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.

AFFIDAVITS OF PREVAILING COUNSEL WERE INSUFFICIENT TO SUPPORT A LOADESTAR DETERMINATION OF AN ATTORNEY FEE AWARD.

El Apple I, LTD., v. Olivas, 370 S.W.3d 757 (Tex. 2012).

Plaintiff Myriam Olivas, an Applebee's restaurant manager, filed suit against her employer, El Apple I, Ltd., alleging sex discrimination and retaliation. A jury found that while Olivas was not the target of sex discrimination, her decision to file complaints against her employer was a motivating factor in El Apple's creation of a hostile work environment. The trial court awarded Olivas damages for back pay, past compensatory damages, and future compensatory losses totaling $104,700.

As the prevailing party, Olivas submitted an application for attorney's fees which was supported by affidavits from her attorneys, Daniel Gonzalez and Francisco Dominguez. Gonzalez averred that he spent approximately 700 hours on the case. Dominguez averred that he spent approximately 190 hours on the case, but was only seeking compensation for 150 hours because some of his work was duplicative of Gonzalez's work. The trial court used the lodestar method to calculate the fee and determined that Gonzalez should be compensated at a rate of $250 per hour for his 700 hours for a total of $175,000, and that Dominguez should be compensated at a rate of $300 per hour for all 190 of his hours for a total of $57,000. The court then enhanced the lodestar by applying a 2.0 multiplier, resulting in a $464,000 fee for trying the case. The court further awarded $6,500 for a total of 100 hours of assistant work and an additional $99,000 in attorney's fees for post-judgment matters.

El Apple challenged the affidavits on appeal, arguing the court did not have sufficient evidence to make a reasonable assessment of the fee application. The El Paso Court of Appeals vacated the award of back pay but otherwise affirmed the award for compensatory damages and attorney's fees, holding that more detailed billing records were not necessary. The El Paso court also held that the trial court did not err in multiplying the lodestar because it considered separate factors from those it used in calculating the lodestar.

As a matter of first impression, the Texas Supreme Court analyzed the evidence required to support an attorney's fee award using the lodestar approach. To make a meaningful evaluation under the lodestar

approach, the trial court must be supplied with proof in support of facts underlying the lodestar, including: (1) the nature of the work; (2) who performed the work and their rate; (3) approximately when the services were performed; and (4) the number of hours worked. The Court noted that an attorney could testify to these facts in the simplest of cases, but in all others would have to refer to some type of record or documentation. Therefore, in cases where there is an expectation that the lodestar method will be used, attorneys should document their time as they would for their own clients, that is contemporaneous billing records or other documentation recorded reasonably close to the time of performance. Furthermore, if multiple attorneys or other legal professionals are involved, the fee application should indicate which professional performed each particular task or category of tasks.

Applying the articulated requirements for supporting a lodestar fee, the Court deemed the submitted affidavits insufficient. Neither attorney indicated how the 890 hours spent on the case were devoted to any particular task. Neither attorney presented time records or other documentary evidence. The attorneys based their time estimates on generalities: the amount of discovery in the case; the number of pleadings filed; the number of witnesses interviewed; and the length of the trial. Furthermore, the attorneys averred that legal assistants were necessary to the prosecution of the case, but offered no evidence to describe the qualifications of the assistants, the nature of the work they performed, their hourly rate, or the number of hours they expended. Because the affidavits in this case did not meet the minimum requirements, the Court reversed and remanded the case to the trial court with instructions that the attorneys applying for fees reconstruct their work in the case to provide the minimum information required for the trial court to conduct a meaningful review. Turning to whether the trial court erred in applying a multiplier to the lodestar, the Court determined that a lodestar presumptively produces a reasonable fee that may justify enhancements in only exceptional circumstances. However, the Court held that whether a multiplier is needed in this particular case cannot be determined until the base lodestar is known.

TRIAL COURT IN A CONDEMNATION CASE IMPROPERLY ADMITTED EXPERT TESTIMONY THAT VIOLATED THE VALUE-TO-THE-TAKER RULE, BUT PROPERLY EXCLUDED EXPERT TESTIMONY THAT DID NOT SHOW THE EXISTING USE OF THE LAND WAS NOT THE LAND'S BEST USE.

Enbridge Pipelines (East Texas) L.P. v. Avinger Timber, LLC, No. 10-0950, 2012 WL 3800234 (Tex. Aug. 31, 2012).

In 1973, predecessors in interest of Avinger Timber, LLC leased 24 acres to a gas processing company for the building and operation of a gas processing facility. The land was in one of Texas' most productive counties for natural gas and already had several pipelines running beneath it. A large processing facility was subsequently built, and Avinger granted easements for additional pipelines, roads, and a high-voltage electric line. The lease was renewed in 1998, and Avinger retained a reversionary interest in the land. Enbridge Processing, LP became the lessee. After Enbridge and Avinger were unable to agree on a rental price for the next renewal period, Enbridge Processing merged with Enbridge Pipelines (East Texas) L.P., a public utility with eminent domain power. Enbridge Pipelines then filed a petition to condemn the land, and the commissioners awarded Avinger $47,580 after it failed to appear at the valuation hearing. Avinger objected to the default award and went to trial on the issue of the fair market value. Avinger's expert, David Bolton, valued the property at $20,955,000. Enbridge Pipelines's expert, Albert Allen, valued the property at $47,940. The trial court allowed Avinger's expert's testimony but excluded the testimony of Enbridge Pipelines's expert. The jury awarded Avinger $20,955,000 as just compensation for the land, and the trial court rendered judgment on that verdict. The Texarkana Court of Appeals affirmed the trial court's decisions to admit the testimony of Avinger's expert and exclude the testimony of Enbridge's expert.

Avinger's expert, David Bolton, concluded that the land's best use was as an industrial property to house a gas processing plant and assigned a $20,955,000 value to the land. In reaching this value, Bolton partially relied on a provision in the lease that required the lessee, Enbridge, to remove all improvements on the land within six months of termination. Bolton further testified that the value of the property to Enbridge would have been much greater than $20,955,000 because by condemning the land, Enbridge no longer had the obligation to

remove the improvements. Considering Enbridge's cost savings from not having to remove the plant, Bolton testified that a prudent and knowledgeable investor would pay between $21,750,000 and $28,500,000 for Avinger's interest. Despite this opinion, Bolton further testified that the land was still worth $20,955,000 even if Enbridge Pipelines did not exist, and the plant was "swept away by a tornado." Enbridge moved to exclude Bolton's testimony, arguing it violated the value-to-the-taker rule because it considered the land's unique value to Enbridge. The trial court denied Enbridge's motion and the court of appeals affirmed, holding that the value-to-the-taker rule had not been violated because the value of the land as a gas processing facility was not unique to Enbridge.

The Texas Supreme Court analyzed Bolton's consideration of Enbridge's potential costs savings in valuing the land and held that it violated the value-to-the-taker rule. The Court noted that the pivotal consideration in a condemnation proceeding is what the owner has lost rather than what the taker has gained. The value-to-the-taker rule prohibits an owner from receiving an award based on the land's special value to the taker, as distinguished from the land's value to others who may or may not have the power to condemn. The interest that should have been appraised in this case was Avinger's interest in the land when the land is put to its highest in best use. According to the value-to-the-taker rule, Avinger was entitled to compensation for the suitability of the land for gas processing, but not for the land's unique value to Enbridge as a result of the lease's terms. Bolton's opinion improperly considered the value to Enbridge of not having to move the current plant. This amount was cost savings to Enbridge, not enhancements to the value of the land that Avinger lost. Therefore, the trial court abused its discretion by admitting this portion of Bolton's testimony.

The Court also affirmed the trial court's exclusion of Allen's opinion. In condemnation cases, the presumed highest and best use of land is the existing use of the land. A landowner can rebut this presumption by showing a reasonable probability that at the time of the taking, the property was adaptable and either needed, or would likely be needed, in the near future for another use. Allen offered no evidence indicating that the property was adaptable and was needed as residential property in the near future. In light of the land's history as a gas processing facility, Allen did not show why the existing use was not the highest and best use.

Justice Johnson filed a dissenting opinion in which Justices Green and Willett joined. The dissenting justices discussed David Bolton's testimony and concluded that it did not violate the value-to-the-taker rule because Texas law and the Uniform Standards of Professional Appraisal Practice (USPAP) required that the terms of the lease be taken into consideration. The terms of the existing lease would affect the value to any hypothetical willing buyer, not just to Enbridge. Bolton opined that willing buyers would factor Enbridge's relocation costs and the potential for purchasing Enbridge's plant into the property's value. Furthermore, Bolton never testified to a value for that factor. Instead, Bolton's testimony clearly stated that the value of the property combined with Enbridge's affixed plant was $20,955,000, a value based on accepted appraisal methods, rather than the land's value to Enbridge based on potential cost savings. The dissenting justices concurred in the majority opinion that Albert Allen's testimony was properly excluded because he improperly valued the land as a vacant, rural residential property.

TESTIMONY OF A WIDESPREAD PATTERN OF INDIFFERENCE FOR MAINTENANCE IS INADMISSIBLE AND IS REVERSIBLE ERROR WHEN THE TESTIMONY FAILS TO SHOW A SUFFICIENT CONNECTION BETWEEN THE EVIDENCE OFFERED AND THE EVENTS AT ISSUE.

U-Haul Intern., Inc. v. Waldrip, No. 10-0781, 2012 WL 3800220 (Tex. Aug. 31, 2012).

A customer sued U-Haul and its subsidiaries when the truck he rented rolled over him when the parking break failed. At trial, plaintiff presented the following evidence in support of his negligence and gross negligence claims: U-Haul's faulty maintenance inspection program; testimony of previous drivers who had problems with the same rental truck; and two expert witnesses who stated that a broken breaking system and faulty transmission caused the accident.

The trial court also admitted, over defendants' objections, the testimony of Brian Patterson, the president of a Canadian private entity, who oversaw the safety of U-Haul trucks entering Canada. Patterson testified on the, "systematic disregard for public safety in the maintenance of vehicles in the Provence of Ontario." In support of his testimony, Patterson recalled instances of carbon monoxide poisoning, broken car parts, and faulty inspections. Although Patterson relied on government reports of

inspections done on U-Haul trucks, he provided no documentation in support of his testimony.

The jury found that all three defendants were joint and severally liable to the plaintiff on all grounds and awarded over $20 million in actual damages. In addition, the jury awarded over $40 million in punitive damages against one defendant and $20 million in punitive damages against the other. After applying a statutory punitive cap, the trial court ordered each defendant to pay slightly over $11 million. The Dallas Court of Appeals reversed the trial court's award of exemplary damages as to one of the defendants and affirmed the remaining judgment in all other respects. The court of appeals also held that the trial court did not abuse its discretion in admitting Patterson's testimony. The central issue on appeal at the Texas Supreme Court was the admissibility of Patterson's testimony. Defendants argued that Patterson's testimony was irrelevant, prejudicial hearsay that tainted the entire trial.

The Texas Supreme Court agreed with U-Haul and remanded the negligence claims against all defendants for a new trial. After agreeing with U-Haul that U-Haul timely objected to the Patterson testimony in order to preserve the issue, the Court discussed why the testimony was inadmissible. In the first evidentiary issue, plaintiff argued that Patterson's testimony should still be admissible against two of the three defendants because they waived their objections when they failed to raise a limiting instruction under Tex. R. Evid. 105. The Court held that Rule 105 does not apply when the evidence in question is not admissible against any party for any purpose. Furthermore, the Court stated that plaintiff used the Patterson testimony against all defendants when plaintiff's counsel collectively alluded to "U-Haul" safety problems when discussing Patterson's testimony. Thus, Patterson's testimony was inadmissible against all defendants.

The Court then addressed the admissibility of Patterson's testimony and why it was irrelevant to the issue at hand. Plaintiff offered Patterson's testimony as proof of a pattern of indifference for poor maintenance as support for exemplary damages. Despite the wide ranging problems that U-Haul had according to Patterson, very little, if any of Patterson's testimony dealt with the issues of faulty brakes and transmission problems. Consequently, the Court found that Patterson's testimony was not sufficiently similar to the issue at hand, and it distracted the jury from the relevant legal issues. The Court refused to draw the conclusion that, "safety problems in a foreign country indicated a disregard of inspection and maintenance programs causing an objectively extreme risk of serious injury in the United States." Ultimately, the Court held that Patterson's testimony probably led to an improper judgment.

Of note, the Court withheld judgment on the issue of whether failing to produce or admit the public records renders inapplicable the hearsay exception of Rule 803(8) for public reports setting forth factual findings from an investigation made pursuant to lawful authority.

Justice Lehrmann wrote a dissenting opinion arguing that even if the trial court abused its discretion in admitting Patterson's testimony, the error was harmless.

JOURNALIST'S AFFIDAVIT THAT RELIED ON CONFIDENTIAL SOURCES WAS ADMISSIBLE IN DEFAMATION ACTION AS RELEVANT, NON-HEARSAY EVIDENCE ABOUT THE JOURNALIST'S STATE OF MIND.

Nelson v. Pagan, No. 05-09-1380-CV, 2012 WL 3206881 (Tex. App.—Dallas Aug. 8, 2012, no pet.)

Officers of the Dallas Police Department sued a journalist and others for a published article that accused the department of writing fake tickets to increase the number of arrest warrants issued. The officers sued for defamation, tortious interference with employment, and intentional infliction of emotional distress.

The defendants moved for summary judgment by submitting the affidavit of the journalist to negate the actual malice element of defamation. The officers objected to the affidavit arguing that it violated Texas Rule of Civil Procedure 166(a)(c). Rule 166 allows summary judgment based on "uncontroverted testimonial evidence of an interested witness . . . if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies that could have been readily controverted." The officers argued that the affidavit could not have been "readily controverted" because it relied on confidential sources.

The trial court overruled the officers' objection and granted summary judgment in favor of the defendants without specifying the grounds. On appeal, the officers argued that the trial court had erred by not sustaining their objection to the affidavit.

The issue before the Dallas Court of Appeals was whether the affidavit's reliance on confidential sources was evidence that could not have been "readily controverted" for summary judgment.

The Court relied on decisions of the Texas Supreme Court and interpreted "readily controverted" as "effectively countered by opposing evidence" – not merely "easily and conveniently rebutted." It explained that the journalist's state of mind is relevant in a defamation claim. To negate actual malice, the evidence must show that the journalist believed in the challenged statement and had a plausible basis for the belief.

The Court of Appeals held that the trial court did not abuse its discretion in overruling the officers' objection to the affidavit. It held that although the affidavit had relied on confidential sources, it was admissible as relevant, non-hearsay evidence about the journalist's state of mind. The affidavit described the journalist's research, it supported his belief that the information from the confidential sources was true, and it showed that he had a "plausible basis" for believing them.

ALLEGED HEARSAY IN A PLAINTIFF'S RESPONSE TO A NO EVIDENCE MOTION FOR SUMMARY JUDGMENT WAS ADMISSIBLE AND SUFFICIENT TO DEFEAT THE MOTION BECAUSE THE TRIAL COURT FAILED TO RULE UPON DEFENDANT'S HEARSAY OBJECTION.

Gaspar v. Lawnpro, 372 S.W.3d 754 (Tex. App.—Dallas 2012, no pet.)

Despite plaintiffs' complaints and their employer's promises, employer paid plaintiffs with worthless checks for two months. Plaintiffs sued their employer, Lawnpro, for breach of contract, fraud, conversion, punitive damages, and attorney's fees when Lawnpro reneged on its promise to fully compensate plaintiffs for bounced checks. Lawnpro filed a no evidence motion for summary judgment and only asserted that there was, "no evidence of one or more of the following elements" in each claim. The motion did not refer to the facts.

In response, each plaintiff filed an affidavit outlining his role as employee, total amount of hours worked, and Lawnpro's promise to compensate them for the bounced checks. Plaintiffs also attached an appendix to the affidavit that included a document from Lawnpro that was stamped "Sub-Contract/Seasonal Labor" which included hours worked, pay rate, payment periods, and year to date amounts paid.

In a separate pleading, Lawnpro objected to the admissibility of the affidavits because the appendix included hearsay. The trial court failed to make a ruling on the objection but nonetheless granted Lawnpro's no evidence motion for summary judgment.

Plaintiffs appealed and argued that the affidavits were sufficient to defeat the no evidence motion for summary judgment. The Dallas Court of Appeals agreed and reversed and remanded the case. The Court held that the affidavits and appendix raised a fact issue as to the elements of plaintiffs' claims. The affidavits and supporting documents, which were arguably hearsay, indicated that Lawnpro promised to pay plaintiffs for the bounced checks. The Court held that Lawnpro waived its objection to hearsay because Lawnpro never sought a ruling on its hearsay objection.

In conclusion, the Court held that in order to prohibit hearsay evidence in a response to a no evidence motion for summary judgment, the moving party must get a ruling from the trial court on a hearsay objection; otherwise the objection is waived. However, the opposing party must be given an opportunity to amend before the trial court rules on the motion.

THIRD PARTY WITNESS SPONSORING BUSINESS RECORDS DOES NOT NEED PERSONAL KNOWLEDGE OF THE PROCEDURES USED IN PREPARING BANK RECORDS WHEN THE BANK RECORDS WERE INCORPORATED INTO THE BUSINESS OF THE THIRD PARTY, ARE RELIED UPON BY THE THIRD PARTY, AND THERE ARE OTHER INDICATORS OF RELIABILITY.

Dodeka, LLC v. Campos, No. 04-11-00339-CV, 2012 WL 1522179 (Tex. App—San Antonio May 2, 2012, no pet.)

Dodeka, LLC, a collection agency, brought a collection action against Campos. At trial, Dodeka offered into evidence an affidavit by one of its custodians of record. Attached to the affidavit were business records obtained by Dodeka from Chase Bank. Campos raised a hearsay objection, arguing that the documents attached to the affidavit were not

admissible because both the affidavit and the documents were untrustworthy. The trial court found Dodeka did not lay a sufficient predicate to admit the documents into evidence and excluded the attached records. With no evidence in support of the contract claim, the trial court entered a take-nothing judgment.

On appeal, the San Antonio Court of Appeals disagreed, holding that the business records properly fit within hearsay exception 803(6), were adequately trustworthy, and should have been admitted. In reaching its decision, the Court considered the general rule that a proponent of hearsay bears the burden to show that the offered evidence fits within an exception to the general rule prohibiting admission of the hearsay evidence. The business records exception allows admission of documents that contain information concerning activity that is regularly conducted. Additionally, a business record created by one entity that later becomes another entity's primary record is still admissible as a record of regularly conducted activity under Rule 803(6). However, documents received from another entity are not admissible under Rule 803(6), if the sponsoring witness is not qualified to testify about the other entity's record keeping. A witness is qualified to testify about the documents of another entity if it can be established the documents were kept in the ordinary course of business and the documents formed the basis for the ongoing transactions.

Campos contended that the affiant did not have sufficient personal knowledge to attest to Chase's business records because the collection agency is a third party who purchased the account and was not the original author of the documents.

The Court stated that in order to introduce business records authored or created by a third party, the proponent must establish three factors: (1) the document is incorporated and kept in the course of the testifying witness's business; (b) that business typically relies upon the accuracy of the contents of the document; and (c) the circumstances otherwise indicate the trustworthiness of the document. The Court held that Chaffin's affidavit sufficiently addressed these three issues; therefore, the affidavit was sufficiently trustworthy.

In evaluating the trustworthiness of the bank documents, the Court reasoned that Chase had to keep careful records of its customer's accounts; otherwise its business would greatly suffer or fail. In addition, if Chase failed to keep accurate records, it could face criminal or civil penalties.

For the foregoing reasons, the Court held that the trial court erred when it sustained the objection to the affidavit and the attached records. Furthermore, the Court reversed and remanded the case because the evidentiary error probably rendered an improper judgment.