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Supreme Court of Texas.
United Services Automobile Association, also known as 'USAA',
Petitioner,
v.
James Steven Brite, Respondent.
No. 05-0132.

September 26, 2006

Appearances:
W. Carl Jordan, Vinson & Elkins LLP, Houston, TX, for petitioner.
Douglas Alexander, Alexander Dubose Jones & Townsend, LLP, Austin,
for respondent.

Before:

Wallace B. Jefferson, Don R. Willett, Harriet O'Neill, David M.
Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson,
Scott A. Brister, Justices.

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JUSTICE: Please be seated. Court is ready to hear argument in 05-0132, United Services Automobile Association versus James Steven Brite.

COURT MARSHALL: May it please the Court. Mr. Carl Jordan will present argument for petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF W. CARL JORDAN ON BEHALF OF THE PETITIONER

MR. JORDAN: May it please the Court. I would like to address three issues as one: The jurisdiction issue, our no evidence issue with respect to the liability finding, and our issue-- our point that the liability question instruction accompanying that question that was put to the jury was imbedded with reversible error. With regard to jurisdiction, our position is that Mr. Brite never established jurisdiction of county court at law in this case because: One, he filed a defective plea well could be cured. Number two, in never cured by establishing that the amount in controversy at the time he filed his lawsuit was within the upper jurisdictional limits of the Court. He did not plead his damages specifically until shortly before trial in response to the special exemption. And at that time, he pled for 1.6 million dollars, 16 times the maximum jurisdictional limit of the Court even as Justice Duncan reasoned in her dissent if you take out the

maximum amount of cumulative damages that he could recover in this lawsuit, the amount of still 1.3 million or 13 times the maximum jurisdictional limits of the Court and almost-- And the vast majority of that amount, as Justice Duncan found, we submit had to be attributable to damages that count as the amount in controversy, back pay is something ...

JUSTICE: Was every-- Was all that, was all that significant to the jurisprudence of Texas?

MR. JORDAN: Your Honor, we think it is significant to the jurisprudence of Texas because we believe that when the Legislature imposed maximum jurisdictional limits on the county courts, they meant for those limits to be enforced. And we believe that in this case, and perhaps in other cases, there is frankly an amount of damage system that can and perhaps does go on.

JUSTICE: Why do those limits vary so much around the state? Some county court and district courts and some other towns?

MR. JORDAN: Your Honor, I do not know anything about the question. I guess we'll have to ask the Legislature but I know it's a hundred thousand dollars in Bexar County. And under the facts of this case, we think that clearly the amount was, way, way, way past the maximum jurisdictional limit.

JUSTICE: Mr. Jordan, you've indicated that jurisdiction with regard to the amount in controversy must be established at the time suit is filed and you say that with some, some authority supporting you. Obviously, we can envision cases in which there's a-- an honest pleading that is wi-- that is under-- seeking a hun-- under a hundred thousand dollars in damages. But then, there is some discoveries of some additional damages that perhaps were not discoverable at the time of filing suit or maybe some new damages or ropes that then pushed the, the amount being sought beyond a hundred thousand dollars. What happens if there's an amendments after an initial pleading that's under-- seeking under a hundred thousand dollar, the amendment a year later seeks a million five. Surely you wouldn't say at the time of filing, since jurisdiction was proper, that the country court could enter a judgment a million five or would you? And what would you suggest should be the result in that case?

MR. JORDAN: I would not say that, your Honor, you're correct. And, and I, I think the decisions of this Court state that if the damages-- the additional damages have accrued because of the passage the time ...

JUSTICE: Okay. Put that situation to the side. I'm not going to give you the easy out.

MR. JORDAN: Thank you. In that case, your Honor, I would say that if there is an amendment that alleges either a new category of damages or increases the amount claimed in the category of damages that has already been pled, and it cannot be established that is due to the passage of time-- And I have some difficulty understanding what that phrase means in the cases as well but it cannot be put into that category. And I think that the plaintiff in, in the hypothetical, as the plaintiff in this case, has pled himself out of court, as Justice Duncan said in her, in her dissent. Otherwise ...

JUSTICE: So then jurisdiction is not strictly established for all cases at the time of filing?

MR. JORDAN: That would be our position in the hypothetical you gave, yes, your Honor. In, in this case, our-- This is a much easier case because Mr. Brite pled for front pay damages, he said in his petition that in all reasonable probability, "My damages will continue unto the future, perhaps for the balance of my natural life for which I

sue." That's what his petition said, and by suing for front pay damages, he placed those damages into controversy. I would say in the hypothetical, Justice Wainwright, that you gave, if an amendment to pleading places a different category of damages into controversy, at that point time, jurisdiction should be revisited. Otherwise, the, the expression of the Legislature with respect to what types of cases the county courts at law should, should have jurisdiction over, it seems to me, would be disregarded.

JUSTICE: Well, did-- Well, your response seems to be similar to the situation that may have been filed in federal court and then defendant's removed and is kicked back to state court. Is that, is that your position? Is it similar to that?

MR. JORDAN: Yes, Justice Medina. There are, there are analogies there. For one thing, in federal court, in determining whether the 75-thousand-dollar threshold for the purpose of jurisdiction is met, the courts count front pay, that is we've cited decisions in our brief from that. In addition to that, the courts look at request for reinstatement, the federal courts even reversed the cases. And, and if the 75-thousand-dollar threshold is in question, they put a value on that, I think some of the cases we cited in our brief's given estimate of what front pay would be with a reasonable amount of time. I think the one the-- I think Justice-- Judge Rodriguez recently issued a decision where he said three to five years was to make what it is will count against the \$75,000. So that's what they're doing in federal courts. [inaudible]

JUSTICE: Do the federal courts use different standards in judging whether the plaintiff has met jurisdiction for versty purposes versus more than the defendant's entitled to moot? It seems like they do

MR. JORDAN: Well, of course, in federal court, Justice Hecht, the burden is on the dependent because they're attempting to invoke the jurisdiction of a federal court over the plaintiff's object-- -

JUSTICE: On the moot?

MR. JORDAN: - objection. And that the court ...

JUSTICE: On the moot?

MR. JORDAN: On the moot, yes sir. And they do go through an evidentiary weighing process where they attempt to determine if, if it's likely the amount is over \$75,000. But there, you have ...

JUSTICE: But I-- is it the same? Do they do the same thing when the-- When there's no removal? They're already in the federal court and the defendant says it's not over \$75,000.

MR. JORDAN: I'm not sure what the answer to that question is. I would assume it might be the same approach but I'm not sure about that.

JUSTICE: The Diagar case that the respondent cites seems to set up sort of a different standard but I couldn't tell. Do yo know about that?

MR. JORDAN: Not very much, Judge. I'll-- I would think that in that situation, again since you would have a party that is contesting jurisdiction, would have the burden, would have the burden of establishing that there are no possibility that jurisdiction exists. Here, they said there's no possibility that jurisdiction could've existed. The only way the Court of Appeals found jurisdiction-- or that two judges in majority found jurisdiction was to conclude that front pay should not be counted because it was speculative. To us, we submit that was just clear error for several reasons: Number one, the statute on its face is plain and it excludes only three categories of damages; punitive damages and the like, attorney's fees, and interest. Does not exclude front pay and there's no authorization for excluding any other

requested monetary relief, so that's one reason the statute's plain on its face. Secondly, the plaintiff pled for front pay damages and by doing so he placed that into controversy. Third, the "likely to recover" standard that the plaintiff has supplied everything's here but-- an, and that the Court of Appeals relied on, it seems both unsupported and not workable. Number one, it reads the phrase "amount in controversy" after jurisdictional statute, which is reads right the statute, it replaces it, we think, with a, a threshold type evaluation about the trial court which, in essence, requires a "mini-trial". For example, in this case, Mr. Brite's case, if the Court had-- if the trial court had gone through a weighing process to determine whether or not it was-- there was a reasonable probability that front pay could be recovered, here's what the trial court would have to think-- would have-- would have had to weigh-- weigh through: Number one, what was the-- what's Mr. Brite lied to with respect the reasons he was going for the termination of his employment, that's why he said he wouldn't come back to work for USAA. So that evidence would have to be sorted through because that would determine whether the third remedy would be reinstatement or front pay, that's got to be weighed through. The impact of his declining to pursue employment opportunities, alternative employm-- employment opportunities that were offered to him by USAA would have to be weighed through. What the circumstances of those were? He turned them down. Two job offers from other employments that were in his professional field. They weren't manager jobs but they were in his professional field, that would have to be weighed through with regard to mitigation. And finally, he took himself out of the job market seven months after he left USAA to trade spots on David [inaudible].

JUSTICE: You clearly sustain your argument and dismiss-- does it go through the sub-practice remedy 60-day provision where there's 60 days re-filing of county court or [inaudible]?

MR. JORDAN: Your Honor, we have not briefed that issue. Of course, however, we think we will have an argument that he will not be at liberty to re-file if you find that the country court law the county has jurisdiction.

JUSTICE: Why is that?

MR. JORDAN: It is because in this Court's decision in Schroeder versus in Texas Iron Works, I believe, the Court ruled that the 60-day there-- at-- that time limitations and that the Texas Commission on Human Rights Act are jurisdictional in nature and not subject to tolling. I believe that the, the code provision of that Chief Justice referred to is limited in it's application to general statutory tasks.

JUSTICE: Well, that seems to-- he made some remark initially that there's some-- perhaps some gamemanship going on in this type of cases and in this type of courts which seems to imply that parties who filed the lawsuit and perhaps, by your suggestion, judges are involved in this gamemanship and you have a plaintiff, a party who doesn't understand this game and then-- who has a meritorious claim sustains a verdict and will be punished because the lawyer maybe the judge are in this game. Is that, that what you're suggesting?

MR. JORDAN: Your Honor, I think, I think the, the other side or the plaintiff's attorney in this prior is probably else for whoever, just won't take it with their eyes wide open. They resisted a request to specify their damages in discovery multiple times until right before trial. Two, two weeks before they finally had to plead, they re-pled and that was 30 days out from trial. Two weeks before then, they told the trial court in a hearing on plead jurisdiction that they'd not brought ou-- put in a number on their damage brief. And two weeks

later, they put 1.6 million dollar on it.

JUSTICE: But I guess the plaintiff in that case would have a remedy against the lawyer and there's a malpractice [inaudible].

JUSTICE: If the trial court with that jurisdiction, the Court of Appeals should not reach the merits, shouldn't they?

MR. JORDAN: We wish it could, Justice Hecht. We think there are a lot of significant ...

JUSTICE: I said the Court, I said the Court of Appeals ...

MR. JORDAN: The Court of Appeals should not have reached the merits if there was not jurisdiction.

JUSTICE: What about the argument that if an amendments takes the amount in controversy beyond the jurisdictional limits for the particular court that the trial judge could still enter a verdict just limited to its jurisdictional amount. What about that argument? I know it may-- it's conceptually denies with the concept of jurisdiction but what do you think of about that argument? Does it fit under the statutory language?

MR. JORDAN: I don't, your Honor, I don't think it does. I think before he administers a decision he doesn't buys from the amount in controversy and I think the plaintiff decides what the amount in controversy is by pleading to it himself.

JUSTICE: If I may move just very briefly-- oh-- to, to the no evidence points. I would cite this on no evidence, under Kell, under this Court's decision in Kell, the Court should look at all the circumstantial evidence on motive including in context most importantly. Perhaps the most--the, the thing that plaintiff relied on most heavily at trial with regard to his pretext claim was his argument that Mr. Brite didn't like to. Mr. Brite acknowledged, we think that charge one several times.

JUSTICE: Thank you. The Court is now ready to hear argument from the respondent.

COURT MARSHALL: May it please the Court. Mr. Douglas Alexander to present argument for the respondent.

ORAL ARGUMENT OF DOUGLAS ALEXANDER ON BEHALF OF THE RESPONDENT

MR. ALEXANDER: May it please the Court. I think that the Court issue on this jurisdictional issue is how we define the amount in controversy and what I would like to do is to provide an illustration to the Court as to why the definition they've arrived at that is the maximum amount of damages sought is the incorrect the standard. We have been, of course, focusing all along on the maximum amount, a hundred thousand dollars, but of course amount in controversy had to work on both ends of the spectrum. So I'd like to take this back to a kinder and gentler time when the district courts would decide smaller cases and the issue was: Did you get over the minimum jurisdictional hurdle of \$500? And I would posit this illustration for you: Let's say that you had a case in which the plaintiff sued for \$510, that's what the pleading wants. And then the defendant came in and says, "Whoa, whoa, whoa, whoa. No way, there is no way under the undisputed facts of this case and the existing law that this plaintiff can get a recovery of \$510." Do we say in that situation that the damages sought are conclusive? No, we don't. What your entitled to do-- and this goes back to Justice Hecht's decision in Blan, which goes back to the Texas

Supreme Court's decision in Hoffman-- is that you can come in as the defendant and say, by plead to the jurisdiction, "I can demonstrate that this is a fraud on the Court. I can demonstrate that that, that amount of damages sought cannot stand." And then we have the kind of hearing, Justice Wainwright, that we had in Texas Parks and Wildlife versus Miranda, where have the, the summary judgment hearing on that. And let me cite the Court to some cases that, that illustrate this point. Well, I'll cite the Court to-- of course, we, we argued this with respect to Dwight in, in our most recent finding, but let me give you another one, Reinhart's, it is 401 SW 2d. 274, a 1966 decision, decision by the Austin Court of Appeals that wrestled with this case, and it's got great facts and I'll just kind of lay it out. In that case, there was no question that the plaintiff-- It was, it was an auto collision case, property damage only, and there was no question that the plaintiff was absolutely entitled to \$440. No question about that. The question was the pleading was for \$510, the plaintiff was asking for an additional \$70 for loss of use of vehicle. And the Court went through a very lengthy analysis saying that, "You know, the law right now is not entirely clear as to whether you can get loss of use of the vehicle damages. There is reasonable doubt on that question." So the defendant was arguing, "You, you know we're out of court. They can't get the \$70." But the Court says, "No. There is a reasonable ground to-- the, the plaintiff had a reasonable ground to expect the society award." Under these circumstances, a recovery of \$510, even though the jury ultimately awarded an amount less than 500, the Court said, "Given that reasonable doubt, in cases where there's question, then we are going to give the doubt to the plaintiff." Now, let's wind that up to our case where we're dealing with maximum jurisdiction. And let me give the Court a double ...

JUSTICE O'NEILL: So even, even if pro-- damages are speculative, we're going to say there were then the realm and we're going to include the money-- amount in controversy.

MR. ALEXANDER: No, because now, we have to, we have to use the same logic.

JUSTICE O'NEILL: But I did.

MR. ALEXANDER: Yes-- No-- You did because here it is, the logic is this: "Within the jurisdiction," focus on the phrase "within the jurisdiction." The plaintiff, in my hypothetical, going over the line was saying, "I am ask-- I'm saying that I have reasonable ground to expect the recovery within the jurisdiction, that is \$510." Okay? That's between 500 and 100. Are you with me? Now let's go to-- up to the hundred thousand mark, apply the same logic. I have got back pay that everybody agrees that I can get. And in this case, my back pay is below a hundred thousand dollars. Where the doubt comes is, can I get front pay? In this situation, it's likely that I can't. And let me try another illustration that might fell more on this, let's talk about-- And this is one that depend there and I think hypothecated very well: Let's say you have personal injury case. And next you-- I'll cite to you another case that really is dealing with this kind of fact, it's Weidner, here's the cite 14 SW 3d. 353. And let me just take it for you slowly, everybody agrees, time suit is filed, the damages are less than a hundred thousand dollars. But the 64-thousand-dollar question is: Can this plaintiff recover future medical damages? Okay? And at the time suit is filed, the doctor says-- the physician says to the plaintiff's attorney who's consulting with him, "I think it's going to be a full recovery, 100 percent recovery by the time of trial. Good news for the plaintiff." And so the, the lawyer asked, "Okay, I hear you say that

that's the probably the case. Are you telling me with a 100 degree certainty that that's true?" "Well, no, I'm not."

JUSTICE O'NEILL: But your analogies are completely different because on the first one you're talking about whether there's a cause of action this this guy was full; and second you're talking about trying to figure out if the facts will get you there.

MR. ALEXANDER: I'm saying that in both instances, that the, the, the words that the Court has used for instance, in *Dwire* is reasonable ground of expectation, both of them are dealing with a reasonable ground of expectation. Let me continue with my hypothetical ...

JUSTICE O'NEILL: One as a, as the matter of legal ...

MR. ALEXANDER: One's a, one's as a the matter of law, one's as a matter of fact -

JUSTICE O'NEILL: - a matter of fact.

MR. ALEXANDER: Correct.

JUSTICE O'NEILL: But that's a big difference.

MR. ALEXANDER: Well, it's, it's-- it, it certainly is a difference but it's, but it's one that, that ultimately comes back to the question: What's the reasonable ground of expectation? Again, back in my hypothetical, it's at the time when filing suit, I have good faith reason to believe based upon what a physician is telling me, in medical probability at that time, that my case falls within the jurisdiction of the Court. But then I ask, "Are you telling me that with, that with certainly?" and he says "No." Then I'm pleading for it, I'm going to plead for future medical damages because it would be malpractice not to do it. But then, in the, in the course of time, it turns out-- and this has actually happened in *Wider*-- that, that the, the doctor says, you know, "I thought it was going to be a full recovery. I now think that we're talking about permanent injuries." The case was amended, the pleadings were amended, and the court ultimately held there was jurisdiction. Now, they tried to do it under the rubric of, well, the damage has increased with pre-- the passage of the time. But, but it, it applies absolutely equally to the question of-- the 64-thousand-dollar question of: Can you recover those future medical damages? That's their big question.

JUSTICE: Mr. Alexander.

MR. ALEXANDER: Yes.

JUSTICE: In your, in your, your logic, doesn't it flip the roles of the defendant and plaintiffs in this hearing your talking about? If the plaintiff files a pleading that's within the jurist-- maximum jurisdictional limits and the defendant says, "No, front pay damages and not speculative." You pleaded yourself out of Court. You hold this hearing that you referenced of *la Miranda*, as you said. And then the defendant comes into that hearing says, "Judge, we're adamant. The defen-- The plaintiff has a reasonable probability of recovering front pay." And the plaintiff walks in and says, "No, we're not going to recover that, Judge. It's speculative." Don't you flip the roles of the parties and make that a bit awkward at a, at a minimum?

MR. ALEXANDER: No, I don't think so because it's effectively what happens heading back to Judge Hecht's question in the removal of context. When you're asking for a remand in the federal-- and at least from the thiser, and then you ask for other different standards around the country, yes, your there are. Some would use possibility, other use-- I mean, different, different courts use different ones. In the Fifth Circuit, they use the test of, of, of, of, of likelihood which is why we suggested that's not a radical approach, and it's the defendant's burden. Now once again, back to your figures that awkward,

well, yes, except that there's no jury in the box. But in that case, yes, that's exactly what the defendant is doing and it fits exactly with Miranda. The defendant comes in and says no. Under these circumstances, in all likelihood, the, the, the amount in controversy exceeds \$75,000. It flips the roles but once again, the courts don't have any problem.

JUSTICE: And are plaintiffs' admissions from their experts during that hearing admissible in the trial and -

MR. ALEXANDER: Absolutely not.

JUSTICE: - the defendant's statements?

MR. ALEXANDER: Absolutely not. And it's ...

JUSTICE: They're under oath, subject for cross examinations.

MR. ALEXANDER: Well, and it's, and it, in it-- Well, and again. The part of the problem is I don't want to get too hung up on this because I'm not trying to be cute. Let's talk about back to my hypothetical. The doctor comes in, under oath, and says "At the time the suit was filed, yes I'd told the plaintiff that in all probability 90% chance that there was not going to be any future damages, any future medical damages. I told them that, I believe it. I'm over-- I'm under oath, I believe it but you know what, six months later and once again this is Wigner, this happen in reality." The Court of appeals says six months later she didn't get well and, and, and in medical probability, I can now say, I can now go in to Court and testify without contradiction that in all reasonable medical probability she will continue to suffer the damages in the future.

JUSTICE: And that the damages were not temporary but we're in this opinion now permanent. Therefore, ...

MR. ALEXANDER: Now, permanent. So there's. there's ...

JUSTICE: Why is, why is weather damages or speculative or not, not a more on windy standard and just a bright land rule. What did the plaintiff plead to determine the amount in controversy and whether that would have been or without of the bright land set up in the statute?

MR. ALEXANDER: If there's has one advantage-- it's more on speed, it simple. No question about it, but it's not one that really fits with, with what we're talking about. And let me get back to, you know -

JUSTICE: Okay.

MR. ALEXANDER: - my, my hypothetical ...

JUSTICE: But the, but the statute says, "Look to the amount unless on the face of a decision."

MR. ALEXANDER: Okay and let say just as well it. Let's say my face on the petition in, you know, arc-- in this case are with effective. But let's say that on the face of petition, it says that the amount in controversy is within the jurisdiction of the Court that takes the question, "How do you defined amount in controversy?" I will take my head off to Justice Duncan, who under took to the findings. She said for purposes of determining the amount of controversy, the question is not what a plaintiff will recover or is likely recover is what the plaintiff seeks to recover. You will notice though in her descent that within four sentences, top or bottom there's no citation any authority which she had to do because no Texas Court has really undertaken to define it is to go through all the authorities and come up with the definition. We barely say that definition is wrong and doesn't fit at all.

JUSTICE: How? How hard was that? The amount in controversy? Is not amount that you reasonably recovery will be amount just likely the amount in controversy to plaintiff leads up to million or billion and isn't that the amount in controversy. They may lose but that is the

amount in controversy, isn't it?

MR. ALEXANDER: Well, here's the prong to come up with. They say the amount in controversy is maximum amount of damages, you saw it and you saw back in the-- in answer to Justice Medina's question, I believe, that they're safe-- even if you later amend that's the amount of the damages sought and that brings you back to my initial illustration. I plead for five hundred and ten dollars and court with, with the minimum jurisdiction of five hundred is that conclusive? Under there-- under the steps I just read. Yes, but what-- what Bland tell us is, "You can go behind the pleadings," and when you go behind the pleadings the Wilther tells us that what you focused on-- in the doubtful case, with all intendant in favor of the plaintiff's jurisdiction is, is, is what-- and I'm just reading with the Supreme Court's decision plaintiff might have reasonable ground of expectation of recovery and I'm just saying that you apply that logic on both sides is not is simplistic-- is simply the number which is pleading the number doesn't work and it is on when the -

JUSTICE: You say that the jurisdiction remains. Why would you always file a defective pleading not stating an amount in controversy, waiting for the special examining then in this case saying, "Okay, the damages are 1.6 million," and once the Court acquire jurisdiction it hasn't throughout.

MR. ALEXANDER: Well, it, it because it doesn't-- well, tab it through out and here's why in other's what, what, what typically what happen and again I don't want to get too hung up on the defects here. What typically what happen and this is require by rule 47-B what's the pleading is going to say that the matter in controversy is exclusive a punitive damages, attorney's fees, interest and cost is within the jurisdiction of the Court that, that will be conclusive and last going back to Texas Parks and Wildlife versus Miranda and Bland. The defending comes in, Who, who, who, who time out not so fast. Your pleading of-- within the jurisdiction but I'm saying that is fraudulent at which point we're ashamed as the language that used in Bland. At which point you have the summary judgment kind of hearing at which point the parties come together and test that fact. That theoretical question that I can't emphasize with enough is then the question becomes "What do you mean by amount in controversy?" I will tell you this, the federal Court have resorted, they defined it differently but they defined it and the reason they have to defined this but the statute does not, Texas statute is the same, it doesn't define it. So the Court's have to fill it in and you know-- just as Justice Duncan for attempting to do it without citing anything and the reason ...

JUSTICE: My question -

MR. ALEXANDER: Again, those slam and her. I guess is not defined.

JUSTICE: My question is a little different -

MR. ALEXANDER: Okay.

JUSTICE: - what I-- like this case, you just don't plead-- you don't say with them that the juristil-- jurisdictional limits of the Court -

MR. ALEXANDER: Okay.

JUSTICE: - you just say nothing you, you just defective in that respect.

MR. ALEXANDER: Okay.

JUSTICE: Then the defendants says, "Your missing something we need to know," and then you come in for trial and say, "Well, our damage desert 15 million dollar."

MR. ALEXANDER: Okay, let me explai -

JUSTICE: Or demand controversy.

MR. ALEXANDER: - Yeah. Let me tell you how it should play out of that situation 'cause we get to the peak case that we haven't talked about. If the-- Typically the way I play out this and there's a two layer approach. I plead a defective plead as you state it, the other side pulse special exemption going who, who, who you have not properly plead jurisdiction. Under peak, I can then amend my pleading, my amended pleading will they say that the language that I just used. The matter in controversy is goods of the X, Y and Z is within the jurisdiction of the Court that's all of the pleading left. Then we go to layer two. Bland, the defendant comes and goes no, no, no, it is not within the jurisdiction of the Court, there, there is no question that the damages in the case are an excess of the jurisdiction of the Court. So we have the Bland, we have a Texas Parks and Wildlife versus Miranda hearing. But then again, the question becomes at that hearing, how do you defi-- defined amount in controversy when I'm suggesting to you is a standard like the federal standard, the fifth circuit, it's not some, you know, bombs throwing radical proposal. It's one that's consistent which Dwire because which Dwire tells us when we go back and visit that is if the plaintiff has plead an amount within the juris-- within the jurisdiction in that case, over five hundred. We examine the question is "Did the plaintiff has a reasonable ground, the expectation for recovering that?" Now, there will be cert-- certain chances well the answer is "no." With the defendant can come in and go. Look, here's the receipts.

JUSTICE: But the reason, why did the legislature have a hundred thousand dollar cash has to be because the IDM was the county courts who going to be for first smaller cases and such?

MR. ALEXANDER: Okay, and I'm glad you got there to say-- I got a little bit time when we go that. Here's, here's -

JUSTICE: And if the ideas you can do that and a man and a state you get a million dollar judgment that's not a small case.

MR. ALEXANDER: Let me, let me-- let's explore that for a while. You landed on error that you think it should be discussed. Here is the jurisdictional of the County Court of law, the basic is, is five hundred same in, in district Court arguably the same. Okay, let me go up to a hundred thousand is concurrent all the way with the District Court. This is what I think, the legislation was doing in 1991 with it increase it from five thousand to, to a hundred thousand. It was saying that you actually want the statutory kind of laws to handle more cases and in fact he said "no, he said a hundred thousand but you can now decide punitive damages," and this is the time before we had tops. So the same statutory, County Court of law you're going to show all board of the burden. Now, let's, let's look at their standing. We're now we going to say that no, the amount in controversy is the maximum amount of the damages sought. Anybody who ever try the case or set on the trial bench knows that the amount you plead as the maximum recovery is typically much higher than which are actually going to be trial. And so what happen's really under their standard is what you-- our saying now to the statutory Counts Court of law is, is despite the legister-- legislator say, "You got the cite the big cases," you're really only to decide the smallest. That's why this case is significant to the jurisprudence of the, of the State because it point to send a message to the statutory country Courts. If you tell them that you can only handle cases in which the absolutely maximum amount plea is a hundred thousand dollars, it means that the cases that are actually can be tried of this Courts of a little bit he wants. Your making them small

planes worth and we're saying that, that is not what the legislature intended and so all we're asking for is for the Court to engage in a type of analysis that Justice Duncan deed and again by packs off to her 'cause she had to work without any Court ever that in Texas which is free medicine that I think that we struggle with it and you look to cases like *Dwire*, you'll see that the appropriate standard is-- and I don't have prior authorship but it's certainly I like closer to what on suggest that is-- if you a have a good faith to leave at a time you follow your case that the damages is likely you going to get or below a hundred thousand dollars then this jurisdiction should ave past at, at that point.

JUSTICE: So and if we have two identical courts wherein Plano and one in In berg with a hundred thousand dollar cash, the one in Plano probably going to have a jurisdiction of the same case well, the In berg not ' cause everybody knows you should going to get more with the same case.

MR. ALEXANDER: That is so cynical-- but I just-- no, no-- I -

JUSTICE: - it's a reasonable believe -

MR. ALEXANDER: Reasonable believe -

JUSTICE: That's what we're going to -

MR. ALEXANDER: I hear you, I hear you, and I think, you know, this is-- you know I think that every time this Court has talked about our system, they described it is descent seen as crews-- I mean, it's-- yeah, I mean, obviously picking on you but this-- you know the bottom line is, is that you know we're in a weird world in Texas with-- one we have this limited on saying let's struggle and try to find a standard that really does work on both and to this spectrum.

JUSTICE: Mr. Alexander, we put the burden-- what, what it seeking whether it his burden but the plaintiff who plied this lawsuit and files pleadings has the option to say, "Here's what I'm going to recover and here's why." Now, in this particular case and in many cases you can have replacement and say, "We, we want damages beyond the minimum jurisdiction in Court," somebody accepts, we have a little gamemanship somebody sends in derogatory, we shaft our feet, we get up to trial and we still not had a hearing on this. Some courts might not want to have a hearing. Now-- it seems to me like a parties and a lawyers particularly the, the one making the claim that is within its jurisdiction if you just say "it's up to you to show what your claim," wouldn't that solve most of these problems you going to go in there and show us and tell that trial Court and tell us on appeal, tell the inside and if you don't then you have the option of being in the situation to find your time. And that is, if we got a problem here, judgment but a problem because you didn't choose to disclose for it. What's the, what's the fault in that approach?

MR. ALEXANDER: Well, I, I think that the fault in that approach is-- Once again, I agree with you, you have to show your part and saying, "This is what our pleading for and I go back to my" -

JUSTICE: And, and let me explain on that. We just heard Mr. Key say earlier, they-- in a prior case that they excluded one claim for tactical reasons. Shortly the plaintiffs are entitled to do that but-- if they, they can pick and choose what they want to assert or same block putting the burden on the plaintiff to say "Here's want I'm claiming and here's why to solve most of these problems where we have Court's have limited jurisdiction."

MR. ALEXANDER: Well, and again, I, I think that approach will be simpler but I don't think it's consistent with what the Court was saying before-- why even though the inquiry is more difficult test all

is adjusted. I think you do have to show your part and I want go back to my hypothetical and, and again it's not hypothetical, it's the Wydner case, the case in which-- I-- I'm pleading for a medical expenses in the past and I'm pleading for medical expenses in the future because my doctors can't say to me with a hundred percent certainty that it's not going to be recovered but I'm saying, "God don't" 'cause you know, I got to decide with it find this ventures law. Today, as of today do you think that he's probable giviving a good luck? Yes, I do. And recent medical probability looks like to be she can get luck. Okay. And I'm comfortable finding County Court law because even though I'm suing for that element the light is in this-- all I can get, okay? But then again as matters developed if that changes-- does the court alleged jurisdiction? I think yes. And I don't think it violates the what the legislature says.

JUSTICE: That's not the case we got here, he got a case for we had triple on the feed, all the way up.

MR. ALEXANDER: Well, I'm not going to sit there and, and argue against shuffling a thief-- I mean, I mean and I don't want to miss my words and your -

JUSTICE: Your best.

MR. ALEXANDER: You're thrown out of here, you know, canvas here, I think part of the comment-- and I'll be very frankly I don't know, they never asked. I think the Court exactly would brief it is because of the language-- We haven't talked about rules 47-(b), is the damages a sought language in that rule? And if somebody came to me and say, "How did you plead the case in the country Court law?" This is what I would I say, "I see I got the red light I won't put [inaudible]." I would say that the, the matter in controversy exclusive of punitive damages, attorney's fees, interesting cost it is within the jurisdiction of the Court, but again if I have a case in which I reasonably probably in effect, I think likely that one of my elements of damages is not referable it should not have.

JUSTICE: Any further questions? Thank you Counsel.

REBUTTAL ARGUMENT OF W. CARL JORDAN ON BEHALF OF PETITIONER

MR. JORDAN: Your Honors, I would submit that Justice Duncan, give a line precedent she said that the amount in controversy is the amount of damages suit for that comes right out of this Court decision in tin face I believe for Court said, that the amount in controversy is the amount of damages suit for the amount in the pleads and to me that's just common sense for approach if the plaintiff pleads for it. The plaintiff places in controversy and-- Now, another thing that we don't have recitation we're going to think forward and said in an original pleading or any subsequent pleading the amount in controversy is within all jurisdictional limits of this Court. Plaintiff is never did them, Brite never did them. She say that was over in the minimum and never said he was below the maximum and then you wouldn't have to discover about these damages, until shortly before problem.

JUSTICE: Do you think it you can't recover as a matter of law that should not begin?

MR. JORDAN: I think that you're going back to the Aguara decision just as happen I look at it all at the same time, and take-- and I think that's the possible approach where in federal Court if the, if

the defendant keep removing says or personal evidentiary showing that, that the 75 thousand dollar threshold has exceeded then the burden shifts to the plaintiff to this resisting removal to established district court says, "To a legal certain," that the recovery cannot be above 75 thousand dollar. Maybe that is the rule that is worth conceiving in this situation in County Court should law that would not be inconsistent or statute says on its face.

JUSTICE: In one way the plaintiff can do that is to disclaim all damages beyond the certain amount. Do you agree or to disagree with that?

MR. ALEXANDER: Well, I think it's the, if they did that in his pleading-- then the-- that microphone?

JUSTICE MEDINA: Mr. Alexander this is important to the jurisdiction because we decide that you correct in the sense of message to this Court said they should only handled small matters of controversy until filled it up.

MR. ALEXANDER: Justice Medina, I don't think that, that cases damages up to not exceeding a hundred thousand dollars are small kind of cases wherein currently say and I don't agree with this comment.

JUSTICE MEDINA: We're not-- it seems to me that, that were the decision that the legislature to change this Court so that all across Texas they have the same, same, same responsibility as suppose to whether mix at this point.

MR. ALEXANDER: Absolutely I mean whether there-- whether I exercised their prero-- their constitutional prerogative is wisely or not the what reason the people might disagree with that, nevertheless, the one of the process for establishing jurisdiction limits of County Court that all rest with the legislature not to leave individual parties by to the around of us. And Justice Wainwright there is a case that addresses your hypothetical about additional of different damages being alleged as the Garcy cases I think it's cited in our brief tell you a El Paso Court in there a new claim was added new damages and, and the Court got simply by saying, "This is not due to the passage of the time." I would say that, in I will suggested Court that the passage of time test the, that's our-- as articulated context is not as bright line of test for trials as of jurisprudence of the state all to have because it-- at least in some instances I think, I can open the door to effort to try to plead around maximum jurisdictional limits that maybe that Agular test is, is more thoughtfully courts at issue. We have some oral arguments exhibits under tab two of that book. Just to make this point about passage of the time with a diagram, passage of the time in this case had no material effect on the quantity the amount of controversy or the damages to save within the cause. Well, back paid dollars with inquiries is time to go on from paid dollars with inquiries so dollars should role just migrating from one category of damages that been plead for in the original petition to the other.

JUSTICE: No further questions. Thank you. This case is submitted. the Court will take a brief recess.

COURT MARSHALL: All rise ...

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