TADC *e-Update*

The Texas Association of Defense Counsel, Inc.

FROM THE PRESIDENT

Michele Smith,
MehaffyWeber, P.C., Beaumont

Dear TADC Friends:

Welcome to 2015! The TADC is off andrunning for what promises to be a year full of great CLE, a Legislative Sessionalready well underway and plenty of local and regional activites for the TADCmembership.

LEGISLATIVE: The 84th Legislative Session is off to a fast start. As predicted, change comes with new faces. Last week, we saw an example of that change--the Texas Senate did away with the two-thirds rule in favor of the three-fifths rule. Now it will take only 19 votes to bring a bill to the floor, rather than 21 votes. This is a first. Further, the adopted rules eliminated the Senate Jurisprudence Committee which had been chaired by Senator Royce West.

The matters about which TADC is most concerned will now go through the State Affairs Committee. Friday, Lieutenant Governor Patrick assembled that committee, selecting Senator Joan Huffman from Houston as Chair and appointing 8 other Republicans and only 2 Democrats. See the Legislative Update below for more details. Stay tuned as we update you throughout the Session. It promises to be an interesting one.

Be sure to look at the activities planned across the state. Several areas have legislative luncheons on the calendar. We hope you will attend one in your area. Never has it been more important to stay informed.

The TADC will have a Legislative Day in Austin the afternoon of March 5. The goal is to meet as many legislators as we can and to ensure key legislators are aware of our position on bills affecting the civil justice system. ANY TADC member is welcome to join us on March 5. Please let me know if you want to participate. We will definitely take any and all help.

PROGRAMS: The ski meeting in Beaver Creek was truly spectacular. The venue was wonderful and the CLE interesting and informative. Thank you to our CLE chairs, Mackenzie Wallace and Mitch Moss, for putting together such a wonderful program. The presenters and topics are listed below.

FROM THE DEFENSE: APPELLATE ISSUES
Michelle E. Robberson, Cooper & Scully, P.C., Dallas

BATTEN DOWN THE HATCHES: TIPS FOR PREPARING A PROACTIVE PRE-SUIT DEFENSE IN AN EMPLOYMENT CASE
Diana Valdez, Law Offices of Diana M. Valdez, El Paso

DIGITAL FORENSICS
Warren Kruse, Altep, Inc., El Paso

TEXAS SUPREME COURT UPDATE
Nathan Aduddell, Thompson & Knight, LLP, Dallas

VOIR DIRE: A DEFENSE PERSPECTIVE
John McChristian, Ray, McChristian & Jeans, Fort Worth

VOIR DIRE: A PLAINTIFF'S PERSPECTIVE
Kevin Glasheen, Glasheen, Valles & Inderman, LLP, Lubbock

USING COURTS FOR DISCOVERY IN ARBITRATION
Andrew Melsheimer, Thompson & Knight, LLP, Dallas

VOIR DIRE: A JURY CONSULTANT'S PERSPECTIVE
Richard Waites, PhD, The Advocates, Houston

DEFENDING OIL AND GAS LITIGATION
Gregory D. Binns, Thompson & Knight, LLP, Dallas

BUDGET FOR YOUR DEFENSE
Whitney L. Mack, Thompson, Coe, Cousins & Irons, L.L.P., Austin

DEFENSE STRATEGY: CAUSATION AND DAMAGES
Christy Amuny, Bain & Barkley, L.L.P., Beaumont

OBTAINING A TEMPORARY INJUNCTION FOR BREACH OF EMPLOYMENT AGREEMENTS
R. Edward Perkins, Sheehy, Ware & Pappas, P.C., Houston

HOW TO DEFEND TOXIC TORT LITIGATION
Arturo M. Aviles, Segal McCambridge Singer & Mahoney, Austin
Patrick W. Stufflebeam, HeplerBroom LLP, Edwardsville, IL

Thank you also to Heather and Robert Sonnier for serving as meeting chairs and assembling an incredible guide for restaurants and activities. One highlight of the meeting was a large sleigh ride dinner to Zack's Cabin--which included 8 kids!

  

<u>TRANSPORTATION SEMINAR</u>: another great program in the works is our Transportation CLE (PLANES, TRAINS, AUTOMOBILES &...SHIPS) chaired by Mitchell Smith and planned for February 26 in San Antonio and May 16 in Fort Worth. Topics and speakers include aviation (John Martin), Trucking (Carlos Rincon), Maritime (Michael Golemi) and Railroad (Toby Nash). This is going to be a great half-day seminar. We hope to see you there.

MEMBERSHIP: We need your help to keep the TADC strong! Our outstanding Membership Committee is doing an excellent job in identifying opportunities for the TADC to recruit and retain members.

Young Lawyers in practice fewer than 5 years who have not attended a TADC seminar qualify for a free meeting registration. This is a great way to involve our younger members (or would-be members). The Spring Meeting in Galveston (April 29-May 2) is a terrific opportunity for young lawyers to attend an outstanding in-state CLE and to meet other young lawyers. Our Young Lawyers' committee will sponsor a happy hour Thursday night during the Spring Meeting and the CLE program being put together by Gayla Corley, Robert Booth and Elliot Taliaferro will have a practical nuts and bolts focus applicable to all lawyers. Take advantage of this great opportunity!

If you know of anyone who should be a TADC member that is not, please let us know. Membership is the life blood of any organization and we want to keep the TADC strong for many years to come.

Welcome to our new TADC members!

Robert M. Disque, Goldman & Associates, PLLC, San Antonio
Brennon D. Gamblin, Craig, Terrill, Hale & Grantham, LLP, Lubbock
Michelle R. Gomez, Cox Smith, San Antonio
Katherine Kassabian, McDonald Sanders, P.C., Fort Worth
Sarah R. Minter, Goldman & Associates, PLLC, San Antonio
Elizabeth A. O'Connell, O'Connell & Avery, LLP, San Antonio
Gregory J. Peterson, Goldman & Associates, PLLC, San Antonio
Lauren Newman Pierce, Cooper & Scully, PC, Dallas
James Montague Stevens, Stevens & Associates, El Paso
Justin Woods, Goldman & Associates, PLLC, San Antonio

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LEGISLATIVE/POLITICAL UPDATE

The Texas Legislature convened on Tuesday, January 13, and immediately made history. For the first time since 1975, House members had to choose between two candidates for Speaker. Three-term incumbent Speaker Joe Straus (R-San Antonio) easily turned back a challenge from Tea Party favorite Scott Turner (R-Rockwall), who garnered only 19 votes. The House quickly moved to adopt rules, and House committee assignments will probably be released next week.

Lieutenant Governor Dan Patrick (R-Houston) took the oath of office at the inauguration ceremony on Tuesday, January 20. Last week the Senate held its much-anticipated debate on the Senate rules. While it came as no surprise, the demise of the traditional 21-vote requirement for suspending the regular order of business to bring bills to the floor marked an historic shift in the operation of the Texas Senate. The GOP holds a 20-11 advantage over the Democrats in the Senate, and the reduction of the threshold from 21 to 19 votes effectively eliminates the need for any Democratic votes on any bill. The Senate rules also reduced the number of committees from 16 to 14. The big surprise was the elimination of the Senate Jurisprudence Committee, which handled the lion's share of bills relating to the judiciary and court administration. It appears that most of the old committee's work will go to Senate State Affairs, which will be chaired by Senator Joan Huffman (R-Houston), a former criminal district judge. Other civil justice-related bills, however, could be sent to one of two committees: Senate Business and Commerce, chaired by Senator Kevin Eltife (R-Tyler), or perhaps Senate Natural Resources and Economic Development, chaired by Senator Troy Fraser (R-Horseshoe Bay). Senate Democrats retained only two chairs: Senate Dean John Whitmire (D-Houston) continues as chair of Criminal Justice, while Senator Eddie Lucio (D-Brownsville) replaces Senator Juan Hinojosa (D-McAllen) as chair of Senate Intergovernmental Relations.

TADC currently has about 88 bills on its tracking file. In our last update, we reported in detail on one of these bills, **SB 64** by Senator-elect Don Huffines (R-Dallas). This proposal limits the time in which the SCOT can act on a petition for review and the time in which it must decide a matter. It also places time restrictions on the Courts of Appeals and allows the Chief Justice of the SCOT to discipline individual justices.

In the last couple of days, two significant bills have been filed in the Texas House. The first, **HB 956** by Representative Chris Turner (D-Arlington), amends §74.001, CPRC, to limit the scope of a health care liability claim. The bill:

(1) clairifies "claimant" to mean a "patient" (rather than a "person"), including a deceased patient's estate, and clarifies that a person who brings suit for damages for an injury to another person who is a patient is also a "claimant",

(2) defines "health care liability claim" to require a claim be "directly related to health care" and expressly excluded a claim arising from an injury to a person who is not a patient, including employment and premises liability claims.

The bill also states that is is intended to clarify and not change existing law. As drafted, it would apply to pending suits.

The second, **HB 969** by Representative Ken King (R-Pampa), amends §41.011, CPRC, to bar evidence of a party's financial condition or net worth for purposes of supporting a claim for punitive damages. We expect both of these proposals to be referred to the House Judiciary and Civil Jurisprudence Committee.

Bills that have not been filed, but which we expect in the next few weeks include:

- A package of legislation seeking to curb abuses in first-party claims arising from natural catastrophies, primarily hailstorm claims;
- A response to the Texas Supreme Court's ruling *In re Ford Motor Company* with respect to the Texas doctrine of *forum non conveniens (§71.051, CPRC);*
- Legislation raising the qualifications for appellate judges and justices; and
- Legislation addressing the practice of patent trolling.

We look forward to seeing everyone in Austin on March 5, 2015 for the TADC Legislative Day. This will be an excellent opportunity for legislators and their staff to get to know our members and hear from us about the importance of a fair and accessible civil jury system.

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CALENDAR OF EVENTS

January 30, 2015
Amarillo Legislative Luncheon
Amarillo Club – Amarillo, Texas

February 4-6, 2015
DRI Product Liability Seminar
The Cosmopolitan - Las Vegas, Nevada

February 6, 2015
Valley Legislative Luncheon
Tony Roma's South - McAllen, Texas

February 11, 2015
Austin Legislative Luncheon
Headliner's Club – Austin, Texas

February 13, 2015
San Antonio Legislative Luncheon
Paesano's at the Quarry – San Antonio, Texas

February 20, 2015
East Texas Legislative Luncheon
Willow Brook Country Club – Tyler, Texas

March 5, 2015
TADC Board of Directors Meeting/Legislative Day
Austin, Texas

April 29-May 3, 2015
TADC Spring Meeting
The San Luis Resort – Galveston, Texas
Robert Booth & Gayla Corley, Co-Chairs
Elliott Taliaferro, Young Lawyer Chair
Registration material will be mailed in mid-February

July 8-12, 2015
TADC Summer Seminar
Snake River Lodge & Spa – Jackson Hole, Wyoming
Pamela Madere & Christy Amuny, Co-Chairs
Registration material will be mailed in late April

July 31-August 1, 2015
TADC Budget/Nominating Committee Meeting
DoubleTree Suites – Austin, Texas

August 7-8, 2015
West Texas Seminar
Inn of the Mountain Gods – Ruidoso, New Mexico
Registration material will be mailed in late May

September 16-20, 2015
TADC Annual Meeting
Millennium Broadway – New York, New York
David Chamberlain & Keith O'Connell, Co-Chairs
Registration material will be mailed in early July

LEGAL NEWS - CASE UPDATES

Case Summaries prepared by

Jerry Fazio with Owen & Fazio, Dallas

***Reddy v. Veedell*, 2014 Tex. App. LEXIS 10504 (TEX. APP. Houston 1st Dist. September 18, 2014)**

A woman sued a doctor for negligence after he struck her with his car while she was riding her bike on a public street. The doctor filed a Motion to Dismiss because she failed to file an expert report required by the Texas Medical Liability Act. The doctor argued that this case involved a health care liability claim because he is a physician, the claims pertained to safety, and the damages were caused by his omission. He also argued that the claims were indirectly related to health care because he believed he was distracted by a phone call from the hospital. The trial court denied and the doctor appealed.

On appeal, the Court was asked to determine whether the claims implicated a departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to heath care. The Court held that trial court correctly denied the Motion to Dismiss because the doctor did not produce evidence that he was attending to health-care issues when he stopped his car in the street. Additionally, the trial court acted within its discretion because the evidence merely showed that he answered a phone call from an unknown caller that could have been an unidentified hospital. The Court stated that the claim involved a motorist liability claim. At the conclusion, a concurring justice wrote that the woman's claim would have not required an expert report even if the doctor were distracted by a call from the hospital. **Read The Opinion HERE**

***Golden Corral Corp. v. Trigg*, 443 S.W.3d 525 (Tex. App.—Beaumont 2014)**

A woman sued Golden Corral after she slipped on wet floor near the buffet station. Golden Corral argued that their duties owed to invitees were discharged as a matter of law because they adequately provided their customers with a wet-floor warning sign. A jury found Golden Corral negligent and the trial court rendered judgment for the plaintiff. Golden Corral appealed and asserted that the evidence did not support the jury's finding as to their negligence, and that its negligence proximately caused the woman's injuries.

On appeal, Golden Corral argued that the jury's conclusion that it failed to provide adequate warning to the woman of the wet floor, is not supported by legally sufficient evidence. The Court agreed and determined that Golden Corral discharged its duty by providing an adequate warning that the floor was wet. Surveillance video established that a warning sign was placed near the wet area. In front of the jury, the woman argued that she never saw the sign. However, on appeal, the woman argued that the sign's location failed to warn her because it was placed four feet away from the wet area. She relied heavily on an expert's testimony. According to the expert, the sign should have been placed directly in front or on the wet area. Yet, the Court determined that the testimony was an unsupported opinion because the expert did not cite to any materials to support his theory. The Court stated that a reasonable, prudent person would have understood that the sign warned of a wet floor in the vicinity of the sign. The Court reversed and rendered a take-nothing judgment for the plaintiff because the evidence was legally insufficient to support the jury's verdict. **Read The Opinion HERE**

In Re Greater McAllen Star properties, Inc., 444 S.W.3d 743 (Tex. App—Corpus Christi 2014).

Nicole Morris (Morris) sued her ex-husband's employer, Greater McAllen Star Properties (McAllen), for injunctive and declaratory relief alleging tortious interference and conspiracy to commit tortious interference after she sought collection efforts on her divorce award. McAllen filed a Motion for Summary Judgment and the trial court set a date for its submission. During this time, Morris filed a Motion to Compel seeking responses to her discovery. McAllen responded by asserting Morris was not entitled to conduct discovery because her original petition failed to specify a range of monetary damages required by Tex. R. Civ. P. 47. Morris amended her pleading but did not re-propound her discovery request. McAllen filed for a protective order against discovery. The trial court granted Morris's Motion to Compel and denied McAllen's protective order. McAllen appealed and asked the Court to set aside discovery and to compel the trial court to conduct a hearing on its summary judgment motion.

The Court was faced with two issues. First, did the trial court abuse its discretion by compelling McAllen response to discovery while refusing to hear its Motion for Summary Judgment? Second, must Morris re-propound her discovery request after she amended her petition in order to comply with Tex. R. Civ. P. 47? The Court overruled the first issue because McAllen did not establish its right to mandamus. To obtain mandamus relief, a relator must establish: (1) the motion was properly filed and has been pending for a reasonable time; (2) the relator requested a ruling on the motion; and (3) the trial court refused to rule. *In re Sarkissian*, 243 S.W.3d 860, 861 (Tex.App.-Waco 2008, orig. proceeding). The record did not show that McAllen demanded a setting or a ruling on its motion, nor did they object to the court's alleged failure to hear or set the motion, or an unreasonable time had passed. McAllen asserted that there was a four-month delay between the time his motion was filed and its submission date, yet Morris was able to obtain multiple hearings on various discovery matters. The Court disagrees and pointed out McAllen invited the error by filing a motion to stay proceedings before Morris's motions were heard. Additionally, a trial court has discretion to decide whether additional discovery is necessary if the motion for summary judgment was premised on legal issues involving mixed questions of law and fact. *Childs v. Haussecker*, 974 S.W.2d 31, 44 (Tex.1998). Lastly, the Court overruled the second issue because requiring a party to re-propound its discovery request would create unnecessary ligation costs and McAllen failed to cite and the Court found no authority requiring a party to do so. **Read The Opinion HERE**

Greenberg Traurig, LLP v. Nat'l Am. Ins. Co., 2014 Tex. App. LEXIS 10206 (Tex. App. Houston 14th Dist. September 11, 2014)

Greenberg Traurig, LLP (Greenberg) appealed the trial courts decision to deny the enforceability of an arbitration provision in their retainer agreement with National American Insurance (NAICO) and it's insured Okie Foundation Drilling Co. Inc. (Okie). NAICO hired Greenberg for Okie's appeal after they suffered an adverse judgment. Greenberg had represented NAICO in litigation matters for the past five years. At the request of Greenberg's attorney, a formal retainer agreement was entered into between Greenberg and NAICO because this was the first time the two entered into a flat fee agreement. The agreement contained a provision compelling parties to arbitrate potential claims if such should arise. The attorney handling the appeal left for a different law firm. The attorney sent

NAICO an engagement letter to retain his services as a member of the new firm. Neither attorney nor members from Greenberg timely filed a notice of appeal. NAICO filed suit against the attorney, his current firm, and Greenberg for negligence and breach of fiduciary. Greenberg moved to compel arbitration among all parties. The trial court determined Greenberg failed to disclose adequately the arbitration provision and was therefore unenforceable under the doctrine of constructive fraud.

The main issue was whether a longstanding relationship imposes a fiduciary duty to disclose the existence and nature of an arbitration provision in a retainer agreement. The Court concluded that Greenberg did not owe a fiduciary duty despite a longstanding relationship for three reasons. First, the retainer agreement was limited to the Okie appeal and was contingent upon NAICO's signature. The language would be futile if fiduciary relationships extended to future representations. Second, arms-length negations for services between insurance defense attorneys and its repeat clients would morph into fiduciary transactions. Third, the legislature has not extended arbitration agreement limitations to the attorney-client context. Additionally, the parties also disputed whether Okie was bound by the terms of the retainer agreement as a non-signatory. Okie asserted that, as a non-signatory, it was not bound by the agreement because it was not supported by mutual assent. However, the Court disagreed because it determined Okie was estopped from attempting to avoid the contracts burdens after they simultaneously sought legal representation. Under the doctrine of direct benefits estoppel, a party who is seeking the benefits of a contract or seeking to enforce it cannot attempt to avoid its own contractual obligations. Lastly, the Court extended the arbitration provision towards NAICO and Okie's claims against the attorney and his current firm because the parties executed a new engagement letter that incorporated the arbitration provisions in the Greenberg agreement. **Read The Opinion HERE**

***Knoderer v. State Farm Lloyds*, 2014 Tex. App. LEXIS 10538 (Tex. App. Texarkana 6th Dist. September 19, 2014)**

A husband and wife appealed a trial court's decision to render judgment in favor of State Farm, and its decision to grant State Farm's motions for monetary sanctions that exceeded one million dollars. Before this case, State Farm prevailed in a precursor lawsuit brought by the couple after State Farm refused to pay for hidden mold repairs because their policy did not cover mold. The couple subsequently added the specific mold coverage to their homeowner's policy. State Farm sent a letter advising that their coverage would cease after State Farm discovered it mistakenly issued the policy. The couple's house flooded before the cease date. Consequently, there was a dispute as to the cause of the flooding. Both party's presented expert witnesses as to the cause. One of State Farm's arguments asserted that photos presented by the couple were altered. The trial court granted State Farm's Motion to Compel requesting the husband's computer hard drives. The husband promised to the court that he would preserve the evidence and not alter it in any way. It was later revealed that the husband deleted the photos using "scrubbing" software programs. As a result, the trial court assessed "death penalty" sanctions, and monetary sanctions in the amount of $1,000,000 in attorney's fees, $142,339 in expert fees, and $33,474 in cost. On appeal, the couple asserted that the sanctions against the wife were improper and that the "death penalty" sanctions were excessive.

The Court reviewed the trial court's ruling for an abuse of discretion. The couple argued that the sanctions were inappropriate because the fabrication and destruction of evidence did not go to the heart of the case. The Court used a two factor, relationship and proportionality test to determine whether the sanctions were just. The Court determined that the sanctions failed both tests. The sanctions cannot be authorized because the destroyed evidence went to impeachment and not the ultimate issue in the lawsuit. The Court also held that monetary sanctions were too excessive because the damages calculated included all the cost incurred by State Farm. The Court stated that the sanctionable conduct should be limited to the costs related to the six fabricated photographs. Lastly, the Court removed all sanctions against the wife because she was not directly connected to any misconduct. State Farm argued that common law imposed liability on an individual for their spouse's torts. This rule, however, has been abolished. Alternatively State Farm argued that her husband acted as the wife agent and, or, she had a duty to preserve evidence. However, State Farm did not present agency arguments in its appellant brief, nor did they present Texas authority that a wife owed a duty to prevent her husband from destroying evidence. **Read The Opinion HERE**

***Bryant v. Cady*, 445 S.W.3d 815 (Tex. App.—Texarkana 2014)**

Three different individuals sued the Defendant for failing to comply with Tex. Prop. Code Ann. §5.077. Certain real estate executory contracts are statutorily regulated in Texas. Under such contracts, Tex. Prop. Code Ann. §5.077 requires sellers provide the purchaser with annual accounting statements containing specified content during January of each year. If a seller fails to do so, they must pay liquidated damages and reasonable attorney fees. The defendant filed a Motion for Summary Judgment asserting that none of the transactions involved an executory contract. The defendant argued that the individual sales agreements between plaintiff one and two were not executory contacts because they were unenforceable unilateral contracts due to the lack of consideration. Furthermore, the sales agreements did not contain options to purchase and the agreement was merely a lease contract. Additionally, the Defendant argued that the sales agreement between plaintiff number three was not an executory contract because the sale contained typical real estate contract documents. The trial court granted the motion and the individuals appealed.

The Court reversed. The defendant's individual sale contracts between plaintiff one and two were supported by consideration because the lease contract and sales contract were executed together as part of the same transaction. The defendant and plaintiff one and two disagreed as to whether the initial $1000 payment constituted a down payment or security deposit. Regardless of the $1000 payment's determination, the court applied the consideration paid for the lease towards sale agreement because both were signed off on the same day. Moreover, the receipts given to plaintiff one and two contained unambiguous language acknowledging the existence of multiple agreements and stated that the payment bound all parties to multiple agreements. The agreement also provided plaintiff one and two with the ability to purchase within a short period after the lease ended. Lastly, the contract between plaintiff number 3 was not a typical real estate transaction because like the other two plaintiffs, he was required to make lease payments for ten years while living on the property and pay the sales price within a short period after the end of the lease term. A typical real estate contract requires the buyer to complete the purchase. However, similar to an executory contract, the plaintiffs had no obligation to complete the purchase. All parties were able to terminate the agreement by moving or stop paying rent. **Read The Opinion HERE**

***Gaia Envtl., Inc. v. Galbraith*, 2014 Tex. App. LEXIS 10100**

(Tex. App. Houston 14th Dist. September 9, 2014)

A consulting firm sued an attorney and his law firm for tortious interference with a prospective and existing business relationship, civil conspiracy, and aiding and abetting. The consulting firm alleged that the attorney and his firm, which represented an oil company it contracted with, threatened to not renew its contracts between the two businesses if a corporate deponent from the consulting firm did not change its testimony related to whether the work performed by the consulting firm's deceased employee was covered by the contract between the two businesses. The consulting firm moved for summary judgment and the lawyer and his firm responded by asserting an affirmative defense based on the attorney immunity doctrine. The consulting firm argued that attorney immunity does not protect the tampering of a witness. The trial court granted summary judgment and the consulting firm appealed.

Court decided two issues de novo. First, did the attorney and his firm present evidence that conclusively proved their conduct occurred during their legal representation of their client, the oil company? If so, did the consulting firm allege sufficient facts to show that the attorney's actions constituted a criminal offense? The Court determined that the alleged conduct by the attorney and his law firm fell within the course of their legal representation because it fit within the realm of zealous and aggressive representation. Here, the consulting firm attempted to sue the attorney and his firm for conduct that occurred while they served in their capacities as attorneys for the oil company in a wrongful death case. The oil company hired its legal team to represent them in the underlying suit. The consulting firm never purchased the required insurance needed to defend the oil company pursuant to the indemnity provision in their contract, as a result the oil company had to defend itself. The two businesses had two entirely separate defenses in the underlying suit. The testimony from the witness directly affected the indemnity provision and formed the basis for the underlying lawsuit. The alleged communication was between two defense attorneys. The oil company's attorneys never contacted the witness. Lastly, the Court concluded that the consulting firm failed to present facts that demonstrated criminal activity because the witness was not threatened to testify falsely. The elements for witness tampering are: (a) a person; (b) with intent to influence a witness; (c) coerces a witness; (d) in an official proceeding; and (e) to testify falsely. Tex. Penal Code Ann. § 36.05(a)(1). The Court focused on whether the oil company's attorney sought to threaten or coerce the witnesses to change his testimony. Here, they do not ask the witness to swear to knowingly false facts, they merely persuaded him through legal action to change initial version of the fact situation. **Read The Opinion HERE**

BP Automotive L.P. v. RML Waxahachie Dodge, L.L.C., 2014 Tex. App. LEXIS 10511 (Tex. App. Houston 1st. Dist. September 18, 2014)

A car dealership sued a prospective purchaser of the dealership alleging breach of contract and several other causes of action after the sale failed to close. The parties involved include the selling dealership and its limited partners. The other parties were the prospective purchaser and the automotive groups of which the purchase was a part. The car dealership executed an asset purchase agreement with the prospective purchasers. The agreement contained a "time is of the essence" provision. The prospective purchaser also entered into a lease with the limited partners who owned the land. The sale fell through because the purchaser was unable to get approved financing from the manufacturer's lender and it could not obtain licenses necessary to operate in Waxahachie. Subsequently, the manufacturer went bankrupt and the dealership closed; shortly after, their franchise agreement was rejected. Eventually, the manufacturer reorganized and awarded the prospective purchaser a franchise for the same location but they could not operate until approved from the state. During this time, the dealership gave the prospective buyer permission to use its service department. The parties disputed as to whether there was a rental agreement. Ultimately, the dealership and its limited partners sued the prospective buyers in bankruptcy court for breach of contract, tortious interference with franchise agreements, tortious interference with prospective business relations, civil conspiracy, unfair competition by misappropriation, breach of leases, and quantum merit claims, Their claims were dismissed without prejudice. However, the 5th Circuit later reversed and remanded based on the bankruptcy's lack of jurisdiction. Thereafter, the dealership filed a lawsuit with essentially the same pleading against the prospective buyer, except the lease claims in state court.

The buyer filed a traditional summary judgment motion and it was granted after it argued that the dealership was estopped from litigation because of the bankruptcy decision. However, the Court determined the trial court erred in granting the motion because the judgment was not final due to its vacated opinion and its potential subjection to district court review. In addition, the prospective buyer filed a no-evidence motion for summary judgment for all of the other claims filed against it. The trial court granted in their favor and the dealership appealed. First, the Court disagreed as to the trial court's decision to dismiss the dealerships breach of contract claim because the dealership presented some evidence that supported a "time is of the essence" breach. The dealer provided a copy of the purchase agreement, which stated its urgency. Attached to the copy was testimony that supported its assertion that the buyer's delay caused the dealership to lose money. Secondly, the Court determined that the trial court properly dismissed the dealerships tortious interference claim with existing contracts for lack of evidence because there was no evidence of an existing franchise agreement that was subject to interference once the manufacture declared bankruptcy. The dealer claims that their franchise application was denied because the prospective buyer also submitted an application. However, there was no evidence that the manufacturer had to accept the dealership's application after it filed for bankruptcy. Third, the Court reversed the trial courts dismissal as to the tortious interference with prospective business relations because the dealership presented testimony that another interested buyer was prevented from purchasing the dealer's assets because they were told that the prospective buyer had already bought it. Fourth, the Court disagreed with the trial court's decision to dismiss the dealer's misappropriation claim because evidence presented showed that the prospective buyer worked on 800 customers who appeared on the dealership customer lists while occupying the dealership's property. Fifth, the Court determined that the dealer produced at least a scintilla of evidence in support of fraud because the record pointed to the prospective buyer's representation that the deal was not contingent upon the obtainment of a Jeep franchise license. However, the buyer included a Jeep application in its initial application for other licenses. The dealership presented evidence that if it had known that the buyer was also pursuing a Jeep franchise, it would have never entered into the agreement. Sixth, the Court affirmed the trial court's dismissal of civil conspiracy claims against the prospective buyer. The dealership argued that the prospective buyer, the manufacturer, and the government conspired against it in order to give the franchise rights to the prospective buyer, however, there was no evidence that the manufacturer had to accept the dealership's application after it filed for bankruptcy. The dealership also appealed the trial court's denial as to its own summary judgment motions for its breach of contract and quantum merit claims. The Court did not find an error in denying the breach of contract motion because the breach of contract was a fact question for the jury to resolve. Additionally, denial was proper for the quantum merit claim because there is an issue as to whether the dealership ever asked for payment. The record showed that the dealership never informed the prospective buyer that it expected payment for its use until they initiated this suit.

Lastly, the dealership also sued the automotive group the prospective buyer was a part of for the same claims. The group filed motions for summary judgment that mirrored those filed in the separate suit against the prospective buyer. The automotive group argued that the summary judgment rulings with respect to the prospective buyer applied equally to the group. The Court agreed. **Read The Opinion HERE**