IN THE SUPREME COURT OF TEXAS

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NO. 00-0932
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DENNIS L. MIGA, PETITIONER

v.

RONALD L. JENSEN, RESPONDENT

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ON PETITIONS FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS
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Argued on October 24, 2001

JUSTICE ENOCH delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE OWEN, JUSTICE JEFFERSON and JUSTICE RODRIGUEZ joined.

JUSTICE O'NEILL filed a dissenting opinion, in which CHIEF JUSTICE PHILLIPS joined.

JUSTICE SCHNEIDER filed a dissenting opinion.

JUSTICE HANKINSON did not participate in the decision.

To reward Dennis Miga for work he had done, Ronald Jensen offered him the option to buy a portion of Jensen's stock in a privately-held corporation. When Miga tried to exercise the option, Jensen refused to honor their agreement, and Miga sued. Before trial, the corporation "went public." The primary issue in this appeal is how to properly measure the damages caused by Jensen's failure to deliver the stock under the option's terms. The trial court and court of appeals concluded that Miga could recover damages measured by the subsequent appreciated value of the stock. Because we conclude that the proper measure of damages was the value of the stock on the date the stock option agreement was breached, minus the exercise price, we reverse the court of appeals' judgment in part, affirm in part, and remand the case to the trial court for rendition of judgment in accordance with our opinion.

I

Jensen hired Miga in 1990 to help run Matrix Telecom, a privately-owned long-distance telephone company. As compensation, Jensen offered Miga, in addition to his salary, a 6% ownership interest in the company. Two years later, Matrix Telecom became a wholly-owned subsidiary of Matrix Communications, and Jensen converted Miga's former 6% interest into a 4.8% ownership share of the new parent company. About that time, Miga set up a meeting between Jensen and the principals of Pacific Gateway Exchange ("PGE"), a fledgling company handling international calls for other telecommunications businesses. Jensen purchased an 80% interest in PGE for $850,000, receiving 11,020 shares of common stock in the privately-held company. Miga soon helped the start-up company secure several major clients. To reward and encourage Miga's productive efforts on PGE's behalf, in July 1993, Jensen orally offered Miga an option to buy 4.8% of Jensen's interest in PGE at Jensen's original cost – that is, 528.96 shares for $40,800, or a little over $77 per share.

On December 4, 1994, Miga sent Jensen a fax indicating that he intended to resign and desired to "settle [his] account." The following day Jensen presented Miga with a termination agreement and severance package that included $300,000 to be paid over thirty months and $450,000 net for Miga's stock in Matrix Communications. The agreement purported to be a "complete accounting" between the parties, but it did not explicitly release Miga's PGE option. When Miga attempted to exercise the option that day, Jensen refused. Miga tried to exercise the PGE option three more times over the next nine months. With his last demand in August 1995, he enclosed a check for $40,800. Jensen rejected these demands and returned Miga's check.

In October 1995, Miga sued Jensen for breach of contract and fraud. At trial, Jensen conceded that he had promised Miga the option, but claimed that the option had been for a scaled price, had terminated on December 31, 1994, was subject to a buy-back if Miga resigned, and most importantly, was released by the termination agreement. Meanwhile, in mid-1996, about eighteen months after Miga's resignation, PGE's stock split 940 to 1, and PGE made an initial public offering. The stock opened at $12 per share, peaked at $45.75 per share, and was worth $35.75 per share at the time of trial in 1997.

The jury found for Miga on all issues, awarding damages of $1,034,400, the difference between the option's exercise price and the value of the underlying stock as of December 1994, and damages of $17,775,686 for what the trial court called "lost profits." Thus, the jury determined that the value of the 528.96 shares of stock Miga wanted to buy for $40,800 in December 1994 was $1,075,200 ($1,034,400 + $40,800), or about $2,033 per share. Had Miga obtained that stock and held it to the time of trial, November 1997, he would have had 497,222 shares after the split (528.96 x 940). The stock was then publicly trading for $35.75 per share, down from the stock's all-time high the previous month of $45.75. The "lost profits" found by the jury were almost exactly the value of the stock at the time of trial ($17,775,686.50). The jury awarded the same amounts on Miga's fraud claims, as well as $43 million in exemplary damages. The trial court disregarded the fraud and exemplary damages findings, but rendered judgment for $18,810,086, combining the two jury findings on the option contract damages. The trial court also awarded $4,486,385.86 in pre-judgment interest, calculated on the total damage award from December 1994 to January 1998, the date of judgment. To suspend execution of the judgment pending appeal, Jensen filed a supersedeas bond in the amount of $25,496,623.39, which subsequent riders increased to $29,500,000.

The court of appeals affirmed the trial court's judgment notwithstanding the verdict on Miga's fraud and exemplary damages claims.[1] But it struck the $1,034,400 damages award as a double recovery and the pre-judgment interest award as inequitable.[2] The appellate court then affirmed the lost profits award of $17,775,686.[3]

Shortly after the court of appeals' decision, the parties entered into an Agreed Order under which Jensen made "an unconditional tender [to Miga] . . . of the sum of $23,439,532.78 . . . toward satisfaction of the Judgment in order to terminate the accrual of post-judgment interest on that sum." To achieve this objective, the Order provided for a reduction of Jensen's supersedeas bond in this amount. Jensen alleges that, if we affirm the court of appeals' judgment, this arrangement will have saved him approximately $1 million per year in the difference between the post-judgment interest rate of 10% and the lower return on his invested supersedeas bond during the pendency of his appeal to this Court.

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[1] 25 S.W.3d 370, 376.

[2] *Id*. at 380-81.

[3] *Id*. at 377-78.

II

Both Miga and Jensen filed petitions for review. Miga, in his petition for review, argues that Jensen's disagreement over the option's terms was tantamount to a denial of the option agreement that the jury found he made, and that this denial together with his behavior during their December 5, 1994 meeting constitute circumstantial evidence that Jensen did not intend to honor the stock option contract at the time it was made in 1993. According to Miga, this evidence, coupled with Jensen's breach, is sufficient to support the jury's fraud finding.[4] Jensen, on the other hand, argues that a dispute over the terms of an oral agreement cannot, by itself, be any evidence of fraud, thereby transforming a contractual disagreement into the tort of fraud and subjecting a promisor to punitive damages. The court of appeals held that there was no evidence of fraudulent intent.[5] We agree with the court of appeals. Jensen's conduct after Miga's resignation in 1994 and his dispute at trial over the contract's terms are not evidence that Jensen did not intend to perform when he offered Miga the PGE option in 1993.[6] This is a classic breach of contract case; Miga has no cause of action for fraud.[7]

III

Before addressing the merits of Jensen's petition, we discuss two preliminary matters interposed by Miga. Miga asserts that Jensen's petition is moot, and if not moot, that Jensen's complaint is not

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[4] *See Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 48 (Tex. 1998).

[5] 25 S.W.3d at 376.

[6] *See, e.g.*, *Formosa Plastics*, 960 S.W.2d at 48; *Hearthshire Braeswood Plaza Ltd. P'ship v. Bill Kelly Co.*, 849 S.W.2d 380, 389-90 (Tex. App.–Houston [14th Dist.] 1993, writ denied).

[7] See, *e.g.*, *Formosa Plastics*, 960 S.W.2d at 48.

preserved for our review.

A

We first decide whether Jensen's $23.4 million payment to Miga mooted his appeal of the judgment against him. In *Highland Church of Christ v. Powell*, we acknowledged the rule that a judgment debtor's voluntary payment and satisfaction of an adverse judgment moots the controversy, waives the debtor's right to appeal, and requires dismissal of the case.[8] But we emphasized there that the rule's basis is "to prevent a party who has freely decided to pay a judgment from changing his mind and seeking the court's aid in recovering the payment. A party should not be allowed to mislead his opponent into believing that the controversy is over and then contest the payment and seek recovery."[9] We reiterated this rationale in *Riner v. Briargrove Park Property Owners, Inc.*[10]

The Texas rule is not, and never has been, simply that any payment toward satisfying a judgment, including a voluntary one, moots the controversy and waives the right to appeal that judgment.[11] In *Highland Church*, we held that the judgment debtor's payment did not moot its appeal because the payment was made under economic duress implied by the threat of statutory penalties and accruing interest.[12] Like *Highland Church*, Jensen was "justifiably anxious to avoid the . . . interest which would

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[8] 640 S.W.2d 235, 236 (Tex. 1982).

[9] *Id.*

[10] 858 S.W.2d 370 (Tex. 1993) (per curiam).

[11] *See, e.g.*, *Highland Church*, 640 S.W.2d at 236; *Riner*, 858 S.W.2d at 370; *Cont'l Cas. Co. v. Huizar*, 740 S.W.2d 429, 433 (Tex. 1987) (Gonzalez, J., dissenting).

[12] *See Highland Church*, 640 S.W.2d. at 237.

accrue while the case was on appeal."[13] One must be able to halt the accrual of post-judgment interest, yet still preserve appellate rights. Whether a party wishes to avoid the accrual of post-judgment interest, particularly on a multi-million dollar judgment, is a question that party should be able to decide without fear of a Hobson's choice – that is, that the party might presumptively waive its appellate prospects. But we recognize the further difficulty presented when a party pays a judgment, but the party's intention to appeal that judgment is unclear. Therefore, explicitly reserving the right to appeal when the judgment is paid would be the safe practice in these circumstances; making that reservation on the record would be optimal. Such a reservation does not make the payment conditional. We emphasized in *Highland Church* that a party should not be allowed to simply change his mind about pursuing the case or mislead his opponent into thinking the controversy is over.[14] Thus, payment on a judgment will not moot an appeal of that judgment if the judgment debtor clearly expresses an intent that he intends to exercise his right of appeal and appellate relief is not futile. We take this to be the same rule applicable in the federal courts.[15]

The Agreed Order states that the purpose of Jensen's payment was to "terminate the accrual of post-judgment interest" on the $23.4 million judgment. This purpose makes sense only if post-judgment interest would otherwise be accruing, and interest would continue to accrue only if Jensen was pursuing an appeal of the judgment. Further, in negotiating the Order, Jensen actually discussed its anticipated jurisdictional effect with Miga. According to sworn affidavit testimony, which we may use to ascertain

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[13] *Id.*

[14] *Id.* at 236.

[15] *See Ferrell v. Trailmobile, Inc.*, 223 F.2d 697, 698 (5th Cir. 1955).

factual matters necessary to the proper exercise of our jurisdiction,[16] Jensen informed Miga that he believed the Agreed Order would not moot his complaint, and that he would continue to pursue appellate review. Miga does not challenge this testimony but complains that his refusal to accede to an express reservation of appeal in the agreed judgment and Jensen's removal of that language makes the payment of the judgment misleading. This is simply not true. While Miga may have believed that Jensen's payment mooted the appeal, he could not have had any reasonable doubt that Jensen believed it did not, or that Jensen intended to pursue the appeal if legally allowed to do so. Consequently, because Jensen's payment was coupled with an expressed intent to pursue his appeal, he did not waive his right to continue to contest the judgment. His appeal is therefore not moot.

Contrary to Miga's argument, our holding does not undermine the Finance Code's post-judgment interest scheme.[17] Post-judgment interest is not a punishment inflicted on a judgment debtor for exercising the right to appeal. Instead, like pre-judgment interest, post-judgment interest is simply compensation for a judgment creditor's lost opportunity to invest the money awarded as damages at trial.[18] When a judgment creditor has received an unconditional tender of the money awarded, and may invest it as he chooses, there is no need for the continuing accrual of post-judgment interest.[19] This is true whether or not an appeal of

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[16] *See* TEX. GOV'T CODE § 22.001(d).

[17] *See* TEX. FIN. CODE §§ 304.001-.007.

[18] *See, e.g., Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 528 (Tex. 1998).

[19] *See, e.g.*, TEX. FIN. CODE § 304.005(a).

the underlying judgment is ongoing.[20] Allowing Miga to choose, pending Jensen's appeal, between the continuing accrual of interest on $23.4 million and receipt of that $23.4 million outright is entirely consistent with the Finance Code.[21]

B

Regarding whether Jensen preserved error, Miga argues that Jensen failed to preserve his objection to the lost profits damages measure submitted to the jury. The court of appeals held that error was preserved.[22] We agree with the court of appeals. Twice during the charge conference Jensen asserted that Miga's damages were limited to the value of the stock at the time of breach; the trial court interrupted Jensen the second time, saying, "you've got your objection on the record." The trial court's subsequent refusal to limit the damages submission as requested effectively overruled the objection.[23] Jensen thus "made the trial court aware of the complaint, timely and plainly, and obtained a ruling."[24] Error was preserved.

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[20] *See id.* § 304.005(b).

[21] *See id.* § 304.005.

[22] 25 S.W.3d at 377.

[23] *See Acord v. Gen. Motors Corp.*, 669 S.W.2d 111, 114 (Tex. 1984).

[24] *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992) (opinion on reh'g).

IV

We now turn to the proper measure of damages for breach of a stock option contract. The trial court submitted two damages measures to the jury in question 11:

> (a) The difference between the cost to exercise the stock option contract per the parties [sic] agreement, if any, and the value of the stock in December, 1994, if any.
>
> **Answer:** $1,034,400.00
>
> (b) Lost profits to Dennis Miga that were a natural, probable, and foreseeable consequence of Ronald Jensen's failure to comply with the agreement, if any.
>
> **Answer:** $17,775,686.00

Neither party requested the lost profits instruction in part (b). In fact, Miga originally objected to the charge on the ground that the damages he sought were direct, not consequential. Jensen argues that the trial court erred in submitting the lost profits question to the jury in this case. We agree with Jensen.

Miga sought to recover the time-of-trial market gain in the stock he attempted to buy years earlier. His only evidence of "lost profits" was the increased market value of PGE stock, and the jury's award coincided with the stock's market value at the time of trial. But an increase in the market value of goods never delivered under a contract is not the same as lost profits.[25] Lost profits are damages for the loss of net income to a business measured by reasonable certainty.[26] Here, there was no evidence before the jury

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[25] *See Whiteside v. Trentman*, 170 S.W.2d 195, 197 (Tex. 1943); *see also* 1 DAN B. DOBBS, LAW OF REMEDIES §§ 3.3(5), 4.5(3) (1993); 3 LAW OF REMEDIES § 12.4(3).

[26] *See, e.g., Tex. Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 279 (Tex. 1994); *White v. Southwestern Bell Tel. Co.*, 651 S.W.2d 260, 262 (Tex. 1983); *Southwest Battery Corp. v. Owen*, 115 S.W.2d 1097, 1098-1099 (Tex. 1938).

that Miga suffered reasonably certain business losses resulting from Jensen's breach. Assuming lost profits would be an appropriate measure of damages, resulting from a failed stock sale, Miga did not testify about what particular profit he expected, or that the parties contemplated a particular resale of the stock;[27] in fact, Miga testified that he would not have sold it. There was thus no reasonably certain profit, the loss of which he had sued for. Instead, the loss he alleged – and recovered under the lost profits submission – was the value of a hypothetical option for 4.8% of Jensen's original interest in PGE exercised at the time of trial. Although labeled lost profits, in part (b) the jury awarded Miga the 1997 market gain in the stock Jensen refused to sell him in 1994.[28] But the rule in Texas has long been that contract damages are measured at the time of breach, and not by the bargained-for goods' market gain as of the time of trial.[29]

The court of appeals nevertheless upheld the "lost profits" award, reasoning that this Court's decisions in *Randon v. Barton*[30] and *Calvit v. McFadden*[31] support measuring Miga's damages as the option's highest market value between the date of breach and trial because Miga could not easily obtain PGE stock elsewhere at the time of breach.[32] In *Randon*, Randon agreed to sell to Barton, Randon's interest in land certificates which were to be sold to him under a contract with yet another party. As it

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[27] *See, e.g.*, *Whiteside*, 170 S.W.2d at 196-97.

[28] *See, e.g.*, *id.* at 196; 1 DOBBS, LAW OF REMEDIES §§ 3.3(5), 4.5(3); 3 LAW OF REMEDIES § 12.4(3).

[29] *See Heilbroner v. Douglass*, 45 Tex. 402, 407 (1876); *Whiteside*, 170 S.W.2d at 196.

[30] 4 Tex. 289 (1849).

[31] 13 Tex. 324 (1855).

[32] 25 S.W.3d at 378.

turned out, Randon did not own all of the interest that he purported to sell. And Barton sued him. Before discussing the measure of damages, this Court noted that the contract over which Barton sued involved "merely . . . the transfer of unlocated land certificates."[33] Thus, the interest being sued over was in the nature of stock rather than the actual property. With that in mind, the Court reinforced the general rule that damages for breach of contract are measured by the value of the good bargained for at the time of breach.[34] But the Court then expressed its concern that that particular measure of damages, when applied to securities, failed to compensate the damaged party to the full measure of his damages. As a result, we applied a limited exception to the general rule, allowing damages for the highest value of the article between the time of breach and the time of trial, because the purchasers had paid the contract price in advance.[35] In *Calvit*, we applied the *Randon* measure of damages to the sale of personal property (cattle) when the purchase price was paid in advance.[36]

Initially, we note that the *Randon* damages measure was patterned on an English and early New York rule,[37] which was subsequently modified by the New York courts for cases involving stock conversion. In an 1889 case involving a broker's mishandling of his client's stock, the United States Supreme Court explained that the rule allowing damages to be measured by the stock's highest value up

[33] *Randon*, 4 Tex. at 293.

[34] *See id.*; *Calvit*, 13 Tex. at 325.

[35] *See Randon*, 4 Tex. at 293-94; *Calvit*, 13 Tex. at 325-26; *Heilbroner*, 45 Tex. at 407.

[36] *Calvit*, 13 Tex. at 326.

[37] *See Randon*, 4 Tex. at 293-95.

to the time of trial had proved unworkable.[38] The Court therefore adopted New York's modification in cases where the defendant converted stock owned by the plaintiff, allowing damages to be measured within a reasonable time after plaintiff received notice of the breach.[39] A reasonable time was the time, in theory, that it would take the plaintiff to enter the market and reacquire the stock that had been wrongfully converted.[40]

The *Randon* damages measure, assuming it is viable today, is inapplicable here. For example, Miga did not pay in advance for his stock interest. Thus, we remain with the general measure of damages. But our decision does not turn on when Miga offered payment for the stock. Because Jensen breached the contract on the same day Miga attempted to exercise his option, the correct measure of damages for Jensen's failure to perform on his promise is the traditional one: "the difference between the price contracted to be paid and the value of the article at the time when it should [have been] delivered . . . ."[41]

This holding is consistent with the approach of at least two Texas courts of appeals that have addressed breach damages for contracts involving corporate stock.[42] Measuring these damages at the time of breach also has the support of other jurisdictions.[43] The New York Court of Appeals, after noting that

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[38] *See Galigher v. Jones*, 129 U.S. 193, 200-01 (1889).

[39] *See id.* at 201-02.

[40] *See id.* at 201; *Schultz v. Commodity Futures Trading Comm'n*, 716 F.2d 136, 140 (2d Cir. 1983).

[41] *Randon*, 4 Tex. at 293.

[42] *See Hurst v. Forsythe*, 584 S.W.2d 314, 316-17 (Tex. Civ. App.–Texarkana 1979, writ ref'd n.r.e.); *Bowers Steel, Inc. v. DeBrooke*, 557 S.W.2d 369, 373 (Tex. Civ. App.–San Antonio 1977, no writ).

[43] *See Hermanowski v. Acton Corp.*, 729 F.2d 921, 922 (2d Cir. 1984); *Simon v. Electrospace Corp.*, 269 N.E.2d 21, 26 (N.Y. 1971); *Finnell v. Bromberg*, 381 P.2d 221, 227 (Nev. 1963); *Colo. Mgmt. Corp. v. The Am. Founders Life Ins.*

"[t]he proper measure of damages for breach of contract is determined by the loss sustained or gain prevented at the time and place of breach,"[44] held that "[t]he rule is precisely the same when the breach of contract is nondelivery of shares of stock."[45]

As the Second Circuit has reasoned, "[m]easuring contract damages by the value of the item at the time of the breach is eminently sensible and actually takes expected lost future profits into account. The value of assets for which there is a market is the discounted value of the stream of future income that the assets are expected to produce."[46] For this reason, New York courts have "explicitly upheld damage awards based on what 'knowledgeable investors anticipated the future conditions and performance would be at the time of the breach' and have rejected awards based on what 'the actual economic conditions and performance' were in light of hindsight."[47] Thus, the "damage award resulting from a breach of an agreement to purchase securities is the difference between the contract price and the fair market value of the asset at the time of breach, not the difference between the contract price and the value of the shares sometime subsequent to the breach."[48] We note that the Second Circuit here uses "lost future profits"

Co., 367 P.2d 335, 337 (Colo. 1961).

[44] *Simon*, 269 N.E.2d at 26.

[45] *Id.*

[46] *Sharma v. Skaarup Ship Mgmt. Corp.*, 916 F.2d 820, 826 (2d Cir. 1990), *cert. denied*, 499 U.S. 907 (1991).

[47] *Id.* (citation omitted).

[48] *Id.* at 825.

loosely; in the case of stock, these "future profits" are more precisely the stock's expected market gain over time.[49]

Calculating the value of an unexercised option can be a complicated enterprise,[50] requiring the application of finance models to determine the present value of the right to purchase stock at a fixed price at some future time.[51] But when, as here, breach occurs when the option holder seeks to exercise the option, the option becomes a straightforward contract to sell a certain amount of stock at a certain price at the time chosen by the holder.[52] When Miga attempted to exercise his option in December 1994, the time for delivery was set; at that point, the option simply represented Jensen's promise to sell Miga 4.8% of his interest in PGE at Jensen's original cost. Jensen failed to deliver the stock when he should have, and damages for failure to deliver stock, like failure to deliver other marketable goods, are measured precisely as they were 150 years ago: the difference between the value of the goods bargained for and the contract price at the time set for delivery.[53]

We note that time-of-breach damages may be inadequate when an employer anticipatorily repudiates an option agreement; that is, the option holder's right to exercise the option has vested, and the employer repudiates the agreement before the right to exercise the option has matured for the option holder,

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[49] *See* 1 DOBBS, LAW OF REMEDIES §§ 3.3(5); 3 LAW OF REMEDIES § 12.4(3).

[50] *See Scully v. US WATS, Inc.*, 238 F.3d 497, 508 (3d Cir. 2001).

[51] *See Lucente v. Int'l Bus. Machs. Corp.*, 117 F. Supp. 2d 336, 354-55(S.D.N.Y. 2000), *adhered to on reconsideration*, 146 F. Supp. 2d 298 (S.D.N.Y. 2001).

[52] *See Lucente*, 146 F. Supp. 2d at 308-09.

[53] *See Randon*, 4 Tex. at 293; *Calvit*, 13 Tex. at 325; *Heilbroner*, 45 Tex. at 407.

as there could be a question as to the time set for delivery in that circumstance.[54] But that case is not before us; Miga had the right to exercise and chose to exercise his option in December of 1994. The correct measure of damages was therefore presented to the jury in question 11, part (a): "The difference between the cost to exercise the stock option contract per the parties [sic] agreement . . . and the value of the stock in December, 1994 . . . ." The jury found this difference to be $1,034,400. Although PGE stock was not publicly traded in December 1994, the parties do not dispute that it had a determinable market value then, evidenced in part by two contemporaneous offers to purchase the company for $27,000,000 and $28,000,000 cash. Further, neither party suggests that Jensen's refusal to perform in December 1994 was not a breach, and neither party contests the finding that the option's value at that time was $1,034,400.

Our holding does not preclude the award of lost profits in contract disputes involving stock and stock options. Miga simply did not claim lost profits, and the evidence he offered was relevant to the bargained-for goods' market gain at the time of trial, not to lost profits damages. The court of appeals thus erred in affirming the trial court's lost profits award.

Miga argues that denying him the appreciation in the value of the stock effectively rewards Jensen for breaching the agreement. As it happens, that is true. However, it was far from certain in December 1994 that the value of the stock would appreciate as it did. While Jensen ultimately benefitted from this appreciation, he also assumed the risk that the investment would be lost, just as any stockholder does. To award Miga damages based on the appreciated value of the stock would be to make him better off than

[54] *See, e.g.*, *Lucente*, 146 F. Supp. 2d at 308-14; *Saewitz v. Epstein*, 6 F. Supp. 2d 151, 157 (N.D.N.Y. 1998).

he would have been had the agreement been honored by giving him an investment free of the risks other shareholders undertook. More importantly, however, trying to determine what part of the stock's appreciation Miga would have realized had he obtained the stock in December 1994 is too speculative. Our holding does not punish the innocent option holder as Miga argues. When a closely held corporation's stock has no ascertainable market value, one could seek specific performance to enforce a stock purchase agreement and thereby gain the hoped for benefits, but as well incur the risks.[55]

V

Finally, Miga argues that $1,034,400 alone, recovered today, is insufficient to compensate him for the loss he suffered due to Jensen's contractual breach in 1994. He is right. All assets, whether property or cash, fluctuate in value over time. But the proper way to make Miga whole is not by allowing him to recover the market gain he would have reaped had he received his stock as promised, managed to pay any taxes potentially owed on his gain without selling a portion of the stock, accepted the risk that the stock would drop below the exercise price, and sold it at the perfect moment when the stock hit its peak two years later. The proper way to compensate Miga for his lost investment opportunity is through the award of interest on his time-of-breach damages.[56]

The trial court awarded 10% pre-judgment interest beginning on the date Miga's suit was filed and running until the date the judgment was signed by the trial court. The court of appeals struck the pre-

[55] *See Bendalin v. Delgado*, 406 S.W.2d 897 (Tex. 1966) (plaintiff could seek specific performance to enforce a stock purchase agreement when the corporation was closely held and the stock had no market value).

[56] *See Johnson & Higgins*, 962 S.W.2d at 528; *Heilbroner*, 45 Tex. at 408.

judgment portion of this award as inequitable in light of Miga's lost profits recovery. Given our holding that Miga's damages must be measured at the time of breach, the trial court was correct to award pre-judgment interest, although it must be computed as simple interest.[57] Miga will also receive 10% post-judgment interest, compounded annually as required by statute.[58]

VI

Because there is no evidence of fraud, we affirm the court of appeals' judgment as to Miga's fraud and exemplary damages claims. Because we conclude that Jensen's payment to Miga, made in order to stop the accrual of post-judgment interest, did not moot his appeal and that Jensen preserved his objection to the measure of damages submitted to the jury, we reach the merits of Jensen's petition and reverse the court of appeals' judgment. Miga's contract damages should have been measured by the value of the option at the time of breach. Because the correct measure was submitted to the jury in question 11(a) and answered in the amount of $1,034,400, we render judgment for Miga for $1,034,400.

Further, we modify the court of appeals' judgment to reflect that Miga receive 10% pre-judgment interest, computed as simple interest, on his damages running from the date he filed suit to the date of

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[57] *See* TEX. FIN. CODE § 304.104.

[58] *See id.* §§ 304.003(c), 304.006.

judgment.[59] The judgment will also reflect 10% post-judgment interest,[60] compounded annually,[61] running until August 29, 2000, when the Agreed Order terminated its accrual. The case is remanded to the trial court for calculation of interest and rendition of judgment accordingly.

Craig T. Enoch
Justice

OPINION DELIVERED: October 31, 2002

[59] *See id*. § 304.104

[60] *See id*. § 304.003(c).

[61] *See id*. § 304.006.