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

IN THIS ISSUE: ***Meetings, Legislative&Election Update, Case Law Update***

FROM THE PRESIDENT

Keith B. O'Connell,
O'Connell & Avery, L.L.P; San Antonio

The 82nd Legislative Session, now fully underway, is already proving to be a challenge. The Governor has selected numerous items for "emergency" status (allowing them to be considered in the first 60 days of the session) including voter identification and eminent domain, to name a few. Committees have yet to be formed, but the Legislature seems to be "engines all ahead full" heading into the session with issues such as redistricting, the budget, social issues (such as voter ID, immigration and abortion) and the sun-setting of more than twenty major state agencies, including the Texas Department of Insurance, The Texas Department of Transportation and the Texas Railroad Commission. Your TADC Legislative Committee headed by Vice Presidents, Junie Ledbetter with Davis & Wilkerson, P.C. in Austin, and Jackie Robinson with Thompson & Knight, L.L.P. in Dallas, are organized and are currently monitoring over 60 bills of the expected 7,000 to be filed this session ahead of the deadline in late March.

The TADC is a trusted resource for unbiased analysis of legislation which has been, and currently is, relied upon by the legislature. If you or a member of your firm is willing to analyze proposed legislation, please contact Junie (ledbetter@dwlaw.com) or Jackie (Jackie.Robinson@tklaw.com).

The TADC is the ONLY Professional Legal Association representing the interests

of the Civil Justice System and the Defense Bar in Texas.

CLE programming for the year is in fine stride. Successful and very well attended Legislative Luncheons have already been held in the Valley and in Dallas. The next Legislative Luncheon will take place in Austin on February 17th and luncheons are now in the works for Dallas, Houston, Beaumont, El Paso, Lubbock, Amarillo and Tyler. Meanwhile we have outsold our room block for the excellent CLE program taking place in Steamboat Springs, Colorado next week. A CLE of the Do's and Don't's in the Courtroom is currently scheduled for San Antonio on March 3, 2011 at the Central Market Cooking School with 3 judges committed, and one judge threatening to participate in the cooking demonstration. The 29th TADC Trial Academy is scheduled for March 4-5, 2011 in Austin. The TADC Trial Academy is likely the most revered program the TADC provides. The level of education balanced with the value to the lawyer and the law firm are unmatched anywhere in the United States. New attorneys licensed between 1-6 years, are able to gain experience in a courtroom type setting, in areas such as opening and closing statements, direct and cross examination of witnesses and voir dire, all from both the plaintiff and defense perspective, earning nearly a year's worth of CLE. Instructors are experienced trial lawyers and members of the Judiciary. I highly suggest you recommend this program to your young attorneys. The workers' compensation, insurance subrogation and other high-volume/low damage cases that used to get our young lawyers in the courtroom are gone, so our Trial Academy for your young lawyers has never been more important or valuable. REGISTER HERE

The TADC Spring Meeting and Legislative Day will be held in Austin March 30-April 3, 2011 at the Hyatt on Lady Bird Lake. Consider this as one of the most important meetings of the year. Aside from the outstanding programming, including presentations by the top trial attorneys in the state, there are numerous panels with members of the Judiciary (including current and past members of the Texas Supreme Court and all other tiers of the judiciary). The Legislature is invited to the opening reception and the members of the TADC walk the halls of the Capitol to provide their resources to the elected members.

Proposed revisions to the Texas Rules of Disciplinary Procedure have made much news as of late. We seem to be bombarded daily with commentary by proponents for and opponents against adoption of the amendments to the Rules. Such important issues deserve a robust debate. On behalf of the TADC, I issued a statement late last week providing what I believe is an objective, unbiased resource for all members to reference with regard to the proposed rules. For a copy of that update and reference material, CLICK HERE. Several members have requested permission to circulate the E-Update and memorandum to non-TADC members. Though intended to be one of our many member benefits, the issue is of such importance to our self-governing Bar that you should feel at liberty to circulate the E-Update and memorandum to anyone you believe is interested in the issues. Each of you are encouraged to exercise your independent, professional judgment in evaluating the proposed changes. As an additional resource, please consider the "redlined version" of the rules from the State

Bar Website, which provides the current and proposed rules side by side in one document. HERE.

The TADC is a vibrant, active organization whose goal is to protect and preserve the Civil Justice System in Texas, and the right to trial by jury. A membership application is linked below. Add your partners, associates and colleagues today!

TADC Membership Application

*** Reminder***

Your TADC Dues statement was mailed in early November and was due by January 1, 2011. If you've not yet paid your dues, drop your payment in the mail today! If you have questions or require a duplicate dues statement, contact the TADC office at tadc@tadc.org or 512/476-5225

WELCOME NEW MEMBERS

Brian M. Andrews, Thompson & Knight LLP; Dallas
Kevin Cazalas, McKibben, Woolsey & Villareal; Corpus Christi
Danley Cornyn, Thompson & Knight LLP; Austin
Salvador Davila, Burns Anderson Jury & Brenner, LLP; Austin
Meagan A. Healy, Thompson & Knight LLP; Houston
Christopher C. Hughes, Fairchild, Price, Haley & Smith; Nacogdoches
Laura E. Hughes, Mills Shirley, L.L.P.; Galveston
Bryon A. Rice, Beck, Redden & Secrest LLP; Houston
Stewart K. Schmella, Nistico, Crouch & Kessler, PC; Houston
Keith L. Woods, Law Office of Keith Woods; Barker

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An Excellent Seminar

Register Now for

2011 TADC TRIAL ACADEMY
March 4-5, 2011 ~ Hilton Garden Inn Downtown
Austin, Texas

If you have not yet registered for the TADC Trial Academy, do it today, space is limited!

The Trial Academy is an excellent opportunity for 1-6 year lawyers to gain powerful skills in courtroom advocacy and an inexpensive alternative to many other programs.

The seminar is staffed by experienced trial attorneys who act as instructors in this intense two-day program. Instruction in Cross & Direct Examination of witnesses, Voir Dire, and Opening & Closing Statements, all in a courtroom setting, as well as respected members of the Judiciary who will serve.

A young attorney is able to earn nearly 1 full year of CLE at a very reasonable registration fee and the program is outstanding. This year's problem is commercial in nature. Register now as you will have to study course materials and the problem in advance of the Academy.

CLICK HERE for Trial Academy Registration Materials

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CALENDAR OF EVENTS

February 2-6, 2011
TADC Winter Seminar
Steamboat Sheraton – Steamboat Springs, CO
Mitch Smith & Slater Elza, Co-Chairs

February 17, 2011
Austin Legislative Luncheon
Headliners Club – Austin

March 3, 2011
San Antonio "Do's & Don'ts" Lunch with the Judiciary

Central Market Cooking School – San Antonio

March 4-5, 2011
29th Annual TADC Trial Academy
Austin, Texas
Brad Douglas & Tasha Waddell, Co-Chairs
Registration Material

March 30-April 3, 2011
TADC Spring Meeting
Hyatt Regency on Lady Bird Lake – Austin
Pat Weaver & Clayton Devin, Co-Chairs
Registration Material

July 13-17, 2011
TADC Summer Seminar
Snake River Lodge & Spa – Jackson Hole, Wyoming
Mark Walker & Russell Smith, Co-Chairs

August 5-6, 2011
Budget/Nominating Committee
San Antonio, Texas

Sept. 27-Oct. 1, 2011
2011 Annual Meeting
Hyatt Regency Maui – Maui, Hawaii
David Chamberlain & Mitzi Mayfield, Co-Chairs

LEGISLATIVE/ELECTION UPDATE

The first days of the legislative session have seen highs and lows. During the inauguration on Tuesday, January 12th, state leaders lauded Texas as a beacon state for the 21st century, a leader in education and economic development. On Wednesday, House Appropriations Committee Chair Jim Pitts (R-Waxahachie) introduced a "no new taxes" state budget that cuts $10 billion from public schools, closes four junior colleges and cuts student financial aid in half, and slashes spending for health care, transportation, public safety, and other state programs. The proposed budget also reduces funding for the judiciary and court system by almost 30% from current levels. The reality is now setting in. Texas is at a crossroads, and the 82nd Legislature will have to decide which direction to take.

TADC members have a huge stake in the budget debate, both professionally and as

members of their local communities. From a professional standpoint, there will be growing pressure to increase "non-tax" revenue to help make up for some of the budget shortfall. That means the possibility of increasing the lawyer occupation tax (which hasn't been raised since it was created in 1991, making it an inviting target for legislators), expanding the sales tax to some or all legal services, and "tweaking" the margin tax. We have already seen a bill filed (SB 376 by Senator Wentworth) to increase the jury fee from $30 to $75, as well as to impose an additional fee for preservation of court records and to fund improvement of Bexar County court facilities. We can expect this to become a trend: proposals to increase “fee revenue” for certain purposes as opposed to "increasing taxes."

We are also starting to see the introduction of bills that affect the civil justice system. Bills limiting the use of broad-form indemnity provisions in construction contracts (SB 361 by Sen. Duncan), establishing new procedures and damages in eminent domain proceedings (SB 18 by Sen. Estes), dealing with trials by special judges and "vexatious litigants" (HB 719 and 720 by Rep. Hartnett), allowing juror questions and note-taking (SB 297 by Sen. Wentworth), and expanding the investigative authority of the attorney general (SB 342 by Sen. Carona). At the same time, we continue to anticipate legislation imposing some sort of loser pays system, creating an "expedited" trial procedure for small claims, codifying and perhaps expanding the Entergy decision, and other ideas. How much attention these ideas will get in the midst of the gravest budget crisis in modern Texas history (and a redistricting session to boot, fraught with significant and controversial social issues) remains to be seen, but there is no question that major changes in the system will be considered.

We cannot emphasize enough the importance of your involvement in TADC this year. Issues vital to the future of our profession and the state are at stake. As the session goes on and decisions start to be made, we will need your input--both to us and to your legislators and their staffs. We will try not to ask you to go to the well too many times, but this session the well is full. Thank you in advance for responding to our calls for your help.

OUR RESPONSIBILITY TO PROTECT THE RIGHT TO JURY TRIALS

By Greg W. Curry, Immediate Past President, Texas Association of Defense Counsel
&
George “Tex” Quesada, President-Elect, Texas Trial Lawyers Association

Article originally published in the Dallas Bar Association “Headnotes.”, November 2010

The Texas Trial Lawyers Association and Texas Association of Defense Counsel have divergent views on many issues. Our living is made fighting each other. None of us like to lose. As a result, these two groups often end up on the opposite side of issues affecting the legal profession. When it comes to the protection of the jury system and the right to a trial by jury, both groups are aligned.

The American jury system is the best and most powerful method ever devised for the ascertainment of truth. It is the ultimate decision-maker for the disputes we spend our professional careers fighting. A jury trial is the pinnacle of the trial lawyer's experience.

The benefits of the jury system were recognized long ago. Indeed, the right to a trial by jury is mentioned in the Declaration of Independence, the body of the U.S. Constitution, and the Bill of Rights. The jury system has been central to the justice system in America since its inception.

Nonetheless, the jury trial is under constant attack. There are a multitude of reasons—some perceived and some real— including high costs of litigation, over worked courts, beliefs that juries are unpredictable and random, delay, and the assumption that most cases will settle. Critics of the jury system will point to verdicts that shock the conscience, concerns about runaway juries, and the purported benefits of alternative dispute resolution. They will claim that America is "sue happy," that many claims heard by juries are frivolous, or that jury trials stifle economic health.

It is incumbent upon us as officers of the court, to ensure that the right to a jury trial is protected. We must fight against unwarranted, inaccurate attacks on the civil justice system. When problems do emerge, lawyers must be in the forefront of seeking solutions that don't "put a thumb" on either side of the scales of justice. We must support our judiciary. We must ensure accurate information is utilized when evaluating jury trials.

Unjustified attacks on the jury system send the wrong message about lawyers and the justice system. Such attacks are often based on, or lead to, the conclusion that trial judges are weak and cannot control their courtrooms, that plaintiffs' lawyers are unethical and sleazy, and that defense lawyers are incompetent or otherwise incapable of preventing the perceived harm that results from the jury system. Such arguments erode respect for the law, solidify anti-lawyer sentiment, and promote unreasonable efforts to change or modify our precious jury system.

The importance of juries to our justice system cannot be overstated. A jury's decision-making process is one of the only times where individuals get to actively participate in the justice system. Participation avoids alienation from the workings of the justice system by the people.

Although jurors may wish they could avoid jury service because of the strain it places upon their lives, once on a jury they inevitably seize the opportunity to take part in

the justice system and attempt to decide matters in a fair and equitable manner. Juries try to and usually do "get it right." The collective knowledge and experience of a group of individuals is superior to the fact-finding ability of one. The collection of knowledge and experiences, and the fact that a group of fact-finders, as opposed to one, review the evidence and hear the witnesses, necessarily must lead to a well considered and reasoned decision. And although some may disagree with those decisions, no other system has ever been demonstrated to be superior.

Too many lawyers remain silent in the face of attacks on the jury trial. Trial lawyers must learn and understand the roots of the jury system. We must obtain and use knowledge regarding the jury system to oppose the jury system's detractors. Trial lawyers on both sides of the docket must embrace our role as examples of those who believe in the jury system and educate others as to its benefits. Silence by the bar will only lead to the public's belief that the statements of the jury system's detractors are fact. Trial lawyers must acknowledge the system's weaknesses, while continuing to seek improvement. Absent such proactive steps, trial lawyers may become an anomaly in a sea of "alternative dispute specialists," "litigators," and "arbitrationors." The time to ensure the jury system is protected is now.

Get involved. Join an organization such as the TTLA or TADC that promotes the jury system and seeks to protect it. Speak with others in the community about the jury system and correct misconceptions about it. And strive to improve the system that is the basis for our chosen line of work. Next time you hear an attack, step up and respond. Correct the misperception. Stand by the judge.

LEGAL NEWS

Case Summaries prepared by Lee Ann Reno with Sprouse Schrader Smith, P.C. in Amarillo

INSURANCE

***Gilbert Texas Constr., L.P. v. Underwriters at Lloyd's London*, ___ S.W.3d ____(No. 08-0246)(Tex. Dec. ___, 2010).**

In a recent success for the TADC Amicus Committee, the Court withdraws its June 4, 2010 opinion and substitutes a new one in its place. In the underlying suit, an unusually heavy rain in the Dallas area resulted in water damage to a building adjacent to a Dallas Area Rapid Transit Authority ("DART") construction site. The owner of the building sued DART and its general contractor, Gilbert, alleging Gilbert assumed liability for the damage

under its contract with DART. The contract between DART and Gilbert provided that it would protect from damage all existing improvements on adjacent property of a third party and repair damage to that property. The trial court granted summary judgment to Gilbert on the basis of governmental immunity for all claims except breach of contract. Gilbert later settled that claim and sought indemnity from its insurers.

The Texas Supreme Court considers whether the contractual liability exclusion in a CGL policy excludes coverage for property damage when the only basis for liability is that the insured contractually agreed to be responsible for the damage and if so, whether an exception to the exclusion operates to restore coverage. The court held that the exclusion for coverage applied, and the exception to the exclusion does not apply; thus, there is no coverage. The Court also addressed whether Gilbert was entitled to recover its settlement payment from its insurers under an estoppel theory. The Court held that it was not.

Gilbert contended the exclusion in question is narrow and should apply only in the limited situation in which the insured has assumed the liability of another, such as in indemnity agreements. The Court held that the exclusion found under Coverage A of the Policy, Exclusion 2(b) precluded coverage when the insured assumes liability for bodily injury or property damage by means of contract, unless an exception to the exclusion brings a claim back into coverage or unless the insured would have liability in the absence of the contract or agreement. Recall that when Gilbert settled with the building owner, the trial court had granted summary judgment on all claims other than the breach of contract obligation that Gilbert had assumed in its contract with DART. Although the Court recognized that other jurisdictions have interpreted the exclusion differently, it disagreed with those courts' conclusions that the language of the contractual liability exclusion at issue applies only to indemnity or hold-harmless agreements.

The Court also rejected Gilbert's argument that if there were no coverage under the policy, then Gilbert should be entitled to recovery under an estoppel theory because the insurer assumed control of Gilbert's defense and prejudiced it as a result. The Court found that Gilbert failed to show prejudice, noting that the excess insurer did not control Gilbert's defense counsel. Instead, that attorney was hired by the primary insurer and was supervised by the primary insurer and Gilbert's in-house claims manager and in-house counsel. Further, there was no claim made that Gilbert's defense counsel had any conflict of interest. The Court additionally held that Gilbert could not show prejudice because there was no coverage for the contract claim even if Gilbert's defense counsel had not filed the summary judgment on immunity grounds, there still would have not been coverage for the breach of contract claims.

Even though the Court reached the same result as the original opinion, it dropped the objectionable estoppel analysis targeted by our Amicus Committee in our brief. We offer special thanks to our amicus authors, Dan Worthington of Atlas & Hall and Tim Poteet of Chamberlain McHaney. Read this opinion HERE

HEALTH LAW

***Jelinek, et al v. Casas, et al*, 54 Tex. Sup. Ct. J. 272 (Dec. 3, 2010).**

In this medical malpractice case, the Court determined what was legally sufficient evidence to support a jury verdict. Eloisa Casas, a cancer patient, was admitted to the defendant hospital with signs of an infection. An infectious disease specialist, defendant Jelinek, prescribed two antibiotic medications. Following surgery, another defendant doctor continued those same prescriptions; however, hospital staff inadvertently failed to place a prescription renewal form on Casas' chart. Thus, a four-and a half-day period elapsed during which she did not receive either medication. A culture of the surgical incision site revealed a fungal infection and a staph infection. However, neither of the previously prescribed antibiotics would have treated those type infections, even if there had not been the lapse in those medications. Casas was discharged from the hospital and passed away several months later. Her family sued, claiming Casas suffered pain she would not otherwise have during the remainder of her life due to the defendants' negligence.

At trial, the jury found the hospital ninety percent responsible and each defendant doctor five percent responsible for the plaintiffs' injuries. On appeal, the defendants argued that there lacked a sufficient causal nexus between the events sued upon and the plaintiffs' injuries. The court reiterated the legal sufficiency standard in medical malpractice cases as follows: "Plaintiffs are required to adduce evidence of a 'reasonable medical probability' or 'reasonable probability' that their injuries were caused by the negligence of one or more defendants, meaning simply that it is 'more likely than not' that the ultimate harm or condition resulted from such negligence." The plaintiffs' expert admitted that there was no direct evidence of an intra-abdominal infection that could have been treated using the two antibiotics; instead, the plaintiffs' expert pointed to various circumstantial indicators of such an infection. The Court stated when the facts supported several possible conclusions, only some of which established that the defendants' negligence caused the plaintiff's injury, the expert must explain to the factfinder why those conclusions are superior based on verifiable medical evidence, not simply an expert's opinion. Because the plaintiffs' expert opined that Ms. Casas suffered an intra-abdominal infection treatable by the previously prescribed antibiotics but could not explain why that opinion was superior to the opposite view, his testimony raised no more than a possibility of causation, which is legally insufficient. Read this opinion HERE

***In Re: Keith Spooner, Cleveland Regional Medical Center and Shirley Kiefer*, ____ S.W.3d ___ (No. 10-00953-CV; No. 10-00956-CV) (Tex. App.—Houston [1st Dist.] 11/30/2010) (orig. proceeding).**

Tangie Walters sued relators Spooner, Cleveland Regional and Kiefer for medical negligence. In two original mandamus proceedings, relators challenged a trial court order declaring they judicially admitted certain liability facts and prohibiting them from offering controverting evidence at trial. The appellate court found a clear abuse of discretion and conditionally granted the requested mandamus relief.

In 1995, Dr. Spooner performed tubal ligation surgery on Walters. In April 2005, another surgeon recovered a sponge from Walters' abdomen. Shortly thereafter, Walters sued Dr. Spooner, the hospital and Kiefer alleging the sponge had been left in her abdomen during the 1995 surgery.

The defendants moved for summary judgment, asserting that Walters' claims were barred by the two year statute of limitations and that Walters' problems were caused by another medical condition. Walters filed a "Motion to Determine Judicial Admissions in Defendants' Pleadings and Exclude Evidence" asserting that defendants judicially admitted in their summary judgment motions that they left the sponge in plaintiff and that it caused her injuries. After reviewing the summary judgment motions, the Court determined that the relators offered the statements at issue in their motions for the purpose of advancing their limitations defense and were not offered to abandon their general denial of liability. In other words, when read in context, the passages from the motions relied upon by plaintiff were not "clear, deliberate and unequivocal," as is required for judicial admissions. The trial court further determined that the relators did not have an adequate remedy by appeal. The Court reasoned that denying relators the right to offer evidence to controvert the claim that the sponge was retained during the 1995 surgery or that it caused plaintiff's pain would skew the proceedings, potentially affect the outcome of the litigation and compromise the relators' defense in ways that unlikely would be apparent in the appellate record. Thus, the Court conditionally granted the requested mandamus relief. Read this opinion HERE

TORTS

***The University of Texas v. Hayes*, ___ Tex. Sup. Ct. J. ___ (Tex. Dec. 3, 2010) (No. 09-0300).**

In this premises-liability suit, plaintiff Hayes alleged that a metal chain blocking a driveway at UT Austin caused him to have a bicycle accident and constituted a premises defect for which the Texas Tort Claims Act (the "Act") waives sovereign immunity. However, because the Court concluded that the chain was not a "special defect" and that Hayes failed to establish an element of a premises-defect claim under the Act, it dismissed

the case for lack of jurisdiction.

In preparing parking areas for a football game, UT placed an 8-foot wide orange and white barricade in front of a metal chain stretching across the entrance to a service driveway. That evening, Hayes rode his bicycle toward the service driveway. He admitted that he saw a barricade, did not brake or slow down significantly, veered left, struck the chain and was injured. Hayes sued UT alleging that the chain was a defect of which UT failed to warn.

The Court explained that under the Act, special defects are normally excavations or obstructions on highways, roads or streets that pose a threat to ordinary users of a particular roadway. The Court reasoned that the chain across a barricaded, enclosed driveway was not a special defect because it did not pose a threat to an ordinary user in the normal course of travel. The Act also waives immunity for premises defects if a plaintiff shows that the landowner failed to either (1) use ordinary care to warn a licensee of a condition that presented unreasonable risk of harm for which the landowner is actually aware and the licensee is not; or (2) make the condition reasonably safe. The Court focused on the actual knowledge element and found that placement of a barricade to close the driveway negates arguments that UT had actual knowledge of a dangerous condition because it had closed the roadway with the barricade. Thus, Hayes failed to establish a premises defect claim. Accordingly, the case was dismissed for lack of jurisdiction. Read this opinion HERE

CIVIL PRACTICE

***Maswoswe v. Nelson, et al*, ___ S.W.3d ___ (No. 09-09-00471-CV) (Tex. App.—Beaumont, Dec. 2, 2010).**

Appellees Nelson and Apodaca obtained an ownership interest in the Southeast Texas Mustangs professional basketball franchise ("Mustangs"). Appellant Maswoswe retained a seventy percent ownership interest in the team. Appellees filed suit asserting a breach of contract claim and alleged that appellant agreed to sell his remaining interests in the Mustangs to them, but then refused to sell and breached that contract. Significantly, appellees only sought specific performance, as well as a temporary restraining order and injunction to prevent appellant from taking certain actions with respect to the team. A few months after suit was filed, appellant's attorney withdrew, and appellees served requests for admissions that were not answered. Appellees then filed a summary judgment motion based solely on the deemed admissions. Appellant also failed to respond to the summary judgment. In the summary judgment motion, appellees sought damages for breach of contract, as well as punitive damages for fraud in the inducement, in the total amount of $4

million. The trial court granted the motion and awarded the requested money damages. Appellant timely filed a motion for new trial, along with a motion to withdraw the deemed admissions. Appellant argued that summary judgment on the breach of contract and fraud claims was improper because appellees sought only specific performance in their pleadings.

Although the only cause of action alleged in the original petition was one for breach of an alleged agreement for appellant to sell his remaining interest in the Mustangs, the summary judgment did not address that claim at all. Appellees argued the issue was tried by consent. However, the Court rejected that contention. The Court distinguished this situation from prior cases due to the fact that appellant did not respond to the summary judgment motion; therefore, the unplead issues could not have been tried by consent. The Court also found that the deemed admissions were insufficient to support a summary judgment. Many of the deemed admissions involved requests asking appellant to admit or deny a purely legal issue; thus, those requests were improper. Read this opinion HERE

EMPLOYMENT

***In Re: K. L. & J. Limited Partnership and David Torres*, _________ S.W.3d ________ (04-10-0070-CV) (Tex. App.—San Antonio, December 10, 2010) (Orig. Proceeding).**

In this mandamus proceeding, the Court considered (1) whether a plaintiff in an employment discrimination case should be compelled to answer deposition questions regarding her citizenship, alienage status, and authenticity of her social security number; (2) whether a plaintiff had to amend her petition to reflect the last three digits of her social security number; and (3) whether plaintiff could quash notices for depositions on written questions regarding prior employment records. Plaintiff Viveros filed suit against her former employer, K. L. & J. Limited Partnership and its employee, Torres, asserting various employment-related causes of action. During her deposition, relators' counsel asked Viveros whether or not she was a U.S. citizen. Her counsel objected and instructed her not to answer. The Court held that Viveros should have been compelled to answer the questions regarding the social security number she previously provided when she applied for employment with relators. The Court held the questions were reasonably calculated to lead to the discovery of admissible evidence. The Court also found that relators did not have an adequate remedy by appeal because, without knowing the authenticity of Viveros' social security number, relators would be denied the ability to develop the merits of their case and could not properly investigate Viveros' true identity and background. However, with regard to deposition questions regarding Viveros' citizenship and alienage status, the Court concluded that relators failed to show that they did not have an adequate remedy by appeal.

The Court also found the lower court did not abuse its discretion by ordering Viveros to provide the last three digits of her social security number in the petition. Texas Civil Practice & Remedies Code § 30.014(b) makes it clear a court may order a party to amend its petition, but does not mandate that the court do so. Additionally, relators failed to show how they lacked an adequate remedy by appeal regarding this issue. Relators also asserted the lower court erred in granting Viveros' motion to quash and for protective order regarding the employment records sought via deposition by written questions. At the hearing regarding this issue, Viveros' counsel stated he did not see an issue with obtaining employment records relating prior claims for sexual harassment or discrimination; however, he did not agree to discovery regarding payroll records, etc. In response, relators' counsel stated that he would work with Viveros' attorney to determine what information could be obtained from prior employment records. Thus, the trial court's granting the motion to quash and protective order, instead of allowing the parties to come to an agreement as they indicated they could, was an abuse of discretion. Further, relators did not have an adequate remedy by appeal with regard to the employment records that the parties, at least in part, agreed were properly discoverable. Read this opinion HERE

Texas Association of Defense Counsel, Inc.
400 W. 15th Street, Suite 420, Austin, Texas 78701 512.476.5225 - 512.476.5384 FAX - tadc@tadc.org