FROM THE PRESIDENT

Clayton E. Devin, Macdonald Devin, P.C., Dallas

TADC's Amicus Committee recently filed a brief in support of the appellant in an important case before the Texas Supreme Court. *Katy Springs Mfg. v. Favalora* is an appeal of a court of appeals decision approving factoring as a way to avoid "paid or incurred" limits on recoverable medical expenses, and allow companies that provide no health care to recover "retail" medical charges. A summary of the case appears below.

The first quarter of 2016 has been a busy one for TADC. In the last membership survey, you asked for more local activities. In response, TADC hosted member luncheons, happy hours and CLE seminars in Amarillo, El Paso, San Antonio, Fort Worth, Austin and Houston during the past two months. More activities are being planned, and the TADC Young Lawyers continue to rise to the challenge by hosting young lawyer events around the state. If you have an idea for local programming in your area, please contact the TADC office.

The TADC Spring Meeting is just around the corner in Nashville, April 27-May 1, 2016. The Loews Vanderbilt Hotel is the perfect venue to host TADC in the Music City. Program Co-Chairs Chantel Crews, with Ainsa Hutson Hester & Crews LLP in El Paso, and Trey Sandoval, with Mehaffy Weber, PC in Houston, have assembled an all-star cast of

speakers including Federal District Judge Xavier Rodriguez, Retired District Judge Robert Dinsmoor, DRI Past President John Parker Sweeny and Sony Music Legal Director Matthew Adams to name but a few. The program offers 10.5 hours of CLE including 3.5 hours of ethics. Register today!

The 33rd TADC Trial Academy will be held in Houston at the South Texas College of Law on April 15-16, 2016. The Trial Academy is one of the best programs TADC has to offer. It is an excellent trial advocacy training program designed specifically for young attorneys licensed 6 years or less. As of this writing, there are still a couple of openings.

TADC Legislative, Publications, Membership, and Program Committees continue to meet monthly via teleconference to monitor and plan activities throughout the year. If you know a potential legislative issue of concern, programming you would like to see, ideas on TADC publications and e-correspondence, or membership development suggestions, please contact me or the TADC office.

I want to welcome our new members who joined since our last E-update. You are what continues to make the TADC strong!

Robin Bell Brzozowski, Brock Person Guerra Reyna, San Antonio
E. Paul Cauley Jr., Sedgwick LLP, Dallas
Greg G. Chandler, Bain & Barkley, New Braunfels
Sarah P. Cowen, Cowen & Garza, LLP, McAllen
Lindsay P. Daniel, Naman Howell Smith & Lee, PLLC, Fort Worth
James Dingivan, Brock Person Guerra Reyna, P.C., San Antonio
David A. DuBois, Brock Person Guerra Reyna, P.C., San Antonio
Mario Franke, Dykema Cox Smith, El Paso
Joshua D. Frost, Field, Manning, Stone, Hawthorne & Aycock, P.C., Lubbock
Celia Garcia, Brock Person Guerra Reyna, P.C., San Antonio
Alma F. Gomez, Liskow & Lewis, Houston
Mark D. Hardy Jr., Fletcher, Farley, Shipman & Salinas, Dallas
Conrad D. Hester, Thompson & Knight LLP, Fort Worth
William E. Hopkins, Shackelford, Bowen, McKinley and Norton LLP, Austin
Kindall James, Liskow & Lewis, Houston
Jeffrey D. Janota, Thompson, Coe, Cousins & Irons, LLP, Austin
Cynthia C. Johnson, Jay Old & Associates, PLLC, Beaumont
James T. Kittrell, Liskow & Lewis, Houston

John A. Koepke, Jackson Walker LLP, Dallas
Blair J. Leake, Wright & Greenhill, P.C., Austin
Jillian Marullo, Liskow & Lewis, Houston
Matthew M. McKee, Craig, Terrill, Hale & Grantham, Lubbock
Robert Montoya, Liskow & Lewis, Houston
Carlos J. Moreno, Liskow & Lewis, Houston
Lauren N. Randle, Liskow & Lewis, Houston
Traci D. Siebenlist, Crenshaw Dupree & Milam, L.L.P., Lubbock
Alyssa Wickern, Brock Person Guerra Reyna, P.C., San Antonio

Thankyou for your membership and participation. I hope to see you at our SpringMeeting or another event in the near future.

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2016 TADC Spring Meeting
Nashville, Tennessee
April 27-May 1, 2016

A program for the practicing trial lawyer offering 10.75 hours CLE, with 3.5 hours ethics

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CALENDAR OF EVENTS

April 14-16, 2016
TADC Trial Academy
South Texas College of Law, Houston
K.B. Battaglini & Peggy Brenner, Program Co-Chairs
Registration Material *or online at www.tadc.org*

April 27-May 1, 2016
TADC Spring Meeting
Loews Vanderbilt Hotel - Nashville, Tennessee
Chantel Crews & Trey Sandoval, Program Co-Chairs
Registration Material *or online at www.tadc.org*

July 6-10, 2016
TADC Summer Seminar
Omni Plantation - Amelia Island, Florida
Slater Elza and Arlene Matthews, Program Co-Chairs
Registration Material to be mailed in Mid-April

July 29-30, 2016
TADC/NMDLA West Texas Seminar
Inn of the Mountain Gods - Ruidoso, New Mexico
Bud Grossman, Program Chair
Registration Material to be mailed in Late-May

August 5-6, 2016
Budget and Nominating Committee Meeting
Stephen F. Austin, Intercontinental - Austin, Texas

September 21-25, 2016
TADC Annual Meeting
Worthington Hotel - Fort Worth, Texas
George Haratsis & Brittani Rollen, Program Co-Chairs
Registration Material to be mailed in Mid-July

LEGAL NEWS - CASE UPDATES

Case Summaries Prepared by Russell Smith, Fairchild, Price, Haley & Smith, L.L.P., Nacogdoches

***Grogan v. W & T Offshore, Inc.*, 812 F.3d 376 (5th Cir. 2016)**

Facts

Triton Diving Services provides vessels, staff, and equipment for offshore piping projects, and was hired by W & T Offshore for this purpose. Tiger Safety is a safety contractor which provides monitoring and training in this field. Jakarta Grogan, a technician for Tiger, was injured while on board one of Triton's vessels. Litigants dispute the terms of their Master Service Contract in allocating liability for Mr. Grogan's injuries.

The lower court construed the contract as placing this burden on W & T alone, and on appeal the Fifth Circuit affirmed this ruling.

Issues

The primary issue in this case, notwithstanding a brief aside into whether maritime or state law governed, is whether and to what extent the belligerent parties are contractually liable for the injuries of a subcontractor's employee pursuant to the Triton/W & T Master Service Contract (MSC). The MSC provided that W & T would indemnify Triton for injury claims brought by members of the "W & T Group"; conversely, Triton agreed to indemnify W & T for personal injury damages brought by a member of the "Contractor Group." The MSC provided operational definitions as follows:

1.1.2 "Contractor Group" shall mean: Contractor, its parent, subsidiary and affiliated companies, and their respective parents, subsidiary and affiliated companies, and all of their respective officers, directors, representatives, employees *and invitees on the Work sites* and insurers of all of the foregoing.

1.1.3 "W&T Group" shall mean: W&T, its parent, subsidiary and affiliated or related companies, its and their working interest owners, co-lessees, co-owners, partners, farmors, farmees, joint operators, and joint venturers, if any, and all of their respective officers, directors, representatives, employees and *invitees on the Work sites* and insurers of all of the foregoing.

The outcome-determinative inquiry is thus twofold: whether Grogan *was* W & T's invitee, and whether he *was not* Triton's invitee; that is, could he have been the invitee of both parties, or only one, and if the latter, which?

Analysis and Impression

As to the first issue – whether Grogan was the invitee of W & T, the court looked to the "customary meaning of 'occupant'" as that finding was the crux of the trial court's decision to be reviewed on appeal. Lacking precedent or aid in the MSC itself, the court turned to an unpublished case in which it had held that phrase to mean "[o]ne who has possessory rights in, or control over, certain property or premises." The court upheld the lower court's ruling on this matter, as it had not clearly erred in determining that W & T occupied the relevant vessel – "the direction, command, and control of the vessel as it pertained to the work on the pipeline recommissioning project itself came from W & T or its company representative." Therefore, W & T cannot be excluded from at least a partial share of the liability.

The remaining question is whether it alone must shoulder this cost, or if Grogan was also Triton's invitee. The trial court had previously held that the MSC precluded such a "dual invitee" status. On appeal, the majority found no need to examine this contention, as there were sufficient facts on which to resolve the case in favor of Triton even absent any express provisions in the agreement. Pointing to the findings that Triton had not induced the participation of Tiger or Grogan in the project, it was W & T that directly contracted with Tiger regarding the scope of work to be done, and was also responsible for funding that contractor. The course of dealing between the parties further supported this arrangement. Even if the MSC had been misconstrued so as to allow the possibility of a dual invitee, such was not the case here. **READ THE OPINION HERE**

***Chesapeake Exploration, L.L.C. v. Hyder*, 2015 Tex. LEXIS 554 (Tex. 2015)**

Facts and Issues

Appellees, the Hyder family, was the lessor of 948 mineral acres in the Barnett Shale area. Chesapeake Exploration, L.L.C. acquired the prior lessee's interest in that tract and negotiated a lease with the Hyders. The lease, particular terms of which give rise to the dispute in this case, included three royalty provisions: (i) 25% of "the market value at the well of all oil and other liquid hydrocarbons," not relevant because oil is not procured from the leasehold; (ii) 25% of "the price actually received by Lessee" for all gas produced and sold or used; and (iii) the controverted provision central to this case, called for "a perpetual, cost-free (except only its portion of production taxes) overriding royalty of five percent (5.0%) of gross production obtained" from directional wells drilled on the lease but bottomed on nearby land. There were seven of these wells.

Argument arose when, after Chesapeake had been paying the Hyders 5% of the gas *purchase* price pursuant to this third royalty provision, the lessors claimed that their overriding royalty should have been based on the gas *sales* price. The trial court found in favor of the Hyders and awarded them $575,359.90 in postproduction costs that had been deducted and which made up the discrepancy between the purchase and sales prices. The court of appeals affirmed, and the Texas Supreme Court granted Chesapeake's petition for review.

Analysis

In Texas, the default rule is that royalties are free of the costs of production, but are subject to post-production costs, such as taxes and transportation from well to market. However, parties to a lease agreement are free to modify this general rule. This litigation centers upon an overriding royalty. The Texas Supreme Court has defined this as "a given percentage of the gross production carved from the working interest, but, by agreement, not

chargeable with any of the expenses of operation"; that is, such a royalty interest usually bears postproduction costs but not production costs.

Here, the Hyders argued that the "cost-free" language in their lease referred to postproduction costs, as the royalty is by nature already free of production costs: that is, this construction is necessary to give any legally binding effect to these words. Conversely, Chesapeake contended that "cost-free" merely emphasized and reiterated the overriding royalty. Chesapeake was able to point to several precedential cases not cited in the opinion in support of such an interpretation, which the court found persuasive. ("Drafters frequently specify that an overriding royalty does not bear production costs even though an overriding royalty is already free of production costs simply because it is a royalty interest.") The court did, however, resolve the case in favor of the Hyders, citing the language in the agreement which purported to base the price paid to the lessor on what Chesapeake actually received from its sale, necessarily after postproduction costs had been paid and incurred.

Impressions

The Court's usual deference to the express language of a contractual document and its readily apparent terms was cast aside in favor of examination of a tertiary concern before reaching an outcome that would have been suggested by the very brief, cogent argument which it had rejected. The Court remained consistent with the generally accepted practice that ambiguities in oil and gas leases, unlike residential and other leases, be construed against the lessee. **READ THE OPINION HERE**

***Oiltanking Houston, L.P. v. Delgado*, 2016 LEXIS 886 (Tex. App. – Houston [14th Dist.] 2016)**

Facts and Issues

Mr. Delgado was killed in an explosion at Houston oil storage facility owned by Oiltanking, L.P. Delgado's family brought this wrongful death claim against Oiltanking, asserting its negligence as the cause of Delgado's death. Before the court were two main issues: first, whether the Appellant had waived its defense because it did not dispute its status as the owner of the premises, or that the injury was the result of Mr. Delgado's efforts as a subcontractor to make improvements to the facilities. Second, whether sufficient evidence had been established to support a finding that Oiltanking had actual knowledge of the risk undertaken by the decedent.

Analysis and Impressions

As to the waiver issue, the claimants found no audience in the court, as their argument against Oiltanking on this ground was rejected in a brief aside: there was no actual material dispute over this issue, and at any rate, it would not be dispositive of the liability issue. After a scholarly explanation of the aggregation of the appellee's negligence theories and review of the revised Chapter 95 statutory requirement that a landowner have actual knowledge of a risk to a contractor or subcontractor, the Court discussed the actual circumstances at issue in this facility. Pointing to the claimants' insufficiency of evidence, the Court analogized to precedent and found that merely working with potentially dangerous material and knowledge of the need for elaborate safety precautions as a general matter do not rise to the level of actual knowledge. This case is a sharp divergence from the trending jurisprudence of many courts in holding landowners liable in an increasingly broad array of situations in dealing with others coming onto their property. The policy underpinning this decision is perhaps susceptible to the argument that a conscious effort to avoid actual knowledge would shield negligent parties from liability. However, this case appears to be an effective application of the legislature's enaction, and continues to develop this area of the law previously scrutinized in *Abalos*, *Olivo*, and *Elmgren*. Read the Opinion Here

Sherman v. Boston, 2016 LEXIS 884 (Tex. App. – Houston [14th Dist.] 2016)

I. Facts

Appellants Edward Sherman and Edward J. Sherman Enterprises, Inc. d/b/a Find It Apartment Locators and Citi Homes (Find It), challenged a trial court's ruling in favor of appellees Datril Boston and Apartment Express, LLC d/b/a Mr. Day Rents (Mr. Day Rents). These litigants either were or did business as apartment locating services. Messrs. Sherman and Boston agreed to an arrangement whereby Sherman would advance a percentage of his fees to Boston, and would in turn receive the proceeds of the referral fees paid by apartment complexes.

This relationship lasted about eleven months, during which time Sherman "advanced about $110,000 through checks made payable to Boston. From the invoices submitted for factoring, Sherman and Find It collected only about $92,000, creating a shortfall of approximately $18,000." Sherman investigated the matter and came to the conclusion that Boston was not honoring his obligation. As a result, he stopped sending payments to Boston, instead sending statements directly to apartment complexes. Sherman – and not Find It – also sued Boston, alleging breach of contract and quantum meruit, as well as a temporary injunction, requested the court require Boston to place the funds it had already collected into a trust account. This request was granted in the amount of $11,410.04; however, by this time Boston / Mr. Day Rents' attorney had withdrawn from the case.

A second attorney filed counterclaims on behalf of Boston and Mr. Day Rents against both Sherman and Find It. This attorney also withdrew before the trial, and Find It "was not served with citation, nor did it otherwise make an appearance." The trial court ruled in favor of Boston and Mr. Day Rents on their counterclaims, rendering a take-nothing judgment on Sherman's claims. Additionally, Boston / Mr. Day Rents was awarded the $11,410.04 previously placed in the registry of the court after prevailing on their conversion counterclaim. Appeal followed.

Issues

Sherman and Find It raised four issues before the appellate court, none of which challenged the take-nothing judgment but instead focused on the judgments against them: first, whether the judgment against Find It was void because the trial court did not re-acquire jurisdiction over it; second, whether Boston had standing to bring a common-law conversion cause of action against Sherman; third, the legal sufficiency of the judgment in favor of Boston; and fourth, the legal sufficiency of the judgment in favor of Mr. Day Rents.

Analysis

The judgment against Find It was void because the trial court did not re-acquire personal jurisdiction over Find It. The court held that trial courts lack personal jurisdiction over a defendant to whom citation "has not been issued and served in a manner prescribed by law unless the defendant waives service or enters an appearance." ***See*** **Tex. R. Civ. P. 124;** ***Wilson v. Dunn*****, 800 S.W.2d 833, 836 (Tex. 1990);** ***Menon v. Water Splash, Inc.*****, 472 S.W.3d 28, 31 (Tex. App.—Houston [14th Dist.] 2015, pet. filed);** ***In re D.A.P.*****, 267 S.W.3d 485, 489 (Tex. App.—Houston [14th Dist.] 2008, no pet.).**

Here, in response to a verified denial asserting that Sherman did not have capacity to sue, Sherman filed an amended petition which deleted Find It as a plaintiff and left himself as the sole plaintiff in the case. Because Boston had no claim for affirmative relief pending against Find It at the time of the amendment, Find It ceased to be a party to the litigation at that time. See Tex. R. Civ. P. 162; ***In re Greater Houston Orthopaedic Specialists, Inc.*****, 295 S.W.3d 323, 324 (Tex. 2009). After Find It ceased to be a party, it was not again served with citation regarding Boston's / Mr. Day Rent's counterclaims, nor did it waive service. As such, the trial court lacked personal jurisdiction over Find It in this case.**

Boston did not have standing to bring a common-law conversion cause of action against Sherman. Mr. Day Rents is a limited liability company and under the modern entity theory of business organizations is a separate legal entity from Boston, its sole member. Because of the structure of limited liability companies, Boston – as a member – does not have a property interest in the company, and lacks standing to assert claims individually where the cause of action belongs to the company. *Barrera v. Cherer*, No. 04-13-00612-CV, 2014 Tex. App. LEXIS 4602, (Tex. App.—San Antonio April 30, 2014, no pet.) (mem. op.) (citing *Wingate v. Hajdik*, 795 S.W.2d 717, 719 (Tex. 1990)). This all sufficiently proven at trial, including by Boston's own testimony, the court held that Boston did not have standing to assert claims on behalf of Mr. Day Rents, of which the common-law conversion cause of action here was one.

Additionally, because Boston's conversion cause of action was dismissed as to both Sherman and Find It, the legal sufficiency of the judgment in favor of Boston need not be considered.

The evidence was legally insufficient to support the judgment in favor of Mr. Day Rents. Because corporations and partnerships are legal fictions, they cannot appear for themselves personally, and may generally appear in a court only through a licensed attorney. *See Kunstoplast of Am. v. Formosa Plastics Corp., USA*, 937 S.W.2d 455, 456 (Tex. 1996); *Apartment Express LLC v. Southchase North Apartments*, 2015 Tex. App. LEXIS 8610, n. 1 (Tex. App.—Houston [14th Dist.] 2015, no pet.). Further, because doing so would constitute the unauthorized practice of law, a non-attorney representative cannot instead appear on the business association's behalf. *L'Arte De La Mode, Inc*, 395 S.W.3d at 295. Because Mr. Day Rents was not represented by an attorney in this case, but instead only by Boston – whose presentation had no legal effect – the evidence was legally insufficient to support a judgment in favor of Mr. Day Rents. This resulted in the court reversing the judgment below and ordering that Mr. Day Rents take nothing from Sherman on its conversion claim.

Conclusions and Impressions

The appellate court reversed the judgment against Find It and rendered judgment dismissing the claims against that enterprise for lack of personal jurisdiction. Sustaining appellant's second issue, the part of the trial court judgment awarding Boston conversion damages was reversed, and judgment was entered dismissing that claim for lack of standing. Finally, the court reversed the lower court and rendered a take-nothing judgment on Mr. Day Rents' conversion claim against Sherman.

The court here appears to have applied several straightforward laws in a manner that is difficult to dispute. Though technicalities, the myriad problems in Boston's patchwork legal claims – perhaps exacerbated by the withdrawal of *two* attorneys for unknown reasons – are of such an obvious nature that the appellate court must be correct to dismiss the claims on the grounds stated. No inquiry appears to have been made into the handling of those withdrawals, or whether they were prejudicial: it seems unlikely, given Boston's successes at the trial stage without any counsel at all. READ THE OPINION HERE

Bedford v. Spassof, 2016 LEXIS 1465 (Tex. App. – Fort Worth 2016)

Facts

Appellee is the sole owner and president of Appellee 6 Tool, LLC, formerly known as Dallas Dodgers Baseball Club, LLC, d/b/a Dallas Dodgers Baseball, a youth instructional baseball organization. Appellant's son was a member of the Dodgers. Mr. Bedford sent the following via text message to Mr. Spassof in September of 2014: "My name is [Stephen] and I need to speak to [you] ASAP to give you a chance to make something right before I start hitting your social media sites." Spassoff called Stephen, who explained that his wife had had an extramarital affair with the team's batting coach. Mr. Spassof demanded a refund of the $1,000 participation fee that had been paid for the Fall 2014 season.

Later that day, Mr. Bedford sent Mr. Spassoff a number of other text messages, including one in which he questioned the ethics of the Dodgers organization and threatened to display a sign at their games. He also forwarded to Spassoff a copy of a message that had just been posted on Facebook using Mrs. Bedford's account. The post "reviewed" the Dodgers, gave the organization one out of five stars, and stated,

Be very careful. One of the coaches put my son on the team an[d] then started calling and texting my wife. This coach is a home wrecker and the club stands behind him. I guess that's the kind of lessons they plan on teaching the kids. Very unethical and [3] from talking to the executives they don't plan on changing. Please stay away!!!!!!!!!!!!!!!!!!

At this time, Mr. Spassoff's attorney notified Mr. Bedford to stop communicating directly with Spassoff and that Appellees were conducting an investigation into the accusation. Thereafter, Bedford sent Spassoff a message that contained a picture of two posters that he had prepared and that stated, "Dodgers coach put my son on a team and then had an affair with my wife!" He then sent Appellee an email that asserting, among other things, his right to post whatever he wished.

Appellees sued, specifically complaining about the Facebook posting regarding the Dodgers, levelling claims against both Bedfords for libel and business disparagement. Mr. Spassof also asserted a claim for intentional infliction of emotional distress (IIED), and the Dodgers organization asserted a claim against Mr. Bedford for tortious interference with an existing contract or, alternatively, a claim against Mrs. Bedford for breach of contract, averring that the son had been removed from the Dodgers organization and that she had demanded to be reimbursed for the registration fee "through coercive threats and disparaging acts."

The Bedfords timely filed a motion to dismiss that expressly implicated chapter 27 of the civil practice and remedies code. After a hearing, the trial court signed an order sustaining Appellees' objections to Mr. Bedford's affidavit and later signed an order denying the Bedfords' motion to dismiss. The Bedfords appeal.

Issues and Analysis

There are five (5) issues under review in this case. First, whether the Bedfords met their burden under the expedited dismissal procedure to show that the claims against them were related to their exercise of the right of free speech. The applicant law is the Texas Citizens Participation Act (TCPA), which purports to shield communications made "in connection with a matter of public concern," of which "good[s], product[s], or service[s] in the marketplace" are explicitly included. A cursory glance at the substance of the communications made reveals that the Act's expectations have been met here, and the appellate court sustained the ruling below that the Bedfords met their burden on this point.

Second, whether the trial court erred in sustaining Appellants' objection to the affidavit. Because the TCPA was met, and because the affidavit was not contested as to its propensity to establish a defense, any error was harmless.

Third, whether Appellees met their burden of establishing a prima facie case for each element of their claims by clear and specific evidence. The court noted that they had failed to do so – or indeed, to present any evidence at all – as to their business disparagement, IIED, tortious interference, and breach of contract claims, and held that the trial court erred in failing to dismiss these grounds. However, deeper consideration was given to the libel issue. A straightforward analysis of the legal test for libel was met with the agreement that the Appellees had met their burden to prove the cogency of their claims by clear and specific evidence. In particular, the court pointed to not only the specific language used, but the totality of the context and the inferences to be drawn from that language. In doing so, they rejected the dissent's argument that Bedford's statements did not constitute libel because they were not related to the actual business undertaken by the baseball organization.

Fourth, and fifth, whether the trial court should have granted the motion to dismiss the claims against Mrs. Bedford and her husband because the only allegation related to her is that her husband used her Facebook page to post. The court overruled these points, as the obligation on appeal was not to prevail on the merits, but whether these claims could survive the TCPA challenge.

Impressions

In what is surely one of the more entertaining cases in recent memory, nearly all of Mr. Bedford's actions are highly questionable, but the legal implications do not appear to have been in serious doubt. Libel is defined in this case as "defamation expressed in written or other graphic form. A libel plaintiff must prove (i) the publication of a false statement of fact to a third party, (ii) that was defamatory concerning the plaintiff, (iii) with the requisite degree of fault, and (iv) damages, in some cases.

A statement is defamatory if the words tend to injure the plaintiff's reputation, exposing him or her to hatred, contempt, ridicule, or financial injury, or if it tends to impeach the person's honesty, integrity, or virtue. To qualify as defamatory, a statement should be derogatory, degrading, somewhat shocking, and contain elements of disgrace. Although the statements were probably equally if not more degrading to himself and his wife than the baseball team, no comparative test is applicable here, and Mr. Bedford undoubtedly intentionally injured the plaintiff's reputation in his outrage. **READ THE OPINION HERE**

Katy Springs & Manufacturing, Inc. v. Favalora, 476 S.W.3d 579 (Tex. App.—Houston [14th Dist.] 2015, pet. denied)

Plaintiff Favalora sued his nonsubscriber employer for personal injuries sustained while working, and the jury awarded roughly $780,000, including $205,000 in past medical expenses. Favalora did not pay these medical expenses. A factoring company, Medstar Funding, paid a discounted amount to Favalora's medical providers in full satisfaction of the debt Favalora owed those providers. But, Favalora's agreement with Medstar stated that Favalora was liable to Medstar for the undiscounted face value of the medical providers' invoices. The trial court excluded any testimony or evidence that the medical providers were paid a discounted amount in full satisfaction of the invoiced charges for Favalora's medical care; the jury's award was in line with the face value of the invoices. The trial court also allowed a reasonableness and necessity affidavit from Medstar, averring that Medstar provided medical services at a rate higher than the amount actually accepted by the true medical provider for Favalora's actual care.

With respect to the paid or incurred issue, the Fourteenth Court of Appeals held the facts of this case did not "fit neatly" into Section 41.0105 or the Texas Supreme Court's *Haygood* ruling, because a factoring company was involved. The 14CtApp noted that Favalora was uninsured and did not himself pay the medical providers, and noted that Medstar's contract required Favalora to pay Medstar the full face amount of the invoices. On that basis, the 14CtApp held that Favalora had incurred the full face amount of the invoices, and evidence regarding the higher amount was admissible.

With respect to the reasonableness and necessity issue, the 14CtApp noted Section 18.001(b) allows the affidavit to be made by (A) the person who provided the service; or (B) the person in charge of records showing the service provided and charge made. The 14CtApp agreed with the trial court that the Medstar affiant was "in charge" of the records, so did not need to be the medical provider, and could testify that the higher amount was reasonable, despite the affiant having paid a lesser amount for those services. READ THE OPINION HERE

THANKS TO TADC CORE SPONSOR

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