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

TO: TADC MEMBERS

RE: TADC DIRECTOR REPORT

Thank you for the privilege to serve as your representative to the Texas Association of Defense Counsel Board of Directors. The Board met during the 2015 Spring Meeting in Galveston in early May. The meeting highlights and happenings since the Board meeting appear below:

From President Michele Smith - Celebrating Our Profession: This week, lawyers from across the state will meet in San Antonio for the Annual Meeting of the State Bar of Texas. TADC is fortunate to have several of its members assuming leadership positions within the Bar. Please join me in congratulating these leaders who demonstrate what is right about our profession. You all make TADC proud!

H. Alan Carmichael, *State Bar Director*; **Scott P. Stolley**, *State Bar Director*, **David E. Chamberlain**, *Chair-State Bar Board of Directors* and; **Allan K. DuBois**, *PRESIDENT of the State Bar of Texas*.

Reporting: This is the second installment of the district reporting you will receive as a TADC member. We want to keep you informed and involved. We want to hear from you with ideas, questions and concerns. Please feel free to contact any of us.

Spring Meeting: The Board was advised that the Spring Meeting had great attendance and the programming was outstanding. Under a new membership incentive to attract young lawyers, a new TADC member licensed five years or less could attend one meeting or seminar with no registration fee. The incentive worked so well that nine young lawyers registered for the Spring Meeting.

Amicus News: Two very important amicus briefs dealing with arbitration had been authorized. George Muckleroy (Sheats & Muckleroy) and Roger Hughes (Adams & Graham) filed an amicus letter brief supporting the motion for rehearing in *Fredericksburg Care Co., Ltd. v. Perez*, __ S.W.3d __, 2015 WL 1035343 (Tex. 2015). This is a landmark decision that the Federal Arbitration Act (FAA) will enforce arbitration agreements in contracts with healthcare providers operating in interstate commerce. Texas Civil Practices & Remedies Code §74.451 requires arbitration clauses be approved by counsel and contain an advisory to that effect. The FAA pre-empts state laws limiting enforcement of arbitration; however, the McCarran Ferguson Act pre-empts applying the FAA to state laws regulating the business of insurance. The Supreme Court held §74.451 is not a law regulating the business of insurance and the FAA pre-empts §74.451.

George Vie III (Mills Shirley) has been authorized to file an amicus brief to support the petition for mandamus in *In re Helle*, No. 14-0772. Helle denies he signed any agreement containing an arbitration clause and there was no such agreement. Nonetheless, the trial judge ordered arbitration. *In re Gulf Explor., Inc.*, 289 S.W.3d 836 (Tex. 2009) denied mandamus review to an order compelling arbitration and staying the case – relator has an adequate legal remedy in an appeal after the arbitration. Helle challenges that as a violation of due process and the right to jury trial if there is no agreement to arbitrate. Helle argues that mandamus must be available to challenge an order compelling arbitration in the absence of an agreement to arbitrate.

Committees: Our four committees have been meeting monthly (and in the case of the Legislative Committee, weekly). Here are a few of the highlights.

Legislative: As you know through the numerous legislative updates and E-updates, your Legislative Committee and leadership worked tirelessly throughout the session keeping up with the nearly 300 pieces of legislation affecting the civil justice system. A brief legislative session wrap-up was emailed to everyone on the last day of session and a more comprehensive update will be provided in the upcoming TADC Magazine.

Membership: There are two new membership initiatives available. The first was mentioned in the Spring Meeting item above, and the second is that any DRI member who has not previously been a TADC member may join for one free year of membership. A new member follow-up initiative has been adopted with the hopes of keeping up with new members throughout their first year of membership and get their thoughts about their TADC experience and how member services might be improved. The board has a goal to have 1700 members by the end of the TADC year. We need your help in recruiting the

best of the best for TADC. If you need help nominating a new member, please let one of us know.

Programs: The TADC held a successful Transportation Law Seminar in Fort Worth in May and seminars in Construction Law and Commercial Litigation are being planned for late summer/early fall. The West Texas Seminar, held jointly with the New Mexico Defense Lawyers Association, is scheduled for August 7-8, 2015 in Ruidoso, New Mexico. Registration has been mailed and is available online. The second annual TADC/OADC Red River Showdown will be held in Frisco on Texas/OU weekend, October 8-9, 2015. We will also keep you posted of CLE's planned for our area.

Publications: The new TADC website has been loaded and operational since mid-January. There are two new features. You now have the ability to register for meetings and seminars online and you are now able to pay dues online. Please continue to let us know how we may improve the website to provide the best membership service. The Summer edition of the TADC Magazine is in the works and should be out and in your hands by the end of June.

Your 2015 Spring Professional Newsletters are now available! Download these important case updates **HERE** or visit the TADC website (www.tadc.org)

Young Lawyers: The TADC Young Lawyers Committee has been extremely active this year. They have been generating speakers for TADC programs and participating in local events. The Young Lawyers hosted a cocktail hour during the Spring Meeting. The committee has prepared a survey specifically designed for young TADC members which will be sent this week so please be on the look out. If you are a young lawyer or know a young lawyer who wants to be involved, please contact the Young Lawyer Committee Chair—Trey Sandoval treysandoval@mehaffyweber.com The Young Lawyer Committee has several exciting ideas for the year and always welcomes additional help.

We hope this information is helpful to you and we hope you will participate in TADC. If you have any ideas, comments or questions, please feel free to contact us. Our contact information is provided below. We want TADC to be YOUR organization.

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REGISTER NOW!

For the 2015 TADC West Texas Seminar/

with the New Mexico Defense Counsel

August 7-8, 2015

A program for the practicing trial lawyer offering 5.5 hours CLE, including 1.5 hours ethics

Topics Including:

~ Non-Compete Clauses in Texas & New Mexico

~A View from the Bench - Multi-jurisdictional Practice!

~ 84th Legislative Update

~ Preserving the Record During Trial

…and much more!

Hotel Reservation cut-off is July 8, 2015

REGISTRATION ONLINE AT www.tadc.org

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CALENDAR OF EVENTS

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
Register Online at www.tadc.org

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 Casey Marcin, Cooksey & Marcin, PLLC, Houston and San Antonio

AZZ Inc. v. Morgan, 2015 Tex. App. LEXIS 3471, *1 (Tex. App. Fort Worth Apr. 9, 2015)

This case was on appeal from the 67th District Court of Tarrant County. Trial Court No. 067-257747-12. In this case, there was an appeal from a judgment on a jury's verdict in favor of Appellees (Michael Coleman Morgan, Boyce Galvanizing, LLD, and Big Spring Holdings, LLC). The primary issues addressed in the appeal are whether Appellants (AZZ Incorporated and AZZ Group, L.P.) conclusively established that AZZ suffered $454,000 in past lost-profit damages and, alternatively, whether the jury's findings that AZZ suffered zero past lost profits and zero future lost profits were against the great weight and preponderance of the evidence.

AZZ sought recovery of the same damages (lost profits) for each of its theories of liability. It did not seek recovery of different damages for a distinct injury stemming from each of its liability theories. The faulty assumptions that AZZ's expert premised his past and future lost-profits damages model upon rendered his lost-profits conclusions speculative, and this defect would persist even if a breach-of-fiduciary-duty question had been submitted to the jury, as AZZ contends it should have been, and even if the jury had answered the breach-of-fiduciary-duty question affirmatively. Consequently, the appellate court's holdings—that the jury's zero past lost-profits damages finding is supported by legally sufficient evidence and that the jury's zero past and future lost-profits damages findings are supported by

factually sufficient evidence under the particular facts here, do make it unnecessary for the court to address AZZ's additional issues.

Because the evidence does not conclusively establish past lost profits and because the jury's zero past and future lost-profits damages findings are not against the great weight and preponderance of the evidence, the appellate court affirmed. **READ THE OPINION HERE**

***ExxonMobil Corp. v. Pagayon*, 2015 Tex. App. LEXIX 3520, *2 (Tex. App. Houston 14th Dist. Apr. 9, 2015)**

This case is on appeal from the Probate Court No. 2, Harris County, Texas. Trial Court Cause Nos. 408, 329-401 & 408, 329. Alfredo M. Pagayon died several weeks after an altercation between himself, his son (also Alfredo G. Pagayon and referred to in the opinion as "J.R."), and an ExxonMobil Corporation employee at an ExxonMobil service station/convenience store.

ExxonMobil challenges the judgment rendered on the jury's verdict in favor of Alfredo's wife, children, and estate (collectively, "the Pagayons") on their claims arising from Alfredo's death. ExxonMobil asserts that the judgment should be reversed because (1) it had no duty to control its employee under the facts of this case; (2) the evidence is legally and factually insufficient to support a finding that its negligent supervision caused Alfredo's death, (3) issues of causation and comparative fault were not fairly tried because the trial court refused to allow ExxonMobil to present certain evidence and defenses, (4) the evidence is insufficient to support the medical-expenses damages awarded, and (5) a remittitur of Alfredo's widow's non-pecuniary damages should be suggested because her pain and mental anguish were due almost entirely to events that occurred during Alfredo's hospitalization and not to the fight at the convenience store.

The appellate court concluded that ExxonMobil is not entitled to rendition of a take-nothing judgment on any of the asserted grounds. The appellate court concluded that ExxonMobil had a duty to control the employee who injured Alfredo, and there is legally sufficient evidence that its breach of that duty caused Alfredo's death. However, the appellate court agreed that the trial court erred in striking ExxonMobil's designation of an emergency-room physician as a responsible third party and that such error caused an improper judgment. Accordingly, without reaching the remaining issues, the judgment was reversed and remanded for a new trial. **READ THE OPINION HERE**

***Eoff v. Cent. Mut. Ins. Co*., 2015 Tex. App. LEXIS 3396, *1 (Tex. App. Dallas Apr. 7, 2015)**

This case was on appeal from the 162nd Judicial District Court, Dallas County, Texas. Trial Court Cause No. DC-12-09034. The Texas Department of Public Safety did not have exclusive jurisdiction over the insurer's claim for damages following Appellant's default on the installment agreement; thus, the insurer was not required to exhaust any administrative remedies prior to filing suit against him for breach of contract, and the trial court had jurisdiction over the insurer's claim. Because the insurer failed to establish an anticipatory repudiation by appellant, and the payments due under the installment agreement were not accelerated, the insurer was entitled to recover only the past due payments under the installment agreement and was not entitled to recover the remaining balance on the agreement; hence, the evidence was insufficient to support the jury's damages award, and

the insurer was given the option of accepting a remittitur or having the case remanded for a new trial.

The judgment was affirmed, conditioned on the insurer's agreement to remit a portion of his damages.

Subsequent history:

***Eoff v. Cent. Mut. Ins. Co*., 2015 Tex. App. LEXIS 4206 *1 (Tex. App. Dallas Apr. 23, 2015).**

The court had issued an opinion in this case dated April 7, 2015 (above in this E-update). In that case, they suggested a remittitur of $4,319.25 of the actual damages awarded to Central Mutual Insurance Company (Central Mutual). The court stated that if the remittitur was filed by Central Mutual within fifteen days of the date of the opinion, they would modify the trial court's judgment with respect to the damages awarded and affirm as modified. On April 15th, Central Mutual timely filed its consent to the suggestion of remittitur and asked the Court to modify the trial court's judgment consistent with the court's opinion and judgment. Accordingly, the court vacated their prior judgment, not the opinion. The trial court's judgment was modified to award Central Mutual $1,200.00 in actual damages and the case was remanded to the trial court for a recalculation of prejudgment interest on the awarded damages. **READ THE OPINION HERE**

***JLG Trucking, LLC v. Garza*, 2015 Tex. LEXIS 346, *2-4, 58 Tex. Sup. J. 726 (Tex. 2015)**

This case is on petition for review from the Court of Appeals for the Fourth District of Texas. On July 16, 2008, Lauren Garza was traveling south on U.S. Highway 83 when she was hit by an 18-wheeler driven by a JLG Trucking, LLC employee. She visited a nearby emergency clinic and then saw an orthopedic surgeon, Dr. Pechero, complaining of neck and back pain. An x-ray showed some straightening of the lordotic curve, which Dr. Pechero concluded was associated with muscle spasms in the neck. He prescribed physical therapy, which Garza underwent for eleven weeks.

On October 9, 2008, Garza was involved in a second car accident. She complained at the hospital of pain in her head, neck, and chest. She returned to Dr. Pechero. MRI revealed that she had two herniated discs in her neck. A March 2009 nerve study revealed that a nerve at the site of the herniations had become compressed. An August 2011 MRI showed two additional herniated discs in her neck. She underwent spinal fusion surgery in January of 2012.

Garza sued JLG alleging that the employee driver's negligence caused her injuries and sought damages for past and future medical expenses, loss of earning capacity, physical pain, mental anguish, physical impairment, and disfigurement. Dr. Pechero served as Garza's expert witness stating the 2008 accident caused her injuries. JLG felt that Dr. Pechero, during questioning, opened the door up to the second accident. It renewed its objection to the exclusion of all mention or evidence of the second accident. The trial court upheld the exclusion ruling. The jury found that JLG's employee was negligent and did proximately cause the July accident and awarded Garza $1,166,264.48 in damages.

JLG appealed, arguing that evidence of the second accident was relevant and that its exclusion amounted to harmful error. The Court reasoned that the exclusion of the second accident curtailed JLG's ability to probe Dr. Pechero's conclusions about causation by asking him to explain why he discounted the second wreck as an alternative cause. The burden was on Garza to establish both that JLG caused the July 2008 accident and that it was this accident that caused her injuries. Part of that burden was to exclude with reasonable certainty other plausible causes of her injuries supported by the record. In this case, the evidence of the second accident was crucial to whether JLG's negligence caused Garza's injuries, and the harm in its exclusion was compounded by JLG's curtailed cross-examination of Dr. Pechero. Accordingly, the Court held that the trial court's exclusion of evidence regarding the second accident was reversible error requiring a new trial. **READ THE OPINION HERE**

***United Med. Supply Co. v. Ansell Healthcare Prods.*, 2015 Tex. App. LEXIS 3318, *1 (Tex. App. Dallas Apr. 3, 2015)**

This case was on appeal from the 68th Judicial District Court, Dallas County, Texas. Trial Court Cause No. DC-02-0433-C.

This case involves the manufacture and selling of latex gloves. United Medical Supply Company, Inc. challenges the trial court's judgment that it take nothing on its claim for statutory indemnity against Ansell Healthcare Products, Inc. On appeal, United Medical contends it showed it was entitled to indemnity as a matter of law under §82.002 of the Texas Civil Practice and Remedies Code. The appellate court agreed with United Medical. The appellate court refused to assume the Supreme Court engrafted onto the statute some sort of "anti-targeting" defense or apportionment requirements that are plainly non-existent in the statute. The appellate court acknowledged that the Supreme Court has simply held that "a seller can recover from a manufacturer any expenses it incurred that were associated with defending that manufacturer's product, and only those expenses." Here, United Medical sought recover of expenses that were related to Ansell's gloves. Although the parties disagree on whether all of the expenses United Medical claimed were reasonably expended to defend Ansell's gloves, clearly United Medical presented some evidence of recoverable expenses.

Accordingly, the matter was reversed and remanded to the trial court for a determination of the reasonable expenses United Medical incurred in defending Ansell's product as well as its attorney's fees in enforcing its right to indemnity. **READ THE OPINION HERE**

***Zuehl Land Dev., LLC v. Zuehl Airport Flying Cmty. Owners Ass'n*, 2015 Tex. App. LEXIS 3979, *1 (Tex. App. Houston 1st Dist. Apr. 21, 2015)**

This case is on appeal from the 274th District Court, Guadalupe County, Texas, Trial Court Case No. 08-1872-CV.

This case involves a dispute between a group of landowners and a homeowners' association for a subdivision immediately adjacent to the landowners' properties. The landowners were using one of the subdivisions' roads to access their land. The homeowners' association claimed that the road was private and built a fence along its edge, thereby blocking access to the adjacent lands from the subdivision's road. The ensuing litigation between the landowners and the homeowner's association has lasted over 10 years, devolving into what

one of the parties' attorneys termed "a nuclear war."

This appeal follows the entry of an agreed partial summary judgment addressing the merits of the litigants' dispute and two subsequent orders concerning peripheral issues, i.e., the denial of attorney's fees authorized to prevailing parties and the imposition of sanctions against one of the litigants. Only these two peripheral issues are being appealed.

In two issues, a subset of the landowners contend that the trial court erred by (1) denying their motion for attorney's fees under § 5.006 of the Texas Property Code, which mandates a fee award to a prevailing party in an action based on a breach of a restrictive covenant and (2) imposing sanctions against one particular landowner for bad-faith discovery and pleading abuses.

This case presented the unusual circumstance of an order that purported to deny all causes and requests for injunctive relief but, at the same time and as a result of a settlement agreement between the parties, prohibited the very conduct alleged to constitute a breach. That the case resolved favorably for the landowners through a settlement and consent decree instead of a jury trial and finding of breach did not prevent the landowners from having prevailed. The trial court abused its discretion by imposing sanctions, for purposes of Tex. R. Civ. P. 13, 166a(h), 215.2(b), and 215.3, that were tied to an arbitrary date and were not reduced based on a determination of relatedness between the fees and expenses incurred and the sanctionable conduct.

The appellate court reversed the trial court's order denying the award of attorney's fees under § 5.006. It overruled the challenge to the trial court's determination that sanctions were warranted, but sustained the challenge to the amount of sanctions imposed. This matter was reversed and the portion of the sanctions awarding fees vacated. The appellate court remanded the cause to the trial court for new evidentiary hearings to determine a reasonable attorney's fee award and just sanction. **READ THE OPINION HERE**

THANKS TO TADC CORE SPONSOR

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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