TADC E-UPDATE
APRIL 5, 2012

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

FROM THE PRESIDENT

Thomas E. Ganucheau,
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Spring is in full swing and the TADC has been busy with local and statewide events. Most recently, the TADC held its 30th Trial Academy program at the South Texas College of Law in Houston on March 30-31. Events began on Thursday evening with a faculty orientation followed by a Houston/Galveston area members' reception at the Hilton Americas Hotel. Former TADC President, Judge Patricia Kerrigan, and Asbestos MDL Judge Mark Davidson presided over the academy. The Trial Academy boasted a sell-out crowd of young lawyers for the two day event. Many thanks to the Judges, co-chairs Michele Smith and Chad Gerke, and dedicated faculty for a job well done. Next year's Trial Academy will be in Dallas in mid-April, so start planning now.

The 2012 TADC Spring Meeting will be in beautiful Santa Fe, New Mexico, at the end of this month, April 25-29, 2012, at the acclaimed Inn and Spa at Loretto. Program Chairs Sofia Ramon with Atlas & Hall in McAllen and Randy Grambling with KempSmith in El Paso have provided a great line-up of speakers, including Justice Gina Benavides, Thirteenth Court of Appeals and Representative Veronica Gonzalez. Topics range from Social Media and Technology in the Courtroom, to panel discussions on Paid v. Incurred and Expedited Jury Trials, for over 11 hours of CLE credit, including 2 hours of ethics. Register now; there is still space available! Download a registration form by following this link. ***SPRING MEETING REGISTRATION***

The TADC has been busy engaging in local events statewide. On March 20th, TADC President-Elect Dan Worthington spoke to the Tarrant County Young Lawyers Association on TADC's perspective from the last legislative session. On April 12th, the TADC will join the Hidalgo County Bar Association, TEX-ABOTA and TTLA

in McAllen to discuss "Paid v. Incurred" and "Expedited Jury Trials". A reception honoring newly appointed Federal Judge Rodney Gilstrap will be hosted by East Texas TADC members in Longview on May 3rd at the Pinecrest Country Club. Monthly events continue in Houston and Fort Worth. Major efforts continue by your Board of Directors to provide more local programming. If you would like a program to be held in your area, contact the TADC office (tadc@tadc.org) and we will do our best to accommodate your request.

Legislatively, the TADC remains very active. Interim study hearings continue in Austin and around the state, with the next scheduled on April 18th before the House Civil Jurisprudence Committee. The charge to be discussed is "alternative litigation financing" and the TADC will be present. Your TADC legislative team is ready to protect and preserve the Texas civil justice system by addressing any issue that may come up which may impact our system of justice. If you have a question or an issue on the legislative front, don't hesitate to contact the TADC office or your legislative Vice Presidents Pamela Madere (pmadere@coatsrose.com) or Jackie Robinson (Jackie.Robinson@tklaw.com).

Finally, and as I typically end all my messages, I encourage you to sign up a new member in the TADC. The education is beyond compare, the services are top notch, and the professional contacts and friendships are only a few of the reasons to join. 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.

** *Reminder***

Your TADC dues statement was mailed in early November and were due by January 1, 2012. 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.

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2012 TADC Spring Meeting

April 25-29, 2012 – Inn & Spa at Loretto – Santa Fe, NM

Don't miss this Seminar *(program link below)*

An 11.0 hr (with 2.0 hrs ethics) CLE Program Featuring:

The Honorable Gina Benavides, Justice, Thirteenth Court of Appeals

Representative Veronica Gonzalez

And topics ranging from

Social Media and Technology in the Courtroom to
Expert Witness Preparation and Non-Compete Law to

Panels on Expedited Trials and Paid v. Incurred, to name but a few!

REGISTRATION MATERIALS HERE Sign up today!

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CALENDAR OF EVENTS

April 12, 2012
TADC/Hidalgo County Bar Association Event
McAllen

April 25-29, 2012
TADC Spring Meeting
Inn & Spa at Loretto – Santa Fe, New Mexico
Sofia Ramon & Randy Grambling, Co-Chairs
REGISTRATION MATERIAL

May 3, 2012
Reception Honoring Judge Rodney Gilstrap
Pinecrest Country Club - Longview

July 18-22, 2012
TADC Summer Seminar
The Grand Sandestin Resort – Sandestin, Florida
Darin Brooks & Greg Binns, Co-Chairs

August 3-4, 2012
Budget/Nominating Committee
Austin, Texas

September 26-30, 2012
2012 Annual Meeting
Westin St. Francis – San Francisco, California
Gayla Corley & Mike Hendryx, Co-Chairs

LEGISLATIVE/ELECTION UPDATE

On April 18 the House Judiciary & Civil Jurisprudence Committee will hold a hearing on the subject of third party litigation financing. This practice, which originated in the United Kingdom and has been utilized in some high profile personal injury litigation in the U.S., is drawing increased scrutiny because of ethical concerns with respect to attorney independence, client confidentiality, privilege questions, and others. The TADC Legislative Committee held a conference call last week to discuss the issue and will submit written testimony to the committee.

As the TADC moves forward with its study we are interested in exploring whether you have experienced this issue (obviously on the other side of the case) and if so whether it had any adverse impact on the handling/resolution of the case.

The committee's ongoing study of asbestos bankruptcy trusts and the inactive asbestos and silica dockets is continuing. Vice Chair Tryon Lewis (R-Odessa), TADC member Sarah Davis (R-Houston), Rep. Richard Raymond (D-Laredo), and Chair Jim Jackson (R-Dallas) have formed a working group to discuss these issues with the stakeholders. A few weeks ago, Rep. Davis met with lawyers from both sides of the docket in the asbestos MDL court to solicit their views and comments. TADC member Kay Andrews appeared at this meeting and conveyed the perspective of the defense side. We expect that the working group will meet in the near future to continue the discussion.

The Senate State Affairs Committee, chaired by TADC member Robert Duncan

(R-Lubbock), is slated to begin its interim examination of the benefit structure of the current workers' compensation system later this year. This study is partly in response to recent court decisions with respect to the scope of the employer's immunity and issues raised by stakeholders with the adequacy of the current benefit levels. TADC will closely monitor this study.

As the state's fiscal situation continues to improve, it appears less and less likely that any significant changes in the state's tax structure will be made next session. This does not mean that the Legislature will not examine modifications of the franchise (or so-called "margins") to make it more equitable, but large-scale revision appears to be off the table. That could change, however, if and when the Texas Supreme Court next takes up the constitutionality of the school finance system, which will probably not occur until after the 2013 legislative session. The current franchise tax was a central part of the legislative response to the last Court decision in 2006.

The May 29 primary election will see close to 50 contested House seats and a number of Senate races as well. About 30 House incumbents are facing election contests from members of their own party, and numerous open seats are up for grabs. TADC continues to have strong representation in the Legislature: Rep. Sarah Davis (R-Houston), Rep. Rene Oliveira (D-Brownsville), and Sen. Robert Duncan (R-Lubbock) (who is considered one of the leading candidates for Lieutenant Governor if Lt. Gov. David Dewhurst wins his race for the U.S. Senate). Two other TADC members in the House—Reps. Pete Gallego (D-Alpine) and Erwin Cain (R-Sulphur Springs)—are running for other offices, while longtime member Travis Clardy from Nacogdoches is seeking election the newly reconfigured House District 11.

LEGAL NEWS

* Case Summaries prepared by Darin L. Brooks and Kristen N. Welsh from Beirne, Maynard & Parsons, L.L.P.

CIVIL PRACTICE

In re Florinda G. Garza
No. 04-11-00835-CV, 2012 WL 556311 (Tex. App.—San Antonio Feb. 15, 2012)

Narciso R. Garza filed suit for the partition of property in Starr County, Texas. The dispute arose from a gift deed that was signed by Crisanta G. Garza on June 28, 1995,

which granted her son, Leonel Saul Garza, sole ownership of the property. In 2000, Leonel passed away and, per the terms of his will, his interest in the property passed to his wife, relator Florinda G. Garza. In the partition suit, Narciso asserts he was gifted a one-fourth interest in the property in a 1980 warranty deed.

On August 2, 2011, Narciso filed a motion to disqualify relator's counsel, Fela B. Olivarez and Roy Garza, because Fela notarized the 1995 gift deed and only Fela and Roy were in the room when Crisanta signed the gift deed. At the hearing on the motion to disqualify counsel, Narciso argued that, under Rule 3.08 of the Texas Rules of Professional Conduct, Fela and Roy are witnesses necessary to establish an essential fact of Florinda's case. At the conclusion of the hearing, the trial court granted Narciso's motion, disqualifying both Fela and Roy.

In the petition for writ of mandamus, Florinda only challenged the trial court's disqualification of Fela. The San Antonio court found that Narciso did not meet his burden to establish that (1) Fela's testimony was necessary to establish an essential fact as Roy could testify as to the signing of the gift deed, and (2) Narciso did not show how Fela's dual roles as attorney and witness would cause Narciso actual prejudice. As such, the Court held that the disqualification was not appropriate. The Court further noted that, without such limitations for disqualification, Rule 3.08 could be improperly employed as a tactical weapon to deprive the opposing party of the right to be represented by the lawyer of his or her choice. **Read this opinion HERE**

EMPLOYMENT

Drennen v. ExxonMobil Corporation

No. 14-10-01099-CV, 2012 WL 456938 (Tex. App.—Houston [14th Dist.] Feb. 14, 2012)

William Drennen filed suit against ExxonMobil Corporation, challenging Exxon's cancellation of his stock incentive awards after Drennen retired from Exxon and went to work for Hess Corporation. After applying the parties' choice of law provision citing New York law, the trial court entered a take-nothing judgment in favor of Exxon. The Fourteenth Court of Appeals reversed the trial court's judgment and remanded the case for consideration under Texas law.

Drennen worked for Exxon for over 31 years in Texas. During that time, Exxon awarded Drennen incentive compensation, including restricted stock and "earnings-bonus units." Drennen's incentive compensation was part of Exxon's Incentive Programs, which included a provision allowing Exxon to cancel the incentive awards of employees who engaged in "detrimental activities" (defined as "activity that is determined in individual cases by the administrative authority to be detrimental to the interest of the Corporation or any affiliate"). The Incentive Programs also included a choice-of-law provision that the Incentive Programs are governed by New York law. Drennen and

Exxon signed each of his restricted stock agreements in Texas. Drennen's stock awards totaled 73,900 shares of restricted stock.

After an annual review in December 2006, where Drennen learned that Exxon viewed his performance as "suffering" and intended to transition him to a different job within Exxon, Drennen submitted a letter of retirement. That letter was dated March 12, 2007. Drennen retired on May 2, 2007. On April 23, 2007, before Drennen retired, Exxon sent him a letter informing him that he should seek permission from Exxon prior to taking a job with another organization in the petroleum or petrochemical industry or any other organization that has a significant ongoing relationship with Exxon. In early May 2007, Drennen interviewed with Hess Corporation and informed Exxon that he was considering taking the position with Hess. Exxon then told Drennen he was at high risk of losing his Exxon incentives if he took the position with Hess. Drennen took the position anyway, and Exxon subsequently cancelled all of Drennen's incentive awards.

Drennen then sued Exxon to prevent enforcement of the detrimental activities provision of the Incentive Programs, seeking declaratory judgment relief, breach of contract and other causes of action. The claims other than the declaratory judgment claims were submitted to the jury who found against Drennen. The trial court then denied Drennen's JNOV and entered judgment against Drennen.

On appeal, the Fourteenth Court of Appeals addressed Drennen's sole point that the trial court denied his JNOV in error because the detrimental activities clauses are covenants not to compete that are unenforceable under Texas law. The Court first determined that the detrimental activities clauses were non-competition provisions. The Court then addressed whether New York law applied (the contractual choice of law provision of the parties) or Texas law (where the stock incentive contracts were negotiated and signed). Under New York law, the detrimental activities clauses are enforceable against Drennen, but under Texas law they are not enforceable. The Court determined that Texas law applied, despite the New York choice-of-law provision, because Texas has a materially greater interest than New York in the determination of whether the detrimental activities provisions are enforceable against Drennen. As support, the Court pointed to the evidence that: Exxon's headquarters are in Texas, most of Drennen's work was performed in Texas, he signed the agreements at issue in Texas, and Drennen resides in Texas. The Court also held that the issue of the enforceability of non-competition provisions on employees who live and work in Texas is a matter of fundamental Texas public policy. The Court further held that application of New York law would be contrary to that fundamental policy. Applying Texas law, the Court held that the detrimental activities provisions were unenforceable. The Court reversed the trial court's judgment and remanded the case to the trial court with directions to: order Exxon to deliver Drennen's incentive awards to him upon the successful completion of any applicable restrictive period, conduct further proceedings on Drennen's attorney's fees claims, and render judgment in Drennen's favor on his declaratory judgment claims that the provision are unenforceable. **Read this opinion HERE**

EVIDENCE

In re Christina Whipple
No. 04-12-00051-CV, 2012 WL 556313 (Tex. App.—San Antonio Feb. 16, 2012)

Christina Whipple filed a petition for writ of mandamus complaining the trial court abused its discretion by: (1) ordering the production of Whipple's mental health records; and (2) ordering the continuation of the deposition of her therapist Stephanie Ecke without limitation and without allowing Whipple to object to communications that occurred prior to August 1, 2009 on the basis of privilege. The court granted mandamus in part.

On August 1, 2009 Ms. Whipple, a real estate agent, was fired from Keller Williams Realty Heritage ("Keller Williams"). Thereafter, she filed suit against Keller Williams, claiming economic damages and mental anguish. On August 24, 2010, in connection with her mental anguish claim, Whipple was ordered to produce her mental health records relating to treatment provided by her therapist Ecke. Whipple finally produced the records on November 10, 2010. It was not until January 6, 2012, that Whipple asked the trial court to reconsider its ruling, and it was not until January 24, 2012 until she filed her petition for writ of mandamus. The San Antonio Court found that, because Whipple failed to explain her delay, Whipple was not entitled to mandamus relief, stating: equity aids the diligent and not those who slumber on their rights.

Keller Williams also deposed therapist Ecke. During her deposition, Keller Williams sought information regarding Whipple's counseling prior to August 1, 2009. Whipple objected to these questions as privileged. On January 5, 2012, Keller Williams filed a motion to compel continuation of the deposition and for sanctions against Whipple and her counsel based on the instruction given to Ecke to not disclose communications between Ecke and Whipple prior to August 1, 2009. The trial court held a hearing on the motions issued requiring that Keller Williams be permitted to depose Ecke and ask questions regarding the records pertaining to Whipple, her counseling sessions with Whipple, and her communications with Whipple.

The San Antonio Court upheld Whipple's objections that the communications prior to August 1, 2009, were protected doctor-patient communications and were not subject to the patient-litigant exception. The patient-litigant exception applies when the records are "relevant to the condition at issue" and the "condition is relied upon as a part of the party's claim or defense, meaning that the condition itself is a fact that carries some legal significance." *R.K. v. Ramirez*, 887 S.W.2d 836, 843 (Tex. 1994)(orig. proceeding). The mental condition becomes "'part' of a claim or defense if the pleadings indicate that the jury must make a factual determination regarding the condition itself." *Id.* And, a routine allegation of mental anguish does not place a party's mental condition in controversy. This legal reasoning was found sufficient even though Whipple was seeking $100,000-$250,000 in mental anguish damages. **Read this opinion HERE**

TORTS – PAID VS. INCURRED MEDICAL EXPENSES

Big Bird Tree Service v. Gallegos
No. 05-10-00923-CV, 2012 WL 966063 (Tex. App.—Dallas Mar. 22, 2012)

In this suit for damages for an on-the-job-injury, Big Bird Tree Service appealed a judgment granted in favor of its former employee Julian Gallegos. In two issues, Big Bird contended (1) the trial court erroneously awarded medical expenses that were not "actually incurred," and (2) Gallegos did not present sufficient evidence to support the jury's award of lost wages. The Dallas Court of Appeals affirmed the trial court's judgment.

Regarding the first issue, Gallegos received medical care at Parkland Memorial Hospital after a fall from a ladder. Parkland determined that Gallegos was indigent and provided him medical services for a fraction of the cost. However, the jury awarded him the full value of his medical care ($16,659.50) as reasonable and necessary expenses. The Dallas court upheld the award, stating that the collateral source rule precludes any reduction in a tortfeasor's liability because of benefits received by the plaintiff from someone else. The Court reiterated that the purpose of the collateral source rule is to prevent a windfall to the defendant when the plaintiff's costs are paid by a third party for the benefit of the plaintiff. The Court was not persuaded by Big Bird's argument that the award was barred by section 41.015 of the civil practice and remedies code, because they were not "actually incurred." Section 41.015 provides: In addition to any other limitation under law, recovery of medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.

The Court noted that there was no evidence of any contract that would have prohibited Parkland from charging Gallegos for the full value. The record showed that Parkland determined Gallegos's indigent status and eligibility and, because of its own determination, agreed to provide the services at a reduced cost. There was also evidence that Parkland would collect for its services should Plaintiff receive a judgment for same, as the plaintiff would no longer qualify as indigent for purposes of the minimal cost services. A charitable program bore the expense, and thus the medical expenses were actually incurred on behalf of Gallegos. Thus, the Court held that the expense was actually incurred by a third party and the collateral source rule barred limiting the recovery.

Regarding the second issue, Big Bird challenged the jury's award for lost earning capacity because Gallegos did not present evidence of his income tax liability on his past lost earnings as required by section 18.091(a) of the Texas Civil Practice and Remedies Code. Pursuant to section 18.091(a), evidence to prove loss of earnings or earning capacity "must be presented in the form of a net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law." The Dallas Court held that because Big Bird did not object to Gallegos' testimony regarding the pre- or post-

tax nature of his wages at trial, and because Gallegos presented evidence that he was unable to work for a year and could now work at a lesser capacity, there was sufficient evidence to support the jury's relatively modest awards of $13,000 for lost capacity in the past and $17,880 for lost capacity in the future. **Read this opinion HERE**

TORTS

Salazar v. Ramos
No. 08-10-00206-CV, 2012 WL 390841 (Tex. App.—El Paso Feb. 8, 2012)

After Santos Martinez Salazar suffered injuries in a motor-vehicle accident, Salazar and his wife, Maria G. Martinez, filed suit against Lesvia Azucena Ramos, Maverick County Insurance Agency, Inc. ("Maverick Insurance"), Elizondo Trucking, Eusebio Elizondo, Selicita Elizondo, and Cross-Plaintiff Roberto Perez Medina. Salazar and Martinez alleged negligence, gross negligence, fraud, and liability under the alter ego, single-business enterprise, and branded-vehicle doctrines. Ramos and Maverick Insurance, Appellees, sought and obtained a hybrid no-evidence and traditional summary judgment. Salazar and Martinez appealed, and the El Paso Court of Appeals affirmed the trial court's judgment.

Salazar was a passenger in Cross-Plaintiff Medina's vehicle as they traveled on a highway in Mexico. A tractor-trailer displaying a brand and logo for Elizondo Trucking struck Medina's vehicle, forcing it off the road and into a creek. The tractor-trailer driver allegedly stopped, failed to render aid or assistance, and left the scene of the accident. After Mexican authorities and emergency personnel arrived, Medina and Salazar were both transported by ambulance to a hospital with injuries.

Generosa Davila and Appellee Ramos are, respectively, President and Vice-President of Appellee Maverick Insurance. Maverick Insurance operates out of Eagle Pass, Texas, and offers insurance policies to Mexican commercial carriers driving in the permitted commercial zones of the United States. It does not offer policies providing liability insurance coverage to those carriers while driving in Mexico. According to Ramos, the customer accepts a quote if the customer signs an application and Maverick collects the insurance premium from the customer. On March 7, 2002 and July 10, 2003, Maverick Insurance provided to Elizondo Trucking an insurance quote for liability coverage while operating within the United States, but Elizondo Trucking rejected both quotes.

Periodically, Davila and Ramos also provide services unrelated to insurance including assisting primarily Spanish-speaking customers by completing forms and translating documents for a nominal or no charge and serving as registered agents for process, a role which Ramos understood to be limited to receiving court documents and conveying them to the proper person or entity.

In 2002, several weeks after Elizondo Trucking rejected Maverick's March insurance quote, Davila provided translation and form-completion services to Eusebio Elizondo in relation to the completion of an "application for Certificate of Registrations for Foreign Motor Carriers and Foreign Motor Private Carriers," a form which was required to be completed in English and submitted to obtain authorization to transport property within the commercial zones near the United States and Mexico border. However, the application was rejected because it failed to designate a registered agent and because submission of a newer form was required, which was offered in both English and Spanish. Elizondo did not request that Maverick Insurance, Davila, or Ramos correct the original application, and Ramos did not know who completed the new form for Elizondo. Ramos later discovered that Elizondo had listed her as its registered agent for service of process when the U.S. Department of Transportation began sending letters to Elizondo Trucking, with copies addressed to Ramos at Maverick Insurance's former mailing address. Some of those letters were sent directly to Elizondo Trucking in Coahuila, Mexico. Ramos did not know who designated her as registered agent for Elizondo Trucking, but proceeded to inform Elizondo Trucking about the letters and asked that it refrain from using Maverick Insurance's address.

Elizondo continued to list Maverick Insurance's address as its address, and Ramos continued to inform Elizondo that she was continuing to receive correspondence from the Federal Motor Carrier Administration. In 2006, Ramos assisted Elizondo with the completion of an amendment to a form for single state registration. Ramos had no other communication with Elizondo until she was served with the instant lawsuit, after which she verified that she had been named Elizondo Trucking's registered agent for process. Ramos notified Elizondo about the suit, and delivered the papers to Elizondo's representative. Elizondo again completed a change of registered-agent form but continued to list Maverick Insurance's address. Ramos asked Elizondo to correct the form, after which the Federal Motor Carrier Administration processed the change.

Elizondo never purchased an insurance policy from Maverick Insurance. Maverick Insurance did not share or have in common any employees, offices, accounting, business names, or allocation of profits with Elizondo Trucking. Ramos had no interest, ownership, or control over Elizondo Trucking or its employees. Prior to the filing of the suit, Ramos did not know Salazar, Martinez or Cross-Plaintiff Medina. Neither Ramos nor Maverick Insurance own the tractor trailer involved in the accident and Maverick Insurance does not employ any persons involved in the accident.

Based on the foregoing facts and upon motion by the insurance agent parties, the trial court entered summary judgment on Plaintiffs' claims against Ramos and Maverick Insurance. The El Paso court held that the insurance agents and agency did not owe a duty to those injured by the trucking company which it did not insure. There was not a scintilla of evidence that the two companies were acting as one such that even without an insurance contract in place liability could be imputed to the agents or their company. Further, there was evidence that the insurance agents repeatedly requested the trucking company to discontinue utilizing the insurance company's address on certain

forms and utilizing them as a registered agent. As such, the Court held that the summary judgment rulings by the trial court were proper. **Read this opinion HERE**

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