TADC e-Update
The Texas Association of Defense Counsel, Inc.

FROM THE PRESIDENT

Junie Ledbetter,
Jay R. Old & Associates, PLLC, Austin

Dear TADC Friends,

I write to report to you on TADC's current spring activities and let you know of more to come.

TRIAL ACADEMY

Thirty-nine young lawyers just completed the 2014 Trial Academy under the able leadership of Co-Chairs Troy Glander and Gayla Corley of San Antonio, and a fine faculty from around the state. The trial problem was based on a commercial case involving multi-million dollar construction, breach of contract allegations, and complicating family connections "gone bad". Congratulations to the young lawyers attending and completing the academy course work; they did an outstanding job of preparation and presentation. Photos of the class and the faculty are posted on TADC's Facebook page, along with a class roster.
Many thanks to the dedicated and talented presenters and faculty. The success of this program depends on the time and expertise these members invest in the program.

Faculty:

- The Honorable Larry Noll (408th District Court, San Antonio)
- The Honorable Barbara Nellermoe (45th District Court, San Antonio)
- Troy Glander, Allen Nava & Glander, PLLC (Co-Chair)
- Gayla Corley, Langley & Banack, Inc. (Co-Chair)
- Tom Coghlan, Langley & Banack, Inc. (Presenting opening statement demonstration)
- Lamont Jefferson, Haynes & Boone, L.L.P. (Presenting opening statement demonstration)
- Michele Smith, Mehaffy Weber PC (Presenting direct examination)
- James D. (Bo) Guess, Law Offices of James D. Guess (Presenting direct examination)
- Brad Douglas, Naman, Howell, Smith & Lee, PLLC (Presenting closing statement)
- Dan Worthington, Atlas Hall & Rodriguez, L.L.P. (Presenting closing statement)

Breakout Faculty :

- Kelli Borbon, Bracewell & Guiliani LLP
- Heidi Coughlin, Wright & Greenhill, P.C.
- Tom Countryman, Norton Rose Fulbright
- Marcella Della Casa, Espey & Associates, PC
- Ty Griesenbeck, Plunkett & Griesenbeck, Inc.
- Albert Gutierrez, Law Offices of Albert M. Gutierrez, P.C.
- Mike Hendryx, Strong Pipkin Bissell & Ledyard, L.L.P.
- Scott Lyford, Mills Shirley, L.L.P.
- Ed Mattingly, Mattingly Law Firm
- Ron Mendoza, Davis, Cedillo, & Mendoza, Inc.

COMING PROGRAMS:

The Spring Meeting begins April 9 in Washington DC under the direction of Co-Chairs Mike Morrison and Doug McSwane. The program is outstanding with presentations from valued TADC speakers on topics pertinent to your practice. Guest speakers include Ken Starr, Senator John Cornyn, Supreme Court Justice Phil Johnson, The Honorable Jan Patterson, Professor Gene Shipp, Federal Judge Rodney Gilstrap, and DRI President Elect John Parker Sweeney. Look for a report on the meeting and presentations in next month's e-blast. (If you are not able to attend, copies of the papers presented at the meeting can be ordered from the TADC website after the meeting at www.tadc.org) Local programs are scheduled in the near future in Austin (April 23), San Antonio (April 16), and El Paso (April 17). In addition, Jerry Fazio has organized some local CLE in partnership with the Dallas Bar Association. Please look for future announcements with the particulars for those meetings so that you can attend and take the opportunity to strengthen your connections with colleagues locally.

MEMBERSHIP SURVEYS:

TADC recently forwarded you a link to a survey intended to give members the opportunity to describe how the organization might better serve you. So far, 183 of the 1800 TADC members have responded. It's not too late to express your thoughts. The survey is quick and easy, and will not take up too much of your time. Go to TADC Membership Survey to participate today. We want to hear from you.

JUDICIAL SELECTION:

I cannot remember a time when judicial selection was not a topic of discussion at TADC board meetings–some years more fervently discussed than others. It appears that the topic will come to the fore again this year. The House Committee on Judiciary & Civil Jurisprudence, under the direction of Chairman Lewis, met in mid-March to take testimony on the following interim charges:

#1 -- Examine the constitutional qualifications and term lengths for appellate court judges, and consider whether changes would benefit the public and the judiciary.

#6 -- Study the issue of whether Regional Presiding Judges should be appointed by the Chief Justice rather than the Governor.

#7 -- Conduct legislative oversight and monitoring of the agencies and programs under the

committee's jurisdiction and the implementation of relevant legislation passed by the 83rd Legislature.

Most likely, TADC will offer testimony to the committee for consideration and for inclusion in the committee's report. TADC will discuss the topic in more detail at the spring meeting.

TADC, LINKED IN GROUP–CONVERSATION REGARDING MANDATORY E-FILING:

At last glance, 280 of TADC's 1800 members were linked into the TADC LinkedIN private account. I say "private" because access to the account is granted ONLY if you are a TADC member. You might be interested in the details of a recent posting by Rich Phillips, Partner at Thompson & Knight LLP: "As mandatory e-filing (and the accompanying switch to e-service, e-dockets, and e-notices) spreads across Texas, we need to adopt new standard practices to ensure that we fulfill our duties to our clients. An appeal pending in the Federal Circuit . . . ." Join the TADC LinkedIN group to connect to the full story.

STATE BAR ELECTIONS:

The time for active campaigning for this year's elections is drawing to a close. Both candidates running for President - Elect are members of TADC: Allan DuBois of San Antonio and Beverly Godbey of Dallas. Some of you have asked if TADC will make a recommendation for voters. As an organization, TADC traditionally does not endorse one candidate over another in the State Bar elections, and in keeping with that tradition, has not done so this year. We are proud to know that whoever wins will have a TADC affiliation.

I look forward to visiting with you again in April. Just call if you would like to talk about any topic before then.

Until next month, Junie Ledbetter

LEGISLATIVE/POLITICAL UPDATE

The May 27 Republican primary run-off election will likely decide who the next Lieutenant Governor and Attorney General will be. Sen. Dan Patrick (R-Houston) substantially outpolled incumbent Lt. Governor David Dewhurst in the first round, making him a prohibitive favorite to win the office. In the Attorney General race, Sen. Ken Paxton (R-McKinney) likewise holds a substantial lead over Rep. Dan Branch (R-Dallas). Most observers think that about 600,000 votes will be cast in the run-off election, about half of the total votes cast in the March 4 primary. Given the overwhelmingly conservative profile of likely runoff voters, victories for Patrick and Paxton look very likely.

There are a few other runoffs of interest to TADC members as well. In Senate District 2, Sen. Bob Deuell (R-Greenville) faces challenger Bob Hall, who is running as a Tea Party alternative. In Senate District 10, vacated by Democratic gubernatorial nominee

Wendy Davis (Fort Worth), Tea Party conservative Konni Burton leads former Rep. Mark Shelton, who lost to Davis two years ago. Burton has Ted Cruz's endorsement, which will likely be decisive in this race.

On March 17, the House Judiciary and Civil Jurisprudence Committee held its first interim hearing to consider whether the current qualifications for serving as a trial or appellate judge need to be enhanced. The committee heard invited testimony from Chief Justice Hecht, former Chief Justice Jefferson, and others regarding the judicial selection system more generally. While the committee seemed sharply divided on the judicial selection issue, there does appear to be interest in raising qualifications for judicial service. TADC has been invited to participate in joint discussions with TCJL, TLR, and TTLA on this subject.

****

REMINDER - REGISTER NOW
for the 2014 TADC SPRING MEETING

Join the TADC in Washington, D.C.
April 9-13, 2014 – The Fairfax at Embassy Row

A program for the practicing trial lawyer featuring:

~ Senator John Cornyn
~ Federal District Judge Rodney Gilstrap
~ Texas Supreme Court Justice Phil Johnson
~ The Honorable Ken W. Starr
~The Honorable Jan Patterson
…..and more!

9.75 hours of CLE including 3.0 hours ethics

*****The Fairfax at Embassy Row will fill quickly due to Cherry Blossom Festival in Washington and the TADC rate at the hotel is fantastic. It is suggested that you secure your accommodations as soon as possible.***

REGISTRATION MATERIALS HERE

****

CALENDAR OF EVENTS

April 9-13, 2014 - *Registration material available **HERE***
TADC Spring Meeting
The Fairfax Embassy Row – Washington, D.C.
Mike Morrison & Doug McSwane, Co-Chairs

April 16, 2014
TADC San Antonio Happy Hour
Blue Star Brewing Company – San Antonio, Texas

April 17, 2014
TADC El Paso Afternoon CLE & Reception
The El Paso Club – El Paso, Texas

April 23, 2014
TADC Austin Area Happy Hour
Abel's on the Lake – Austin, Texas

July 16-20, 2014 - *Registration material available in early May*
TADC Summer Seminar
Coeur d'Alene Resort – Coeur d'Alene, Idaho
Brad Douglas & Charlie Downing, Co-Chairs

August 1-2, 2014
TADC Budget/Nominating Committee Meeting
DoubleTree Suites – Austin, Texas

August 8-9, 2014
West Texas Seminar - *Registration material available in early June*
Inn of the Mountain Gods – Ruidoso, New Mexico

September 24-28, 2014 - *Registration material available in mid-July*
TADC Annual Meeting
Hyatt Hill Country Resort – San Antonio
Tom Ganucheau & Mitzi Mayfield, Co-Chairs

LEGAL NEWS - CASE UPDATES

CaseSummaries byLauren Freeland,Naman,Howell, Smith&Lee, Austin; Jennie C. Knapp,The Underwood Law Firm, Amarillo&Jarad Kent, Chamblee, Ryan, Kershaw&Anderson, Dallas

Hill Country San Antonio Managment Service, Inc. v. Trejo
San Antonio Court of Appeals, February 12, 2014

Appellee Rachel Trejo sued Appellant Hill Country Achievement Center ("Hill Country") for allegedly failing to monitor or assist her adult son, Rene Trejo, in exiting a van. Rene suffered from several mental disabilities and required special assistance. On July 21, 2011, Ms. Trejo took him to Hill Country, a "Day-Hab" facility that provides care for adults. That day, Hill Country had scheduled a bowling outing. A Hill Country employee took Rene to the bowling alley and returned at about 2:45 p.m. After an unknown length of time, another employee found Rene lying on the pavement outside the van with a severe broken leg that required an eight-week hospital visit that cost approximately $320,000.

The appeal centered on whether the claims for failure to supervise fell under Chapter 74 of the Texas Civil Practice and Remedies Code. Under that section, a plaintiff asserting health care liabilty claims must serve an expert report soon after filing the lawsuit. Failure to do so may result in dismissal. Although Trejo originally made demands and claims under Chapter 74, she later dropped them and did not serve an expert report. Hill Country filed a motion to dismiss based on Trejo's failure to serve an expert report. The trial court denied the motion to dismiss. The appellate court affirmed for two reasons. First, the court determined that Hill Country is not a health care provider but an adult day-care facility. Its employees are not nurses and it does not provide medical care, treatment, or confinement. Further, Hill Country is not overseen by any medical professionals. Second, Rene's injuries were sustained in the course of transportation and were not related to treatment, lack of treatment, or a departure from accepted standards of medical care. The bowling outing was separate and distinct from any medical treatment or doctor-prescribed plan. The claims of lack of supervision sounded in ordinary negligence and were not health care liabilty claims. READ THIS OPINION HERE

Branch V. Monumental Life Insurance Co.
Houston's 14th Court of Appeals, February 11, 2014

In this interpleader case, the appellant Loretta Young Branch challenged the trial court's decision that she was not entitled to interpleaded life-insurance proceeds. Loretta was married to Archie Branch, Sr. when Archie obtained the life insurance policy in question and named Loretta as a beneficiary. Loretta and Archie

divorced on May 3, 2011, and Archie died six weeks later. Loretta demanded insurance proceeds, but the insurer refused payment. Upon learning from a newspaper article that Archie had five children, the insurer filed an interpleader action. The trial court determined that Loretta was not entitled to the proceeds but that they should instead be distributed to Archie's legal heirs.

Loretta appealed, claiming that she was the named beneficiary on the insurance policy and was therefore entitled to the funds. The appellate court disagreed, relying on Texas Family Code Section 9.301(a). That statute provides that if an insured's spouse is designated as a life-insurance beneficiary but the couple later divorces or their marriage is annulled, the earlier designation of the spouse as a policy beneficiary is ineffective. There are three exceptions to this rule: (1) the former spouse is designated as the life insurance beneficiary in the divorce decree, (2) the insured re-designates the former spouse as a beneficiary after the divorce, or (3) the former spouse is designated to receive the proceeds in trust for, or on behalf of, or for the benefit of a child or a dependent of either of the former spouses. Loretta cited old case law that supported her position but predated the statute, and she did not attempt to argue that one of the exceptions applied. The court, therefore, affirmed the trial court's decision and held that the divorce rendered the policy's beneficiary designation ineffective as a matter of law. Read This Opinion Here

In re Berman-Smith
5th U.S. Circuit, No. 13-50154, 12-16-2013

In this case, the Gartleys filed suit against Smith, claiming Smith made fraudulent misrepresentations about his company. Shortly before the trial date, Smith and his wife, Iris Berman-Smith filed for bankruptcy under Chapter 7. Appellants then filed an adversary proceeding in the bankruptcy court against Debtor Smith and his wife and Co-Debtor.

In 2012, the bankruptcy court held that the Debtor Smith was liable for fraud and that the Gartleys has suffered $2,657,000 in damages from Smith's fraudulent misrepresentations. The bankruptcy court also held that this constituted a nondischargeable debt under 11 U.S.C. § 523 (a)(2)(A)&(B).

Thirty days after the bankruptcy court entered its final judgment, Smith again appealed to the district court. The district court affirmed in part but vacated and remanded for proceedings to determine the amount of the debt. The Gartleys then appealed, arguing that the district court lacked jurisdiction to hear the second appeal from the bankruptcy court because Smith had not filed timely notice of appeal. The Fifth Circuit agreed with the Gartleys. The Court first noted that Federal Rule of Bankruptcy Procedure 8002(a) requires that a notice of appeal must be filed within fourteen days from the date of the judgment or order being appealed. The court held that this time limit is jurisdictional, and that a failure to file a timely notice of appeal in the district court leaves the district court without jurisdiction to hear the appeal. Therefore, the Fifth Circuit vacated the judgment of the district court and instructed the lower court to dismiss Smith's appeal for lack of jurisdiction. READ THIS OPINION HERE

J.C. General Contractors v. Chavez
El Paso Court of Appeals, No. 08-12-00012-CV, 01-15-2014

In this case, a construction laborer sued his employer, a corporation, for damages stemming from the serious injuries he sustained on the job in a forklift accident. The corporation presented evidence at trial that the laborer had been intoxicated at the time of the accident and argued that the employee should therefore be barred from relief under the Texas Labor Code by reason of his intoxication at the time the injuries were sustained. The trial court instructed the jury to consider whether or not the injury to the employee was caused while he was in a state of intoxication, and the jury did not find that the injury was caused while he was intoxicated and found that the corporation's negligence proximately caused the injury. The corporation was found negligent and liable as a nonsubscriber to worker's compensation insurance under Texas Labor Code § 406.033 and was ordered by the trial court to pay $310,607 in damages to the employee.

The corporation appealed, arguing that the trial court did not issue the correct charge to the jury and that Texas Labor Code § 406.033 bars an employee from relief merely by being intoxicated at the time the injuries are sustained. The corporation also appealed on the grounds that the jury's finding that the employee was not intoxicated at the time of the accident was against the great weight and preponderance of the evidence.

The Court of Appeals held that the corporation waived both of these issues by inadequate briefing pursuant to Rule 38.1 of the Texas Rules of Appellate Procedure. Specifically, the Court pointed to the appellant's failure to provide any relevant case law, citations to the record or explanations as to how the submitted charge was understood by the jury. Therefore, the Court of Appeals affirmed the trial court's judgment. Read This Opinion Here

Estate of Fisher
Texarkana Court of Appeals, No. 06-13-00106-CV, 01-15-2014

In the underlying case, Fisher and her husband Garcia contested the application to probate of her adopted father's will on the ground that her father had been unduly influenced by his nephew, Umberger. The trial court granted a partial no-evidence summary judgment motion in favor of Umberger, finding no evidence of undue influence. The trial court's order stated that an immediate appeal of its order granting the no-evidence summary judgment motion may materially advance the ultimate termination of this litigation, as the remaining issues in the case will likely be controlled by the determination of the issue of undue influence on the will, and the trial court granted permission to Fisher and Garcia to pursue an interlocutory appeal of the order granting the no evidence summary judgment motion. Fisher and Garcia filed an accelerated permissive appeal from the trial court's order pursuant to Section 51.014(d) of the Texas Civil Practice and Remedies Code.

The Court of Appeals focused on the fact that the determination of the issue of undue influence, which was described by the trial court as the controlling issue, is an ultimate question of fact for the fact-finder, not a question of law. The court held that Section 51.014(d)'s requirements had not been met, because the statute does not contemplate permissive appeals of summary judgments where the facts are in dispute. Further, the Texas Rules of Appellate Procedure require the petition for permissive appeal to argue why the order to be appealed involved a controlling question of law, which was not done in this case. Therefore, the Court of Appeals dismissed the permissive appeal for want of jurisdiction. Read This Opinion Here

Vantage Drilling Co. v. Su
5th U.S. Circuit Court of Appeals, No. 13-20379, 01-07-2014

Vantage Drilling Company sued one of its former directors, Hsin-Chi Su, in Texas state court asserting various state law claims including breach of fiduciary duty, fraud, misrepresentation and unjust enrichment. Vantage is incorporated in the Cayman Islands with its principal place of business in Texas. Su is a Taiwanese citizen.

Su removed the case to federal court on the basis of diversity jurisdiction, arguing that because Vantage is a corporation with foreign citizenship and because Su is a foreign citizen, there was complete diversity of citizenship. The district court concluded that Vantage was "fully Texan" because its employees, operations and headquarters were all located in Texas. Based on these facts, the district court denied Vantage's request for remand, and Vantage appealed.

The Court of Appeals reversed and remanded with instructions that the district court remand the case to state court. §1332(c)(1) deems a corporation a citizen of every State and foreign state in which it is incorporated and the State or foreign state where it has its principal place of business. This applies to alien corporations, and when a corporation is incorporated in a foreign country, it is a citizen of a foreign state. Because Vantage is a citizen of a foreign state under §1332(c)(1) and because Su is an alien, there are aliens on both sides of the litigation. Therefore, the court held that complete diversity was lacking, and there can be no diversity jurisdiction. Read This Opinion Here

Weatherford V. Smart
Fort Worth Court of Appeals, No. 02-13-00063-CV, 1-23-14

Smart, who had had been visiting a patient in the emergency room at Weatherford Regional Medical Center, slipped and fell on a puddle of water in the hospital lobby. Smart filed suit against WRMC under negligence and premises defect theories. After expiration of the 120 day deadline, WRMC filed a motion to dismiss based on Smart's failure to provide an expert report pursuant to Section 74.351 of the Texas Civil Practices and Remedies Code. The trial court denied WRMC's motion to dismiss and WRMC perfected an interlocutory appeal of this denial.

In affirming the trial court's denial of WRMC's motion to dismiss, the Fort Worth Court of Appeals held that for a claim to qualify as a health care liability claim under Chapter 74, "there must be some connection, even indirect at best, between the safety claim and the provision of health care for the claim to fall under the TMLA's health care liability claim definition." The Court of Appeals distinguished this case from the Texas Supreme Court's opinion in Texas West Oaks Hospital, L.P. v. Williams, in which the Supreme Court had stated that the phrase "directly related to health care," found within Chapter 74's definition of a health care liability claim, did not refer to the safety prong of the definition and thus a claimed departure from safety standards did not need to be directly related to health care. Read This Opinion Here

Memorial Hermann v. Galvan
Houston's 14th Court of Appeals, No. 14-13-00120-CV, 01-28-2014

Galvan, a non-patient who was visiting a patient at Memorial Hermann Southwest Hospital, slipped and fell on a puddle of water in a hallway of the hospital. She brought suit against Memorial Hermann, asserting negligence and premises defect causes of action. After expiration of the 120 day deadline, Memorial Hermann filed a motion to dismiss for failure to prove an expert report pursuant to Section 74.351 of the Texas Civil Practices and Remedies Code. The trial court denied Memorial Hermann's motion to dismiss, and an interlocutory appeal was perfected.

In addressing the question of whether Galvan's claims qualified as health care liability claims requiring an expert report, the Houston 14th Court of Appeal held that "health care liability claims based on alleged departures from accepted safety standards must involve an alleged departure from standards for protection from danger, harm, or loss, but need not involve an alleged departure from standards that involve health care or are directly or indirectly related to health care." The Court of Appeals relied on binding dicta from the Texas Supreme Court's opinion in Texas West Oaks Hospital, L.P. v. Williams, in which the Supreme Court stated that the phrase "direct related to health care" did not modify the term "safety" within Chapter 74's definition of a health care liability claim and thus, a claim based upon alleged departures from accepted safety standards do not need to be directly related to health care to qualify as health care liability claims. The Court of Appeals also rejected the argument that while no direct relationship is required at least an indirect relationship to health care must be present. The Court of Appeals commented that such an interpretation was outside the scope of guidance provided by the Supreme Court in the Williams case. Read This Opinion Here

Texas Association of Defense Counsel, Inc.
400 W. 15th Street, Suite 420, Austin, Texas 78701 512.476.5225 - 512.476.5384 FAX - tadc@tadc.org