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

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LEGISLATIVE UPDATE

Now that the final gavel of the legislative session has finally come down, important issues affecting the judiciary are moving to the next phase. Court reorganization, three sessions in the making, must now be implemented; HB 274 rulemaking is under way; and significant budget cuts to the courts will be felt when the next fiscal biennium begins on September 1.

TADC members are actively involved in both rulemaking projects, both through the Supreme Court Rules Advisory Committee, a special task force appointed by the Court to assist with reorganization, and as part of a working group with TTLA and TEX-ABOTA. Our goals remain the same as they were during the legislative session: preserving full and fair access to a jury trial; assuring that the expedited trial procedures called for in HB 274 are voluntary and balanced; promulgating an early dismissal practice closely modeled on the federal rule without undue risk of cost-shifting; and ensuring that our courts have adequate resources to do their work as efficiently and expeditiously as possible. We will keep you informed as these projects unfold.

With respect to the legislative interim, we expect that both chambers will direct standing committees or create special committees to study the state tax structure. Two chief concerns are the franchise tax (the so-called "margin" tax) and the sales tax. Widespread dissatisfaction with the revenue performance of the franchise tax has resulted in increasing pressure for legislative reform, which could well lead to consideration of a business income tax to replace it. Broadening the sales tax base to include services is also likely to be considered. These discussions are likely to begin this fall.

In political news, redistricting and the attrition associated with a difficult legislative

session will combine to produce higher than normal turnover in the Texas House and Senate. A number of prominent members have announced their retirement, and others will seek election to different offices. Lt. Governor David Dewhurst's candidacy for the U.S. Senate next year could result in a vacancy in the office of president of the Senate. If this occurs, the 31 members of the Senate will elect a presiding officer to act as lieutenant governor in the 2013 session. The same scenario will occur if Governor Rick Perry vacates his office, as it did when Governor George W. Bush was elected president in 2000.

CALENDAR OF EVENTS

August 12-13, 2011	**TADC West Texas Seminar** Inn of the Mountain Gods – Ruidoso, New Mexico
Sept. 27-Oct. 1, 2011	**2011 Annual Meeting** Hyatt Regency Maui – Maui, Hawaii David Chamberlain & Mitzi Mayfield, Co-Chairs
November 11-12, 2011	**TADC Board of Directors Meeting** Galveston, Texas
January 20-21, 2012	**TADC Board of Directors Meeting** San Antonio, Texas
February 1-5, 2012	**Joint TADC/ADC (Alabama) Winter Seminar** Elevation Resort & Spa – Crested Butte, Colorado Max Wright & Mark Bennett, Co-Chairs
March 30-31, 2012	**2012 TADC Trial Academy** South Texas College of Law Michele Smith & Chad Gerke, Co-Chairs
April 25-29, 2012	**TADC Spring Meeting** Inn & Spa at Loretto – Santa Fe, New Mexico Sofia Ramon & Randy Grambling, Co-Chairs
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

REMINDER - REGISTER NOW!

2011 TADC Annual Meeting

September 27- October 1, 2011 ~ Hyatt Maui Resort & Spa
Maui, Hawaii

Don't miss this Meeting (program & registration link below)

An 11 hour *(with 2.00 hrs ethics)* CLE Program featuring such topics as:

Successful Trial from Voir Dire to Verdict,
Using Animations as Demonstrative Evidence,
Enticing Issue Statements: Selling your
Case in 75 Words or Less,
Lawyers and the Legislature,
and a Supreme Court Update by Justice David Medina.

REGISTRATION FORM AND SEMINAR PROGRAM
Hotel deadline – August 27, 2011

CASE LAW UPDATES

PRODUCTS LIABILITY

BIC Pen Corp. v. Carter
Texas Supreme Court

The minor plaintiff was burned when her brother accidentally set fire to her dress with a BIC lighter. Plaintiffs claimed that the minor plaintiff's injuries were the result of manufacturing and design defects in the lighter. The jury found that both types of defects were producing causes of the minor plaintiff's injuries. The court of appeals affirmed based on the defective design finding. The Texas Supreme Court reversed and rendered judgment for BIC.

The Texas Supreme Court concluded that Plaintiffs' manufacturing defect claim was not preempted by federal law. Additionally, the Court held that Plaintiffs presented legally sufficient evidence that the lighter did not meet manufacturing specifications. However, the Court agreed with BIC that even if the lighter deviated from specifications, Plaintiffs failed to prove that the deviation was a producing cause of the minor plaintiff's injuries. The Court stated that evidence that components of a product deviated from manufacturing specifications, an accident occurred, and the deficient components were involved in the accident is insufficient evidence to support a causation finding. Rather, there must have been some evidence that the fire that burned the minor plaintiff started because of the specific manufacturing defects and that absent those defects, the injuries would not have occurred. Finally, the Court declined to adopt a Havner-type analysis as to causation where manufacturing defects was the basis for the liability claim. Texas Supreme Court, No. 09-0039, 06-17-2011. **READ THE OPINION HERE**

PREMISES LIABILITY

Griffin v. Shell Oil Co.
Houston Court of Appeals [1st Dist.]

Plaintiff, while working as an employee of a subcontractor, sustained injuries after tripping and falling over a pallet, which had been randomly placed on a floor in standing water in a poorly lit storage room in the basement of a building owned by Shell Oil Co. Plaintiff alleged that Shell and CH2M, the project manager at the Shell building, knew about the standing water, dim lighting, and improperly stored unsecured materials in the storage room and failed to adequately warn him of the conditions and provide safeguards to prevent his injuries. Shell and CH2M contended that Plaintiff was aware of the conditions in the storage room and in fact, previously inspected the room as part of the project. Shell and CH2M moved for summary judgment, which the trial court subsequently granted. The Houston Court of Appeals reversed and remanded.

The Houston Court of Appeals noted there are two types of premises defects for which an independent contractor's employee typically seeks to hold a premises owner or general contractor liable. The first category includes those defects an independent contractor, or its injured employee, create by its work activity. In this scenario, the owner or general contractor ordinarily has no duty to warn the independent contractor's employees of the premises defect. The second category includes those defects that exist on a premises when a business invitee enters for business purposes or are created through some means unrelated to the activity of the injured employee or his employer. In this scenario, the owner or general contractor has a duty to inspect the premises and warn about the dangerous conditions of which the owner or general contractor knows or should know. The Court held that if an independent contractor is injured by a concealed defect that is not created by his work activity and the premises is controlled by an owner or occupier, the owner or occupier has a legal duty to, among other things, inspect the premises and warn of dangerous conditions of which the owner or occupier knows or should know and, thus, Texas law permits the contractor to pursue a premises-defect claim against the owner or occupier, based upon the "right to control." Houston's 1st Court of Appeals, No. 01-09-01089-CV, 06-23-2011. **READ THE OPINION HERE**

EMPLOYMENT

Hernandez v. Grey Wolf Drilling L.P.
San Antonio Court of Appeals

Plaintiff, age 53, was an employee of Grey Wolf Drilling when his employment was terminated. Plaintiff thereafter sued Grey Wolf under the Texas Commission on Human Rights Act ("TCHRA") for age discrimination and retaliation. Grey Wolf filed a no-evidence motion for summary judgment on both claims, which the trial court subsequently granted. The San Antonio Court of Appeals reversed and remanded.

Neither Plaintiff nor Grey Wolf argued that this age discrimination case was a "mixed-motive" case in which the plaintiff had direct evidence of discrimination in the employment decision. Therefore, it was a "pretext" case in which the plaintiff claims the employer's stated reason for the adverse action was a pretext for discrimination. In a pretext case, federal and Texas courts traditionally follow the McDonnell Douglas-Burdine framework for allocation of proof. Under this framework, the plaintiff-employee has the burden of producing evidence that raises an inference of discrimination. The burden then shifts to the defendant-employer to articulate a legitimate, nondiscriminatory reason for the plaintiff's discharge. The burden then shifts back to the plaintiff to show the defendant's stated reason was a pretext for discrimination.

However, Grey Wolf argued that Plaintiff's pretext claim should be evaluated using the *Gross v. FBL Financial Services, Inc.* "but-for" test, rather than the McDonnell Douglas-Burdine framework. Under the *Gross* "but for" test, the plaintiff must prove, by a preponderance of the evidence, that age was the "but for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. The Court acknowledged that the law is currently unsettled as to whether *Gross*, which construed the federal Age Discrimination in Employment Act of 1967 ("ADEA"), also applies to age discrimination claims brought under the TCHRA.

The Court ultimately held that *Gross* does not apply for two reasons. First, the TCHRA contains the "motivating factor" language that the *Gross* court notes was critically absent from the ADEA and thus, *Gross's* analysis may not apply to TCHRA claims. Second, no court has extended *Gross* to a pretext claim and in fact, *Gross* explicitly left open the question of whether the McDonnell Douglas-Burdine framework is still the appropriate framework for evaluating pretext claims brought under the ADEA. Therefore, the Court declined to apply the *Gross* "but for" test to Plaintiff's pretext claim and instead applied the traditional McDonnell Douglas-Burdine framework. San Antonio Court of Appeals, No. 04-10-00730-CV, 06-22-2011. **READ THE OPINION HERE**

INSURANCE LAW

Martinez v. ACCC Insurance Co.
Dallas Court of Appeals

A driver and passenger were involved in an automobile accident with an insured of State and County Mutual Fire Insurance Company. The insured's policy included a cooperation clause, including requirements that the insured promptly notify the carrier of the accident, send copies of any suit papers received in connection with the accident and cooperate with the carrier in the investigation, settlement or defense of any claim or suit, all of which the insured failed to do. The driver and passenger filed suit against the insured and their attorney sent the carrier's representative a copy of the Original Petition and advised that suit had been filed. However, the insured never forwarded any suit papers or otherwise notified the carrier or agents that she had been served. Eventually, the driver and passenger obtained a default judgment against the insured.

The driver and passenger thereafter filed suit against the carrier and agents alleging that they insured the driver in the underlying suit but refused to pay indemnity benefits for the default judgment obtained in the underlying suit. The carrier and agents moved for summary judgment, which was granted by the trial court on the basis that they had no duty to defend or indemnify the insured with respect to the underlying suit. The Dallas Court of Appeals affirmed.

The Court held that the insured's failure to cooperate in the investigation, defense and settlement of the claims against her was sufficient grounds to support the summary judgment as the cooperation clause of a policy has been interpreted as a condition precedent to coverage. However, the Court stated that an insured's failure to cooperate will not operate to discharge an insurer's obligations under the policy unless the insurer is actually prejudiced or deprived of a valid defense by the actions of the insured. Dallas Court of Appeals, No. 05-09-01145-CV, 06-21-2011. **READ THE OPINION HERE**

CIVIL PRACTICE

In Re: Vicki Clark
Beaumont Court of Appeals

In litigation between Texas Citizens Bank and a former loan officer, Vicki Clark, who was accused of violating her non-solicitation and non-competition agreement, the trial court ordered Clark to produce her personal computer and electronic storage devices. Clark sought mandamus relief, which the Beaumont Court of Appeals conditionally granted.

The Court found that it was within the trial court's discretion to order production of electronic information on Clark's personal electronic storage devices. However, the Court held that the trial court failed to adequately address privilege, privacy and confidentiality concerns as no search parameters limited the access to information of a personal and confidential nature that has no possible relevance to the litigation. The Court stated that if it was not possible for the trial court to describe search protocols with sufficient precision to capture only relevant, non-privileged information, the trial court may order the forensic examination to be performed by an independent third-party forensic analyst. Moreover, the trial court must provide a mechanism through which Clark can withhold from discovery any documents or information that is privileged or confidential

and instead provide a privilege log subject to an in camera review by the trial court. Some method for screening privileged information must be provided that does not depend on the opposing party to do the screening. Beaumont Court of Appeals, No. 09-11-00217-CV, 07-14-2011. **READ THE OPINION HERE**

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