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

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

FROM THE PRESIDENT

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

With 2010 drawing to a close and the 82nd Legislature just around the corner, the TADC is ramping up local events in anticipation of the session and what it may produce. Legislative luncheons have been calendared for the Valley on December 17, Austin on February 17 and Fort Worth on February 24. Other events are in the planning stages for Dallas, Houston and the Panhandle. These events are extremely informative and serve as a great conduit to the membership with regard to what's happening in the legislature and how the TADC is involved. I strongly encourage you to attend these events in your area.

The TADC held a very successful "Do's and Don'ts in the Courtroom" luncheon with a panel of distinguished judges in Houston late this fall. Attendance at the Houston Center Club was at capacity. This is a luncheon program that the TADC intends to continue in all areas of the state, offering members an opportunity at CLE credit in ethics. A "Do's and Don'ts" luncheon already has been scheduled at the Central Market Cooking School in San Antonio for March 3, 2011. All local judges will be invited. District Court Judge Rene McElhaney, and newly elected Judges Richard Price and Cathy Stryker will be speaking. (There may even be some Do's and Don'ts in the kitchen, as Judge Price has offered to do the cooking as part of the brief cooking demonstration).

Do not put off registering for the 2011 Winter Seminar in Steamboat Springs, Colorado. The program is outstanding with over 9 hours of CLE and the airfares are fantastic now, beginning as low as $250 from Houston and Dallas.

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 contacts, business development 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 is 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

NEWS OF MEMBERS

Longtime TADC member Michael Phillips with the law firm of Phillips & Akers in Houston is a newly published author. *Monster in River Oaks* hit bookshelves this fall and tells the tale of power, corruption and abuse in one of the country's most prestigious neighborhoods. We have already been advised that this is a magnificent piece of piece of writing and a must read! The book is available at www.amazon.com

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Register Now for the

2011 Winter Seminar

Sheraton Steamboat Springs – Steamboat Springs, CO
February 2-6, 2011

A program for the practicing trial lawyer:

* ***Practical Ethics for the Litigator***
* ***Admissibility of Social Media Evidence at Trial***
* ***Texas Supreme Court Rules and Decisions***
* ***The Law of Voir Dire***

And much more!

9 hours of CLE including 1.25 hours ethics

The TADC has an excellent rate at the Sheraton & Airfares are fantastice out of Dallas & Houston!

Register today - Hotel Cut-off is December 20, 2010!

CLICK HERE for Registration Materials

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CALENDAR OF EVENTS

December 17, 2010
South TexasLegislative Luncheon
Cooper Center –McAllen

January 14-15, 2011
TADC Board ofDirectors Meeting
Austin,Texas

February 2-6, 2011
TADC WinterSeminar
SteamboatSheraton – Steamboat Springs, CO
Mitch Smith&Slater Elza, Co-Chairs
RegistrationMaterial

February 17, 2011
AustinLegislative Luncheon
Headliners Club– Austin

February 24, 2011
Fort WorthLegislative Luncheon
Fort Worth Club– Fort Worth

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

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

March 30-April 3, 2011
TADC SpringMeeting
Hyatt Regency onLady Bird Lake – Austin
Pat Weaver&Clayton Devin, Co-Chairs

July 13-17, 2011
TADC SummerSeminar
Snake RiverLodge&Spa – Jackson Hole, Wyoming
Mark Walker&Russell Smith, Co-Chairs

August 5-6, 2011
Budget/NominatingCommittee
San Antonio,Texas

Sept.27-Oct. 1, 2011
2011 AnnualMeeting
Hyatt RegencyMaui – Maui, Hawaii
DavidChamberlain&Mitzi Mayfield,Co-Chairs

LEGISLATIVE/ELECTION UPDATE

In the aftermath of the November election, the Texas Legislature may see significant changes in the traditional rules of the game. While the insurgency against House Speaker Joe Straus (R-San Antonio) remains small and little threat to unseat the incumbent speaker (despite the noise), its real significance lies in the probability that many "conservative" issues--immigration, abortion, budget cuts, voter identification, to name a few--will get to the floor for votes. In prior sessions, these issues were generally sidetracked in committee or fell victim to the operation of House rules. With 99 Republicans chomping at the bit to deliver on these and other issues, 2011 is likely to be a no holds barred session in almost every respect.

On the Senate side, the first test issue in January will be whether the Senate retains the two-thirds rule for considering legislation on the floor. The two-thirds rule prevents any bill from reaching the Senate floor without some support from the party that is not in power, unlike the United States Senate which can bring a bill up for discussion with a simple majority. The effect of the rule is to require the Senate to build consensus on both sides of the aisle, making the process not only more civil but in effect preventing the passing of bad policy with a simple majority. Although Republicans still hold only a 19-12 majority, that is more than enough to change the Senate rules to allow bills to reach the floor with some number fewer than 21 votes. Senator Dan Patrick (R-Houston) has been the most vocal advocate for doing away with the rule. The question then becomes whether the 12 remaining Democrats will have a mind to coalesce on key issues in the face of Senate redistricting, which is going to be in the hands of the Republicans.

The consequences of this conservative swing are hard to predict in general, but with respect to civil justice issues in particular, we expect to see a "loser pays" proposal and limitations on contingency fees to receive serious consideration. It is unclear at this time precisely how these proposals will work, but we will keep you informed and up to date as soon as details become available. Another area of scrutiny will be settlements of windstorm claims and legal fees paid in connection with those settlements.

Governor Perry's elevation to the head of the Republican Governors' Association is also likely to have substantial effects on legislative action in 2011. Whether or not the Governor decides to run for President in 2012, his high national profile certainly gives the Legislature an added incentive to give his agenda high priority.

For copies of any testimony presented by TADC during the legislative session or interim hearings and other up-to-date legislative news, visit the members' side of the TADC website (www.tadc.org)

LEGAL NEWS

Case Summaries prepared by Curry L. Cooksey with Orgain, Bell & Tucker, L.L.P.; The Woodlands

CIVIL PRACTICE

CHAPTER 74 REPORT – REPORTS WERE TIMELY AND ADEQUATE

Kingwood Specialty Hospital, Ltd v. Barley, 2010 Tex. App. Lexis 8598 (Tex. App. Houston 14th Dist., Oct 28, 2010)

The hospital was brought in to the matter by amended petition and the expert report was filed within 120 days of the amendment, but more than 120 days from the date of the Original Petition. The Houston court agreed with those authorities holding that the 120 day period from the "Original Petition," refers to the first petition against the Defendant complaining of the report. In reading the report requirement as a whole, the court felt that there was no report duty triggered until a defendant was named in the action.

The court also rejected the hospital's assertion that the court should review medical records and find the report inadequate, due to the experts' factual errors, when compared to the record. Following the Fort Worth rather than Beaumont authorities, the Houston court held that the review for adequacy was limited to the four corners of the report. **Click here to read the opinion.**

TORTS

SETTLEMENT ALLOCATION – CANNOT ALLOCATE TO EXTINGUISH SUBROGATION RIGHTS

Elliot v. Hollingshead, 2010 Tex App. Lexis 8755 (Tex. App. Eastland Oct.28, 2010)

This automobile collision wrongful death case involved a decedent who was in the course and scope of employment at the time of death and wrongful death beneficiaries who had received workers' compensation death benefits. The employer's workers' compensation carrier intervened to recover its subrogated interest out of the settlement proceeds. In allocating the settlement between the statutory beneficiaries and the survival claim, which carried no subrogation rights, the trial court allocated the vast majority of the proceeds to the survival claim. The workers' compensation carrier complained that this was an improper allocation that was entered to decrease its subrogated interest. The court held that the allocation of settlement proceeds among different claimants cannot be entered in a way that interferes with subrogation rights. In addition to the improper allocation, the court found error in trial court orders awarding plaintiffs' attorneys a full one-third fee from the subrogation recovery, despite involvement by the carrier's attorney. This was improper, due to the statutory mandate that the fee be split, commensurate with work, when both the plaintiff and carrier have attorneys pursuing recovery. The court also held that the trial court had no authority to order plaintiff's attorney to forfeit a portion of his fees, for findings of breach of fiduciary duty, when the lawsuit and pleadings before the court did not contain a complaint against him for such. Judges cannot award relief that is

not requested in pleadings. **Click here to read the opinion.**

CONTRACT - FRAUDULENT PROCUREMENT OF CONTRACT CONSTITUTES BOTH A TORT AND A CONTRACT CLAIM

Reservoir Sys. v. TGS-NOPEC Geophysical Co., L.P., 2010 Tex. App. LEXIS 8915(Tex. App. 14th Dist. Nov. 9, 2010).

In *Reservoir Sys. v. TGS-NOPEC Geophysical Co., L.P.*, 2010 Tex. App. LEXIS 8915 (Tex. App. 14th Dist. Nov. 9, 2010), TGS-NOPEC Geophysical Co., L.P. ("TGS")(Appellee) sued Reservoir Systems, Inc., (Appellants) and Reservoir's president and owner, Axel Sigmar, for breach of contract and fraud arising out of a failed business venture and Reservoir asserted its counterclaims. The matter was tried via bench trial and the trial court found for TGS and ordered recovery of $5 million on its breach-of-contract claim against Reservoir and $735,000 on its fraud claim against Sigmar. Reservoir and Sigmar appealed. The main issue on appeal was whether or not TGS's injury constituted only a contract claim and did not constitute a tort claim since TGS's only injury was economic loss on the contract. The Appellate Court stated that it is well established that the legal duty not to fraudulently procure a contract is separate and independent from the duties established by the contract itself and consequently tort damages are recoverable for a fraudulent-inducement claim irrespective of whether the fraudulent representations are later subsumed in a contract or whether the plaintiff only suffers an economic loss related to the subject matter of the contract. The Appellate Court overruled Sigmar's and Reservoir's issues and affirmed the trial court's judgment. **Click here to read the opinion.**

SUMMARY JUDGMENT - EXPERT OPINION NEEDED FOR HOMEOWNERS TO ESTABLISH FACT ISSUE IN EXCESS WATER CASE

Palma v. Chribran Co., L.L.C., 2010 Tex. App. LEXIS 8921 (Tex. App. Beaumont Nov. 10, 2010).

In *Palma v. Chribran Co., L.L.C.*, 2010 Tex. App. LEXIS 8921 (Tex. App. Beaumont Nov. 10, 2010), Joe and Gladys Palma, homeowners and Appellants, sued the Chribran Company, L.L.C., developer and Appellee, after alleging that water began coming from expansion joints in streets and driveways. The trial court granted the developer's summary judgment. The issue on appeal was whether the homeowners were required to present expert testimony to establish a fact issue existed regarding whether the construction of the pond was the cause in fact of the excess water on their lot. The only opinion in evidence as to the element of cause in fact was Joe Gladys' affidavit stating that it was his opinion that the excess water was caused by Chribran's construction of the pond. The Appellate Court determined that the homeowners were required to present expert

testimony to show that a fact issue existed regarding whether the construction of the pond was the cause in fact of the excess water on their lot. Accordingly, the decision of the trial court was affirmed. **Click here to read the opinion.**

ADR

ARBITRATION – AGREEMENT UNENFORCEABLE UNDER STATE LAW NOT PRE-EMPTED BY FEDERAL ARBITRATION ACT

In re: Sthran, 2010 Tex. App. Lexis 8775 (Tex. App. Dallas Oct. 29,2010)

In this suit against a nursing home by the wife of the patient, the wife had signed admission papers which included an arbitration agreement that did not meet the requirement of conspicuousness under state law. The nursing home moved to compel arbitration and the plaintiff resisted, claiming that the arbitration provision that she signed when her husband was admitted was unenforceable under state law and that defendant failed to prove that she had the authority to waive her husband's jury trial rights. The trial court granted the motion in part, ordering arbitration of the wife's individual's claims, but not claims derivative from her husband.

On appeal, the nursing home claimed that the Federal Arbitration Act pre-empted the state law requirement and allowed enforcement of the agreement. The plaintiff argued that the McCarren-Ferguson Act reverse pre-empted the FAA, since Chapter 74 of the Civil Practice and Remedies Code was a statute dealing with regulation of insurance. The court of appeals agreed with the reverse pre-emption argument and held the arbitration clause unenforceable. **Click here to read the opinion.**

HEALTH LAW

CHAPTER 74 REPORT – SUIT AGAINST INDEPENDENT CONTRACTOR OF HEALTHCARE PROVIDER WAS NOT A HEALTHCARE LIABLITY CLAIM

Orthopedic Resources, Inc. v. Swindell 2010 Tex. App. Lexis 8897 (Tex. App. Nov. 8 2010)

Plaintiff lost four toes to frostbite after following the instructions given by a durable medical equipment provider at an orthopedic clinic. The physician had ordered that the patient use the cold compression pump intermittently, but the agent of the equipment company told the plaintiff that she should use it 24/7. The equipment provider filed a motion to dismiss under Chapter 74, claiming that since it was the independent contractor of the orthopedic clinic, it too was a healthcare provider under Chapter 74. Plaintiffs claimed that since the equipment provider gave recommendations contrary to those given by the physician, his instructions were not within the course and scope of fulfilling the contractual requirements between the equipment provider and orthopedic clinic. The trial court sided with the plaintiffs and denied the motion to dismiss.

Utilizing the abuse of discretion standard, the appellate court affirmed, finding that the trial court could reasonably have believed that the contractor's recommendations were outside the scope of the contract, which precluded the equipment provider from claiming healthcare provider status. **Click here to read the opinion.**

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