NWOHA LAW FIRM
INJURY LAW GROUP

Topic: Trial Skills | LAW JOURNAL VOL. 1 | Published: Sept. 22, 2024

EXPLORING THE DIFFERENCE BETWEEN AFFIRMATIVE DEFENSES, AVOIDANCES AND INFERENTIAL REBUTTALS

Throughout my career the thing that confuses and perplexes me most of all is the routine, wide-spread, and downright abusive use of cause of actions and defenses in pleadings.

Often times attorneys will plead a myriad of boilerplate claims and defenses in fear of failing to plead something that, albeit it unlikely, may possibly prove useful, or even critical, in pending litigation.

However, it is important to be able to spot the difference between these terms, because typically speaking inferential rebuttals do not need to be plead. *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").

In this Journal Entry, I hope to flush out the differences between Affirmative Defense, Avoidances, and Inferential Rebuttals, in the hopes of allowing us to quickly spot where on applies and where it doesn't, based on the facts available to us.

a) Texas Rules of Civil Procedure § 94 is not a Helpful Starting Point.

Understanding the matter, at least initially, is made harder than it needs to be by Texas Rules of Civil Procedure § 94 – Affirmative Defenses; a plain reading of it states:

> *"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****..."* Tex. R. Civ. P. 94.

A plain reading of Chapter 94 – Affirmative Defenses is the dictionary definition of circular logic. How can the chapter defining Affirmative Defenses have affirmative defenses in its definition? Well, put simply, this is likely because the term affirmative defense pre-dates its inclusion into the Texas Rules of Civil Procedure. And so, when including it into the Texas Rules of Civil Procedure, they included to all regularly used and known affirmative defenses and then, in a *characteristically lawyerly* fashion, incorporated all other unnamed affirmative defenses into the rule by reference.

Accordingly, to define these terms we will turn to case law, rather than Rule 94, as it is somewhat clear that Rule 94 merely tries to incorporate the already known defense of "affirmative defense" into Texas law, as opposed to establishing such.

b) The Difference Between Affirmative Defense and Avoidance.

There are three main categories of defenses:

- affirmative defenses;
- avoidance; and
- inferential rebuttal.

The first distinction to cover is the difference between affirmative defenses and avoidances. *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.").

While closely related, there is a key difference between the two kinds of defenses that we can use to differentiate between them.

An avoidance must admit the truth of the plaintiff's claims while an affirmative defense is true irrespective of the truth of the plaintiff's claims. *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." *Id*.

Put simply, an avoidance admits the truth of the plaintiff's claim, then asserts additional facts which justify or excuse the defendant's improper act. *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"). You can see how other defense theories immediately fall into the category of avoidance. Without delving too deep into case law for support, you can see how the following would be avoidances:

- Anticipatory Breach – If you claim that you breached a contract or failed to perform under a contract because you had good cause or reason to anticipate that the other party would breach or not perform, this defense will fall under an avoidance. [1] [2]. The nature of this defense is that, you admit that the Plaintiff is correct and that you breached the contract, however, you provide facts that excuse the breach, i.e., the other party was going to breach the contract as well.

However, an affirmative defense defeats the plaintiff's claim without conceding the truth of the plaintiff's statements. *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.").

A great example of an affirmative defense is the statute of limitations. No matter what or how the Plaintiff pleads, or what their facts are, the statute of limitations will bar any claim once a certain amount of time has passed.

c) What is an Inferential Rebuttal?

An inferential rebuttal is similar to an avoidance defense except rather than providing facts which justify or excuse the defendant's improper act, the defendant provides facts which contradict the facts put forth by the Plaintiff. Archer Grp., LLC v. City of Anahuac, 472 S.W.3d 370, 376 (Tex. App.—Houston [1st Dist.] 2015, no pet.) ("Inferential rebuttals are defensive theories that operate to rebut an essential element of a plaintiff's case by proof of other facts."); see also Select Ins. Co. v. Boucher, 561 S.W.2d 474, 477 (Tex. 1978) ("The basic characteristic of an inferential rebuttal is that it presents a contrary or inconsistent theory from the claim relied upon for recovery.")

The Sudden Emergency doctrine is a good example of an inferential rebuttal.

The root of a sudden emergency defense is wherein the defense pleads the unexpected appearance of an emergency, which caused or substantially contributed to the causing of the negligent act, thereby absolving the defendant of negligence. *Morales v. Dougherty*, No. 12-06-00416-CV, 2008 WL 2930245, at *2 (Tex. App.--Tyler July 31, 2008) ("To warrant the submission of an instruction on sudden emergency, there must be evidence that (1) an emergency situation arose suddenly and unexpectedly, (2) the emergency situation was not caused by the defendant's negligence, and (3) after the emergency situation arose, the defendant acted as a person of ordinary prudence would have acted.")

Let review the difference between all three again:

1) Affirmative Defense – Defeats the Plaintiff's claims irrespective of what facts that Plaintiff pleads. **Put simply, "it doesn't matter what I did, you cannot sue me."**
2) Avoidance – Defeats the Plaintiff's claims by providing additional facts that excuse or justify the bad acts of the Defendant. **Put simply, "Yes, I committed the bad act, but I have an acceptable excuse for why I did it."**
3) Inferential Rebuttal – Defeats the Plaintiff's claims by providing facts that contradict the facts put forth by the Plaintiff. **Put simply, "I did not commit the bad act, you have your facts wrong."**

d) Conclusion

Now it can be a little confusing when applying these concepts, and sometimes even courts and judges can get it wrong; although I will add that whenever a court gets something wrong, there are two attorneys behind it that also got things wrong.

While these are the main categories of defenses, there are several sub-categories of defenses that fall within these distinct categories, such as: sudden emergency, unavoidable accident, failure to mitigate, etc.

As a quick short cut, I have cited to most of these defenses and also provided some case law explaining what category each of these defenses fall into, and if I forget one, hopefully I have provided you with enough information to be able to discern yourself what category said defense would fall into.

The following is a list of defenses that are commonly plead as affirmative defenses, but are in actuality inferential rebuttals, and thereby do not need to be pleaded:

a. Statutory Rights are not affirmative defenses.

Statutory rights are not affirmative defenses. *Zorillo v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 157 (Tex. 2015) ("[§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.").

It stands to reason that §18.091 and §41.0105, as well as any other statutory right would also not be considered affirmative defenses that needs to be plead.

b. Sole Proximate Cause.

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

c. New Independent Cause.

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

d. Pre-existing Condition

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

e. Failure to Mitigate

"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" *Moulton v. Alamo Ambulance Serv., Inc.*, 414 S.W.2d 444, 448 (Tex. 1967).