

## UNCOVERING THE PIPELINE: Revisiting Mustang Pipeline

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Imagine you're the plaintiff in a \$2,000,000+ construction dispute. You've just been called back into the courtroom to hear the jury's verdict. Months of hard work, dedication, and more than a few sleepless nights have led to this moment. On question one, the Jury answers in your favor—you established liability! On question two, the Jury awards you \$2,104,601 in damages! You've done it! All that's left now is to go collect your judgment! Right?



Maybe, maybe not. Six months later, after the champagne has worn off, you get an email from your lawyer (who didn't want to call) saying that the court granted a judgment notwithstanding the verdict. Your multimillion-dollar verdict just turned into a goose egg. Why? Because there was no evidence that your damages were reasonable and necessary.

Texas law is fraught with cautionary tales of plaintiffs establishing liability – obtaining a substantial verdict – and, going home with nothing. Why? For failing to prove their remedial damages were reasonable and necessary. So how do you keep your hard-fought victory from turning into a stunning (take nothing) defeat? We suggest three steps:

1. Get an expert;
2. Focus on the market for the cost of repair; and
3. Gather data to determine (and prove) reasonableness.

Almost 15 years ago, the above scenario played out before the Texas Supreme Court in *Mustang Pipeline Co. v. Driver Pipeline Co.* Mustang (the project owner) established Driver's (the contractor's) liability for a material breach of contract and obtained a \$2,104,601 jury verdict. When it was all said and done, Mustang took home nothing. Why? Mustang failed to provide any evidence that its completion damages were reasonable. The Court held that: (1) a party seeking to recover damages for the cost of completion has the burden to prove that their damages are reasonable; and (2) that evidence of the amount charged and paid alone is no evidence that payment was reasonable and necessary. Since the *Mustang* decision, there has not been much instruction or help from the Texas Supreme Court on what is needed to prove that your damages were reasonable and necessary. This is a self-help situation. Experience, expertise, and preparation will be rewarded. Charging forward at full gallop with a "wing it" mentality will not.

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To "Go Green", our firm uses recyclable paper or ceramic cups and no longer uses Styrofoam cups. In addition, we have adopted a less-paper office environment.

We hope that these changes make big differences in the future.

*Well done is better than well said.*

- Benjamin Franklin



For example, say you want to buy a horse, but know nothing about horses, and have no idea what you should pay. Your first step should be to hire an expert. Your expert can tell you what type of horse you need, and help you focus on the market. By focusing on the market and gathering data points, you can determine the reasonable price for a particular horse. In practice, this concept has given litigants fits:

- ***McGinty v. Hennen***. Amount not recovered: \$651,230.72. Why? The Texas Supreme Court held that the evidence of how a pricing estimate was derived from "Exactimate" does not in itself make the estimate reasonable. Accordingly, the evidence did not support the jury's finding that the estimated price was reasonable.
- ***Ergon Energy Partners, L.P. v. Sheffield***. Amount not recovered: \$1,324,000. Why? The Beaumont Court of Appeals found that the evidence was "wholly insufficient to prove that any of Sheffield's projected remediation costs are reasonable in amount."
- ***Nu-Build & Associates, Inc. v. Sooners Group, L.P.*** Amount not recovered: \$3,600,000. Why: The Dallas Court of Appeals found that "Sooners adduced no evidence that the \$3.6 million it paid to complete the project was reasonable."

Proving reasonableness of damages is tricky, difficult, and dangerous. It is a trap for the unwary. Plaintiffs should take warning and create a plan of attack to avoid this common pitfall. Defendants on the other hand, should be prepared to combat a plaintiff's evidence of reasonableness, or move for directed verdict if no evidence is provided.

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