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

FROM THE PRESIDENT

Dan K. Worthington,
Atlas, Hall & Rodriguez, L.L.P., McAllen

END OF SESSION (ALMOST)/MID-YEAR UPDATE

While the Special Session drags on, it does so without holding the civil justice system hostage. As we reported in June, our business in Austin has been completed and we are able to report that, unlike the recent past, there was very little effort made to further curtail the ability of litigants to have their claims or defenses to be given fair treatment.

As part of our continuing obligation to you, we are completing a summary of what was enacted and anticipate having that out to you via e-blast before the end of August.

Meeting Updates.

We have just returned from the Summer meeting in Whistler which was held jointly with the Washington State Defense Trial Lawyers' Association. The programs/presentations, the networking with the Washington State defense bar, the hospitality suite and everything else Whistler had to offer were outstanding. David Chamberlain, Greg Binns, the speakers, Bobby and our entire staff delivered a first rate event.

On August 9, the West Texas Seminar is set for Inn of the Mountain Gods, in Ruidoso, New Mexico and the program being delivered by Bud Grossman, Barry Peterson, Chantel Crews, Milton Colia, Mark Walker, and Mitch Moss is shaping up to be another success. Whether you are in need of CLE or not, if you can make the trip, please consider taking the opportunity to attend this joint meeting being held with the New Mexico Defense Lawyers' Association.

The Fall meeting is scheduled for Boston with the opening reception set for Wednesday, September 17 and the CLE to follow on Thursday and Friday September 18 and 19. Like most of our meetings this year, the program will include members of the Massachusetts Defense Lawyers Association. John Weber and Mitch Smith have put together an outstanding CLE program. In addition to the CLE, we are providing an opportunity to scratch one more item off your bucket list, by securing a block of tickets to Fenway to see a Red Sox game.

Items of Note.

If you have not joined our linkedin page, please do so. You will find the opportunity to discuss/locate experts, strategy questions and substantive legal questions well worth the small investment in your time. Our twitter following continues to grow and you should give that a look as well.

We hope to have an Apple/Android App available by mid-next year and would love to hear your thoughts on how we can make it as user friendly and worthwhile as is possible.

DRI

When Carlos Rincon, of El Paso, rotates off the DRI board at the end of this year, Texas will no longer have a presence/voice on the DRI board. Scott Stolley, a TADC member and partner at Thompson & Knight in Dallas, is running for a board position to follow Carlos as our representative. The TADC Board of Directors strongly supports his candidacy and requests that any of you who know Scott (or know of him) and who are attending the annual DRI meeting in Chicago in October consider registering and speaking to the DRI committee in support of Scott. For those of you who are not attending the meeting, written support of Scott can be made to John Kouris by October 11 to:

John Kouris
DRI
55 W. Monroe
Suite 2000
Chicago, IL 60603
johnrkouris@dri.org

Scott is not only a great lawyer, he is an even more outstanding person and will effectively represent our voice and concerns to the DRI.

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REGISTER NOW!

For the 2013 TADC Annual Meeting
Join the TADC in Boston - September 18-22, 2013

A program for the practicing trial lawyer:

~ Causation in Texas: Clear as Mud
~ There's an APP for that: The I-Pad and your Practice

~Assets Freezing Order Act: Your Clients should be Afraid
~ Supreme Court Update
…..and much more, including an optional
Boston Red Sox Game!

Reservation cut-off date is August 28, 2013

REGISTRATION MATERIALS

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CALENDAR OF EVENTS

August 2-3, 2013
TADC Budget/Nominating Committee
Austin, Texas

August 9-10, 2013
West Texas Seminar
Inn of the Mountain Gods – Ruidoso, NM
REGISTRATION MATERIAL

September 18-22, 2013
TADC Annual Meeting
W Hotel – Boston, Massachusetts
REGISTRATION MATERIAL

November 8-9, 2013
TADC Board of Directors Meeting
San Antonio, Texas

January 24-25, 2014
TADC Board of Directors Meeting
Austin, Texas

February 5-9, 2014
TADC Winter Seminar
Elevation Resort & Spa – Crested Butte, Colorado

April 9-13, 2014
TADC Spring Meeting
The Fairfax Embassy Row – Washington, D.C.

July 16-20, 2014
TADC Summer Seminar
Coeur d'Alene Resort – Coeur d'Alene, Idaho

September 24-28, 2014
TADC Annual Meeting

Hyatt Hill Country Resort – San Antonio, Texas

LEGAL NEWS - CASE UPDATES

* Case Summaries prepared by Russell R. Smith; Fairchild, Price, Haley & Smith, L.L.P., Nacogdoches

Bailey v. Amaya Clinic

2013 Tex. App. LEXIS 6565

Facts and Issues

Plaintiff was being treated by a dermatologist and the staff of a clinic for weight loss surgery when she allegedly fell from a machine, breaking one ankle and spraining the other. Plaintiff filed suit against the dermatologist and the clinic under the Texas Medical Liability Act claiming negligence and gross negligence. When served with plaintiff's expert physician reports, the defendants filed a motion to dismiss and objections to the reports on grounds that the doctors were not adequately qualified to opine in this matter and did not properly summarize or apply proper standards of care. The trial court sustained and overruled objections to the physicians' reports and denied the motion to dismiss. The parties' issues with the order revolve around the doctor's articulation of a fair summary of opinions of standards of care, establishment of qualifications to opine that standard of care and application of the same standard of care to both the doctor and the clinic.

Analysis and Decision

One of plaintiff's experts was an orthopedic surgeon that had previously treated the plaintiff. The court ruled he was qualified to opine even though he was not a dermatologist or weight loss surgeon. A similar decision was reached for another doctor, who was a board certified surgeon that had experience in treating obese patients. The last doctor was deemed unqualified, even though he was an experienced dermatologist, because the issues in this case had nothing to do with skin or skin disease, but with exercise equipment and weight loss surgery.

The court also ruled on the reports of the qualified doctors, ruling that while their reports either similarly or exactly regarded the same standard of care for both Powell and the clinic, the defendants owed the same duties to the plaintiff. They ruled that the Powell objection to Francis' and Bell's different standard of care explanations has no merit. The trial court's denial of the motion to dismiss was affirmed. However, there was also a dissenting opinion written, which claimed that this appellate court did not have the jurisdiction to preside over this case. **READ THIS OPINION**

Bich Negoc Nguyen v. Allstate Insurance Company and Lincoln Benefit Life Company

2013 WL 2360108 (Tex.App.-Dallas)

Facts

Ahn Nguyen applied for life insurance with Lincoln Benefit Life Company (Lincoln). Ahn Nguyen spoke no English but completed the application with the help of a translator. Ahn Nguyen answered "no" to questions about any existing medical conditions and "no" to the question about whether she had recently seen a doctor. Additionally, when asked during the physical examination, Ahn Nguyen stated that she had no pre-existing conditions and that she had not seen a doctor in the last five years. The policy was issued on June 9, 2008, Ahn Nguyen was diagnosed with lung cancer on June 17, 2008, and she died on September 8, 2008. Because Ahn Nguyen died within two years of the policy being issued, Lincoln conducted a routine investigation. Lincoln discovered that Ahn Nguyen had a prior history of many severe lung issues and had seen a doctor at least fifteen times before applying for life insurance. In December, Lincoln rescinded the policy because of misrepresentation. Bich Nguyen, Ahn Nguyen's daughter and beneficiary, brought suit because of Lincoln's rescission of the life insurance policy.

Procedural History

Lincoln filed a combined no-evidence motion for summary judgment. Bich replied to the summary judgment motion by filing 650 pages of summary judgment evidence claiming that it raised an issue of material fact. Lincoln argued that it was insufficient to respond to a summary judgment motion with a large stack of documents without addressing the issues within these documents. The trial court agreed and granted Lincoln's motion for summary judgment on all of Bich's claims.

Analysis and Decision

Bich appealed claiming the trial court erred in not considering the evidence she filed and for determining that the evidence presented did not raise an issue of material fact. After reviewing Lincoln's no-evidence motion for summary judgment, the court determined that Lincoln had set forth each element of Bich's claims and proved that there was no evidence to support each claim. Thus, Lincoln's motion for summary judgment was upheld.

Additionally, Bich filed a motion regarding perjury of one of Lincoln's affidavits. Allstate's Rebecca S. Jones stated that she handled and made the final decision to rescind the policy. However, in Bich's motion regarding perjury, Bich claimed that Allstate's Janie Adams conducted all affairs dealing with Ahn Nguyen's policy and that Adams did not mention Jones in her deposition. Bich stated that Adams was likely telling the truth and that Jones' testimony was perjury. However, Bich did not submit enough evidence to support this claim, and like the trial court, the court rejected Bich's motion. The court ruled that the trial court did not abuse its discretion by denying Bich's motion regarding perjury.

Lastly, Bich claimed that they did not have the opportunity to depose a key witness, Kyrston Fautheree (the woman who conducted Ahn Nguyen's physical examination), because Lincoln failed to disclose Fautheree's information until the last day of discovery.

The trial court allowed Bich to get Fautheree's deposition before the set trial date. However, summary judgment was granted before Bich received Fautheree's deposition. Thus, Bich filed another motion to depose her. The trial court denied this motion and ruled that Bich had plenty of time to get Fautheree's deposition but failed to do so. Agreeing that Bich had enough time to get Fautheree's deposition, the court determined that the trail court did not err in denying Bich's motion to depose Fautherree after summary judgment was granted. **READ THIS OPINION**

CenterPlace Properties, LTD. v. Columbia Medical Center of Lewisville Subsidiary, L.P.

2013 Tex. App. LEXIS 6601

Facts

Medical Center of Lewsiville (MCL) entered into a commercial lease agreement with CenterPlace Properties (CenterPlace) to use CenterPlace's building for medical offices and surgery centers. Because CenterPlace's buildings were new, MCL agreed to finish necessary building construction. After discussion of a construction plan, an amendment to the lease was agreed upon which delayed the construction completion date. However, MCL had not started construction by the completion date and, as a result, CenterPlace attempted to terminate the lease and its amendments. CenterPlace sent MCL numerous letters of notice, telling MCL that the lease was terminated and that MCL should move out as soon as possible. CenterPlace intended to re-lease the property as soon as MCL moved out. CenterPlace brought a breach of contract claim against MCL for failure to complete construction by the agreed upon date. MCL denied breaching the contract and alleged CenterPlace had committed prior material breach by violating Texas Property Code section 93.002.

Procedural History

The trial court ruled for MCL for CenterPlace's violation of Texas Property Code section 93.002 for intentionally preventing MCL from entering the premises. The trial court found that the notice letters constituted an intention to prevent MCL from re-entering the property. Because of this violation, the trial court found that CenterPlace breached the lease and CenterPlace was awarded nothing on its claims. CenterPlace appealed.

Analysis and Decision

On appeal CenterPlace claimed that there was not enough evidence for the trial court to find that it intentionally violated Texas Property Code section 93.002. This statute states that a commercial landlord "may not intentionally prevent a tenant from entering the lease premises except by judicial process." In other words, a landlord cannot use "self-help" methods to remove a tenant from the leased property. After reviewing three precedent cases, the appeals court determined that in order for a landlord to violate Texas Property Code section 93.002, something more than a notice to vacate must occur. The court holds that some level of landlord self-help beyond a notice of default or to vacate is required to create liability under section 93.002(c). Thus, because MCL could still enter into the property and because they had only received notices to vacate, CenterPlace did not violate section 93.002.

CenterPlace also claimed that there was insufficient evidence to support the trial court's finding that CenterPlace breached the lease by failing to provide the MCL with Tenant Improvement Allowance/Funds (TI funds) at MCL request, as per the lease agreement. However, the court held that, based on sufficient evidence, CenterPlace continuously denied MCL's request for TI funds. Thus, CenterPlace breached the lease by failing to provide these funds.

The last issue on appeal was the trial court's decision to award attorney's fees to MCL. According to the lease agreement, the unsuccessful party must pay all cost, expenses, and reasonable attorney's fees that incurred during litigation. CenterPlace claimed that if they succeed in their appeal they were no longer liable for attorney's fees. However, the court rules that MCL remains the prevailing party, due to CenterPlace's failure to pay TI funds, and is still entitled to attorney's fees under the lease agreement. Additionally, the court rejects CenterPlace's alternative claim for attorney's fees based on the plain meaning of the lease. CenterPlace wrongfully interpreted the lease agreement to allow the landlord to be reimbursed for retaining counsel. However, the court rejects this argument, interpreting the lease to allow "reimbursement of its legal fees if CenterPlace retained counsel to enforce MCL's obligation under the lease agreement so long as litigation did not ensue." However, because litigation did occur, the prevailing party, MCL, was entitled to legal fees. **READ THIS OPINION**

Gardner v. Children's Medical Center of Dallas

2013 Tex. App. LEXIS 6775

Facts

Plaintiffs filed this appeal after a trial court issued a take-nothing judgment in favor of Children's Medical Center in reference to the plaintiffs' daughter, who now suffers from permanent brain damage, cerebral palsy, and cortical blindness that allegedly resulted from emergency care received from an emergency transport team from the defendants. Plaintiffs claimed that the heightened standard of proof burdened on patients receiving emergency medical care in a non-covered setting violated the Equal Protection Clause of the Texas and U.S. Constitution.

Procedural History

Prior court rulings suggest that the party challenging the rationality of a legislative statute has the burden of negating every conceivable basis in support of the law. To pass constitutional muster, a law does not have to be perfect; however, it cannot limit a constitutional right or discriminate against a class. The law must be upheld as long as there is a rational relation to some legitimate end.

Analysis and Decision

The plaintiffs' claim that the legislature enacted Section 74.153 of the *Texas Civil Practices and Remedies Code*, which puts a higher burden of evidence on the claimant when receiving emergency treatment outside of an emergency medical department, did so arbitrarily and without articulating facts or reasons for doing so. However, the Court found that the State did have a rational basis for the statute, stating that, "the legislature could rationally decide that *Section 74.153* would help protect physicians from rising

malpractice premiums and would make it easier for hospitals to recruit on-call physicians." The Court concluded that the statute bears a rational relationship to the State's interest, therefore passing the rational-basis review established by previous rulings. As a result, the plaintiffs' appeal is overruled and the judgment of the trial court is affirmed. **READ THIS OPINION**

Gloria Gurka and Eric Brock v. Tracy Gurka

2013 Tex. App. LEXIS 6363

Facts

Shane Gurka allegedly drowned while at the residence of his grandmother and Eric Brock (Appellants). Shane's alleged father, Tracy Gurka (Tracy) filed a wrongful death action against the Appellants. However, the Appellants challenged whether Tracy was Shane's true father.

Procedural History

After hearing various testimonies from Tracy, Shane's mother, and Shane's grandmother, the trial court determined that there was enough evidence to prove that Tracy was in fact Shane's biological father. The trial court took into account these factors when making their determination: a previous court determination that Tracy was Shane's father; that Shane looked like Tracy; and that Tracy had been paying child support.

On appeal, Appellants challenged the legal and factual sufficiency of the trial court's determination that Tracy was Shane's father. Appellants also contended that the trial court erred in allowing evidence that indicated Tracy as the father from a previous custody order in a different court. Lastly, Appellants claimed that the trial court erred in permitting Shane's grandmother to testify after the close of evidence and arguments.

Analysis and Decision

Like the trial court, the appellate court determined that when biological parentage is contested certain factors can be taken into account by the fact finder: the child's resemblance to the parent, prior statements from the alleged father that he is the father of the child, and other admissions in testament to the relationship of the child, including the periods of gestation and conception. The court holds that based on the evidence presented, the trial court was within its discretion to consider these factors and choosing what to believe as true after hearing testimony. Thus, the court holds that the evidence presented at trial was legally and factually sufficient for the fact finder to determine that Tracy was Shane's father.

Appellants also contended that the trial court erred in admitting evidence of a prior order that indicated Tracy as the father. The court determined that this evidence was only used to prove that Tracy had claimed Shane as his son in the prior family court proceedings. The trial court did not err in admitting this order as evidence.

The court dismisses Appellants' assertion that the trial court erred in allowing Shane's grandmother to take the stand after the close of evidence and arguments. The court holds that Appellants failed to support their position on appeal. Thus, the court overrules this issue and affirms the trial court's judgment. **READ THIS OPINION**

In Re Texas Rice Land Partners, Ltd., James E. Holland, an David C. Holland

2013 Tex. App. LEXIS 6318

Facts

TransCanada Keystone Pipeline, L.P, filed a petition for condemnation seeking to condemn property owned by Texas Rice Land Partners, Ltd., to be used for the construction of the Gulf Coast Project, a stretch of pipeline carrying crude oil from Cushing, Oklahoma, to Port Arthur, Texas. The commissioners ordered TransCanada pay compensation for the property, and the company complied. However, TRLP, Ltd. objected to the commissioners' decision. TRLP, Ltd. requested a jury trial, claiming that TransCanada did not possess the power of eminent domain because it had not proved it was a common carrier. The relator TRLP, Ltd. filed a petition for writ of mandamus asking the Court to vacate a writ of possession issued to TransCanada.

Procedural History

Case law suggests that mandamus is an "extraordinary" remedy available only in limited circumstances. It requires a clear abuse of discretion for which there is no other adequate remedy. The party seeking mandamus must not only show inadequate remedy by appeal but also abuse of discretion by the trial court. In direct relation to the issue at hand, a prior case involving TRLP, Ltd. went to the Texas Supreme Court, who ruled in favor of TRLP, Ltd. against Denbury Green Pipeline-Texas, LLC. Because Denbury did not prove it was a common carrier as a matter of law, they did not have the power of eminent domain. The Court held that there must be a reasonable probability the pipeline will serve the public, thus qualifying as a common carrier and obtaining the power of eminent domain.

Analysis and Decision

TRLP, Ltd. objected on the grounds that the court did not make a preliminary finding that TransCanada did in fact have the power of eminent domain. However, TransCanada provided a sworn affidavit from Louis Fenyvesi, director of markets and supply for TransCanada, along with other documents supporting their claim as a common carrier, giving them the power of eminent domain. This Court ruled that while the trial court erred in not making a preliminary finding, the evidence is undisputed, thus making the error harmless. Therefore, the request for mandamus was denied. **READ THIS OPINION**