

**Supreme Court of Texas**  
**January 8, 2016**

**Blair v. Atl. Indus., Inc.**

No. 14-1041

Case Summary written by Justin Stevens, Staff Member.

PER CURIAM.

After Eugene Blair, III was injured in an automobile accident, he sued Faustino Murillo and his employer, Atlantic Industrial, Inc. for negligence. It was stipulated that Murillo was the sole cause of the accident, and no negligence or causation questions were submitted to the jury as to him. At issue with Atlantic were *respondeat superior*, negligent entrustment, and proportionate responsibility. The jury apportioned fault between Atlantic at 60%, and Murillo at 40%, and rendered a joint and several judgment against both defendants. The court of appeals reversed the trial court's judgment, holding Atlantic was not liable. The court affirmed the judgment in all other respects.

Murillo, however, moved for rehearing because of inconsistencies between the court's opinion and its judgment. Specifically, the court's judgment stated that, "We therefore reverse the judgment of the court below and render that the Appellee [Blair] take nothing against Appellants [Atlantic and Murillo]. The judgment in all other respects is affirmed." On petition for review, the Supreme Court of Texas agreed that the appellate court's opinion was inconsistent with itself, and without addressing the merits of the case remanded the case back to the court of appeals for it to render a judgment consistent with the appellate court's own opinion.

***Sloan v. Law Office of Oscar C. Gonzalez, Inc.***

No. 14-1015

Case Summary written by Jordan Stevens, Staff Member.

PER CURIAM.

The plaintiff, Isabel Sloan, sued her former attorneys, Oscar Gonzalez and Eric Turton, and the Law Office of Oscar C. Gonzalez for allegedly misappropriating \$75,000 in trust funds that Turton obtained after settling a case on Sloan's behalf. The jury found that an attorney-

client relationship existed between Sloan and all three defendants. The jury also found that all three defendants had engaged in a joint venture and a joint enterprise with respect to Sloan's underlying case. Finally, the jury found that all three defendants had breached fiduciary duties owed to Sloan, failed to disclose information to Sloan, committed fraud, committed professional negligence, knowingly and intentionally violated the Texas Deceptive Trade Practices and Consumer Protection Act (DTPA), and acted with malice and gross negligence. With regard to proportionate-responsibility, the jury assigned 30% to Gonzalez, 30% to the Law Office, and 40% to Turton. Sloan chose to recover under the DTPA and the trial court, based on the jury's findings, held all three defendants jointly and severally liable for \$77,500 in actual damages, \$64,125 in pre-judgment interest, \$424,875 in additional DTPA damages, and \$238,366 in attorney's fees, plus costs, appellate fees, and post-judgment interest.

Two defendants, Gonzalez and the Law Office, appealed the trial court's decision. The court of appeals found that there was sufficient evidence to support the jury's findings. The court, however, held as a matter of law that Sloan was only entitled to recover for professional negligence because all of the other claims, the DTPA claim included, were the result of an improper attempt to fracture Sloan's legal malpractice claim into alternative causes of action. The court of appeals also held that the trial court used an excessive interest rate. In light of these holdings, the court concluded that Sloan could recover \$77,500 in actual damages plus costs and interest. The court did not address the jury's findings regarding proportionate responsibility and applied those findings in its judgment, ordering the Law Office and Gonzalez to each pay Sloan \$23,250, 30% of \$77,500, in addition to costs and interest.

Sloan filed a motion for rehearing. Specifically, Sloan argued that the court of appeals erred by applying the proportionate-responsibility percentages without addressing whether the Law Office and Gonzalez were jointly and severally liable for all of the damages because the jury found that they were engaged in a joint enterprise and a joint venture with Turton. The court of appeals denied Sloan's motion for rehearing. Sloan then petitioned the Texas Supreme Court for review. In Sloan's petition, she argued that the court of appeals violated Rule 47.1 of the Texas Rules of Appellate Procedure by failing to address the effects of the joint venture and joint enterprise in the court's opinion.

**Issue:** Did the court of appeals violate Rule 47.1 by failing to address the effects of the jury’s findings regarding a joint enterprise and a joint venture?

The Court began by noting that Rule 47.1 obliges courts of appeals to deliver a written opinion that “addresses every issue raised and necessary to final disposition of the appeal,” and that courts of appeals are not at liberty to disregard this mandatory provision. In the case before the Court, the court of appeals did not address the sufficiency of the evidence regarding the existence of a joint enterprise or a joint venture, or the legal implications of those findings, which both parties disputed. Specifically, Sloan argued that because the jury found that all three defendants were engaged in a joint enterprise and a joint venture, Gonzalez and the Law Firm were each jointly and severally liable for all damages, including those attributable to Turton’s actions. Gonzalez and the Law Office, on the other hand, challenged the sufficiency of the evidence supporting the jury’s joint-enterprise and joint-venture findings and argued that no other agency relationship existed that would support joint and several liability. The Court found that these issues were necessary to the disposition of the appeal because they determined the amount of damages that the court of appeals’ judgment could assign to Gonzales and the Law Office. The Court, therefore, held that the court of appeals erred by failing to address these issues in its opinion. The Court declined the opportunity to address whether Chapter 33’s proportionate-responsibility scheme supersedes common law joint-enterprise and joint-venture theories for imposing joint and several liability. Instead, the Court left this question to the court of appeals. Finally, the Court reversed the court of appeals’ judgment and remanded the case to the court of appeals.

***Occidental Chem. Corp. v. Jenkins***

No. 13-0961

Case Summary written by Kylie Rahl, Staff Member.

JUSTICE DEVINE delivered the opinion of the Court.

Occidental Chemical Corporation owned a chemical plant that produced triethylene glycol (TEG), a chemical compound with a variety of industrial and commercial uses. The production occurred in a large tank where the TEG had to be maintained at a certain acidity level.

Technicians originally regulated the acidity level by hand until 1992, when Occidental designed and attached a device known as the acid-addition system to the tank in order to make adding acid to the tank a safer process. In 1998, Occidental sold the plant to Equistar Chemicals, L.P., Jason Jenkin's employer. In 2006, the acid-addition system that had been used fourteen years without incident caused injury to Jenkins when acid was expelled into his face and eyes. Jenkins sued Occidental alleging that Occidental's negligent design of the acid-addition system caused his injuries.

Issue: Whether a property owner who creates a dangerous condition on the property owes both a duty in premises liability to warn of the dangerous condition or make it safe and a duty in negligence to use reasonable care not to create the dangerous condition in the first place.

The Court held Occidental owed Jenkins no duty of care regarding the property's condition because the duty had passed to Equistar eight years before Jenkin's injury. With respect to land conveyances, the doctrine of caveat emptor retains much of its original force, requiring the recipient of land to make his own inspection of the property and relieving the previous owner of responsibility for its existing defects. Thus, owners of real property are not liable for injuries caused by dangerous conditions on real property after the owners convey the property.

Even though there is an exception where the creator of a dangerous condition can remain liable for the condition after relinquishing control of the property, that exception applies when an independent contractor created the dangerous condition, which is judged under ordinary negligence principles. The Court held that when a property owner is also the designer and creator of the defective improvement, the property owner does not act in dual-capacity as both the property owner and independent contractor when improving its own property. As a result, only premises liability principles apply to a property owner who created a dangerous condition on its property. Under these circumstances, because the injury occurred after the creator of the condition conveyed the property, the premises-liability claim lies against the property's new owner, who ordinarily assumes responsibility for the property's condition with the conveyance.

***Fischer v. CTMI, LLC***

No. 13-0977

Case Summary Written by Zirwa Sheikh, Staff Member

JUSTICE BOYD delivered the opinion of the Court.

In 2007, Ray Fischer, the owner of a tax-consulting business called Corporate Tax Management, Inc. sold his business to CTMI, L.L.C, created by Mark Boozer and Jerrod Raymond by executing a written asset-purchase agreement. A separate written agreement was also executed stipulating that Fischer would remain a CTMI employee until 2010.

The asset-purchase agreement included a list of assets that CTMI would be entitled to. This included accounts receivable on projects that Fischer had not completed by the closing date (2007). For the incomplete projects, Fischer was entitled to a payment that was equal to the percentage by which Fischer had completed the project before closing. In exchange for these assets, CTMI agreed to pay \$900,000 in total, but the purchase price would be paid in a series of payments. Fischer was to receive \$300,000 in 2007, followed by annual payments for the next four years, and he was to remain a CTMI employee. In addition to his \$300,000, Fischer was to receive an “earn-out” payment of \$16,215 in 2007. For the years 2008 and 2009, Fischer was to receive annual “earn-out” payments that included a minimum payment of \$194,595 plus an adjustment payment that amounted to 30% of that year’s business revenue in excess of \$2.5 million.

For the 2010 annual payment, the final year Fischer was to remain an employee at CTMI, the terms of the written asset-purchase agreement provided Fischer a share of the revenue from all projects that CTMI completed prior to Fischer’s last day (December 31, 2010) and a share of the revenue from projects that were pending but not yet completed by the end of 2010. Overall, for 2010, Fischer was entitled to receive a minimum payment of \$194,595 and 30% of the business revenue exceeding \$2.5 million earned from January 1, 2010 through December 31, 2010. Projects that remained incomplete by December 31, 2010 would be placed on a list by January 31, 2011 with a percentage of completion allotted to each project as of December 31, 2010. Both CTMI and Fischer were responsible to mutually agree and assign the percentage of completion for the incomplete pending-projects. This

pending-projects clause requiring both parties future consent regarding the completion percentage assignments to projects at the end of 2010 formed the basis of this dispute.

Problems between CTMI and Fischer arose after the 2007 closing. Once the initial \$300,000 payment was made pursuant to the purchase agreement, in addition to the 2007 earn-out payment, CTMI refused further payments. In December 2008 CTMI initiated a suit against Fischer, seeking declaratory judgment that Fischer was not entitled to receive any payment on certain accounts receivable for 2007, and CTMI was under no obligation to make any remaining payments because Fischer was in breach of his employment contract. Fischer counterclaimed alleging that CTMI breached the purchase agreement because of wrongful termination. Later, in 2010, CTMI filed a second amendment to the original petition alleging that portions of the asset-purchase agreement were unenforceable because they were an “agreement to agree.” Additionally CTMI alleged that the 2010 adjustment was also unenforceable because of the “mutually agreed upon” language in the purchase agreement that required both Fischer and CTMI to mutually come to an agreement regarding the incomplete projects completion percentages at the end of 2010. On trial, both parties settled and Fischer received a judgment for \$1.7 million, but the settlement excluded CTMI’s allegations regarding the 2010 adjustment. The dispute regarding the 2010 adjustment proceeded to trial. The trial court entered judgment in favor of Fischer, concluding that the 2010 adjustment was *not* an unenforceable “agreement to agree.” CTMI appealed and the court of appeals reversed. The Supreme Court of Texas granted a petition for review.

Issue for the Texas Supreme Court: Whether the 2010 pending-projects clause created a legally enforceable obligation? In other words, was the “percentage of completion” clause that required mutual agreement by both parties definite as to the essential and material terms?

Justice Boyd began his analysis with a discussion on the standards required for an enforceable contract, acknowledging that an enforceable contract requires definite essential and material terms, one that demonstrates clear intent of the parties desire to be bound, and that allows the court to understand each parties’ obligation, as well as the suitable remedy if applicable. He then articulated how an

“agreement to agree” does not meet the enforceability standard because it fails to be definite in regards to all of its essential and material terms, since it leaves the material matters open-ended and to be decided in the future. He also contended that an agreement to enter into a future contract might still be enforceable provided that the agreement lays out all the material terms in the future contract.

In concluding that the pending-projects clause was definite and thus *enforceable*, the Court utilized several guiding principles: (1) Courts must read the contract as a whole to determine parties’ intent and avoid rewriting contractual language; (2) The law abhors forfeiture and contracts are generally construed by courts to avoid rendering such contracts invalid; (3) reasonable terms will be applied when necessary as to avoid forfeiture; (4) indefinite terms may be defined by trade usage or course of dealings between parties; (5) partial performance and reliance on an agreement demonstrate parties’ intent to be bound and remove any uncertainty.

The Court concluded that the parties had mutual intent to reach a binding contract in which CTMI would pay Fischer a 2010 earn-out payment encompassing an adjustment based on revenue from any pending projects that existed by December 31, 2010. The Court held that this language illustrated CTMI’s immediate intent to be bound. While the parties could not contemplate the specific amount for the 2010 earn-out payments at the time they entered into the agreement, they established the formula for understanding the price making the contract definite enough for the Court to conclude with reasonable certainty what the adequate damages would be. The formula articulated by the Court was the completion percentages of pending-projects at the end of 2010. Since both parties had the intent to be bound, as depicted by the pending-projects clause, the Court held that the law will presume a reasonable price was intended, even if the price is meant to be agreed by parties in the future. Furthermore, the substantial performance by CTMI under the purchase agreement, along with Fischer’s transfer of his business assets to CTMI, indicated that pending-project clause was enforceable.

In response, CTMI argued that the language of the contract, “will have to be mutually agreed upon by [Fisher] and [CTMI,]” does not allow courts to force the parties to reach a mutual agreement, and it is not under any obligation to make pending-project payments if an

agreement isn't made. Since courts are not allowed to rewrite the language of the contract, CTMI argued that a court cannot impose a price without the negotiation and agreement between both parties. The Court contended that the agreement did not stipulate for additional negotiations over the percentages the 2010 adjustment would be based on. Additionally, the Court held that the pending-project clause also did not stipulate a lack of obligation on the part of CTMI in the event the parties failed to come to an agreement. Essentially, the Court read a "cooperation" provision into the contract, concluding that both parties must take reasonable measures to perform the obligations listed in the purchase agreement, and that CTMI could not avoid its agreement to pay for the 2010 pending projects because it refused to agree on the percentages.

In holding that the pending-projects clause was enforceable, the Supreme Court of Texas reversed the court of appeals' judgment, and reinstated the trial court's judgment denying CTMI's claim for declaratory relief.

***J&D Towing, LLC v. Am. Alternative Ins. Corp.***

No.14-0574

Case Summary written by Morgan Shell, Staff Member.

JUSTICE WILLETT delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN, JUSTICE LEHRMANN, JUSTICE BOYD, JUSTICE DEVINE, and JUSTICE BROWN joined, and in Parts I, II.B, III.C, and IV of which JUSTICE JOHNSON joined.

J&D Towing, LLC (J&D), a towing company from Huntsville, Texas, owned one tow truck, a 2002 Dodge 3500, purchased for \$18,500. While the owner was driving to repossess a vehicle on December 29, 2011, Cassandra Brueland struck the passenger side of the truck, rendering the vehicle a total loss.

After the accident, J&D negotiated a settlement with Brueland's insurer for \$25,000, which J&D used to purchase another truck and continue the business.

J&D filed an additional claim with AAIC under an underinsured-motorist policy, claiming that the settlement with Brueland's insurer was insufficient to compensate him for the loss of the use of the truck.



Upon AAIC's refusal to pay the claim, J&D sued the insurance company to recover the damages. At trial, J&D asked the jury to award loss-of-use damages in the amount of \$27,866.25 or \$29,416.25, contingent on whether the award was for a nine or ten week period. AAIC, upon filing a motion for summary judgment and instructed verdict, contended that Texas did not permit the recovery of loss-of-use damages in total destruction cases and was therefore not legally obligated to pay for the damages. The trial court denied both motions and at the conclusion of trial, submitted to the jury a question concerning the amount of loss-of-use damages. The jury awarded J&D \$28,000 and entitled AAIC to a credit of \$5,500—the amount paid by Brueland's insurer for J&D's loss-of-use damages.

The court of appeals, upon agreeing with AAIC's contention that Texas law did not permit loss-of-use damages when the property is totally destroyed, reversed and entered judgment for AAIC.

J&D subsequently appealed the court of appeals' decision arguing that Texas law permits loss-of-use damages in partial-destruction cases and to deny these damages simply because the vehicle was totally destroyed, instead of only partially destroyed, was illogical.

On review, the Supreme Court of Texas observed that loss-of-use damages are usually encompassed within consequential damages and account for the damages incurred during a reasonable period of lost use of the property. It also observed that while jurisprudence behind partially destroyed property is clear-cut, it has not directly addressed loss-of-use damages in total-destruction cases.

The Court proceeded to examine other Texas court of appeals decisions that had discussed in dicta the availability of loss-of-use damages in total-destruction cases. It observed, as did AAIC and the court of appeals below, that at least six court of appeals had expressly restricted loss-of-use damages in total-destruction cases. On the other hand, it examined *Mondragon v. Austin* and a Second Court of Appeals decision in 2014, which recognized in dicta that loss-of-use damages in total-destruction cases should be available.

Pursuant to the principals of full and fair compensation, as well as the holdings of a majority of other Texas case law prohibiting loss-of-use damages for total-destruction incidents, the Court looked to common law development, treatises and other jurisdictional views for further guidance. It recognized that most case precedent in the United States

resolving loss-of-use damages relied on common law and took a “monkey-see-monkey-do” approach. It noted that, instead of using independent reasoning, courts strung together cases and treatises without further analysis.

Despite this earlier approach, however, the Court relied on the shift in both case law and legal treatises on loss-of-use damages in total-destruction cases and emphasized that sixteen high courts in the country had made loss-of-use damages available in total-destruction cases. It agreed with the general reasoning behind those decisions that there is no distinction between partially and completely destroyed personal property when determining loss-of-use damages. Additionally, it agreed with the Supreme Court of Iowa’s reasoning that “loss of use damages will be incurred as readily when a vehicle is totally destroyed or when it cannot be restored by repair to its prior condition as when the vehicle can be restored by repair.” It further recognized that in order to uphold principals of full and fair compensation, loss-of-use damages must be available in total-destruction cases.

Finally, it utilized treatises, some of which have eliminated the distinction between partial-destruction and total-destruction of property altogether, and the Restatement (Second) of Torts to finalize its decision. The Restatement, which the Court observed was most in line with the majority of jurisdictions, allows a plaintiff to recover the value of the property, as well as interest on the loss-of-use damages and compensation for loss of use in a total-destruction case.

In observing the importance of compensating a party for injury of his or her personal property, it held that the owner of personal property may recover loss-of-use damages for totally destroyed property in Texas. It warned however, that permitting loss-of-use damages should be controlled by commonsense rules. The damages cannot be too remote and must be directly traceable to the tortious act. Neither can the damages be speculative nor awarded for an unreasonable period of lost use.

Finding that the trial court did not abuse its discretion when it submitted the loss-of-use question to the jury, the Supreme Court reversed the court of appeals’ judgment, finding for J&D.