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ARTICLES

THE MIS-USE OF AFFIRMATIVE DEFENSES IN PERSONAL INJURY.

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Within the personal injury practice, it is very common for defense counsels to submit answers to the plaintiff's petition which assert a wide myriad of affirmative defenses. This article would argue that many of these proclaimed affirmative defenses are fictitious, and indicative of cautious lawyering.

For those familiar with Plaintiff's Personal Injury litigation, you are undoubtedly familiar with the common practice of defense attorney's listing everything other than the "Schultz Defense" as an affirmative defense in their answer to the Plaintiff's petition. What was likely born from a healthy level of caution to avoid inadvertently waiving what could have been a legitimate affirmative defense by failing to plead it, has turned into a monster the legal community can no longer afford to feed.

For those who don't know, the usual response to a petition is a general denial, wherein the defendant generally denies all of the allegations within the plaintiff's petition.[1]

> "A general denial of matters pleaded by the adverse party which are not required to be denied under oath, shall be sufficient to put the same in issue. When the defendant has pleaded a general denial, and the plaintiff shall afterward amend his pleading, such original denial

[1] *See,* Tex. R. Civ. P. 92.

> shall be presumed to extend to all matters subsequently set up by the plaintiff."[2]

The problem arises in that affirmative defense's must be asserted specifically and are not covered by the general denial. Therefore, if you fail to assert an affirmative defense you have effectively waived that affirmative defense, and possibly also committed legal malpractice as well.

It's no wonder why most defense attorney's file answers that include a rather short general denial and an arduously long list of affirmative defenses; the majority of which do not apply, and a good portion of which do not even exist!

From my perspective, the problem is born of either an abundance of fear or complacency. Both of which I will attempt to cure with the following explanation.

All legal defenses fall into one of three categories: (1) affirmative defenses; (2) avoidance; and (3) inferential rebuttal.[3]

> "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense."[4]

While the difference between an avoidance and an affirmative defense is not well known, understanding the difference is important.[5]

An avoidance defense requires that the defendant admits the truth of the plaintiff's claims, and then assert additional facts which justify or excuse the improper act.[6] The

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[2] *Id.*

[3] *See*, Tex. R. Civ. P. 94.

[4] *Id.*

[5] *See, Zorillo v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 156 (Tex. 2015) ("Because 'avoidance' and 'affirmative defense' are closely related terms, courts frequently use the words interchangeably.").

[6] *See*, *Id.* ("[An avoidance] is one of justification. . . Rather than being in conflict with the cause of action, the [avoidance] admits it but asserts the existence of other facts which justify or excuse it.")

classic example is the theory of Self-Defense, wherein before you can claim that you committed a bad act in self-defense, you must first admit that you committed the bad act. [7]

In contrast, the affirmative defense defeats a plaintiff's claim without conceding the truth of the plaintiff's statements.[8] The classic example is the theory of the Statute of Limitations, wherein the truth of the plaintiff's statements is completely irrelevant, the only relevant question is whether the plaintiff waited too long to bring their claim.

The theories of avoidance and affirmative defenses are both considered affirmative defenses under Rule 94.[9] But there is also a third category of defense known as an "inferential rebuttal."[10]

An inferential rebuttal is similar to an affirmative defense except rather than providing facts which justify or excuse the defendant's improper act, the defendant provides facts which show that the improper act was not the cause of the plaintiff's damages.[11] The ultimate aim of the inferential rebuttal is to either break the chain of causation or demonstrate that the defendant cannot be held solely liable for all of the plaintiff's damages.

But most importantly, an inferential rebuttal is not an affirmative defense.[12]

Because an inferential rebuttal is not an affirmative defense, it is inappropriate to assert them as if they were affirmative defenses. And yet, in defense counsel's do this

[7] *Id*, 469 S.W.3d at 156 ("Self-defense is an [avoidance] because the defendant admits the conduct but seeks to avoid the legal effect by justifying an otherwise impermissible act").

[8] *Id*, 469 S.W.3d at 156 ("The statute of limitation is an affirmative defense, rather than an [avoidance], because [it] defeats the plaintiff's claim without regard to the truth of the plaintiff's assertions.").

[9] *See*, Tex. R. Civ. P. 94.

[10] *See, Dillard v. Texas Elec. Co-op.*, 157 S.W.3d 429, 430 (Tex. 2005).

[11] *Id*, 157 S.W.3d at 430 ("the defendants in this case contended at trial that the fatal auto accident in issue was not caused by their negligence, but rather by the presence of cattle on the roadway or by the conduct of the cattle's owner who allowed them to be there.").

[12] *Perez v. DNT Glob. Star, L.L.C.*, 339 S.W.3d 692, 700 (Tex. App. 2011) ("Inferential rebuttal defenses are distinct from affirmative defenses. . . as such, inferential rebuttals need not be specifically pleaded").

all the time. Here is a short list of inferential rebuttals that are commonly mistaken as being affirmative defenses:

1) Statutory Rights are not affirmative defenses — Texas Civil Practice and Remedies Code § 18.091, §41.008, & 41.0105.

Statutory rights are not affirmative defenses.[13] [14] And by this logic, it stands to reason that §18.091 and §41.0105, as well as any other statutory right, would also not be considered affirmative defenses.[15]

2) Sole Proximate Cause is also an inferential rebuttal, and not an affirmative defense.[16]

3) New Independent Cause is also an inferential rebuttal, and not an affirmative defense.[17]

4) Pre-existing Condition is an inferential rebuttal, not an affirmative defense.[18]

5) Failure to Mitigate, as you might imagine, is an inferential rebuttal.[19]

What is the danger of this common practice? I have seen as much as three pages of an answer fraught with frivolous and non-existent affirmative defenses. The concern

[13] *See*, *Zorillo v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 157 (Tex. 2015).

[14] *Id.* ("[§41.008(b)] does not bear the characteristics of an affirmative defense or avoidance. Specifically, it does not require proof of any additional fact to establish its applicability; moreover, there is no defense to it. (citation omitted). Though certain types of claims are excluded from the statute's application, the [statute] applies automatically to claims not expressly excepted.")

[15] *Id.*

[16] *Id*, 339 S.W.3d at 699. ("Sole proximate cause is not an affirmative defense; it is an inferential rebuttal defense.")

[17] *See*, *James v. Kloos*, 75 S.W.3d 153, 161 (Tex. App. 2002) ("New and independent cause is an inferential rebuttal defense. . . the doctrine is not an affirmative defense.")

[18] *In re Nance*, 143 S.W.3d 506, 512 (Tex. App. 2004). ("Although the hospital pleaded preexisting condition as an alternative and affirmative defense, the defensive theory is in the nature of an inferential rebuttal. . .")

[19] *Moulton v. Alamo Ambulance Serv., Inc.*, 414 S.W.2d 444, 448 (Tex. 1967) ("We hold that failure to mitigate damages by care and treatment of personal injuries is not an affirmative defense which must be specially pleaded to let in evidence of such failure and to entitle the wrongdoer to proper court instruction.")

here is the very real possibility that among the myriad of spurious affirmative defenses claimed by the defendant, a single, plausible defense may slip pass under the radar.

Furthermore, the practice is wasteful of an attorney's time (spent reading through the frivolous defenses), which is inevitably passed down to the client, as well as wasteful to an attorney's resources (in printing and court costs), which can add up over time.

Lastly, the practice creates confusion and ambiguity where there does not need to be any. Remember, the nature of an affirmative defense is that, once proved, it defeats the plaintiffs' claims. However, an inferential rebuttal, once proved, will likely just reduce damages.

So, what steps can be taken to curb this behavior? There is only one tool I can think of, unfortunately it may be more work than it is worth… A Rule 91 Special Exception. The Special Exception effectively puts the court on notice of a deficiency in the defendant's pleading and gives the defendant the ultimatum to remove the defective clause or cure the defect.[20] In this case, the defendant will be forced to remove the nonexistent affirmative defenses.

Furthermore, such behavior could be disastrous on the defendant's case. Texas courts have recently taken an unfavorable stance against misleading boilerplate language, going so far as holding that boilerplate language in discovery objections deemed them waived.[21]

In conclusion, the practice of mis-identifying affirmative defenses is misleading, confusing, and potentially dangerous. And the legal community will be all the better for coming together and bringing it to a swift end.

[20] Tex. R. Civ. P. Rule 91. ("A special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegation in the pleading excepted to.")

[21] *See*, *Halleen v. Belk, Inc.*, No. 4:16-CV-55 (E.D. Tex. Aug. 6, 2018) ("Concerning Defendant's responses which use 'subject to' or boilerplate language, the Court finds that Defendant, as a result of using such language, waived each of its objections. The practice of including 'subject to' or 'without waiving' statements after objections is an age-old habit comparable to belts and suspenders. This practice is 'manifestly confusing (at best) and misleading (at worse) and has no basis at all in the Federal Rules of Civil Procedure.")