TADC EVIDENCE LAW UPDATE

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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

A PARTY APPEARING PRO SE MUST COMPLY WITH ALL APPLICABLE PROCEDURAL RULES

Corona v. Pilgrim's Pride Corp., 245 S.W.3d 75 (Tex. App.—Texarkana 2008, pet. filed)

The plaintiff creditor filed suit on a sworn account against the defendant, the borrower's guarantor. The defendant counterclaimed for breach of contract, negligence, fraud, conspiracy to commit fraud, conversion, and malicious prosecution. The trial court entered summary judgment in favor of the plaintiff and dismissed the counterclaims. The defendant appealed pro se; and the Texarkana Court of Appeals affirmed the judgment.

One issue on appeal was whether the trial court properly excluded the defendant's summary judgment affidavit as hearsay. The entire affidavit consisted of statements that defendant was informed by others about certain events. The Court held that the entire affidavit was hearsay and the trial court did not abuse its discretion in excluding the affidavit.

AFFIDAVIT: ADMISSIBILITY AND SUFFICIENCY

AFFIDAVIT CONTAINING STATEMENTS ABOUT PAST AGREEMENTS AND POST-AGREEMENT REPRESENTATIONS ARE INADMISSIBLE AND ARE INSUFFICIENT SUMMARY JUDGMENT EVIDENCE.

Garner v. Fidelity Bank, N.A., 244 S.W.3d 855 (Tex. App.—Dallas 2008, no pet. h.)

The plaintiff lender filed lawsuit against the defendant borrower, seeking to collect debt from the defendant after the defendant failed to pay a promissory note on its maturity date or surrender collateral secured by a commercial security agreement. The plaintiff filed motion for summary judgment. The defendant responded and requested a continuance. The trial court denied the defendant's continuance, granted summary judgment for the plaintiff, and granted a foreclosure of security interest in the collateral. The defendant appealed. The Dallas Court of Appeals affirmed the trial court's judgment.

On appeal, the Court first addressed the continuance issue. The Court stated that if a motion for continuance is not verified or supported by an affidavit stating specific cause, it will presume the trial court did not abuse its discretion in denying the motion. Because the defendant's motion for continuance did not include an affidavit stating sufficient cause, the Court held the trial court's ruling was neither arbitrary nor unreasonable.

The Court then addressed the defendant's argument that an affidavit he submitted describing past notes as well as representations that were made after the date of the promissory note should have been summary judgment evidence. The Court noted that when parties have a validly integrated agreement, the parol evidence rule precludes enforcement of a prior or contemporaneous inconsistent agreement. As for the statements made after the note was signed, although they were not barred by the parol evidence rule, they were barred because they contradicted the express terms of a validly integrated written agreement.

AFFIDAVIT: SUFFICIENCY

AN AFFIDAVIT IS INSUFFICIENT TO SUPPORT SUMMARY JUDGMENT WHEN BASED ON SUBJECT BELIEF AND HYPOTHETICAL CONCLUSIONS.

Frank's Int'l, Inc. v. Smith Int'l, Inc., No. 01-06-00366-CV, 2008 WL 126630 (Tex. App.—Houston [1st Dist.] 2008, no pet. h.)

The plaintiff, a lessor of oilfield equipment, sued the defendant lessee for breach of contract involving the payment of taxes to Ecuador. After the trial court granted summary judgment for the plaintiff on its breach of contract claim, the defendant appealed, arguing that the plaintiff had not presented sufficient evidence of its breach. On appeal, the defendant argued that the only evidence the plaintiff presented for its breach, an affidavit of the plaintiff's internal tax manager, was not based on personal knowledge and was speculative and conclusory.

The affidavit at issue affirmatively stated that the facts stated therein were based on the tax manager's personal knowledge and demonstrated that the tax manager became personally familiar with the facts due to his position in the plaintiff's company. The First Court of Appeals noted that an affiant's job responsibilities can qualify him to have personal knowledge of the facts stated in the affidavit. However, the affidavit also stated "[i]t is my understanding" that the defendant was supplying equipment and "under these circumstances" a tax "would have been imposed" on the defendant.

The Court held that the tax manager's "understanding" was a statement of subjective belief. The Court further held that the statement "under these circumstances" a tax "would have been imposed" were opinions about a hypothetical scenario. Since these statements did not unequivocally state what the circumstances were as a matter of fact, the statement did not qualify as competent summary judgment evidence. Since the tax manager did not unequivocally attest to any facts that support his conclusion, the Court held that the evidence was insufficient to support summary judgment as a matter of law; it reversed the trial court's judgment and remanded the case.

EXCLUSION OF EVIDENCE: PRESERVATION OF ERROR

A PARTY MUST OFFER EVIDENCE AND OBTAIN AN ADVERSE RULING TO PRESERVE ERROR ON EXCLUDED EVIDENCE.

Lister v. Walters, 247 S.W.3d 381 (Tex. App.—Amarillo 2008, no pet. h.)

Following a handshake deal, a dispute arose regarding the details upon which the parties believed they had agreed. Without addressing the merits of the case, the Amarillo Court of Appeals determined that because the lawsuit was filed in small claims court, it lacked jurisdiction over the appeal. In dicta, however, the Court reiterated that "[t]o preserve error concerning the exclusion of evidence, the complaining party must actually offer the evidence and secure an adverse ruling from the court."

HEARSAY: BUSINESS RECORDS EXCEPTION

BUSINESS RECORDS CREATED BY A DIFFERENT ENTITY ARE ADMISSIBLE, BUT AFFIANT OR WITNESS ESTABLISHING FOUNDATION MUST HAVE PERSONAL KNOWLEDGE OF THE MANNER IN WHICH IT WAS PREPARED.

Martinez v. Midland Credit Management, Inc., No. 08-07-00031-CV, 2008 WL 704206 (Tex. App.—El Paso, Mar. 13, 2008, no pet. h.)

The plaintiff, a credit management company, brought suit against the defendant credit card holder for a debt allegedly owed on a credit card. The plaintiff filed its petition with an attached affidavit that contained a computer-generated, single-page document that listed the defendant's name, address, an account number, and a balance due of $2,076.74. The affidavit was signed, but failed to contain the printed name of the affiant, and the attached document was apparently prepared by the plaintiff's "predecessor."

Based on the pleadings, the plaintiff sought judgment in the amount of the debt, plus attorney's fees, pre-judgment interest, post-judgment interest, and court costs. The plaintiff filed a motion for summary judgment based on evidence set forth in above-mentioned affidavit and single-page summary of the defendant's account, and a second affidavit from the plaintiff's counsel regarding legal fees. The trial court granted the plaintiff's motion for summary judgment, and the defendant appealed.

On appeal, the defendant argued that the summary judgment evidence was legally and factually insufficient to support the judgment in favor of the plaintiff. Specifically, the defendant argued that the first affidavit and attached summary of the account was defective because it failed to meet the requirements of the business records exception to hearsay as codified in rule 803(6) of the Texas Rules of Evidence.

In analyzing the adequacy of the affidavit, the El Paso Court of Appeals recognized that although it is permissible to admit business records created by a different entity if the offering party has adopted the document as its primary record, the witness or affiant establishing the foundation of the business record must nevertheless have personal knowledge of the manner in which it was prepared. Applying this standard, the Court held that the affidavit offered in conjunction with the purported business record was improperly admitted because there was no information that would indicate the affiant had knowledge of the record-keeping practices of the entity that actually created the document, or that the records were trustworthy. As such, the only evidence that remained in support of the summary judgment was the affidavit from the plaintiff's attorney regarding legal fees, which was insufficient evidence to support the trial court's granting of the plaintiff's motion for summary judgment. Accordingly, the Court reversed the judgment of the trial court and remanded the case.

SUFFICIENCY: EXEMPLARY DAMAGES EVIDENCE IN MESO CASE

EXEMPLARY DAMAGES EVIDENCE FAILED TO SHOW DEFENDANT CREATED AN EXTREME DEGREE OF RISK THAT WOULD CAUSE INJURY.

Exxon Mobil Corp. v. Altimore, No. 14-04-01133-CV, 2008 WL 885955 (Tex. App.—Houston [14th Dist.], Apr. 3, 2008, no pet. h.)

The plaintiff, a surviving spouse, brought a personal injury case against her deceased husband's former employer, alleging that her husband's clothes transmitted asbestos from work to home, which ultimately caused her to develop mesothelioma. The plaintiff's husband was employed by the defendant and was exposed to asbestos dust from 1942 through 1972. The plaintiff testified that she would shake the dust off her husband's clothes before washing them, causing the inhalation of and exposure to asbestos particles. Based on this evidence, the jury awarded $992,001 in actual damages, and the same in exemplary damages. The defendant appealed, arguing that the plaintiff failed to present legally or factually sufficient evidence to support exemplary damages.

The Houston Court of Appeals initially noted that because the case accrued on or after September 1995, and was filed before September 1, 2003, the plaintiff was required to meet the following two-prong test to be entitled to exemplary damages: (1) the defendant's act or omission involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (2) the defendant had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

In addressing the first prong, the Court recognized that to determine if acts or omissions involve extreme risk, the events and circumstances must be analyzed from the defendant's perspective at the time the harm occurred, without resorting to hindsight. Applying this standard, the Court listed multiple reasons why the plaintiff failed to meet the first prong. First, the Court held that based on the evidence, during the time of the husband's exposure there was consensus among scientists that there was a safe level of exposure to asbestos. Second, the Court recognized that the plaintiff did not offer any evidence of reports showing that family members of employees exposed to asbestos were exposed to an extreme degree of risk. Third, the Court noted that the plaintiff failed to produce any evidence that she was exposed to an extreme risk given the dosage or amount of asbestos fiber on her husband's clothes. Fourth, there was no valid testimony establishing that the defendant exposed the plaintiff to an extreme degree of risk of harm from 1942 through 1972. Fifth, there was no evidence of mesothelioma cases among other family members of persons employed by the defendant. Finally, there was a lack of consensus in the scientific community, during the relevant time period, that family members of persons

who are exposed to asbestos at work were subjected to any degree of risk.

Accordingly, the Court reversed the trial court's award of exemplary damages and rendered judgment that the plaintiff take nothing.

SUFFICIENCY: EVIDENCE OF DRIVER'S COMPETENCE IN A NEGLIGENT ENTRUSTMENT ACTION

EVIDENCE OF PRIOR CITATIONS WAS LEGALLY INSUFFICIENT TO PROVE DRIVER'S INCOMPETENCE.

Houston Cab Co. v. Fields, No. 09-06-506 CV, 2007 WL 5011586 (Tex. App.—Beaumont Mar. 20, 2008, no pet. h.)

The plaintiff, a passenger who was injured while attempting to enter a taxicab, brought an action against the driver for negligence and against the taxicab company for negligent entrustment. The trial court entered judgment for the plaintiff following a jury trial.

At trial, evidence was offered showing that the driver executed an independent contractor agreement with the taxicab company three days before the accident. The enrollment form the driver was supposed to have submitted (the taxicab company could not locate the driver's actual enrollment form, but offered a form that would have been used at that time), required an applicant to "have the past three (3) years of licensed driving experience in the United States." The "driver enrollment form" asked whether the applicant's license had ever been revoked or suspended. During the trial, the driver admitted she did not have a driver's license from January 2003 until October 2003 and Texas Department of Public Safety ("DPS") records showed that the driver's license was suspended on January 13, 2003, for lack of liability insurance. The taxicab company had hired a private firm to obtain information regarding the driver's driving record. However, the information the private firm collected did not show the prior license suspension, the driver's receipt of two citations for failing to have liability insurance, or a citation for an injury accident. The DPS records did contain this information, however.

On appeal, the taxicab company contended the evidence was legally insufficient to show that the taxicab company negligently entrusted the cab to the driver. The plaintiff contended the evidence was legally sufficient to show the driver's incompetence and the taxicab company's negligent entrustment. The Beaumont Court of Appeals analyzed the Texas Transportation Code's section entitled, "Employment of Unlicensed Driver" and discussed the Texas Supreme Court's recent confirmation of the requirements for establishing liability for negligent entrustment. The appeal concerned the second and third elements, specifically, whether the driver was an unlicensed, incompetent, or reckless driver, and whether the driver was negligent on the occasion in question. The taxicab company pointed to evidence showing (1) the driver had a valid driver's license at the time of the entrustment; (2) the driver's only two convictions for driving-related offenses were for lack of liability insurance, not reckless driving; and (3) the taxicab company did not know of the driver's prior citation for an injury accident.

In its analysis, the Court recognized the Texas Supreme Court's opinion in *City of Keller* which instructs that a court cannot disregard some types of contrary evidence when dealing with competency evidence, among other types of evidence. The Court agreed that no-insurance citations and proof of a license suspension for those citations is legally insufficient to show incompetence or recklessness. The Court also noted that competency under the company's rules is not the same as incompetency under Texas negligent entrustment law. One of the witnesses testified that the driver would not have been competent under the taxicab company's rules if the driver had only been licensed a few days before she started driving the cab.

The Court reversed the trial court's judgment regarding the driver and the taxicab company and rendered a take-nothing judgment in favor of the taxicab company. The Court noted that the findings supporting the judgment against the driver were not challenged on appeal, and therefore, the judgment regarding the driver was affirmed.

SUFFICIENCY: EXPERT WITNESS TESTIMONY IN MEDICAL MALPRACTICE ACTION

EXPERT WITNESS TESTIMONY WAS FACTUALLY SUFFICIENT TO DEFEAT A NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT.

Hamilton v. Wilson, 51 Tex. Sup. Ct. J. 686, 2008 WL 820717, (Mar. 28, 2008)

The defendant doctor intubated and administered general anesthesia to the plaintiff prior to the

plaintiff's back surgery. During the attempted intubation, the defendant encountered resistance, yet continued insertion. After the surgery, the plaintiff complained of chest pain and x-rays revealed that she had suffered a tear in her esophagus, for which she had to have emergency corrective surgery. The plaintiff brought a health care liability claim against the defendant, alleging that the defendant negligently tore her esophagus during intubation by forcing the endotracheal tube into her esophagus after encountering resistance.

The defendant moved for summary judgment, contending that there was no evidence that she was negligent or that she caused the esophageal tear. The plaintiff responded with the deposition testimony of her expert. The trial court granted summary judgment in favor of the defendant and the Amarillo Court of Appeals affirmed. The Texas Supreme Court granted the plaintiff's petition for review.

The Court noted that the plaintiff was only required to provide evidence that would enable reasonable and fair-minded jurors to differ in their conclusions. Upon review of the evidence, the Court held that the plaintiff had met her burden. The plaintiff's expert testified that the defendant violated the applicable standard of care by improperly calculating the tube's location and that the defendant's manipulation of the tube caused the plaintiff's esophageal tear. Moreover, the defendant and her own expert conceded that this was possible.

The Court further held that the plaintiff's expert's testimony was not based on mere possibilities, speculation, or surmise, noting that his opinion was based on: (1) the location of the tear in relation to where the tube would have been when it was manipulated by the defendant; (2) his review of the medial records indicating that the tear was "probably related to intubation at the time of surgery;" and (3) his impression that the "tight fit" encountered by the defendant was the cricopharyngeal ring of the esophagus. Thus, the plaintiff's expert's testimony was based on factual evidence relating to the defendant's care, or lack thereof, and created a genuine issue of material fact, precluding summary judgment.

Therefore, the Court, without hearing oral argument, reversed the court of appeals' judgment and rendered the case to the trial court for further proceedings.

SUFFICIENCY: LIABILITY FOR CRIMINAL ACTS OF A THIRD PARTY

DEPOSITION TESTIMONY BY DIRECTOR OF ATHLETIC MINISTRY FOR CHURCH THAT HE WAS NOT AWARE OF PREVIOUS ASSAULTS WAS COMPETENT SUMMARY JUDGMENT EVIDENCE TO NEGATE FORESEEABILITY ELEMENT OF PREMISES LIABILITY CLAIM BROUGHT AGAINST THE CHURCH.

Jane Doe 1 v. Pilgrim Rest Baptist Church, No. 05-06-00197-CV, 2008 WL 588864 (Tex. App.—Dallas Mar. 5, 2008, no pet. h.)

The plaintiff brought this premises liability action against the defendant arising out of the sexual assault of the plaintiff's daughter while the daughter was a participant in a youth group run by the defendant and held at the defendant's premises. The sexual assault occurred in the bathroom of the defendant's third-floor gymnasium. The plaintiff claimed the defendant failed to provide security for its invitees and failed to warn the plaintiff about its inadequate security. The defendant moved for a traditional and no-evidence motion for summary judgment, submitting deposition testimony of its Director of Athletic Ministry, which it claims establishes that criminal conduct on the premises was not foreseeable. The trial court granted the summary judgment, and the plaintiff appealed.

On appeal, the Dallas Court of Appeals recognized that property owners have a duty to use ordinary care to protect invitees from foreseeable criminal acts of third parties. The Court noted that the deposition testimony from the Director was competent summary judgment evidence that negated the foreseeability element. Specifically, the Court held that the Director's testimony that he was not aware of any other person being sexually assaulted in the gymnasium was sufficient to meet the defendant's initial summary judgment burden of negating the foreseeability element of premises liability.

Having met the initial burden of negating foreseeability, the Court held that the plaintiff was required to raise a fact issue with regard to foreseeability of sexual assaults, but failed to do so. The plaintiff's only evidence of any prior crime in or near the defendant's premises was deposition testimony from the Director, in which the Director admitted that there had been fights on the defendant's premises. The Court held that evidence of prior fights does not make the danger of sexual assault

foreseeable, and therefore concluded that the plaintiff failed to raise a fact issue on the element of foreseeability of sexual assaults. The Court affirmed the judgment of the trial court.

SUFFICIENCY: SJ EVIDENCE

EVIDENCE SUBMITTED IN RESPONSE TO FIRST MOTION FOR SUMMARY JUDGMENT COULD NOT BE CONSIDERED AS EVIDENCE PRESENTED IN RESPONSE TO SECOND MOTION FOR SUMMARY JUDGMENT.

Fears v. Texas Bank, 247 S.W.3d 729 (Tex. App.—Texarkana 2008, no pet. h.)

The plaintiffs' son borrowed money from the defendant bank and failed to make payments on the promissory note in a timely manner. The plaintiffs conveyed fifty acres of their property to the defendant to prevent the defendant from foreclosing on property held by the plaintiffs' son. The defendant assured the plaintiffs that it would return their property upon payment of the note by the plaintiffs' son.

The note was never paid, and the defendant was preparing to sell the fifty-acre property when the plaintiffs sued the defendant, alleging they had been coerced to execute the deed to the defendant to avoid foreclosure and were under duress when they executed the deed. The plaintiffs requested that the trial court find the conveyance to the defendant void. The plaintiffs claimed that the deed to their son violated the statute of frauds. The defendant moved for summary judgment which the trial court granted, finding the defendant was the owner of both properties (the plaintiff's son had also conveyed another tract of land to the defendant that the plaintiffs had previously conveyed to the son).

The defendant filed its initial traditional motion for summary judgment in June 2005, and the plaintiffs filed a response in August 2005. In February 2006, the defendant filed a supplemental no-evidence motion for summary judgment on the plaintiffs' claims of duress, and the plaintiffs filed a supplemental response on February 6, 2006. The trial court granted summary judgment on April 6, 2006.

On appeal, the plaintiffs claimed there was some evidence that the transaction should be set aside and there was some evidence that the deed was obtained by fraud and extortion by the defendant. The Texarkana Court of Appeals noted that while the plaintiffs submitted evidence of duress, coercion, and fraud in response to the defendant's first traditional motion for summary judgment, the plaintiffs did not submit this evidence in response to the defendant's supplemental no-evidence motion for summary judgment.

The Court affirmed the trial court's summary judgment, holding that even if the evidence submitted in response to the first motion for summary judgment was sufficient to establish a fact issue with regard to duress, coercion, and fraud, the evidence was not filed in response to the supplemental no-evidence motion and could not be considered in response to that second motion because (1) the plaintiffs did not ask the trial court to take judicial notice of such evidence; (2) the plaintiffs did not incorporate or otherwise refer to such evidence in response to the second motion; and (3) more than eight months elapsed between the filing of the two motions.