



FROM THE PRESIDENT

Michele Smith,
MehaffyWeber, P.C., Beaumont

OFF TO THE RACES!

It's been an exciting and fast-paced start to 2015. The Legislative Session is in full-swing as noted in George Scott's update. Several areas across the state hosted Legislative Luncheons. We held our first specialty seminar and planning for our big in-state meeting in Galveston is well underway.

LEGISLATIVE: I was fortunate to attend Legislative Luncheons in Amarillo, McAllen, Austin, San Antonio and Tyler. Our Amarillo luncheon provided an opportunity to meet Rep. John Smithee in person. He was later appointed Chair of the Judiciary and Civil Jurisprudence Committee.



I also enjoyed meeting TADC members across the state and hearing about their concerns for this Session. At bottom, our membership wants to know if we will have additional reform to the civil justice system. We are almost to the 60th day of the Session and the bill filing deadline of March 13. Once the bill filing deadline passes, you will receive a complete “hot list” from us on the bills TADC is actively monitoring. George Scott discusses some of the more interesting bills filed to date. I encourage you to contact me on any bill about which you have a question or concern.

Protecting the civil justice system continues to guide our course. In that regard, TADC proudly stood with many other organizations in actively supporting ABOTA's civility oath filed by Senator Kirk Watson and Representative Todd Hunter (SB 534 and HB 1909 respectively). The effort to promote civility in our profession by formally adding language to the lawyer's oath has been widely supported by lawyers in all ranks. Our own TADC Past President David Chamberlain has worked tirelessly to lead this charge. The bill

received a hearing just this morning in the Senate State Affairs Committee and TADC offered its support though testimony offered by by TADC Board Member Pamela Madere.

AMICUS: A group of unsung heroes of the TADC is our bright and brilliant Amicus Committee led by Roger Hughes. Roger does an amazing (and often thankless) job of coordinating amicus requests and getting briefs written when necessary. Many of the committee members, including Roger, have served for years. Our organization is fortunate to have the legal talent assembled in this group. Our amicus committee is recognized nationally, with good reason. THANK YOU Amicus Committee for all your hard work!

TADC Amicus Curiae Committee

Roger W. Hughes, Chair, Adams & Graham, L.L.P.; Harlingen

Ruth Malinas, Plunkett & Griesenbeck, Inc.; San Antonio

George Muckleroy, Sheats & Muckleroy, LLP; Fort Worth

R. Brent Cooper, Cooper & Scully, P.C.; Dallas

Scott P. Stolley, Thompson & Knight LLP; Dallas

Bob Cain, Alderman & Cain, PLLC.; Lufkin

Mitch Smith, Germer PLLC; Beaumont

Mike Eady, Thompson, Coe, Cousins & Irons, L.L.P.; Austin

Tim Poteet, Chamberlain ♦ McHaney; Austin

William C. Little, Mehaffy Weber PC; Beaumont

Richard B. Phillips, Jr., Thompson & Knight LLP; Dallas

George Vie III, Mills Shirley, L.L.P.; Houston

In the case law update provided by Mark Stradley, you will see a groundbreaking case on the admissibility of seat belt evidence from the Texas Supreme Court in *Nabors v. Romero*. The underlying case was tried by TADC members, Bruce Williams and David Lauritzen. Further, the TADC filed an amicus prepared by committee member, Ruth Malinas. Congratulations to all!

PROGRAMS: One of the suggestions, echoed by many, from the membership survey last year was more local programming and more programming in a variety of areas of the law.

TADC members presented such a program in San Antonio last week. Chair, Mitchell Smith, assembled an all-star cast of speakers who delivered interesting and creative presentations at the Transportation Seminar. Great job by everyone.

THE FRIENDLY SKY? CRISIS MANAGEMENT IN AVIATION LITIGATION

Janelle L. Davis, Thompson & Knight LLP, Dallas

ON THE RAILS FOR THE DEFENSE LAWYER

Toby N. Nash, Germer PLLC, Beaumont

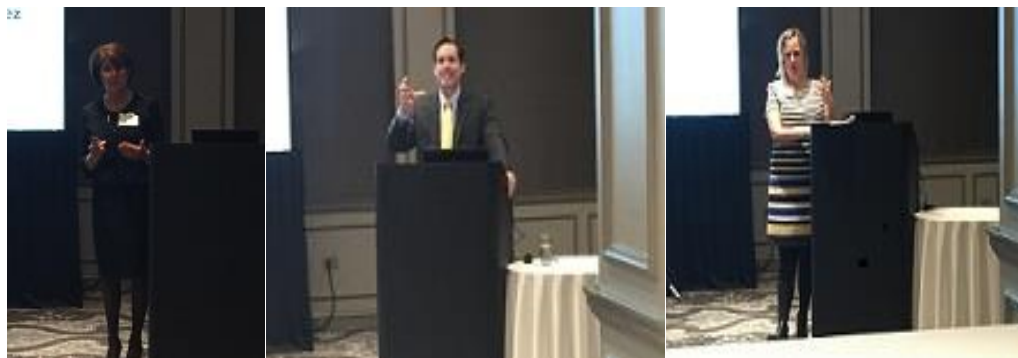
CAR/TRUCK, NO! TRUCK/CAR NO! BIG RIGS AND PERSONAL TRANSPORTATION: WHAT THE LAW ADVISES

Sergio Chavez, The Rincon Law Group, El Paso

ROW YOUR BOAT: ADMIRALTY IN 2015

James T. Kittrell, Liskow & Lewis, Houston

THE LAWYER SAID WHAT? CIVILITY IN THE COURTROOM
Justice Patricia O. Alvarez, Fourth Court of Appeals, San Antonio



Publications: TADC has a Linked-In and Facebook profile and is on Twitter. Please consider following us if you do not. Also, check out our new website if you have not. We want your input, particularly if you have suggestions for improvement. We expect online payment, registration and programming this Spring.

Membership: Please welcome these new members.

- Kristi L. Kautz**, Fletcher, Farley, Shipman & Salinas, LLP, Dallas
- William A. Hicks**, Mehaffy Weber, Houston
- Anelisa Benavides**, Mounce, Green, Myers, Safi, Paxson & Galatzan, El Paso
- Vanessa Lee Humm**, Royston, Rayzor, Vickery & Williams, L.L.P., Brownsville
- Brett William Arnold**, Burleson, LLP, Midland
- Stuart C. Atwell**, Crouch & Ramey, LLP, Dallas
- Marion Lawler, III**, Lawler & Associates, P.C., Brownsville
- Barrett C. Leshner**, Hallett & Perrin, P.C., Dallas
- Whitney Mack**, Thompson Coe Cousins & Irons, LLP, Austin
- Christopher R. Cowan**, Beck Redden LLP, Austin

Stay tuned as the race continues...

LEGISLATIVE/POLITICAL UPDATE

Members of the 84th Texas Legislature appear on track to file a record number of bills in 2015. This trend goes for civil justice matters as well, as TADC is currently tracking more than 150 bills with some connection to Texas courts, the judiciary, and the jury trial system. The TADC Legislative Committee has been meeting regularly by conference call to review the bills and assign significant ones for analysis.

Here is a brief look at some of the key bills that have been filed to date

Forum non conveniens. [HB 1692](#) by **Rep. Kenneth Sheets (R-Dallas)** amends §71.051, CPRC, to: (1) require a court to give substantial deference to a plaintiff's choice of a Texas court, provided that the plaintiff is a legal resident and the lawsuit has a significant

connection to the state; (2) allow the court in its sound discretion to determine the legal residency of a plaintiff; and (3) clarify that the definition of “plaintiff” applies to the person with the underlying claim, not to derivative plaintiffs, such as beneficiaries, intervenors, next friends, or a non-resident decedent’s estate.

Asbestos bankruptcy trust disclosure. [SB 491](#) by **Sen. Charles Schwertner (R-Georgetown)**/[HB 1492](#) by **Rep. Doug Miller (R-New Braunfels)** adds Subchapter B, Chapter 90, CPRC, to require a claimant in an asbestos or silica suit to serve notice on each party of each trust claim made by or on behalf of the claimant. The bill allows an MDL court to decline to remand a claim to the trial court if the claimant fails to comply with notice requirements. On a defendant’s or judgment debtor’s motion, a court may reopen and modify a judgment, after reasonable notice to the parties, by the amount of a subsequent payment to the claimant by a trust that was not noticed as required, or by the amount of a claim made after the judgment but that existed at the time of the judgment.

Juries in Statutory County Courts. [HB 1122](#) by **Rep. Travis Clardy (R-Nacogdoches)** requires a 12-member jury in a civil case pending in a statutory county court in which the amount in controversy is \$200,000 or more; requires drawing of jury panels, jury selection, and practice and procedure to conform to district court practice in the county in which the court is located.

Certificate of merit. [HB 1353](#) by **Rep. Charlie Geren (R-Fort Worth)** amends §150.001, CPRC, to add a definition of “claimant” to the statute that requires a person to file an affidavit of a third-party licensed architect, engineer, landscape architect, or land surveyor with a claim for damages arising out of the provision of professional services by a licensed or registered professional. For purposes of the statute, “claimant” means a party, including a plaintiff, counter-claimant, cross-claimant, or third-party plaintiff, seeking recovery of damages. The current statute uses only the undefined term “plaintiff.” The effect of the statute appears to be to broaden the filing requirement for a certificate of merit.

Health care liability claims/tort liability. [HB 1403](#) by **Rep. Sheets** amends §74.001(a)(13), CPRC, which defines “health care liability claim,” to exclude a cause of action brought under Labor Code §406.033(a) (action for personal injury or death by or on behalf of an employee against a non-subscribing employer) or §408.001(b) (recovery of punitive damages by surviving spouse or heirs of deceased employee for employer’s gross negligence or intentional act). [HB 820](#) by **E. Thompson**: Adds Chapter 72A, CPRC, to bar a person from recovering non-economic or exemplary damages in a claim arising from a motor vehicle accident if the person was operating the vehicle without liability insurance at the time of the accident. Does not apply if the claimant was injured by another person, if the other person was driving while intoxicated, fled the scene of the accident, was acting in furtherance of the commission of a felony, or whose willful act or omission or gross neglect caused the accident. Applies to a derivative claim, including a wrongful death claim for loss of consortium or companionship. Requires insurers, DPS driver’s license offices, and operators of defensive driving courses to post conspicuous notice of this provision. Does not prohibit the claimant from acting as personal representative of another person injured in the accident, as next friend. [HB 956](#) by **C. Turner**: Amends §74.001, CPRC, to limit the scope of a health care liability claim. The bill redefines “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”; and defines “health care liability claim” to require a claim to be “directly related to health care” and

expressly excludes a claim arising from an injury to a person who is not a patient, including employment and premises liability claims.

Construction defect claims. [HB 1784](#) by Rep. Paul Workman (R-Austin) amends §41.015, CPRC, to establish a 10-year statute of repose for construction defect claims against the person who actually designed, administered, constructed, or repaired an improvement to real property. The statute of repose applies only to the actual costs incurred in curing a construction defect. The amount of damages for cost to cure is reduced by 10% on each anniversary date of substantial completion of the construction of repair that occurs before the date the action is filed. An award of exemplary damages, multiplied damages, or other damages computed on the basis of the amount of damages for the cost to cure the defect must reflect any reduction made under this section.

FAIR Plan claims. [HB 1732](#) by Rep. John Smithee (R-Amarillo) creates a dispute resolution process for claims arising under insurance policies issued by the Fair Access to Insurance Requirements Plan Association.

Creation of Chancery Court. [HB 1603](#) by Rep. Jason Villalba (R-Dallas) establishes a seven-member chancery court located in Travis County with civil jurisdiction concurrent with the district courts for virtually all contract and business-related actions involving entities organized under the Business Organizations Code. The court has statewide jurisdiction over any matter within its purview. The court does not have jurisdiction over personal injury or death cases, or any action brought by or against a governmental entity, unless by the consent of the parties or the entity. Establishes a procedure for filing original cases in the court and removing cases filed in district courts to the court. The court may issue any writ necessary to enforce its jurisdiction. Establishes qualifications for judges of the chancery court and provides for the appointment of judges by the Governor with the advice and consent of the Senate. Judges serve staggered six-year terms and are eligible for reappointment. Appeals from Chancery Court are to a Chancery Appeals Court consisting of seven active court of appeals justices appointed by the Governor. The TADC will oppose this bill.

Lawyer's Oath. [SB 534](#) by Sen. Kirk Watson (D-Austin)/[HB 1644](#) by Rep. Smithee/ [HB 1909](#) by Rep. Todd Hunter (R-Corpus Christi) add to the lawyer's oath a pledge "to conduct oneself with integrity and civility in dealing and communicating with the court and all parties". This bill was heard today in the Senate State Affairs Committee. TADC Board Member Pamela Madere was present and testified in support of this effort on behalf of the TADC.

Judicial elections. [HB 25](#) by Rep. Sheets removes judicial offices from straight-ticket voting.

Franchise tax. [SB 7](#) by Sen. Jane Nelson (R-Flower Mound) reduces the franchise tax rate from 1% to .85% and from 5% to 0.5% and then to 0.425% for retail and wholesale trade. [SB 8](#) by Sen. Schwertner raises the small business exemption in the franchise tax from \$1 million to \$4 million.

Occupation tax. [SB 765](#) by Sen. Kevin Eltife (R-Tyler) repeals the \$200 annual attorney occupation tax (as well as all other occupation taxes on licensed professionals).

We are still awaiting the filing of legislation addressing the recent spate of hailstorm claims across the state. This legislation is likely to make substantial changes in Chapters 541 and 542, Insurance Code. As always, we will keep you apprised of the progress of this legislation.

We look forward to seeing everyone in Austin on March 5 for TADC Legislative Day. This will be an excellent opportunity for legislators and their staffs to get to know our members and hear from us about the importance of a fair and accessible civil jury system. Thank you for everything you do to support our legislative effort!

CALENDAR OF EVENTS

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, Program Co-Chairs

Kim & Fred Raschke, Meeting Chairs

Elliot Taliaferro, Young Lawyer Liaison

Registration material will be mailed in early March

May 1, 2015

TADC Young Lawyer Happy Hour

In conjunction with the 2015 Spring Meeting - Galveston, Texas

May 14, 2015

TADC Transportation Law Seminar

Fort Worth, Texas

J. Mitchell Smith, Program Chair

Registration material will be mailed in early March

July 8-12, 2015

TADC Summer Seminar

Snake River Lodge & Spa – Jackson Hole, Wyoming

Pamela Madere & Christy Amuny, Program Co-Chairs

Molly & Dennis Chambers, Meeting 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, Program Co-Chairs

Registration material will be mailed in early July

October 8-9, 2015

TADC/OADC Red River Showdown

Westin Stonebriar – Frisco, Texas

Jerry Fazio, Chair

Registration material will be mailed in early August

LEGAL NEWS - CASE UPDATES

Case Summaries Prepared by Mark Stradley, The Stradley Law Firm, Dallas

Nabors Well Services Ltd. and Lauro Bernal Garcia v. Asuncion Romero, et al (Tex. - Feb. 13, 2015)

In this major case, the Texas Supreme Court ruled that use or nonuse of seatbelts is admissible if the use or nonuse caused or contributed to a plaintiff's injuries.

Plaintiffs sued for wrongful death and personal injuries sustained in an automobile accident. Plaintiffs were thrown from their vehicle after colliding with Defendants' tractor-trailer. Defendants Nabors and Garcia sought to introduce evidence of the nonuse of seatbelts, as well as medical evidence that the injuries and death were caused by being thrown from the vehicle. Both the trial court and the El Paso Court of Appeals refused to allow this evidence even though Defendants had alleged comparative negligence and failure to mitigate damages. On appeal, the Texas Supreme Court overruled its decision in Carnation Co. v. Wong, 516.S.W.2d 116 (Tex. 1974) and found that the Texas Proportionate Responsibility law made no distinction between negligence causing the accident and negligence causing the injuries. [READ THE OPINION HERE](#)

PAIN CONTROL INSTITUTE, INC., Appellant v. GEICO GENERAL INSURANCE COMPANY, Appellee

In this case, the Dallas Court of Appeals found that an injured patient's partial assignment of her personal injury cause of action to her chiropractor did not allow her chiropractor to make a direct action claim against the tortfeasor's insurer, and that the Uniform Commercial Code (UCC) did not apply to a tort case.

The injured party (Hooper) had an accident with a GEICO insured (Cluck), and subsequently, treated with her chiropractor at Pain Control Institute, Inc. (PCI). Hooper gave PCI an assignment to the extent of their chiropractic bills. PCI then filed a UCC Financing Statement with the Texas Secretary of State, attempting to perfect its lien. Subsequently GEICO settled with Hooper and received a signed release for itself and its insured, Cluck. Then PCI sued GEICO for nonpayment of its perfected lien. Both sides filed for summary judgment, and the court granted GEICO's summary judgment without specifying the reasons.

On appeal, the Dallas Court of Appeals upheld GEICO's summary judgment, finding that a personal injury plaintiff cannot assign greater rights than she has under tort law, and that Texas tort law does not allow a personal injury plaintiff to directly sue the third party's insurance company. Further, the court found that the UCC does not allow a lien for personal injury tort cases. [READ THE OPINION HERE](#)

ONCOR ELECTRIC DELIVERY COMPANY, LLC, Appellant v. MARCO MURILLO, Appellee

In this case, the Houston Court of Appeals (Dist. 1) found that an electric shock caused by an electric company transformer on an easement granted the electric company a premises liability case rather than an ordinary negligence case.

Plaintiff Murillo was seriously injured when he was shocked by an Oncor transformer. He won at the trial court level based upon a comparative negligence submission. Defendant Oncor appealed, and initially the Houston Court of Appeals (Dist. 1) affirmed. On rehearing, *en banc*, the Court of Appeals reversed and rendered, finding that an energized electric transformer on an electric easement is a condition of the premises. As an owner or occupier of premises, Oncor was entitled to a premises liability submission to the jury. This is not a proper negligent activity case since the allegation involves nonfeasance and not malfeasance. [READ THE OPINION HERE](#)

GLOBAL PARAGON DALLAS, LLC AND ILAN ZELNIK, Appellants v. SBM REALTY, LLC, Appellee

In this case, the Houston Court of Appeals (Dist. 14) found that a defendant's Special Appearance had been waived by having a Motion for New Trial heard first.

Plaintiff Global Paragon Dallas LLC (Global) sued Defendant SBM Realty, LLC (SBM) in Texas, obtained service, and after the answer date passed, obtained a default judgment. SBM, an out-of-state corporation, filed a Special Appearance, contesting jurisdiction over SBM by Texas courts. SBM also filed, subject to its Special Appearance, a Motion for New Trial to set aside the default judgment. The trial court granted the Special Appearance. On an interlocutory appeal, the Court of Appeals found that the grant was erroneous because SBM entered a general appearance by obtaining a ruling on its motion for new trial - an action inconsistent with its assertion that the trial court lacked jurisdiction over it. [READ THE OPINION HERE](#)

WHATABURGER RESTAURANTS LLC, Appellant, v. YVONNE CARDWELL, Appellee.

In this case, the El Paso Court of Appeals found that an arbitration agreement between Whataburger and its employee should be enforced.

Plaintiff Cardwell was a Whataburger employee who was injured on the job. Defendant Whataburger, a nonsubscriber, filed a Motion to Compel Arbitration. The trial court expressed concern that the arbitration would take place in Dallas under the forum selection clause. Whataburger's counsel agreed that the arbitration could take place in El Paso. Nonetheless, the trial court found the arbitration agreement to be unconscionable, and denied the Motion to Compel Arbitration. Whataburger filed an Interlocutory appeal.

On appeal, the El Paso Court of Appeals reversed and remanded the case with instructions to the trial court to compel arbitration and dismiss the lawsuit. Because defense counsel waived the forum selection clause on the record in open court, that clause became moot, and the trial court should have ordered arbitration. [READ THE OPINION HERE](#)

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