



FROM THE PRESIDENT

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2013 is quickly reaching an end and the TADC has had a successful year protecting the Seventh Amendment and the civil justice system, providing outstanding education and services and providing business development opportunities for the membership. As TADC prepares for the new year, there are a number of exciting things being planned. A calendar of events is included in this update but I assure you it is not exhaustive.

Local events are being planned around the state with the first in El Paso on January 16, 2014 with the TADC and El Paso County Trial Lawyers providing a CLE event on the differing perspectives between the defense and plaintiff's bar on various areas of the law. If you would like an event to be held in your area, contact your District Director or the TADC office (tadc@tadc.org) to set something up!

The TADC Winter Seminar will be held in Crested Butte, Colorado, February 5-9, 2014 at the fantastic Elevation Resort at the base of Mt. Crested Butte. This will be a joint meeting with the Illinois Defense Counsel and will be a wonderful opportunity to commune with fellow defense lawyers from another part of the country. Crested Butte has had 83 inches of snow so far and more expected! Registration materials are available below. The TADC Trial Academy will be held in San Antonio on March 14-15, 2014. The Trial Academy is an amazing, hands-on program for young lawyers, which has been a signature even of the organization for 32 years. Young Lawyers are provided the opportunity to develop their skills in a practical way, in a courtroom setting. The Trial Academy provides almost a full year of CLE credit and is the best value for a firm's dollar to be had. The TADC Spring Meeting will be in Washington, D.C. and former Solicitor General Kenneth Starr and Texas Supreme Court Justice Phil Johnson are on the program. This will be one you won't want to miss.

Legislatively and politically, interim charges have been announced by the Senate but not yet by the Texas House. In a recent E-update, we provided everyone the Senate charge list. The TADC is monitoring all interim charges and will advise of any issue that raises a question or causes concern. The 2014

elections are heating up in a big way. Numerous incumbents across the spectrum of offices have drawn primary election opponents. The elections are detailed below.

Look forward to an exciting year in 2014 and please do not hesitate to contact me or the TADC office if there is any issue you wish to discuss or concern you need to raise.

I wish everyone a blessed and safe holiday season and bright and Happy New Year!

REMINDER

2014 Dues statements were mailed on November 1, 2014 and are due on January 1, 2014. If you need another copy of your dues statement, please email the TADC at tadc@tadc.org

LEGISLATIVE/POLITICAL UPDATE

The filing deadline for the March 2014 party primaries has passed, and the electioneering has begun in earnest. With the retirement (or career change) of Governor Perry, we are seeing the first significant movement on the statewide ballot in more than a decade. The races are shaping up as follows:

Governor: Attorney General Greg Abbott did not draw any serious challengers in the primary (although there is a guy with the name "SECEDE") and will coast into the November election. But it will be cakewalk against the Democratic candidate, Sen. Wendy Davis of Ft. Worth. Senator Davis will enjoy a lot of national attention and should be able to raise enough money to run a competitive race in terms of television advertising. While actually winning a statewide office is probably still beyond reach for the Democrats, Senator Davis gives them their best opportunity in years to begin rebuilding the Democratic Party pool of potential candidates.

Lieutenant Governor: Lt. Governor Dewhurst has the unprecedented task of defeating three potentially strong challengers in his own primary: Sen. Dan Patrick (Houston), Land Commissioner Jerry Patterson, and Agriculture Commissioner Todd Staples. Most polls show Dewhurst somewhere in the 40%-plus range, with Patrick hovering in the mid-teens and the other two candidates trailing behind. It appears likely that this race will go to a runoff, perhaps between Dewhurst and Patrick (though we shouldn't rule out either Patterson or Staples from making a

surge). If that happens, then all bets are off. On the Democratic side, Sen. Leticia Van de Putte (like Sen. Davis) will force the Republican nominees to talk about issues like immigration, women's health, and public education. While she might not be able to compete with the GOP's huge funding advantage, she will make maximum use of earned media and her stature as one of the most important women and Hispanic legislators in Texas history.

Attorney General: Three strong Republican candidates are vying for the OAG: Rep. Dan Branch (Highland Park), Sen. Ken Paxton (McKinney), and Railroad Commissioner Barry Smitherman (Houston). Smitherman may have the advantage in terms of the Perry network, but both Branch and Paxton likewise have strong support in the base of the party. This race could split pretty evenly three ways, and there will almost certainly be a runoff. The Democrats are putting up Houston attorney Sam Houston, who has previously run for the Texas Supreme Court.

Comptroller: Another donnybrook between Republican candidates is unfolding in the race to succeed Susan Combs. Grassroots activist Debra Medina (Wharton), who mounted a surprisingly strong primary challenge to Governor Rick Perry four years ago, probably has the most statewide name recognition. Sen. Glenn Hegar (Katy) has strong support from anti-abortion groups. Rep. Harvey Hilderbran (Kerrville) has considerable business support and two sessions under his belt as chair of the House Ways & Means Committee. The fourth candidate, former State Rep. Raul Torres (Corpus Christi) is virtually unknown, but in a down-ballot race for a spot in the runoff, anything can happen. A Houston businessman, Mike Collier, will fill out the Democratic ballot here.

Texas Supreme Court: Three of the four SCOT incumbents drew primary challengers. Chief Justice Hecht faces former State Rep. Robert Talton, a Houston area trial attorney who served six terms in the Texas House. Newly minted Justice Jeff Brown squares off against Austin-area construction lawyer Joe Pool. And in perhaps the toughest test of all, Justice Phil Johnson must deal with a challenge from 14th Court of Appeals Justice Sharon McCally. Justice Jeff Boyd did not get a challenger in the primary. In the general election, Justices Hecht, Brown, and Boyd will have Democratic challengers: Hecht against El Paso District Judge Bill Moody, Brown against Court of Criminal Appeals Justice Larry Meyers, and Boyd against 13th Court of Appeals Justice Gina Benavides.

Third Court of Appeals: Justice Jeff Rose and former Justice Diane Henson will fight it out to replace retiring Chief Justice Woody Jones.

Texas House of Representatives: Numerous Republican incumbents have primary challenges. With respect to races of most interest to TADC, Speaker Joe Straus (San Antonio) and Reps. Travis Clardy (Nacogdoches), John Otto (Dayton), Byron Cook (Corsicana), Jim Keffer (Eastland), Drew Darby (San Angelo) will need our support to turn back their opponents.

Texas Senate: As in the House, several incumbent Senators drew primary challengers. Sen. Bob Deuell (Greenville) will face Mark Thompson of Mesquite; Joan Huffman (Houston) has Derek Anthony from Sugar Land; Sen. Donna

Campbell (San Antonio) must face two challengers, Mike Novak and Elisa Chan. Rep. Van Taylor (Plano) will move up to the Senate in an uncontested race to replace Sen. Ken Paxton.

The TADC will keep you informed of developments in these and other races.

**REMINDER! – REGISTER NOW
for the 2014 TADC Winter Seminar!**

**Join the TADC in Crested Butte, Colorado
February 5-9, 2014 – Elevation Resort & Spa**

*A program for the practicing trial lawyer:
~ Legal Malpractice – Causes and Avoidances ~
~ Trial by Deposition: Leaving your Opponent in the Dust! ~
~ Windstorm First Party Cases ~
~ Preservation of Error ~
.....and more!*

**8.25 hours of CLE including 1.5 hours ethics
Great Air Service on American & United into Gunnison
or Montrose and the Elevation has extended the TADC
an excellent winter rate!**

***The Hotel advises that rooms are filling rapidly and
asked that we let everyone know to be sure and secure your
accommodations as soon as possible.*

Hotel Reservation cut-off date is

December 20, 2013

[REGISTRATION MATERIALS HERE](#)

CALENDAR OF EVENTS

January 24-25, 2013

TADC Board of Directors Meeting
Radisson Town Lake - Austin, Texas

February 5-9, 2014- [REGISTRATION MATERIAL](#)

TADC Winter Seminar
Elevation Resort & Spa – Crested Butte, Colorado
Heidi Coughlin & Victor Vicinaiz, Co-Chairs

March 14-15, 2014 - *Registration material available in early January*

TADC Trial Academy
Omni Colonnade – San Antonio, Texas
Troy Glander & Gayla Corley, Co-Chairs

April 9-13, 2014 - *Registration material available in early February*

TADC Spring Meeting
The Fairfax Embassy Row – Washington, D.C.
Mike Morrison & Doug McSwane, Co-Chairs

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

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

Case Summaries prepared by Rebecca Kieschnick & Melody Rodney, Donnell, Abernethy & Kieschnick, P.C., Corpus Christi

In re Jarvis—No. 14-13-00224-CV (Tex. App.—Houston [14th Dist.]):

In this writ of mandamus proceeding regarding a trial judge's order allowing

discovery of medical billing records and health insurance contracts, the issues surrounded arguments over information sought for paid or incurred determinations. The Court of Appeals granted mandamus relief in part and denied in part. In the first issue, Defendant had sent Depositions on Written Questions, and Plaintiff had filed a Motion to Quash and for Protective Order, for all billing records from Plaintiff's healthcare providers from the date of the accident forward, including for several specific unrelated procedures. The Defendant stated that the referenced unrelated billing records were necessary to clear up a discrepancy because multiple healthcare providers billed for the same surgery, but for different amounts (the opinion was not real clear on this, but it seems that the Defendant may have been trying to argue that he thought some items were being included in one of the bills that may have been charges for the unrelated surgery). The Court did not agree with the argument and ruled that billing records for medical procedures that are unrelated to the issues in the lawsuit are protected by the attorney-client privilege and are not discoverable, and granted mandamus relief on this issue.

In the second issue, the Defendant had sent Depositions on Written Questions, and Plaintiff had filed Motions to Quash, for the health insurance contracts between Blue Cross Blue Shield, Plaintiff's health insurance carrier, and Plaintiff's healthcare providers seen as a result of the incident that formed the basis of the lawsuit. The Court found that the Defendant was entitled to the insurance contracts to aid in determining paid or incurred issues, including whether Plaintiff's healthcare providers were required to accept payments of less than the amounts billed, and denied mandamus relief on this issue. [READ THIS OPINION](#)

The Methodist Hospital, TMH Physician Organization, and The Methodist Hospital Research Institute v. Anthony J. Halat, MD—No. 01-13-00121-CV (Tex. App.—Houston [1st Dist.]):

This was an appeal of a trial court's order denying a motion to dismiss for failure to serve an expert report pursuant to Chapter 74 of the Texas Civil Practices and Remedies Code. The underlying lawsuit arose from an employment dispute between Dr. Halat and The Methodist Hospital. Dr. Halat was employed under a "Letter of Agreement of Employment", the latest amendment of which allowed either entity to terminate the agreement without cause with 120 days' notice. Dr. Halat resigned, stating that he was never allowed to take paid time off and also citing problems that he felt existed with the way the ICU department was run creating a dangerous situation for patients. Dr. Halat applied his accrued time off to the 120 day notice period and stated in his resignation that he did not intend to work another day at the hospital and requesting compensation for the remainder of paid time off that he still had left. The day after Dr. Halat sent the letter the hospital terminated Dr. Halat for cause. Dr. Halat files suit against the hospital for breach of contract, quantum meruit, unjust enrichment, fraud in the inducement, and negligent misrepresentation. The hospital filed the motion to dismiss.

The Court first looked at whether the doctor's claims were related to health care, thus placing the suit within the confines of Chapter 74. The Court determined that Dr. Halat's claims did not concern the "treatment, lack of treatment, or other claimed departure from accepted standards of medical care, health care, or safety or professional or

administrative services directly related to health care.” The Court further determined that Dr. Halat’s statements in his letter of resignation regarding the issues with the ICU department had no bearing on Dr. Halat’s claims in the lawsuit and were immaterial to whether Dr. Halat provided proper notice to terminate his employment contract, whether Dr. Halat’s accrued paid time off was a benefit for which he had a reasonable expectation to be compensated, and whether the hospital misrepresented whether Dr. Halat would be able to take paid time off. As such, the Court determined that Dr. Halat’s claims did not relate to health care and thus no expert report was required under Chapter 74 and affirmed the trial court’s order denying the motion to dismiss. [READ THIS OPINION](#)

Creel v. The Woodlands Township—No. 09-12-00525-CV (Tex. App. Beaumont):

This was a suit against the township for failure to remove dead trees from Creel’s property that allegedly resulted in water entering Creel’s home through the roof. Creel brought suit against the township for the property damages to his home. The township asserted immunity from suit as a governmental unit. Creel did not contest the immunity status but instead argued that Section 101.022 of the Texas Civil Practices and Remedies Code waived the governmental immunity. The Court noted that property damages were not recoverable in a premises liability claim against a governmental unit under that section and affirmed the trial court’s judgment in favor of the township. [READ THIS OPINION](#)

Ellman v. JC General Contractors—No. 08-12-00029-CV (Tex. App.—El Paso):

This was an appeal from a trial court’s denial of a motion to compel arbitration. It was not disputed by the parties that a Standard Form Agreement construction contract had been entered into that contained an arbitration provision. The lone issue was whether the arbitration provision had been waived.

The Court found that the Defendant had not filed the motion to compel arbitration until 36 months after the suit had been filed. It was also found that Defendant had substantially invoked the judicial process by raising affirmative claims for relief by virtue of a counterclaim, conducting discovery on the merits initiated by Defendant, including 155 requests for production, request for disclosure, 30 interrogatories, and noticing and taking 6 depositions, and filing a summary judgment. Finally, the Court found that Defendant waited to make its demand for arbitration until after Plaintiff had revealed its trial strategy in the form of filing trial and fact expert witness lists and noted that the prejudice lied in the form of considerable delay, expense, and damage to Plaintiff’s legal position. [READ THIS OPINION](#)

Trinity Drywall Systems, LLC v. TOKA General Contractors, LTD, et al.—No. 08-12-00041-CV (Tex. App.—El Paso):

In this appeal from a final judgment on a materialman's lien, the Court was faced with a matter of first impression: whether Section 53.026 of the Texas Property Code (the "sham contracts" provision) applies to the constitutional lien authorized by article XVI, § 37 of the Texas Constitution (the source of all mechanic's liens). Trinity signed a contract with TOKA as a subcontractor to provide labor and materials for a construction project. When some of Trinity's work was not paid for Trinity filed its lien, but did not perfect it, and sued the general contractor (TOKA) and owner of the shopping center being constructed (Vineyard). The trial court granted Vineyard's declaratory judgment and declared that Trinity's mechanic's lien was invalid and unenforceable because the court deemed Trinity a subcontractor and therefore did not have a constitutional lien, and its statutory lien was unperfected.

On appeal, Trinity asserted that it was entitled to enforce a constitutional lien (which does not need to be perfected) because it qualified as an original contractor under Section 53.026 of the Texas Property Code, otherwise known as the "sham contracts" provision. Trinity asserted that it was an original contractor pursuant to the sham contracts provision because TOKA was essentially no more than an "alter ego" of Vineyard (the 2 companies could effectively control each other through voting stock, interlocking directorships, and the companies have the same business address in their Articles of Incorporation, among other similarities). The Court noted that under the sham contract provision a subcontractor is placed in direct privity with the property owner for purposes of the mechanic's lien statutes and can thus assert and enforce a constitutional lien as if he was the general contractor. The Court found that the trial court erred in concluding otherwise and reversed the trial court on the issue and rendered judgment denying Vineyard's request for declaratory judgment. The issue of whether a sham contract did in fact exist in this case was remanded to the trial court. [READ THIS OPINION](#)

In re Reassure America Life Insurance Company—No. 13-13-00431-CV (Tex. App.—Corpus Christi-Edinburg):

The Court was faced with a writ of mandamus concerning an order by the trial court granting pre-suit oral depositions with subpoena duces tecum. The petition for pre-suit depositions was extremely vague and merely tracked the language of Texas Rule of Civil Procedure 202. It was apparent that the Plaintiff sought depositions in relation to a specific insurance policy written by Reassure, but there was no substance in the petition upon which anyone could determine what the depositions would even be about. The petition alleged an "incident" but gave no information as to what the incident was, when it occurred, or what the potential claim would be about. There were no explanatory facts provided whatsoever.

The Court noted that pre-suit depositions were never intended for routine use as there were inherent issues with due process involved in pre-suit depositions. The use of Rule 202 was to be strictly limited. The Court noted that while the rule does not require pleading of a specific cause of action, the subject matter of the anticipated claim or lawsuit must be set out in the petition for pre-suit depositions. The Court conditionally granted the mandamus relief stating that the judge could voluntarily withdraw the order for pre-suit

depositions. [READ THIS OPINION](#)

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