ORAL ARGUMENT – 09/11/02
01-0531
HARRIS COUNTY V. SMITH

HACHEM: The focus of this case is a reversible error standard that's going to apply in this state. And the issue before this court is whether that reversible error standard in this case involving an improperly submitted element of damages unsupported by evidence over objection in a broad-form question constituted reversible error?

I believe the answer to that question is, yes, for three reasons. First, precedent of this court, including Bonney v. San Antonio, which was decided in 1959; second, principles articulated by this court, including the principle that all parties have the right to a jury correctly instructed in the law as well as the open court's provision, which gives people the right to have their grievances addressed; thirdly, because of the prospect of what could happen if this court decided to retract from its principles on this type of error.

O'NEILL: If we agree with your argument wouldn't the logical conclusion be that we would end up with a series of blanks in a jury form as opposed to broad-form submission?

HACHEM: The law has been this way for many years. In 1959, when the Bonney decision was decided...

O'NEILL: Which was before our broad-form submission rule that mandates...

HACHEM: That's correct. In fact the reversible error rule is the focus here, not whether we just had a new rule about whether you do broad-form submission. Because that reversible error standard has been the same past the time that we had broad-form submission. It's been the law all along. We haven't had a problem and yet now it's being urged at least it has since 1992 in an article by Garcinio(?), that maybe this is going to have some effect. I think he didn't really do the more stringent review that the Baylor law review did in deciding what was reversible error standard in Texas with respect to this type of error.

O'NEILL: Well Garciano(?) took the same position that the US SC has taken didn't he?

HACHEM: The US SC took that position in a criminal case applying federal common law. And in our state we have a rule, 44.1. That rule has been the same since 1941 essentially. It has two components. One of those components is that you find that there was error where probably causing rendition in a proper judgment; and a second component which was cited by this court in the Casteel opinion, is the component that it probably prevented the appellant from properly presenting their case to the CA...

O'NEILL: We can say that on legal theories. I think that on this charge, we have the jury

instructed to consider each element of damages individually if any and not to blend the elements. So isn't that a distinction that what you're really arguing is possibly harm rather than probably. You're presenting the jury did not follow those instructions?

HACHEM: The jury was told to consider each of the elements, including one which should have not have been submitted. There's no question it should not have been submitted.

O'NEILL: Doesn't "if any" take care of that?

HACHEM: You know what the court in Bonney said, what this court said in 1959. This is what it said happens when you have a jury instructed to consider that. It says the jury speculates. Now that is something that this court can allow, and then these are the problems that will occur as a result of that.

HANKINSON: You've given us the list of principles in this, and it may be error, but I don't understand how all of this ties to a reversible error analysis. How does it tie into harmful error? It's one thing for it to be error. It's another thing to show that it's harmful error. And I don't understand how the various things that you're talking about lead to the conclusion that this is harmful error.

HACHEM: Well this court has long recognized that it's harmful when a party tries to get an instruction where it's properly instructing them on something they can do in the case. In this case awarding damages. And they are being told to consider something that they legally should not be told that they can consider. We don't know if the jury considered it or not.

HANKINSON: But that's error. That's not the harmful error standard. My question to you is, which I think is a follow up to what J. O'Neill was asking was, how do you get over the hurdle in terms of the probably caused harm that's required under the reversible error standard?

HACHEM: Well the standard that this court cited in Casteel was subpart 2. Which _____ it probably prevents the appellant from properly presenting their case. And that's harmful.

HANKINSON: What is wrong with the CA's analysis? The CA in this case agreed with you as to your argument on two of the three no evidence points that you raised. But then it proceeded, and so it was error to submit those, but then it proceeded to perform a traditional harmful error analysis. What is wrong with the analysis that the CA applied?

HACHEM: I would disagree that it's traditional for this court, because this court in the Bonney case decided in 1959, which is 20 years after this court adopted its standard...

HANKINSON: But tell me what's wrong - looking at the analysis that they performed, they reviewed the charge in its totality, they reviewed the evidence in the totality, they went through everything under the approach to looking at harmful error in a jury charge that this court has said needs to be followed. What was wrong with that analysis?

HACHEM: What's wrong with that analysis is that it does not take into account the fact that the jury was - we don't know that the jury didn't consider it. It does not take that into account.

HANKINSON: That's a possibility. That's not probability.

HACHEM: Well that was just the same possibility that was in Casteel. That was the same possibility in Bonney. And in those cases the court found it was reversible error. This court found harm.

HANKINSON: And Casteel has been subject to comment that we in fact changed the law with respect to that type of a charge that in fact that was a change.

HACHEM: I disagree with that, because subpart 2 clearly envisions a 44.1(a). Clearly envisions this court looking at the fact that this is a type of error where the appellant probably was prevented from being able to show just how much harm was involved.

HANKINSON: I don't see in the analysis applied by the CA here that you can show that there was probably harm.

HACHEM: When a jury is being told that they can consider something, and you don't know if they did consider it, the fact that they may have considered other elements of damages does not give us comfort that they weren't able to find it on a proper basis.

HANKINSON: So you're asking us to say that under these circumstances it's per se harm. That if in fact the charge is submitted to the jury and contains an element of damage for which there is no evidence, even with the appropriate conditioning instruction in any language that it is always harm, and, therefore, must always be reversed?

HACHEM: There may be situations like in the Boatlan(?) case or some other case where you have a situation where you can show in the charge itself that it wasn't harm...

HANKINSON: Give me one of those circumstances.

HACHEM: In the Boatlan(?) case, you had several questions. And the question that was given that was harmful was basically nullified by the jury's answer to another question that was in the same charge.

HANKINSON: But in a broad-form damage submission as was submitted in this case, when would you ever have a case where it would not be harmful error?

HACHEM: I guess the only case would be where the damages were proven conclusively as to certain damage elements.

HANKINSON: If we had one element included for which there was not any evidence.

HACHEM: Right. But what I'm saying is if the other elements were proved conclusively as a matter of law, that would be a circumstance where you couldn't prove.

HANKINSON: I don't understand that.

HACHEM: If for example, you had a situation where you found liability and the question asked for say medical expenses only. The jury came out with an amount. It was exactly the amount of the medical expenses, and they are entitled to it as a matter of law, then...

HANKINSON: No. I'm talking about multiple elements.

HACHEM: I'm saying if the wrong submission was with that.

OWEN: In this case if the jury had filled in the blank $67,000 as opposed to $90,000, would you be arguing for reversal?

HACHEM: Probably not. It wouldn't be as _____ as this case. Well no. Actually I probably still would. Because in this particular case we also had a problem because there was evidence of prior back injuries, so the jury wasn't giving the full amount.

OWEN: But you don't have that issue in front of this court?

HACHEM: I know. But I'm just saying that that's one of the reasons the amount was less than the medical that they probably would have awarded.

ENOCH: If we follow your line of reasoning, does that effectively do away broad-form submission?

HACHEM: No it doesn't, because it's been the law in this state for over 43 years.

ENOCH: You would never know because you could come forward and say, I object. You're submitting the request for damages elements for which there is no evidence. And the trial judge says, I disagree and submits it. The moment you make that objection would not the judge be obligated to then submit special issues to avoid the problem that if he/she is wrong and it goes up on appeal, the whole case comes back; whereas the simple solution is just don't submit broad-form. Put them all out separately and then we go back to special issues.

HACHEM: Certainly a judge could do that. What happens if they don't have review by this court to let them know there's an incentive to do that? There's no disincentive to a party offering proper instructions on damages. You could get a list of different factors where there is no evidence to support it. How is that fair?

JEFFERSON: Could the judge submit that issue separately and have the rest of them submitted broad-form? In other words, submit the issue about which there is a question about whether there's a...

HACHEM: And that would be a solution obviously. And then it would continue to have the fair process there.

O'NEILL: But except, unless the advocate wants to preserve the factual sufficiency challenge. And then it's going to incumbent upon them if they want to raise factual sufficiency in the CA to separate those elements out as well.

HACHEM: Correct.

O'NEILL: So the careful advocate is going to object to each individual element to preserve the factual sufficiency argument on appeal.

HACHEM: Yes. If you're an appellant you probably would ask for that. But then of course I don't think it would be reversible error probably not separating them out.

O'NEILL: But you couldn't review it for factual sufficiency if you're prevented from reviewing an individual element for factual sufficiency unless you pulled it out. So your argument would lead to that result.

HACHEM: Well possibly.

PHILLIPS: In your opening statement you pointed out that this charge was properly objected to. Would your argument be different if there had been no evidence objection at the TC?

HACHEM: If there had not been an objection, I would have nothing to argue. I would have to preserve it...

PHILLIPS: Even though no evidence doesn't have to be...

HACHEM: Well a no evidence point can be brought up after the case obviously. But that's a different error. This case is not about presuming error. It's about presuming harm. It's a totally different issue.

Equal justice under the law will not be furthered in this case if this court changes its traditional analysis in this context.

HANKINSON: If we adopt your approach to this, what would we do with Thomas v. Oldham, which seems to me to be on point in this case and requires us to look at the damage evidence as a whole? Do we have to overrule it?

HACHEM: No. Thomas v. Oldham was a case where we were looking at error. I have error in this case. The court erred in giving an instruction that gave the plaintiff more than they should have had. In Thomas v. Oldham, the error was factual and sufficiency, legal insufficiency. That's different than my case. You had to decide whether there was insufficient evidence to support an element. And the court said, you can only consider it as a whole because the charge was given to them that way even though the jurors made little notations by each. So that's the way the court reviewed it.

ENOCH: So this is a sufficiency question?

HACHEM: No the question is the improperness of submitting this charge with an element that has no evidence. The focus is the error and the court not doing what we asked the court to do with respect to that.

ENOCH: I thought you said that the distinction between this and Oldham was that in Oldham that was a sufficiency question. This is a legal question.

HACHEM: This is a question with respect to the charge. This is a charge error problem.

HANKINSON: But don't you have to fall over into a sufficiency analysis in order to do the harmful error analysis?

HACHEM: I have to first prove that it was error for the court not to do what I requested. True. But the harmful error analysis then goes to whether it was improper for the court to submit it in that manner.

HANKINSON: That's the error analysis, not the harmful error analysis. The harmful error analysis is going to still require you to look as the CA did here in terms of the totality of the evidence to determine whether or not it caused harmful error.

HACHEM: Well I disagree with that because that's not what this court did in Bonney. We would ask the court to reverse.

* * * * * * * * * *

RESPONDENT

PHILLIPS: Counsel, when I was trying these cases generally the person bringing the suit wanted as many different lines as possible of damages. Why did you want it all in one blank?

COLEMAN: Simply following the broad-form rule that in most instances is appropriate to have the broad-form unless there is a special circumstance when you should not do that. It was my attempt to follow that rule in having a broad-form submission.

PHILLIPS: So you weren't worried about their no evidence - if you had thought their no evidence objection had merit you would have consented?

COLEMAN: If I had thought that there was a problem with the evidence, I would have. I thought that there was sufficient evidence to support that issue going before the jury, and the CA disagreed with me.

HECHT: Well but you don't think so now.

COLEMAN: I yield to the will of the first court.

HECHT: I thought you told them that you didn't disagree with that. Is that not right? Did you concede that in the CA?

COLEMAN: I did, and I do today.

OWEN: It seems to me that there was some evidence from which the jury could have concluded that Lynn Smith's ability to work was impaired. The only problem was there was no dollar evidence put on, that there was no dollar amount put on that evidence. So couldn't the jury have speculated saying, even when he played with his kids he had to go to bed for two days, and this did impair his earning capacity. And then on their own come up with some number like they would for mental anguish. Put some dollar amount on all of that evidence that clearly showed he was impaired.

COLEMAN: When you _____ in those terms, I think that was part of my thinking at the time that the charge session was going on in this case. I believe that the evidence at that point in time supported those issues being submitted to the jury.

HANKINSON: If we were to agree with you in this case why wouldn't we have a very large problem in Texas with lawyers deliberately submitting elements that there wasn't evidentiary support on, or they weren't sure about not proving their case, and then being thoroughly protected on appeal, and there being no basis for anyone to ever complain?

COLEMAN: For a couple of reasons. First of all, I think we have to trust lawyers to appropriately present their cases before juries. And secondly, I think that what prevents that is that there still has to be review about whether or not there was sufficient evidence to support and the case still has to stand up on appeal...

JEFFERSON: But practically there is no review in the end. If we adopt your reasoning, then there is no consequence to lawyers submitting and TC's charging the jury with elements on which there is no evidence whatsoever. So the jury is instructed on that. And the jury may possibly award damages based on that element, and yet, what the CA and you are saying is there is no review whatsoever.

COLEMAN: I think also what some of the cases indicate is that we are counting on trial judges to make sure that based upon the evidence that issues that should not make it in front of the jury will not make it in front of the jury.

JEFFERSON: But we have seen case after case, appellate cases, in which the CA say, just like they did here, yes there was error in submitting that, but we can't touch it either because broad-form submission is the rule, or because there are other elements in their mental anguish and others that have no mathematical certainty. Wo we can't tell whether the jury gave money for an element of damage that wasn't presented in the evidence.

COLEMAN: There are occasions in the law where simply you approach an issue in the most efficient manner that you can, and I think that the approach that exist now with the broad-form submission and with the harmful error review is the best that our system can provide at this time.

OWEN: If there hadn't been any evidence of impairment at all, it might be one thing. But I'm struggling with that. Can you help me? Because you thought there was evidence on lost earning capacity, and that's what you argued to the TC. And certainly you did put on a lot of evidence that this gentleman was impaired. So how can we be sure that the jury didn't put dollar damages on lost earning capacity?

COLEMAN: I think we are sure according to the reasoning of the first appeals, and we cannot absolutely be sure. We can not be, but based upon the review of the facts in this case, I think that the evidence and the verdict coincide with one another to the extent that the verdict, even the award amount, still supports the issues that were left validly for the jury to consider.

OWEN: How do we know what the jury plugged in between $90,000 and $67,000, _____ you that you got medical damages up to $67,000? How do we know with any kind of reasonable probability what the jury considered in raising that to $90,000?

COLEMAN: I think we made reasonable inferences from the evidence presented at the TC. And I believe that it was reasonable for an individual such as Lynn Smith, who had been incapacitated for a period of time and the record revealed his pain and that type of thing, that there was sufficient evidence in this particular case to support pain and mental anguish of the additional $27,000.

OWEN: Did you ever put a dollar amount in your arguments to the jury on pain and suffering?

COLEMAN: I am certain that I did.

OWEN: Do you know what it was?

COLEMAN: With 3-1/2 years history, I believe it was $100,000

HECHT: What figure would you think make the CA uncomfortable in trying to decide whether it was harmful or not? $200,000? $300,000? Where do you think the CA would begin to have trouble?

COLEMAN: I'm not sure at what point they would. The argument in the case and the ultimate request from the jury was $380,000. And so they ended at $90,000. So in my mind obviously they were not in an area where they should have been. However, I think that there was basis on the record to even support the $200,000 if a jury had so found based upon the testimony of Dr. Johnston primarily in this case, and Mr. Smith himself.

HECHT: But do you think there's a level where the CA would say, well we just can't tell; we can't tell if they were awarding damages for this improper category?

COLEMAN: I think that there probably is a level. Can I quantify what that level is for you to know. I think what has to take place is a case by case evaluation to determine whether or not those valid issues that remain support the award amount.

HECHT: But how do you think the CA is going to do that when there are noneconomic damages? How are they going to know whether pain and suffering was worth $20,000 something like the jury may have found, or $300,000 like you thought it was, or a different amount?

COLEMAN: I think what has to be applied is somewhat of a reasonableness standard, and the reasonableness standard will allow the appellate court to review, and in those instances where the award amount far exceeds what issues remain. For example, if the only issue that remain was medical _____, and a jury returned a verdict of $90,000, then it might in that situation be unreasonable. And surely if they had returned $200,000 at that point in time, I think that the court could apply the reversible error rule analysis and determine that it probably was - that a jury probably at that point in time as opposed to possibly made a decision based upon an invalid theory.

ENOCH: In fact isn't that what the CA did in this case? Didn't the CA in this case because in making their harm analysis they recognized the problem. They went ahead and looked at the factual and evidentiary sufficiency of the other damages issues, and determined whether there is evidence to support the finding as to those issues, to the court could conclude that the including in an instruction allowing the jury to find damages when there was no evidence and, therefore, it should not have been - the jury had nothing to answer. Before they concluded that was harmless they actually were forced to look at all the other elements for factual and legal sufficiency before they could reach that. So in fact in the harm analysis they just didn't say, well you know it was harmless because there was other evidence. They actually had to do a full evidentiary review of every single damage element that was requested before they could conclude that submitting this one was harmless. So even though there has been a challenge because this was no evidence, they really had to do a complete review of all the evidence. Isn't that what a CA is supposed to do in the face of an evidentiary challenge _____ damages?

COLEMAN: I agree that that's what they are supposed to do. I believe that that's what the first court did in this case, and I think that the decision that they reached was an appropriate decision.

PHILLIPS: There's not as many games to be played with submitting 6 elements of damages separately, because the jury is going to have to add them up back there in the jury room anyway as there are any _____ the charge on liability.

COLEMAN: I think that there is a difference; however, I believe that broad-form is appropriate in most instances. And in those instances when it's not appropriate, I think that we ought to put blanks.

PHILLIPS: Why is it a better brand of justice to have broad-form damage submission? What's the reason we'll say, okay it's worth a little play in the joints as we may have in this case in order to promote this greater good?

COLEMAN: I'm not sure of the rationale or the theory with which supports that.

HECHT: Do you think it would make a difference if the proponent of the issue did not argue to the trial judge that there was evidence to support one of the elements and the trial judge gave it anyway over objection?

COLEMAN: I do not think that there would have been a difference in the result in this case.

HECHT: Even if the proponent of the issue admitted that there was no evidence, would that make a difference? It's in the jury pattern charge. Let's not take a chance. Let's just do it the way the book says. And the judge says, well fine. And the jury will sort out all this out. And they stick it in there with the proponent conceding that there's no evidence.

COLEMAN: If the proponent concedes that there is no evidence, I believe it inappropriate for the TC at that point in time to submit such an issue to the jury.

HECHT: But if he does it, then is it reversible without a showing of harm?

COLEMAN: I believe that the reversible error analysis is still appropriate even in that situation.

It appears that what is being suggested to this court is that we do away with in part broad-form jury submission. And impart the reversible error analysis. I believe that those are both valid propositions that should remain in the law. I think that to the extent that cases such as Iron Mountain and WalMart v. Reddin have indicated a different result and an automatic reversible in those cases. I think that essentially what the effect of those cases would be is an eradication of 44.1. And to a certain degree of a broad-form jury submission, I think we're headed back in that area where we got jury charges. Maybe not as Judge _____ suggests of 40 or 50 in a particular

submission. But I think we're certainly going to get back to an area of too many blanks, and I think that's an inappropriate road that this court should not proceed under.

JEFFERSON: Even if we found against you, if both parties agreed on a broad-form submission, because I think the chief is right, there are times when both sides have reason for submitting just one blank, if they agreed, then there would be no error on appeal. Right? I mean any error that there was in submitting an element for which there is no evidence would be waived?

COLEMAN: If the parties agreed.

* * * * * * * * *

REBUTTAL

HANKINSON: I'm having a little bit of trouble as you try to parse out the idea of charge error from sufficiency review. Since a challenge based on no evidence need not be made at the time the charge is submitted in order to preserve error, what is the effect then if you do have a submission like this and no challenge is made to the charge?

HACHEM: If no challenge is made to the charge, then what you're left with after the trial is over is just challenging the bottom line answer. Because you've not complained to the court about one element of it.

HANKINSON: Walk me through the damages that the jury found for Erika Smith. We know that there was evidence of about - she got $3,100 and there was about $2,000 in medical expenses, which left a little bit less than $1,100. And the CA decided it was not harmful error because that could have been an amount for pain and suffering. Now based on that kind of a record, how do you write this is harmful error?

HACHEM: Because the jury was told they could consider medical physical impairment and they could also consider - I mean they had other things that they could consider: pain and suffering. Pain and suffering could have meant - you know bend the balance as the appellate court found. But we don't know that. And then go back to Castell...

HANKINSON: But that again, that's error. How do you take that jury charge with those findings and tell me that that's harmful error?

HACHEM: It's harmful because we don't know if the jury was misled to think that they could award say $500 for physical impairment. We just don't know the answer to that question.

HANKINSON: If the jury has been told to award damages, if any, based on the evidence that's presented and Texas law says that jurors are to be presumed to have followed the instructions, then why wouldn't as part of the analysis the court do exactly what it did here and say that that went to pain and suffering?

HACHEM: Because we're speculating that the jury thought. There's no evidence even though they've been told that they can consider it.

HANKINSON: But you have to show that it probably caused harm.

HACHEM: I think what I have to show is that there was no evidence, and that was error for the court to submit that. And then I have to show you based on the analysis this court applied in Bonney and other cases that that could have misled the jury. And the jury wasn't told what they should do. What they should have done is not consider that.

HANKINSON: Then that's per se error. That's not harmful error. So you're asking for a per se rule then?

HACHEM: Yes. You know in Casteel y'all stated a maxim. It is fundamental to our system of justice that parties have the right to be judged by a jury properly instructed in the law. That fundamental right comes under another maxim: Equal justice under the law.

O'NEILL: That language came from analyzing a commingling of liability theories and, therefore, the judge's decision on which law should apply. And there is law out there that says that is purely up to a trial court to make that determination. Jurors cannot be expected to bear it through different legal theories on _____. However, there is a presumption that jurors can follow the evidence. So, therefore, isn't it a big difference to try to extend Casteel beyond commingling liability theories to commingling damage elements?

HACHEM: Damage elements are just as essential as a liability question. Because that is the whole key of why they are even suing.

O'NEILL: Let me again quote to you the US SC case that that exact argument was made. And the argument was made that elements of damages are in effect sort of legal state theories that judges should work through. And the US SC rejected that analysis and said no, that really is sort of playing semantics that individual elements are more factual in nature. The jury is perfectly capable and we're going to presume that they can fare(?) it through and not make findings on something there is no evidence on.

HACHEM: In Bonney this court said that you couldn't assume that - in a damage question where there is a no evidence element submitted...

O'NEILL: But Bonney was reversed on a legal theory.

HACHEM: If we had charge error in this as well that's a cross point.

O'NEILL: But it was reversed...

HACHEM: But they had to decide whether a new trial would be granted on that basis because there was already an award for damages. They could have just rendered and given that amount. And also with respect to Griffin, the 1st federal district court has not applied that in the federal arena. In fact in it's opinion, 282 F.3d 44, they say it's not always easy to explain the discrepancy. The SC has not used the same presumption it found in Griffin in civil cases. And it gives some cited authority in that opinion.

HECHT: Like Marilyn v. Baltimore?

HACHEM: Correct. And there's also a Boston law review article: Out State Constitution Matters. And it talks about how the federal analysis may be different based on your state constitution. And our state constitution matters. We have an open courts provision that allows to have redress.