TADC EVIDENCE LAW UPDATE

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INTRODUCTION

The cases selected for this edition of the Evidence Law Update are not an exhaustive review of every published opinion involving evidentiary issues since the last update. Rather, the editors selected cases that provide new law regarding evidence-related issues, apply existing evidence-related law to unique facts or circumstances, or otherwise discuss interesting evidentiary points. We hope that you find the update both interesting and useful in your practice.

ADMISSIONS: QUASI-ADMISSIONS/ JUDICIAL ADMISSIONS

QUASI-ADMISSION WILL BE TREATED AS JUDICIAL ADMISSION IF FIVE FACTORS ARE MET.

Phillips v. Bramlett, No. 07-05-0456-CV, 2007 WL 836871 (Tex. App.—Amarillo March 19, 2007, mot. for reh'g filed).

Family brought a wrongful death action against Defendant doctor, alleging that the doctor's medical malpractice resulted in patient's death from postoperative bleeding. At trial, the jury returned a verdict for Plaintiffs, including a finding that Defendant had been grossly negligent. Following the court's entry of judgment, Defendant filed a Motion to Correct, Modify, or Reform Judgment and a Motion for New Trial. The trial court overruled each motion and Defendant appealed.

On appeal, Defendant challenged the legal and factual sufficiency of the evidence to support the jury's causation finding. Defendant contended that Plaintiffs' expert opinion was nothing more than bare opinion and did not identify a causal connection between Defendant's acts and Plaintiffs' alleged damages. Therefore, Defendant argued, Plaintiff offered no evidence of causation.

The Amarillo Court of Appeals reviewed the record and found that the evidence was legally and factually sufficient to sustain the jury's verdict on causation. In so holding, the Court carefully reviewed the procedural setting and evidence adduced at trial, including all expert testimony concerning negligence and causation. The Court noted that, during cross-examination, Defendant's own experts admitted that, had Defendant gone to the patient's bedside before leaving the hospital, the patient would not have died. The Court emphasized that, in a multiple expert case, each expert's testimony on the possible causes of death may assist the jury in reaching its ultimate decision.

In addition, the Court considered Defendant's own testimony. During cross-examination, Defendant admitted that, had he gone to his patient's bedside and evaluated her clinical condition, she would be alive today and that, had he checked his voice mail, he would have stayed at the hospital. The Court identified these statements as quasi-admissions, but explained that a quasi-admission will be treated as a judicial admission if it appears that: 1) the declaration relied upon was made

during the course of a judicial proceeding; 2) the statement is contrary to an essential fact embraced in the theory of recovery or defense asserted by the party giving the testimony; 3) the statement is deliberate, clear, and unequivocal, thereby eliminating the hypothesis of mere mistake or slip of the tongue; 4) giving conclusive effect to the declaration will be consistent with the public policy upon which the rule is based; and 5) the statement is not destructive of the opposing party's theory of recovery.

Reviewing these factors, the Court concluded that there was no question that Defendant's testimony was made during a judicial proceeding. It further observed that Defendant claimed he committed no act of negligence in the treatment of his patient, and that it was the hospital's nurses that acted negligently. Thus, his admissions that, had he checked his voice mail, he would have stayed at the hospital and his patient would be alive today, ran contrary to an essential fact of his defensive theory. Moreover, Defendant made this admission twice during cross-examination, thereby, eliminating the hypothesis of slip of the tongue or mistake. The Court concluded further that giving conclusive effect to the declarations was consistent with the public policy that it would be unjust to allow a party to rely on one factual defense at trial and then, after the trier of fact found against him, to argue a different factual defense on appeal. Finally, the Court concluded that there was nothing about these quasi-admissions that was destructive of Plaintiffs' position.

For the foregoing reasons, the Court held that the quasi-admissions of Defendant should be treated as judicial admissions on the question of negligence and cause in fact of his patient's death.

ADMISSIONS: QUASI-ADMISSIONS/ JUDICIAL ADMISSIONS

PASSENGER'S DEPOSITION TESTIMONY DID NOT RISE TO THE LEVEL OF A JUDICIAL ADMISSION NECESSARY TO CONCLUSIVELY ESTABLISH THAT DRIVER WAS NOT NEGLIGENT.

Aguirre v. Vasquez, No. 14-06-00325-CV, 2007 WL 1246951 (Tex. App.—Houston [14th Dist.] 2007, no pet h.).

While returning to Texas from Nebraska, three employees of Systems Painters and a passenger were hit by a dust storm. They stopped their truck in the highway in hopes of waiting out the storm. A tractor-trailer driver did not see the Systems Painters' truck until immediately before he collided with it. Three Systems Painters employees were killed and another was seriously injured. The decedents' families and the injured passenger sued the tractor-trailer driver and his employer, as well as the estate of System Painters' driver and System Painters. One of the Plaintiffs was the father of the deceased System Painters driver.

The Systems Painters driver's estate filed a motion for summary judgment alleging that (1) the employees and their families were barred from recovery by the exclusive remedy defense of the Workers' Compensation Act, and that (2) there was no evidence to support the claim that the Systems Painters' driver was negligent or grossly negligent. The trial court granted the motion and Plaintiffs appealed.

On appeal Plaintiffs contended that the Systems Painters' driver was negligent in stopping the truck in a moving lane of the highway and that his negligence proximately caused the accident. The estate replied that it conclusively established through decedent's father's deposition testimony that the driver exercised a degree of ordinary care and that his conduct was not the proximate cause of the accident. The estate argued that the deposition testimony rose to the level of a judicial admission by the father/Plaintiff.

On its way to reversing the summary judgment in part, the Fourteenth Court of Appeals reviewed the decedent's father's testimony to determine whether it was merely a quasi-admission or a judicial admission. The Court noted that, although a party's testimonial declaration that is contrary to its position is a quasi-admission, a quasi-admission is merely some evidence, and not conclusive, upon the person making the admission. *Mendoza v. Fidelity & Guar. Ins. Underwriters, Inc.*, 606 S.W.2d 692, 694 (Tex. 1980). The Court distinguished a quasi-admission from a true judicial admission, which is a formal waiver of proof usually found in pleadings or the parties' stipulations. As a matter of public policy, though, the Court noted that a party's testimonial quasi-admission will be treated as a true judicial admission if the following requirements are met: (1) the declaration relied upon was made during the course of a judicial proceeding; (2) the statement is contrary to an essential fact embraced in the theory of recovery or defense asserted by the person giving the testimony; (3) the statement is deliberate, clear, and unequivocal (the

hypothesis of mere mistake or slip of the tongue must be eliminated); (4) the giving of conclusive effect to the declaration will be consistent with the public policy upon with the rule is based; (5) the statement is not also destructive of the opposing party's theory of recovery.

Considering these parameters, the Court concluded that Plaintiff's testimony did not rise to the level of a judicial admission. Specifically, the Court noted that Plaintiff testified as to his own personal opinion of the driver's driving and he neither testified as to what an ordinarily prudent person would do nor did he prove that he was qualified to make such a statement. Furthermore, the Court concluded that the witness made no showing that he understood the duty owed by the driver or that he intended to swear himself out of court by failing to blame the driver for the accident. The Court also raised some concerns that it appeared the witness might not to be fluent in English. Finally, the Court pointed to concerns about the "amorphous emotional undercurrents" that made it unfair to hold against the father as a judicial admission his comment that he did not blame his dead son for the accident.

Based upon the foregoing, the Court reversed and remanded in part because the evidence raised a genuine issue of material fact as to negligence.

AFFIDAVITS: ADMISSIBILITY AND ERROR

TRIAL COURT DID NOT CAUSE ANY HARM OR RENDER AN IMPROPER VERDICT BY ADMITTING AFFIDAVIT.

Miller v. Raytheon Aircraft Company, et al., No. 01-05-00787-CV, 2007 WL 1166161 (Tex. App.—Houston [1st Dist.] April 19, 2007, no pet. h.).

Plaintiff, an airline pilot, filed a *Sabine Pilot* wrongful discharge claim against Defendants. Plaintiff contended he was fired because, on several occasions, and despite pressure from Defendants, he refused to fly Defendants' aircraft when they did not meet the Minimum Equipment List (MEL) standards. Defendants, on the other hand, contended that Plaintiff's termination was based on complaints of abusive behavior towards a female flight attendant and Plaintiff's involvement in unnecessary delays in equipment upgrades. Defendants moved for summary judgment on the basis that they had a valid reason to terminate Plaintiff, thus negating the *Sabine Pilot* causation requirement. The trial court granted the motion.

Plaintiff appealed, *inter alia*, on the grounds that the trial court abused its discretion by denying his motion to strike one of the Defendants' officer's affidavits. Plaintiff challenged the officer's competency to testify therein about Plaintiff's employment status and objected that the affidavit contained hearsay regarding a "combination agreement" between the Defendants.

The First Court of Appeals held that the affiant, as an officer of the Defendant for five years, had demonstrated "a basis for personal knowledge concerning [Plaintiff's] employment status." The Court further concluded that the testimony regarding the "combination agreement" probably did not cause rendition of an improper judgment, because Plaintiff had included a copy of the combination agreement in its summary judgment evidence.

The Court then focused on the trial court's summary judgment ruling, finding that Plaintiff was not wrongfully discharged by Defendants. Under *Sabine Pilot Serv., Inc. v. Hauck*, the plaintiff has the burden of demonstrating that his "discharge is for the sole reason that he refused to perform an illegal act." The Court found that the undisputed evidence showed Defendants terminated hundreds of airline pilots because of a merger that caused one of the Defendants to cease its operations. Defendants, therefore, offered evidence that they had terminated Plaintiff for a reason other than the refusal to perform an illegal act. Because this evidence precluded Plaintiff's wrongful discharge claim, the Court affirmed the summary judgment.

AFFIDAVITS: MEDICAL EXPENSES

A NONOFFERING PARTY CAN PREVENT THE OFFERING PARTY'S AFFIDAVITS OF REASONABLENESS AND NECESSITY OF MEDICAL EXPENSES FROM BEING USED AS EVIDENCE UNDER TEX. CIV. PRAC. & REM. CODE § 18.001 BY FILING A PROPERLY CONTROVERTING AFFIDAVIT.

Hong v. Bennett, 209 S.W.3d 795 (Tex. App.—Fort Worth 2006, no pet.).

Plaintiff sued Defendant for alleged personal injuries from an automobile accident. Approximately four months before trial, Plaintiff filed and served on Defendant four affidavits for the authentication of medical bills in accordance with section 18.001 of the Texas Civil Practice and Remedies Code. The bills were from a chiropractic clinic, as well a medical doctor, radiologist, and pharmacist to whom the

chiropractic clinic had referred him. In the affidavits accompanying the bills, the affiants averred that the services provided were reasonable and necessary.

One month later, Defendant filed a controverting affidavit by a chiropractor, averring that none of the services provided by, or referred by, the chiropractic clinic were reasonable and necessary. The affidavit stated that "[t]he prognosis for an injury such as [Plaintiff's] is excellent from the outset, with or without treatment, due to the body's natural healing capabilities."

After an extensive pretrial hearing, the trial court concluded that the chiropractor's affidavit could controvert all of Plaintiff's medical bill affidavits. Instead of ruling that Defendant's controverting affidavit rendered Plaintiff's affidavits inadmissible, the trial court ruled that both Plaintiff's and Defendant's affidavits should be admitted in evidence.

Defendant appealed, contending that the trial court erred by ruling that Plaintiff's affidavits were admissible at trial. Defendant asserted that once the trial court determined that his affidavit was sufficient to controvert Plaintiff's affidavits, it should have excluded all of the affidavits and required Plaintiff to proffer expert testimony as to the reasonableness and necessity of his medical expenses.

On appeal, the Fort Worth Court of Appeals explained that an uncontroverted Section 18.001(b) affidavit provides legally sufficient—but not conclusive—evidence to support a jury's finding that the amount charged for a service was reasonable and necessary. Without a Section 18.001(b) affidavit averring that medical expenses are reasonable and necessary, a plaintiff must prove the reasonableness and necessity of such expenses by expert testimony. Thus, Section 18.001(b) provides a limited exception to the general rule that expert testimony is required to prove reasonableness and necessity of medical expenses, and it further provides an exception to general hearsay rules. However, by filing a controverting affidavit, the nonoffering party can prevent the offering party's affidavits of reasonableness and necessity from being used as evidence.

Having stated the foregoing, the Court held that the controverting affidavit was sufficient to exclude Plaintiff's affidavit regarding chiropractic expenses, but not those concerning services of the medical doctor, radiologist, and pharmacist. Specifically, the Court found that a report attached to Defendant's chiropractor's affidavit gave sufficient reasonable notice of how Defendant intended to controvert Plaintiff's initial affidavit as to the reasonableness and necessity of the chiropractor's services, but that Defendant's chiropractor did not show that he was qualified to controvert the reasonableness of the medical doctor's, radiologist's, or pharmacist's bills. In his affidavit, he averred only that he was familiar with the reasonable and customary charges for chiropractic services. The Court explained that general experience in a specialized field does not qualify a witness as an expert. Instead, "what is required is that the offering party establish that the expert has 'knowledge, skill, experience, training, or education' regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject." Specifically, the Court found that Defendant's chiropractor's affidavit did not address the claims made in Plaintiff's non-chiropractic affidavits, such as why a medical doctor would not need to evaluate a patient whose injury should be improving.

Based upon the foregoing, the Court held that the trial court did not abuse its discretion by admitting the affidavits as to the medical doctor's, radiologist's, and pharmacist's services, but that the trial court did abuse its discretion by admitting both the affidavit as to chiropractic expenses and the chiropractor's affidavit, instead of requiring Plaintiff to provide expert testimony as to those expenses at trial. Because the Court could not be reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it, it held that the error was reversible.

EXPERTS: NON-MEDICAL EVIDENCE SUPPORTING CAUSATION OF INJURY

EXPERT TESTIMONY THAT ALLEGED ACTION CAUSED DAMAGES WITHIN A "REASONABLE MEDICAL PROBABILITY" IS NOT REQUIRED IN ORDER TO RAISE A GENUINE ISSUE OF MATERIAL FACT AS TO CAUSATION.

Choice v. Gibbs, No. 14-05-01068-CV, 2007 WL 1080582 (Tex. App.—Houston [14th Dist.] 2007, no pet. h.).

Plaintiff, a contractor, filed a negligence suit against Defendant homeowner claiming that the electrocution he suffered from coming into contact with protruding wires in Defendant's home caused his subsequent heart attack. Defendant filed a no-

evidence motion for summary judgment alleging that Plaintiff lacked evidence of causation. Plaintiff responded with (1) layperson deposition testimony that the heart attack occurred shortly after the electrocution and (2) the affidavit of a medical doctor stating, in the form of an opinion, that the electrocution caused the heart attack. The trial court granted Defendant's no evidence motion for summary judgment stating that Plaintiff's evidence was insufficient to raise a genuine issue of material fact on causation. Plaintiff appealed.

On appeal, Plaintiff asserted that the trial court erred in granting the no-evidence motion for summary judgment, and Defendant argued that Plaintiff's evidence did not raise a fact issue because it lacked expert testimony of causation based on a "reasonable medical probability." The Fourteenth Court of Appeals held that expert testimony that the alleged negligent act caused the damages within a "reasonable medical probability" was not required in order to raise a genuine issue of material fact as to causation. The Court explained that (1) lay testimony providing direct evidence of the prompt onset of symptoms following an incident, when combined with (2) expert medical testimony that such an incident could have caused the alleged damages, was sufficient to raise a genuine issue of material fact as to causation. Because Plaintiff provided both, the Court reversed and remanded.

EXPERTS: RELIABILITY

RELIABILITY IS NOT DEMONSTRATED WHERE ADMISSIBLE EXPERT TESTIMONY DOES NO MORE THAN SET OUT FACTORS AND FACTS WHICH ARE CONSISTENT WITH THE EXPERT'S OPINION.

Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572 (Tex. 2006).

The driver of a Mack Truck tractor-trailer was badly burned and died as a result of his injuries following a rollover crash. Decedent's survivors filed suit against the tractor-trailer's manufacturer alleging defective design, manufacture and marketing of the truck. Specifically, Plaintiffs alleged that the truck's fuel system design and manufacturing defects were conducive to ignition and fire following a crash and that Defendant had failed to provide warnings about the defects.

Defendant moved for summary judgment, arguing that Plaintiffs could present no evidence that any alleged defects caused the fire. Plaintiffs responded by filing the deposition testimony and expert report of their expert, Elwell; Defendant had previously moved to exclude Elwell's testimony as unreliable.

Following an *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995) hearing, the trial court granted Defendant's motion to exclude Elwell's testimony as to causation, but the court allowed Elwell to testify again for the Plaintiffs' bill of exceptions. The trial court then granted Defendant's summary judgment motion.

Plaintiff appealed, and the Corpus Christi Court of Appeals reversed the summary judgment, concluding that the trial court abused its discretion by excluding Elwell's causation testimony. In reaching this conclusion, the appellate court considered Elwell's testimony from both the *Robinson* hearing and the bill of exceptions.

Defendant then appealed the intermediate court's ruling to the Texas Supreme Court. Defendant argued, among other things, that the court of appeals erred by considering testimony admitted only for the bill when it reviewed the trial court's exclusion of Elwell's causation testimony.

First, the Court noted that the purpose of a bill of exceptions is to allow a party to make a record for appellate review of matters that do not otherwise appear in the record (such as evidence that was excluded), but that, unless the trial court commits fundamental error, appellate courts are not authorized to consider issues not properly raised by the parties. Because the court of appeals did not classify the trial court's refusal to permit the Plaintiffs to present further evidence or to reconsider admission of Elwell's causation opinions as fundamental error, the Texas Supreme Court concluded that Elwell's testimony from the bill of exceptions could not be considered in determining whether the trial court erred in excluding Elwell's causation testimony.

Still, Plaintiffs argued that, even with the exclusion of Elwell's causation testimony, they provided sufficient evidence to survive summary judgment. To this end, Plaintiffs cited accident witness accounts, a report by Defendant's accident reconstruction expert and Elwell's non-excluded testimony.

In reviewing the cited testimony, the Court explained that non-expert testimony will constitute some evidence of causation only when a layperson's general experience and common understanding

would enable the layperson to determine from the evidence, with reasonable probability, the causal relationship between the event and the condition. Otherwise, expert testimony is required. *See Alexander v. Turtur & Assocs.*, 146 S.W.3d 113, 119-20 (Tex. 2004).

With this standard in mind, the Court concluded that a lay juror's general experience and common knowledge do not extend to whether design defects such as those alleged in this case caused releases of diesel fuel during a rollover accident. Therefore, proof of causation required expert testimony.

The Court further concluded that Plaintiffs' evidence did not provide proof that any of the possible sources of fuel was more likely than another to have been the source of fuel to first ignite. The Court noted that testimony that one source could "possibly" have ignited the fire was not evidence that it probably did so; such evidence was speculative and insufficient to prevent summary judgment.

Finally, to the extent that Plaintiffs relied upon circumstantial evidence to suggest that the speed of the fire was consistent with their theory of a defectively-designed fuel system, the Court concluded, that this evidence did not tend to show more likely than not that the fuel system was the cause of the fire rather than some other allegedly improperly designed and/or located ignition source.

Because Plaintiffs' admissible summary judgment evidence was insufficient to raise a genuine issue of material fact, the Court reversed the court of appeals and rendered in favor of Defendant.

EXPERTS: SUFFICIENCY OF STATUTORY HEALTHCARE EXPERT REPORT

MEDICAL EXPERT REPORT OMITTED STATUTORY ELEMENTS, THUS REQUIRING DISMISSAL OF HEALTH CARE LIABILITY ACTION.

CHCA Mainland L.P. v. Burkhalter, No. 01-06-00158-CV, 2007 WL 686679 (Tex. App.—Houston [1st Dist.] March 8, 2007, no pet.).

Plaintiffs brought a health care liability action against Defendant medical center and others, alleging that their negligence proximately caused decedent's death. After Plaintiffs served Defendant with a medical expert report, Defendant filed an objection, claiming that the report was inadequate and requesting dismissal of Plaintiffs' claim. The trial court denied the objections, and Defendant moved to dismiss, re-asserting the inadequacy of the expert report. The trial court denied the motion to dismiss, and Defendant appealed the ruling.

On appeal, Plaintiff argued that Defendant's notice of appeal was untimely because the objections to the expert report requested dismissal and, thus, the appellate timetable ran from the court's ruling on the objections. The First Court of Appeals disagreed, holding that the trial court did not rule on the initial request for dismissal in its order denying the objections. Thus, appeal from the order denying the motion to dismiss was timely.

After disposing of this threshold issue, the Court turned to the adequacy of the report. Defendant argued that the trial court erred by denying the motion to dismiss, because the expert report failed to include the standard of care for the hospital or the hospital staff and because the report was conclusory as to how the hospital and staff breached the standard of care and caused damages. For these reasons, Defendant contended, the report was not "an objective good faith effort under section 74.351(*l*)."

The Court reviewed the denial of the motion to dismiss for an abuse of discretion and noted that, by statute, an expert report must include: (1) a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, (2) the manner in which the care rendered by the physician or health care provider failed to meet the standards, and (3) the causal relationship between that failure and the injury, harm, or damages claimed. The Court added that a trial court must grant a motion to dismiss only if, after hearing, it appears that the report does not represent an objective good faith effort to comply with these statutory requirements.

Conducting its analysis under these standards, the court noted that there are two purposes which must be fulfilled for the report to constitute a good faith effort: (1) the report must inform the defendant of the specific conduct the plaintiffs call into question, and (2) the report must provide a basis for the trial court to conclude the claims have merit. In fulfilling these purposes, the expert must explain the basis for his statements and link the conclusions to the facts.

The Court concluded that the report did not mention the appropriate standard of care for Defendant, its nurses, and staff, and, similarly, that it did not identify how Defendant, its nurses, and staff

breached that standard of care. Furthermore, the report did not explain the causal link between Defendant's acts and the alleged injuries.

For the foregoing reasons, the Court held that the report did not constitute an objective good faith effort to meet the statutory requirements, and held that the trial court erred in denying Defendant's motion to dismiss.

EXPERTS: SUFFICIENCY OF STATUTORY HEALTHCARE EXPERT REPORT

REPORT ADEQUATELY ADDRESSED CAUSATION BUT FAILED TO ADDRESS PARTICULAR PLEADED CLAIMS.

Farishta v. Tenet Healthsystem Hospitals Dallas, Inc., No. 02-06-00188-CV, 2007 WL 174417 (Tex. App.—Fort Worth April 26, 2007, no pet. h.).

Plaintiff sued a hospital in a medical malpractice action, alleging negligence in failing to adopt, implement, and enforce prenatal Group B Streptococcus ("GBS") testing and screening. In support of her claims, Plaintiff filed three expert reports: (1) an original report drafted by a doctor; (2) an addendum to the original report; and (3) a report drafted by a hospital consultant. Defendant filed a motion to dismiss, arguing that Plaintiff's expert's reports were not sufficient because they only contained a single conclusory statement as to causation. The trial court granted Defendant's motion to dismiss and severed the claim. Plaintiff appealed.

Regarding the adequacy of the doctor's report, the court distinguished *Bowie Memorial Hospital v. Wright*, wherein the Texas Supreme Court held that an expert's conclusory statements did not satisfy the statutory requirements. *See* 79 S.W.3d 48 (Tex. 2002). In this case, by contrast, the Fort Worth Court of Appeals observed that the doctor's report indicated that the standard of care was to perform the tests or screening, that the tests were not performed or required, that the failure to perform or require the tests allowed Plaintiff to contract GBS and cause injuries, and that antibiotic treatment would have prevented the infection. The Court held that this constituted a good faith effort to summarize the causal relationship between the breach of the standard of care and Plaintiff's damages.

However, the Court further concluded that, while the report addressed other specific conditions "and other injuries," it failed to address "illness" and "developmental impairment," which where both pleaded and alleged by Plaintiff. Because these alleged results of the breach of the standard of care were not properly addressed in the expert's report, the Court sustained the objection with regard to these injuries. Additionally, the Court sustained the objection with regard to the hospital's consultant report because "it is axiomatic that a nonphysician may not opine on medical causation matters." Accordingly, the Court remanded to the trial court for further proceedings consistent with its holdings.

EXPERT: SUFFICIENCY OF STATUTORY HEALTHCARE EXPERT REPORT

REPORT SATISFIED REQUIREMENTS OF PROVIDING CURRICULUM VITAE AND OF ADDRESSING STANDARD OF CARE AND CAUSATION.

Harris County Hosp. Dist. v. Garrett, No. 01-06-00782-CV, 2007 WL 1299872 (Tex. App.—Houston [1st Dist.] May 3, 2007, no pet. h.).

Plaintiff sued physicians and hospital for failure to timely disclose her breast cancer biopsy results. Plaintiff claimed that the hospital's employees and staff failed to inform her of her diagnosis and failed to release her medical records to both her and her doctor. The hospital objected to Plaintiff's expert's report and moved to dismiss. The trial court denied the objections and the motion.

On appeal, the hospital argued that the trial court abused its discretion in denying the motion to dismiss because the expert report: (1) did not include a curriculum vitae and did not show the expert was competent to testify as to the hospital's procedures; (2) failed to identify the standard of care applicable to the hospital; and (3) failed to show that any conduct of the hospital caused any damages.

The expert report did not include a curriculum vitae as a separate document. Instead, the expert discussed his experience and credentials in a paragraph within the report. On appeal, the hospital argued that this was an impermissible method to set forth an expert's curriculum vitae. The First Court of Appeals dismissed this argument, noting that the hospital failed to cite any authority for the proposition that a curriculum vitae must be provided in a separate document. The Court further held that, while the statute requires a curriculum vitae as to each expert, it does not include a requirement that it be served as a separate document.

Alternatively, the hospital argued that the curriculum vitae was "grossly inadequate" because it failed to establish the expert's credentials as an expert "on the operation of a major metropolitan hospital's records systems or pathology labs." Since Plaintiff's claims involved the failure of the hospital's staff to provide medical records, the standard of care identified in the expert's report was that the hospital should have timely informed Plaintiff of her cancer diagnosis and released her medical records to both her and her doctor. The Court observed that the hospital failed to cite any authority that would require the expert to possess expertise "on the operation of a major metropolitan hospital's records systems or pathology labs." Rather, the expert was only required to satisfy the statutory requirements by showing he was practicing health care in a field of practice that involved the same type of care or treatment delivered to Plaintiff, had knowledge of the acceptable standards of care, and was qualified on the basis of training or experience to offer an expert opinion regarding the standard of care. Since the expert's report met this standard, the Court held that the trial court did not err in denying the hospital's motion to dismiss.

The hospital further argued that the report failed to identify the standard of care allegedly breached and never stated "what should have been done." Merely stating the no one notified Plaintiff of her diagnosis, the hospital argued, did not establish the standard of care. The hospital further argued that the report did not sufficiently identify specific complained-of conduct of the hospital. Responding to these arguments, the Court held that the report properly identified the standard of care and breach thereof—*i.e.*, that the hospital's employees should have informed Plaintiff of her biopsy results and should have released those results to her and her doctor. While the report primarily focused on her treating physicians, the report specifically referred to conduct of the pathology lab, nurse practitioner, and medical records department.

Finally, the hospital argued that the expert's report failed to identify what caused Plaintiff's alleged damages and did not show Plaintiff actually sustained damages. Specifically, the hospital argued that "a poor forecast for the disease" was not actual damages and that the report failed to show anything different would have happened if the hospital had acted differently. In dismissing this argument, the Court distinguished *Bowie Memorial Hospital v. Wright*, where the Texas Supreme Court held that an expert's opinion that the delay in informing the plaintiff of her diagnosis prevented a "possibility of a better outcome" did not sufficiently link the expert's conclusion to the alleged breach of the standard of care. *See* 79 S.W.3d 48 (Tex. 2002). By contrast, the expert in this case concluded that the hospital's breach of the standard of care permitted Plaintiff's cancer to advance and prevented the availability of effective diagnostic measures and therapeutic options. The Court also noted pain and swelling that Plaintiff reportedly experienced during this time. For the foregoing reasons, the Court held that the expert's report presented a fair summary of the causal relationship between the hospital's breach of the standard of care and Plaintiff's damages.

Having held the hospital's various arguments unavailing, the Court affirmed the denial of the hospital's motion to dismiss.

EXPERT: SUFFICIENCY OF STATUTORY HEALTHCARE EXPERT REPORT

EXPERT REPORT FAILED TO ADDRESS ADEQUATELY CAUSAL RELATIONSHIP BETWEEN STANDARD OF CARE AND ALLEGED DAMAGES.

Cayton v. Moore, No. 05-06-00490-CV, 2007 WL 172069 (Tex. App.—Dallas June 24, 2007, no pet.).

Plaintiff filed a medical malpractice claim against a neurologist, physician, and hospital, alleging that Defendants failed to immediately schedule treatment and hospitalize her and, as a result, Plaintiff suffered permanent damage related to Brown-Sequard Syndrome. The physician filed a motion to dismiss, arguing that Plaintiff's expert report failed to adequately address the causal relationship between the physicians's standard of care and Plaintiff's alleged injuries. The trial court denied the physician's motion, and he filed an interlocutory appeal.

The Dallas Court of Appeals noted that, while the report specifically referred to the physician in discussing the standard of care, the portion of the report that addressed causation did not mention the physician. Furthermore, the Court noted that, while the report concluded that Plaintiff would not have suffered permanent injury if she had had surgery "within a day or so" of her evaluation at Baylor University Hospital, Plaintiff's first visit to the Defendant doctor did not occur until four days after Plaintiff was evaluated at the hospital. Concluding that the report failed to adequately address the causal relationship between the Defendant physicians' alleged breach of the standard of care and Plaintiff's

claimed injury, harm, or damages, the Court held that the trial court abused its discretion to the extent that it determined Plaintiff's expert's report constituted a good faith effort to comply with the statutory report requirements. Accordingly, the Court reversed the trial court's order denying the physician's motion to dismiss and remanded the case to the trial court.

HEARSAY: BUSINESS RECORD EXCEPTION

BUSINESS RECORDS HELD ADMISSIBLE DESPITE CHALLENGE TO RECORDS AFFIDAVIT.

Petty v. CitiBank (South Dakota) N.A., 218 S.W.3d 242 (Tex. App.—Eastland 2007, no pet.).

A credit card company, Plaintiff, sued a credit card holder, Defendant, to collect on the unpaid balance on a credit holder's account.

As part of its summary judgment evidence, Plaintiff offered the affidavit of an account representative. Attached to the affidavit were over 100 pages of documents that the representative stated were relevant to the account. Defendant claimed that the affidavit did not meet the requirements of establishing admissibility of the documents under the business records exception to the hearsay rule.

Initially, the Eastland Court of Appeals noted that Texas Rule of Evidence 902(10)(b) includes a form affidavit to be used when introducing business records under Rule 803(6). It recognized also that Rule 902(10)(b) is not exclusive, and that an affidavit that substantially complies with the affidavit in the rule will suffice.

The Court held that the documents attached to the affidavit, along with the affidavit itself, substantially complied with Rule 902(10)(b) for the following reasons:

(1) The representative stated in the affidavit that the matters asserted in it were based on her personal knowledge of the facts and were all true and correct; and

(2) She also stated that the documents attached to the affidavit were (a) true and correct copies of statements that identified charges in the relevant period, (b) true and correct copy of the relevant credit card agreement, and (c) a true and correct copy of Defendant's credit card agreement; (d) the representative confirmed that the documents were kept in the regular course of business and that they were made by an employee or representative with personal knowledge of the account at or near the time the event was recorded, or reasonably soon thereafter.

Having held that the affidavit substantially complied with Rule 902(10)(b), the Court concluded that the affidavit and attached documents were admissible as an exception to the hearsay rule under Rule 803(6). The Court affirmed the judgment of the trial court.

HEARSAY: BUSINESS RECORDS/OTHER DEPOSITIONS

COURT OF APPEALS FOUND SUFFICIENT EVIDENCE TO SUPPORT TRIAL COURT'S ORDER IMPOSING SANCTIONS.

Trantham v. Isaacks, 218 S.W.3d 750 (Tex. App.—Fort Worth 2007, pet. filed).

Plaintiff sought a declaratory judgment regarding statements he made in a newspaper article about Defendant. Specifically, Plaintiff sought determinations of (1) his own potential tort liability for defamation; and (2) Defendant's guilt in connection with an alleged penal code violation. One day prior to a hearing on Defendant's plea to the jurisdiction, Plaintiff dropped the suit.

Defendant filed a motion for sanctions under Sections 10.001 and 10.002 of the Texas Civil Practice & Remedies Code. At the sanctions hearing, Plaintiff objected to an attorney's fees affidavit offered by Defendant as hearsay, on the basis that the affiant was present and could have testified. The trial court admitted the affidavit. Plaintiff also sought admission of the a deposition taken in an employment lawsuit Plaintiff filed in federal court. Defendant objected, stating that because Plaintiff had the opportunity to subpoena the witness to testify in this case, but did not, Plaintiff should not have the opportunity to use a deposition taken in another matter in which Defendant was not present. The trial court excluded the deposition and ordered Plaintiff to pay Defendant $7,769.07 in sanctions.

Plaintiff appealed, challenging the sufficiency of the evidence to support the award of sanctions and claiming that there was no evidence of sanctionable conduct. Plaintiff further challenged the trial court's evidentiary rulings at the sanctions hearing.

First, the Court noted that declaratory judgment actions may not be used to either determine potential tort liability or "render naked declarations of rights, status or other legal relationships arising under a penal statute." Following a comprehensive review of the record, the Court found that there was sufficient evidence for the trial court to find that: (1) Plaintiff's suit was filed for the improper purpose of harassing Defendant; (2) Plaintiff's claims and assertions were not warranted by existing law or by non-frivolous arguments for the extension, modification, or reversal of existing law or the establishment of new law; and (3) a reasonable sanction was necessary to deter repetition of that conduct.

Addressing the trial court's ruling on the admissibility of the attorney fee affidavit, the Dallas Court of Appeals found no abuse of discretion. The Court noted that properly authenticated records of regularly conducted business activity can be admitted into evidence as an exception to the hearsay rule under Rule 803(6) of the Texas Rules of Civil Procedure, and, as provided by Rule 902(10), the foundation for admission of a business record may be established by testimony or by affidavit. For purposes of Rule 803, the availability of the declarant is immaterial. Therefore, the affiant's presence or absence at the hearing was irrelevant.

Likewise, the Court held that the trial court did not abuse its discretion by excluding the deposition from another lawsuit. Under Rule 801(e), a statement is not hearsay if it is a deposition taken in the same civil proceeding. Because the proffered affidavit came from other proceedings, the trial court did not abuse its discretion by excluding it.

Having affirmed each of these rulings, the Court affirmed the trial court's order imposing sanctions.

HEARSAY: PARTY OPPONENT EXCEPTION

HEARSAY STATEMENT NOT ADMISSIBLE WHERE THERE WAS NO EVIDENCE DECLARANT WAS EMPLOYEE OF PARTY AGAINST WHOM STATEMENT WAS OFFERED.

Stensrud v. Leading Edge Aviation Servs. of Amarillo, Inc., 214 S.W.3d 98 (Tex. App.—Amarillo 2006, no pet.).

Plaintiff brought a premises liability claim against Defendant for personal injuries allegedly sustained at Defendant's facilities when Plaintiff slipped in a puddle of oil left when a hydraulic hose on a "Manlift" machine broke. Plaintiff offered an individual's comment regarding the cause of the puddle as evidence that Defendant had actual or constructive knowledge of the oil, claiming that the individual was Defendant's employee. Defendant objected to the statement as hearsay at the summary judgment stage and at trial. The trial court sustained the objection and granted summary judgment for Defendant.

On appeal, Plaintiff argued that the statement was not hearsay because it was not being offered to prove the truth of the matter asserted, and because the comments were uttered by Defendant's employee. Defendant replied that Plaintiff had failed to "clearly establish" that the individual was Defendant's employee. Plaintiff argued that only some evidence of employment was necessary to raise a fact question.

Addressing the issue, the Amarillo Court of Appeals noted that an employer/employee relationship exists where one has the right to control the progress, details, and methods by which another performs his work. The Court recited the evidence purportedly illustrating the required relationship, and determined that there was no evidence describing whether Defendant had any right to control the individual's actions. The Court also noted that there was nothing to show whether the individual was an employee of Defendant or the employee of a contractor Defendant may have retained. The Court held that one inference was not more likely than the other, and, therefore, no evidence established that the individual was Defendant's employee.

Because Plaintiff provided no evidence that the comments were made by defendant's employee, the Court affirmed the trial court's ruling that the comment was hearsay and affirmed the summary judgment.

OPINION TESTIMONY: LAY WITNESS

SUMMARY JUDGMENT AFFIDAVIT OF SURVEY TECHNICIAN FOUND TO BE PROPER LAY WITNESS OPINION EVIDENCE BECAUSE NATURAL RESOURCES CODE DOES NOT MANDATE METHODOLOGY FOR DETERMINING ALLEGED NAVIGABLE WATER'S WIDTH.

Hix v. Robertson, 211 S.W.3d 423 (Tex. App.—Waco 2006, pet. filed).

Land-owner Plaintiffs filed a declaratory judgment action against Defendant for access to alleged statutory navigable waters that ran across Defendant's land. The parties had previously executed flood easements on their respective properties which resulted in a soil conservation flood-retarding dam to be built on the stream in question. The dam formed a lake covering portions of the land of both parties. However, prior to the dam being built, Defendant constructed a fence around his property. The fence remained in place when the lake was formed causing a 90-acre portion of the 100-acre lake to be fenced-off. Plaintiffs sought a declaration that the waters were statutory navigable waters and owned by the State in trust for the public, and that Defendant must remove his fence and may not interfere with the public's access to the 90-acre portion of the lake. Plaintiffs filed a motion for summary judgment that the water in question was a statutory navigable stream. In support, Plaintiffs attached affidavits to establish the average width of the stream. The trial court granted Plaintiffs' motion.

Defendant appealed, *inter alia*, on the grounds that the trial court erred by considering the affidavits submitted by Plaintiffs to establish the water's width measurements for purposes of determining its navigability under the Natural Resources Code. More specifically, Defendant challenged the methodology of the width measurements and asserted that the affidavits were based on factual and legal conclusions.

In resolving the appeal, the Waco Court of Appeals focused on the affidavit of the survey technician. The Court determined that it could find "no law mandating a certain method for measuring a stream's width for the purpose of determining its navigability under section 21.001(3) of the Natural Resources Code." Accordingly, the Court held that the affidavit testimony was proper lay witness testimony under Rule 701 of the Texas Rules of Evidence. Because the survey technician's affidavit was "clear, positive, direct, [and] otherwise credible and consistent, and [because] it could have been readily controverted by [the Defendant]," the Court affirmed the summary judgment.

PRIVILEGE: SETTLEMENT COMMUNICATIONS

Rabe v. Dillard's, Inc., 214 S.W.3d 767 (Tex. App.—Dallas 2007, no pet. h.).

Plaintiff sued Defendant department store, alleging an injury from a fall on Defendant's premises. The parties mediated and reached a settlement agreement, but Plaintiff subsequently refused to sign the settlement documents and dismiss the action. Defendant filed a counterclaim for breach of contract based on Plaintiff's failure to honor the settlement agreement and moved for summary judgment on the counterclaim. Plaintiff asserted that she entered the settlement agreement under duress and claimed that, during the mediation, defense counsel threatened to contact the worker's compensation carrier if she refused to sign the settlement agreement.

Plaintiff's only summary judgment evidence consisted of statements contained in an affidavit. One of these statements described the alleged threat made by defense counsel during the mediation. The Dallas Court of Appeals noted that, pursuant to Texas Rules of Civil Procedure 166a(f), affidavits submitted as summary judgment evidence must set forth facts that would be admissible as evidence. Because communications made during an alternative dispute resolution procedure are confidential, and may not be used as evidence, there was no competent summary judgment evidence of a threat. Thus, the Court concluded that Plaintiff failed to raise a question of fact as to any remaining elements of her claim and summary judgment was appropriate.

SUFFICIENCY: DURESS

INSUFFICIENT EVIDENCE TO SUPPORT EMPLOYEE'S CLAIM THAT EMPLOYER USED ECONOMIC DURESS SOLELY TO ENFORCE ARBITRATION PROVISION OF EMPLOYMENT AGREEMENT.

In Re RLS Legal Solutions, L.L.C., 50 Tex. Sup. Ct. J. 641, 2007 WL 1162795 (April 20, 2007).

From 1997 to 2000, RLS Legal Solutions, L.L.C. ("RLS") and its employee, Amy Maida, executed several employment agreements which included arbitration provisions. In 2001, Maida wholly objected to a new agreement, which contained numerous provisions, including an arbitration provision. A dispute arose, whereby Maida contended that RLS withheld a salary payment until she complied with its request to sign the new agreement. Maida ultimately signed the new agreement, but subsequently brought suit against RLS, alleging that she was under duress to sign the new employment agreement.

RLS moved to compel arbitration under the employment agreement. The trial court denied the

motion and RLS filed a petition for writ of mandamus, which the court of appeals denied, holding that the trial court did not abuse its discretion by denying RLS's motion to compel arbitration. RLS then petitioned the Texas Supreme Court for writ of mandamus.

In the Texas Supreme Court, Maida argued that the arbitration provision was not enforceable because RLS improperly withheld her salary payment to force her to accept the arbitration provision. However, there was evidence that, in addition to objecting to the arbitration provision, Maida objected to the compensation, commission, and non-compete provisions of the employment agreement. The Court held that, unless the arbitration provision alone is singled out from the other provisions, the claim of duress goes to the agreement generally and must, therefore, be decided in arbitration. Because the evidence was not sufficient to show that the arbitration provision was the only provision to which Maida objected, the Court conditionally granted RLS's petition and directed the trial court to grant RLS's motion to compel arbitration.

SUFFICIENCY: QUANTUM MERUIT

NO EVIDENCE TO SUPPORT ELEMENTS OF PLAINTIFF'S QUANTUM MERUIT CLAIM AND, THUS, TRIAL COURT PROPERLY GRANTED JNOV.

LTS Group, Inc. v. Woodcrest Capital, L.L.C., No. 05-05-01426-CV, 2007 WL 1241405 (Tex. App.—Dallas April 30, 2007, no pet. h.).

LTS Group, Inc. ("LTS") entered into an agreement with Massachusetts Mutual Life Insurance Corporation ("Mass Mutual") for the purchase of an office building. In relevant part, the agreement provided that LTS could not assign the agreement without Mass Mutual's written consent. The agreement further provided LTS with a thirty-day due diligence period in which LTS could terminate the agreement at any time during the period.

Prior to LTS's completion of its due diligence, Woodcrest Capital, L.L.C. ("Woodcrest") and LTS agreed that Woodcrest would purchase LTS's rights under the agreement for $230,000. LTS turned over all of its due diligence information to Woodcrest. Complications arose with LTS's purchase of the building and LTS ultimately terminated the agreement with Mass Mutual. Woodcrest subsequently bought the property directly from Mass Mutual, but never paid LTS anything for the due diligence materials. LTS sued Woodcrest under a theory of quantum meruit and a jury awarded LTS $75,000 in damages. The trial court, however, granted a JNOV in favor of Woodcrest and ordered that LTS take nothing on its claims. LTS sought this appeal, arguing that the jury's award was supported by some evidence and should not have been set aside.

The Dallas Court of Appeals, after reviewing the evidence, found that LTS's due diligence materials were provided to Woodcrest in expectation of a fee in excess of $200,000, to be paid to LTS when Woodcrest purchased the building. As noted by the Court, the expectation of a future business advantage or opportunity cannot form the basis of a quantum meruit cause of action. Therefore, because there was no evidence to support LTS's quantum meruit claims against Woodcrest, the Court held that the trial court properly granted Woodcrest's motion for JNOV. The Court further held that LTS's trial testimony regarding the value of the due diligence materials, based on the above-mentioned expectation, was no evidence to support the jury's verdict and rejected LTS's contention that the trial court erred in failing to find that $200,000 was the value of LTS's compensable work.

SUFFICIENCY: SPECIFIC JURISDICTION

COURT EXPLORES SUFFICIENCY OF EVIDENCE TO SHOW "SUBSTANTIAL CONNECTION" BETWEEN NONRESIDENT DEFENDANT'S CONTACTS WITH FORUM AND OPERATIVE FACTS OF THE LITIGATION.

Moki Mac River Expeditions v. Drugg, 50 Tex. Sup. Ct. J. 498, 2007 WL 623805 (Mar. 2, 2007).

Parents of a thirteen-year old child who died while hiking with a Utah expedition company sued the company in Texas for wrongful death and intentional and negligent misrepresentation. On appeal, the company argued that because the child's death on a Grand Canyon hiking trail did not arise from or relate to its in-state commercial activities, the Plaintiff could not establish specific jurisdiction over it in Texas.

When specific jurisdiction is alleged, the Court must ensure that (1) the defendant has minimum contacts with the jurisdiction, and (2) the defendant's alleged liability arises out of or is related to an activity conducted within the forum. In this case, the Texas Supreme Court examined the strength

of the nexus required to establish the second prong of the specific jurisdiction test.

The Court first held that the company had established minimum contacts with Texas through the following activities: (a) regular advertising in Texas, (b) hiring public relations firms to target media groups and tour operations in Texas, (c) soliciting Texas residents through mass and targeted direct-mail companies, (d) utilizing particular customers to become *de facto* group leaders to plan, organize, and promote trips, and (e) giving discounted trip prices to some Texas clients.

When addressing the second prong of the specific jurisdiction test, the Court recognized that the Supreme Court has provided little guidance as to how closely the cause of action must be to the defendant's forum activities. It then undertook a review of several approaches employed in other jurisdictions.

The Court first noted the "but for" relatedness test, which states that a cause of action arises from or relates to a defendant's forum contacts when, but for those contacts, the cause of action would never have arisen. Acknowledging that the Ninth Circuit has adopted this approach to relatedness, the Texas Supreme Court declined to follow. Instead, the Court stated that it agreed with the Fifth and Sixth Circuits, which have signaled a movement away from the broad test. The Court concluded that the test is "too broad and judicially unmoored to satisfy due-process concerns."

Next, the Court reviewed the "substantive relevant/proximate cause" test. This test requires forum-related contacts to be substantially relevant, or even necessary, to the proof of the claim. That is, "a contact that is the proximate or legal cause of an injury is substantively relevant to a cause of action that arises from it." The Court observed that the First, Second and Eight Circuits appear to have followed this approach. It, however, concluded that "the substantive-relevance/proximate-cause standard is more stringent than the Supreme Court has, at least thus far, required."

Third, the Court considered the "sliding scale relationship test." Under this analysis, a court examines the relationship between forum contacts and the litigation along a continuum – as the extent of the forum contacts increases, the degree of relatedness to the litigation necessary to establish jurisdiction decreases. Reasoning that this approach blurs the distinction between the firmly established tests for general and specific jurisdiction, the Court declined to adopt this method.

Finally, the Court explained that "our limited jurisprudence . . . suggests a middle ground, more flexible than substantive relevance but more structured that but-for relatedness, in assessing the strength of the necessary connection between the defendant, the forum, and the litigation." Based on this premise, the Court held that "for a nonresident defendant's forum contacts to support an exercise of specific jurisdiction, there must be a substantial connection between those contacts and the operative facts of the litigation." Applying this new standard to the facts of the case, the Court concluded that the relationship between the operative facts of the Plaintiff's death on a hiking trail in Arizona and the expedition company's promotional activities in Texas were too attenuated to satisfy the due process concerns of specific jurisdiction. The Court remanded the case so that it might consider arguments related to general jurisdiction.