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Texas Civil Procedure - Evidence of Net Worth - Net Worth Is Discoverable and Admissible into Evidence for the Purpose of Assessing Punitive Damages Recent Development.

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to be handled differently. *See id.* Absent such a distinction, there was no reason not to apply *Tinker* to the case at hand. *Id.* The result obtained under the majority's test was characterized as granting school officials free license to exercise "thought control" with regard to school-sponsored speech. *See id.* at —, 108 S. Ct. at 577-78, 98 L. Ed. 2d at 615. Moreover, the dissenting Justices asserted that even if they were to agree that the articles were constitutionally subject to censorship, the methods employed by principal Reynolds were far too extreme. *See id.* at —, 108 S. Ct. at 579-80, 98 L. Ed. 2d at 617. Rather than contacting the teacher and the newspaper's staff to discuss the alternatives available, Reynolds chose to excise entire pages, the majority of which were unobjectionable. *See id.* at —, 108 S. Ct. at 580, 98 L. Ed. 2d at 617.

The decision in *Hazelwood* is a bitter pill for high school students to swallow. It also evinces a judicial trend towards limiting the constitutional rights of secondary school students. The potential chilling effect *Hazelwood* will have on our aspiring student journalists seems very high. The decision creates a powerful tool for school officials, who now have less reason to weigh the benefits of publishing controversial articles in school papers against the dangers thereof. Even if one accepts the majority's distinction between student speech at school and school-sponsored student speech, it appears that the test enunciated in the case is flawed, because it allowed a principal who was concerned about a few words and sentences to correct those problems with a paper shredder, rather than an eraser and a pencil. In essence, the final Journalism II lesson for the staff of the Spectrum is that the principal's sword will often be mightier than the students' pen.

Christopher Nielsen Forbis

TEXAS CIVIL PROCEDURE—EVIDENCE OF NET WORTH—NET WORTH IS DISCOVERABLE AND ADMISSIBLE INTO EVIDENCE FOR THE PURPOSE OF ASSESSING PUNITIVE DAMAGES. *Lunsford v. Morris*, 31 Tex. Sup. Ct. J. 207 (Feb. 10, 1988).

Garry Lunsford and Robert Dail brought suit against their former employer and others, claiming malicious defamation and conspiracy. *Lunsford v. Morris*, 31 Tex. Sup. Ct. J. 207, 207 (Feb. 10, 1988). Based upon the premise that they were seeking punitive damages, the plaintiffs requested production of documentation evidencing the defendants' net worth. *Id.* The trial court refused to order the requested discovery. *Id.* After the court of

appeals denied plaintiffs' leave to file a petition for writ of mandamus, the Supreme Court of Texas granted their request. *Id.* In an opinion written by Justice William W. Kilgarlin, the court held that evidence of a defendant's net worth is discoverable and admissible at trial for the sole purpose of assessing punitive damages, radically changing over 100 years of Texas procedural and evidentiary law. *See Lunsford*, 31 Tex. Sup. Ct. J. at 209.

The court in *Lunsford* found that a defendant's net worth is relevant to the assessment of punitive damages. *See id.* Although the question specifically before it dealt with the discoverability of net worth, the court found such information was both discoverable *and* admissible at trial pursuant to Texas Rule of Civil Procedure 166(2)(a) and Texas Rules of Civil Evidence 401 and 403. *See id.* The court did note that the usual evidentiary limitations of undue prejudice, privilege, competence or other legal basis for exclusion of such evidence still applied. *See id.* (citing Tex. R. Civ. Evid. 401, 403, 501-10, 601). Additionally, the court disclaimed any intention to limit a trial judge's authority to determine, upon motion, whether a discovery request involves "unnecessary harassment or invasion of personal or property rights." *Id.* (citing Tex. R. Civ. P. 166b(5) and comparing Tex. R. Civ. P. 13).

In discussing the relevancy of a defendant's net worth, the court recognized the two purposes of punitive damages—to deter and punish wrongdoing. *See id.* at 208. The court reasoned that a defendant's ability to pay is directly related to the issue of deterrence and punishment. *See id.* As a result, the Supreme Court of Texas held that "in cases in which punitive or exemplary damages may be awarded, parties may discover and offer evidence of a defendant's net worth." *Id.*

Since the landmark case of *Young v. Kuhn* in 1888, evidence of a defendant's net worth has not been admissible for the purpose of assessing punitive damages in Texas. *See Young v. Kuhn*, 71 Tex. 645, 653, 9 S.W. 860, 862 (1888)(evidence of defendant's worth held not relevant). In *Young*, the plaintiff sued the Daily Texarkana Independent newspaper for libel arising from the defendant's alleged publication that the plaintiff was slaughtering and selling as food "diseased and unwholesome meats." *Id.* at 646, 9 S.W. at 861. At trial, the plaintiff was allowed to offer evidence that the defendant "was possessed of considerable property." *Id.* at 651, 9 S.W. at 862.

The Supreme Court of Texas in *Young* recognized that conflicting authority existed regarding the admissibility of this type of evidence. *See id.* In discussing the admissibility of evidence of a defendant's net worth to be considered in the assessment of exemplary damages, the court rejected the argument that rightful punishment could only be ascertained on the basis of a proportionate share of the defendant's wealth. *See id.* The court held that "[a] rule which makes the true basis for damages not the injury inflicted, but the ability of the offending person to pay, . . . finds no sanction in principle,

and, if applied, would lead to results most embarrassing in the administration of justice.” *Id.* at 652, 9 S.W. at 867.

The *Young* court also discussed several concerns with the admission of a defendant’s net worth for the purpose of assessing punitive damages. *See id.* at 652-53, 9 S.W. at 862-63. The court noted, without elaborating, that no such sliding scale for administering justice existed in the criminal context. *See id.* at 652, 9 S.W. at 862. Further, the court recognized that the worth of a defendant at the time of trial would not necessarily be probative of the defendant’s worth at the time of his wrongful act. *See id.* The court opined that damages sought for the purpose of punishment should depend on the character of the wrongful act, not the changing ability of the defendant to pay. *See id.* Additionally, the court reasoned that if the worth of a wealthy defendant is admissible for the purpose of aggravating punitive damages, there should logically follow a converse rule of admissibility of a defendant’s poverty to mitigate damages. *See id.* at 653, 9 S.W. at 862-63 (quoting *Ware v. Cartledge*, 24 Ala. 622, 626 (1854)). The court noted that no sound principle of law supported such a rule. *Id.*; accord *Case v. Marks*, 20 Conn. 248, 249-50 (1850)(holding defendant cannot introduce evidence of poverty to mitigate damages).

Following *Young*, Texas courts have held that introduction of evidence of a defendant’s financial condition to influence the assessment of exemplary damages constitutes reversible error. *See, e.g., First Nat’l Bank of Marshall v. Beavers*, 619 S.W.2d 288, 289 (Tex. App.—Texarkana 1981, writ ref’d n.r.e)(introduction of evidence of land holdings improperly prejudicial); *Bukowski v. Williams*, 198 S.W. 343, 346 (Tex. Civ. App.—Beaumont 1917, no writ)(introduction of evidence of defendant’s wealth for purpose of assessing exemplary damages constitutes reversible error); *Texas Pub. Util. Corp. v. Edwards*, 99 S.W.2d 420, 427 (Tex. Civ. App.—Austin 1936, writ dismissed). In *Edwards*, the court found improper an “argument . . . calling attention . . . to the relative financial condition of the [defendant], . . . and insisting that the jury should assess large exemplary damages because [the defendant] was able to pay them.” *Id.* Further, this conduct was found to be improper “even though there was some evidence in the record as to the financial condition of [the] parties, but which evidence related to other issues in the case.” *Id.* The court noted that the introduction of the financial worth of the parties no doubt “greatly influenced the jury in assessing the large and excessive sum of \$25,000 as exemplary damages.” *Id.* The court also pointed out that some jurisdictions which allow evidence of a defendant’s worth impose many limitations on the admissibility of such evidence. *See id.* In reviewing the admission of testimony regarding the financial condition of the parties, the Austin Court of Appeals held that the trial court had committed error. *See id.*

More recently, in *Murphy v. Waldrip*, 692 S.W.2d 584, 588 (Tex. App.—

Fort Worth 1985, writ ref'd n.r.e.), a Texas appellate court again emphasized that the amount of damages awarded must not be based on improper evidence, and stated that it was reversible error to inject into trial information regarding a party's wealth. *See id.* (citing *Young v. Kuhn*, 71 Tex. 645, 653-54, 9 S.W. 860, 862 (1888)). However, because there was no timely objection to the introduction of this improper evidence, the court of appeals found it was not an abuse of discretion for the trial judge to overrule a motion for declaration of a mistrial or an instruction to disregard the evidence. *See id.* at 589. Therefore, while introduction of a defendant's worth for the purpose of assessing punitive damages was usually considered reversible error, such objection could be deemed waived in the proper circumstances. *See id.*

Notwithstanding Texas' traditional disfavor with wealth being a consideration in the assessment of punitive damages, the Supreme Court of Texas in *Lunsford* chose to adhere to the view of forty-three states, substantial federal authority, the United States Supreme Court, and the Restatement (Second) of Torts that hold evidence of net worth is discoverable and admissible for the purpose of assessing punitive damages. *See Lunsford*, 31 Tex. Sup. Ct. J. at 208 nn.2, 3. The court recognized that some states impose restrictions before discovery of net worth is allowed. *See id.* at 208. These restrictions were summarized by the court as follows:

- (1) a *prima facie* showing of entitlement to punitive damages must be done before a defendant's net worth may be discovered;
- (2) a plaintiff must wait until evidence warranting an assessment of punitive damages is heard by the jury before evidence of net worth may be introduced;
- (3) a *prima facie* entitlement to punitive damages must be proved in a show-cause hearing before discovery of net worth may be had; and
- (4) a plaintiff must make a *prima facie* showing of entitlement to punitive damages and then a bifurcated trial on damages is had to establish entitlement to punitive damages and to consider evidence of net worth.

Id. at 209 (citations omitted); *see also*, Annotation, *Necessity of Determination or Showing of Liability for Punitive Damages Before Discovery or Reception of Evidence of Defendant's Wealth*, 32 A.L.R. 4th 432 (1984)(discussion of state and federal views on discoverability and admissibility of defendant's wealth).

In *Lunsford*, the court refused to impose any limitation on discoverability and admissibility of net worth and found no threshold to such discovery which must be overcome before a party alleging punitive damages may discover a party's worth. *See Lunsford*, 31 Tex. Sup. Ct. J. at 209. Likewise, the court found that the only basis of an evidentiary exclusion must be founded on Texas Rules of Civil Evidence regarding relevancy, exclusion on special grounds, privilege, and witness competency. *See id.* (citing Tex. R.

Civ. Evid. 401, 403, 501-10, 601). The court did note that a trial judge would still have the authority to consider whether a discovery request involved “unnecessary harassment or invasion of personal or property rights.” *Id.* (citing Tex. R. Civ. P. 13, 166b(5)).

The court relied on its recent opinion in *Birchfield v. Texarkana Memorial Hospital* to demonstrate that the court had “previously permitted admission of evidence of the financial condition of a defendant.” *Lunsford*, 31 Tex. Sup. Ct. J. at 208-09. In *Birchfield*, the Texarkana Court of Appeals had considered the propriety of the trial court’s admission of a hospital’s financial condition in a malpractice action. *See Hall v. Birchfield*, 718 S.W.2d 313, 326 (Tex. App.—Texarkana 1986), *rev’d*, 31 Tex. Sup. Ct. J. 36 (Oct. 28, 1987). The hospital administrator had taken the position at trial that the hospital did not have enough money for proper equipment or personnel training, contrary to a stipulation entered into by the hospital’s counsel. *See id.* at 326. The court of appeals held that introduction of the financial condition was proper for impeachment purposes and to establish gross negligence. *See id.* (citing Tex. R. Civ. Evid. 401, 402; *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981)). The Supreme Court of Texas affirmed the admissibility of financial worth to show “ability to provide proper facilities.” *Birchfield*, 31 Tex. Sup. Ct. J. at 38. However, the underlying purposes of the admissibility of evidence of financial worth in *Birchfield* is completely unrelated to the purposes explained in *Lunsford*. *Compare Birchfield*, 31 Tex. Sup. Ct. J. at 38 (evidence admissible to show ability to provide proper facilities) *with Lunsford*, 31 Tex. Sup. Ct. J. at 208 (ability to pay bears on issue of deterrence and punishment).

For more than 100 years, Texas courts have held that the wealth of a defendant is immaterial as regards the assessment of punitive damages. *See, e.g., Young v. Kuhn*, 71 Tex. 645, 653-54, 9 S.W. 860, 862 (1888); *Murphy v. Waldrip*, 692 S.W.2d 584, 588 (Tex. App.—Fort Worth 1985, writ ref’d n.r.e.); *First Nat’l Bank of Marshall v. Beavers*, 619 S.W.2d 288, 289 (Tex. App.—Texarkana 1981, writ ref’d n.r.e.); *Bukowski v. Williams*, 198 S.W. 343, 346 (Tex. Civ. App.—Beaumont 1917, no writ). This information has repeatedly been held inadmissible, and whenever it was improperly admitted, such admission has been held to constitute reversible error. *See, e.g., First Nat’l Bank of Marshall v. Beavers*, 619 S.W.2d 288, 289 (Tex. App.—Texarkana 1981, writ ref’d n.r.e.); *Bukowski v. Williams*, 198 S.W. 343, 346 (Tex. Civ. App.—Beaumont 1917, no writ).

The Supreme Court of Texas disregarded this precedent of nonadmissibility of financial worth with its holding in *Lunsford*. The court replaced the rationale of nonadmissibility of financial worth—that the injury inflicted is the sole proper consideration for assessing punitive damages—with the diametrically opposing view that a defendant’s ability to pay bears directly on the issue of adequate punishment and deterrence. *See Lunsford v. Morris*,

31 Tex. Sup. Ct. J. 207, 208 (Feb. 10, 1987). As an example justifying this change in rationale, the court stated:

[O]ne hundred dollars as a punitive award against a single mother of three small children may be a greater deterrent than one hundred thousand dollars awarded against a major corporation whose directors are shielded from the stark reality of harm done by the paneled walls and plush carpet of the corporate boardroom.

Id. Though persuasive, this argument oversimplifies the problems inherent in unfettered discovery of a defendant's worth merely upon an allegation of entitlement to punitive damages. For example, as stated by counsel for the original defendants in *Lunsford*: "A business can easily pick a fight and allege any theory for punitive damages and then can discover all the financial worth of a company." Elder & Burch, *Plaintiffs Win Twin Victories*, Texas Lawyer, Feb. 22, 1988, at 6, col. 3. As a consequence, plaintiffs will now be able to obtain information that has been considered highly confidential in the past. *Id.* at col. 2.

While the change of the rules regarding discoverability and admissibility of financial worth may be justified by the principles of deterrence and punishment as the dual purposes of exemplary damages, there must be some reasonable limitations and safeguards. Because of the deference that will be given to a trial judge in ordering production of documents, the Supreme Court of Texas should recognize the severe invasions of privacy that may result from their failure to adopt any of the procedural thresholds that were discussed, but then rejected, by the court. *See Lunsford*, 31 Tex. Sup. Ct. J. at 209. The court's intimation that Texas Rules of Civil Procedure 166b(6) and 13 may provide protection to a party against unwarranted requests for production of information regarding financial worth is not persuasive in light of the court's holding that there are no threshold requirements to discovery of a defendant's net worth. *See id.*

A better approach would be to require a plaintiff to make at least a *prima facie* showing of entitlement to exemplary damages in a pre-discovery hearing. *See, e.g., Wortman v. Shipman*, 737 S.W.2d 438, 442 (Ark. 1987)(trial judge's finding of *prima facie* action for punitive damages made on basis of affidavit and answers to interrogatories); *Curtis v. Partain*, 614 S.W.2d 671, 674 (Ark. 1981)(*prima facie* showing of relevancy required before court orders production of tax records and personal financial data for purpose of assessing punitive damages). This would protect the defendant against the potentially serious invasion of privacy that he might be subjected to by requiring at least some legitimate foundation for the request. As stated by the Arkansas Supreme Court in *Curtis*, "[n]o doubt our rules were designed to improve and expedite trials, but not at the expense of basic fundamental rights." *Id.* (noting that rules of procedure allowed discovery of financial records, but judicially imposing showing of entitlement).

A second reasonable approach to the introduction of a defendant's net worth is to require that, after a *prima facie* showing of entitlement to exemplary damages, the party subjected to the discovery need only produce a statement, in admissible form, reflecting the defendant's net worth. *Cf. Maresca v. Marks*, 362 S.W.2d 299, 300 (Tex. 1962)(only relevant portion of income tax returns discoverable); *see also* Tex. R. Civ. P. 166b(6) (allowing judge to make protective orders in the interest of justice). This would have the effect of fulfilling the purpose of disclosure of net worth to the jury, permit the accurate assessment of what level of punitive award would have a deterring and punishing effect, and still maintain the privacy interests of the defendant to some degree. Perhaps the Supreme Court of Texas, upon rehearing, will adopt these or similar protections against the abuse of discovery of net worth.

If the Supreme Court of Texas chooses not to put reasonable restrictions on the discovery of a defendant's net worth, trial judges should at least be guided as to how they should fashion their discovery orders by the Supreme Court's holding in *Maresca v. Marks*, 362 S.W.2d 299 (Tex. 1962). When addressing the discovery of income tax returns, the court held:

The protection of privacy is of fundamental—indeed, of constitutional—importance. Subjecting federal income tax returns of our citizens to discovery is sustainable only because the pursuit of justice between litigants outweighs protection of their privacy. But sacrifice of the latter should be kept to the minimum, and this requires scrupulous limitation of discovery to information furthering justice between the parties which, in turn, can only be information of relevancy and materiality to the matters in controversy.

Id. at 301.

Texas has now joined the majority of jurisdictions that permit the discovery and admission at trial of a defendant's net worth for the purpose of assessing punitive damages. However, this state has done so without any of the reasonable restrictions placed on the discovery of potentially sensitive materials that have been so placed by many other states. Hopefully, trial judges will recognize that the responsibility to protect the fundamental right to privacy may now be a matter of assessing the true relevancy of disclosure of net worth in a particular fact situation and issuing protective orders accordingly.

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