



FROM THE PRESIDENT

Michele Smith,
MehaffyWeber, P.C., Beaumont

The TADC is a professional organization of attorneys in private practice who represent business clients in personal injury defense, business disputes and commercial litigation matters. The TADC seeks to preserve, protect and promote protection of the Seventh Amendment and the right to trial by jury and a competent, fair and impartial judiciary.

These words have guided my actions and decisions as the Legislative Session has advanced. You need listen to only one committee hearing to understand how much our profession and the right to trial by jury are under attack. Lawyers are vilified and labeled. Our judges are not safe from criticism either. We must stand up for our profession.

TADC proudly stood with TEX-ABOTA and TTLA in supporting the Civility Oath bill. The oath sailed through the Texas Legislature and has landed on Governor Abbott's desk awaiting his signature. The revisions to the attorney oath called for in Senate Bill 534 impress upon new lawyers taking the oath, the importance of civility and the value it brings to their conduct and their dealings. The bill adds one line to the new lawyer oath which requires lawyers to swear to conduct [oneself] with integrity and civility in dealing and communicating with the court and all parties.

Our TADC members serving in the Legislature this session have done so with distinction and honor. **Chairman Rene Oliveira** was appointed chair of the Business and Industry committee even though he is not a member of the majority party. This is a great honor and a reflection of respect for his past leadership and service. **Representatives Travis Clardy and Kenneth Sheets** are members of the crucial Judiciary and Civil Jurisprudence Committee. They have been instrumental in serving as gatekeepers for bills impacting the

civil justice system. Both have been invaluable to me and have been great examples of how effective leaders should govern. **Representative Sarah Daviss** serves on the very important Calendars Committee and received a vote of confidence from Speaker Straus by being appointed a conferee on the budget. She has been steadfast in making sure the legislative process is meaningful. Thank you all for your service and dedication. You make TADC proud!

PROGRAMMING

Our Spring Meeting in Galveston was perfect with beautiful weather, unbelievably clear water and great attendance. Our young lawyers attended in large numbers and brought energy and fresh perspectives to the meeting. Program Chairs **Gayle Corley, Robert Booth and Elliott Taliaferro** hit the ball out of the park on practical and creative programming!

Joining the many distinguished speakers, were TADC Past President, the **Honorable Patricia Kerrigan** and former **Representative and Speaker Pro-Tempore, Craig Eiland**. Both provided their unique points of view on our profession and the civil justice system. To universal acclaim, we brought back group activities to the spring meeting. These were organized superbly by **Kim and Fred Rashke**. A special thank you to the City of Galveston and all involved in making the meeting a great and fun event.

Our second TADC Transportation Law Seminar takes place tomorrow in Fort Worth, Texas. We have a great collection of speakers and the meeting provides an opportunity for local programming in areas that are mostly tort-reform proof. If you have not signed up to attend, please consider doing so. Registration materials are linked in the calendar below. Thank you to Program Chair, **J. Mitchell Smith** for organizing such a high quality program.

The 2015 Summer Seminar in Jackson Hole is just around the corner! Registration materials for the Summer Seminar are linked in the calendar below. Beat the heat and join TADC in beautiful, scenic Wyoming. Chairs **Christy Amuny, Pamela Madere** and young lawyer liaison **Jason McLaurin** have put together a fantastic program. You do not want to miss this one. Register now online at www.tadc.org. The hotel cut-off is **June 5, 2015 and they will sell out!**

MEMBERSHIP

One of our membership initiatives this year is one free program attendance for young lawyers (those in practice fewer than five years, who have never attended a TADC meeting). Nine young lawyers took advantage of this opportunity in Galveston. Our other initiative is a one year free TADC membership for DRI members who are not TADC members. Please contact **Brad Douglas** (bdouglas@namanhowell.com) or **Sophia Ramon** (sramon@atlashall.com) if you have any people who qualify for these membership incentives.

WELCOME NEW TADC MEMBERS!

MelissaAckie,Thompson Coe Cousins&Irons, LLP,Austin
NicoleAndrews,Serpe, Jones, Andrews, Callender&Bell,PLLC,Houston
BrentBishop,Atlas, Hall&Rodriguez, LLP,McAllen
J.Coffman,Brackett&Ellis,Fort Worth
ChristopherCook,Craig, Terrill, Hale&Grantham,Lubbock
CeciliaGarza,Gault, Nye&Quintana, LLP,Edinburg
MichaelStewart,Godwin Lewis PC,Dallas
MichaelYanof,Thompson, Coe, Cousins&Irons,L.L.P.,Dallas

Anda big thank you to TADC members and their firms for sponsoring the applicationsof our newest members! Thanks to**PeggyBrenner**,SchirrmeisterDiaz-Arrastia Brem, **R. Bruce Moon**,Brackett&Ellis, P.C.,**MitziMayfield**,Riney&Mayfield, L.L.P., **Bud Grossman**,Craig, Terrill, Hale&Grantham,L.L.P.,and**SofiaRamon**,Atlas, Hall&RodriguezLLP,McAllen.

STATE BARREPORT

Congratulations are in order for theserising stars in the State Bar! **PastTADC President David Chamberlain**was elected Chair of the Board of Directorsof the State Bar of Texas for the 2015-2016 year. TADC members,**Scott Stolley and AlanCarmichael**,also won election as District Directors in their respectivejurisdictions.

The Texas Supreme Court approved theproposed amendments to the Texas Rules of Evidence by Order dated March 10,2015. The Court initially providednotice and opportunity for public comment on the revisions in November. The comment period for providing commentsended on February 28, 2015. TADC tookthe opportunity to provide comments to the Texas Supreme Court after a completereview of the proposed amendments. Theamendments became effective April 1, 2015.

There is apossibility of a special session, but hopefully it will not be on mattersimpacting the civil justice system. Staytuned for our Legislative wrap up report. I hope to see you at an upcoming TADCevent.

REGISTER NOW!

For the 2015 TADC Summer Seminar

**Join the TADC in Jackson Hole, Wyoming
July 8-12, 2015**

*A program for the practicing trial lawyer
offering 9.25 hours CLE, including 1.75 hours
ethics*

Topics Including:

- ~ Wrap-Up of the 84th Legislative Session*
- ~Contempt of Court!*
- ~ The Science of an Apology*
- ~ Understanding Sovereign Immunity*
- ~ The Expedited Civil Action: The First 2 Years*
- ...and much more!*

Hotel Reservation cut-off is June 5, 2015

REGISTRATION MATERIALS

LEGISLATIVE/POLITICAL UPDATE

With only 20 days left to go in the 84th Legislative Session, the House and Senate continue to churn through long calendars and late night committee hearings in an effort to get things done. Of course, the only thing the Legislature has to do every two years is pass a budget. HB 1, the general appropriations act, is currently being negotiated in conference committee. Though the budgets of the two chambers are not that far apart in dollar terms, several contentious issues remain: the level of spending on public schools, border security, transportation, as well as the big disagreement over tax cuts. The House wants across-the-board cuts in the sales and franchise tax, while the Senate prefers raising the homestead exemption and the small business exemption of the franchise tax. Governor Abbott has indicated that he wants franchise tax relief above all other things, so the stage is set for a frenetic three weeks of wrangling.

Calendar deadlines will now begin to fall. Monday, May 11, was the last

day for House committees to report House bills. As a practical matter, however, bills not currently in Calendars Committee have very little chance of making it to the floor. The last House Daily Calendar with House bills must have been distributed yesterday, Tuesday, May 12, and the last day the House can pass non-local House bills on second reading is on Thursday, May 14. Deadlines for Senate bills kick in on May 23 (last day for a House committee to report a SB), May 24 (last House calendar with SBs), May 26 (last day for SBs on second reading), and May 27 (last day for third reading SBs and local SBs).

Civil justice-related bills are finally moving through this tangled process. On Friday, May 8, the House brought up three bills: [HB 969/SB 735](#) (discovery of net worth in punitive damages claims), which was left pending in the House on Friday, was brought up for debate again on Monday, May 11, only to be sent back to committee on a point of order raised from the floor; [HB 1492](#) (transparency in asbestos bankruptcy trust claims), which saw three floor amendments and was passed to third reading in the House on Friday, May 8, 2015 and was finally passed yesterday, May 11 and is on the way to the Senate; and [HB 1692](#) (*forum non conveniens*), which saw one floor amendment and was passed to third reading in the House on Friday, May 8, 2015 and was finally passed yesterday, May 11 and is on its way to the Senate.

TADC has taken an active role in the net worth and FNC bills. Another bill in which TADC has taken a particular interest, [SB 455](#) (three-judge district court for school finance and redistricting cases) has passed the Senate. The House companion, [HB 1091](#), continues to be set on the House Calendar .

The sweeping first party litigation reform bill, [SB 1628](#), has passed the Senate and awaits action in the House Insurance Committee. TADC has closely monitored this bill, and we expect a House committee substitute in the next few days that will reconcile the Senate and House versions of the bill. Areas of negotiation in the bill include: the scope of immunity for a carrier's representatives, agents, employees, or adjusters; the hard two-year limitations period for filing a property damage claim; and extensive changes to Chapters 541 and 542, Insurance Code, that significantly limit interest and attorney's fees.

Some problematic bills linger. [HB 1603](#), which establishes a statewide chancery court for certain business cases, remains in House Calendars (at least as of today). TADC testified in opposition to this bill in committee and continues to communicate our opposition to House members. The Uniform Collaborative Law Act, [HB 2512](#), which TADC likewise opposes and testified accordingly, is stalled in House committee and appears dead for the session.

Finally, [HB 2089](#), which, among other things, repeals the \$200 attorney occupation tax, has passed the House and is pending in the Senate Finance Committee. TADC supports this bill.

CALENDAR OF EVENTS

May 14, 2015

TADC Transportation Law Seminar

Fort Worth, Texas

J. Mitchell Smith, Program Chair

Register online at www.tadc.org

June 5, 2015

El Paso/West Texas CLE & Chihuahuas Baseball!

El Paso Club, 201 E. Main Drive, 18th Floor, El Paso, TX

RSVP Information at www.tadc.org

June 11, 2015

Houston Legislative Luncheon

Downtown Club at Houston Center

RSVP Information at www.tadc.org

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

Jason McLaurin, Young Lawyer Liaison

*Registration material **HERE** or register online at www.tadc.org*

July 31-August 1, 2015

TADC Budget/Nominating Committee Meeting

La Mansion del Rio – San Antonio, Texas

August 7-8, 2015

West Texas Seminar

Inn of the Mountain Gods – Ruidoso, New Mexico

Bud Grossman, Program Chair

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, Program Chair

Registration material will be mailed in mid-August

LEGAL NEWS - CASE UPDATES

Case Summaries Prepared by Heidi Coughlin, Wright & Greenhill, P.C., Austin

Nabors Well Services, Ltd. v. Loera, Supreme Court of Texas, No. 13-0126

This case arises from a collision between a Nabors Wells tractor-trailer and a pickup truck operated by plaintiff Loera. Loera attempted to pass two Nabors tractor-trailers that had begun slowing to make a left turn and collided with the lead tractor-trailer as it began to turn. The trial court admitted evidence that the Loeras were not using their seat belts. The jury found Nabors driver 50 percent at fault for causing or contributing to cause the “occurrence or injury,” Nabors 10 percent at fault, and Loera 40 percent at fault. The jury was also asked questions regarding the Loeras’ failure to use seat belts, specifically “was the non-use of the seat belt by any of the [plaintiffs] negligence and the proximate cause of the injuries if any?” The jury answered, “Yes” to each Loera plaintiff and found their percentage of responsibility “100 percent.” The jury awarded the Loeras approximately \$450,000 in damages, but the trial court entered a take-nothing judgment presumably based on the jury’s answers to the seat belt question. The issue was taken up on appeal.

The Court of Appeals in El Paso concluded that the trial court improperly admitted evidence of non-seat belt use based on *Carnation v. Wong*, 561 S.W.2d 116 (Tex. 1974). That decision was appealed to the Supreme Court. While the appeal was pending, the Supreme Court decided *Nabors Wells Services, Ltd. v. Romero*, ___ S.W.3d ___ (Tex. 2015) which overruled *Carnation* and “held relevant evidence of use or non-use of seat belts is admissible for the purpose of proportioning responsibility in civil lawsuits.” The Supreme Court “further observed that ‘there is nothing about injury-causing conduct that renders it incompatible with being considered alongside occurrence-causing conduct in one responsibility apportionment for the harm suffered by the plaintiff.’” *Nabors v. Romero*. Accordingly, “there is no need . . . to deviate from a single apportionment question.” *Id.* Thus, the court vacated the judgment of the Court of Appeals and remanded the case for further proceedings. [READ THE OPINION HERE](#)

Richard Malouf v. State of Texas, Court of Appeals, Third District of Texas, Austin, No. 03-14-00036-CV

Relators Ellis and Castillo filed suit against Malouf Defendants, a dentist, his professional corporation and his professional association pursuant to the Texas Medicaid Fraud Prevention Act. Subsequently, the State of Texas intervened and assumed primary responsibility for the prosecution of Relators' claims. Essentially, the State/Relator alleged that Malouf Defendants violated the Texas Medicaid Fraud Prevention Act by engaging in unlawful acts, making false statements, and misrepresentations of material fact. Malouf Defendants filed a Motion to Dismiss the suit and requested attorney fees under §74.351 of the TMLA on the grounds that the State/Relator failed to provide an expert report. The trial court denied the Motion to Dismiss.

On appeal, the issue to be decided was whether claims brought by the State/Relator pursuant to the Texas Medicaid Fraud Prevention Act (TMFPA) are subject to the expert report requirement of the Texas Medical Liability Act (TMLA). The Court of Appeals examined whether the State/Relator was a "person" as required in the definition of a "claimant" who is subject to the expert report requirement. The court analyzed the common law meaning of the term "person" and concluded that when the state brings a lawsuit under the TMFPA, it is not a "person" within the definition of "claimant" under the TMLA and thus is not subject to the expert report requirement. The court also concluded that Relators Ellis and Castillo are not subject to the TMLA expert report requirement either. [READ THE OPINION HERE](#)

State of Texas v. Emeritus Corp., Court of Appeals, Thirteenth District of Texas, Corpus Christi—Edinburgh, No. 13-13-00529-CV

In this case, the State of Texas brought a lawsuit against Emeritus, the operator of an assisted living facility, seeking penalties, attorney's fees, and injunctive relief under the Deceptive Trade Practices Act ("DTPA") and the Assisted Living Facility Licensing Act ("ALFLA"). Emeritus moved to dismiss the lawsuit filed by the State alleging that the claim constitutes a "healthcare liability claim" under the Texas Medical Liability Act ("TMLA") and the alleging the State failed to produce an expert report as required by §74.351. The trial court agreed with Emeritus and dismissed the State's claim. The State appealed asserting that it is not subject to the TMLA expert report requirement when acting pursuant to its police powers, seeking only statutory civil penalties and injunctive relief. The Court of Appeals analyzed whether the relief sought by the State constituted "damages" in the TMLA. The court held that the State is not subject to the expert report requirement of the TMLA when the State, pursuant to its police powers, and acting in its sovereign capacity, seeks statutory civil penalties and injunctive relief. [READ THE OPINION HERE](#)

Grant Prideco, Inc. v. Empeiria Conner L.L.C., Court of Appeals, Fourteenth District of Texas, Houston, No. 14-13-00644-CV

Empeiria Connor, LLC, seller, entered into a Stock Purchase Agreement with Grant Prideco, Inc., purchaser. The Stock Purchase Agreement contained an indemnification provision that required the seller to indemnify purchaser for losses arising out of, or related to, "any Claims of Product Liability for which the facts, events and circumstances with respect to such Products Liability Claim first arose prior to the closing date." Seller and

purchaser disagreed about whether the indemnity provision applied to a products liability claim arising out of injuries sustained by Jose Lara while working with a product manufactured, designed, marketed, and distributed by a company purchased by purchaser.

The issue decided by the Court of Appeal was whether Lara's claims are "Claims for Product Liability for which the facts, events, and circumstances with respect to such [claim] first arose prior to the closing date." The closing date for the Stock Purchase Agreement was May 25, 2011, and Lara alleged he sustained injuries on or about September 1, 2011.

The Court of Appeals, in interpreting the indemnity provision, concluded that the language "facts, events, and circumstances arise" was a broader concept than when a claim "accrues." The court held the trial court erred in granting seller's Motion for Summary Judgment and that resolution of the issue as to whether the claim was covered by the indemnity language rests on disputed facts. The case was remanded to the trial court for further proceedings. [READ THE OPINION HERE](#)

Kenny v. Portfolio Recovery Associates, LLC, Court of Appeals, First District of Texas, Houston, No. 01-14-00058-CV

Portfolio Recovery Associates, LLC sued Joe Kenny for a debt on a credit card originally issued by HSBC Bank Nevada, N.A. Following a trial, the trial court issued judgment against Kenny and in favor of Portfolio Recovery. During the trial, the court considered four exhibits, one of which was a Business Records Affidavit signed by Meryl Dreano, a custodian of records for Portfolio Recovery. Dreano asserted in the affidavit that the other documents were kept in the regular course of Portfolio Recovery's business. Dreano also asserted that Portfolio Recovery "is the assignee of HSBC Bank Nevada, N.A. and is the current owner of the account of Joe Kenny ("Defendant") ending in 972 (the "Account")." Kenny objected to the affidavit arguing that the assertion of the assignment was not necessary to authenticate the documents as business records and was inadmissible hearsay. The court held that unless specifically permitted by statute or rule, affidavits do not constitute evidence at trial. *Ortega v. Cach, LLC*, 396 S.W.3d 622, 630 (Tex. App.—Houston [14th Dist.] 2014, no pet.). "When an ex parte affidavit presents evidence beyond similar authentication requirements of Rule 902" . . . "the extraneous portions of the affidavit constitute inadmissible hearsay." *Id.* at 630. The court found that Dreano's assertion regarding the assignment of Kenny's account to Portfolio was not relevant to establish the documents as business records and that the representation went beyond the authentication and constituted hearsay. [READ THE OPINION HERE](#)

Keva Nuckols Sampson v. ASC Industries, In the United States Court of Appeals for the 5th Circuit, No. 14-10085

Rebecca Breaux brought an age discrimination action against her employer ASC Industries. Approximately one year later, Breaux's attorney, Lurlia Oglesby, filed a suggestion of death pursuant to FRCP 25(a)(3). After 90 days allotted for the substitution of a party under Rule 25(a)(1) passed without any motion being filed, ASC moved for the action to be dismissed pursuant to the rule. The court dismissed the case. On appeal, Breaux's estate argued that the 90-day period did not run after the notice of death was filed

pursuant to Rule 25 because service was not made on the deceased plaintiffs' estate which would notify the estate of the suggestion of death.

Rule 25 states that when a party dies and a claim is not extinguished, a statement noting death must be served on parties in accordance with Rule 5 "*non-parties*" in accordance with Rule 4. Fed. R. Civ. P. 25(a). Following the *service* of the statement noting the death, a motion for substitution of a proper party must be made within 90 days or the action must be dismissed. Fed. R. Civ. P. 25(a)(1).

On appeal, the issue was whether personal service of a suggestion of death on a deceased-plaintiff's estate is required in order for the 90-day time limit to run from the substitution of a party under Federal Rule of Civil Procedure 25. The Fifth Circuit joined the Fourth, Seventh, Ninth, and Tenth Circuits in holding that when a plaintiff dies, in order for the 90-day deadline to run under Rule 25, the suggestion of death must have been personally served on the deceased-plaintiff's estate pursuant to Rule 4. Pursuant to this holding, the court reversed the trial court's dismissal. [READ THE OPINION HERE](#)

THANKS TO TADC CORE SPONSOR



Scientific Expert Analysis™

Texas Association of Defense Counsel, Inc.

400 W. 15th Street, Suite 420, Austin, Texas 78701 512.476.5225 - 512.476.5384 FAX - tadc@tadc.org