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

FROM THE PRESIDENT

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

Dear TADC Friends,

Winter has been a busy time for TADC, with more to come for members of all ages and interests.

BOARD MEETING: TADC conducted its second board meeting for the 2013 - 2014 term in Austin on the first major ice day on a freezing January Friday. In spite of bad weather, most were able to overcome travel challenges and attend the meeting, continue work on projects at hand, and enjoy a friendly dinner with several justices from the Texas Supreme Court and their wives.

PROJECTS & NEW MEMBERS: Some of the projects now underway include planning for programming in your area, review and evaluation of pertinent interim charges posted by the legislature, updating publications and the TADC website, and discussion of membership initiatives. If you know someone interested in joining TADC, please pass this generous offer on to them: upon payment of membership dues ($295 for a 5 year lawyer), the new member will be entitled to a $500 credit on the seminar of their choice, whether in Washington DC in April, Couer d'Alene Idaho in July, or in San Antonio in September. Applications are print-ready on the TADC website, and you can send them in today. (http://www.tadc.org/become-a-member/) Given the many benefits of membership, this is quite a bargain.

LOCAL PROGRAMS: Mitch Moss again encouraged El Paso TADC members to gather in January for combined CLE on *"Legal Writing for the Re-wired Brain"* and happy hour with other local attorneys. Fort Worth members met on February 20 for their monthly Member Luncheon. Houston TADC members, led by Ron Capehart, Houston Area Vice President, are working with the local bar and judiciary to present a half-day seminar on the intricacies of ad litem representation on February 28. (You are welcome to attend any local TADC function even if out of your home territory, but be sure to call in advance to confirm a reserved spot.)

TRIAL ACADEMY: TADC has scheduled its 32nd Trial Academy in San Antonio March 13 - 15. Troy Glander and Gayla Corley are heading up the hands-on litigation training for

a full house of young lawyers. Several seasoned litigators are already signed up to act as faculty, but we have additional faculty openings to fill. This is a great opportunity to get involved by sharing your litigation expertise with the next generation of lawyers. Can you help? If so, email Gayla (gcorley@langleybanack.com) or Troy (tglander@anglawfirm.com) to volunteer on the faculty.

CRESTED BUTTE SKI SEMINAR - February 5-9: TADC members Heidi Coughlin and Victor Vicinaiz organized a wonderful seminar in Crested Butte, one of TADC's favorite venues for the winter seminar, and for good reason. There's a powdery ski slope for every level of expertise, and so much in the area to enjoy even if you don't ski. (Photos on TADC web-site.) CLE began early in the morning, fast and furious, and you were out on your skis, snowboards, snowmobiles, or snowshoes before noon.


Heidi Coughlin


Victor Vicinaiz

TADC speakers in Crested Butte made some great presentations on a variety of topics:

Windstorm First Party Cases
by Jeff Roerig/David Roerig (Roerig, Oliveira & Fisher, Brownsville)
Deposition Ground Rules
by Matt Breeland (Wright & Greenhill, Austin)
Medical Malpractice Overview, CPRC Chapter 74,
by Terri Harris (Ewbank & Harris, PC, Austin)
FRCP 45 – New Subpoena Rule,
by MacKenzie Wallace (Thompson & Knight, Dallas)
Voir Dire Compendium,
by Michele Smith (Mehaffy Weber, Beaumont)
Allocation Wells,
by Greg Binns (Thompson & Knight, Dallas)
Legal Malpractice–Causes & Avoidance,
by Tom Ganucheau (Beck Redden, Houston)
Preservation of Error,
by Belinda Arambula & David Brenner (Burns, Anderson, Jury & Brenner, LLP, Austin)

Copies of papers presented are available through the TADC office. (Or search online at TADC.org, Member Section, TADC-Papers.)

WASHINGTON DC SPRING MEETING - April 9-13: By now you've seen the list of distinguished speakers and pertinent topics that Mike Morrison and Doug McSwane have organized for the Spring Meeting in Washington DC. (See a copy of the brochure **HERE** In addition to the many historic venues for after-seminar touring and dining, the Cherry Blossom Festival will be in full swing. Our hotel, the stately Fairfax Hotel, two blocks from Dupont Circle, stands among the historic mansions of Embassy Row, and next door to the Anderson House which serves as a museum and headquarters to the Society of the Cincinnati, the nation's oldest patriotic organization. The Capitol, the White House, and the Smithsonian are all nearby. We expect the hotel to fill early, so make your reservations as

soon as possible. (And remember, any new TADC member who joins this spring is entitled to a $500 credit toward the seminar.)

THE ELECTIONS: While George S. Christian addresses the coming elections in his comments below, I want to urge all of you to vote early, and encourage your friends and colleagues to exercise their vote as well. Of note, there are four Supreme Court justices running for re-election, and while TADC itself does not traditionally endorse candidates, I do want to note that Phil Johnson, Jeff Boyd, and Jeff Brown are all former members of TADC who are running in the Republican Primary. Gina Benavides, another former TADC member is also a candidate for Supreme Court running as a Democrat in the Fall general election.

SURVEY: TADC has canvassed its members from time to time for suggestions. It's that time again. In the coming few days, you will be receiving a link to TADC's short membership survey. Please take a moment to offer your thoughtful comments. We value your insight and look forward to hearing from you.

One final note: We were notified of the passing of one of TADC's oldest members, James (Jim) W. Wray, formerly of Corpus Christi. Jim Wray was a leader in TADC for many, many years, offering strong guidance and sound advice from as early as 1960. He was also an early mentor in my career and the person most responsible for my involvement in TADC. Many are the stories we could share. He was not only a good lawyer, but a good and kind man. He will be missed.

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REMINDER

2014 Dues statements were mailed on November 1, 2013 and are due on January 1, 2014. If you need another copy of your dues statement, please email the TADC at tadc@tadc.org

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LEGISLATIVE/POLITICAL UPDATE

March 4 Primary Election: TADC PAC Weighs In

Early voting has begun for the March 4 Republican and Democratic primaries and runs through February 28. With regard to the Democratic primary, there are virtually no contested state-wide races. The TADC PAC has made contributions to the three incumbent justices with opponents on the GOP primary ballot: Chief Justice Nathan Hecht, Justice Phil Johnson, and Justice Jeff Brown. Given the unpredictable dynamics of Republican politics,

the outcome of these races remains in doubt. The challengers--former State Rep. Robert Talton of Houston (Hecht), Houston Court of Appeals Justice Sharon McCally (Johnson), and Joe Pool (Dripping Springs)--have received endorsements from several conservative and grassroots groups. These groups have the capacity to reach more than 400,000 GOP primary voters out of a total electorate expected to reach about one million. Needless to say, **the incumbents have been compelled to spend heavily on direct mail and radio advertising (TV will be limited) in an effort to overcome them**.

TADC PAC has also been active in primary elections for the Texas Senate and House of Representatives. The TADC PAC has made contributions in several contested primaries involving incumbents who have worked with TADC and other groups on civil justice-related issues. For the Texas Senate, TADC PAC supports Senators Bob Deuell (R-Greenville), John Whitmire (D-Houston), Kel Seliger (R-Amarillo), and John Carona (R-Dallas). For the Texas House, the choices are House Speaker Joe Straus (R-San Antonio) and Representatives Travis Clardy (R-Nacogdoches), Sarah Davis (R-Houston), Jim Keffer (R-Eastland), Drew Darby (R-San Angelo), John Otto (R-Dayton), and Byron Cook (R-Corsicana). Two of these incumbents, Sarah Davis and Travis Clardy, are longtime members of TADC. Remember that these are contested primary races only; TADC PAC will consider additional contributions for the November general election later this year.

As you know, a number of other statewide offices are on the ballot, and most of the action is in the Republican Primary. It is widely expected that Lt. Governor David Dewhurst will face one of his three challengers (Sen. Dan Patrick, Land Commissioner Jerry Patterson, or Agriculture Commissioner Todd Staples) in the primary runoff election (May 27). A runoff is also likely in the race to succeed Greg Abbott as Texas Attorney General. Most observers think that Rep. Dan Branch (R-Dallas) and Railroad Commissioner Barry Smitherman have the funding advantages, but Sen. Ken Paxton (R-McKinney) has the support of a number of conservative grassroots organizations as well. All three of the AG candidates are up on television. The race for Texas Comptroller is up in the air as well. Former gubernatorial candidate Debra Medina has significant grassroots support, as does Sen. Glenn Hegar (R-Katy). Rep. Harvey Hilderbran has garnered a number of major newspaper and business group endorsements. As of today, only Hegar has raised enough money for television, though Hilderbran is going up in some markets. In other statewide races, George P. Bush is likely to win election as Land Commissioner, but races for the Railroad Commission and Agriculture Commissioner are wide open. We'll have to wait until the dust settles to find out who will make the runoff.

Please make every effort to exercise your constitutional privilege and cast your vote in one of the party primaries. These elections are critically important to TADC members and to all Texans. The outcome could come down to a handful of votes in your area, so make sure you are one of them!

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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.***

Hotel Reservation cut-off date is
March 10, 2014
REGISTRATION MATERIALS HERE

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CALENDAR OF EVENTS

February 28, 2014
Joint HBA/TADC/HTLA Ad Litem Seminar
South Texas College of Law - Houston, Texas
RSVP to rmilton@tadc.org

March 14-15, 2014
TADC Trial Academy
Omni Colonnade – San Antonio, Texas
Troy Glander & Gayla Corley, Co-Chairs

April 9-13, 2014 - *Registration material available* ***HERE***
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

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

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

January CaseSummaries, by Jim Hunter&Esteban Delgadillo, Royston, Rayzor, Vickery&Williams, L.L.P., Rio Grande Valleyoffice.

1. **Contractual venue provision analysis by Federal Court.**

Atlantic Marine Construction Co., Inc. v.
United States District Court for the Western District of Texas et al.
(Supreme Court of the United States, December 3, 2013)

The petitioner, Atlantic Marine Construction Co., a Virginia corporation, entered into a subcontract with respondent J-Crew Management, Inc., a Texas corporation, for work on a construction project in Texas. The subcontract between Atlantic Marine and J-Crew contained a forum-selection clause providing that all disputes would be litigated in the Circuit Court for the City of Norfolk, Virginia, or the United States District Court for the Eastern District of Virginia, Norfolk Division. When a dispute about payment arose, J-Crew sued Atlantic Marine in the Western District of Texas invoking diversity jurisdiction. Atlantic Marine filed a motion to dismiss, arguing that the forum-selection clause rendered venue in the Western District of Texas "wrong" under §1406(a) and

"improper" under Federal Rule of Civil Procedure 12(b)(3). In the alternative, Atlantic Marine filed a motion to transfer the case to the Eastern District of Virginia under §1404(a). When the District Court denied both motions, Atlantic Marine petitioned the Court of Appeals for the Fifth Circuit for a writ of mandamus to compel the District Court to dismiss or transfer the case. The Fifth Circuit denied Atlantic Marine's petition. On appeal, the Supreme Court unanimously concluded that although a forum-selection clause does not render venue in a court "wrong" or "improper" within the meaning of §1406(a) or Rule 12(b)(3), the clause may be enforced by a motion to transfer under §1404(a) - if the forum-selection clause points to a federal forum. Furthermore, if the forum-selection clause points to a state or foreign forum, the clause may be enforced by the doctrine of forum non conveniens.

The reasoning behind this holding is that when a contract contains a valid forum-selection clause, that clause represents the parties' agreement that the contractual forum is the most proper forum for suit. The agreed upon forum should be given controlling weight in all but the most exceptional cases. Accordingly, a district court must adjust its usual §1404(a) analysis in three significant ways. First, the district must give the plaintiff's choice of forum no weight, and the plaintiff has the burden of showing that transferring the case to the contractual forum is unwarranted. Second, the district court should only look to the forum-selection clause to identify the private interests of the parties, and essentially may only consider public interests. Third, a §1404(a) transfer of venue from the original venue to the contractual forum will not carry with it the original venue's choice-of-law rules. This is because the party that was bound by a forum-selection clause disregarded its contractual obligation by filing suit in a different forum than the contractual forum. As such, the District Court improperly placed the burden on Atlantic Marine to prove that the transfer to the contractual forum was warranted instead of requiring J-Crew to establish that a transfer to the contractual forum is unwarranted. The District Court further erred (1) by giving weight to the parties' interests outside those expressed in the forum-selection clause and (2) by concluding that the Virginia federal court would have been required to apply Texas' choice-of-law rules instead of Virginia's.

In sum, when a defendant files a §1404(a) motion to transfer based on a valid forum-selection clause, a district should transfer the case unless exceptional circumstances - that are unrelated to the parties' convenience - clearly disfavor a transfer. **READ THIS OPINION HERE**

2. Timing of Objections to the Jury Charge.

King Fisher Marine Service L.P. v. Jose H. Tamez

(Corpus Christi Court of Appeals, May 31, 2012, Review Granted October 18, 2013)

This is a maritime case in which Plaintiff sued Defendant King Fisher Marine Service, L.P., for personal injuries he sustained while working aboard a dredging vessel. Plaintiff claimed he sustained such injuries while carrying out "specific orders," as opposed to "general orders." The jury awarded Plaintiff $420,000 in compensatory damages. Because the jury found that Plaintiff acted under specific orders at the time of the incident, the trial court did not reduce his damages by the percentage of his own negligence, which the jury found to be 50%. King Fisher appealed to the Corpus Christi Court of Appeals.

The second issue on appeal was whether the trial court erred in rejecting King Fisher's proposed definition of "specific orders" on the grounds that it untimely filed the proposed definition. Reviewing the issue under abuse of discretion, the Corpus Christi Court of Appeals concluded that trial court did not abuse its discretion by rejecting King Fisher's proposed definition. The court explained that King Fisher had "ample opportunity" to submit its proposed definition given that the trial court had a scheduling order in place and had held both an informal and formal charge conference at which it heard objections. Instead, King Fisher submitted the proposed definition only minutes before the court was going to bring in the jury to read the charge. Texas Rule of Civil

Procedure 272 provides that the trial court must allow counsel reasonable time to inspect and raise objections to the charge. King Fisher essentially argued that this language means that a party may submit a proposed jury instruction at any time prior to the final charge being read to the jury. Contrary to this, the court concluded that a trial court has discretion in its control of trial proceedings, including the discretion to reject a proposed jury instruction as untimely given the circumstances of the case. Ultimately, the court held that the trial court did not abuse its discretion in rejecting King Fisher's proposed jury instruction.

King Fisher appealed to the Texas Supreme Court. The Texas Supreme Court granted certiori to determine whether King Fisher's proposed jury instruction was timely when King Fisher submitted the proposed jury instruction after the formal charge conference but before the trial court read the charge to the jury. **READ THIS OPINION HERE**

3. Analysis of Death Penalty Sanctions

Shops at Legacy (Inland) Ltd. P'ship v. Fine Autographs & Memorabilia Retails Stores, Inc.
(Dallas Court of Appeals, Nov. 25, 2013)

This case involved a trial court's imposition of the so called "death penalty" sanction—a sanction that adjudicates a claim and precludes the presentation of the merits of the case. The Dallas Court of Appeals concluded that the trial court erred when it dismissed Appellant's cause of action with prejudice, given that the record did not show the trial court considered and analyzed the availability of lesser sanctions and whether the sanctions would fully promote compliance. This case involved a shopping center lease agreement that Appellant claimed Appellee breached. On the day of trial, when the trial court denied Appellant's request for a continuance, Appellant orally moved for a nonsuit without prejudice. In response, Appellee filed a motion for sanctions based on discovery abuse. The court granted Appellee's motion for sanctions and dismissed Appellant's cause of action with prejudice.

Under Texas Rule of Civil Procedure 215.2, a trial court may impose any appropriate sanction authorized by sections (b)(1)-(5) and (8) if the trial court finds a party is abusing the discovery process in seeking, making, or resisting discovery. Discovery sanctions have three principal functions: (1) to secure the parties' compliance with the discovery rules; (2) to deter other litigants from violating the discovery rules; and (3) to punish parties who violate the discovery rules. On appeal, to determine if a trial court's sanctions were proper, an appellate court considers: (1) whether there is a "direct relationship" between the abusive conduct and the sanction imposed; and (2) whether the sanction is excessive. Because a sanction should be no more severe than necessary for its intended purpose, a court must consider whether a less severe sanction would promote compliance with the discovery rules. A death penalty sanction should be imposed only in the most egregious and exceptional cases when it is clearly justified. Importantly, the record must corroborate the necessity of the death penalty sanctions. The Dallas Court of Appeals concluded that the trial court erred because the record did not demonstrate that the trial court fully considered and analyzed, aside from reciting that lesser sanctions would be ineffective, whether less stringent sanctions would promote compliance with the discovery rules. This case stands for the proposition that death penalty sanctions are truly reserved for the most egregious abuses of the judicial process, abuses of which the trial court cannot rectify with less stringent sanctions. **READ THIS OPINION HERE**

4. A slip and fall at a hospital is a healthcare liability claim subject to the Texas Medical Liability Act.

***East Texas Medical Center Regional Health Care System v.* Reddic**

(Tyler Court of Appeals, December 4, 2013)

This interlocutory appeal involved the issue of whether a slip and fall in a hospital lobby constituted a health care liability claim (HCLC) under the Texas Medical Liability Act (TMLA). The Tyler Court of Appeals concluded that Appellee's claim did in fact constitute a HCLC, given that safety is a fundamental need that a hospital must provide to both patients and visitors. Appellee allegedly fell on a wet mat while walking from the main entrance to the front desk of the hospital. Appellant argued that Appellee's claim constituted a HCLC and therefore Appellee was required to serve an expert report within 120 days of filing suit. Under the Texas Civil Practice & Remedies Code section 74.001(a)(13), a HCLC includes a cause of action against a health care provider "for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care***, or safety*** or professional or administrative services directly related to health care...." (*emphasis added*).

Although the record was not clear as to whether Appellee was a patient or a visitor at the hospital, the Court stated that it was irrelevant because her claim would nevertheless qualify as a HCLC under the safety prong of the TMLA. The Court concluded that a fall, even by a visitor, in a hospital lobby meets the TMLA's safety prong. This is because the services that a hospital must provide under the ambit of TMLA protection include those services required to meet patients' fundamental needs, such as ensuring the safety of a floor around an area that patients use throughout the day. At the very least, this has an indirect relationship to the provision of health care that is sufficient to satisfy the safety prong of the TMLA. Because Appellee fell in an area that a hospital should keep safe for patients, Appellee's claims have a "strong indirect relationship to the safe provision of health care for patients." Accordingly, Appellee's claims were HCLCs under the TMLA. **READ THIS OPINION HERE**

5. Appellate Jurisdiction over venue in a case involving multiple-plaintiffs; & What constitutes a Defendant's principal place of business for venue purposes?

Union Pacific Railroad Co. v. Stouffer
(Dallas Court of Appeals, December 19, 2013)

This case involved a tragic accident that took the lives of several of our country's veterans and their spouses. A train operated by Union Pacific collided with a truck and a connected flatbed trailer owned by Smith Industries, in which the passengers were military veterans and their spouses. Plaintiffs filed a personal injury and wrongful death suit against Smith and Union Pacific in Dallas County, alleging that Union Pacific maintained a principal office in Dallas County. Union Pacific filed a motion to transfer venue and asserted its sole principal office was located in Harris County.

The first issue on appeal was whether the appeals court had appellate jurisdiction to hear the interlocutory appeal over the trial court's interlocutory order denying Union Pacific's motion to transfer venue. On this issue, the Dallas Court of Appeals interpreted section 15.003(b) of the Texas Civil Practice & Remedies Code broadly to mean that there is interlocutory appellate jurisdiction over all venue rulings in all cases involving multiple plaintiffs. The court explained that in a multiple-plaintiff case, the trial court's venue ruling is necessarily a determination that each plaintiff did or did not independently establish proper venue. Otherwise put, in a case with multiple plaintiffs, because a trial court's order denying a motion to transfer venue of the entire case is necessarily a determination that each and every plaintiff independently established proper venue, such orders are subject to interlocutory appeal.

The second issue on appeal was whether the plaintiffs met their burden to present prima facie proof that venue was proper in Dallas County. In reviewing a venue decision, an appellate court

conducts an investigation of the entire record—as opposed to a trial court's venue determination, which is based solely on the pleadings and affidavits—to determine whether any probative evidence supports the trial court's venue decision. Under section 15.001(a) of the Texas Civil Practice & Remedies Code, a principal office is the office in which the "decision makers … conduct the daily affairs of the organization." The Texas Supreme Court has held that the phrase "a principal office" means that a corporation may have more than one principal office in this state. To establish venue based on a principal office, the plaintiff must show (1) that the employees in the county of suit are decision makers and (2) that these employees have substantially equal responsibility and authority relative to other company officials within the state. The plaintiffs in this case failed to meet the second prong of this test that the employees of the Dallas office possessed authority that was substantially equal to others in the state, but instead focused exclusively on whether they were decision makers. Accordingly, the plaintiffs failed to establish their prima facie case that Dallas County was a principal office for Union Pacific. **READ THIS OPINION HERE**

6. Presumption & shifting burdens in a malicious prosecution claim.

Rico v. L-3 Communications Corporation
(Dallas Court of Appeals, January 10, 2014)

This case arose from an alleged sexual assault committed by Appellant against Appellee. Once Appellant was acquitted of the charge of sexual assault, he filed suit against Appellee on the theories of intentional infliction of emotional distress and malicious prosecution. The trial court granted summary judgment on both claims in favor of Appellee. The Dallas Court of Appeals affirmed the trial court's ruling.

Regarding the burden shifting regime in a malicious prosecution claim, the court explained that there is a presumption that the defendant acted reasonably and in good faith and had probable cause to initiate criminal proceedings. To rebut this presumption, the plaintiff "must produce evidence that the motives, grounds, beliefs, or other information upon which the defendant acted did not constitute probable cause." The burden then shifts to the defendant to offer proof of probable cause. In this case, Appellant produced no summary judgment evidence that Appellee did not have probable cause to file the police report. Because Appellant produced no evidence on this element of his malicious prosecution claim, the trial court did not err in granting summary judgment on this issue against Appellant.

Regarding his claim of intentional infliction of emotional distress, the court concluded that Appellant produced no evidence that Appellee's conduct was extreme or outrageous. Although Appellant claimed innocence, this was not sufficient to establish that Appellee did not reasonably and in good faith believe that she was sexually assaulted by Appellant. Accordingly, summary judgment was proper. **READ THIS OPINION HERE**

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