CAUSE NO. PR-11-3238-1

IN RE: ESTATE OF MAX D. HOPPER, DECEASED	§	**IN THE PROBATE COURT**
JO N. HOPPER *Plaintiff*,	§	**NO. 1**
v.	§	
JPMORGAN CHASE BANK, N.A. STEPHEN B. HOPPER, and LAURA S. WASSMER, *Defendants*.	§	**DALLAS COUNTY, TEXAS**

PLAINTIFF'S BENCH BRIEF REGARDING ISSUES RAISED IN INFORMAL JURY CHARGE CONFERENCE

Plaintiff Jo N. Hopper ("Mrs. Hopper") files this bench brief regarding issues raised during the informal jury charge conference on September 19, 2017.

I. Broad form versus separate questions under Rule 277 and *Casteel*

In some situations, a broad-form question is appropriate. And in other situations, a question instead should ask separate subparts for different theories. Ms. Hopper's proposed liability questions follow the approach suggested by the PJC, which are (1) broad-form for breach of contract, PJC (Business 2016) 101.2; and (2) separate subparts for breach of fiduciary duty, PJC (Family & Probate) 232.1.

Ordinarily, broad form is proper. Rule 277 provides that "the court shall, whenever feasible, submit the cause upon broad-form questions." Tex. R. Civ. P. 277. The Texas Supreme Court has explained, "The rule unequivocally requires broad-form submission whenever feasible. Unless extraordinary circumstances exist, a court must submit such broad form questions." *Tex. Dep't of Human Servs. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990).

Broad form is not feasible if question mixes a valid theory with one that is legally invalid or not supported by legally insufficient evidence. *Romero v. KPH Consol., Inc*., 166 S.W.3d 212, 227 (Tex. 2005). The Texas Supreme Court held in *Casteel* that "submitting invalid theories of liability in a single broad-form jury question is harmful error when it cannot be determined whether the jury based its verdict on one or more of the invalid theories." *Crown Life Insurance Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000).

The PJC's form questions suggest broad form for breach of contract; but it suggests separate questions when a party alleges breaches of different fiduciary duties. *Compare* PJC (Business 2016) 101.2 (contract) with PJC (Family & Probate) 232.1 (breach of fiduciary duty). The comment to PJC 232.1 explains the committee's reasoning:

> **Broad form submission**. TEX. R. CIV. P. 277 mandates broad-form submission whenever feasible. If there is no dispute about the duties imposed on the personal representative, no issue about the sufficiency of the evidence for any of the duties, and no difference in the damages arising from the breach of each duty, this question may be submitted in broad form with the duties listed in an instruction. Otherwise, the question should be submitted as shown above [with separate answer blanks for each duty].

PJC (Family & Probate) 232.1 cmt. As demonstrated by the arguments at the informal charge conference, the parties strongly dispute whether the Bank owed some of the fiduciary duties in this question. Under the PJC committee's suggestion, it may significantly reduce the risk of a retrial if the court submits the PJC's standard-form question, which uses separate answer blanks for each duty.

II. Breach of fiduciary duty – the Bank's proposed instruction regarding the right to make a declaration.

The Bank has proposed the following instruction, which is both (1) an improper statement of the law, and (2) an improper comment on the weight of the evidence:

> Under Texas law, an independent administrator has a right to have a court make a declaration to direct the independent administrator: (1) to do or abstain from doing

> any particular act in their fiduciary capacity, or (2) to determine any question arising in the administration of the estate. Exercise of this right is not a breach of fiduciary duty.

First, the instruction is incorrect as a matter of law. Section 37.005 does not give an independent administrator absolute immunity from a claim of breach of fiduciary duty if the administrator seeks a court declaration improperly. Instead, it is a jurisdictional-creating statute, which merely provides that various persons "may have a declaration of rights or legal relations in respect to the trust or estate" for particular issues. Tex. Civ. Prac. & Rem. Code § 37.005.

There are various situations where an executor administrator might violate its fiduciary duties by bringing a declaratory judgment action. For instance, an executor might retain her an attorney spouse to bring a frivolous declaratory judgment claims on behalf of the estate in order to funnel attorney fees from the estate to her spouse. Yet the Bank's argument, if accepted, would mean that the executor is completely immune from any claim, including a breach of fiduciary duty, for that conduct. That is simply not what Section 37.005 says.

Second, the instruction is an improper comment on the weight of the evidence. Plaintiff has presented evidence that the Bank breached its fiduciary duty by bringing the declaratory judgment action improperly. The instruction is an improper comment that would place the court's thumb on the scales by improperly suggesting the jury should find in favor of the Bank.

Finally, the Bank can point to no authority in the PJC or Texas cases that support instructing the jury on this issue. If the Bank has a legal challenge to Ms. Hopper's theory, it can raise that legal issue in post-verdict motions and on appeal. It is improper to instruct the jury on it.

III. Proportionate responsibility questions

Section 33 of the Texas Civil Practice and Remedies Code is the proportionate responsibility scheme for "any action based on tort...." Tex. Civ. Prac. & Rem. Code § 33.002. In

this case, the Bank has submitted this issue with regard to Plaintiff's claim of breach of fiduciary duty. There are several issues that should be considered in submitting this question.

A. The predicate question should submit only the persons and legal theories for which there is evidence of a breach of an applicable legal standard.

Chapter 33.003 contains two requirements before a court should submit either person or a legal theory regarding that person as a basis for proportionate responsibility.

1 – There must be legally sufficient evidence of the conduct submitted. "This section does not allow a submission to the jury of a question regarding conduct by any person without sufficient evidence to support the submission." Tex. Civ. Prac. & Rem. Code § 33.003(b).

2 – The conduct must be based on evidence of negligence or other violation of "an applicable legal standard." Section 33.003(a) provides:

> The trier of fact, as to each cause of action asserted, shall determine the percentage of responsibility, stated in whole numbers, for the following persons *with respect to each person's causing or contributing to cause in any way the harm for which recovery of damages is sought, whether by negligent act or omission*, by any defective or unreasonably dangerous product, *by other conduct or activity that violates an applicable legal standard*, or by any combination of these:
>
> (1) each claimant;
> (2) each defendant;
> (3) each settling person; and
> (4) each responsible third party who has been designated under Section 33.004.

Tex. Civ. Prac. & Rem. Code § 33.003(a).

The Bank has suggested that all parties and settling persons should be automatically submitted. But the statute provides for the submission of the responsibility of those persons only if there is evidence that they contributed to the Plaintiff's harm by negligence or "other conduct or activitiy that violates an applicable legal standard."

B. For the submission of a negligence theory, there must be evidence that the submitted person owed a duty to the plaintiff.

To submit a negligence theory as to any potentially responsible party, the Bank must show that that person owed a duty. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex.1990) ("The elements of a negligence cause of action are a duty, a breach of that duty, and damages proximately caused by the breach of duty.").

The Bank properly has not submitted a negligence theory as to Gary Stolbach and Glast, Phillips & Murray because, as attorneys representing other persons, they owed no duty to Ms. Hopper. See Plaintiff's Motion to Strike the Designation of Glast, Phillips & Murry and Gary Stolback as Responsible Third Parties, filed January 5, 2017.

The Bank also has not shown or argued what duty in negligence Stephen Hopper or Laura Wassmer owed Jo Hopper under the circumstances of this case. Absent evidence that establishes a duty, their responsibility for negligence cannot be submitted under Section 33.003(b). Tex. Civ. Prac. & Rem. Code § 33.003(b).

C. For the submission of a theory of participation in breach of fiduciary duty, there must be evidence of participation.

We are not aware of any Texas cases that address the submission of a theory of participation of breach of fiduciary duty as a basis for proportionate responsibility. The standard for submission of a theory – violation of "an applicable legal standard" – is broad. Tex. Civ. Prac. & Rem. Code § 33.003(b).

Regardless, the Bank's proposed instruction about "knowing participation" is improper. Contrary to the Bank's proposed instruction, knowing participation cannot be based on merely "causing" or "contributing" to a breach of duty. Rather, Texas law requires actual *participation* in the breach of duty, such as paying a kickback to an employee who owes a fiduciary duty. *Darocy*

v. Abildtrup, 345 S.W.3d 129, 138 (Tex. App.—Dallas 2011, no pet.) ("A cause of action based on a contribution to a breach of fiduciary duty must involve the defendant's knowing participation in such a breach."); *Kastner v. Jenkens & Gilchrist, P.C.*, 231 S.W.3d 571, 580 (Tex. App.—Dallas 2007, no pet.) ("A cause of action premised on a contribution to a breach of fiduciary duty *must involve the knowing participation* in such a breach.").

Although Ms. Hopper does not concede that there is evidence of any knowing participation, her proposed instruction is in the proper form because it tracks the language of the cases describing this theory. *Darocy*, 345 S.W.3d at 138. ("A claim that a defendant knowingly participated in a breach of fiduciary duty by a third party necessarily hinges on the existence of a fiduciary duty owed by the third party to the plaintiff. In addition to the existence of a fiduciary duty, the plaintiff must show the defendant knew of the fiduciary relationship and was aware of his participation in the third party's breach of its duty."). The Bank provides no support for its instruction, which is not consistent with Texas law.

Finally, there is no evidence to submit this theory as to Ms. Hopper. There is no authority that Ms. Hopper owes a fiduciary duty to herself, and such a legal standard would make no sense. Further, there is no evidence to support such a breach of a duty if even if it did exist.

D. If a person's negligence and "knowing participation" are submitted, they should be submitted separately in both proportionate responsibility questions.

With regard to Gary Stolbach and Glast, Phillips & Murray, the Bank has proposed submitting their responsibility under only a "knowing participation" theory—not negligence. But with regard to Stephen Hopper and Laura Wassmer, it proposes submitting both negligence and "knowing participation." If the Court were to submit the submission of both theories, they should be submitted with separate answer blanks in both questions to help minimize the risk of a new trial.

These theories should be submitted with separate answer blanks because a finding of percentage of responsibility for negligence is likely to have a different effect on the judgment than a finding of percentage of responsibility for participation in breach of fiduciary duty. *See Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942) (holding that, when a third party participates in a breach of a duty of a fiduciary, "such third party becomes a joint tortfeasor with the fiduciary and is liable as such."). If a subpart to the question mixes negligence and "knowing participation," either this court or an appellate court may not be able to determine which theory the jury found, and therefore may not be able to determine the proper judgment award without a new trial.

IV. Breach of contract – materiality instruction

The Bank's proposed instruction on materiality is legally incorrect and improper because materiality is not at issue in this case.

The instruction incorrectly states that, "[a] failure to comply must be material." That is an incorrect statement of the law. Materiality is not an element for most claims of breach of contract; only a showing of breach is required. *Worldwide Asset Purchasing, L.L.C. v. Rent-A-Ctr. E., Inc.*, 290 S.W.3d 554, 561 (Tex. App.—Dallas 2009, no pet.) ("The elements of a claim for breach of contract are: (1) existence of a valid contract; (2) performance or tentative performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damage resulting to the plaintiff from the breach.").

Proof of materiality is required only for claims where a party is seeking certain equitable relief such as rescinding the contract because of a prior material breach by another party. *See, e.g.*, *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 196 (Tex. 2004) ("It is a fundamental principle of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance."). Materiality

was submitted in Mustang Pipeline because "both parties raised the other's material breach as an affirmative defense." *Id*.

The PJC does not suggest using the materiality instruction under the circumstances of this case. PJC 101.2 contains the basic question for breach of contract, which is what Ms. Hopper's proposed charge uses. PJC (Business 2016) 101.2. The comments to this question discuss a possible instruction on materiality only after discussing the unique situation – like Mustang Pipeline – where parties have "competing claims of material breach." PJC (Business 2016) 101.2 cmt. (see comments for "Disjunctive question for competing claims of material breach" and the following comment regarding "Material breach"). The PJC comment regarding material breach only recommends an instruction on materiality "[i]f the parties dispute whether the alleged breach is a material one...." PJC (Business 2016) 101.2 cmt. This claim does not involve competing claims of material breach. Thus, materiality is not at issue. To instruct the jury that materiality is an element of Ms. Hopper's claim would be a legally incorrect instruction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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