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FROM THE PRESIDENT

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School has started, summer is drawing to a close and the TADC has been busy!

The 2012 TADC Summer Seminar was held in Sandestin, Florida July 18-22. The seminar was a great success with TADC Past President Russell Serafin and Judge R.K. Sandill giving presentations, along with an outstanding cast of defense lawyers including Richard Collins, Past President of the Florida Defense Lawyers Association.

The second TADC West Texas Seminar was held 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. Over 20 young lawyers attended, many with their families.

The TADC, in conjunction with the State Bar of Texas, TEX ABOTA, and the TTLA, held a Webinar discussing Expedited Jury Trials on August 20, 2012. The event was very well attended and members of the TADC, TEX ABOTA and TTLA were able to attend at no charge. In case you missed it, the Webinar will be available on the State Bar video archive site at the end of September.

In a continuing effort to bring the TADC to you, the Association continues to host local events around the state. Events are being planned for early October in Beaumont and Lubbock/Amarillo. Be on the lookout for a TADC event in your area! If you would like an event, please contact your District Director or the TADC office.

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. There is still space available so register now!

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>

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.

CALENDAR OF EVENTS

[September 26-30, 2012](#)

2012 Annual Meeting

Westin St. Francis – San Francisco, California

Gayla Corley & Mike Hendryx, Co-Chairs

[November 9-10, 2012](#)

TADC Board of Directors Meeting

McAllen, Texas

[January 18-19, 2013](#)

TADC Board of Directors Meeting

San Antonio, Texas

[February 6-10, 2013](#)

TADC Winter Seminar

Sheraton Steamboat – Steamboat Springs, Colorado

Greg Curry & Randy Walters, Co-Chairs

[April 3-5, 2013](#)

TADC Spring Meeting and Legislative Day

Doubletree Suites – Austin, Texas

Robert Sonnier & Ross Pringle, Co-Chairs

[April 26-27, 2013](#)

31st Annual TADC Trial Academy
Sheraton Dallas North – Dallas, Texas
Clayton Devin & Mike Shipman, Co-Chairs

[July 17-21, 2013](#)

TADC Summer Seminar
Westin Whistler – Whistler, Vancouver
David Chamberlain & Greg Binns, Co-Chairs

[August 2-3, 2013](#)

TADC Budget/Nominating Committee
Austin, Texas

[September 18-22, 2013](#)

TADC Annual Meeting
W Hotel – Boston, Massachusetts
Mitch Smith & John Weber, Co-Chairs

LEGISLATIVE/ELECTION UPDATE

The big question in Austin is what the outcome of the GOP primary runoff means for the next legislative session and the 2014 election cycle. Ever since Lt. Governor David Dewhurst announced his candidacy for the U.S. Senate, it had been widely expected that his high name identification and immense personal wealth would ensure a fairly comfortable victory in the race. At the time, no one foresaw that redistricting would produce a two and a half-month postponement of the primary election, and that this would prove decisive in allowing the grassroots campaign of Ted Cruz to get its footing and attract significant national money and attention. The rest, as they say, is history.

The Lieutenant Governor is thus back in the saddle, and he is facing a very different Senate than the one he thought he was leaving for good and all in June, 2011. Donna Campbell's victory over longtime incumbent Jeff Wentworth (R-San Antonio) can be attributed to three factors: (1) she is perceived by voters in the district as more conservative than Senator Wentworth; (2) Senator Wentworth has served in public office for a very long time; and (3) the election was a low-turnout affair that favored candidates with strong grassroots appeal (see Ted Cruz). Even without Campbell, the Senate may be more "conservative" on some issues than it has been, though it remains to be seen how this will play out. Four of the new members elected so far—

Kelly Hancock, Larry Taylor, Ken Paxton, Charles Schwertner—have compiled solidly conservative records in the House and can be expected to bring this philosophy to the upper chamber. Additionally, Sen. Wendy Davis (D-Fort Worth) is facing an uphill battle to hang onto her seat, given that 2012 might be a bigger GOP year in Texas than 2008. Rep. Mark Shelton has an even chance of unseating her (though Davis is a formidable campaigner and fundraiser). The significance of this race cannot be understated: if Shelton prevails, the Senate will be on the verge of operating without the 2/3 rule, as there will only be 11 Democrats left. Indeed, Sen. Dan Patrick (R-Houston) has already made it clear that he is effectively running for "majority leader" of the Senate on a platform of getting rid of the rule altogether. Though the rule has been set aside in the past for certain purposes, doing away with it will dramatically alter the consensus-based approach that has historically governed the Senate, reduce the power of the Lieutenant Governor, and make the two-party caucuses even more important in formulating policy.

The bottom line is this: in a general sense, Texas is no longer different than any other state. Partisan affiliation is the most important indicator of political philosophy and, given overwhelming GOP predominance, the Legislature will likely be pulled further to the right. The election results for the House bear this out. About an equal number of "Tea Party" candidates and candidates backed by the pro-public school Parent PAC won their primaries. Speaker Joe Straus, the target of some groups that don't think he is conservative enough, is very likely to be re-elected to lead the House in 2013. Although he lost quite a few chairmen to retirement, new offices, or election defeat—Rick Hardcastle, Veronica Gonzales, Jerry Madden, Pete Gallego, Larry Taylor, Jim Jackson, Vicki Truitt, Burt Solomons, Aaron Pena, Chuck Hopson, Sid Miller, Rob Eissler, and Mike Hamilton—this will allow him to elevate a new cadre of lieutenants who have been waiting in the wings. Moreover some of the Speaker's most vocal opponents in the House were likewise defeated (Christian, Berman, Landtroop).

With regard to the Texas Supreme Court, former Harris County District Judge John Devine's primary victory over incumbent Justice David Medina once again highlights how difficult it is for Hispanic Republicans to win a contested party primary. But it might also indicate a new trend in judicial elections: the most socially conservative candidate in the GOP primary wins. If this is the case, we can expect more results like the Medina-Devine race, and even less emphasis on qualifications and experience in judicial elections. Time will tell.

Last but certainly not least, TADC members fared very well in the election, though there is still some work left to do in the fall. Longtime member Travis Clardy from Nacogdoches won a closely contested race in East Texas. Rep. Sarah Davis (R-Houston), who has served with great distinction on the House Judiciary and Civil Jurisprudence Committee, has a general election opponent and merits our strong support in November. Senator Robert Duncan (R-Lubbock) and Rep. Rene Oliveira (D-Brownsville) will return for new terms. Additionally, Rep. Pete Gallego won his

party primary for Congressional District 23. Rep. Gallego will face incumbent Quico Canseco in November. The good news here is that TADC members continue to run for and be elected to legislative and judicial office. This reflects the tremendous diversity of our membership and the commitment and dedication of our members to public service. No matter which way the political pendulum swings at a given moment, TADC members are always there for their communities, their profession, and the constitutional liberties they are sworn to uphold. There is good reason to be optimistic for the next legislative session and beyond.

LEGAL NEWS

* Case Summaries prepared by Slater Elza, Autum L. White, Bill Pinkham and Benjamin Doyle with the Underwood Law Firm, P.C., Amarillo

EMPLOYMENT LAW

***E.E.O.C. v. Boh Brothers Construction*, No. 11-30770, 2012 U.S. App. LEXIS 15594 (5th Cir. July 27, 2012)**

The Fifth Circuit overturned a jury verdict in this Title VII sexual harassment case brought by the EEOC against Boh Brothers Construction. The EEOC had brought the case on behalf of Kerry Wood, a male construction worker and former employee of Boh Brothers who alleged that he had been sexually harassed and discriminated against by his male supervisor, Charles Wolfe. The evidence showed that, during the course of Woods's employment, Wolfe referred to Woods as "faggot" and "princess," approached him from behind with lewd actions simulating sexual conduct, and allegedly exposed himself to Woods on a number of occasions. No evidence was presented to show that either man was homosexual or effeminate with the exception of one accusation by Wolfe that Woods used "Wet Ones" rather than toilet paper. The evidence also showed that misogynistic and homophobic epithets were commonly exchanged among all of the construction crew members, though Woods was the primary and constant victim of Wolfe's remarks.

Woods complained to his crew foreman about Wolfe's conduct, but no action was taken. At one point, Woods was sent home for three days without pay for allegedly requesting to see other employees' time sheets. While the company investigated the issue, Wolfe allegedly told his supervisor that Woods was "different" and that he "didn't fit in." When Woods returned to work, he was transferred to another crew and ultimately was laid off for "lack of work."

The EEOC argued that Wolfe's actions constituted harassment by sex stereotyping

because, in Wolfe's view, Woods did not conform to the male stereotype. The jury returned a verdict in favor of the EEOC and Woods on the harassment claim, and Boh Brothers appealed. The Fifth Circuit reversed the jury verdict. Importantly, the Fifth Circuit side-stepped the issue of whether sex stereotyping constitutes a cognizable form of same-sex harassment under Title VII, and instead found that there was insufficient evidence that Wolfe acted on the basis of gender in his treatment of Woods. The Fifth Circuit noted that there was insufficient evidence to show that Woods did not conform to a male stereotype, pointing out that there was no evidence that Woods was homosexual or effeminate. In other words, the Fifth Circuit essentially found that a Plaintiff in a harassment case based on gender stereotyping must show that the Plaintiff does not conform to their gender stereotype. On this point, the Fifth Circuit distinguished the case from the landmark Title VII case, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), where a woman alleged that she had been denied partnership in her accounting firm because the other partners thought she was too "macho." There, a plurality of the Supreme Court noted that an employer is acting on the basis of gender if it acts on the belief that a woman cannot be aggressive. The Fifth Circuit concluded that the present case stands in "sharp contrast" to *Price Waterhouse*, in which there was considerable evidence that the plaintiff did not conform to the female stereotype. [Read this opinion HERE](#)

CIVIL PRACTICE

***Welborn v. Ferrell Enterprises*, 2012 Tex. App. LEXIS 6378 (Tex. App.—Dallas, no pet. h.)**

This case involves an individual who was injured during an ambulance ride. The Dallas trial court dismissed all claims of all parties after a severance was granted to the company operating the ambulance. The trial court held a status conference some five years later after it was alerted that it had inadvertently dismissed the entire action. The court determined during a show cause hearing that there was good cause to dismiss the case for want of prosecution. Welborn filed a motion to reinstate the matter. Welborn presented four arguments for why the trial court should grant the reinstatement: first, she argued the notice for show cause hearing was invalid since it purported to be a final judgment; second, that the trial court erred in denying her motion to reinstate because it applied the incorrect standard and abused its discretion; third, that the trial court erred in not considering the plaintiff's physical, emotional, and economic limitations as they related to her conduct in prosecuting her case; and lastly, that since the court retained plenary power, they abused their discretion in not reinstating the matter.

The Court held as to the first issue that while the trial court has full control of the judgment, and the dismissed party thereby receives the same hearing with the same burden of proof, it would have had before the order of dismissal was signed, no harmful error was shown. Since Wellborn was given an opportunity to show good cause for reinstatement, the trial court acted correctly. Regarding the second issue, the court held that, when

viewing the totality of the circumstances regarding the long delay in prosecuting the matter--to include long periods of inactivity, the entire record and unexplained delays--the trial court acted correctly in refusing to reinstate the case. The appellate court further determined that the trial court's refusal to consider how the health and finances of the plaintiff in refusing to reinstate her case was not in clear error. The court reasoned that the argument presented by Welborn failed to state how her health and finances affected this ability, thus they rendered the point moot. Lastly, the court simply held that when there is no written order issued regarding a motion for new trial or rehearing, those motions are overruled by operation of law according to the Texas Rules of Civil Procedure. [Read this opinion HERE](#)

LEGAL PROFESSION

***Green v. McKay*, 2012 Tex. App. LEXIS 6397 (Tex. App.—Dallas 2012, no pet. h.).**

Appellant, Robert Green, a building inspector in Dallas, brought suit against Appellee Joe McKay, an attorney, for legal malpractice. In the suit that was the basis for the malpractice claim, Green sold properties to two individuals retaining a vendor's lien. One of the individuals, Hill, filed bankruptcy and as part of the Chapter 13 proceeding, and "surrendered" the property back to Green. During this period of time, the City of Dallas brought suit against Hill for code violations occurring on the property. When the property was surrendered to Green, the City amended their complaint to include Green as well. The City also filed an in rem action against the property for failure to pay ad valorem taxes. Green met with McKay and brought the amended petition in the code violation case, a motion for default judgment in the code violation case, the bankruptcy documents where the property was surrendered to Appellant, and documents relating to the tax lawsuit. Green testified that McKay told him he did not have to do anything with regard to the lawsuit and that "it would go away". The trial court subsequently rendered judgment against Green for \$562,275 for civil penalties regarding the code violations. When Green found out about the final judgment, he took the final judgment to McKay's office where members from his office told Green that there was nothing he could do about it. Green brought suit for malpractice against McKay for failing to advise him to answer the lawsuit and for failing to advise him to file a motion for new trial. Appellee filed a motion for summary judgment which was granted in the trial court.

The issue before the Fifth District Court of Appeals was whether or not the Appellant could show causation with regard to his claims. In order to prevail and recover under a malpractice theory, Green had to show that he would have been successful on the merits in the underlying action but for the attorney's negligence. Thus, Green had to show he would have prevailed if he had answered the city's suit. The Appellant's expert testified that had the underlying case been properly pleaded by McKay, Green could have asserted that he did not own the property and because of this, he would have prevailed. However, as the court stated, under a vendor's lien, the vendor retains equitable title while the vendee

takes legal title. Thus, the defense that Green did not own the property would not have been successful on the merits in the underlying action as he retained the legal title throughout. Likewise, in order to recover for the failure to file a motion for new trial, Green had to show he would have prevailed on his motion for new trial. In order to prevail on a motion for new trial, Green had to prove that that he had a meritorious defense. The court again pointed to the defunct theory that Green did not own the property in finding that he could not have set up a meritorious defense. In so doing, the court affirmed the trial court's summary judgment. [Read this opinion HERE](#)

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