TADC EVIDENCE LAW UPDATE

FALL 2008 EDITION

EDITORS:

Darin L. Brooks
Stephen B. Edmundson
BEIRNE, MAYNARD & PARSONS, L.L.P.

CONTRIBUTING AUTHORS:

Amparo Y. Guerra
Kristen W. Kelly
Julia M. Lake
Sean P. Milligan
Dawn E. Norman
Bruce R. Wilkin

BEIRNE, MAYNARD & PARSONS, L.L.P.

J. Bradley Compere
HERNANDEZSIMPSON, PLLC

EDITORS' NOTE

The cases we selected for this edition of the Evidence Law Update are not an exhaustive review of every published opinion involving evidentiary issues since the last update. Rather, we selected cases that provide new law regarding evidence-related issues, apply existing evidence-related law to unique facts or circumstances or otherwise discuss interesting evidentiary points. We hope that you find the update both interesting and useful in your practice.

AFFIDAVIT: ADMISSIBILITY AND SUFFICIENCY

LEGAL CONCLUSIONS AND SUBJECTIVE BELIEFS ARE INSUFFICIENT EVIDENCE OF MEETING OF MINDS.

Paciwest, Inc. v. Warner Alan Properties, LLC, No. 02-07-443-CV, 2008 WL 4180322 (Tex. App.—Fort Worth, Sept. 11, 2008, no pet. h.).

The plaintiff, a purchaser of commercial real estate, sued for specific performance and breach of sales contract when the defendant, a vendor, refused to close the transaction.

One issue on appeal was the trial court's sustaining of the plaintiff's objections to the following statements in the defendant's summary judgment affidavit: (1) "There was never an agreement reached between the parties concerning an amendment to the Contract," and (2) "It was [the defendant's] understanding, which was in accordance with the express terms of the contract, that if an amendment or modification was not agreed to in writing that the amendment or modification was not finalized, nor enforceable."

The Fort Worth Court of Appeals affirmed the trial court's exclusionary ruling on both statements. The Court determined that the first statement was more of a legal conclusion than a statement of fact. Regarding the second statement, the Court held that a party's subjective intent is irrelevant as to whether the parties agreed to a contract amendment: "A determination of whether a meeting of the minds has occurred is based on an objective standard; thus, evidence of [the defendant's] subjective belief about what the contract says or about whether an amendment occurred is not relevant to whether there was a meeting of the minds sufficient to amend the contract."

Parenthetically, in determining that the trial court did not abuse its discretion in determining that the plaintiff was not barred from seeking specific performance by the "unclean hands" doctrine, the Court noted that a contract is subject to specific performance if it contains the essential terms of a contract, expressed with such certainty and clarity that it may be understood without recourse to parol evidence.

AFFIDAVIT: ADMISSIBILITY AND SUFFICIENCY

AFFIDAVIT CONTAINING DEFENDANTS ALLEGED ADMISSIONS NOT ADMISSIBLE UNDER DEAD MAN'S RULE.

Fraga v. Drake, No. 08-06-00295-CV, 2008 WL 2966989 (Tex. App.—El Paso, July 31, 2008, no pet. h.).

After the limitations period had run, the plaintiff, a property purchaser, filed suit against the deceased sellers' estate, claiming fraud and DTPA violations regarding undisclosed structural and sub-surface defects. The defendants, the sellers' estate, moved for summary judgment on limitations grounds. The plaintiff responded that the defendants' fraudulent concealment tolled limitations, and in support, submitted an affidavit that discussed various admissions allegedly made by the now-deceased defendants during the property sale. The trial court sustained the defendants' "Dead Man's Rule" objections to the affidavit and granted summary judgment. The plaintiff appealed. The El Paso Court of Appeals affirmed.

On appeal, the Court agreed that the defendants' admissions in the affidavit were inadmissible summary judgment evidence under Texas Rule of Evidence 601(b), also known as the "Dead Man's Rule." Per its own text, the rule applies to actions by or against executors, administrators, or guardians and prevents a party from testifying against the other party as to any oral statement by a testator, intestate, or ward, unless that testimony to the oral statement is corroborated, or unless the witness is called at the trial to testify thereto by the opposite party. The Court noted that corroborating evidence may come from any witness or other source, including documents, and need only tend to confirm and strengthen the testimony and show the probability of its truth, such as conduct by the deceased that is generally consistent with the testimony concerning the deceased's statements.

Here, the Court first noted that the defendants' "Dead Man's Rule" objection to several statements had been waived because the defendants did not object to the plaintiff's deposition testimony on the same ground, and yet used the deposition testimony as summary judgment proof. On this basis, the Court held that the trial court erred by sustaining objections as to those statements where the only basis for objecting was the "Dead Man's Rule." The Court then examined whether another basis justified exclusion of those statements in the affidavit.

For the most part, the Court held that the statements in the affidavit were conclusory. It noted that summary judgment affidavits must be developed from personal knowledge, must set forth such facts that would be admissible in evidence, and must establish that the affiant is competent to testify on the matters stated therein. Here, most of the remaining statements in the plaintiff's affidavit provided only conclusions or broad accusations without providing the underlying facts or admissions made by the defendants were the subject of such statements. The Court held that the trial court properly excluded most of the statements in the affidavit and that the portions of the affidavit that were erroneously stricken by the trial court did not raise a fact issue regarding fraudulent concealment. Accordingly, the Court affirmed the summary judgment in favor of the defendants.

EXPERT REPORT: SUFFICIENCY

MEDICAL EXPERT REPORT FOUND SUFFICIENT WHERE CRITICISM OF REPORT DOES NOT RELATE TO CLAIM.

A. Moore, M.D. v. Gatica, No. 02-06-442-CV, 2008 WL 4531713 (Tex. App.—Fort Worth, Oct. 9, 2008, no pet. h.).

The plaintiff patient brought a health care liability claim against defendant physician who performed her laparoscopic appendectomy. After the claim was filed, the defendant filed a motion to dismiss the case with prejudice, alleging that the plaintiff failed to file an adequate expert report as required by law. The trial court denied the defendant's motion, and the defendant appealed. Initially, the Fort Worth Court of Appeals dismissed the appeal. The Texas Supreme Court reversed and remanded.

On remand, the Court reviewed the expert report to determine whether the trial court had abused its discretion when it determined that the report sufficiently established the submitting physician's credentials as a qualified "expert" under the Texas Civil Practices and Remedies Code. In making this assessment, the Court noted that, to qualify as an expert, a person must be a physician who (1) is practicing medicine at the time he or she wrote the report; (2) has knowledge of the accepted standards of medical care for the diagnosis, care, or treatment of the illness, injury, or condition involved in the

claim; and (3) is qualified on the basis of training or experience to offer an expert opinion regarding those accepted standards of medical care. Generally, the Court noted, the report must demonstrate that the expert has the knowledge, skill, experience, training, or education regarding the specific issue before the trial court as would qualify the author to testify as an expert on that particular subject.

In the end, the Court affirmed the trial court's order denying the defendant's motion to dismiss and held that the trial court did not abuse its discretion in determining that the physician expert's report qualified as a good faith effort to satisfy the necessary requirements. The Court concluded that the report established that the physician was practicing medicine at the time the claim arose and when he wrote the report, and that he did have knowledge of the accepted standards of care for the treatment of the very matter on which he proposed to give an opinion. In reaching this conclusion, the Court rejected the defendant's argument that the failure to demonstrate experience in laparoscopic procedures disqualified the report about a laparoscopic appendectomy. The Court reasoned that the defendant failed to articulate how the laparoscopic nature of the surgery related to the plaintiff's negligence claims. The claims concerned the failure to close the cecum and ileum following the surgical dissection of the appendix, but, as the defendant conceded in his reply brief, the plaintiff complained of the surgical technique once the doctor was addressing the appendix—not the type of incision or approach involved in getting to it.

EXPERT TESTIMONY: SPECULATION

COURT NOT REQUIRED TO ACCEPT PURPORTED EXPERT'S SPECULATIVE TESTIMONY REGARDING ALLEGED UNRELIABILITY OF ELECTRONIC VOTING MACHINE.

Flores v. Cuellar, No. 04-08-00561-CV, 2008 WL 3926405 (Tex. App.—San Antonio Aug. 27, 2008, no pet. h.).

The plaintiff, an incumbent county sheriff filed an election contest against challenger after a court-supervised recount deemed the challenger the winner by a margin of 39 votes. The contest challenged the results of the count claiming the results reported from the electronic voting devices were unreliable and could not be utilized in determining the election winner.

The record reflected that when the electronic voting devices are used, votes are cast both on a personal electronic ballot (PEB) and a flash card; therefore, the total votes recorded on the PEBs and the flash cards should always be the same. The plaintiff offered expert testimony concluding that a mismatch in the PEBs and flash cards of two of the voting machines used in the election revealed an "inherent unreliability" in the entire electronic vote process (59 machines). The expert suggested the mismatch was analogous to a situation in which a person discovers his bank account is missing $23.00, and he submitted that such a banking error would make him "really really untrustworthy of the banking system altogether." The expert had previously examined electronic voting devices, but had never examined the devices used in the election at issue and was uncertain whether the devices used were the same as the ones he had studied. The expert further acknowledged that he did not know the cause of the mismatch between PEB and flashcard votes and that there could be an "infinite" number of causes. He stated that with more investigation and time he could have determined the most likely cause. Finally, he concluded, without analysis or reasoning, that the discrepancy between PEB and flashcard votes could be indicative of switching—*i.e.*, tallying of a vote for the opposite candidate from the one picked.

The trial court was not persuaded by the expert testimony and held that there were no irregularities in the election that affected the outcome. The plaintiff appealed, contending the trial court was required to accept the expert opinion and the need for a new election. On review, the San Antonio Court of Appeals held that the expert's opinions were based, in part, on speculation. Unlike the preponderance of the evidence standard in an ordinary civil case, the Court held that an election contestant must establish by clear and convincing evidence that voting irregularities materially affected the election outcome and, therefore, the trial court did not abuse its discretion in refusing to order a new election. The Court affirmed the trial court's judgment.

EXCLUSION OF EVIDENCE

TESTIMONY ABOUT PARTY'S FINANCIAL CIRCUMSTANCES HELD INADMISSIBLE BECAUSE IT FAILS TO MAKE CLAIMS MORE OR LESS PROBABLE AND IS INJECTED TO INFLAME THE JURY.

Reliance Steel & Aluminum Co. v. Sevcik, 51 Tex. Sup. Ct. J. 1437, 2008 WL 4370683 (Tex. Sept. 26, 2008).

The plaintiffs, injured in a highway accident, filed suit against the defendant tractor trailer driver. Even though punitive damages were not at issue, the plaintiffs offered testimony at trial that the defendant's annual revenues were $1.9 billion. The defendant objected that the evidence was irrelevant and inflammatory, but the trial court overruled the objections. Ultimately, the trial court entered a judgment for the plaintiffs in excess of $3 million.

On appeal, the Corpus Christi Court of Appeals concluded that admission of the evidence was harmless. The Texas Supreme Court disagreed.

In reversing, the Court evaluated the entire record, from voir dire to closing argument, considering the state of the evidence, the strengths and weaknesses of the case and the verdict. The Court noted that the magnitude of the number surely caught the juror's attention and that the lack of "guidepost numbers" in the evidence of soft-tissue damages and impairments made it probable that proof of the defendant's revenues played a crucial role in the determination of the key trial issue, which was damages (liability was not contested). So too, the Court looked at the plaintiff's counsel's repeated references to the defendant's size, which seemed to bear no relation to the traffic accident, other than to suggest the defendant could pay a big judgment. Likewise, the Court considered that the evidence was offered intentionally rather than inadvertently (having been offered as a deposition excerpt). In the end, the Court reversed the judgment, noting the policy considerations behind its decision:

> Intentionally leading the trial court into error does not always make the error harmful. But when issues like race, religion, gender, and wealth are injected into a case unnecessarily, there is the potential for damage not just to a litigant but to the civil justice system. Courts must provide equal justice to all, regardless of their circumstances, and efforts to suggest that jurors should do otherwise cannot be lightly disregarded.
>
> * * *
>
> We recognize that evidence of a party's wealth is sometimes admissible, and sometimes unavoidable; a large company may be so well known that jurors need no evidence about its ability to pay a judgment. But we also recognize "the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." We reiterate today that gratuitous evidence about either party's financial circumstances is not what trials should be about.

(Citations omitted).

HEARSAY: MISCELLANEOUS

CONTRACT IS NOT HEARSAY; EXPERT AFFIDAVIT/REPORT ADMISSIBLE WHERE EXPERT'S KNOWLEDGE, RELIABILITY, AND RELEVANCE NOT CHALLENGED.

Limited Logistics Servs., Inc. v. Villegas, No. 13-07-00370-CV, 2008 WL 3916463 (Tex. App.—Corpus Christi Aug. 27, 2008, no pet.).

The plaintiff, a trucking company employee who was injured when he was pinned between trailer and wall while making deliveries to a store for foreign corporation defendant, sued the corporation for negligence. The trial court denied the defendant's special appearance.

The defendant filed an interlocutory appeal, contending that the trial court erred in making certain evidentiary rulings. Specifically, the defendant objected to the admission of the carrier agreement, arguing that it was inadmissible hearsay.

The Corpus Christi Court of Appeals concluded that, although the defendant claimed the plaintiff did not authenticate the agreement, the defendant had waived objection by failing to raise the issue to the trial court.

The Court further held that, because the defendant was a party to the agreement, the agreement had legal effect independent of the truth of any statement it contained. As such, the trial court did not abuse its discretion by overruling the defendant's hearsay objection.

Next, the defendant contended that an affidavit and expert report submitted by the plaintiff should not have been admitted because they were not based on the expert's personal knowledge. The Court rejected the defendant's contention that expert reports tendered at the special appearance hearing should be

held to the same standard as an affidavit presented at a summary judgment hearing. Instead, the Court recognized that an expert witness may testify regarding scientific, technical, or other specialized matters if the expert is qualified and if the expert's opinion is relevant and based on a reliable foundation. In the end, the Court held that, because the defendant did not challenge these factors, the trial court did not abuse its discretion by overruling the defendant's objection to the expert report.

HEARSAY: STATE OF MIND EXCEPTION

TESTATOR'S HEARSAY STATEMENT EXCLUDED FROM WILL CONTEST WHERE STATEMENT WAS OFFERED TO PROVE REVOCATION AND NOT STATE OF MIND.

In re *Estate of Turner*, No. 11-07-00050-CV, 2008 WL 3126442 (Tex. App.—Eastland, Aug. 7 2008, no pet. h.).

The testator fatally shot himself on March 2, 2006. The testator's sister, Betty Glaze, filed an application to probate a photocopy of a will allegedly executed by the testator in 1990. The will named Glaze as the sole beneficiary of the testator's estate. The testator's children opposed the application for probate, asserting that the testator revoked the 1990 will and died intestate.

To prove that the testator died intestate, the opponents called the testator's daughter as a witness to show that the 1990 will had been revoked. The daughter testified that she had a conversation with the testator in which the testator allegedly said "he had taken care of everything, and if he ever did pass away everything would be hers." The trial court sustained Glaze's hearsay objection. The trial court ultimately denied the will contest and admitted the photocopied will to probate.

On appeal, the opponents of the will challenged the trial court's exclusion of the testator's statement to his daughter. Specifically, the opponents argued that the testimony was not hearsay, but failed to articulate their reasoning. The Eastland Court of Appeals upheld the trial court's exclusion of the evidence stating that the statement was not offered to show the fact that a conversation occurred between the testator and his daughter, but to show that the testator revoked his 1990 will. Thus, the statement was offered for the truth of the matter asserted.

Alternatively, the opponents of the will argued that the statement was admissible under the state of mind exception to the hearsay rule as codified in Rule 803(3) of the Texas Rules of Evidence. The Court held that this exception is applied to statements made by a testator only when the statement relates to the execution, revocation, identification, or terms of his will. The Court noted that while the statement may have been relevant to establish that the testator executed a new will naming the daughter as the sole beneficiary, it was not relevant in this case because the opponents' position was that the testator died intestate. The Court further held that the opponents suffered no harm by the exclusion of the statement because there was ample testimony from several witnesses that the testator did in fact execute the 1990 will and did not revoke it.

PUBLIC RECORDS: ADMISSIBILITY

PUBLIC RECORDS BEARING SIGNATURE AND SEAL OF A U.S. GOVERNMENT DEPARTMENT OR SUBDIVISION FOUND TO BE SELF-AUTHENTICATING, ADMISSIBLE HEARSAY.

F-Star Socorro, L.P. v. City of El Paso, No. 08-06-00295-CV, 2008 WL 2718480 (Tex. App.—El Paso, July 3, 2008, no pet.).

The plaintiff, the City of El Paso, brought suit to recover unpaid property taxes from the defendant property owners. Following a bench trial, the trial court granted judgment for the city. The defendants appealed, arguing that the plaintiff had not introduced competent evidence that the defendants owed any delinquent taxes. Specifically, the defendants complained that the certified tax statement the plaintiff introduced as evidence of the amount of taxes due was not property authenticated, was prepared solely for litigation, and was inadmissible hearsay. The tax statement at issue had been prepared on the date of trial, was signed by the city tax assessor-collector, and all pages of the statement bore his office's seal.

The El Paso Court of Appeals reviewed the trial court's evidentiary rulings under an abuse-of discretion standard and noted that the Texas Rules of Evidence permit public records to be admitted into evidence even though they are hearsay. Further, the Court noted that certain documents are considered to be self-authenticating, including any public record bearing the signature and seal of a department or subdivision of the United States.

The defendant's only remaining argument was that the statement "was prepared for the sole purpose of litigation…" The Court rejected this argument and affirmed, noting that tax records may be admitted, even if prepared solely for the purpose of litigation, as long as they are properly authenticated.

SUFFICIENCY: NO-EVIDENCE SUMMARY JUDGMENT

PRO SE PLAINTIFF'S UNAUTHENTICATED EVIDENCE DID NOT PRECLUDE NO-EVIDENCE SUMMARY JUDGMENT.

Mayo v. Suemaur Exploration & Production LLC, No. 14-07-00491-CV, 2008 WL 4355259 (Tex. App.—Houston [14th Dist.] Aug. 26, 2008, no pet.).

The plaintiff, appearing *pro se*, brought a negligence suit against the defendants, following the plaintiff's collision with one of the defendant's cattle on a farm-to market road. The defendants each filed no-evidence motions for summary judgment, which the trial court granted. The plaintiff appealed.

The plaintiff first argued that he should have been allowed an opportunity to amend or correct his summary judgment responses. The Fourteenth Court of Appeals disagreed, noting that, while Texas Rule of Civil Procedure 166a(f)[1] does provide a vehicle for curing formal defects in summary judgment evidence, the plaintiff neither requested an opportunity to cure nor moved for a continuance in the trial court, thereby failing to preserve the issue for appeal.[2]

The plaintiff further argued that he presented sufficient evidence to avoid summary judgment. Again, the Court disagreed, finding that the only evidence the plaintiff presented in response to both of the defendants' motions for summary judgment were unauthenticated exhibits. The trial court could not consider this evidence. Additionally, the Court noted that statements appearing in the plaintiff's responses to the motions for summary judgment were not competent summary judgment proof. Therefore, the plaintiff had no competent evidence with which to present a genuine issue of material fact as to any of the claims he brought against both defendants.

The Court affirmed and held that the trial court did not err in granting the defendants' no-evidence motions for summary judgment.

---

[1] Texas Rule of Civil Procedure 166a(f) provides that "defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend." TEX. R. CIV. P. 166a(f).

[2] The court made sure to point out that, although Mayo was a *pro se* litigant, he was held to the same standards as licensed attorneys and was required to comply with the applicable procedural and evidentiary rules.