

# IN THE SUPREME COURT OF TEXAS

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No. 98-0333  
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GUNN INFINITI, INC., PETITIONER

v.

DONALD O'BYRNE, RESPONDENT

=====  
ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS  
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**Argued on January 14, 1999**

JUSTICE BAKER, dissenting.

Although I agree with the Court that O'Byrne did not proffer legally sufficient evidence of mental anguish in this case, I do not agree with the Court's disposition of the mitigation of damages issue. The Court holds that because Gunn's sales manager and O'Byrne used the word "settle" in testifying about Gunn's various offers to O'Byrne, Gunn's offers, as a matter of law, would have required O'Byrne to relinquish all his claims against Gunn. The majority concludes that, therefore, Gunn's offers do not warrant a jury question on mitigation. I disagree. I would reverse the court of appeals' judgment and remand for a new trial.

## I. APPLICABLE LAW

A trial court must submit questions, instructions, and definitions that the pleadings and evidence raise. *See* TEX. R. CIV. P. 278; *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992). A trial court may refuse to submit a question only if no evidence exists to warrant its submission. *See Elbaor*, 845 S.W.2d at 243; *Brown v. Goldstein*, 685 S.W.2d 640, 641 (Tex. 1985) (citing *Garza v. Alviar*, 395 S.W.2d 821, 824 (Tex. 1965)). If there is some evidence to support a jury question and the trial court does not submit the question, the trial court has committed reversible error. *See Elbaor*, 845 S.W.2d at 243; *Moore v. Lillebo*, 722 S.W.2d 683, 686 (Tex. 1986). In determining whether a trial court should have submitted a question to the jury, the reviewing court must examine the record for evidence supporting submission of the question and ignore all evidence to the contrary. *See Elbaor*, 845 S.W.2d at 243. Conflicting evidence presents a fact question for the jury. *See Brown*, 685 S.W.2d at 641-42; *Phillips Pipeline Co. v. Richardson*, 680 S.W.2d 43, 48 (Tex. App.--El Paso 1984, no writ).

Mitigation, if raised by the evidence, is a fact question for the jury. *See America W. Airlines, Inc. v. Tope*, 935 S.W.2d 908, 915 (Tex. App.--El Paso 1996, no writ); *Sorbus, Inc. v. UHW Corp.*, 855 S.W.2d 771, 775 (Tex. App.--El Paso 1993, writ denied). Whether a party failed to mitigate is determined according to the standard of ordinary care — what a reasonable person would have done under the same or similar circumstances. *See Moulton v. Alamo Ambulance Serv., Inc.*, 414 S.W.2d 444, 447, 449 (Tex. 1967); *Sorbus, Inc.*, 855 S.W.2d at 775.

## II. ANALYSIS

There is evidence that Gunn made several offers to O'Byrne: (1) to take the car back and

refund the purchase price and O'Byrne's transportation costs; (2) to exchange the car for a red one and give O'Byrne \$1000; (3) to exchange the car for a slightly newer model and charge O'Byrne only for the additional equipment that came with the newer model; and (4) to ship the car to San Antonio for repainting. Gunn's general manager testified that Gunn's primary motivation in making these offers to O'Byrne was to "satisfy a somewhat dissatisfied customer." But O'Byrne did not accept any of these offers. Indeed, according to Gunn's general manager, O'Byrne responded to one of the offers by stating: "No that won't work. You made a mistake and you're going to pay big-time." Instead of accepting any of Gunn's offers, O'Byrne kept the car at least three years and drove it fifty thousand miles, even though he claims that merely looking at it caused him mental anguish.

The Court concludes that this evidence does not support a mitigation of damages question because, as a matter of law, Gunn's offers required O'Byrne to release his claims. The Court bases this conclusion on: (1) the fact that, on cross-examination, Gunn's sales manager responded "yes" to the question: "All four of these offers that you made were to settle with Mr. O'Byrne, correct, sir?" and (2) the fact that O'Byrne testified that the offers were "to settle." In focusing on this evidence, the majority ignores the proper scope of review. *See Elbaor*, 845 S.W.2d at 243 (holding that to determine whether legally sufficient evidence supports the submission of a jury question, the reviewing court must examine the record for evidence supporting the question and ignore all evidence to the contrary).

The Court also circumvents the standard of review by determining that what Gunn meant when it used the word "settle" to describe its offers to O'Byrne is a legal question. But what Gunn meant by its offers to O'Byrne is a disputed fact issue for the jury, not a legal issue for the Court to decide. *See Brown*, 685 S.W.2d at 641-42 (holding that a trial court improperly refused to submit

issue of contributory negligence because evidence of improper lookout and failure to timely apply brakes was conflicting and presented a factual question for the jury). “Settle” is “a word of equivocal meaning; meaning different things in different connections, and the particular sense in which it is used may be explained by the context or circumstances.” BLACKS LAW DICTIONARY 1372 (6<sup>th</sup> ed. 1990). Therefore, what Gunn meant when it used the word “settle” to describe its offers to O’Byrne depends on the particular context and circumstances.

The cases the Court cites for the proposition that “settle” necessarily implies a release are distinguishable precisely because of their particular context and circumstances. In *Yancy v. Yancy*, the court held that an agreed order dismissing a pending case, based on a settlement, barred another trial on the same claims. *See Yancy v. Yancy*, 55 S.E.2d 468 (N.C. 1949). The court held that “settle,” as used in the trial court’s dismissal judgment, meant that the controversy had ended. *See Yancy*, 55 S.E.2d at 469.

*Herring v. Dunning* similarly concerns settling claims during litigation. *See Herring v. Dunning*, 446 S.E.2d 199 (Ga. Ct. App. 1994). The issue in *Herring* was whether an “offer to settle” an existing lawsuit “for the limits of liability coverage” was sufficiently definite to be capable of acceptance and to create a mutually binding and enforceable contract. *See Herring*, 446 S.E.2d at 202.

In *C & H Nationwide, Inc.*, we held that the word “settlement,” as used in comparative responsibility law, means money or anything of value paid or promised to a claimant in consideration of potential liability. *See C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 320 (Tex. 1994). This holding was partly based on the fact that the Texas Civil Practice and Remedies Code defined “settling person” as “a person who at the time of submission has paid or promised to pay money or

anything of monetary value to a claimant at any time in consideration of potential liability.” TEX. CIV. PRAC. & REM. CODE § 33.011(5); *see C & H Nationwide*, 903 S.W.2d at 319. Here, Gunn made offers to O’Byrne before O’Byrne filed suit, sent a DTPA notice, or hired a lawyer. The context and circumstances of Gunn’s sales manager and O’Byrne using the word “settle” to describe Gunn’s offers do not compel a legal conclusion that Gunn would require O’Byrne to release all his claims against Gunn.

### III. CONCLUSION

Because the evidence of Gunn’s offers is some evidence that O’Byrne could have mitigated his damages, I would hold that the trial court erred in refusing to submit Gunn’s proposed mitigation questions and instruction. This conclusion would require reversing the court of appeals’ judgment and remanding the cause to the trial court for a new trial. Because the Court holds to the contrary, I dissent.

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James A. Baker  
Justice

OPINION DELIVERED: June 24, 1999