

# TADC EVIDENCE LAW UPDATE

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### *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.**

### 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.

### ADMISSIBILITY OF EVIDENCE

**A SUMMARY JUDGMENT RESPONDENT  
MAY OFFER CONTROVERTING EVIDENCE  
ON AN ISSUE IT HAS NOT YET PLEADED.**

*All Metals Fabricating, Inc. v. Ramer Concrete, Inc.*,  
No. 08-07-00233-CV, 2009 WL 638259 (Tex.  
App.—El Paso Mar. 12, 2009, no pet.).

The plaintiff, a commercial metal company, brought suit against the defendants, a general contractor and its subcontractors, claiming breach of contract, breach of express warranties, and breach of the implied warranties in the construction of a facility for the plaintiff. In response to the plaintiff's suit, the subcontractors filed a no-evidence motion for summary judgment and later a second motion for summary judgment asserting that the plaintiff did not own the property and did not enter into any contract for the construction or development of the improvements on the property, and as such, the plaintiff had no valid claims against any party in the case. In its response to the motion for summary judgment, the plaintiff included evidence that it was assigned all claims of the actual property owner arising from the construction contract, and therefore had a right to bring its causes of action. Despite the assignment evidence, the trial court granted the traditional motion for summary judgment and severed the cause of action based on the proposition that the defendant subcontractors had disproved at least one essential element of the plaintiff's cause of action.

On appeal, the plaintiff argued that it had provided the assignment of claims as evidence in response to the motion for summary judgment and that the assignment document was relevant to the determination of the motion. In reversing the order granting summary judgment and remanding the case to the trial court, the El Paso Court of Appeals agreed with the plaintiff, emphasizing that despite not having alleged a cause of action, a plaintiff is not barred from raising an issue for the first time in its summary judgment response.

## **AFFIDAVITS: ADMISSIBILITY**

### **AN EXPERT'S AFFIDAVIT BASED ON A SEPARATE, UNSWORN AFFIDAVIT MAY BE ADMISSIBLE.**

*Merrell v. Wal-Mart Stores, Inc.*, 276 S.W.3d 117 (Tex. App.—Texarkana 2009, pet. filed).

The plaintiffs, parents of a fire victim, brought a products liability action against the defendant retailer, alleging that a defective halogen torchiere lamp caused the apartment fire. The trial court granted summary judgment in favor of the defendant. Both sides appealed.

One of the issues on appeal was the defendant's argument that the trial court abused its discretion in overruling the defendant's objections to some of the summary judgment evidence. The Texarkana Court of Appeals agreed that an unsworn affidavit is incompetent summary judgment evidence. However, the Court noted that the unsworn affidavit was admissible for a limited purpose—as information reasonably relied upon by the plaintiffs' expert. The Court recognized that Texas Rule of Evidence 703 expressly permits an expert to base his opinion on facts or data “perceived by, reviewed by, or made known to the expert at or before the hearing.” Rule 703 also provides, in part, “[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject, the facts or data need not be admissible in evidence.”

The Court applied Rule 703 and concluded that the expert could rely on the unsworn affidavit because the veracity of the statement could be verified and the defendant could have presented evidence to the contrary if the statement was incorrect. The Court further recognized that an expert is not required to have personal knowledge of the facts on which he bases his opinion and can reasonably rely upon the factual statements of eyewitnesses. The Court held that the trial court did not abuse its discretion by admitting the expert's affidavit because the trial court could reasonably conclude the unsworn affidavit was of the nature reasonably relied upon by experts.

The defendant objected further to the plaintiffs' expert's affidavit, *inter alia*, as being speculative and conclusory. The Court reiterated established law that an expert must explain how he reached his conclusion and that an expert's opinion is conclusory if it offers no factual substantiation. The Court held that the expert established general causation by

relying on an extensive list of articles and government reports to conclude that halogen lamps can cause fires. The Court further held that the plaintiffs' expert established specific causation that the halogen lamp was the cause of the fire by eliminating other possible causes of the fire and by evaluating statements of fact witnesses and evidence collected at the scene. The Court ultimately reversed the trial court's summary judgment in favor of the defendant, holding that the plaintiffs' expert's affidavit bridged the analytical gap between the origin of the fire in the general area of the lamp and the conclusion that the halogen lamp was the cause-in-fact of the fire.

## **AFFIDAVITS: SUFFICIENCY**

### **AFFIDAVIT FOUND INSUFFICIENT TO AVOID SUMMARY JUDGMENT BECAUSE THE AFFIANT FAILED TO ESTABLISH PERSONAL KNOWLEDGE OF FACTS FROM THE 1840s.**

*Kerlin v. Arias*, 274 S.W.3d 666 (Tex. 2009).

The plaintiffs, heirs of a grantee under a Mexican land grant, brought this action against the defendant title holder, alleging trespass, trespass to try title, conversion, constructive trust, and fraud. The plaintiffs sought to set aside an 1847 deed from Jesus Bali (and all sales in the ensuing 161 years) on the basis that it was fraudulent because the deed was signed by Bali's father, and because the deed stated that Bali was a minor at the time, even though he was not a minor. The defendant moved for summary judgment on several grounds, including that the deed was valid and not procured through fraud.

In response to the defendant's motion, the plaintiffs submitted an affidavit of one of the heirs in which the affiant asserted that Jesus Bali was not a minor in 1847. The defendant objected to the affidavit due to lack of personal knowledge and hearsay. The trial court granted the defendant's motion, but the Corpus Christi-Edinburg Court of Appeals reversed. The defendant appealed that decision to the Texas Supreme Court.

The Court first noted that affidavits must be based on the affiant's personal knowledge and shall set forth such facts as would be admissible in evidence. Regarding the defendant's hearsay objection, the Court held that the affiant's testimony that she “heard testimony” in another case, “reviewed documents” related to the heirs' claims, and “read historical accounts about Padre Island” were hearsay

which carried no probative weight over the defendant's objection. The Court further held that the affidavit failed to show how the affiant could have personal knowledge about events occurring in the 1840s. Because the affiant could have no personal knowledge of whether Jesus Bali was a minor, the affidavit could not withstand the defendant's objection and was not probative evidence in response to summary judgment.

The Court reversed the court of appeals and rendered a take nothing judgment, holding that there was no fact question that the 1847 deed was fraudulent.

### **EXCLUSION OF EVIDENCE**

#### **RULE EXCLUDING EVIDENCE BECAUSE OF LATE DISCOVERY RESPONSE APPLIES IN NO-EVIDENCE SUMMARY JUDGMENT PROCEEDINGS.**

*Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater*, 52 Tex. Sup. Ct. J. 632, 2009 WL 1028047 (Apr. 17, 2009).

While lowering himself to sit down, the plaintiff condominium renter severed the tip of his finger on what was alleged to be a broken weld on a pool-side chair. The plaintiff filed a premises liability claim against the condominium association. Under a Level 3 discovery plan, the parties agreed to an expert disclosure deadline and two subsequent extensions. However, the plaintiff failed to disclose an expert by any of the deadlines.

The defendant filed a no-evidence motion for summary judgment, arguing that the plaintiff presented no evidence that the condition of the chair posed an unreasonable risk of harm and the plaintiff knew or should have known of any danger presented by the chair. The plaintiff's response, filed more than five months after the last agreed-upon expert designation deadline, included: (1) the affidavit of a previously undisclosed expert; (2) photos of the chair taken by an insurance adjuster after the injury; (3) the plaintiff's unchallenged explanation of how the occurrence happened; (4) and deposition testimony of the condominium manager that the condominium maintained and inspected the chair six days a week, knew that the combination of chlorine and salt water had a corrosive effect on metal chairs, and the manager first became aware of the injury a day after it occurred.

The defendant objected that the expert was not timely disclosed and as such the affidavit was inadmissible to preclude summary judgment pursuant to Rule 193.6 of the Texas Rules of Civil Procedure. In response, the plaintiff argued, in part, that Rule 193.6 does not apply in a summary judgment setting, and even if it did, the defendant was not unfairly surprised or prejudiced by the affidavit. The trial court sustained the objections, excluded the expert's affidavit, and granted the defendant's no-evidence motion. The Corpus Christi Court of Appeals reversed, holding that Rule 193.6 does not apply in a summary judgment proceeding and that the expert's affidavit was sufficient to preclude summary judgment.

On review, the Texas Supreme Court observed that, before the no-evidence motion for summary judgment was introduced to Texas trial practice, courts did not apply evidentiary exclusions for failure to timely designate an expert in summary judgment proceedings. However, after the no-evidence motion was introduced to Texas in 1997, pretrial discovery rules were amended to include evidentiary exclusions under Rule 193.6. Now, Rule 193.6 exclusions apply equally in trial and summary judgment proceedings. Because the new discovery rules establish a date certain for the completion of discovery, there is no longer a concern that discovery will be incomplete at the summary judgment stage and the no-evidence rule, by its very language, is to be used following discovery. As such, the Court held that the trial court did not abuse its discretion in striking the untimely expert affidavit, and that the plaintiff also failed to establish good cause or lack of unfair surprise or prejudice because the other evidence offered did not establish failure to reasonably inspect or awareness of the dangerous condition. The Court reversed the judgment of the court of appeals, and rendered judgment in favor of the defendant.

### **EXCLUSION OF EVIDENCE**

#### **WEBSITE WRITING AND RECORDING WAS HELD INADMISSIBLE AS NOT PROPERLY AUTHENTICATED.**

*Burnett Ranches, Ltd. v. Cano Petroleum, Inc.*, No. 07-07-0321-CV, 2009 WL 619590 (Tex. App.—Amarillo Mar. 11, 2009, no pet.).

The plaintiffs, mineral lessors, sued the defendants, lessees, seeking to terminate a mineral lease and damages from a fire allegedly caused by the defendants' negligence. Following a summary judgment in favor of the defendants, the plaintiffs

appealed, complaining in part that the trial court erred in sustaining objections to portions of their summary judgment evidence.

Specifically, the plaintiffs offered a writing and recording from a website. The plaintiffs attested that the writing was a “true and correct copy of [one of the defendants’] Environmental Overview printed from its website” and the recording was a “true and correct copy of from AMEX TV Interview of S. Jeffrey Johnson obtained from [one of the defendants’] website.” Still, the trial court excluded both the writing and recording as unauthenticated.

The Amarillo Court of Appeals upheld the decision of the trial court, noting that (a) the affiant did not establish that the website from which he secured the documents was actually that of one of the defendants, and (b) the affiant did not confirm that he knew or recognized the voice of Jeffrey Johnson and that the voice excerpts from the website were actually those of Johnson.

The Court summarized: “[W]hile it may be arguable that most information found on the internet is what it purports to be, we cannot simply assume that all of it is.”

**EXPERTS: RELIABILITY**

**COURT DID NOT COMMIT REVERSIBLE ERROR BY CONSIDERING ACCIDENT RECONSTRUCTIONIST’S TESTIMONY THAT WAS BASED, IN PART, ON “EYEBALLING.”**

*Lincoln v. Clark Freight Lines, Inc.*, No. 01-06-01177-CV, 2009 WL 350563 (Tex. App.—Houston [1st Dist.] Feb. 12, 2009, no pet.).

The plaintiff, the mother of a child killed when an automobile driven by his father collided with a tractor-trailer, sued the driver of the tractor-trailer and the company that owned the tractor-trailer for negligence, gross negligence, wrongful death, and negligent hiring, training and supervision. The trial court entered a take nothing judgment after the jury found that the negligence of the child’s father was the sole proximate cause of the collision.

At trial, the plaintiff filed a *Daubert* motion to prevent a deputy accident reconstructionist with Harris County from testifying about causation, but the trial court ruled that he could testify. On appeal, the plaintiff did not challenge the deputy’s qualifications as an expert. Rather, the plaintiff’s sole challenge was to the deputy’s methodology. The

plaintiff argued that his testimony drew conclusions from no scientific testing and only subjective belief or unsupported speculation.

The challenged portions of the deputy’s testimony related to his calculation of the “coefficient of friction,” which is a vehicle’s deceleration rate when the vehicle’s tires are locked and it is sliding on a roadway. Since the vehicle involved in the collision, a Ford Mustang, could not be used to conduct the accident reconstruction, the deputy used a Chevy Camaro. The plaintiff challenged the use of a Camaro on several grounds due to the differences between the two vehicles, including the capabilities of the brakes, the weight, and the type of engine. The deputy testified that the differences were inconsequential because, once the brakes lock up, the different vehicle capabilities are irrelevant and the weight difference was not enough to affect the calculations.

The deputy testified that the only relevant factor was the similarity in the Camaro’s tires to the soft rubber tires on the Mustang. The deputy admitted that he did not use a Durometer to measure and compare the consistency of the tires. Instead, he “eyeballed” the tires to confirm they were the same soft rubber consistency. While he admitted that “eyeballing” was not a scientific process, he testified that his extensive experience with Mustangs and Camaros yielded similar if not the same results.

The First Court of Appeals held that the trial court did not abuse its discretion by admitting the expert testimony. The Court held that the deputy had shown that the differences between the accident at issue and the deputy’s reconstruction were minor and that he had explained them sufficiently to the jury. While part of the deputy’s analysis involved his subjective “eyeballing” interpretation, the court held that this should be considered along with his extensive testing with similar vehicles and similar tires. The Court noted that, during trial, the deputy conducted a Durometer test and confirmed his “eyeballed” analysis. While the jury did not hear this evidence, the trial court was aware of it and it could have affected the court’s analysis in admitting the testimony.

Finally, the Court noted that the plaintiff’s expert had used virtually identical calculations, with the only difference being a disputed fact issue of when the father began to accelerate towards the intersection where the collision occurred. The plaintiff’s real complaint with the deputy’s testimony was that he concluded that the father caused the collision because

he accelerated towards the intersection earlier than the plaintiff's expert concluded he had. However, this conclusion was based on eyewitness testimony, not the calculation of the coefficient of friction. Thus, whether or not the deputy used a Durometer to check the tires had no bearing on his testimony regarding when he concluded the father accelerated toward the intersection. Accordingly, even if the trial court improperly allowed the deputy to testify regarding the coefficient of friction or causation, the Court held that it could not conclude that such testimony led to an improper verdict. The Court affirmed the judgment of the trial court.