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

IN MEMORY

Members,

We must sadly report that longtime TADC Executive Director, Martha Bonner Miller, passed away in Austin on March 26, 2015. Martha served as TADC Executive Secretary (later to be retitled Executive Director) from 1976 until her retirement in 2006. She was a mentor to many, a friend to all and will be missed.

A memorial service for Martha will be held in Austin at 2:00pm on Sunday, April 12, 2015 at Tarrytown United Methodist Church, located at 2601 Exposition Boulevard, Austin, Texas 78703. Martha's obituary is linked here.

Please keep Martha's family in your thoughts and prayers.

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FROM THE YOUNG LAWYER COMMITTEE CHAIRMAN

Bernabe G. "Trey" Sandoval, III
MehaffyWeber, P.C., Houston

Friends,

It is my privilege to serve as the 2015 Texas Association of Defense Counsel Young Lawyer's Chairman. It has been a pleasure to meet and work with so many talented young lawyers this year.

We are in a very critical time in the history of our organization and my committee has been charged to grow, lead, and energize the young lawyers in our state. Michele Smith, our president, has empowered my committee to develop initiatives to better incorporate young lawyers into our organization. One of those initiatives is our in-state Spring Meeting that takes place in **Galveston, Texas at the San Luis Resort from April 29 to May**

3. We have specifically designed this meeting to appeal to our young lawyers and have made it cost efficient in hopes of removing cost as a reason not to attend.

This year the TADC will be ***waiving the registration fee*** for all young lawyers who have been practicing **5 years or less**. *(you still need to fill out a registration form and send it in so that we know you're coming!)* In addition to that incentive, we will be pairing all first and second time TADC meeting attendees with our veteran members who will act as "mentors." As mentors they will be responsible throughout the meeting to introduce them to other members and will be inviting them to join them for dinner on Friday and Saturday night. These young lawyers will only be responsible for transportation, lodging, and uncovered meals. Additionally, any DRI member who signs up to become a TADC member is eligible to receive a one year TADC membership ***free***. As you can see, we want to provide as many incentives for our firms to approve the conference/CLE expenses for their young lawyers.

The message is clear -- **young lawyers are important**. No other organization I have ever been a part of has taken such practical steps to involve young lawyers. Please don't miss this opportunity!

You can follow this link to the brochure: **Spring Meeting Registration**. Our hotel block is filling up quickly, so don't hesistate. It is going to be an excellent meeting and will provide numerous opportunities to build new relationships in addition to receiving quality CLE.

Should you have any questions, please feel free to email me at treysandoval@mehaffyweber.com.

I will see you in Galveston!

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WELCOME NEW TADC MEMBERS!

Jane Cherry, Thompson & Knight LLP, Dallas
Benjamin Gomez-Farias, Kemp Smith LLP, Austin
Jason Douglas Tomlin, Fletcher, Farley, Shipman & Salinas, Dallas
Anna Kalinina, Thompson & Knight LLP, Dallas
Wendy H. Hermes, The Berry Firm, PLLC, Dallas
Elizabeth Cantu, Atlas, Hall & Rodriguez LLP, McAllen

Anna Sebastian, Germer PLLC, Houston

And a big thank you to TADC members and their firms for sponsoring the applications of our newest members! Thanks to **Greg Binns**, Thompson & Knight LLP, Dallas, **Milton Colia**, Kemp Smith LLP, El Paso, **Michael J. Shipman**, Fletcher, Farley, Shipman & Salinas, Dallas, and **Sofia Ramon**, Atlas, Hall & Rodriguez LLP, McAllen.

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LEGISLATIVE/POLITICAL UPDATE

With only 60 days left in the 84th Legislative Session and plenty of major legislation still to consider, the 84th Legislature may be hard pressed to finish its business by *sine die*. The first deadline arrives on May 11, which is the last day for the House to report House bills and resolutions. As a practical matter, however, House bills looking for a chance to make it to a calendar better be out of committee by the end of April, if not earlier. The hard deadline for House bills is May 14, the last day the House can consider its own bills on second reading. The last day for the House to report Senate bills and resolutions follows on May 23, and May 26 is the last day for the House to consider Senate bills and resolutions on second reading. The whole shebang wraps up on June 1 (at least we hope it does).

It has already been an exceptionally busy session for TADC, and more is yet to come. Your TADC Legislative Committee has held weekly meetings by conference call to discuss dozens of bills and assign them for detailed analysis. These analyses help us determine which bills require TADC involvement and the nature of the action we should take on each one. As a consequence of this process, TADC has become directly involved in several important pieces of legislation affecting the civil justice system. These include bills that:

amend Chapters 541 and 542 of the Insurance Code, as well as other code provisions, with respect to first party claims against insurers;
modify the doctrine of *forum non conveniens*;
limit evidence of a defendant's net worth in a trial for punitive damages;
create an appointed chancery court to hear disputes between businesses;
establish a three-judge district court to hear cases of statewide importance;
require disclosure of bankruptcy trust claims in asbestos litigation;
protect the attorney-client privilege in workers' compensation matters;
require a 12-member jury in a county court-at-law case with more than $200,000 in controversy;
limit the definition of a "health care claim" for purposes of Chapter 74, CPRC;

remove judicial offices from the straight party vote; and
add a pledge of civility to the lawyer's oath.

Last Tuesday, the Senate Business & Commerce Committee considered the first party insurance litigation bill, **SB 1628** by Sen. Larry Taylor. In a hearing that stretched throughout the day, the committee heard testimony from defense and plaintiff's attorneys, consumers, and public adjusters. Senator Taylor indicated that he wanted input on the bill from the interested parties and would prepare a substitute for consideration by the committee at a later meeting. The House version of the bill, **HB 3646** by Rep. John Smithee, has been referred to House Insurance Committee but has not yet been set for hearing.

On Tuesday, April 7, the House Judiciary & Civil Jurisprudence Committee will consider three bills of interest: *forum non conveniens* (**HB 1692** by Rep. Kenneth Sheets); asbestos bankruptcy trust claims (**HB 1492** by Rep. Doug Miller); and the three-judge district court (**HB 1091** by Rep. Mike Schofield). TADC will be present at the hearing to offer our input on these proposals.

If you have any questions about any of these bills or others, do not hesitate to contact President Michele Smith (michelesmith@mehaffyweber.com), a member of the TADC Legislative Committee, Bobby in the TADC office, or George Christian. There is a lot going on and it's happening fast, but we will get back to you promptly. If it becomes necessary for our members to contact their legislators on an issue, we will send a call for action with the appropriate background material.

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A LITTLE STATE BAR NEWS

TADC members **Scott P. Stolley** and **H. Alan Carmichael** are running for Directors positions on the State Bar Board of Directors. **Stolley**, with Thompson & Knight, LLP in Dallas is running in District 6, Place 2. **Carmichael**, with Wetsel, Carmichael & Allen, L.L.P in Sweetwater is running in District 16. Please consider voting for your TADC members.

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CALENDAR OF EVENTS

April 10, 2015
Waco Legislative Luncheon
Baylor Club at the Stadium - Waco, 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

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

June 11, 2015
Houston Legislative Luncheon
Downtown Club at Houston Center - Houston, Texas

July 8-12, 2015
TADC Summer Seminar
Snake River Lodge & Spa – Jackson Hole, Wyoming
Christy Amuny & Pamela Madere, Program Co-Chairs
Jason McLaurin, Young Lawyer Liaison
Molly & Dennis Chambers, Meeting Co-Chairs
Registration material will be mailed in mid-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 Christy Amuny, Bain & Barkley, Beaumont

In re Union Pacific Railroad Company and Wanda Heckel, 2015 WL 590873 (Tex. App. – El Paso 2015)

A minor was struck and killed by a Union Pacific train operated by engineer Wanda Heckel. The parents filed suit for negligence and gross negligence. Heckel suffered from sleep apnea and Plaintiffs subpoenaed her medical records. Heckel and Union Pacific filed motions for protective orders and moved to quash the depositions on written questions based on privilege under HIPAA and the physician-patient privilege under Rule 509 of the Texas Rules of Evidence. After an *in camera* inspection, the court ordered production of a portion of the records. This mandamus ensued. The sole issue was whether the records were protected or whether they fell into the exception under Rule 509. The pertinent exception in Rule 509(e)(4) provides an exception exists "as to a communication or record relevant to an issue of the physical, mental or emotional condition of a patient in any proceeding in which any part relies upon the condition as part of the party's claim or defense." The Texas Supreme Court previously held the exception applies when the records are relevant to the condition at issue in the litigation and the condition contained in the records is relied upon as a "part" of a party's claim or defense. Whether a defendant's condition is a "part" of a claim is determined from the pleadings, without reference to the evidence that is allegedly privileged. *R.K. v. Ramirez*, 887

S.W.2d 836 (Tex. 1994). As a general rule, a condition will be a "part" of a claim or defense if the pleadings indicate the jury must make a factual determination concerning the condition itself and it is not enough that the condition is relevant to the claim or defense because any litigant could plead some claim or defense to which a patient's condition could arguably be relevant and the privilege would cease to exist. *Id.* The Plaintiffs' pleadings list twenty-four acts or omissions they contend constitute negligence, none of which directly allege Heckel was physically or mentally impaired due to sleep apnea or any other medical condition at the time of the incident. The case law cited by Plaintiffs does not support their position that they are entitled to the records because there are neither pleadings nor evidence in the record demonstrating they are relying on Heckel's medical condition as the basis for the negligence claims such that it is an ultimate or central issue in the case. Thus the court concluded Plaintiffs failed to establish an exception to the physician-patient privilege under Rule 509(e)(4). **READ THE OPINION HERE**

Duncan v. First Texas Homes, 2015 WL 600854 (Tex. App. – Fort Worth 2015)

Duncan fell down a set of exterior stairs while leaving an office trailer on a construction site. Duncan had been up and down the steps at least 4 times a day, 5 days a week for 2 years and 3 months. Duncan claimed there was insufficient clearance between the swing of the door and the edge of the platform. First Texas was a non-subscriber and Duncan sued under multiple theories of negligence. The trial court granted First Texas's MSJ and Duncan appealed. First Texas argued it owed no duty to warn Duncan about the platform because by virtue of his 11 years' experience as a construction superintendent and his frequent use of the stairs, he understood any risk associated with going up and down the stairs. However, First Texas failed to put forth any evidence establishing Duncan knew about the hazard created by the platform or that he appreciated the risks associated due to his experience as a construction superintendent. Accordingly, First Texas failed to show there was no genuine issue of material fact. First Texas also argued it was not liable under a premises liability theory because there was no evidence it had actual or constructive knowledge of the alleged defect. Hernandez, an area manager for First Texas, testified he had difficulty entering and exiting the trailer and he was concerned the platform was dangerous as there was not enough room to safely maneuver when opening and closing the trailer door. When he reported these concerns to the director of construction, he was told the stairs and landing were in compliance and First Texas was not going to modify them. The court

concluded this testimony raised a fact issue as to whether First Texas had actual knowledge of the condition. Lastly, First Texas argued Duncan's own negligence was the sole proximate cause of his injuries as his method of using the stairs on the day in question is what resulted in his injuries. For First Texas to prevail on its summary judgment, it had to prove as a matter of law that Duncan's own conduct was the only proximate cause of his injuries and to defeat this claim, all Duncan had to show was that some negligence of the employer caused his injuries. Even though Duncan left the trailer numerous times without incident, First Texas failed to establish Duncan's actions were the only cause of his injuries. The summary judgment was reversed and the case remanded. **READ THE OPINION HERE**

Texas Farm Bureau Underwriters v. Graham, 450 S.W.3d 919 (Tex. App. – Texarkana 2014)

Graham shot and killed Chambers, a would-be burglar, at his ranch house. Texas Farm Bureau refused to provide Graham a defense in the wrongful death lawsuit brought by Chambers' family. Graham successfully defended the lawsuit and then sued TFB to recover the defense costs incurred. The parties filed competing motions for summary judgment. The trial court denied TFB's motion and granted Graham's motion ruling TFB should have defended Graham in the Chambers lawsuit. TFB asserts the case is governed by the eight corners rule which provided an insurer is entitled to rely solely on the factual allegations contained in the four corners of the complaint in conjunction with the four corners of the liability policy to determine whether it has a duty to defend. The facts in the petition were that Graham ordered someone to bring him a loaded shotgun, ordered that person to shoot Chambers and when that person refused and handed the gun to Graham, he used it to carry out his intent to bring about the death of Chambers. If the complaint includes even one covered claim, the insurer must defend the entire suit. However, a court only defers to a complaint's characterization of factual allegations, not legal theories or conclusions. The mere allegation of negligence does not control the duty to defend. The court was required to analyze the facts contained in the petition and not just the causes of action plead. The underlying petition's allegations of negligence and gross negligence, on their own, were insufficient to require TFB to defend Graham in the Chambers suit. Although the act causing the damage was intentional, the court recognized that an intentional act can still be considered an accident because whether an event is accidental is determined by its effect. A deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been

different had the deliberate act been performed correctly. Here, the petition demonstrated that Graham's use of a loaded shotgun to carry out his intent and purpose of bringing about Chambers' death was intentional. Because Chambers' death was the type of injury that ordinarily follows from pointing a shotgun at a person's head and shooting him at very close range, the court concluded the injury was a natural and probable result of Graham's act. Because the policy excluded intentional acts, and because the incident was not an accident, TFB had no duty to defend. **READ THE OPINION HERE**

In re In the Matter of The Complaint of RLB Contracting, Incorporated, As Owner of the Dredge "Jonathan King Boyd" and its Engine, Tackle and Gear for Exoneration or Limitation of Liability, 773 F.3d 596 (US Fifth Circuit 2014)

On July 1, 2011, the Jonathan King Boyd (the "Vessel"), owned by RLB Contracting, was engaged in dredging operations when a fishing boat, operated by Butler, collided with one of its floating dredge pipes. All occupants were thrown overboard, suffering various injuries and one was killed. Butler filed suit against RLB in state court on June 12, 2014, RLB was served on July 2, 2012 and on December 28, 2012, filed its limitation of liability action in federal court seeking to limit its liability to the $750,000 value of the Vessel. Butler filed a motion to dismiss the limitation action as untimely, contending RLB had received written notice of the claim more than 6 months prior to the filing of the limitation action. At the heart of the dispute is a series of letters, mostly emails, between RLB's lawyers and Butler's lawyer, Frank Daniel. There were a number of emails exchanged between July 26, 2011, just a few weeks after the accident, and the time suit was filed. Invoking the Limitation Act has a jurisdictional requirement that the vessel owner must bring an action within 6 months after a claimant gives the owner written notice of a claim. The written notice must communicate the reasonable possibility of a claim and the reasonabl possibility that the damages are in excess of the vessel's value. A state court complaint clearly gives notice of the claim itself. To the extent the Court has never explicitly held that a written communication may serve as notice under the Act in lieu of a filed complaint, they did so here. The Court held that entire body of correspondence (ie, all of the letters/emails), considered as a whole, better approximates what the vessel owner, as a recipient of all the writings, should have thought was a reasonabl possibility of a potential claim and its value. It was factually inconceivable that RLB had notice of a claim after almost a year of emails discussing the case, thus the Court found RLB had notice of the claim more than 6 months prior to filing its limitation action. To

the same extent RLB had notice of a potential wrongful death suit, it had notice there was a reasonable possibility the damages would be in excess of $750,000, even though the emails never specified an amount. RLB should have realized an action involving the death of a child would easily exceed $750,000 in potential damages. The district court's dismissal of RLB's complaint as time-barred was affirmed. **READ THE OPINION HERE**

In re Essex Insurance Company, 450 S.W.3d 524 (Tex. 2014)

Zuniga sued San Diego Tortilla after losing his hand while operating a tortilla machine. Essex (commercial general liability policy insurer) concluded the policy did not cover Zuniga as he was an employee of SDT. Zuniga and SDT claimed Zuniga was an independent contractor. Essex agreed to defend SDT but did so under a reservation of rights refusing to indemnify SDT against any judgment based on the policy's employee exclusion. Zuniga added Essex as a defendant to the suit seeking a declaration that the policy required Essex to indemnify SDT. Essex filed a motion to dismiss arguing Zuniga was barred based on the "no direct action" rule, lack of standing and lack of ripeness. In Texas, the general rule is that an injured party cannot sue the tortfeasor's insurer directly until the tortfeasor's liability has been finally determined by agreement or judgment. Whether stated as a claim for damages or for declaratory relief, Zuniga's claim against Essex fails unless SDT is in fact liable to Zuniga for his injuries, which is why the "no direct action" rule applies to a declaratory judgment suit. Allowing Zuniga to pursue claims simultaneously against SDT (for liability) and Essex (for coverage of that liability) in the same suit would prejudice both Essex and SDT because it would create a conflict of interest for Essex and necessarily require the admission of evidence of liability insurance. Zuniga did cite any case where a plaintiff, who is not a party to the insurance contract, may seek or obtain a declaratory judgment regarding an insurer's duty to indemnify an insured defendant against liability to the plaintiff before that liability has been determined. The trial court abused its discretion by denying SDT's motion to dismiss Zuniga's claims in this case. **READ THE OPINION HERE**

Lerma v. Border Demolition & Environmental, Inc., 2015 WL 737989 (Tex. App. – El Paso 2015)

Border Demolition demolished Lerma's house. Lerma refused to pay Border Demolition claiming the company unlawfully retained bricks and other building materials. The jury found in favor of Border Demolition and Lerma

appealed. Lerma contended the trial court abused its discretion by limiting evidence showing Border Demolition failed to mitigate its damages by refusing to accept Lerma's settlement offers. Border Demolition countered it had no duty to mitigate its damages by accepting a settlement offer conditions on an implicit surrender of its claim. The central question was whether Lerma's offer to let Border Demolition keep bricks from the home in exchange for a lower contract price constituted a mitigation attempt or a settlement offer. Mitigation is an affirmative defense and a defendant is entitled to a mitigation instruction where he raises the issue at trial. However, foreclosing a plaintiff from pursuing suit is not mitigation and an offer only raises a fact question on mitigation where the offer is unconditional. An offer that purports to resolve the dispute between the parties is not an unconditional mitigation offer, but an offer to settle, even where the offeror never explicitly demands release of the claims. The evidence showed Lerma offered to resolve the dispute between him and Border Demolition by letting it keep bricks and other building materials in exchange for a reduction in price on the contract. That constituted a settlement offer since it created a quid pro quo situation purporting to resolve the dispute in its entirety. Settlement offers are inadmissible to prove liability or invalidity of the claim or its amount, although a settlement offer may be offered for other purposes. Here, Lerma's purpose in offering the settlement evidence was to prove the invalidity of the claim or its amount, thus introduction of settlement evidence was prohibited by rule and the trial court did not err in excluding it. **READ THE OPINION HERE**

THANKS TO TADC CORE SPONSOR