TADC e-Update
The Texas Association of Defense Counsel, Inc.

EVENTS & CASE LAW UPDATE

July 13, 2012

SPECIAL NOTICE

The TADC is now on "LINKEDIN." Membership is restricted to current TADC members. We believe Linkedin will provide our membership with a forum to ask questions, disseminate information and provide yet another means by which we can network with lawyers in other venues.

Best of all, it's free! Please request to join today.

EVENTS UPDATE

By Thomas E.Ganucheau, TADCPresident
Beck, Redden&Secrest, L.L.P.,Houston

In an effort to bring the TADC to you, the Association continues to host local events around the state, with the most recent being in Austin on June 19th. The happy hour was well attended by Austin members and members of the Travis County Judiciary, as well as two Justices from the Third Court of

Appeals and a member of the House Civil Jurisprudence Committee. Events are being planned for later in the summer in San Antonio and Lubbock/Amarillo. Be on the lookout for a TADC event in your area!

The second installment of the TADC West Texas Seminar is coming up on August 10-11, 2012 at the Inn of the Mountain Gods in Ruidoso, New Mexico. This program was specifically designed with younger lawyers in mind, with a lower registration fee and a family-friendly, affordable venue. Register today for the West Texas Seminar.

The TADC, in conjunction with the State Bar of Texas, TEX ABOTA, and the TTLA, will be presenting a Webinar on Expedited Jury Trials on August 20, 2012. Details on this great program will be coming soon.

The TADC Summer Seminar will take place in sunny Sandestin, Florida next week. TADC Past President Russell Serafin and Judge R.K. Sandill will give presentations, along with an outstanding cast of defense lawyers.

The TADC 2012 Annual Meeting is right around the corner! San Francisco will host the TADC September 26-30, 2012. The program will be outstanding and will include presentations by Justice Phil Johnson, Texas Supreme Court, Judge Patricia Kerrigan, 190th District Court – Houston, and Judge Carlos Cortez, 44th District Court – Dallas. Registration materials will be mailed early next week.

The TADC participated in the June 21st hearing of the Judicial Compensation Commission and provided both written and oral testimony. Other groups participating included the Texas Civil Justice League, TEX ABOTA, The State Bar of Texas and the TTLA. Numerous judges were also in attendance. Chairman Mike Slack made a special point to recognize the TADC for all the efforts the Association has made throughout the years to promote equitable compensation for the judiciary and adequate funding for the courts in Texas.

A reminder that the TADC is now on Facebook. Please join us on Facebook and check out our recent activities posted online. http://www.facebook.com/tadclawyers

The TADC is now on Linkedin! Our Linkedin group, which is for members only, will provide a forum for our members to communicate about issues affecting their practices, and to share information, thoughts and strategies. Please join us on Linkedin today.

Finally, I encourage you to sign up a new member in the TADC. Talk to your law partners, colleagues and friends about the benefits of membership. The TADC is the largest state organization of its kind in the United States and the ONLY voice of the defense bar in Texas. Help keep it strong by signing up a new member today.

CASE LAW UPDATE

* Case Summaries prepared by Leonard R. "Bud" Grossman with Craig, Terrill, Hale & Grantham, L.L.P., Lubbock & Nancy Morrison with Naman, Howell, Smith & Lee, P.C., Waco

IMMUNITY EXTENDED TO SUBCONTRACTORS UNDER EXCLUSIVE REMEDY FOR CONTRACTUALLY "DEEMED EMPLOYEES"

***Garza v. Zachry Construction Corp.*, 2012 Tex. App. LEXIS 4064 (Tex. App.—San Antonio 2012).**

Hector Garza was working in a plant for DuPont alongside Zachry Construction Corporation's employees—a subcontractor on the job. On November 25, 2007, Garza operated a railcar mover pulling four tanker railcars. Morales and Rodriguez, employees of Zachry, assisted him. Three of the cars came loose and collided with the railcar mover. As a result, Garza was injured, and he received workers' compensation benefits through a policy provided for him by his employer DuPont.

After the accident, Garza sued Zachary and its employees. The trial court rendered a take-nothing summary judgment in favor of Zachry and its two employees. On appeal, the appellate court determined that recovery of workers' compensation benefits was an exclusive remedy under Texas Labor Code § 408.001(a). Accordingly, the immunity of DuPont extended to subcontractors where DuPont had purchased workers' compensation insurance that covered all of the workers on the site, pursuant to § 406.123(a). Under DuPont's contract with the subcontractor, DuPont agreed to provide workers' compensation insurance to the subcontractor, thereby creating the legal fiction of the general contractor as the "deemed employer" and the subcontractor and its employees as "deemed employees." Therefore, the court affirmed the trial court's ruling that Garza's claims against all the defendants in this case were barred by the exclusive remedy provision of the Texas Workers' Compensation Act. **Read this opinion HERE**

ARBITRATION COMPELLED IN GENDER DISCRIMINATION CASE

***IHS Acquisition No. 171, Inc. v. Beatty-Ortiz*, 2012 Tex. App. LEXIS 3671 (Tex. App.—El Paso 2012).**

IHS Acquisitions No. 171, doing business as Mesa Hills Specialty Hospital, hired Joann Beatty-Ortiz in May 2000. On June 30, 2006, Beatty was promoted to CEO where she remained until her termination on February 3, 2010. On March 31, 2010, Beatty-Ortiz filed a complaint

with the Texas Workforce Commission Civil Rights Division against IHS alleging continuing gender discrimination from November 2008 until the date of her termination. Then on October 28, 2010, Beatty-Ortiz filed suit against IHS, alleging essentially the same gender discrimination allegations contained in her Texas Workforce Commission Complaint. IHS filed a motion to compel arbitration, attaching a copy of a mutual arbitration agreement signed by Beatty-Ortiz on September 23, 2008. The trial court denied IHS's motion.

On appeal, the court observed that Beatty-Ortiz had signed the agreement, manifesting her intent that gateway issues of validity, enforceability, and arbitrability be arbitrated. Because there was a specific delegation provision that gateway issues would be arbitrated, and because Beatty-Ortiz challenged the agreement as a whole, rather than the specific delegation provision, the court found that the issue went to the arbitrator. Therefore, the determination of whether the agreement was illusory was for the arbitrator and not the trial court. The court concluded that a misnomer regarding the name of IHS in the agreement did not render the agreement unenforceable. IHS presented an agreement that was clearly between IHS and Beatty-Ortiz. Accordingly, the court held that the trial court erred in refusing to compel arbitration. **Read this opinion HERE**

PARTY MUST DEMONSTRATE ON APPEAL THAT THE EVIDENCE ESTABLISHES, AS A MATTER OF LAW, ALL VITAL FACTS IN SUPPORT OF THE ISSUE

***Brinker v. Evans*, 2012 Tex. App. LEXIS 3241 (Tex. App—Amarillo 2012).**

Jimmy Evans was in the business of preparing sites for construction. As part of that operation, he leased a caliche pit in Medina County. Anthony Brinker worked for a trucking company that hauled caliche from the pit to the sites being prepared. The case at bar arises from the injuries Brinker sustained from crashing his truck into the caliche pit.

The caliche pit was adjacent to a dirt road. The road was allegedly wide enough to allow two vehicles to pass each other. Evans had spaced multi-ton boulders between the road's edge and the pit to act as barriers. Brinker, with a full load of caliche, was leaving the pit when the accident occurred. After travelling about three hundred feet, his truck left the surface of the roadway. Witnesses saw no effort on his part to stop. Nor did the boulders impede his drop of thirty feet into the hole. Brinker argued that the road collapsed under him.

Brinker sued Evans alleging causes of action for negligence, negligence per se, gross negligence, and negligent hiring, supervision, and management. The trial court directed a verdict against Brinker on all of the claims except for negligence, generally, and premises liability, specifically. The trial court found that Brinker's own negligence was the cause of the accident.

On appeal, the court addressed the issues of sufficiency of the evidence, whether the directed verdicts were in error, exclusion of expert witness, and the jury instruction on proximate cause. The court found that "[w]hen a party attacks the legal sufficiency of an adverse finding

on an issue on which she has the burden of proof, she must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue."

In this case, evidence showed that Brinker had driven the road many times before and knew what the boulders signified. Furthermore, there was enough space between the boulders and the other side of the road to allow for two lanes of traffic. Further, Brinker testified at trial that the accident would not have happened had he stayed on the right-hand side of the road. Evidence further showed that Brinker did not attempt to brake or steer away from the drop-off before the accident, and that the road did not give way, rather, the truck tore at the road itself as it was falling.

Ultimately, the court held that in light of this evidence, the findings cannot be overruled on insufficiency. **Read this opinion HERE**

AGREEMENT DID NOT COMPLY WITH STATUTE OF FRAUDS PROVISION OF REAL ESTATE LICENSE ACT

***Litton Loan Servicing, LP v. Zachariah Manning & Intrarealty, Inc.*, 2012 Tex. App. LEXIS 3318 (Tex. App—Dallas 2012)**

This case involves broker commissions on a real estate contract. Zachariah Manning and IntraRealty, Inc. d/b/a IntraRealty were engaged by HomeEq, a mortgage servicer acting as an agent for the property owner, to sell the residential real property at issue in this case. Intra Realty was presented with several offers, one of which was accepted by HomeEq. While the contract was pending, HomeEq transferred management of the property to Litton Loan Servicing, LP. IntraRealty did not have a commission agreement with Litton.

At and prior to the closing, Litton was unable to procure marketable title prior to the closing date, and the buyer was able to terminate the contract and recover her earnest money. IntraRealty demanded their commission because they had produced a ready, willing, and able buyer. Litton refused to pay the commission because the property had not sold. IntraRealty sued Litton for breach of contract and negligent misrepresentation.

At trial, the jury awarded IntraRealty its commission and attorney's fees. The court then made findings of fact and conclusions of law concluding that a series of e-mails around March 7, 2007 constituted a legally binding contract for Litton to pay IntraRealty a commission of $11,700 for producing a ready, willing, and able cash buyer for the property.

On appeal, the court held that a listing agreement between the parties was insufficient to satisfy the statute of frauds provision of the Real Estate License Act. Although the document identified an amount as "Commission," it did not identify the broker to whom the commission was to be paid. Other documents and emails between the parties, although containing instructions and references to the commission amount, did not provide a promise to pay a real estate commission to the agents or identify the agents as brokers to whom a real estate

commission was to be paid. Therefore, there was no written agreement complying with statute of frauds provision of the Real Estate License Act. **Read this opinion HERE**

FAIN RULE ALLOWED PARTIAL EXTINGUISHMENT ABSENT AN EXPRESS PROVISION IN ASSIGNMENT AGREEMENT

***SM Energy Co. v. Sutton Producing Corp.*, 2012 Tex. App. LEXIS 4069 (Tex. App.—San Antonio 2012).**

At issue in this case were several mineral leases comprising 40,000 acres of Briscoe Ranch, Inc. In 1966, Sutton Producing Corporation leased the land. Several years later they assigned the lease to Kenoil, reserving a 5.4% overriding royalty interest (ORRI). Accompanying this was a reservation clause, which encumbered the leased land such that any subsequent leases of the land following a cancellation of the previous lease, for up to one year, would also be encumbered by the ORRI. Several years later Kenoil again assigned the lease to another party and included a similar ORRI, reserving for themselves a two percent ORRI. Following a series of assignments that resulted in SM Energy holding the lease, SM Energy cancelled the lease as to 22,000 acres of the Briscoe Ranch. Over a year later SM energy entered into several leases for the previously released acreage on the Briscoe Ranch land.

Sutton sued for back royalties based on the earlier reservation, contending that the reservation applied unless the entire lease was cancelled. SM Energy disagreed, arguing that under the *Fain* Rule, a partial extinguishment cancelled the previous ORRI after the passing of the one year limitation.

In Texas, an ORRI does not survive the termination of the leasehold which it burdens absent an express provision to the contrary. In *Fain*, the original oil and gas lease for 110 acres authorized the lessee to release any portion of the original lease back to the lessor. The lessee released the north sixty acres but retained the south fifty acres under the original lease. The ORRI owners argued that because the lease continued on the south fifty acres, any subsequent lease of the north sixty acres would be burdened by their ORRI. The court rejected their argument. Instead, it reasoned that because the original lease allowed the lessee at any time to release any portion or portions of the leased premises and be relieved of all obligations as to the acreage surrendered, the ORRI pertaining to the released acreage was necessarily extinguished unless the instrument creating the overriding or royalty interest as an estate in itself makes express provision to the contrary.

The court ultimately interpreted the *Fain* Rule to allow partial extinguishment absent an express provision in the assignment agreement that extends either the time period or requires a termination of the entire lease. The court further held that the language in the assignment agreement referring to "the termination of the present lease" allowed a partial cancellation to extinguish the ORRIs as to that portion of the lease. **Read this opinion HERE**

STANDING/RIPENESS/MOOTNESS IN CLASS ACTIONS

***Heckman v. Williamson County*, 55 Tex. Sup. Ct. J. 803, 2012 Tex. LEXIS 462 (Tex. June 8, 2012).**

Background

Four criminal defendants, all charged with misdemeanors, filed a civil lawsuit against Williamson County and five judges in their official capacity under *section 1983* of the Civil Rights Act of 1871, claiming they had been deprived of their constitutional rights (1) to counsel, (2) to self-representation, and (3) to open-court proceedings. The mother of a fifth criminal defendant, also facing misdemeanor charges, joined in the third claim on behalf of her minor daughter. These five plaintiffs, who sought injunctive and declaratory relief, brought the claims not only on their own behalf but also for the putative class of all individuals accused of misdemeanors in Williamson County, facing possible confinement and unable to afford legal counsel. The civil defendants filed a plea to the jurisdiction, asserting (1) that the trial court lacked jurisdiction to intervene in equity into pending criminal proceedings, (2) that three of the civil plaintiffs lacked standing to bring their claims and that their claims were moot, and (3) that two of the civil plaintiffs' claims were not ripe. The trial court denied the plea. Prior to the trial court's ruling on the petition for class certification, the civil defendants filed an interlocutory appeal, renewing their jurisdictional arguments and noting additional bases for the plaintiffs' claims being moot. The Austin Court of Appeals, vacating the trial court's denial of the defendants' plea to the jurisdiction, held that none of the plaintiffs ever had standing to pursue all of the purported class's claims, and it dismissed the suit for want of jurisdiction. The supreme court granted the plaintiffs' petition for review and reversed and remanded to the trial court.

Holdings

1. Jurisdiction of the Texas Supreme Court. The supreme court has jurisdiction over the appeal of an interlocutory order because the court of appeals' decision conflicts with prior decisions of the supreme court. The court of appeals held that because no named plaintiff had standing on all of the class's claims, no named plaintiff had standing. The supreme court has previously held that a plaintiff's lack of standing to bring some, but not all, of his claims deprives the court of jurisdiction only over those discrete claims.
2. Jurisdiction of the Texas Supreme Court. The supreme court has appellate jurisdiction of this case because the underlying case does not amount to a "criminal law matter." The issues in this case involve standing, ripeness, and mootness – all questions of justiciability and appropriate for supreme court review.
3. Standard of Review. Standing, ripeness, and mootness are questions of law, which the supreme court reviews *de novo*.
4. Standing. Where plaintiffs seek to represent a class, a plaintiff need not have standing on each one of the class's claims. As long as an individual plaintiff has standing on *some* claims, he has standing to pursue class certification as to those claims. At the time that Plaintiff Heckman joined this suit, he had standing to claim violations of his rights to counsel and self-representation. He, therefore, had standing to pursue certification of the putative class. The supreme court need not determine what claims, if any, the other named plaintiffs had standing to bring and whether their claims are ripe; those issues shall be determined by the trial court on remand.

5. Mootness. Because the plaintiffs were ultimately appointed counsel and their criminal cases concluded, their individual claims are now moot. However, the supreme court adopts the "inherently transitory" exception to the mootness doctrine in the class action context. Some claims, by their nature, are so short-lived that the trial court may be unable to decide on certification before the named plaintiff's individual claims become moot, but a population still exists who suffers from the same alleged harms and has the same "inherently transitory" claims against the same defendant. The mootness doctrine, under these circumstances, would not apply. This exception is not to be confused with a previously recognized exception—claims that are "capable of repetition, yet evading review." Both exceptions require a claim to be short lived, but the "capable of repetition" exception generally applies only if the plaintiff can show that the claim is capable of repetition as *to him*. The supreme court is able to determine that the plaintiffs' claims are sufficiently short lived to satisfy the "inherently transitory" exception, but the trial court, upon remand, must decide whether, as the result of certain intervening events, a class still exists that has the same constitutional claims. **Read this opinion HERE**

CERTIFICATE OF MERIT/LICENSED OR REGISTERED PROFESSIONALS

***Apex Geoscience, Inc. v. Arden Texarkana, LLC*, No. 06-11-00128-CV, 2012 Tex. App. LEXIS 4840 (Tex. App.—Texarkana June 19, 2012, no pet. h.).**

This is a case of statutory construction of § 150.002 of the *Texas Civil Practice and Remedies Code*, requiring a certificate of merit to be timely filed in cases arising out of the provision of certain professional services.

Developer sold some shopping center property to Owners. Following the sale, Owners discovered defects in the property's substructure and declined to make payments in accordance with the sale agreement. Developer sued Owners for breach of contract, and Owners counterclaimed on various bases. Owners also alleged third-party claims against Engineer.

Engineer filed a motion to dismiss for Owner's failure to file a certificate of merit as required by § 150.002. Owners then filed a motion for extension of time to file a certificate of merit. The trial court allowed Owner an extension of time to file a certificate of merit and denied Engineer's motion to dismiss. Engineer filed this interlocutory appeal.

The pertinent portions of § 150.002 follow:

"(a) In any action . . . for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file with the complaint an affidavit of a [qualified third-party professional meeting certain requirements].

"(c) The contemporaneous filing requirement of Subsection (a) shall not apply to any case in which the period of limitation will expire within 10 days of the date of filing and, because of such time constraints, the plaintiff has alleged that an affidavit of a third-party [professional] could not be prepared. In such cases, the plaintiff shall have 30 days after the filing of the complaint to

supplement the pleadings with the affidavit. The trial court may, on motion, after hearing and for good cause, extend such time as it shall determine justice requires."

The court of appeals found that the "time constraint allegation" referenced in subsection (c) must be made at least before the expiration of thirty days after the petition is filed in order to qualify for the automatic extension. Otherwise, the contemporaneous filing requirement referenced in subsection (a) is not excused. If additional time is required, the trial court may then extend the thirty-day grace period on motion, after hearing, and for good cause. In this case, Owners did not file a certificate of merit or allege any sort of time constraint allegation until three months following the filing of their third-party claims against Engineer and well after Engineer had filed a motion to dismiss. The trial court's order allowing an extension of time was reversed, and the case was remanded. **Read this opinion HERE**

JUDICIAL ESTOPPEL/SUMMARY JUDGMENT EVIDENCE

***Phillips v. Flying J Inc.*, No. 07-11-0368-CV, 2012 Tex. App. LEXIS 4813 (Tex. App.—Amarillo June 15, 2012, no pet. h.).**

Plaintiff customers sued the defendant gas station for a slip and fall. The trial court granted the gas station's traditional motion for summary judgment, holding that the plaintiffs were judicially estopped from pursuing their claim since they had failed to disclose it as an asset in their Chapter 13 bankruptcy schedules. The court of appeals reversed and remanded. Although judicial estoppel may be invoked to deny plaintiffs the opportunity to prosecute claims they fail to disclose during bankruptcy, the defendant invoking the doctrine has the obligation to prove each element of the affirmative defense as a matter of the law in order to be entitled to summary judgment. The gas station, attempting to meet its burden, supplied only a copy of the motion to modify the payment plan and argued in the body of its motion for summary judgment that the bankruptcy schedules said nothing of the claim. The record contained neither the schedule of assets and liabilities or debts. An unsworn statement by the gas station's attorney in the body of the motion for summary judgment does not constitute competent evidence. Similarly missing from the record was any admission or concession by the plaintiffs that their suit against the gas station had been omitted from their bankruptcy schedules. **Read this opinion HERE**

ARBITRATION

***White v. Siemens*, No. 05-10-01433-CV, 2012 Tex. App. LEXIS 4432 (Tex. App.—Dallas June 5, 2012, no pet. h.).**

Plaintiff investor brought claims against the defendant limited partnerships and their co-founders for violations of the *Texas Securities Act* and common-law fraud. In accordance with the provisions in the subscriptions agreements, Plaintiff's claims were arbitrated. After the arbitration panel issued its final award in favor of Plaintiff, Plaintiff filed an application to

confirm the award with the trial court. The defendants, in turn, filed a motion to modify or vacate the award. Plaintiff thereafter entered into a settlement and forbearance agreement with all of the defendants except for White, one of the co-founders. Plaintiff and the settling defendants agreed to present the trial court with an agreed judgment confirming the arbitration award in accordance with the terms of their settlement agreement. Defendant White filed a motion to modify, complaining that the settlement agreement and proposed agreed judgment significantly modified the arbitration award. The trial court signed the agreed judgment presented by the settling defendants. Defendant White appealed. The court of appeals reversed and rendered judgment, confirming the arbitration award and holding (1) that the trial court erred by modifying the arbitration award to dismiss all claims against one of the limited partnerships, a jointly and severally liable party; and (2) that a modification of the arbitration award is not the proper way to credit a party for partial payment of the award. **Read this opinion HERE**

EQUINE ACT

***Young v. McKim*, No. 14-11-00376-CV, 2012 Tex. App. LEXIS 4317 (Tex. App.—Houston [14th Dist.] May 31, 2012, no pet. h.).**

Traditional summary judgment granted to the defendant horse owner is affirmed. Plaintiff caretaker, who was injured by Defendant's horse, sued for negligence under the *Equine Act*. The court of appeals, affirming the summary judgment, held that (1) the Act's limitation on liability to "participants" in equine activities does not apply only to consumers of such activities; (2) because the plaintiff caretaker was an independent contractor and not an employee of the defendant, she was a participant under the Act and was, therefore, subject to the limitation on liability; (3) the exceptions to the limitation on liability were inapplicable in this case; and (4) the fact that the defendant horse owner did not post warning signs, which could have triggered liability under the Act, was not raised in the plaintiff caretaker's response to the defendant's motion for summary judgment and was, therefore, not preserved for appeal. **Read this opinion HERE**