



Texas Supreme Court Update

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Oil & Gas Leases: A clause designed to encourage continuous production was ambiguous about how to calculate the permissible interval between the completion of one well and the start of the next and, therefore, its alleged violation could not, as a matter of law, terminate the lessee's rights.

Contract Interpretation: When the written text is not sufficient to resolve an alleged ambiguity, the courts may look to the business objective to be achieved but cannot assume the parties did not intend to contract for an unconventional result.

The dispute in [*Endeavor Energy Resources, L.P. v. Energen Resources Corp.*](#) involved the first-time interpretation of a continuous production clause in an oil and gas lease. The lease provided that it would “terminate as to all non-dedicated acreage any time a subsequent well is not commenced within ...150[] days from the completion of a preceding well.” The troublemaking provision, hereafter referred to as “the accumulated unused days clause,” allowed the lessee “the right to accumulate unused days in any 150-day term ... to extend the next allowed 150-day term between the completion of one well and the drilling of a subsequent well.”

Endeavor timely drilled twelve consecutive wells. Only 114 days lapsed between completion of the eleventh well and beginning drilling for the twelfth well leaving “unused” 36 of the 150 days permitted. In drilling all twelve wells, Endeavor delayed the drilling on the next well by a grand total of 377 days less than the total number of days the lease allowed for completing one well and beginning the next.

The dispute: extension allowed for aggregate of unused days for all wells v. only for unused days in starting immediately preceding well.

But Endeavor delayed the start of the thirteenth well for 320 days after it completed the twelfth. The lessor insisted Endeavor started the thirteenth well too late. The lessor asserted the lease terminated when Endeavor failed to start drilling well thirteen within 186 days after completing well twelve – i.e., the 150 days allowed under the lease plus the 36 days saved from the 150 days allowed between wells eleven and twelve. According to the lessor, the accumulated unused days clause was a use-it-or-lose-it provision under which unused days from the interval between two wells could only be applied to start drilling the next well, not later wells. The lessee, on the other hand, urged the accumulated unused days clause allowed the cumulative total of unused days to be applied to any later well.

Ambiguous provisions cannot, as a matter of law, support the termination of a leasehold interest.

Writing for a unanimous court, Justice Blacklock began his analysis by reviewing familiar interpretive principles designed to ascertain objective intent based on the words used in the larger context of the business activity involved.

If those principles do not resolve the ambiguity, when the instrument affects title to real property, the ambiguity must be resolved against terminating the leasehold unless the language can be given no other interpretation.¹

Against this backdrop, the opinion explores the parties' arguments about the meaning of the accumulated unused days clause and their disagreement over whether its reference to a "150-day term" was simply a label for the maximum period without drilling activity or a specific limitation of the length of each particular term from which unused days may be added to the next period and thereby disallowing the "banking" of unused days from more than one term.

The majority opines on an argument neither party presented.

The opinion notes that neither party urges a "literal" interpretation of the accumulated unused days clause that only allows unused days to be carried over if the previous term was not extended by credit for "unused" days and goes out of its way to "decline" such a "hyper-literal" interpretation. It is difficult to understand this gratuitous declaration as anything but advisory and beyond the supreme court's constitutional mandate.

Addressing the contentions the parties actually advanced, the opinion determines that neither is "unreasonable based on the Lease's operative text alone." Choosing between the parties' competing interpretations was deemed "too close to call" on the basis of fine points like the use of singular rather than plural in reference to the "next term" or that accumulate usually, but not always, means a gradual build up over time.

When ambiguity is too close to call based on text and grammatical niceties, the court looks to extrinsic circumstances like the business objective to be achieved but cannot assume the parties did not intend to contract for "odd results."

Unable to choose a single reasonable interpretation based on text alone, the court looked for assistance from the "extrinsic circumstances" that consider the "business activity sought to be served" while not allowing speculation to supplant the parties' intentions by ignoring that parties may "contract for ... odd results." From this perspective, the opinion notes the objective of the accumulated unused days clause was to assure continuous development. The opinion provides little guidance, however, about when these contradictory rules should be applied or when an interpretation favoring a conventional business objective must yield to the possibility the parties intended to reach an eccentric agreement.

Consistent with its previous recognition that the parties cannot be assumed to have intended the usual or "conventional" arrangement, the court was not impressed with the argument that the deviation of accumulated unused days clause from "form book" language of similar clauses manifested the parties' rejection of the interpretation accorded the language of "standard" forms.

In this case, the general business objective did not aid the court in resolving the narrow issue of whether the objective was to assure an overall average pace of drilling and development or instead limit the gap between completion and drilling of any two successive wells. Both interpretations generally discouraged exploration delays.

Because both interpretations were reasonable, the accumulated unused days clause was construed in a manner supporting continuation of the lease.

The opinion concludes that both parties' interpretation is reasonable, and that the accumulated unused days clause is ambiguous. However, because of the rule that ambiguities cannot be resolved in a way that terminates a lease, the court rendered judgment that Endeavor's lease had not terminated.

Relevant Evidence – Probative Value v. Prejudicial Effect: Representation of an instrument in a manner that conforms to the litigant's view of the evidence is an inherent part of litigation

¹ This rule is internally inconsistent. To apply it, the agreement must be ambiguous – i.e., susceptible of two reasonable but inconsistent interpretations. If so, then how can it ever be true that terminating the lease is the only reasonable interpretation? Perhaps the better statement of the rule would have been that if a provision is ambiguous it must be interpreted so that the lease is not terminated.

and not inherently unfairly prejudicial merely because there is evidence contrary to the litigant's characterization.

Factual Insufficiency – Waiver by Inadequate Briefing: When a factual insufficiency argument is intermingled with those attacking legal sufficiency, the intermingled arguments must be considered when deciding whether the issue was adequately briefed.

The *per curiam* opinion in *Lion Copolymer Holdings, LLC v. Lion Polymers, LLC* addressed whether a trial court abused its discretion in admitting testimony about the basis of a calculation central to the dispute and whether the losing party sufficiently briefed its complaint in the court of appeals that the evidence was factually insufficient to support the jury's verdict.

Admission of evidence characterized having disputed qualities is not unfairly prejudicial.

Under the LLC agreement, the Company, Holdings LLC, was allowed to advance funds for the tax liabilities of member entities, such as Polymers, LLC, and then deduct that advance from later distributions. Polymers urged that the Company improperly took this tax advance deduction twice from its distribution. In support of this assertion, the Polymers cited a February 2012 spreadsheet that showed a double deduction for a tax advance. Holdings LLC conceded the spreadsheet was inaccurate but urged that the error was corrected in later spreadsheets on which the contested distributions were actually based. Over the Company's objection that prejudicial effect outweighed probative value, the trial court allowed Polymers to introduce that the February spreadsheet was, contrary to the Company's contention, the "final" calculation on which the distributions were based.

When factual insufficiency arguments are intermingled with legal insufficiency complaints, the court of appeals must look to the substance of both arguments before holding the factual insufficiency complaint waived by inadequate briefing.

The issue concerning the adequacy of the briefing of a factual insufficiency complaint illustrates the competing mandates on briefing imposed by the rules of appellate procedure. On one hand, briefs must be brief. They are limited by word counts, Tex. R. App. P. 9.4 (i) and a requirement that the argument be "clear *and concise*." Tex. R. App. P. 38.1. On the other hand, briefs must be sufficiently detailed that the appellate court is not called upon to guess about the ruling being attacked or why the party maintains it was erroneous.

In this case, the Company challenged both legal and factual sufficiency of the evidence supporting the verdict which have very different standards of review. In its briefing, the Company "intermingled" its legal and factual sufficiency analysis in the briefing supporting its legal sufficiency analysis. Rather than repeat these arguments under its factual insufficiency issues, the Company's brief asserted only that "[a]lternatively, for these same reasons, the evidence is so weak that it is factually insufficient." The court of appeals deemed this and similarly conclusory assertions to be insufficient and ruled that the Company waived its factual insufficiency points.

The supreme court reversed this ruling because of its strong preference for deciding cases on the merits, not procedure – a preference reflected in the requirement that "briefs must ... 'be liberally, but reasonably, construed so that the right to appeal is not lost by waiver.'" Although separate briefing of each issue is generally preferred, the supreme court recognized that when issues are interrelated the appellate courts must look to the "arguments, evidence and citations" relied on to determine what briefing supports the argument of an issue. Although the opinion does not say so explicitly, it is clear the assertion that the evidence was factually insufficient "for these same reasons" for which the Company asserted legal insufficiency was adequate briefing when the brief was liberally construed to avoid waiver.

The *per curiam* opinion does not mention it, but if the court of appeals could not ascertain the basis of the Company's factual insufficiency challenge, the appropriate remedy would have been to direct re-briefing, not holding the issue waived for insufficient briefing. Nevertheless, the cautionary tale for practitioners is that, in both the trial and appellate courts, the briefing in support of factual insufficiency complaints be separately briefed so the arguments specifically address the differing requirements for deciding factual, as opposed to legal, insufficiency complaints.

Suggesting a spreadsheet represented the basis for calculating the amount distributed was not unfairly prejudicial when the evidentiary dispute revolved around how the distribution was calculated.

The company urged the testimony was obtained by counsel's alleged misrepresentation to the authenticating witness that the February spreadsheet was the "final" calculation of the distribution notwithstanding evidence about later revisions and thereby unfairly misled the jury. The supreme court ruled that admitting testimony that the February spreadsheet was the basis of the ultimate distribution was not unfairly prejudicial despite the contrary evidence. It reasoned the witness's testimony was relevant because it went to whether it was more or less probable the tax advance was deducted from more than one distribution. Merely because it the calculation was characterized as "final" in the face of contradictory evidence was deemed part and parcel of the adversarial system. This inexorable byproduct of that system, without more, did not constitute unfair prejudice when it "addressed the exact wrong [Polymers] complained of."

Factual Insufficiency – Standard of Review When the Burden of Proof is Beyond a Reasonable Doubt: The evidence is factually insufficient to establish a fact beyond a reasonable doubt if, in light of the entire record, the disputed evidence a reasonable factfinder could not have credited in favor of the verdict, along with undisputed facts contrary to the verdict, is so significant that the factfinder could not have found that fact beyond a reasonable doubt.

[*In re Commitment of Jeffery Lee Stoddard*](#) was a proceeding to determine whether a person was subject to post-imprisonment civil commitment as a sexually violent predator under Texas Health & Safety Code chapter 841. The State is burdened to prove beyond a reasonable doubt the person satisfies the statutory criteria for classification as a sexually violent predator ("SVP").

In this case, the court of appeals determined the evidence was factually insufficient to support that determination. In another unanimous decision, the opinion penned by Justice Lehrmann reversed that decision for two reasons. First, the supreme court held the court of appeals applied an incorrect standard of factual sufficiency evidentiary review when the burden of proof is beyond a reasonable doubt. Second, the supreme court disapproved of the reasoning of the court of appeals suggesting that proof of SVP status obliged the State to establish not only the statutory criteria but also that the determination was consistent with the legislature's findings concerning the need for civilly committing SVPs.

The court of appeals majority reviewed the factual sufficiency of the evidence by "weigh[ing] all of the evidence in a neutral light to determine whether the jury's finding 'is factually insufficient or is so against the great weight and preponderance as to be manifestly unjust,'" "shock[] the conscience," or "clearly demonstrate[] bias.'" Under that standard, the court of appeals majority deemed the evidence factually insufficient to show beyond a reasonable doubt Stoddard was "a member of the small group of extremely dangerous sex offenders that require civil commitment because they are likely to engage in future predatory acts." It also observed that Stoddard's criminal history "pale[d] in comparison" to four other cases where the civil commitment had been upheld.

The supreme court disapproved the standard of proof applied by the court of appeals majority because it was not sufficiently deferential to the "factfinder's role" regarding "the extent to which disputed evidence contrary to a finding may be considered." After considering the factual insufficiency standard applicable when the burden of proof is by clear and convincing evidence, the supreme court ruled that evidence is factually insufficient to establish a fact beyond a reasonable doubt only when, in light of the *entire* record, the disputed evidence that a reasonable factfinder could not have credited ... along with the undisputed facts that do not support the finding, is so significant that the factfinder could not have found [the disputed fact] beyond a reasonable doubt. It reasoned the court of appeals majority erroneously decided the evidence was factually insufficient because it "largely failed to apply the required *presumption* in favor of the jury's determinations as to evidentiary weight and credibility." As long as the testimony had probative value, the court of appeals was not at liberty to "ignor[e] the jury's right to determine the requisite weight to be given testimony" of the State's expert by "deem[ing it] insufficiently persuasive." Thus, when the burden of proof is beyond a reasonable doubt, "evidence is factually insufficient if, in light of the entire record, the disputed evidence that a reasonable factfinder could not have credited ... along with the undisputed facts that do not support the finding[] is so

significant that the factfinder could not have found beyond a reasonable doubt that the statutory elements² were met.” The standard enunciated by the supreme court is essentially negative to preserve deference the jury’s evaluation of testimonial weight and witness credibility.

Mandamus to Correct *Ultra Vires* Acts: When a statute only authorizes a State official to determine the existence of the documentation to obtain relief, the official has no authority to independently question the legal validity of documents whose authenticity is unquestioned.

After serving more than twelve years in prison and ten on death row, the capital murder charges against Alfred Dewayne Brown were dismissed because the State withheld material evidence favorable to his defense. Later investigation by a special prosecutor established Brown’s actual innocence. In response to this determination, the trial court replaced its previous order dismissing the charges against Brown for prosecutorial misconduct with one that declared that he was actually innocent of the capital murder charge because clear and convincing evidence established he could not have been present when the crime occurred.

After his release, Brown sought relief under the Tim Cole Act, which compensates those who are determined to have been actually innocent of the charges for which they were incarcerated. Brown’s application satisfied all the statutory requirements for compensation. However, the Comptroller refused Brown’s application by questioning whether the district court had jurisdiction withdraw its initial dismissal order for the suppression of exculpatory evidence and replace it with one that was based on the special prosecutor’s determination that Brown was actually innocent. It was otherwise undisputed that Brown’s application met all statutory criteria for compensation.

In re Alfred Dewayne Brown determined unanimously that the Comptroller abused his discretion by exceeding his authority under the statute. In an opinion penned by Justice Guzman, the Tim Cole Act only authorized the Comptroller to perform purely ministerial acts of determining whether the required verified documentation showed: (1) Brown was incarcerated under Texas law; (2) Brown obtained *habeas corpus* relief; (3) the convicting state court entered an order dismissing the charge for which he was convicted and sentenced which was (4) based on the State attorney’s motion to dismiss for want of credible inculpatory evidence and belief that Brown is actually innocent. The Comptroller’s authority under the Tim Cole Act ended with the ministerial determination whether Brown’s application satisfied these statutory criteria. It did.

Whether the district court had jurisdiction to enter order of dismissal for Brown’s actual innocence was a question for the judiciary, not the Comptroller, to resolve. In going behind the face of the dismissal order in an effort to independently determine its validity, the Comptroller acted without authority. The supreme court rejected the Comptroller’s argument that his office was obligated to “protect[] the public fisc from wrongful payments” by determining whether the supporting documents were “legally valid.” It reasoned although “Legislature could have made such a policy choice, that is not the scheme [it] enacted.”

Family Law: Mandamus may issue to prevent enforcement by criminal contempt for the alleged violation of an ambiguous agreed child conservatorship.

Whether a contempt citation for the violation of a custody order is an abuse of discretion is routine fare for the original jurisdiction of an intermediate appellate court, but fairly unusual for the supreme court. *In re Pamela Janson* is an extraordinary instance of the supreme court addressing this otherwise ordinary topic.

In *Janson*, mother was held in contempt for not taking the daughter to *indoor* soccer practice. Under the custody order, the parents agreed that each could enroll the child in one extra-curricular activity. The agreement recited that the daughter was enrolled in “soccer” at that time. The agreement did not specify that the “soccer” was of the outdoor variety. Under the agreement, the parent with possession was primarily responsible for taking the child to practice and games.

² This statement assumes, of course, that the jury charge correctly submits those elements. As the supreme court has ruled many times, the evidence need only be sufficient to support the jury’s answer to the question actually submitted, not the question that *should* have been submitted.

The agreement also allowed each parent to designate an additional extra-curricular activity but there was no obligation of the other parent to transport the child to any activity additionally designated. After the daughter completed the outdoor soccer season, dad enrolled her in indoor soccer. Mom declined to transport the daughter to this activity. Dad initially relented that Mom was not obliged to do so, but apparently after the ongoing dispute became rancorous, Dad sought to hold Mom in contempt for violating the agreement by urging the agreement that primarily obligated Mom to transport the daughter to “soccer” applied to indoor as well as outdoor soccer. The trial court agreed and held Mom in criminal contempt for violating the agreement.

In a *per curiam* opinion, the supreme court ruled the trial court’s order an abuse of discretion and conditionally granted mandamus relief. The opinion ruled the agreement “cannot support the contempt order because it does not ‘set forth the terms of compliance in clear, specific, and unambiguous terms’” because it only specified that soccer was the enrolled activity at the time of the agreement, but the order did not specify that activity was the same at the time of the alleged violation. It was equally plausible that the parties only agreed with respect to *outdoor* soccer as the “enrolled” activity and that activity – and hence the agreement – did not apply once the outdoor soccer season was over. This ambiguity made the agreement too indefinite to enforce by contempt.