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.

ADMISSIBILITY OF EVIDENCE

REPORT ISSUED BY A PARTY'S INTERNAL ACCIDENT REVIEW BOARD WAS ADMISSIBLE IN A NEGLIGENCE ACTION ARISING OUT OF A MOTOR VEHICLE COLLISION BECAUSE IT QUALIFIED AS AN ADMISSION OF A PARTY-OPPONENT AND WAS NOT PROTECTED BY THE WORK-PRODUCT PRIVILEGE

Pilgrim's Pride Corp. v. Burnett, No. 12-10-00037-CV, 2012 WL 381714 (Tex. App.—Tyler Feb. 3, 2012, no pet.)

The plaintiffs sued Pilgrim's Pride Corporation and one of its employee drivers for injuries and damages they received in an automobile accident. During the jury trial, the trial court admitted, over the defendants' objections, a one page report authored by Pilgrim's Pride's regional fleet safety manager and a member of the Internal Accident Review Board at Pilgrim's Pride. The one page report indicated that the employee driver was "chargeable" for the accident, and that the accident would be added to the employee driver's record as a chargeable accident. The defendants objected to the report on the grounds that it constituted inadmissible hearsay or, alternatively, was privileged as "work product." The trial court admitted the report into evidence, and the jury returned a verdict finding Pilgrim's Pride twenty percent at fault, and Pilgrim's Pride's employee driver forty-five percent at fault. The jury awarded the plaintiffs $1,084,390.22 in damages, which was reduced by the plaintiffs' percentage of fault.

On appeal, the defendants argued that the trial court reversibly erred by allowing the report from the Internal Accident Review Board to be presented to the jury because the report was inadmissible hearsay and was protected from discovery by the work-product privilege. The Twelfth Court of Appeals first addressed the defendants' hearsay argument, and cited to the general definition of hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." TEX. R. EVID. 801(d). The Court, however, accepted the plaintiffs' argument that the report was not hearsay because it was excluded from the hearsay rule as an admission of a party-opponent under Texas Rule of Evidence 801(e)(2)(D).

In accepting the plaintiffs' argument that the report qualified as an admission of a party opponent, the Court noted that the Internal Accident Review Board

was comprised entirely of agents or employees of Pilgrim's Pride, and that the findings evidenced in the one page report were made as part of the Board's investigation of the accident, a function within the scope of the Board's authority and within the scope of each Board member's employment. The Court also rejected Defendants' argument that, to qualify as an admission by a party opponent, the out of court statement must be inconsistent with a position taken by the party at trial. The Court noted that there is no inconsistency requirement under Rule 801(e)(2).

The defendants next argued that the report was protected under the "investigative privilege." The Court noted that under Texas law the investigative privilege had been subsumed into the work product privilege. The Court quoted the definition of "work product" under Texas Rule of Civil Procedure 192.5(a) as: (1) materials or mental impressions developed in anticipation of litigation; or (2) a communication made in anticipation of litigation between a party and the party's representatives, or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents. TEX. R. CIV. P. 192.5(a). In determining whether a statement or communication was made *in anticipation of litigation*, the Court applied a three pronged test: (1) whether a reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue; (2) whether the defendants, as the parties asserting the work product privilege, subjectively believed in good faith that there was a substantial chance that litigation would ensue; and (3) the investigation was conducted for precise purpose of preparing for the litigation.

In applying the above rules to the facts, the Court noted that there was no evidence in the record indicating that the investigation that resulted in the one page report was being conducted for the purpose of preparing for trial of any anticipated personal injury lawsuit. The Court noted that the record indicated that the investigation was conducted solely for the purpose of determining whether the accident was "chargeable" to the employee driver, a determination that could have affected the employment status of the driver. Accordingly, the Court held that the defendants failed to meet their burden of establishing the applicability of the work product privilege. After modifying the trial court's judgment on other grounds, the Court affirmed the judgment as modified.

ADMISSIBILITY OF EVIDENCE

AFFIDAVIT NOT BASED ON PERSONAL KNOWLEDGE, EVEN IF IT WAS A STATEMENT AGAINST INTEREST, WAS NOT SUMMARY JUDGMENT EVIDENCE; OBJECTING PARTY WAIVED FORM OBJECTIONS TO AFFIDAVIT BY FAILING TO RAISE OBJECTIONS IN TRIAL COURT OR TO ADOPT CO-DEFENDANT'S OBJECTIONS.

Wolfe v. Devon Energy Prod. Co., No. 10-09-00223-CV, 2012 WL 851678 (Tex. App.—Waco Mar. 14, 2012, TRAP 53.7(f) motion granted May 1, 2012)

The plaintiff (the purported oil and gas lessee) sued the mineral interest lessor and lessee for declaratory judgment, trespass to try title, permanent injunction, conversion, and trespass regarding the lessors' and lessee's claimed right in mineral interests. The purported lessor intervened and asserted claims for declaratory judgment and trespass to try title. The trial court initially granted the purported lessee's and intervenor-lessor's motions for partial summary judgment. The lessee moved to strike and exclude the purported lessee and intevenor-lessor's summary judgment evidence. Following the lessor's and lessee's motions for reconsideration and motions for traditional and no-evidence motions for summary judgment, however, the trial court reconsidered and granted the lessors' and lessee's motions for summary judgment and denied the purported lessee's and intervenor-lessor's motions for summary judgment on their trespass-to-try-title claims. A month later, the trial court sustained the lessor's objections to the summary judgment evidence.

On appeal, the Waco Court of Appeals addressed whether the trial court properly sustained objections to a summary-judgment affidavit offered by the intervenor-purported lessor to establish or raise a fact issue regarding his claimed ownership in the mineral interest. First, the Court analyzed whether the affidavit satisfied TRCP 166a(f)'s requirement that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The Court concluded that the affidavit was deficient because it failed to satisfy the first and third prongs. Specifically, not only did the affiant fail to affirmatively state that she offered the affidavit based on her personal knowledge, but also the statements in the affidavit did not clearly show that the statements were made from her personal knowledge.

The intervenor-purported lessor next argued that even if the affidavit was technically deficient under TRCP 166a(f), it was nevertheless admissible under TRE 803(24) as a statement against interest and as a certified public record under TRE 901 and 902. The Court rejected this argument because a summary judgment affidavit must satisfy all three prongs of TRCP 166a(f). Therefore, even if the affidavit averments were statements against interest and thus satisfied TRCP 166a(f)'s requirement that the affidavit set forth facts that would be admissible evidence, the affidavit was still fatally deficient for failing to satisfy the personal knowledge and competency prongs of the rule. Reliance on TRE 901 and 902 was unavailing because TRE 901 and 902 are authentication – not admissibility – rules.

On appeal, the prevailing lessors attempted to join in the prevailing lessee's objections to the summary judgment affidavit just discussed. Because the lessors did not assert their own objections with the trial court and neglected to adopt their co-defendant's objections, however, they were precluded from later relying on their co-defendant's objections to preserve the issue for appellate review. Nevertheless, because the Court recognized that substantive (as opposed to formal) objections to summary judgment evidence may be raised for the first time on appeal, the court went on to analyze whether the lessors' objections were substantive or formal. The Court decided that the lessors raised both substantive objections (viz., the affidavit's alleged inclusion of conclusory statements and legal conclusions and the argument it was a sham affidavit) and formal objections (viz., lack of personal knowledge and competence). After noting that the formal objections had been waived, the Court assessed whether the statement "Mr. Wolf [the intervenor-lessor] paid for the property," was a conclusory statement and held that it was neither a legal nor factual conclusion.

ADMISSION/EXCLUSION OF EVIDENCE

TRIAL COURT IN PERSONAL INJURY CASE ABUSED DISCRETION BY ADMITTING UNADJUSTED MEDICAL BILLS AND EXCLUDING ADJUSTED BILLS.

Henderson v. Spann, No. 07–11–00133–CV, 2012 WL 569679 (Tex. App.—Amarillo Feb. 22, 2012, reh'g overruled).

The plaintiffs in a personal injury-car accident case obtained a jury verdict that included past medical expenses. The medical bills admitted at trial did not reflect adjustments and write-offs associated with worker's compensation. The defense lawyers unsuccessfully attempted during trial to admit the adjusted bills and unsuccessfully objected to the admission of the unadjusted bills. The trial court determined post-verdict that the plaintiffs could only recover the amount of past medical expenses that were "actually paid or incurred," and downwardly adjusted the award to reflect the adjustments and write-offs associated with worker's compensation.

On appeal, the Amarillo Court of Appeals held that evidence of unadjusted medical bills is inadmissible under TEX. CIV. PRAC. & REM. CODE ANN. § 41.0105. The Court further held that because irrelevant evidence will not support a judgment, post-verdict adjustment could not cure the harm in admitting irrelevant evidence, excluding relevant evidence, and, ultimately, permitting the jury's verdict to be based on insufficient evidence of medical expenses "actually paid or incurred." The post-verdict adjustment was insufficient to cure the harm because (1) permitting the trial court to resolve disputed fact issues relating to damages violated the constitutional right to a jury trial, and (2) post-verdict adjustment is inadequate to account for or remedy any effect the inadmissible evidence of unadjusted past medical expenses may have had on the jury's assessment of non-economic damages. Because the trial court abused its discretion, the judgment was reversed, and the case was remanded for a new trial.

Justice Pirtle wrote a concurrence arguing for repeal of the binding precedent that prohibits admission of unadjusted bills in every case. Chief Justice Quinn wrote a concurring and dissenting opinion that agreed error had occurred, but disagreed that the error was harmful.

ADMISSION/EXCLUSION OF EVIDENCE

TRIAL COURT IN CONDEMNATION CASE PROPERLY ADMITTED/EXCLUDED DAMAGES EVIDENCE AND OPINION TESTIMONY.

Dallas Cty. v. Crestview Corners Car Wash, No. 05–09–00623–CV, 2012 WL 523920 (Tex. App.—Dallas Feb. 16, 2012, no pet.)

To widen a road, Dallas County condemned part of a land parcel used as a car wash. At issue was how much the car wash should be paid for damage to the remainder property and damage attributable to restricted access during the taking. The appeal before

the Dallas Court of Appeals involved four evidentiary issues.

First, the trial court properly excluded the expert testimony of the county's appraiser, because the appraiser's post-taking valuation did not involve a willing buyer/willing seller analysis. The valuation involved instead determining (properly) the fair market value of the property before the taking, dividing that amount by the number of car wash lanes (five), then subtracting from the pre-taking value of the entire parcel the value of the single lane that was taken. The appraiser's calculation was unreliable because there was no basis to assume that a willing buyer and willing seller would agree to reduce the market value by one-fifth for the loss of the lane.

Second, the trial court properly admitted the expert testimony of the car wash's expert. The county argued the expert testimony should not have been admitted because it included lost profits, which had not been pled. The Court held there was no pleading deficiency because in condemnation proceedings, the landowner is not generally required to specifically plead damages, because condemnation damages are specified by statute. The car wash was not seeking to recover damages independent of those specified by statute. Further, and although the car wash could not recover lost profits as a separate item of damage, it was entitled to use lost profits as evidence of the effect of the taking on the market value of the remainder.

Third, the car wash owner's lay opinion as to the market value of the property, based upon his extensive experience in the business, was properly admitted, because a property owner is qualified to testify to the market value of his property if the testimony is based on a market value estimate and not on some intrinsic or other value such as replacement cost. The testimony was properly admitted even though the owner was not an appraiser, did not have a report, and did not have market data to support his opinions.

Fourth, the trial court properly admitted evidence of damage attributable to the relocation of underground gas storage tanks on the car wash property. The car wash contended that the tanks had to be moved during the taking because the road construction would occur too close to the tanks and create an unsafe condition. The evidence was properly put to the jury and did not involve resolution of a legal question because the car wash claimed not that the underground storage tanks were taken for a public purpose requiring payment of just compensation, but rather that the damages to the remainder property included necessary costs to cure an unsafe condition caused by the taking. Further, the county failed to timely object to opinion testimony offered by the car wash's appraiser and land planner about the allegedly dangerous condition, waiving the issue on appeal. The Court noted the county did not contend that the opinions were so speculative and conclusory as to be legally insufficient to support the judgment.

AFFIDAVITS: FORMAL REQUISITES

JURAT IS NOT REQUIRED FOR AFFIDAVIT, BUT EVIDENCE MUST PROVE AFFIDAVIT WAS SWORN TO BY AFFIANT; HOWEVER, OBJECTION TO DEFICIENCY WAS ONE OF FORM THAT WAS WAIVED IF NOT RAISED IN TRIAL COURT.

Mansions in the Forest, L.P. v. Montgomery Cty., 10-0969, 2012 WL 1370867 (Tex. Apr. 20, 2012)

In this condemnation suit, the landowner appealed a summary judgment for the condemning county. During the condemnation proceeding, the landowner offered the purported affidavit of the company's vice president concerning the value of the land. However, the purported affidavit did not contain a statement by which the author swore to the truth of his testimony. Additionally, the notary's certification stated that the author acknowledged, rather than swore to, his statements. The county objected to the timeliness and conclusory nature of the affidavit, but did not object to the missing jurat. The trial court sustained the objections and excluded the affidavit. On appeal, the county objected to the lack of jurat and failure to swear to or give the affidavit under oath. The Beaumont Court of Appeals affirmed on the ground that the lack of a jurat was a substantive defect (rather than of form), and could be raised for the first time on appeal. The landowner appealed.

In a per curiam opinion, however, the Texas Supreme Court reversed and remanded the case. The Supreme Court held that the court of appeals incorrectly decided that the purported affidavit's lack of a jurat was a substantive defect when neither Texas Government Code section 312.011(1) nor Texas Rule of Civil Procedure 166a(f) requires that a summary judgment affidavit contain an officer's attestation of the affiant's oath. To satisfy the Government Code's statutory requisites for an affidavit, however, other evidence must show that the affidavit was sworn to before an authorized officer. Because no evidence existed in the case that the

affidavit was sworn to before an authorized officer, the document did not qualify as an affidavit. Nevertheless, the Supreme Court went on to hold that the opposing party must object in the trial court to the lack of jurat and absence of other evidence proving the properly sworn nature of the affidavit so that the offering party has an opportunity to cure the defect. In this case, the county waived the affidavit's deficiency by failing to raise it in the trial court and therefore did not preserve the error for appellate review.

EXCLUSION OF EVIDENCE

TESTIMONY BY PURCHASER CONCERNING REPRESENTATIONS MADE BY LENDER'S SENIOR VICE-PRESIDENT WAS NOT HEARSAY BUT WAS ADMISSIBLE TESTIMONY CONCERNING OPERATIVE FACTS.

Comiskey v. FH Partners, LLC, No. 14-10-01001-CV, 2012 WL 1231958 (Tex. App.—Houston [14th Dist.] Apr. 12, 2012, no pet. h.).

A borrower took out several purchase money loans from a lender to purchase various pieces of real property from a company owned by Appellant. In connection with these loans, the borrower executed deeds of trust pledging the purchased properties as collateral on the purchase money loans. These deeds of trust also contained cross-collateralization clauses that made each piece of property purchased by borrower security for all of the borrower's indebtedness to the ender. The borrower had intended on selling the purchased property to a local developer, but when the sale fell through, the borrower elected to deed some of the purchased property back to the appellant. This transaction, however, did not extinguish the lender's first lien on the transferred property.

The appellant and the borrower went into Lender's office where they both executed an "Extension and Modification" of the original promissory note on the transferred property. The key dispute in the case was whether this "Extension and Modification" terminated the cross-collateralization clause in the original deed of trust with respect to the transferred property. At trial, the appellant was asked what a senior vice president of the lender had said to him that made him believe that if the original purchase money loan was paid off, that title to the transferred property would be released to him. The lender's attorney objected to this line of questioning on hearsay grounds, and the trial court sustained the objection. In the offer of proof, the appellant's attorney indicated that had the appellant been permitted to answer this question, he would have testified that the senior vice president of the lender told him that the "Extension and Modification" was the only document he needed to review and full payment of the original note would result in a full release of the lender's lien on the transferred property.

On appeal, the Fourteenth Court of Appeals agreed with the appellant's argument that the proffered testimony was not hearsay but was rather proof of "operative facts" and was not being offered for the truth of the matters asserted. In other words, the Court reasoned that the testimony was being offered as evidence that the lender's senior vice president had made the statements, regardless of whether the statements were true or false. In reversing the trial court's granting of a directed verdict as to the appellant's waiver claim, the Fourteenth Court of Appeals held that the proffered testimony, along with other evidence admitted at the time of trial, was sufficient to raise a fact issue on the question of whether the lender intended to yield a known right.