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

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

FROM THE PRESIDENT

Thomas E. Ganucheau,
Beck, Redden & Secrest, L.L.P; Houston

With 2011 drawing to a close, the TADC is gearing up to hit 2012 at full speed! Your Board of Directors held its first meeting of the new fiscal year in Galveston on November 11-12, 2011. Board Committees met and are well underway in planning TADC's activities and legislative involvement for the remainder of this year and into 2012.

Your program chairs have been busy putting together CLE for the coming year. The TADC Winter Seminar is set for a return to Crested Butte, Colorado on February 1-5, 2012. The programming is outstanding and the topics are relevant, timely, hands-on for the practicing trial lawyer. The Elevation Hotel is a new, ski-in, ski-out facility and will provide the perfect venue for this seminar. Registration materials have been mailed and the TADC room rate for the meeting is outstanding. Secure your reservations as soon as possible as space is limited and rooms won't last long! 2012 Winter Registration.

In addition to the Winter Seminar, exciting programs are being planned for the 2012 Spring Meeting in Santa Fe, New Mexico, the 2012 Summer Seminar in Sandestin, Florida and the 2012 Annual Meeting in San Francisco, California.

The 2012 TADC Trial Academy will be held in Houston at the South Texas College of Law on March 30-31. As you are aware, the Trial Academy is one of TADC's signature education programs specifically designed for lawyers practicing from 1-6

years. The Trial Academy provides practical courtroom experience for your young lawyers. Academy Co-Chairs Michele Smith (michelesmith@mehaffyweber.com) and Chad Gerke (cgerke@strongpipkin.com) are currently assembling breakout room faculty. If you would like to volunteer as an instructor at next year's Trial Academy, please contact Michele or Chad.

There will be a concentrated effort next year to do more local programming and lunchtime and one-day seminars. The TADC has been very successful in past years with local events and a greater effort will be made to continue these events. If you want a program in your area, send an email to the TADC office (tadc@tadc.org) and we will do our best to accommodate your request.

If you or a member of your firm are looking for speaking opportunities, please contact me (tganucheau@brsfirm.com) or our Program Vice Presidents Christy Amuny (christy@bainlaw.com) and Jerry Fazio (fazio@owenfazio.com).

In an effort to continue TADC's high level of service, the TADC website will undergo some minor modifications to better serve the membership. The website is a great resource, containing a searchable member roster, a searchable listing of CLE papers to order, and an archive of past magazines and professional newletters. The TADC will also continue to expand into other areas of social media such as Facebook and LinkedIn. TADC on Facebook (http://www.facebook.com/tadclawyers)

On the legislative front, the TADC Legislative Committee is scheduled to meet monthly to prepare for upcoming interim committee hearings and provide testimony and tactical support to the committees as they wade through their charges. House Interim Charges were issued late last month and Senate charges are expected in late November or early December. Issues which could surface for the 2013 Legislative Session include "paid or incurred", judicial selection, no-fault insurance and a revisitation of the margins tax on corporations. The TADC legislative team will be ready to meet these and any other issues head-on in order to protect and preserve the civil justice system.

On a final note, I encourage everyone to sign up a new member in the TADC. Talk to your law partners, colleagues in other areas of the state and friends and explain the great benefits of being a member of the TADC. The education is beyond compare, the services are top notch, and the business contact and friendships are only a few of the reasons to join. The TADC is the largest state organization of its kind in the United States and the ONLY voice of the defense bar in Texas. TADC Membership Application

** Reminder**

Your TADC Dues statement was mailed in early November and are 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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An Excellent Seminar

Register Now for

2012 TADC Winter Meeting

The TADC Returns to Crested Butte!

Elevation Hotel & Spa ~ Crested Butte, Colorado

February 1-5, 2012

A program for the practicing trial lawyer:

~ Our Responsibility to Protect the Right to Trial by Jury ~

~ Technology and Your Litigation Practice ~
~ The Top Ten Mistakes Lawyers Make in Summary Judgements ~
~Developing Non-Compete Law in Texas ~
…and more!

8.5 hours of CLE including 1.75 hours ethics

The Elevation Hotel & Spa has extended the TADC an excellent Winter rate!

The Elevation Hotel & Spa is a fantastic four-star, five-diamond ski-in ski-out facility located at the base of Mt. Crested Butte. The complex is virtually brand new with restaurants and shopping throughout. Non-stop flights operate daily from Dallas and Houston on

American and Continental Airlines respectively and multiple times daily from Denver on United.

Secure your accommodations now - Hotel Reservation cut-off is December 20, 2011

Registration Materials Here

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CALENDAR OF EVENTS

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
REGISTRATION MATERIAL

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

LEGISLATIVE/ELECTION UPDATE

Redistricting continues to cast a cloud of uncertainty over the party primaries next March. Two weeks ago, a federal judicial panel in Washington, D.C. denied summary judgment in the state's case to preclear the congressional, Texas House, and Texas Senate maps under Section 5 of the Voting Rights Act. This action means that the preclearance case will proceed to trial. At the same time, a three-judge federal panel in San Antonio has heard the Section 2 challenge to the maps and has drawn interim districts for the spring primaries pending a final decision. The court has delayed the filing period, originally scheduled to begin on November 12, until December. Observations of those following the litigation that the most likely changes to the legislatively enacted maps would be in the congressional and Texas House districts rather than in the Senate districts tended to be proven true, with the exception of Senate District 10 in Fort Worth, which was largely restored.

The resulting confusion has not stopped incumbents and challengers from jumping into a larger than usual number of legislative races, although the final destination for some of these candidates might be altered now that the San Antonio court has issued its order. Incumbents who had drawn primary challengers at this point include: Rep. Veronica Gonzales (D-McAllen); Rep. Marva Beck (R-Centerville); Rep. Leo Berman (R-Tyler); Rep. Doc Anderson (R-Waco); Rep. Wayne Christian (R-Center); Rep. Rob Eissler (R-The Woodlands); Rep. Chuck Hopson (R-Jacksonville); and Rep. Jim Landtroop (R-Plainview). These challenges are in addition to at least 20 incumbents not seeking re-election to the House and at least one hotly contested race involving paired incumbents Mike Hamilton (R-Mauriceville) and James White (R-Lufkin). Depending on the outcome of these races, as many as 30 new House members might come to Austin next January to join the 25 or so newcomers elected in 2010. In other words, the House will be relatively more inexperienced than it usually is.

The Senate will see a similar turnover. District 10 in Fort Worth had been drawn to elect a Republican to replace incumbent Sen. Wendy Davis, although that district has to a large extent been restored to its original form by the San Antonio Court; the two Republican contenders are House members Kelly Hancock and Dr. Mark Shelton. Sen. Florence Shapiro's (R-Plano) retirement creates an open seat in District 8, for which Rep. Ken Paxton (R-McKinney) and former Air Force pilot Scott O'Grady are vying in an increasingly heated race. Sen. Mike Jackson's (R-La Porte) decision to run for Congress leaves District 11 probably to Rep. Larry Taylor (R-Friendswood), and Sen. Chris Harris's (R-Arlington) open seat will be decided between former Rep. Toby Goodman (R-Arlington) and one-term Rep. Rodney Anderson (R-Grand Prairie). In District 5, Sen.

Steve Ogden (R-College Station) has decided to call it quits, opening the seat for one-term Rep. Charles Schwertner (R-Georgetown). Additionally, longtime incumbent Sen. Jeff Wentworth (R-San Antonio) faces a severe challenge from Railroad Commissioner Elizabeth Ames Jones, who has dropped plans to run for the U.S. Senate.

With both Governor Perry and Lt. Governor Dewhurst running for national office, House Speaker Joe Straus (R-San Antonio) appears to be in position to take the lead policy role next session. Although Speaker Straus is likely to face a challenge from the right, at this point there appears to be little chance that an insurgent candidate could gather enough support to topple the two-term Speaker. Probably the most important issue to TADC members from an economic standpoint will be revision of the so-called margin tax, which as a matter of constitutional law must originate in the House. The combination of a predicted multibillion-dollar budget shortfall, a new school finance lawsuit, and widespread dissatisfaction with the way the margin tax works and the amount of revenue it generates makes it extremely likely that the tax will be substantially altered in 2013. Whether the tax moves more in the direction of a business profits tax or a gross receipts tax will have major implications for TADC member firms. House Ways & Means Committee Chair Harvey Hilderbran (R-Kerrville) will begin holding hearings on the margin tax and other issues (including the possibility of expanding the sales tax) in January. TADC will be closely monitoring the progress of these hearings, and the TADC Legislative Committee is establishing a subcommittee to work on appropriate input into the process.

House and Senate interim committees will also begin meeting early next year. As we have reported, the Speaker has already released his interim charges, and the Senate will likely follow suit in the next few weeks. Of the charges that have been issued so far, the one involving alternative (or third-party) litigation financing (ALF) is likely to be of great interest to TADC members. ALF, which is extensively used in Australia, has recently become a significant ethical issue in the U.S., and the ABA has appointed a blue-ribbon committee to consider what, if any, changes need to be made to codes of professional ethics to deal with it. It is also possible that the issue could generate state-specific legislation, and the House Judiciary & Civil Jurisprudence Committee will investigate the issue next year. If you have any experiences with or information about ALF that you think would be helpful to the TADC Legislative Committee in formulating a position on this issue, please contact Jackie Robinson or Pam Madere, Legislative Committee Chairs.

LEGAL NEWS

Case Summaries prepared by Don Kent, with Kent, Good, Anderson & Bush, P.C. in Tyler

Premises Liability

Jensen v. Southwest Rodeo L.P., (Tex. App. Dist. 5 09/29/2011)

In this premise liability case, plaintiff Bob Jensen, acting on behalf of the Hella Shrine Temple signed a lease agreement with Southwest Rodeo L.P., to use the arena facilities for a Hella Shrine circus. During one of the circus performances, plaintiff Jensen tripped and fell on the arena stairs. Jensen filed suit against Southwest Rodeo alleging claims for negligence and premises liability.

Southwest Rodeo moved for summary judgment alleging it owed no duty to Jensen as a matter of law. It is well established that a lessor generally owes no duty to a tenant or its invitees for dangerous conditions on the leased premises. The tenant takes the property as he finds it and assumes the risk of apparent defects. Plaintiff, however, alleged that a recognized exception to this rule is that a lessor may be liable for injuries caused by a defect on a portion of the premises that remains under the lessor's control and that said exception controlled in this case. The Court of Appeals affirmed the trial court's granting of the summary judgment.

The retained-control exception is generally applied to common areas maintained by the landlord for the use and benefit of multiple tenants or the public. The rationale of the common area cases is that because no individual tenant controls the common area, the landlord remains in control. It was undisputed in this case that Jensen fell in an area of the arena that was leased to the Temple and that the Temple was the sole lessee. Accordingly, the common law area rationale does not apply.

Plaintiff Jensen then contended that the evidence showed that Southwest Rodeo maintained sufficient control over the area made the subject of the lease to raise a fact issue on the retained-control exception. However, the appellate court noted that the lease agreement in this case required the Temple to return the facilities in "good condition and repair" at the end of the lease term. This contractual requirement placed the responsibility for maintenance, repair and cleaning on the Temple, not Southwest Rodeo, during the term of the lease. The fact that Southwest Rodeo required maintenance to be performed shows only its intent to protect its interest in the property and not a retention of control over the property during the lease term.

Further, a provision in the lease that permitted the general manager of Southwest Rodeo, or its representative, a right of access to the premises during the lease term for

matters connected with the facilities (a reservation of a right to re-entry) does not amount to a retention of control. Finally, the fact that Southwest Rodeo placed its employees on the premises as ushers did not constitute retention of control either. According to the summary judgment evidence, Southwest Rodeo placed ushers in the arena during events so that if an accident occurred the ushers would be there to assist. These general requirements, much like the requirement that the premises be kept in good repair, are intended to protect the lessor's interest and they are no evidence of any intent to control either the premises or the details of the lessee's use of the facility.

The trial court's summary judgment was affirmed. **Read this opinion HERE**

Certificates of Merit

Litigation concerning the certificate of merit requirements under chapter 150 of the Texas Civil Practice and Remedies Code are now making their way through courts.

In ***CTL/Thompson Texas LLC v. Starwood Homeowner's Association, Inc.*** (Tex. App. Dis. 2 09/29/2011), appellant CTL/Thompson Texas LLC, filed a motion to dismiss appellee Starwood Homeowner's Association's claims against them for failure to comply with the certificate of merit requirements of chapter 150 of the Texas Civil Practice and Remedies Code. The trial court denied the motion and CTL filed its notice of appeal. Starwood then filed a nonsuit in the trial court, non-suiting all of its claims against all defendants, including CTL. Starwood then filed an emergency motion in the court of appeals to dismiss the appeal arguing that as a result of the nonsuit, no justiciable controversy existed between the parties. CTL opposed the motion to dismiss the appeal, arguing that its motion to dismiss Starwood's claims for Starwood's alleged failure to comply with the statutory certificate of merit requirements is, in fact, a motion for sanctions and that it sought the sanction of dismissal with prejudice and, that such allegation constituted an affirmative claim for relief that survives Starwood's nonsuit. CTL also pointed out that Starwood had already refiled its claims in another district court. The Court of Appeals, however, noted that Starwood's actions and other trial courts and other trial court's cause numbers was not relevant to whether a justiciable controversy currently existed in the case before it after whether the appeal was moot. The Court of Appeals noted that the plaintiff's absolute rack to nonsuit claims in accordance with Texas Rule of Civil Procedure 162. The court then, noted, the exception that any dismissal "shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief".

CTL contends that its motion to dismiss Starwood's claims based on Starwood's purported failure to comply with the statutory certificate of merit requirements is a claim for affirmative relief (akin to a motion for sanctions) that survives the nonsuit. By way of analogy, CTL pointed out that when a trial court is required to dismiss a health care liability claim under the Medical Liability Insurance Improvement Act for a claimant's

failure to comply with statutory expert report requirements, the motion to dismiss is treated as in the nature of a motion for sanctions, and a claimant's nonsuit has no effect on the pending motion to dismiss. The Court of Appeals, however, compared the certificate of merits statute to the one under the Medical Liability Insurance Improvement Act and noted significant differences. Concerning dismissal of a plaintiff's claim against a defendant design professional for failure to comply with the statutory certificate of merit requirements, chapter 150 does not permit recovery of attorney's fees, does not provide an independent basis for taxing costs against a plaintiff, and provides for dismissal either without prejudice or with prejudice at the trial court's discretion. Chapter 74, on the other hand, requires a trial court to dismiss a health care liability claim with prejudice if the claimant does not comply with the chapter's statutory expert report requirements, and it mandates an award of costs and attorney's fees when properly requested and proved. That's the plain language of chapter 74 makes a motion to dismiss under that statute a motion for sanctions that survives a nonsuit. However, the plain language of chapter 150 concerning the statutory consequences imposed for a failure to comply with chapter 150's certificate of merit requirements, dismissal without prejudice or discretion to dismiss with prejudice, does not make a motion to dismiss pursuant to chapter 150 a motion for sanctions. Starwood's emergency motion to dismiss the appeal was granted as moot. **Read this opinion HERE**

In another certificate of merit case is ***Carter & Burgess Inc. v. Sardari***, (Tex. App. Dist. 1 10/14/2011).

This, also, was an interlocutory appeal case where the architectural firm Carter & Burgess, Inc. appealed the trial court's order denying its motion to dismiss plaintiff's cases against it for failing to file a certificate of merit and is required by section 150.002 of the Texas Civil Practice and Remedies Code.

Plaintiff Sardari cut her wrist on the sharp edge of the inside of the door when entering Gigi's Asian Bistro and Dumpling Bar in the Houston Galleria. The cut severed an artery, and Sardari filed suit to recover damages arising from her injury. In her original petition, she asserted negligence claims against the owner of Gigi's and one of the contractors responsible for installing the door. After the contractor named C&B as a responsible third party, Sardari amended her petition to join C&B as a defendant. Sardari alleged that C&B was the project manager overseeing the installation of the door and project in general. In response to C&B's motion to dismiss for failure to file a certificate of merit, plaintiff Sardari contended that no certificate of merit was required because of her tailored allegations of negligent project management relate to the actions of an unlicensed employee and therefore did not arise out of the "provision of professional services". C&B alleged that it is an architectural and engineering design firm and it had entered into a professional services agreement with Gigi's pertaining to construction and renovation work at the restaurant. C&B alleged that all of its services were professional architecture services pursuant to the Texas Occupations Code.

Plaintiff argued that her case had nothing to do with negligent design by a licensed

or registered professional. Rather, her claim was for the negligent supervision and negligent repair of a stainless steel door, jam, and frame that was sharp upon installation or that sharpened as it opened and closed during the day. In this respect, C&B was acting as a project manager, not as a design professional, and that the C&B employee who Sardari contended was most responsible for the negligence was not a licensed architect.

C&B responded that it provided a project manager as part of its professional services in designing and constructing the restaurant and that these services could not be separated from C&B's professional services. The trial court denied the motion to dismiss and C&B appealed.

The court examined the substance of plaintiff Sardari's pleadings to determine if her cause of action against C&B arose out of the practice of architecture. The court failed that the plaintiff's allegations fit within the statutory definition of the practice of architecture and that they involved "observing the construction, modification, or alteration of work to evaluate conformance with architectural plans and specifications" as set forth in TEX. OCC. CODE ANN. §1051.001(7) ©. The court felt, as such that the plaintiff's that implicated an architect's special knowledge because an architect may repair or supervising control preparation of specifications that include all construction details. Taking the plaintiff's allegations at a whole, the court believes that her allegations implicated the practice of architecture as defined by the Occupations Code and, therefore necessitated a certificate of merit.

Consequently, the trial court abused its discretion in denying C&B's motion and the judgment of the trial court was reversed and remanded with instructions for the trial court to dismiss plaintiff's claims against C&B. **Read this opinion HERE**

Texas Tort Claim Act - Election of Remedies

The election of remedies provision of the Texas Tort Claims Act continues to be a focus of litigation.

In ***City of Houston v. Esparza*** (Tex. App. Dist. 1 10/07/2011). Plaintiff Gloria Esparza was injured in a car wreck and sued the City of Houston alleging that its employee's negligence was the cause. She also sued the individual employee as well. The City moved to dismiss Esparza claims against Espinoza individually, pursuant to section 101.106(e) of the Texas Tort Claims Act, which motion was granted by the trial court. The City also filed a plea to the jurisdiction asserting that Esparza's claims against the City were barred by section 101.106(b) of the Act. In essence, the City was arguing that because the plaintiff sued both the City and its individual employee in the same case, she could recover against neither for failing to make an election of remedies. The trial court denied the City's plea to the jurisdiction to dismiss the claims against it and this appeal, by the City, followed.

On appeal, the City contended that section 101.106(b) of the Texas Tort Claims Act operated as complete barratry claimants that sues both the government entity and its employees. The City was contending that subsections (d) and (e) apply without reference to each other when a claimant sues both the government and its employee together, thus requiring the dismissal of both defendants. Needless to say, the trial court disagreed. Instead, the court held that the statutory scheme requires that the trial court dismiss the employee upon the governmental units motion leaving the governmental unit as the defendant. While claimant who erroneously fails to make an election has an election voiced upon her by operation of the statute, her artful drafting does, alone, bar her claims against both the employee and the employer. Such construction is consistent with the purpose of the statute. Consequently, it was held that the trial court properly denied the City's plea to the jurisdiction under section 101.106(b) of the Texas Tort Claims Act and the trial court's order was affirmed. **Read this opinion HERE**

More complex factual situation was presented in ***City of Webster v. Myers*** (Tex. App. Dist. 1 10/27/2011). Myers became a peace officer with the City of Webster police department in 1985. In 2004, he was promoted to the position of captain. After three female subordinates filed complaints alleging that Myers had sexually harassed them, the City terminated his employment in 2008.

Myers then filed suit against the City and eight individuals, including seven city employees and one non-employee. Myers denied the allegations of sexual harassment and asserted that the allegations arose from a plan formulated by a fellow peace officer who had a grudge against him and wanted to become captain. He claimed that the peace officer recruited three female police department employees to claim that Myers had sexually harassed them. He even alleged that the City's chief of police and the city manager also participated in the conspiracy against him. Myers unsuccessfully contested the termination through the City's internal grievance process. The City filed a motion to dismiss Myers claims against the City employees pursuant to Texas Tort Claims Act section 101.106(e). The trial court denied the City's motion and this interlocutory appeal followed.

Myers contends that he alleged only constitutional claims against the City seeking applicable relief and that such claims do not fall under the tort claims act. The court then reviewed the pleadings to determine whether Myers asserted a common law tort claim against both the employees and the City. If he did, then section 101.106(e) mandates that the employees be dismissed from the suit upon the filing of a motion by the governmental unit. Myers contention was that the acts he attributed to the individual employees to support his conspiracy claim against them were separate and distinct from the acts he attributed to the City to support his constitutional claims against it. A review of Myers petition revealed that he set forth the acts of each individual employee that he contended supported his conspiracy claim against those employees in their individual capacities. Nevertheless, his original petition also explicitly identified the City as a participant in the conspiracy and set forth the City's acts which further the conspiracy. He made express allegations of acts of conspiracy that he claimed the City committed. He also sought

damages against the City in addition to his request for equitable relief. Texas courts have held that a claim seeking damages for an alleged constitutional violation is brought under the Texas Tort Claims Act for purposes of section 101.106. Although he framed his claims against the City as constitutional, he supported those claims with allegations that the City had adopted and ratified the tortuous acts of the employees and also sought damages from the City. Consequently, he was advancing his claims against the City based either on the tortuous conduct of the employees adopted and ratified by the City or on the City's own acts of conspiracy as alleged in his petition. In short, his petition demonstrated that he had filed suit under the Texas Tort Claims Act against both the City and the employees. The trial court erred when it denied the City's motion to dismiss the claims against the employees. **Read this opinion HERE**

Medical Malpractice - Emergency Room Standard

The amount of evidence necessary to support a recovery against a hospital under the emergency room standard of care was the issue in ***Christus Health Southeast Texas d/b/a Christus Hospital - St. Mary v. Mary Ann Licatino, Individually and as Representative of the Estate of Stacy Meaux, et al.*** (Tex. App. Dis.9 10/13/2011).

A heart attack killed Stacy Meaux hours after her discharge from the emergency room at Christus Health Southeast Texas d/b/a Christus Hospital-St. Mary. Trial went to a jury which returned a verdict in favor of the plaintiff. On appeal, the defendants challenged the sufficiency of the evidence claiming that said evidence was illegally insufficient to support the jury's finding that there was willful and wanton negligence on the part of the hospital nurses and their care and treatment of Stacy Meaux. The court noted that this was an emergency room case and the heightened standard of care required that the plaintiff prove that the defendants negligence was "willful and wanton". Plaintiffs claim that the nurses' failure to follow the hospital chest pain protocol showed an entire want of care as to establish that their negligence with the result of conscious indifference. The plaintiff's presented expert testimony from both a physician (emergency medicine specialist) and a nurse. It was fairly well coincided that Stacy presented with unstable angina and chest pains suspicious for a possible heart attack. However, the plaintiffs emergency medicine specialist testified that he did not believe the nurses intentionally harmed Stacy. He thought she presented with symptoms that were very consistent with unstable angina and myocardial infarction and that these possibilities were not adequately evaluated. The plaintiffs' nursing expert faulted the assessment performed by the triage nurse in failing to delineate the type of chest pain she was having. He believed that the nurse should have triaged her as a Level 1, whereas she was triaged as a Level 2. She felt that the nurses did not perform an assessment that was sufficient to make them aware that Stacy was experiencing unstable angina. She was also critical of the nurses for failing to order cardiac enzymes and not instituting the chain of command when the doctor decided to discharge Stacy.

It was pointed out that the record showed clearly none of the nurses knew or suspected that Stacy was experiencing unstable angina. At the time of discharge she had a normal EKG, normal x-ray, normal blood pressure, and normal respirations and oxygenation. Her chest pain had improved. None of the nurses disagreed with the doctor's decision regarding discharge and was therefore no need to institute the chain of command. The court concluded that viewed in the light most favorable to the verdict, the evidence demonstrated that St. Mary's nurses deviated from the hospital's procedures for the assessment and treatment of chest pain. The nurses failed to pinpoint the location of her pain and thus failed to determine that the pain was in her chest and it was radiating to her arms. Consequently, the nurses failed to follow the treatment procedure for a patient with suspected cardiac chest pain and if they followed the procedure for suspected cardiac chest pain they would have used a heart monitor with a rhythm strip, and they would have drawn blood to test for cardiac enzymes. However, because the nurses provided emergency medical care in a hospital emergency department, the plaintiff must prove that the nurses deviated from the standard of care with willful and wanton negligence. The court noted that the plaintiff must prove an extreme degree of negligence. The court noted that Stacy was triaged immediately upon her arrival, assigned her an urgent status and she was taken to a treatment room and seen by a treating physician in approximately 30 minutes. In an attempt to ascertain a diagnosis, EKGs and a chest X-ray were done and the doctor evaluated Stacy for chest pain and recorded his medical assessment of her cardiovascular status. The doctor was aware of Stacy's risk factors for cardiac disease and he knew that Stacy was experiencing a sensation of tightness across her chest and arms. The doctor and the nurses thought that Stacy's medical complaint had been adequately addressed, but they were wrong. The court then said that an entire of want of care cannot reasonably be inferred under the circumstances in this case in which the nurses recorded the patient's history and determined the status of her medications, took the patient's vital signs, promptly got the patient to the emergency room physician, provided EKGs and an X-ray to assist the doctor in making his diagnosis, provided the treatment for hypertension and bronchospasm as ordered by the doctor, and ascertained that the patient's blood pressure and oxygenation were within normal limits at the time of discharge. None of the evidence supported an inference that the nurses consciously disregarded their patient's welfare. Since the plaintiff failed to establish the degree of deviation from the standard of care that is required to impose malpractice liability on a provider of emergency health care services, the Court of Appeals reversed the trial court judgment. **Read this opinion HERE**

Worker's Compensation

In ***Liberty Mutual Insurance Co. and Texas Department of Insurance, Division of Workers' Compensation v. Adcock*** (Tex. App. Dist.2 10/20/2011).

The Court of Appeals was faced with the question as to whether the Texas Department of Insurance, Division of Workers' Compensation and Liberty Mutual

Insurance Company had jurisdiction in 2009 to review a 1997 award of Lifetime Income Benefits to Adcock. In 1991, Adcock received a compensable on-the-job injury, and in 1997, the Division's Appeals Panel held that he was entitled to Lifetime Income Benefits due to the total and permanent functional loss of use of his right foot above the ankle and right hand up to and including the right wrist. This decision was not appealed.

Several years later, Liberty Mutual, the workers' compensation carrier, sought to reopen Adcock's case, asserting that Adcock was no longer entitled to Lifetime Income Benefits because he no longer had the total and permanent functional loss of use that was the basis of the award. Adcock argued that based on the statutory language in labor code section 408.161 and on principles of res judicata and collateral estoppel, his case could not be reopened. The Division intervened, asserting that it had jurisdiction. The trial court entered a judgment that the Texas Department of Insurance-Division of Workers' Compensation, and by extension this court, lacked jurisdiction to revisit the issue of Lifetime Income Benefits awarded to plaintiff in 1997.

The court noted that the statutory language stating that the lifetime income benefits are "paid until the death of the employee" and the legislature clear and intent when enacting the Texas Workers' Act to provide for review under several circumstances, but not once entitlement to Lifetime Income Benefits has been established, indicated that the legislature gave the Division no express or implied authority to further review of Lifetime Income Benefits after eligibility is determined. Liberty Mutual and the Division relied heavily on Deep East Texas Self Insurance Fund, Appeal No. 020432-s, 2002 WL 971079 (Tex. Workers' Comp. Comm'n Apr. 10, 2002), as authority to support their jurisdictional argument. In that case, after the plaintiff received an award of Lifetime Income Benefits in 1999 upon a finding of loss of permanent function in his legs, he was videotaped in situations showing that he could walk independently without a walker, cane or other device. The Appeals Panel, in a 2-to-1 decision, decided that the Commission had continuing jurisdiction to resolve disputes over entitlement to Lifetime Income Benefits. However, this Court of Appeals thought that conclusion would render section 415.031 meaningless and cited the decent in the Deep East Texas opinion. Knowing that there was no express language in section 408.161 that gives the Division the right to revisit the issue of Lifetime Income Benefits and a statutory scheme clearly showed that the legislature knew how to include this authority, this court disagreed with the Deep East Texas opinion and concluded that the Division had no right to review Lifetime Income Benefits after the initial administrative and appellant remedies have been exhausted. Consequently, the trial court's judgment was affirmed. **Read this opinion HERE**