

When is an issue tried by consent?
by David Coale and John Volney*

An unpleaded claim or defense is generally waived unless the parties consent to its trial. Tex. R. Civ. P. 67. In two opinions last year, the Dallas Court of Appeals summarized and applied the rules for trial by consent; finding it in one case but not the other. Those rules are useful for any trial lawyer in the Dallas area.

The two cases agree on the basic principles. An issue is not tried by consent just because evidence about that issue is admitted. This is so because if evidence is relevant to pleaded as well as unpleaded issues, the offer of that evidence would not be calculated to draw an objection. The court of appeals examines the record “not for evidence of the issue, but rather for evidence the issue was tried.”

Consent not found

Applying those rules, the court found no trial by consent in *Garcia v. Nunez*, No. 05-17-00631-CV, 2018 Tex. App. LEXIS 9507 (Tex. App.–Dallas Nov. 20, 2018, no pet.) (mem. op.) Nunez was injured while installing a new window in the defendant’s home. He sued for negligence, pleading several types of damages. In particular, he sought damages for “pain and physical impairment,” but did not plead “disfigurement” as an additional type of damage. On appeal, Nunez argued that disfigurement damages were tried by consent, citing this testimony:

Q. What parts of your body were in pain?

A. In the arm.

Q. Do you also have a scar from the operation to your arm today?

A. Yes, of course.

Q. Can you show the Court the scarring of the arm?

A. It’s right here (indicating).

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* The authors are partners at Lynn Pinker Cox & Hurst LLP.

Q. How long did it take for the elbow and the hand, the bones anyway, to heal?

A. More than half a year.

Q. Okay. And were you in pain during that time period?

A. Yes, of course.

The court found that because this testimony was relevant to types of damage for which Nunez had pleaded, its admission without objection did not create trial by consent. “This is, at best, a doubtful case for applying trial by consent, and trial by consent should not be inferred in doubtful cases.”

Consent found

The second case found trial by consent. *Lemelin v. BB&T*, No. 05-17-00381-CV, 2018 Tex. App. LEXIS 4621 (Tex. App.–Dallas June 21, 2018, pet. denied) (mem. op.) A bank sued to collect on several individuals’ guaranties of a business loan. The guarantors asserted the statute of frauds as a defense. On appeal, the bank made arguments about the “counter-defense” of waiver; the guarantors said the defense had not been pleaded and should not be considered.

The court agreed with the bank that the defense could nevertheless be considered because it had been tried by consent. It observed that “the Bank’s claims ... were based on the loan documents,” which included the underlying note, the guaranties – and a “statute of frauds notice” – all of which were admitted without objection.

Each of the guarantors then “testified about the statute of frauds notice and the lack of a written agreement modifying the terms of the Note or the guaranties,” and the issue of waiver was discussed with the trial judge after the evidence closed. Accordingly, because the defendants “did no object to the evidence, the arguments, or the trial court’s questions on the ground they related to an issue not pleaded by the Bank,” the issue of waiver was tried by consent.

Conclusion

These recent opinions from the Dallas Court of Appeals make clear that trial by consent cannot occur simply because evidence on an unpleaded claim or defense is admitted without objection, if that evidence is also relevant to a pleaded claim or defense. Once admitted, the likelihood of a consent finding increases as the parties’ engage in more questioning and argument about that evidence – particularly if that litigation activity

clearly refers to matters about the unpleaded issue. Parties and judges may want to consider adding to these guidelines by provisions in scheduling orders and pretrial orders.