ORAL ARGUMENT – 10/09/02
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TANA OIL & GAS V. MCCALL

HOBLIT: I would like to emphasize two points. First of all, the respondent's underlying lawsuit was for the recovery of attorney's fees as their sole measure of damages. There has been some effort in this appeal to recast that damage element as some sort of lost profits.

HECHT: It's not exactly attorney's fees is it? Isn't it lost time?

HOBLIT: The respondents have made an effort to say that it's some sort of lost profits measure. And the way you measure that is their lost time. But if you look at the pleadings, if you look at their discovery answers, if you look at their stipulations in the record both in deposition and before the court, it is very clear and as the CA said, it is undisputed that what they are really trying to recover here are their attorney's fees from defending a separate lawsuit that they allege was frivolous.

HECHT: There is some indication in the record they didn't pay any attorney fees.

HOBLIT: It was a little bit confusing. In the Nueces county suit, not only did they represent themselves but they also represented the Niemeyer defendants. In the Travis county case they made a claim for all of those damages. To me the record is a little bit confusing, but their claim is for the recovery of attorney's fees.

The other point is, that the Nueces suit filed by my clients has never been adjudicated. It is abated. There was never any finding by the DC judge or the CA's when they attempted to abate this on several occasions or anyone that the allegations were frivolous. And in fact, we have now over the court of the litigation and as a result of favorable jury verdict and judgment on behalf of petitioners in Fayette county, we nonsuited the claims against the respondents in this case. So there was never an adjudication of those claims.

The respondents are attempting to do something in this case that I submit is unprecedented in the State of Texas. They want to recover the attorney's fees that they incurred in defending what they allege to be a frivolous suit in another venue.

PHILLIPS: But the suit against the attorneys in this situation is almost unprecedented too.

HOBLIT: It is unusual and unprecedented. The courts in and this court has noted that the general rule in Texas and the US is is that the recovery of attorney's fees as a damage element is not allowed unless allowed by statute or by contract. I recognize that there are exceptions to that

rule, but in reading the exceptions that have been allowed in both this state and across the nation, I note that they typically are allowed 1) typically in the suit in which they were incurred; and 2) the courts emphasize relationships among the parties. For example, you see attorney's fees being allowed to be recovered in a debtor/creditor situation where there is unequal bargaining power, or between an insured and insurer in bad faith litigation where there's perhaps unequal bargaining power. You also see exceptions when constitutional issues are involved, or when there's an interpretation of a statute. But as the Houston CA said in the Detenbech case in 1994, the proper remedy for a party seeking compensation for damages as a result of a bad faith litigation is to seek rule 13 sanctions in the subject action. A separate lawsuit is inappropriate.

And this has been tried before. In Martin v. Trevino in the Corpus Christi CA, Judge Paul _____ writing for the majority held that bad faith tactics or bad faith litigation or litigation brought in bad faith is not actionable. Just as this court held as early as 1885 your remedy is in the court. And that's my point. The respondents had a remedy in this case. And not only in law but in statute. They could have under rule 13 or under the Civ. Pract & Rem Code §10.04 brought a motion for sanctions and asked for their attorney's fees if the court found it to be frivolous. And I believe the record will show that while they pled that the allegations against them were frivolous, they never pursued that avenue. At no time in the two years that that case was pending did the DC ever rule that the allegations against the respondents was frivolous or make any finding.

HECHT: You say that case is still pending, so these issues could be raised still.

HOBLIT: No. The allegations, the causes of action against the respondents in this case have long since been nonsuited. The case against John Niemeyer was abated. The lawsuit in Fayette county that started all this was tried to a jury verdict in 2000 in favor of the petitioners in this case.

ENOCH: But the court still has the jurisdiction in Nueces county to hear their complaints, because their nonsuit was interlocutory and the case is still pending, so the court will still have jurisdiction to hear their complaint.

HOBLIT: I don't dispute that. They could have availed themselves of a directed verdict or a motion to dismiss for failure to state a cause of action or try the case to a jury verdict. They chose to do none of that. What they chose to do instead was file a separate suit in Travis county.

Imagine the potential for abuse if this situation is allowed to exist and the CA's opinion is allowed to stand. You could foresee a situation where a resident of Hidalgo county is in Potter county in Amarillo and has a car wreck. He goes back to McAllen, discovers that he's been sued in a negligence case in Potter county. He believes that action is frivolous. And not only does he believe it's frivolous, it's taking away from his ability to either run his business or pursue his perspective economic advantages. So what does he do? Rather than go to Potter county and file a rule 13 motion for sanctions, or a motion for sanctions under the Civ. Pract & Rem Code, he files suit in Hidalgo county and ask a Hidalgo county jury or judge to opine on whether the Amarillo case has any merit. And I think this is what the courts of this state have tried to avoid. And there have

been many opinions, and the court talks about vexatious litigation and it has been very careful to craft the exceptions on when you can sue. And the common law in this case has a remedy.

ENOCH: Except in your case you concede that they can bring these claims in Nueces county because the case isn't filed. But you didn't nonsuit it. So you no longer have got _____ case. So how do they then vindicate whatever they claim, they were brought in and it was frivolous and all that, but there's not a lawsuit pending against you now. That's been disposed of. Why can't they go to some court and say we want to make a determination whether or not it's frivolous.

HOBLIT: Well they had two years to pursue that before it was abated and they did not. And the courts, I submit, ought to look at the law on malicious prosecution. Because the courts have been very careful to stick to the strict elements of a malicious prosecution case and not let courts water those down. And under that high burden of a malicious prosecution case where you have an outcome in favor of the plaintiff and you have special damages those are ascertainable things. Was the outcome of the litigation in favor of the plaintiff? Do they have special damages? Under those limited circumstances this court, for example in Texas Beef Cow held we will allow a malicious prosecution claim because we have some security that these elements are finite and able to be ascertained. But when you just go to another venue and allege that a litigation in another court was frivolous when that court never opined on that, and of course the legislature and the SC has said, by the way that's where you need to go to do it, I think there's a great potential for abuse.

The other problem in this case is that they had no actual damages. And as this court held recently in the Gulf States opinion earlier this year, not only did this court reaffirm the general rule that you don't allow attorney's fees except by statute or by contract, you also cannot recover attorney's fees without actual damages. And this is a situation again where the respondents had no actual damages other than the attorney's fees that they were seeking.

I have provided the court with a time line that shows the progression of the Fayette county suit that started this litigation and then the filing of the case in Nueces county and how it was handled in various interlocutory appeals. And then also the resolution of the case before the court.

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RESPONDENT

MONTS: The American rule, the traditional rule that you don't get to recover your attorney's fees unless there's a contract or a statute is really not under attack in this case. You don't even have to go there. This case is about tortuous interference with contracts. And that's a well recognized principle of law, cause of action that I believe J. Hecht wrote in the WalMart case that was first upheld in 1891 in the state of Texas.

ENOCH: I don't understand what is the underlying contract that's been tortuously interfered with for which you claim you are entitled to damages.

MONTS: Tom and David McCall, were hired by John Niemeyer to file a lawsuit for underpayment of royalty. They act in a representative capacity under a contract. They are hired to represent their client. They file a lawsuit in Fayette County Texas for underpayment of royalty. The defendants, Tana Oil & Gas and Robert Rowling, in response to that they go after Tom and David McCall, the attorneys. They sue them individually in Nueces County claiming that the filing of the suit tortuously interfered with a pending sale that Tana had of some oil and gas properties. They sue them for $35 million. They allege in addition abuse of process. They allege a number of things that are in the records through amended pleadings.

Now over the next several years starting in 1995, the McCalls, with my assistance, we spent hundreds of thousands of dollars of time, hundreds of thousands of hours fighting the lawsuit against Tom and David McCall. So really what you're talking about here today is, as the SC of Texas what are you going to do when litigants say it's a good idea to go after the other side's lawyers?

ENOCH: So Niemeyer then fired their lawyers.

MONTS: They did not.

ENOCH: Niemeyer's lawyers were then disqualified from representing Niemeyer?

MONTS: They were not disqualified.

ENOCH: So what contract was terminated as a result of this interference?

MONTS: The tortuous interference does not necessarily require the termination of the contract. It simply requires that the performance be retarded, impeded or in some way made more difficult. Suffice it to say what Tom and David McCall had to endure over those several years in continuing to represent their client, and extricating themselves personally from that very litigation where they had been attacked was an interference with their ability to perform their attorney/client contract for Mr. Niemeyer.

HECHT: That's the part I'm having trouble with. Because if they had gotten sued by City Bank for not paying their bills or something unrelated to any of this litigation, and it took the same amount of time and the same amount of energy away from their other work it would have had the same effect on the Fayette county case. Why is this effect unique?

MONTS: I don't know that the effect would be the same. I agree with you that we all live lives and we all have problems, and when we represent clients other things come up that make our jobs more difficult. But I think you have to look at the directness of the attack here. You have to understand from the record in this case that Tana and Rowling, not only did they file the lawsuit for damages against the McCalls, a lot happened. If you look at the exhibits you will see we didn't just go lightly in Nueces county. That time line will show yo, we fought like mad for several years

to finally get that case abated. But it did not stop there. The record shows in this case that Tom McCall filed for bankruptcy after he had been sued. And I guess because of the automatic stay they chose to nonsuit him. At some point Tana and Mr. Rowling obtained bankruptcy counsel and went after him in his personal bankruptcy action objecting to his confirmation of his ch. 13. They notified his creditors that they were suing him for $35 million. They even contacted one of the firm's good clients and there's a letter in the record saying, Please terminate your services with McCall firm because we think there's a conflict.

ENOCH: But you didn't incur any - I mean you had to fight their lawsuit that was suing you as defendants and keep them from suing you as defendants. But you didn't incur any expenses with respect to Niemeyer's threatening to cancel your contract, or Niemeyer requiring you to put down some additional consideration to keep the contract. I saw nothing here that said your contract with Niemeyer was interfered with. What I saw here was you got upset that you were having to defend in this lawsuit because you were representing Niemeyer. But I didn't see any indication that Niemeyer was threatening to cancel your contract or Niemeyer was requiring you to put in some additional consideration to maintain the contract. I just didn't see anything that your relationship with Niemeyer was causing you to incur additional expense.

MONTS: Part of the reason for that is that the record at the trial in Travis county is very brief. In fact, I was in the middle of my first witness when the trial judge granted the directed verdict. So we really didn't get very far into the record. I made a bill of exception to sort of provide the appellate courts with some idea. We didn't get that far into it. So this court doesn't really have the benefit in the record of everything that happened. But suffice it to say that the proof at trial, and I think the limited proof in the bill of exception shows that the testimony and the evidence was that the lawsuit against the attorneys themselves did impede, did affect and impair the McCall's ability to represent Mr. Niemeyer. In fact that is the reason that I was brought in for assistance because it was a difficult burden and task.

HECHT: But how would it have interfered anymore than anybody else suing the McCalls?

MONTS: Because it went directly to the heart of their representation of their client. If City Bank sues Mr. McCall for not paying his credit card bill, that does not directly have any impact on the lawsuit for Mr. Niemeyer. Likewise, City Bank obviously did not sue Mr. McCall because he chose to represent John Niemeyer in a suit against Tana and Mr. Rowling.

HECHT: Any of those third party suits would take time away from representing the Niemeyers in Fayette county. And you're saying well this took time away from that, this made that harder, but any lawsuit would have done that.

MONTS: The point I would like to make to the court is it seems the court has pegged this case as a challenge to the American rule, that is now we're going to have every lawyer in the state filing a tort action saying, you know, I can get my attorney's fees. And we all know that's not

the rule in Texas. We're sort of in a situation with tortuous interference where it's almost a contract tort. The remedies for tortuous interference include the damages that were sustained as a result of the interference. That is, what costs, what burdens were caused due to the interference.

We've found a couple of cases. First of all under the Stuessy case, the Austin CA has recognized that the attorney/client contract can be interfered with. We're not special. Our contracts can be interfered with, and the courts have recognized that. In fact, former Justice Gonzalez wrote in State Farm, 987 S.W.2d 625 in his concurring opinion that he believed that an attorney may state a claim for tortuous interference with the attorney/client relationship. And he cites some authority from other states. I don't think that's really the issue whether or not a lawyer's contract can be interfered with. I think it is a factual determination for a jury to decide whether or not that has occurred. And that's where we find this case procedurally.

OWEN: Would you address his arguments that we ought to look at malicious prosecution or the existing avenues for sanctions in lieu of a tortuous interference _____?

MONTS: I believe that's an argument in their brief is that our exclusive remedy as lawyers, if in fact our contract has been interfered with or if we've been sued frivolously, then we go back to the court where they file suit, we seek sanctions under either §9, §10 of the civil practice code, or under rule 13. And that that is somehow our exclusive remedy.

ENOCH: I'm just trying to figure out what it is that you're claiming your damages are. Aren't your damages really for having had to defend a frivolous lawsuit?

MONTS: The impact of that is the same. I will agree with you that we could seek those types of sanctions under rule 13 or the other ones. The McCalls would have that option to do that.

ENOCH: But your damages stem from a frivolous lawsuit being filed against you. They don't stem from Niemeyers demand on you to kick in additional consideration or to take on some other burden for Niemeyer to represent him because you yourselves got sued by Tana.

MONTS: I think the evidence at trial would have developed that it was a contingency fee contract with Mr. Niemeyer and that expenses were being advanced in addition and that substantial sums of money were advanced to deal with this side lawsuit against the lawyers themselves. This issue remains to be tried.

In our brief on page 2, we point out that in our supplemental pleading the one cause of action that is to be retried at this point in Travis county is on tortuous interference. And in the prayer for damages the McCalls allege that they have suffered damages greatly in excess of the minimum jurisdictional limits of this honorable court for which sums they now sue. That is the nature of the pleadings in the case at this point.

HECHT: But you told the trial judge and the jury repeatedly that all you were after was

the value of the lost time, the value of your time and the McCalls' expenses and your expenses.

MONTS: That is what we told the jury in that original trial. Obviously we're dealing in an area that's a little bit unusual. I think this court - we're having to grapple with some unusual facts where the lawyers themselves are sued in this way. But I will say that tortuous interference law does not limit our damages to that...

HECHT: But that was your claim though.

MONTS: That was the strategy that we did follow at that point. That was where we were going. You're right. But on retrial with some guidance from the appellate courts, we have every right to pursue different damages.

HECHT: No question about that. But our concern is was the judge right in ruling on this claim, which was limited to these damages.

MONTS: We didn't get our case on. So we really didn't get through our case. I did make statements to the court, to the jury that we were not asking for mental anguish. I think that may have been what I told the jury that we were seeking just the value of the time that was lost. But again, on retrial that could be addressed and handled in different ways and we don't necessarily have to attack the American rule and go around it. Even though I do think that Justice Powers was right and this is one of those egregous type cases where there needs to be some remedy.

OWEN: Would you address my question about remedy could be either malicious prosecution or a sanction for frivolous...

MONTS: We did assert claims for malicious prosecution and abuse of process. Summary judgment was granted and was upheld on appeal. Malicious prosecution. I've had some experience with what we know as slap suits. They are difficult causes of action. Malicious prosecution as we know requires the special injury rule, severely restricts the ability to recover. The abuse of process is a difficult cause of action. It typically requires you to literally use the process for some purpose it's not intended. The CA found that the facts in this case did not fit into those elements and they simply did not work to provide a remedy.

OWEN: What about frivolous. If it's a frivolous lawsuit you would be entitled to sanctions.

MONTS: I think anytime a frivolous lawsuit is filed, I believe that you do have that remedy. You can seek rule 13 or whatever other remedies are available. You can do that in the TC. The TC, the judge has the discretion to act as a fact finder and impose sanctions under an abuse of discretion standard. That's the standard on appeal. But I would submit to the court that that is not the same thing that if I also have a valid cause of action for tortuous interference, I have a right under the open courts provision as a citizen, as an injured litigant to have my case heard in a full blown jury

trial. And to have the evidentiary findings in that case reviewed under those standards on appeal. It's very different from a sanction. And I think we all know that typically sanctions are used fairly sparingly, at least in my experience. And to go to a TC and ask for sanctions in the form of lost time of $600,000 plus, plus expenses, I think would be a fairly unusual request. But yes, that is something the McCalls could have availed themselves of but it was not the exclusive remedy available to them.

It seems to me that the petitioners are suggesting that because we are lawyers assuming that our contract is interfered with through a frivolous malicious type case, that our only remedy is to go to the judge where they filed the suit and ask for sanctions. That seems to be their argument. I don't know what the precedent is for that. I don't know why a lawyer is any different from any other injured litigant.

JEFFERSON: What's the precedent for the position you're taking here?

MONTS: The precedent would be under tortuous interference where as an element of the tortuous interference damages. In other words how the defendant rendered the contract more difficult to perform or impeded its performance. An element of those damages included fees or legal costs. A couple of cases are: Capital Title, 739 S.W.2d 384 (Houston 1st Dist, 87); and in that case they talk about the damages that were introduced into evidence and on which the verdict was based included additional legal costs. Let's say hypothetically that someone interferes with a real estate contract. And it renders the performance of that contract more difficult or it impedes it or delays it in someway, obviously there would have to be accountants involved, there would have to be lawyers involved, there's going to be updated escrow work, title work, things of that nature. Certainly those would be proper elements of damages for tortuous interference.

HECHT: Here's my problem. Just take any defendant - doctor, contractor, business person, or just an employee ran into the back of somebody, and the plaintiff sues and says you better settle this because if you don't your life is going to be hell for a long time, and you're going to incur a lot of expenses, you're going to be put to a lot of trouble, it's going to take you away from your work, the thing to do now is just pay up and give up. No, no, no. I don't think you have a claim. I've got to fight it. Fight it. Fight it. Fight it. And it turns out that that's correct. Then he sues for tortuous interference and says, you did what you threatened to do. You took me away from my business, took me away from my practice, from whatever it was, and I'm out all this money and therefore I want you to pay for it. It seems to me this same kind of situation would apply in almost any kind of suit. Why wouldn't it?

MONTS: I would hope these facts are unusual what happened to these lawyers in this case. I think the more dangerous policy rule is to say to these parties it's okay to do that. It's okay to go after the other sides lawyer, beat them up in court in a venue that you deem to be the best venue for your purposes as long as you can, and then at the last possible moment nonsuit them. And in fact that's what happened here. Tom McCall was nonsuited because of his bankruptcy. They later nonsuited David McCall, years later I think before the appellate argument before the third court. But I think that's a very dangerous precedent in a world where litigation has become increasingly

aggressive to embrace a rule that says that the lawyer who's attacked like that really has no remedy other than to go to that judge for sanctions, not compensatory damages, but sanctions as his exclusive remedy, I think that's a worse rule. I think that's the camels nose under the tent to some even worse abuses.

I think this case should be and is an anomaly. We've been living this for years and years and years. This is an egregious set of facts. It is an unusual set of facts. And all we ask is that this court let this case go back to the DC in Travis county on a trial on the merits for tortuous interference for full whatever damages the law may allow for that. And then this case may come back. It may well be back and then you will have all the record and the evidence and can decide...

HECHT: You're not encouraging us here. It's already been here 3-4 times already.

MONTS: We just want to go back and try the case under tortuous interference. We want to avail ourselves of remedies that are available to the McCalls as citizens, and then let's see what the evidence says. If in fact the McCalls did something, if they really did something wrong, if they really filed the suits for their client and somehow committed a tort, let the jury sort that out. Let that evidence come in, because I've never seen it.

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REBUTTAL

HOBLIT: Allow me to clarify what I think is a misstatement in the record. Respondent said that we sued the respondents because they were attorneys representing the Niemeyers. That is false. The record will reflect that our theory against the respondents was that they exceeded their scope of representation and engaged in a course of conduct that was with the intent of frustrating our sell of $20 million worth of production to Rosewood Resources, and it culminated in filing a suit on the eve of the closing. We were never allowed to litigate that case.

HECHT: It seems a pretty weak theory. It seems like you could make that allegation anytime anyone files a suit.

HOBLIT: Well it was an aggressive position. We researched it. As counsel just said, attorneys are just ordinary people and they are not always cloaked with immunity. There are situations where attorneys can be sued. I don't think it's relevant here, because we're here on the issue of what they can recover, but they were not sued as attorneys representing the Niemeyers. They were sued because they exceeded their scope of representation. We were never allowed to pursue that theory because that case was abated.

ENOCH: Your argument is is that Niemeyer didn't give them the authority to file the ___ lawsuit?

HOBLIT: No. Our argument was that separate from the lawsuit in the summer

preceding the sale of the production to Rosewood they engaged in a course of conduct in an effort to frustrate that sale. It did culminate in the filing of that lawsuit. The Hughes case says the filing of a lawsuit can result in tortuous interference. So that was our theory. We were never allowed to pursue it.

HECHT: Well you gave up at some point. You nonsuited.

HOBLIT: This question I don't think adequately answered that was posed to counsel a minute ago. Why didn't you pursue rule 13 sanctions or sanctions under the civil pract. & rem code? Well $600,000. Excuse me. When this case was first filed, if it was indeed frivolous the fees would not have been $600,000.

HECHT: So many of these arguments cut both ways. If it weren't frivolous you wouldn't nonsuit them either. And it just kind of goes back and forth.

HOBLIT: Well we ultimately did nonsuit. They never pursued that avenue. What they did try to do was get it abated under principles of dominant jurisdiction. At one point they removed it to federal court for which they were sanctioned $25,000 by the TC judge for wrongful removal. They tried to do everything other than go to this court and say, look we believe this is frivolous and under rule 13 of the Civ Pract. & Rem Code we want you to find so and assess attorney's fees.

OWEN: But you have to agree that that's their only remedy under your view, because under our writings they don't have a malicious prosecution case.

HOBLIT: Right. And that's a protection that the court of this state want to afford all parties. It's a very high threshold to reach to a malicious prosecution level and there's reasons for that. I think there is public policy reasons for that.

Their pleadings only allege tortuous interference with one contract. They didn't allege tortuous interference with their business as a whole. It was with the Niemeyer contract. That case was tried to a verdict, which they lost and we never made any effort to disrupt that litigation. We did not try to disqualify them from that litigation at all. We did at one point argue that dominant jurisdiction was in Nueces county because not all parties were in the Fayette county suit. But once we lost that, we stopped and we allowed them to try that case, did not raise the disqualification issue nor did anything else to interfere with that representation.

HANKINSON: What was your cause of action in Nueces county?

HOBLIT: We had had a previous lawsuit with the Niemeyers where we had drilled a well on their land and they had sued us for royalties. A lawyer had messed up a title opinion. And we settled that case. And that was a very litigious and contentious case. And we had a settlement agreement that we believed covered the issues that were ultimately filed in the _____ case a year later on the eve of our settled production to Rosewood. So in Nueces county we sued them for

breach of a settlement agreement. We asked for a declaratory...

HANKINSON: You sued the lawyers for breach of the settlement agreement?

HOBLIT: No.

HANKINSON: What cause of action did you assert against the lawyers?

HOBLIT: Tortuous interference with a contact. The respondents have ceased on this in the CA because they say the petition in Nueces county says defendants breached the contract. When we filed our first petition we outlined the facts of the case. But in our allegations we did just use a global defendants. We soon thereafter amended that petition to segregate out the allegations where we were not alleging that the McCall lawyers breached the settlement agreement.

HANKINSON: So you sued them in Nueces county claiming that by virtue of their representation of their client they tortuously interfered with the contract that your client had, and then they turned around and sued you all for tortuously interfering with their contract with their client?

HOBLIT: Yes, but we didn't sue them for their representation. Our theory was is that their actions exceed the scope of their representation.

HANKINSON: I don't know what legal theory that is. I don't know what cause of action it is that someone who's not - what a third party can do to sue a lawyer and say you're outside your representation. That's not a cause of action as far as I know. What legal theory is it?

HOBLIT: It has nothing to do with them being a lawyer. As individuals tortuous engagement in a course of conduct to interfere with our sale.

HANKINSON: But it's a tortuous interference claim and they were involved in this by virtue of their representation of their clients.

HOBLIT: They were involved because of their prior representation and then we believe they did a course of conduct that exceeded the scope and then interfered with our sale.