

# TADC PROFESSIONAL LIABILITY NEWSLETTER

*Fall 2007*

*By Michael B. Johnson  
Thompson Coe Cousins & Irons, LLP*

*This newsletter is intended to summarize the most significant recent cases impacting non-medical professional malpractice litigation. It is not a comprehensive digest of every case involving professional liability issues during the period or of every holding in the cases discussed. This newsletter was not compiled for the purpose of offering legal advice. Any opinions expressed herein are those of the author and do not necessarily reflect the views of Thompson Coe Cousins & Irons, LLP.*

## Vicarious Liability of Law Firms

*Owens v. McLeroy, Litzler, Rutherford, Bauer & Friday, P.C., et al.*, No. 06-07-00030-CV, 2007 WL 2682109 (Tex. App.—Texarkana Sept. 14, 2007, no pet.)

In *Owens* the Texarkana Court of Appeals considered the potential vicarious liability of a law firm for the alleged acts of one of its attorneys.

Appellant Coy Owens brought this appeal from the grant of summary judgment in favor of the appellee law firm of McLeroy, Litzler, Rutherford, Bauer & Friday, P.C. Owens alleged that his father, with the assistance of Frank Bauer, had converted personal property belonging to Owens, had committed wrongful sequestration and was liable for abuse of process. Bauer was an attorney associated with McLeroy, Litzler (“the Firm”). Owens further alleged that the Firm was vicariously liable for Bauer’s role in these alleged acts.

The trial court signed separate orders granting summary judgment for Bauer individually and for the Firm. Owens filed a timely notice of appeal in the case against the Firm. However, he did not appeal

the summary judgment in favor of Bauer individually and it became a final judgment.

On appeal, Owens argued that there was a genuine issue of material fact as to whether the Firm was vicariously liable for Bauer’s acts. The Firm asserted that Bauer was not acting as its agent as to the acts and/or omissions complained of by Owens.

The *Owens* Court noted that, generally, the doctrine of vicarious liability renders a principal liable for the conduct of its employee or agent. Such liability is based on the principal’s control or right to control the agent’s actions undertaken the further the principal’s objectives.

The Firm vigorously contested the allegation that Bauer was acting as its agent in relation to the acts giving rise to Owens’ claims. However, the *Owens* Court held that it need not reach this issue. The Court noted that Bauer had obtained a take nothing summary judgment in his favor which was not appealed and became a final judgment. Since Owens’ allegations against the Firm were solely based on vicarious liability, the summary judgment in favor of Bauer necessarily meant that the Firm could not be vicariously liable. There were no allegations in Owens’ live pleading complaining of the Firm’s independent conduct. Therefore, the summary judgment in favor of the Firm was proper notwithstanding the question of whether Bauer was acting on the Firm’s behalf.

## Personal Jurisdiction

*Robert P. Markette, Jr. and Gilliland & Caudill, L.L.P. v. X-Ray X-Press Corp.*, No. 14-07-00146-CV, 2007 WL 2447979 (Tex. App.—Houston [14<sup>th</sup> Dist.] Aug. 30, 2007, no pet.).

In *Markette* the 14<sup>th</sup> Court of Appeals considered whether an Indiana law firm was subject to personal jurisdiction in Texas as a result of legal advice given to a Texas corporation.

X-Ray X-Press Corporation (“X-Ray”), a Texas corporation, was sued in Indiana state court. X-Ray hired Gilliland & Caudill (“Gilliland”), an Indiana law firm, to represent it in the Indiana lawsuit. Robert Markette, an attorney with Gilliland, was the primary attorney assigned to the X-Ray matter.

In the underlying Indiana lawsuit, Markette filed a motion to dismiss the suit against X-Ray for lack of personal jurisdiction. The motion was denied by the

Indiana state court. Markette then sent an email from Indiana to X-Ray in Texas providing his legal advice regarding X-Ray's options. One of the options was for X-Ray to take no further action in the Indiana lawsuit. Markette advised that the Plaintiffs would likely move for default judgment. Once it was granted, Plaintiffs would institute enforcement proceedings in Texas to collect the judgment. Markette further advised that X-Ray would then be able to re-litigate the issue of jurisdiction in a Texas court in the enforcement proceeding. He concluded that a Texas court would be more likely to agree that Indiana did not have jurisdiction over X-Ray. However, he cautioned that if the court found against X-Ray it would be subject to a default judgment that must be satisfied. X-Ray accepted this option and allowed his adversary to obtain a default judgment against it in the Indiana suit. Ultimately, a Texas court found against X-Ray in proceedings to enforce the judgment and X-Ray was required to satisfy the default judgment.

X-Ray sued Markette and Gilliland for legal malpractice and other related claims. Markette and Gilliland filed special appearances challenging the court's personal jurisdiction. The trial court initially granted the special appearances but reversed its ruling following X-Ray's motion for new trial.

On appeal, the *Markette* Court first recited the well-established test for personal jurisdiction. The Court noted that the Texas Long Arm Statute governs the exercise of personal jurisdiction over non-resident defendants by Texas courts and that the statute reaches as far as due process allows under the Federal Constitution. Personal jurisdiction is proper if the defendant has minimum contacts with the state and exercise of jurisdiction will not offend traditional notions of fair play and substantial justice. The "touchstone" of personal jurisdiction is the non-resident's "purposeful availment" of the benefits of Texas law. The Court further noted that a defendant's contacts can give rise to either general or specific jurisdiction. General jurisdiction arises from continuous and systematic contacts with the forum. Specific jurisdiction is based on purposeful contacts that give rise or relate to the litigation.

Turning to the facts of this case, the *Markette* Court noted that X-Ray's jurisdictional allegations related only to specific jurisdiction. To establish specific jurisdiction, there must be a substantial connection between the defendant's forum contacts and the operative facts of the litigation. In the present case, X-Ray's jurisdictional allegations focused on the supposed incorrect legal advice about Texas law

upon which X-Ray allegedly relied to its detriment. However, Markette exercised his legal judgment and formed his legal opinions in Indiana. While Markette communicated his opinions and judgment to X-Ray in Texas, the operative facts of X-Ray's claim focused on the legal advice itself, not the communication of said advice. Even if Markette gave legal advice on Texas law directed to a Texas client, the *Markette* Court found that this would not be sufficient to establish personal jurisdiction. Markette's legal judgment would be the focus of the litigation. This legal judgment was exercised in Indiana, not in Texas.

The *Markette* Court noted that the Texas Supreme Court has rejected the notion of focusing on where a defendant directed a tort or where the effect of the tortious conduct will be felt in determining specific jurisdiction. Rather, the correct analysis is the degree of connectedness between the forum contacts and the litigation to determine whether the operative facts of the litigation focus on these contacts. The Court concluded that the exercise of personal jurisdiction did not comport with due process and reversed the trial court's ruling.

*Weldon-Francke and Normandin Cheney O'Neil, PLLC v. Fisher*, No. 14-06-00834-CV, 2007 WL 2592990 (Tex.App.—Houston [14<sup>th</sup> Dist.] September 11, 2007, no pet.).

In *Fisher*, the 14<sup>th</sup> Court of Appeals again examined the exercise of personal jurisdiction over a non-resident attorney and a non-resident law firm. In this instance the Court paid particular attention to the role of a law firm's website on the issue of general jurisdiction.

Ms. Weldon-Francke is a New Hampshire attorney who practices with the New Hampshire law firm of Normandin Cheney O'Neil, PLLC. The Fishers are Texas residents who owned a second home in New Hampshire. The Fishers sued Weldon-Francke and her law firm for legal malpractice and breach of fiduciary duty.

The claims derived from legal advice Weldon-Francke provided to the Fishers concerning federal estate tax liability and the transfer of certain property located in New Hampshire into a trust for the benefit of their two sons. The Fishers alleged that Weldon-Francke prepared a trust document and a deed of trust that would have affected a transfer of the New Hampshire home to the trust. The Fishers further alleged that Weldon-Francke provided legal advice

regarding the transfer of the property to the trust, billed the Fishers for the legal services, and the Fishers paid for the services. The Fishers asserted that the legal advice was erroneous. However, the Fishers claimed that Weldon-Francke sent them an unsolicited letter, several years after the trust activities, in which she asserted that the trust did achieve the goal of avoiding federal estate taxes. When their Texas counsel requested an explanation of Weldon-Francke's letter, the Fishers alleged that she failed to admit that her advice was erroneous and tried to "obscure" her malpractice in additional communications, both orally and in writing.

Weldon-Francke and Normandin Cheney O'Neil, PLLC ("the Firm") entered special appearances in response to the suit contesting personal jurisdiction. The trial court denied the special appearances.

On appeal, in support of the special appearances Weldon-Francke noted that she is not licensed to practice law in Texas and the Firm maintains a single office in New Hampshire. She has never been to Texas, has never advertised in Texas and has never actively promoted business in Texas. She has never represented Texas residents in litigation or transactions in Texas.

She further alleged that her initial phone communication was with the Fishers in New Hampshire and that their initial meeting occurred in New Hampshire. The trust instruments were drafted in New Hampshire and were sent to the Fishers at their New Hampshire address. Similarly, the Firm's invoices were sent to the Fishers in New Hampshire. Five years after the trust was formed, the Fishers contacted Weldon-Francke from their New Hampshire residence to discuss the issues raised by the trust. Weldon-Francke admitted that she communicated with the Fishers' Texas counsel, but asserted that she had never contacted the Fishers directly in Texas during the time period relevant to the creation of the trust.

In support of specific jurisdiction, the Fishers focused upon (1) Weldon-Francke's communication with their Texas counsel, and (2) Weldon-Francke's subsequent letter to the Fishers, in Galveston, Texas, defending the manner in which the transaction was handled.

The *Fisher* Court noted knowingly contracting with and accepting payment from Texas residents for services was insufficient to support specific jurisdiction. Specific jurisdiction is based on purposeful contacts that give rise or relate to the

litigation. The phone calls and letters to Texas, which occurred many years after the legal services were performed, did not give rise to the Fishers' claims and therefore could not support specific jurisdiction.

The Fishers also alleged that general jurisdiction existed in Texas. General jurisdiction exists when a defendant has continuous and systematic contacts with Texas so that Texas courts may exercise personal jurisdiction over the defendant even if the plaintiff's claims did not arise from or relate to the defendant's activities purposefully directed at Texas.

The Fishers' only basis for general jurisdiction was the Firm's website. The Court noted that internet contacts are evaluated on a "sliding scale" in a general jurisdiction analysis. At one end of the continuum are websites through which a defendant does business over the internet by entering into contracts and through the repeated transmission of computer files. At the other end of the scale are websites that provide passive posting of information on the internet. The latter scenario is not sufficient to establish general personal jurisdiction.

The *Fisher* Court concluded that the Firm's website did not provide a basis for personal jurisdiction. The evidence demonstrated that the Firm's website did not allow (1) the exchange of information between the user and the Law Firm; or (2) transaction of business or entry of contracts through the website or internet. The Court thereby concluded that the Firm's website did not provide a basis for general jurisdiction. The *Fisher* Court reversed the trial court's denial of the special appearances of Weldon-Francke and the Firm.

### **Work Product Privilege – Prosecutors**

*In re Bexar County Criminal Attorney's Office*, 224 S.W.3d 182 (Tex. 2007).

In *In re Bexar County*, the Texas Supreme Court examined the question of whether the work-product privilege protects prosecutors from testifying in a malicious prosecution suit when they have already produced the prosecution file.

Real party in interest David Crudup and relator Cynthia Blanks were feuding neighbors who complained about each other repeatedly regarding barking dogs, obscenities, strewn grass clippings and similar "incivilities." In one instance, Blank alleged that Crudup threatened to kill him. Following this

complaint the DA charged Crudup with making terrorist threats. The DA's prosecution file contained numerous memos, letters from Blank and notes of interviews with Blank. The notes indicated that Blank refused to testify at trial despite the prosecutor's warning that the DA's Office would drop the charges against Crudup if he did not testify.

The DA's Office eventually dropped the charges and Crudup sued Blanks for malicious prosecution. The DA's Office turned over its prosecution file in response to a *subpoena duces tecum*. Thereafter, Crudup subpoenaed one of the prosecutors to testify at trial. The DA's Office filed a motion to quash and for a protective order, arguing that the work-product privilege precluded the prosecutor's testimony sought by Crudup. Crudup responded that the DA's testimony was not work product and, in the alternative, that the DA had waived the privilege by disclosing the prosecution file. The trial court granted the DA's motion. Crudup complained that the ruling had "damaged" and "severely limited and handicapped" his case.

The court of appeals granted Crudup's petition for mandamus relief, reasoning that "[u]nder these circumstances the work-product privilege does not operate as a blanket privilege covering all decisions made by the DA's office."

The Supreme Court first noted that its prior decisions had not announced a blanket privilege waiver or authorized plaintiffs to subpoena prosecutors to testify whenever they wished to bolster the causation element of a malicious prosecution action. The prosecutor's direct testimony was not necessary to establish causation in a malicious prosecution suit.

The Court then reviewed the scope and nature of the work-product privilege, which protects materials prepared by or at the request of an attorney in anticipation of litigation. Broader than the attorney-client privilege, the work-product privilege outlives the litigation for which the materials are initially prepared. The privilege extends beyond documents to protect an attorney's mental impressions, opinions, conclusions and legal theories, as well as the ordering of documents.

The Court noted that the DA's entire file as well as conversations made in the course of the investigation, information learned during the investigation and the DA's decision to drop the case are protected by the work-product privilege.

Assuming, *arguendo*, that the requested testimony did not represent sacrosanct "core work product," Crudup was required to show "substantial need" for the prosecutor's testimony and that "he [would be] unable without undue hardship to obtain the substantial equivalent of the material by other means."

As to the first prong, "substantial need", the Court determined that Crudup did not meet the test. While the testimony would undoubtedly bolster his case, this was not sufficient to overcome the privilege.

Turning to the second prong, the Court held that the DA's disclosure of the prosecution file provided Crudup with the "substantial equivalent" of the desired testimony. The Court noted that most of these materials were likely to be admissible through various exceptions to the hearsay rule. Crudup could not meet the undue hardship prong following disclosure of the prosecution file.

Finally, the Court held that production of the prosecution file did not constitute a blanket waiver of the work-product privilege. While the privilege was waived as to the contents of the prosecution file, this waiver was "limited, not limitless . . ." It did not require the DA to produce its prosecutors and subject them to further disclosure of their privileged mental processes and case preparation.

### **Legal Malpractice – Privity**

*O'Donnell v. Smith*, No. 04-04-00108-CV, 2007 WL 2114654 (Tex.App.—San Antonio July 25, 2007, pet. filed).

In *O'Donnell*, the San Antonio Court of Appeals considered, in light of the Supreme Court's recent decision in *Belt v. Oppenheimer, Blend*, whether the executor of a decedent's estate had the necessary privity with a law firm to maintain a suit for legal malpractice deriving from services rendered to the decedent.

In 1968, the decedent, Corwin Denney, retained attorneys Smith and Guenther of the law firm of Cox & Smith (collectively "Cox & Smith") to advise him regarding the administration of his late wife's estate. Denney and his wife had entered into marriage with considerable separate assets. These assets were commingled during their marriage. While they had made certain oral agreements concerning the characterization of their assets as separate or community, nothing was reduced to writing. Cox &

Smith did an independent analysis of the Denneys' assets and concluded that more information was necessary to determine the proper characterization.

In 1969, Cox & Smith filed a Federal Estate Tax Return for Denney as executor of his late wife's estate. The tax return included an inventory of Denney's wife's estate which did not list considerable stock assets as her separate property. Based upon this information, Denney funded his wife's testamentary trust but did not include the stock. Their children would receive the residue of this testamentary trust upon Denney's death.

Denney died in 1999. Very shortly after Denney's death, Denney's children sued his estate claiming that the testamentary trust had been under funded. Specifically, they complained that some of the stock assets that were characterized as community property in 1969 (and therefore held by Denney) should have been held by the trust. The executor of Denney's estate, O'Donnell, settled the children's claims for \$12.9 million. O'Donnell then sued Cox & Smith, alleging that the Firm's negligence between 1968 and 1970 caused the Denney Estate to settle the claims of the beneficiaries.

In the Court's initial 2004 opinion, it had held that no cause of action had accrued during Denney's lifetime and thus, O'Donnell (as executor) lacked the necessary privity of contract with Cox & Smith to maintain the suit.

In the instant appeal, the Court of Appeals considered its prior holding in light of the Supreme Court's opinion in *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006), discussing that opinion at length. The *Belt* Court held that a legal malpractice claim in the estate planning context survives the deceased client. It reasoned that such legal malpractice claims seeking recovery for purely economic loss are essentially limited to property damages. Thus survival of the legal malpractice claim comports with the common law rule that actions for damages to property survive the decedent. The *Belt* Court added that a legal malpractice claim in the estate planning context accrues before the client's death. Therefore, some (if not all) injury arises during the decedent's lifetime and the claim survives the decedent.

The San Antonio Court then considered the parties' competing views of *Belt's* application to *O'Donnell*. O'Donnell argued that *Belt* was controlling, that all causes of action accrued during Denney's lifetime and that, as personal representative of Denney's

estate, O'Donnell may maintain a legal malpractice action against Denney's attorneys. Cox & Smith countered that *Belt* only relaxed the privity rule to allow suits by personal representatives for estate planning malpractice. Cox & Smith further argued that O'Donnell's claims did not arise out of estate planning for Denney and thus the privity rule continued to bar O'Donnell's claims.

The Court agreed with O'Donnell's more expansive reading of *Belt*. The Court held that *Belt* relied upon the legal principle that actions for damage to property survive the death of the injured party. The Court then determined that *Belt* foreclosed a privity argument for suits brought by the estate's personal representative on behalf of the estate. This case was not an instance of disgruntled heirs, who were never represented by the firm, seeking damages to the estate. Rather, in this instance, as in *Belt*, the personal representative had "stepped into Denney's shoes" to prosecute Denney's malpractice claims.

Applying these principles to the claims in *O'Donnell*, the Court concluded that the malpractice claims accrued during Denney's lifetime. It further held that the claims, alleging damage to property, survived Denney's death. Moving to the merits, the Court concluded that O'Donnell had presented sufficient evidence to defeat Cox & Smith's no-evidence and traditional Motions for Summary Judgment on legal malpractice. No-evidence summary judgment in favor of Cox & Smith was affirmed as to O'Donnell's claims for breach of fiduciary duty and malice. Thus, the Court reversed and remanded O'Donnell's legal malpractice claims for further proceedings.

A petition for review has been filed with the Texas Supreme Court and remains pending as of the date of writing.