Affirmed and Opinion filed April 6, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00183-CV

UNION NATURAL GAS COMPANY, Appellant

V.

ENRON GAS MARKETING, INC., ENRON GAS SERVICES CORP., ENRON CAPITAL TRADE AND RESOURCES CORP., LOUISIANA GAS MARKETING COMPANY, and LOUISIANA RESOURCES COMPANY, Appellees

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On Appeal from the 61st District Court
Harris County, Texas
Trial Court Cause No. 94-015429

O P I N I O N

In this natural gas supply contract case, Union Natural Gas Company ("Union") appeals the portion of the judgment entered in favor of Enron Gas Marketing, Inc ("EGM"), Enron Gas Services Corp. ("EGS'), Enron Capital and Trade Resources Corp. ("ECT"),[1] Louisiana Gas Marketing Company ("LGM"), and Louisiana Resources Company ("LRC") (collectively, "Enron"), asserting error in the jury

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[1] Union asserts no wrongdoing by ECT, but joined it as defendant because EGM and EGS were merged into ECT after this litigation began.

charge, choice of law, and evidentiary rulings. Conversely, Enron appeals the portion of the judgment entered in favor of Union, asserting error in the choice of law and evidentiary rulings and challenging the legal sufficiency of the evidence. We affirm.

Background

Union is a gas marketing company based in Dallas. In May of 1990, Union entered into contracts to: (1) sell gas to the Louisiana Municipal Natural Gas Purchasing and Distribution Authority (the "Authority") for distribution to the City of Alexandria, Louisiana (the "city") (the "Union/Authority contract"); and (2) buy gas from LGM to fullfill Union's supply obligations under the Union/Authority contract (the "Union/LGM contract"). Among other things, the Union/Authority contract contained a "bypass" provision which prohibited the Authority from buying gas for the city from Union's supplier, LGM, or its affiliates. In addition, the Union/LGM contract included a confidentiality provision that generally prohibited LGM from disclosing its terms to third parties. Enron purchased LGM in 1993.

After the Authority canceled the Union/Authority contract in 1994, Union filed this lawsuit against appellees and other defendants who have since settled their claims with Union, asserting claims for breach of contract, tortious interference, and conspiracy. Union essentially alleged that appellees and the other parties breached or tortiously interfered with its contracts in order to enable Enron to sell gas directly to the Authority or city, *i.e.*, without Union as an intermediate seller.

At trial, the jury found in Union's favor on its breach of contract claim and on one of its tortious interference claims and awarded Union damages equal to one year's lost profits. The trial court entered judgment in accordance with the jury's verdict and, pursuant to a stipulation of the parties, offset the amount awarded to Union against an amount that Union otherwise owed LGM.

Union's Issues Presented for Review

Choice of Law

Union's third issue presented[2] contends the trial court erred in applying Louisiana law, rather than Texas law, to its tort claims. The choice of law is material in this case because recovery of punitive damages for the alleged torts is not available under Louisiana law.[3]

The determination of which state's law is applicable is a question of law subject to *de novo* review. *See Minnesota Mining & Mfg. Co. v. Nishika Ltd.*, 955 S.W.2d 853, 856 (Tex. 1996). In all choice of law cases, except those contract cases in which the parties have agreed to a valid choice of law clause, the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984).[4]

With regard to a tort issue, the determination of the state which has the most significant relationship to the occurrence and parties is made under the principles stated in section 6 of the Restatement. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971). Section 6 provides that where, as here, a state has no statutory directive on a particular choice of law question, the relevant factors include: (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result; and (g) ease in the determination and application of the law to be applied. *See id.* § 6(2). Contacts to be considered in applying the principles of section 6 include: (1) the place where the injury occurred; (2) the place where the conduct

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[2] We address this issue first because its disposition affects the analysis of other issues.

[3] *See infra* notes 18-20. Although the parties dispute whether punitive damages could be recovered if Texas law applied to Union's tort claims, we do not reach that issue because we determine, as discussed below, that Union has failed to show that application of Louisiana law was in error.

[4] Courts may not circumvent settled choice of law standards by using public policy doctrine as an excuse to reach a more equitable remedy. *See Larchmont Farms, Inc. v. Parra*, 941 S.W.2d 93, 95 (Tex. 1997).

causing the injury occurred; (3) the domicil, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered. *See id.* § 145(2). These contacts are to be evaluated according to their relative importance with respect to the particular issue. *See id*. Therefore, this analysis should not turn on the number of contacts, but, rather, on their qualitative nature. *See Duncan*, 665 S.W.2d at 421.

With regard to the first element under section 145, Union claims that its injury was the loss of profits from its gas sales to the Authority and that this injury occurred in Texas, where it conducted its business and where payment for the gas sales was received. Conversely, Enron argues that Union's injury was the inability to sell gas in Louisiana and thus occurred in that state. We agree with Enron that the injury occurred in Louisiana where Union suffered a loss of gas sales. *See CPS Int'l, Inc. v. Dresser Indus., Inc.*, 911 S.W.2d 18, 29 (Tex. App.–El Paso 1995, writ denied) (observing that the financial harm suffered in Texas was merely a measurement of appellants' inablity to operate in Saudi Arabia).[5] Therefore, the first element, the place where the injury occurred, favors the application of Louisiana law.

With respect to the second element, Union contends that the tortious interference with its contracts occurred in Texas because: (1) the Enron employee allegedly most responsible for interfering with the contracts, Jim Ducote, was located in Enron's Houston headquarters; (2) every gas-supply proposal Enron provided to Pelican Gas Management, Inc. ("Pelican")[6] before the termination of the Union/Authority contract was prepared by Ducote in Houston and mailed or made during a telephone conversation from Houston; (3) Ducote allegedly disclosed the confidential price term of the Union/LGM contract to Adley[7] in a telephone call Ducote initiated from Houston; (4) the November 30, 1993, meeting, at which Ducote allegedly misrepresented to the Mayor of Alexandria (the "Mayor") the quantity and the quality of Union's

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5 To hold instead that a commercial injury is suffered at the plaintiff's place of business because that is where payments are received or lost profits are realized would largely undermine the distinction between the first and third factors of section 145 in non-payment and lost profits cases.

6 Pelican was the gas purchasing agent hired by the Authority in 1993. Because Pelican was compensated based on the gas purchases it negotiated, Union alleges that Pelican participated with Enron in seeking termination of the Union/Authority contract so that a Pelican negotiated contract could replace it.

7 Robert Adley was President and owner of Pelican.

gas supply, occurred in Houston; and (5) Enron's December 6, 1993, gas supply proposal to Pelican, on which the Authority's decision to terminate Union's contract was allegedly based, was prepared by Ducote in Houston.

However, other significant events occurred in Louisiana: (1) Johnson[8] met with the Mayor to determine if the city would deal with Enron directly; (2) Adley met with the Mayor to secure his support for terminating the Union/Authority contract, after which the Mayor consulted with the Authority's legal advisor about doing so; (3) after a meeting with Union, in which he learned that Enron (LGM) was Union's gas supplier, Adley contacted Enron directly; (4) Adley asked Johnson for a gas supply proposal for the city, and Johnson, in turn, asked Ducote to draft a proposal to the Authority; (5) Adley asked Ducote to reveal the confidential price that Union was paying LGM; (6) Adley told Enron the price the Authority was paying Union for the gas and provided Enron with details of Union's "upgrade" proposal;[9] and (7) prior to the Authority's executive committee meeting on December 8, 1993, Adley asked Ducote to send a proposal for a term gas supply for the city. Because conduct causing the injury thus occurred in both Louisiana and Texas, the second element does not clearly favor either state.

Regarding the third element, it is undisputed that Union's and Enron's respective principal places of business are each located in Texas. In addition, Union contends that LGM, LRC, and EGS filed reports with the States of Louisiana and/or Texas identifying Houston as the location of their principal office or place of business. Although EGM had a sales office in Louisiana, Union asserts that all relevant gas sales activities were performed in Houston, including formulation of price quotes, determination of credit terms, obtaining of gas supplies, arranging of transportation and delivery, handling of gas "nominations," billing and collections, maintaining of contract files, controlling of LRC's Louisiana pipelines, and determination of which Enron affliate would be the gas seller under a particular contract. Union further argues that many administrative functions for the Enron subsidiaries were perfromed in Houston, including human relations, payroll, tax, legal, and public relations.

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8 Roy Johnson was LRC's President and LGM's Vice President.

9 Union had proposed that the Union/Authority contract be upgraded to provide a "firm" rather than "interruptible" gas supply.

Enron points out that LGM is a Louisiana corporation and that its president, Johnson, resides and offices in Louisiana. Similarly, the city and Authority are Louisiana political subdivisions, and Pelican and Adley are Louisiana residents. Moreover, the United States District Court for the Southern District of Texas has determined, for purposes of federal diversity jurisdiction, that LGM's principal place of business is Louisiana because its activities are based there and Louisiana is the only state in which LGM sold gas. *See Louisiana Gas Marketing Co. v. Union Natural Gas*, No. H-94-1898 (S.D. Tex. Dec. 8, 1995). On balance, we conclude that the third factor, the location of the parties, slightly favors application of Texas law.

As to the fourth element, the place where the parties' relationship was centered, many communications between the parties and administrative functions took place wholly or partly in Texas. Nevertheless, we believe that the consideration most essential to this factor is that all of the gas sold under the Union Contracts was produced, transported, delivered, and consumed within the State of Louisiana. Therefore, the fourth element strongly favors the application of Louisiana law. Moreover, because many Louisiana citizens were dependent on the contracts in question for their supply of gas, any torts committed with regard to those contracts was of far greater significance to the State of Louisiana than to the State of Texas.

Therefore, considering the relative importance of the foregoing section 145 factors, with respect to both their qualitative nature and the particular issues in this case, we conclude that the State of Louisiana had the most significant relationship to the torts alleged in this case. Accordingly, Union has not demonstrated that the trial court erred in submitting Union's tort claim to the jury under Louisiana law, and Union's third issue presented is overruled.

Jury Instructions

Union/Authority Contract

Union's first issue presented argues that the trial court erred in refusing to submit in the court's charge to the jury Union's proposed instruction interpreting the following provisions of the Union/Authority contract:

> 1a. The term of this Contract . . . shall continue . . . until April 1, 1992 and shall continue . . . thereafter for successive periods of one (1) year . . . until terminated

by either party upon at least ninety (90) days prior written notice to the other party specifying a termination date effective April 1, 1992 or any aforementioned yearly period thereafter.

1b. However, except as provided in . . . subparagraphs D and E below, this Contract shall not be terminated by [the Authority] as long as [it] supplies natural gas to or for the account of the [city] . . . . In the event the [city] . . . takes affirmative action to reject the pipeline proposal, then this paragraph 1b shall become null and void concurrently with the date of said action.

D) Notwithstanding anything to the contrary contained herein, except as specifically provided for in subparagraph "E" below, . . . prior to [the Authority] exercising its right to terminate this Contract, . . . [Union] shall have the right to match the terms and conditions for such other supply source's . . . gas sale offer. . . . Should [Union] elect not to match such offer . . . this Contract shall terminate . . . .

E) [Union] . . . agrees that if such [new alternate gas pipeline system] is constructed by the [the Authority], [the Authority] shall have the sole right to terminate the Contract . . . .

Union's proposed instruction interpreted these provisions as making the contract terminable only if one of three conditions occurred:

> Union's contract with the [Authority] could not be terminated unless (i) the pipeline for [the city] was completed, (ii) the pipeline project was affirmatively rejected by [the city], or (iii) [the city] withdrew from the [Authority]. If the contract could be terminated because of a rejection of the pipeline project, then Union was entitled to a match. To conform with the match provision, the match had to be provided 30 days before the notice of termination.

Enron's interpretation of the contract differs from this principally in contending that the limitation on the Authority's right to terminate in 1b is subordinate to the match right provided in D because 1b states, "except as provided in . . . subparagraphs D" and because D states, "Notwithstanding anything to the contrary contained herein." Thus, Enron construes the match right as a fourth circumstance allowing the Authority to terminate. The trial court ruled that the Union/Authority contract's termination and match provisions were unambiguous, but refused each party's proposed jury instruction interpreting them.[10]

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[10] Although the Union/Authority contract contains a Louisiana choice of law provision and the parties agree that Louisiana law is controlling as to the contract's interpretation, neither party contends that a different interpretation results from application of Louisiana law than would result from application of Texas law.

A trial court is to submit the questions, definitions, and instructions which are (i) raised by the pleadings and evidence and (ii) proper to enable the jury to render a verdict. *See* TEX. R. CIV. P. 278, 277. If the construction of a contract provision is in dispute, and the trial court resolves the dispute by interpreting the provision (*i.e.*, rather than by finding it ambiguous), the court should include its interpretation in submitting the question on whether the contract was breached. *See* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES PJC 101.7 (1997).[11] A trial court's refusal to submit a requested instruction is reviewed for abuse of discretion. *See Magro v. Ragsdale Bros.,* 721 S.W.2d 832, 836 (Tex. 1986). A trial court is given wide latitude to determine the propriety of explanatory instructions and definitions. *See H.E. Butt Grocery Co. v. Bilotto*, 985 S.W.2d 22, 23 (Tex. 1998).

Error by a trial court generally warrants reversal only where it probably caused rendition of an improper judgment or prevented the appellant from making a proper presentation of the case to the appellate court. *See* TEX. R. APP. P. 44.1. The one satisfaction rule provides that a party who suffers only one injury may recover only one satisfaction of the damages arising from that injury. *See El Paso Natural Gas Co. v. Berryman*, 858 S.W.2d 362, 364 (Tex. 1993). This rule applies when multiple defendants commit either the same act or different acts that result in a single injury. *See Crown Life Ins. Co. v. Casteel*, 43 Tex. Sup. Ct. J. 348, 356 (Jan. 27, 2000). Therefore, where the same damages are claimed for multiple theories of recovery and/or against multiple defendants and those damages have been awarded with regard to some but not all of the theories or defendants, any error which prevented recovery of those same damages on the remaining theories or against the remaining defendants is generally harmless.[12]

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[11] However, a trial court's failure to submit an instruction is not a ground for reversal unless a substantially correct instruction was requested in writing and tendered by the party complaining of the judgment. *See* TEX. R. CIV. P. 278.

[12] *See Stewart Title Guar. Co. v. Aiello*, 911 S.W.2d 463, 478 (Tex. App.—El Paso 1995) (holding that any error by the trial court in refusing to submit additional jury issues on claims for insurance code violations and deceptive trade practices was harmless where the recovery obtained by the plaintiffs for breach of the duty of good faith was the most favorable they could have received), *rev'd on other grounds*, 941 S.W.2d 68 (Tex. 1997); *Nance v. Resolution Trust Corp.*, 803 S.W.2d 323, 333 (Tex. App.—San Antonio 1990) (holding that any error in failing to submit requested

In response to the liability questions in this case, the jury: (1) found that LGM failed to comply with the Union/LGM contract; (2) failed to find that LGM's failure to comply was excused; (3) found that Robert Adley/Pelican intentionally interfered with, *i.e.*, wrongfully induced a breach of, the Union/Authority contract; (4) failed to find that Enron or LGM were part of a civil conspiracy with Pelican to tortiously interfere with the Union/Authority contract; and (5) failed to find that either Ducote or Johnson intentionally interfered with the Union/LGM contract. The damage question then asked for the amount of Union's damages resulting from the "failure to comply or that were proximately caused by the interference or the conspiracy to interfere." The jury was instructed that this calculation should be based on the lost profits, if any, from the Union/Authority contract that were a consequence of LGM's failure to comply with the Union/LGM contract. The jury awarded one year's lost profits as past damages and no future damages.

Union claims that the trial court's refusal to submit its instruction is reversible error because it allowed the jury to interpret the unambiguous contract provisions to incorrectly find that the contract could be terminated even if one of the three conditions did not occur. Union further contends that a proper interpretation of the termination and match provisions of the Union/Authority contract were inextricably linked to the jury's determination of whether Adley tortiously interfered with the Union/Authority contract and whether Enron conspired with him to do so. In addition, Union argues that the jury needed to be instructed that the Union/Authority contract was not terminable on April 1 of any year in order to conclude that Union suffered more than the one year's lost profits the jury awarded.

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jury instruction on duty of good faith and fair dealing was harmless because the plaintiff had been awarded the same damages on his contract claim as he had sought on the good faith claim; thus "nothing would be gained by a remand to consider additional causes of action seeking the same damages."), *writ withdrawn, improvidently granted*, 813 S.W.2d 154 (Tex. 1991); *see also Canales v. National Union Fire Ins. Co.*, 763 S.W.2d 20, 23 (Tex. App.—Corpus Christi 1988, writ denied) (holding that any error in failing to submit additional liability theories was harmless where the damages were the same for the submitted and unsubmitted theories and the jury had awarded zero damages on the submitted theories); *El Paso*, 858 S.W.2d at 364 (holding that after plaintiff's recovery of full damages against one defendant, action against co-defendant that would have been jointly and severally liable for the same damages was barred by the one satisfaction rule). Being prevented from recovering the same damages from additional defendants could be harmful if the damages could not be collected from the defendants against whom they were awarded. However, that is not a consideration in this case because Union was given credit for its damages against a debt it owed to LGM.

However, Union obtained affirmative liability findings on its breach of contract claim and one of its tort claims. Therefore, the instruction was obviously not necessary for a finding of contract and tort liability or for an award of lost profits and thus an implied determination that the Union/Authority contract had been wrongfully terminated. Because Union was not harmed from not being awarded these same damages against more defendants or on more theories,[13] we next consider whether the lack of the instruction could have prejudiced the amount of its recovery. In that regard, although the measure of damages for each of Union's theories of recovery was the same, *i.e.*, lost profits from gas sales to the Authority, the instruction does not mention damages or lost profits at all but only the circumstances in which the Union/Authority contract could be terminated and the requirement and timing of providing a match. Union's brief does not explain how this instruction could have communicated to the jury that Union suffered more than one year's lost profits from the wrongful termination.

Apart from the language of the instruction, Union sought $2.4 million damages, *i.e.*, eight years lost profits,[14] on the assumption that, but for appellees' alleged wrongful conduct, the Union/Authority contract would not have been terminated for the eight years it would have taken to approve, plan, and complete a second pipeline. However, the city withdrew from the Authority on April 1, 1995, and Enron argued that, even if the 1994 termination of the Union/Authority contract was wrongful, Union's damages were at most one year's profits because the city's 1995 withdrawal would have allowed the contract to be lawfully terminated at that time in any event.[15]

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13 *See supra* note 12 and accompanying text.

14 The jury awarded $210,050.20 in actual damages. Union's brief describes this amount as one year's lost profits but states that eight years' profits would have been $2.4 million. These figures suggest that the profits would not have been earned ratably over the eight years.

15 Union contends that a fact issue existed as to whether the city would have withdrawn from the Authority in 1995 had the Union/Authority contract not been wrongfully terminated and this lawsuit not been filed. It further contends that the trial court's failure to submit the proposed instruction prevented the jury from deciding that fact issue. Again, however, in light of the jury's implied finding that the Union/Authority contract was wrongfully terminated and its award of lost profits, it is not apparent how the lack of Union's proposed instruction could have prevented the jury from deciding whether the city would have withdrawn from the Authority in 1995 had the termination and lawsuit not occurred.

Under these circumstances, any possible connection between Union's proposed instruction on the termination and match provisions and the jury's calculation of damages is too remote, and any likelihood of the instruction producing a greater damage award is too attenuated and speculative, to demonstrate that the trial court's failure to submit the instruction, even if erroneous, probably caused rendition of an improper judgment with regard to the amount of damages awarded. Accordingly, we overrule Union's first issue presented.

Union/LGM Contract

Union's second issue presented complains that the trial court erred in refusing to submit to the jury its proposed instruction on trade usage.[16] Union claims that trade usage was an implied term of the Union/LGM contract and that gas industry trade usage prohibited Enron from attempting to sell gas to the Authority while the Union/Authority contract was in place. Union further contends that the trial court's refusal to submit this instruction prevented the jury from considering Union's additional theories for breach of contract, tortious interference, and conspiracy to interfere with the contracts.

As noted above in addressing Union's first issue presented, Union could have been harmed by such a failure to secure more liability findings against more defendants only if submission of the instruction could have also produced a greater damage recovery than Union was awarded. In that Union does not contend that the trade usage instruction could have increased its damage award, it does not show harm from the lack of the instruction.

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[16] Union's proposed instruction on trade usage states:

> Union's contract with [LGM] includes obligations in addition to the language of the agreement. Specifically, the law adds to the terms of the contract a duty of "good faith" and a duty to comply with industry "usages of trade."
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> a. The duty of "good faith" requires one to perform a contract with honesty in fact and to observe the reasonable commercial standards of fair dealing in the trade. The duty prohibits one from performing any action that would destroy or injure another party's right to receive the fruits of the contract.
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> b. A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.

Union notes in its brief that the trial court submitted a jury instruction on the implied duty of "good faith," which it considered comparable to the portion of the above requested instruction on good faith. Therefore, we understand Union to complain only of the trial court's failure to submit the portion of the above instruction on trade usage.

In addition, under Louisiana law,[17] Union's claim against Enron for tortious interference with the Union/Authority contract is precluded.[18] Moreover, Louisiana law does not recognize an independent cause of action for civil conspiracy.[19] Therefore, because Enron cannot be found to have tortiously interfered with the Union/Authority contract under Louisiana law, it cannot be found liable for conspiring to interfere with that contract.[20] Accordingly, Union's brief fails to demonstrate that the trial court's refusal to submit its proposed instruction on trade usage, even if erroneous, probably caused rendition of an improper judgment. Therefore, Union's second issue presented is overruled.

Evidentiary Rulings

Union's fourth through seventh issues presented complain of evidentiary rulings. Union first asserts that the trial court abused its discretion by admitting evidence of "bad acts" by Union and the city's utilities director, A.E. Craig, because such actions were unrelated to the termination of the Union/Authority contract. These alleged bad acts include: (1) a bribe by a former Union employee to the Alexandria city attorney; (2) Craig's trips to Las Vegas with the father of Union's Louisiana agent, who had no relation to the city or the Authority; (3) payments by Union to a city gas department employee, who did part-time work for Union; (4) an impropriety in selecting Union's 1988 bid over a competitor's lower bid; and (5)

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[17] The trial court's application of Louisiana law to Union's tort claims was upheld in the preceding section.

[18] Under Louisiana law, tortious interference is limited in its scope and application to interference by a corporate officer with his employer's corporate contract with a third person. *See Belle Pass Terminal, Inc. v. Jolin, Inc.*, 618 So. 2d 1076, 1080 (La. App. 1st Cir.) (citing *Great Southwest Fire Ins. Co. v. CNA Ins. Cos.*, 557 So. 2d 966, 969 (La. 1990)), *writ denied*, 626 So. 2d 1172 (La. 1993); *Spencer-Wallington, Inc. v. Service Merchandise, Inc.*, 562 So. 2d 1060, 1063 (La. App. 1st Cir.), *writ denied*, 567 So. 2d 109 (La. 1990).

[19] *See Jefferson v. Lead Indus. Ass'n,* 930 F. Supp. 241, 247 (E.D. La. 1996), *aff'd*, 106 F.3d 1245 (5th Cir. 1997); *Clark v. America's Favorite Chicken Co.*, 916 F. Supp. 586, 596 (E.D. La. 1996), *aff'd*, 110 F.3d 295 (5th Cir. 1997); *see also* LA. CIV. CODE ANN. art. 2324 (West. 1997); *Junior Money Bags, Ltd. v. Segal*, 798 F. Supp. 375, 379-80 (E.D. La. 1990) ("The cause of action is not the conspiracy itself but rather the tort the alleged conspirators agreed to perpetrate and which they committed in whole or in part."), *aff'd*, 970 F.2d 1 (5th Cir. 1992); *Butz v. Lynch*, 710 So. 2d 1171, 1174 (La. App. 1st Cir.), *writ denied*, 721 So. 2d 473 (La. 1998).

[20] *See Jefferson*, 930 F. Supp. at 248; *Clark*, 916 F. Supp. at 596.

Craig's refusal to sign his deposition transcript for Fifth Amendment reasons. Union contends that such acts destroyed the credibility of its witnesses on whom the success of establishing its claims was dependent. Union also complains of the trial court's evidentiary rulings in: (1) admitting testimony of the Mayor, the city attorney, and the Authority's legal advisor that Enron had not committed any acts of tortious interference or conspiracy; (2) excluding testimony that the Authority's and Pelican's representatives had been told by the persons who had negotiated the Union/Authority contract that it was not terminable at any time on 90-days' notice; and (3) the exclusion of the telephone log of Pelican's Vice President, which refers to a telephone conversation in which Ducote purportedly breached the Union/LGM contract's confidentiality provision by disclosing Union's gas prices to Pelican.

The admission or exclusion of evidence is reviewed for abuse of discretion. *See City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). However, as noted previously, a judgment may not be reversed unless the error complained of probably caused rendition of an improper judgment or prevented the appellant from making a proper presentation of the case to the appellate court. *See* TEX. R. APP. P. 44.1. In this case, Union contends that the alleged errors in evidentiary rulings were prejudicial only with regard to its obtaining additional liability findings, but not with regard to the award of damages. As with Union's first two issues presented, Union has not demonstrated that it was harmed by any error prejudicing only additional liability findings but not the award of damages. Accordingly, Union's fourth through seventh issues presented are overruled.

Enron's Cross Points

Application of Oklahoma Law to the Union/LGM Contract

Joined with its fourth reply point, concerning the trial court's refusal to submit Union's trade usage instruction, Enron also asserts its first cross point, that the trial court erred in concluding that Oklahoma law applied to the Union/LGM contract. However, in the manner that these two independent contentions are presented together rather than separately, and in that Enron complains of the application of Oklahoma law only to the extent it could support submission of Union's proposed instruction on good faith accompanying

its trade usage instruction,[21] we interpret Enron's first cross point to be asserted in the alternative, *i.e.*, only in the event Enron did not prevail on its reply point. Therefore, because we have overruled Union's complaint regarding the failure to submit its trade usage instruction, we do not reach Enron's first cross point.

Evidentiary Rulings

Enron's second cross point claims that the trial court abused its discretion in admitting an exhibit containing handwritten notes from a telephone conversation in which Union alleges that Ducote disclosed information to Adley concerning the price Union was paying LGM for gas under the Union/LGM contract.

Enron objected to admission of the exhibit on the basis of hearsay and that it had not been proven up as a business record to establish that hearsay exception.[22] Enron contends this exhibit is the only evidence supporting the jury's finding that Enron breached the Union/LGM contract by disclosing confidential information because Ducote denied disclosing the price, and Adley could not testify that the price information he received had come from Ducote.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *See* TEX. R. EVID. 801(d). Thus, a statement is not hearsay if it is offered for a purpose other than to prove the truth of the matter asserted. *See McCraw v. Maris*, 828 S.W.2d 756, 757 (Tex. 1992). Therefore, if the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. *See* FED. R. EVID. 801(c) advisory committee notes.

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[21] *See supra* note 16. Despite the trial court's application of Oklahoma law, Enron's brief asserts that the good faith instruction actually submitted to the jury was proper, regardless whether the law of Oklahoma, Louisiana, or Texas was applied.

[22] In particular, Enron asserts that the business records affidavit Union used with this exhibit was generic and not specific to this or any other particular document. In addition, Enron contends that Adley could not say what portion of the information in the notes came from Ducote and did not specifically recall having the conversation with Ducote which is memorialized by the notes. However, Adley acknowledged that he had written the notes on September 23, 1993, the date that appears on the exhibit, and that he had spoken to Ducote by telephone that day. Adley also "assume[d that] it was from Mr. Ducote" that he received the information regarding the amount Union had been paying Enron.

In this case, because Enron challenges the notes only as being offered to prove that the statements in them were made, and not for the truth of those statements, Enron has not established that the statements in the notes were hearsay or that the trial court erred in admitting the notes over Enron's hearsay objection. Accordingly, Enron's second cross point is overruled.

Legal Sufficiency of the Evidence

Breach of Contract

Enron's third cross point argues that there is no evidence to support the jury's finding in Question 1 that LGM failed to comply with the Union/LGM contract, either on the theory that LGM violated an implied duty by responding to the city's invitation to bid or that LGM breached a confidentiality provision of the contract by revealing the LGM/Union sales price to the city. However, Enron's challenge pertaining to the confidentiality provision is premised solely on the inadmissibility of the Adley telephone notes discussed above in Enron's second cross point. Because Enron failed to demonstrate the inadmissibility of the notes, its challenge to the legal sufficiency of the evidence without those notes likewise fails. Therefore, Enron's third cross point is overruled.

Waiver

Enron's fourth cross point contends that there is no evidence to support the jury's failure to find that Union waived any failure by LGM to comply with the Union/LGM contract.

To overcome an adverse finding on an issue on which the complaining party had the burden of proof, the party must demonstrate that the opposite finding was established as a matter of law. *See Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989). In considering such a challenge, we: (1) examine the record for evidence that supports the jury's finding while ignoring all evidence to the contrary; and (2) if there is none, examine the entire record to see if the contrary proposition is established as a matter of law. *See id.*

In this case, the instruction to the jury on waiver, which neither party challenges on appeal, states that "waiver is an intentional relinquishment of a known right or intentional conduct inconsistent with claiming

the right." Enron maintains that Union waived the confidentiality provision of the Union/LGM contract by faxing a copy of the 1989 Union/LGM contract to the city in 1989.[23]

The 1989 Union/LGM contract was a predecessor contract to the 1990 version that Union alleges LGM breached, and the 1989 contract was terminated in 1989, four years before the alleged breach of the 1990 contract. Moreover, Enron cites no evidence that Union (or anyone else) ever disclosed to the city that the price reflected in the 1989 contract was the same as that specified in the 1990 contract. Under these circumstances, even if Union's disclosure of the 1989 contract to the city in 1989 should properly have been admitted into evidence, which we do not address, that evidence would, at most, have created a fact issue as to whether Union waived the confidentiality provision in the subsequent Union/LGM contract, but would not have established that fact as a matter of law. Therefore, Enron's fourth cross point is overruled, and the judgment of the trial court is affirmed.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed April 6, 2000.
Panel consists of Justices Amidei, Edelman, and Wittig (Justice Wittig concurs in the result only).
Do Not Publish — TEX. R. APP. P. 47.3(b).

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[23] The trial court excluded this contract as well as testimony by the city attorney that he had seen a copy of it in the City's files. Without separately challenging the exclusion of this evidence, Enron contends that this evidence established waiver as a matter of law and, with it, the legal insufficiency of the evidence supporting the jury's failure to find waiver.