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

FROM THE PRESIDENT

Mike Hendryx, Strong Pipkin Bissell & Ledyard, L.L.P., Houston

2017 is full steam ahead and the TADC has been busy! The 85th Texas Legislature has come to Austin and as you would expect, the capitol is buzzing with activity. There have been over 3,500 bills filed thus far and with the filing deadline just over a week away, the legislature is on pace to exceed 7,000 filed bills. Your TADC Legislative Committee is hard at work monitoring legislation that could affect the civil justice system and the practice of law. Working groups have been established to monitor specific bills and provide white papers and other helpful information to legislators and your TADC leadership stands ready to testify as needed on these important issues. For example, we are actively working to correct the abuses in the current affidavit process used in Section 18.001 of the Civil Practices and Remedies Code and opposing the renewed effort to create a separate chancery court system. You will receive timely updates on any issue of import that could affect your practice. If you or your law partners or clients are made aware of an issue that might be of concern, please let the TADC office know.

TADC CLE programs are keeping pace as well. On the heels of a very successful Winter Seminar held in Beaver Creek, Colorado in early February and an Austin Legislative Luncheon shortly thereafter, we are looking forward to the 2017 Spring Meeting in New Orleans, Louisiana, April 19-23. Program Chairs Tom and Ken Riney have assembled an outstanding line-up of speakers including Federal District Judge Joseph Anderson and Texas Supreme Court Justice Jeff Boyd. You won't want to miss this meeting with 10 hours of CLE and nearly 2 hours of ethics. You can find the program and registration **HERE** or register online at **www.tadc.org.** In addition to the Spring Meeting, the 2017 Summer Seminar, West Texas Seminar and Annual Meeting are all coming up and more detailed information is contained in the calendar of events below.

In answer to a call from the membership, there are numerous local events in the planning stages including CLE programming and young lawyer functions. Events are currently being planned in Austin, Houston, Dallas, Beaumont, Fort Worth, El Paso, Lubbock, Amarillo and San Antonio. If you would like local programming in your area, please let me or the TADC office know.

I would be remiss if I did not mention the TADC website. The site (www.tadc.org) has a wealth of information for members.

- A searchable roster,
- CLE papers from the past 9 years, searchable by author, topic, title, etc.,
- An archive of past issues of TADC Magazines,
- TADC Professional Newsletters covering 13 areas of substantive law,
- Information on how to access expert witness information,
- An interactive calendar of events, and
- The website serves a direct means to register for a meeting or seminar, contribute to the TADC PAC and pay your dues online.

If you think something should be changed or added, please let the TADC office know.

Finally, I would encourage you to talk to your law partners, colleagues and friends about TADC and recruit a member. The TADC is the ONLY voice of the defense trial bar in Texas.

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REGISTER TODAY

2017 TADC Spring Meeting
April 19-23, 2017
Omni Royal Orleans – New Orleans, Louisiana

A program for the practicing trial lawyer
offering 10.00 hours CLE, with 1.75 hours ethics

Topics Including:

~ Application of Settlements Credits
~Summary Judgment Tips
~ Third Party Litigation Financing
~ Supreme Court Update
…and much more!

REGISTRATION HERE OR REGISTER ONLINE WWW.TADC.ORG

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CALENDAR OF EVENTS

April 19-23, 2017
TADC Spring Meeting
Omni Royal Orleans - New Orleans, Louisiana
Tom & Ken Riney, Program Chairs
Registration Material or register online at www.tadc.org

July 12-16, 2017
TADC Summer Seminar
Ritz Carlton Grand Lakes - Orlando, Florida
Keith O'Connell & Elizabeth O'Connell Perez, Program Chairs
Registration Material to be mailed in late April

August 11-12, 2017
West Texas Seminar with the New Mexico Defense Lawyers
Inn of the Mountain Gods - Ruidoso, New Mexico
Bud Grossman, Mark Standridge & Rachel Moreno, Program Co-Chairs
Registration Material to be mailed in late May

September 20-24, 2017
TADC Annual Meeting

The Fairmont Olympic Hotel - Seattle, Washington
Don & Jarad Kent, Program Co-Chairs
Registration Material to be mailed in early July

LEGISLATIVE NEWS

The 85th Legislature is in full swing. As of today, legislators have filed more than 4,000 bills and resolutions with another 3,000 likely to be filed between now and the March 10 filing deadline. The TADC is currently monitoring 175 bills pertaining to the civil justice system, and we expect at least that many more to be introduced in the coming days. What follows is a description of the primary bills of interest thus far.

First-Party Insurance Claims

SB 10 by Hancock/HB 1774 by G. Bonnen: Sometimes referred to as the "hail" bill, the main provisions of the bill include:

- An election of remedies between Ch. 541 and the DTPA;
- Cutting the interest penalty on late payment from 18% to prime + 3% and barring the additional recovery of prejudgment interest;
- A 60-day presuit notice requirement with detailed information about the claim and attorney's fees incurred to file the claim;
- A right of inspection by insurer;
- Immunity for an agent if the insurer accepts liability (with cost shifting if the insured still sues the agent);
- A limitation on attorney's fees (a bar on attorney's fees if the insured fails to give presuit notice).

We expect the Senate Business & Commerce Committee to hear the bill within the next two weeks.

Paid or Incurred/Medical Expense Affidavits

HB 2300 by Schofield: This legislation defines the amount actually paid or incurred to a claimant for health care expenses as the amount the treating physician normally would be paid for similar services in a nonlitigation context, limited to: (1) the amount actually paid by a third-party for the service, plus any cost-sharing paid by the claimant; or (2) if the claimant had no health care

coverage or did not access benefits for the service, 125% of the Medicare reimbursement rate for the service.

HB 2301 by Schofield: The proposed bill amends §18.001, CPRC, to change the date of service of an affidavit of medical expenses to the earlier of 60 days before trial or the date the offering party must designate experts. It further requires a party intending to controvert the affidavit to serve a copy of the counteraffidavit by the earlier of 30 days before trial or the date the party must designate experts. As currently drafted, a party or the party's attorney may make the counteraffidavit. Finally, the proposal provides that the affidavit of medical expenses does not create a presumption that the amount charged was reasonable or the service necessary.

TADC is working closely with Rep. Schofield's office and other interested parties on HB 2300 and HB 2301. We expect to see some tweaks to the language prior to the committee hearing phase.

Chancery Court

Last session the Chancery Court proposal cleared House committee but died in Calendars at the end of the session. This session's version, **HB 2594 by Villalba:**

- Establishes a seven-member chancery court located in Travis County with civil jurisdiction concurrent with the district courts for virtually all contract and business-related actions involving entities organized under the Business Organizations Code;
- Grants the chancery court statewide jurisdiction over any matter within its purview. No jurisdiction over personal injury or death cases, or any action brought by or against a governmental entity, unless by the consent of the parties or the entity.
- Establishes a procedure for filing original cases in the court and removing cases filed in district courts to the court. Authorizes the court to issue any writ necessary to enforce its jurisdiction.
- Establishes qualifications for judges of the chancery court and provides for the appointment of judges by the Governor with the advice and consent of the Senate. Judges serve staggered six-year terms and are eligible for reappointment.
- Appeals from Chancery Court are to a Chancery Appeals Court consisting of seven active court of appeals justices appointed by the Governor.

Dram Shop Reform

SB 875 by Hancock:

- Requires that an action against a provider of alcoholic beverages may not be commenced unless the "obviously intoxicated person" is a named defendant in the action and is retained in the action until the conclusion of the litigation by trial or settlement.
- Creates a rebuttable presumption that a provider of an alcoholic beverage other than provider who last sold, served, or provided an alcoholic beverage to an obviously intoxicated person did not commit an act giving rise to a cause of action.
- Bars a cause of action against a provider by an obviously intoxicated person or a person who bought an alcoholic beverage for or provided one to an obviously intoxicated person.
- Requires 120-day presuit notice to all providers of an alcoholic beverage, running from the date the claimant enters into an attorney-client relationship for the purposes of bringing a cause of action against a provider.
- Provides that all defenses available to an obviously intoxicated person are available to a provider.
- Bars damages for financial support, services, gifts, parental training, guidance, love, society or companionship of the alleged obviously intoxicated person.
- Bars suit by a parent if the other parent recovers in a separate action. Provides for the survival of a right of action to or against the deceased party's representative.
- In an action by a spouse, child, or parent, the general reputation of a spousal or child-parent relationship is prima facie evidence of the relationship, and the recovery of a child, spouse, or parent is the sole property of that person.
- Establishes a two-year limitations period from the day the cause of action accrues.

Construction Law

HB 2343 by Workman:

- Requires a person with an interest in real property with an alleged construction defect to obtain a written report from an independent third-party licensed professional engineer prior to filing a lawsuit.
- Requires the claimant to notify each party subject to the claim at least 10 days prior to the inspection and gives each party the right to attend the inspection.
- Creates a right to correct a construction defect or related condition identified in the report within 150 days.
- Tolls the statute of limitations for one year if the claim is brought in the final year of the limitations period.
- Provides for an abatement of a lawsuit for up to one year on a showing of non-compliance with the inspection requirement and dismissal with prejudice if the claimant does not comply.

- Excepts from the inspection and right to correct requirement: (1) a claim asserted by a contractor, subcontractor, supplier, or design professional; (2) a claim for personal injury, survival, or wrongful death; (3) a claim involving construction of residential property governed by Ch. 27, Property Code; (4) a defect or design claim covered by §82.119, Property Code (Uniform Condominium Act); (5) a contract entered into by TXDOT; or (6) a project that receives money from the state or federal highway fund.

HB 2422 by Schofield:

- Requires an affiant who produces a certificate of merit in an action against a licensed architect, engineer, surveyor, or landscape architect to establish the affiant's familiarity or experience with the practice area at issue such that they establish the affiant's ability to render the opinion on the issue.
- Requires the affiant to attach a CV to the affidavit.

HB 1053 by Meyer: Reduces the statute of repose for construction defect claims against architects, designers, or engineers from 10 to 5 years.

SB 621 by Creighton/HB 1315 by P. King: Amends §95.001(3), CPRC, the definition of property owner, to include an employee of the property owner for purpose of the limitation of liability of an owner for work done by an independent contractor on the owner's premises.

Expedited Trials

HB 2574 by Murr: Raises the damages limit for an expedited trial process from $100,000 to $200,000, excluding attorney's fees.

Court Records

HB 1258 by Clardy:

- Provides that a person that maintains an electronic court record database in this state may not allow public access to any court document filed with a county court, statutory county court, or district court unless the court clerk enters into a written agreement with the person authorizing public access through the database and the commissioners court approves the agreement.
- Prohibits the Supreme Court from adopting rules in conflict with this provision.

HB 2469 by S. Davis:

- Directs the Office of Court Administration to establish a database of settlement agreements for personal injury and wrongful death actions in which a minor or incapacitated person is a beneficiary.
- Authorizes a guardian, guardian ad litem, or next friend to file the agreement. Maintains the confidentiality of the agreement.
- Taxes the filing fee as court costs.

If you would like the status of any bill TADC is following or any further information, please do not hesitate to contact Bobby Walden in the TADC office at bwalden@tadc.org .

CASE LAW UPDATES

Case Summaries Prepared by Nathan M. Brandimarte, Orgain, Bell & Tucker, L.L.P., Beaumont

Post Acute Medical, LLC v. Montgomery, 2017 Tex. App. LEXIS 1167 (No. 03-15-00807, Tex. App.—Austin Feb. 10, 2017).

This is a medical malpractice case involving the sufficiency of expert reports. Montgomery had a colectomy and ileostomy and later developed pneumonia after surgery and was transferred to a rehabilitation hospital where he ultimately died from asphyxiation caused by an airway obstruction. Montgomery's family sued the surgeon and hospital claiming the surgery was unnecessary and the ileostomy was performed improperly. The initial expert report served with the lawsuit specifically addressed the doctor's alleged negligence, but did not "implicate" the hospital. Accordingly, the hospital filed a motion to dismiss. The trial court denied the hospital's motion to dismiss for failure to file an expert report and provided Montgomery a 30-day extension to cure the deficiency with the expert report. On interlocutory appeal, the hospital claimed the trial court erred by granting the 30-day extension when "no report" was filed against the hospital. The court of appeals agreed with the hospital and reversed and rendered, holding that the expert report filed against the hospital constituted "no report" at all against the hospital because the expert report did not "implicate" the hospital. The court of appeals noted that the expert report focused on the surgery and the history of Montgomery's care; it did not claim that the hospital engaged in negligent conduct. **VIEW THE OPINION HERE**

Hernandez v. Amistad Ready Mix, Inc., 2017 Tex. App. LEXIS 1052 (No. 04-16-00267, Tex. App.—San Antonio Feb. 8, 2017).

This is a premises liability case. Amistad hired Carrillo to construct a truck port at Amistad's cement plant. Carrillo hired Hernandez to help with the project and on the day of the incident, Carrillo lifted Hernandez 12 feet above the ground in a forklift without any fall protection. Amistad provided the forklift and other tools and equipment to Carrillo to perform the work. As Hernandez stood on the forklift, he lost his balance and fell when some beams he was working on shifted. Hernandez broke his ankle and knee as a result of the fall. Hernandez sued Amistad claiming that Amistad failed to provide him proper fall protection or a safety basket, and under various other negligence theories. Amistad filed a no evidence motion for summary judgment, citing Chapter 95 of the Texas Civil Practices and Remedies Code claiming it did not have actual knowledge of the danger or condition and did not exercise or retain control over the manner in which the work was performed. The trial court granted Amistad's no evidence motion for summary judgment.

The court of appeals held that there was a fact issue on the element of control, relying on the facts that Amistad was responsible for providing the equipment being used on the job and Amistad retained the discretion as to which pieces of equipment were permitted to be used on the project. The court of appeals also found facts sufficient to raise a genuine fact issue as to whether Amistad actually knew Carrillo and Hernandez were using the forklift to perform the work without fall protection and the evidence also raised a fact issue as to whether Amistad actually knew its materials were in a dangerous condition because the steel was rusted, corroded and bent, and the integrity of the materials had been compromised. Accordingly, the court of appeals reversed and remand those dismissed negligence claims. But the court of appeals affirmed the trial court's dismissal of the negligent entrustment claim, holding that under Chapter 95 there must be some evidence that the property owner had actual knowledge of the danger or condition and noted that in this case, there was no evidence that Amistad knew of the applicable safety regulations and safety standards regarding forklift operations and there was no evidence that Amistad had actual knowledge that Carrillo and Hernandez were not competent or certified forklift operators. **VIEW THE OPINION HERE**

Crawford v. XTO Energy, 2017 Tex. LEXIS 121 (No. 15-0142, Tex. Feb. 3, 2017).

This is a joinder case under the Rule 39 of the Texas Rules of Civil Procedure. Crawford, a lessor under an oil and gas lease sued XTO, the lessee under the oil and gas lease, for the failure

to pay royalties. The dispute involved an issue as to whether Crawford's predecessor in interest conveyed some of the mineral interests to adjacent landowners in prior conveyances where no mineral interests were expressly reserved. Upon learning of the prior conveyances from a title report, XTO started diverting royalty payments from Crawford to the adjacent landowners. Once sued, XTO filed a motion to abate and compel joinder of the forty-four (44) adjacent landowners who purportedly owned the mineral interests from prior conveyances. XTO claimed that the adjacent landowners were necessary parties because they may have an interest in the minerals at issue in the lawsuit and their interests would be affected by the relief sought; therefore, the adjacent landowners were needed for the fair and just adjudication of Crawford's claims. The trial court granted XTO's motion and ordered Crawford to join the adjacent landowners or risk dismissal. Thereafter, Crawford failed to add the adjacent landowners, and upon XTO's filing of a motion to dismiss, the trial court dismissed Crawford's lawsuit. The court of appeals affirmed, holding that the trial court did not abuse its discretion in requiring joinder, and noting that the adjacent landowners have a pecuniary interest in the outcome of this litigation and could file a separate suit, subjecting XTO to the possibility of inconsistent obligations. But the Texas Supreme Court reversed, holding that Rule 39 does not require joinder of persons who potentially could claim an interest in the subject of the lawsuit—it only requires joinder, in certain circumstances, of persons who actually claim such an interest. In this case, the adjacent landowners had not made such a claim; thus, they were not necessary to join. The Texas Supreme Court noted that XTO could bring in the adjacent landowners as proper parties under Rule 37, but could not force Crawford to do it under Rule 39. **VIEW THE OPINION HERE**

Nassar v. Liberty Mutual Fire Insurance, 2017 Tex. LEXIS 113 (No. 15-0978, Tex. Jan. 27, 2017).

This is a first party insurance case arising from Hurricane Ike. The homeowner Nassar owned six acres of property in Richmond, Texas that was damaged as a result of the hurricane. Nassar filed a homeowner's insurance claim against its insurer, Liberty Mutual Insurance Company. Following the claim, a dispute arose over whether Nassar's damaged fencing was adequately covered under the insurance policy. Nassar elected $247,000 in coverage under the "dwelling" insurance provision and $24,720 in coverage under the "other structures" insurance provision. On the other hand, Liberty Mutual valued the damage to the dwelling at $20,090.61 and the damage to the other structures at $70,449.02. The fence spanned over 4,000 linear feet and consisted of white picket fencing, an ornamental iron fence, numerous cross-fencing, garden fencing, pens and larger perimeter fencing. The undisputed value of the damage to the fencing alone totaled $58,665, an amount that exceeded Nassar's coverage limit for "other structures." Liberty Mutual issued payment for only $20,090.61 under "dwelling" coverage and a separate payment equal to the policy limit for "other structures" to settle the Nassar's claim. The issue was

whether the fence damage fell under the "dwelling" or "other structures" provisions of the insurance policy. If it fell under "other structures", Nassar would not be completely compensated for his damages.

Both parties filed cross motions for summary judgment on the issue. The trial court ruled in favor of Liberty Mutual and determined that the fencing was considered an "other structure." In a split decision the court of appeals affirmed. The Texas Supreme Court concluded that the fencing, at least in part, was unambiguously considered part of the "dwelling" coverage of the insurance policy language, and therefore, it reversed and remanded the case to the trial court to determine the extent to which the fencing would be considered part of the dwelling for purposes of coverage under the insurance policy, noting that some of the dwelling could be considered "other structures" depending upon the facts of the case. The Texas Supreme Court relied at least in part on the fact that some of the fencing was bolted and attached directly to Nasser's dwelling, causing it to fall within the definition of "dwelling" under the insurance policy. **VIEW THE OPINION HERE**

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