lost business was based on profits from Innovative's sales to the customer. The majority deemed this testimony no evidence because there was no evidence connecting the sales to the statements or that Innovative's sales were at Valley's expense.

Because the case was submitted on an improper theory of liability over timely objection and the plaintiff adduced no probative evidence to support recovery on the theory submitted, the court rendered judgment that Valley take nothing.

Supersedeas for Non-Monetary Judgments: *The amount necessary to avoid loss or damage when the judgment is for other than money or a property interest must be calculated according to the judgment creditor's actual loss from suspending the judgment's enforcement.*

At issue in *Haedge v. Central Texas Cattlemen's Association* was the amount that the prevailing defendant was entitled to recover from a supersedeas bond to suspend the enforcement of a non-monetary judgment. The Haedge group and other cattle owners were members of a cattlemen's association through which members procured grazing rights for up to 2000 cattle. The association's dues were based on the member's share of the association's costs to maintain those rights. The association terminated the Haedge group's grazing rights due to impermissible uses. Haedge unsuccessfully sued to overturn the termination. To prevent removal of 325 head of cattle while their appeal was pending, the Haedge group posted a supersedeas bond in an amount equal to the association's "opportunity cost" – i.e., what it would have cost to obtain grazing rights on *other* property for 325 head of cattle. All but one member of the Haedge group continued paying association dues while the appeal was underway.

After the Haedge group lost their appeal, the court of appeals directed the trial court to allow the association to recover from the supersedeas bond the amount of all grazing fees and costs incurred for the Haedge group's cattle during the appeal. Initially, the trial court limited that recovery to the amount of dues unpaid by the members of the Haedge group while the appeal was ongoing – that is, $7000. The court of appeals rejected this interpretation and ruled that the association was entitled to recover nearly $115,000, being the cost of alternative grazing rights for 325 head of cattle minus dues paid by the Haedge group.

By *per curiam* opinion, the Texas Supreme Court reinstated the trial court's determination that the judgment creditor was only entitled under the supersedeas bond only the amount it actually lost due to the suspension of the enforcement of the judgment. It was not entitled to recover the amount that would have been incurred if the association had actually obtained alternative grazing rights. The opinion points out that the actual loss to the association while the appeal was pending was only the unpaid dues, not the cost of obtaining alternative grazing rights.

Arbitration: *Failure to pursue an Interlocutory appeal from the denial of a motion to compel arbitration does not foreclose challenging that ruling in an appeal from a final judgment following trial.*

The opening sentence of the majority opinion in *Bonsmara Natural Beef Co., et al. v. Hart of Texas Cattle Feeders, LLC, et al.*, uses such a bad pun to describe the case, it demands quotation. "In this cattle-feeding dispute, the parties ask us to *wrangle* issues regarding the effect of forgoing an interlocutory appeal and the availability of their chosen forum for arbitration." (Emphasis added). The "wrangling" resulted in a 6:3 decision by Justice Busby writing for the majority that a party who foregoes an available interlocutory appeal does not, subject to a few statutory exceptions, surrender its right to challenge the same ruling in an ordinary appeal from the trial court's final judgment.

Bonsmara is a rancher that specializing in raising "natural beef" from imported cattle. The rancher entered an agreement with a cattle feeder to "finish" – think pre-barbeque day spa here – and sell the cattle. The agreement worked well for several years. However, the rancher sued the feeder for various theories of liability when many of the cattle sent to the feeder for finishing contracted a disease that required antibiotic treatment. The surviving cattle that received antibiotics no longer commanded a premium price because they could not be marketed as "natural."

Under the agreement, the feeder had the option of having "[a]ny dispute" resolved by arbitration. The trial court denied the feeder's motion to compel arbitration. Civil Practice and Remedies Code §51.016 *permits* a party to appeal an interlocutory order if the matter was subject to the Federal Arbitration Act and that Act would have allowed the appeal of the order if entered by a federal district court.
However, the feeder did not then appeal the denial of its motion to compel arbitration. Instead, first challenged that order in its appeal from an adverse judgment rendered on the jury's verdict. The rancher urged that by permitting an appeal from the interlocutory order denying arbitration, the Legislature likewise limited the appellate court's jurisdiction to entertain that judgment in an ordinary appeal.

The majority rejected that assertion, pointing out that a statute providing that a party "may" appeal simply permits that action, not mandate it. Relying on its previous decision interpreting a similar statute, the majority concluded that there was no basis in the wording of the statute that required a use it or lose it interpretation. Not only did the majority deem the rancher's arguments flawed interpretation, it also deemed it bad policy. It specifically mentioned that waiting for the outcome of trial preventing wasting resources on an appeal that may have been unnecessary if the party seeking arbitration prevailed at trial. Moreover, it noted that reading "may appeal" as "must appeal" for certain types of interlocutory appeals made traps for "unwary parties … who have no textual cues to guide them … whether an interlocutory appeal will be their only option for challenging" the interlocutory order. Finally, the majority bolstered its conclusion with a comprehensive review of interlocutory appeal statutes and distinguishing instances, such as failure to challenge a temporary injunction or the failure to challenge the appointment of a receiver. In the case of the former, the jurisdictional concern is that complaint about a temporary injunction is moot after entry of a final judgment. In the case of receiver, the failure to pursue an interlocutory appeal from the appointment works an estoppel because third parties dealing with the receiver have changed their positions in reliance on the receiver's appointment.

The majority rejected the contention of the dissent by Justice Green, joined by Chief Justice Hecht and Justice Devine, that a party who "substantially invokes" litigation cannot later complain about the failure to compel arbitration. The majority responded by pointing out this rule applies only if the substantial invocation of litigation occurs *before* seeking to compel arbitration. Here, the litigation followed the denial of the feeder's motion to compel.

The dissenters' principal objection was that it was inherently unfair and contrary to "common sense" to allow a party to await the outcome of a trial to first challenge the disposition of the motion to compel arbitration. The dissent bemoaned an interpretation of the interlocutory appeal provision in a way that allowed a "second bite at the apple" to defeat the intent of the Legislature to make case resolution more efficient. It deemed reading "may" as granting permission instead of imposing a requirement amounted to using accepted principles of statutory construction to defeat manifest legislative intent. The dissent did not, however, address where the Legislature expressed this intent. Following the classic textualist reasoning, the majority's approach looked no further than the words used in the statute to ascertain that intent.

The majority then turned to the feeder's challenge to the enforceability of the arbitration agreement itself, which is a "gateway" courts decide. The agreement provided for arbitration by an industry association under the rules that only allowed association members to submit disputes. The feeder argued the arbitration agreement was unenforceable because the chosen arbitrator was "unavailable." The majority rejected this contention, because availability of an arbitral forum was a matter of "procedural arbitrability" for the arbitrator to decide.

This reasoning presents a chicken-and-egg problem. If there is no arbitral forum, then who decides procedural arbitrability? The majority says it should be decided by the designated arbitrator but sidesteps the unavailability hurdle because the association selected to serve as arbitrator was willing to do so despite the absence of a party who was also an association member. Had there been an association rule that the association could *only* arbitrate disputes involving a member, there would have been no “available” arbitrator and arbitration could not proceed.

The final issue the majority addressed was whether the arbitration agreement could apply to non-signatories. The feeder was a limited liability company. The rancher sued the LLC plus three individual members who did not sign the arbitration agreement. No matter. The members were estopped to question the right to arbitrate contained in an agreement from which they sought to benefit. Parties may draft agreements to limit the estoppel doctrine, but *this* agreement was drafted to encompass a broad swathe of disputes and no language that limited estoppel’s application to prevent arbitration.

Federal Pre-Emption: *Showing pre-emption by a federal statute requires proof the state law or regulation has the effect required by any pre-emption provision in the federal statute or, if none, a "significant forbidden effect."*

Worker's Compensation: The Texas regulation requiring "fair and reasonable" compensation by worker's compensation insurers was not pre-empted by the 1978 federal Airline Deregulation Act so that insurers were obliged to pay the full amounts billed by air ambulance services.

Texas Mutual Ins. Co. et. al. v. PHI Air Medical involved a dispute between an air ambulance service and Texas worker's compensation insurers over reimbursement rates. The air ambulance company urged that the federal statute deregulating airlines pre-empted the Texas Workers Compensation Act's ("TWCA") "fair and reasonable" limitation on service reimbursements by insurers. Relying on the standards established by the Worker's Compensation Division of the Texas Department of Insurance, insurers reimbursed 125% of Medicare rates for air ambulance service, well below the amounts billed by the provider and at which the provider claimed insufficient to avoid providing these services at a loss. According to the air ambulance company, the federal statute obligated insurers to pay the full amounts charged, even if those amounts exceeded the TWCA "fair and reasonable" limit. In a 6:1:2 decision with a majority opinion Justice Busby, the court rejected these arguments.

Morales v. Trans World Airlines, Inc., 504 U.S. 374, 388 (1992), held that the Airline Deregulation Act only pre-empted state law only if it had a "forbidden significant effect upon fares." A majority of the Texas Supreme Court ruled in *PHI* that the evidence did not establish that the TWCA's reasonableness standard had a sufficient effect on rates for its services for injured workers. On the basis of that conclusion, it was unnecessary for the court to decide whether the McCarran-Ferguson Act's exception for insurance regulation would have precluded federal pre-emption. Justice Bland, along with Justices Lehrmann and Blacklock who also joined the majority, concurred in the judgment against PHI because they would have also deemed the "fair and reasonable" reimbursement regulation protected from federal pre-emption under the McCarran-Ferguson Act.

ADA pre-emption provision did not apply because the Texas regulation was not expressly directed to air transport services and did not have a significant effect on the rates for those services.

The majority explained that the power to provide a compensation method for injured workers is a police power reserved to the states under the Tenth Amendment. The majority also explained that the airline deregulation statute itself only purported to pre-empt laws and regulations that are "related to" an air carrier's charges. Under U.S. Supreme Court precedent, the test for pre-emption by the ADA is a law or regulation that establishes by express reference to an air carrier's charges "binding requirements" that have a "significant effect" on fares. Texas's "fair and reasonable" reimbursement standard did not satisfy this test because it was general, not directed particularly to air fares.

Because the ADA's pre-emption test did not apply, the majority turned to the "standard" pre-emption test: whether the Texas regulation had a "forbidden significant effect." Based on an earlier decision that increased airline costs did not necessarily lead to increased fares, the majority ruled that PHI failed to prove that the "fair and reasonable" compensation rate established by Texas's regulations had the necessary "significant effect." The focus of the ADA's pre-emption was on fares – that is, how much was charged to the parties to the transaction. The parties in this case were the provider and the injured worker, not the worker's compensation insurer. Therefore, the ADA pre-emption provision did not apply.

Moreover, the injured worker does not agree to a price, so the common law implies the same rate as the TWCA regulation: a reasonable rate. For this additional reason, the regulation could not be shown to have the required "significant effect." The majority distinguished cases from other jurisdictions holding worker's compensation regulations pre-empted for one of three reasons. Those cases involved (1) rules that triggered the ADA pre-emption provision by expressly referencing air ambulance prices; (2) rules significantly affecting rates by implementing a fee cap; or (3) challenges to prohibitions against directly billing the worker.

Even if pre-empted, the relief sought would have been prevented under the ADA because the pre-emption provision would have foreclosed the application of any standard, including one for the full reimbursement the provider sought.

The majority decided that there was no federal pre-emption of the "fair and reasonable" reimbursement standard. Nevertheless, it addressed the hypothetical question of how much of Texas's reimbursement law would have been displaced under an ADA pre-emption. This unusual step appears to have been aimed at pointing out the untenable, double-edged nature of PHI's argument. If, as PHI insisted, the ADA pre-empted the "fair and reasonable" standard because it "related to" air fares, then all standards – including payment of the carrier's full rates – would be pre-empted without regard to whether it was inconsistent with the standard applicable under the ADA. And without *some* standard, there would be no reimbursement requirement at all.

The majority further points out that the Tenth Amendment does not give the federal government the power to order *States* to change laws relating to matters, such as worker's compensation and other police powers, not within Congress's enumerated powers. The majority further concluded that it could not grant PHI a right to full reimbursement in any event because such an order would amount to an end run around the Tenth Amendment's restrictions on federal power.

Justice Green, joined by Chief Justice Hecht, dissented to express disagreement with both the majority and concurring opinions. In a nutshell, the dissenters deemed the "fair and reasonable" reimbursement standard pre-empted by the ADA because it related to and limited the price an air carrier could charge. They also would have held that Texas law was not protected by the carve-out under McCarran Ferguson's exception for insurance law. They reasoned that the TWCA's reimbursement standard was not intended to regulate the business of insurance as such, but to encourage instead employer participation in the workers' compensation system. This difference in objective, according to the dissent, meant that McCarran Ferguson did not protect it from being invalidated by the ADA.

Common Carriers: *Being "in … business" as a common carrier to whom the slight negligence standard applies depends on the character of the activity, not profit motive.*

Sovereign Immunity: *A governmental entity may be "in the business" for purposes of the applicable standard of liability even though it cannot engage in proprietary functions*.

The Supreme Court affirmed the judgment of the trial court that VIA Metropolitan Transit, a governmental entity, breached its duty to act as a "very cautious, competent, and prudent person" would act under similar circumstances to a passenger who was injured while riding a VIA bus, holding that VIA was liable for the passenger's injuries in this case.

A passenger sued VIA, San Antonio's public transit authority, to recover for injuries allegedly sustained while a passenger aboard one of VIA's buses. The passenger asserted VIA was a common carrier owing a higher duty of care. *Via Metropolitan Transit v. Meck*, the issues before the court were whether the common carrier's higher duty of care applied and, if so, whether the Tort Claims Act waived VIA's governmental immunity.

Common carrier status depends on the nature of the business, not profit motive. By statute, VIA was created to transport passengers.

Justice Boyd's opinion for a six-judge majority rejected VIA's contention that it was no common carrier because it was statutorily precluded from making a profit and that a profit goal was essential to being "in the business" of acting as a common carrier. The majority reasoned that common carrier status depends on "the public character of the carrier's employment," not "the … adequacy of the consideration." Thus, one can engage in a line of business by offering goods or services for remuneration even without a profit objective. Pointing to statutes authorizing VIA's creation as a public *transit* authority, the majority rejected VIA's claim that its principal objective was to implement the State's transportation policy by constructing roads, issuing bonds and promoting economic development. Thus, the majority concluded VIA was a common carrier because its "primary function" was transporting passengers.

A governmental entity may be "in the business" for purposes of the applicable standard of liability even though it cannot engage in proprietary functions for purposes of governmental immunity.

The majority also rejected VIA's argument that governmental entities cannot be common carriers because the Tort Claims Act provides that governmental entities cannot engage in proprietary functions. It reasoned the governmental-propriety distinction under the TCA was relevant to immunity from liability, not whether a governmental entity could be in a given business. It was equally unimpressed with VIA's claim that the TCA only waived liability for ordinary negligence, and not the slight negligence standard applied to it in this case. Considering the context, the majority ruled that "negligence" as used in the waiver provision of the TCA for incidents involving the use of motor vehicles was merely a categorical reference that did not attempt to define the particular standard by which liability for negligence was determined.

The court recognized that there was a logical argument for abandoning the submission differing degrees of negligence, but the majority declined to rule on the issue because it was unnecessary to resolve this case.

VIA also sought to overturn its liability by asking the court to eliminate distinct degrees of negligence in favor of a general standard that negligence "always and only involves the breach of a duty to exercise the ordinary care a reasonable person would exercise under the same or similar circumstances." After reviewing precedent from Texas and other jurisdictions, the majority acknowledged the appeal of VIA's reasoning. "The same or similar circumstances" might be sufficient to consider the actor's actual and constructive knowledge and experience without imposing a "higher" degree of care disconnected from such knowledge and experience.

However, the majority declined VIA's invitation because the difference would make no difference in the outcome because VIA conceded the applicable standard of care did not permit actions that caused the passenger's injury. On the other hand, Chief Justice Hecht, joined by Justices Guzman, Devine and Bland, concurred in the judgment to express their approval of abolishing different degrees of care and evaluating whether conduct was "negligent" according to the actual and constructive knowledge of the actor and what the actor should have done under the same or similar circumstances.

Finally, the majority ruled that expert testimony was not necessary to impose liability. The facts established by the trial evidence showed that VIA's own witnesses agreed that the acts and omissions that allegedly led to the plaintiff's injury were ones that a bus operator should avoid. That the same witnesses did not acknowledge that the conduct violated the applicable standard of care did not undermine the sufficiency of the evidence to support the verdict. After all, the jury is free to believe all, some or none of a witness's testimony.

Family Law – Managing Conservatorship Modification: *A "fit" parent must be presumed to act in the child's best interests to protect the fundamental right to determine what is in the child's best interests.*

The United States Constitution protects a parent's fundamental right to decide matters about the care, custody, and control of their children. In *Troxel v. Granville*, a plurality of the U. S. Supreme Court recognized that this fundamental right requires a presumption that a "fit" parent acts in the child's best interests. Texas law likewise recognizes that government may not "infringe on the fundamental right of parents to make child rearing decisions" simply because an official disagrees. Accordingly, the presumption that a fit parent acts in the child's best interest was embodied in a Texas statute governing the *initial appointment* of managing conservators. That statute, however, omits any reference to *modification* proceedings by non-parents. The Texas Supreme Court has twice held, once only two weeks after *Troxel* but without mentioning it specifically, the presumption did not reach such modification proceedings.

In re C. J. C. revisited the effect of this omission and whether the presumption applies when a parent is the conservator whose conservatorship is the subject of the proceeding. *In re C.J.C.* involved a non-parent's attempt to modify a parent's managing conservatorship without claiming the parent was unfit. In an opinion by Justice Bland, the court held that the presumption applied even though not explicitly included in the statute. The opinion distinguished the court's previous decisions because neither involved a "modification proceeding in which a fit parent had been named the child's managing conservator" and went on to point out that the court had consistently applied the *Troxel* presumption when a fit parent's conservatorship was at stake.

In a concurring opinion, Justice Lehrmann pointed out the unanswered question of the circumstances that allow the presumption to be rebutted and the standards establishing that threshold, but agreed those matters were not before the court in this case.

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