TADC

TEXAS ASSOCIATION OF DEFENSE COUNSEL

An Association of Civil Trial, Commercial Litigation & Personal Injury Defense Attorneys - Est. 1960

FALL / WINTER 2018

IN THIS ISSUE:

Table of Contents

The TADC Magazine is a publication of the Texas Association of Defense Counsel
Doug Rees, Editor, Cooper & Scully, P.C., Dallas
214-712-9500

doug.rees@cooperscully.com

TADC CALENDAR OF EVENTS

Jan.30-Feb. 3, 2019	**2019 TADC Winter Seminar** The Steamboat Grand – Steamboat Springs, Colorado David Brenner & Megan Schmid, Program Co-Chairs *Registration available online at www.tadc.org*
February 22, 2019	**TADC Board of Directors Meeting** Headliner's Club – Austin, Texas
May 1-5, 2019	**2019 TADC Spring Meeting** Westin Savannah Harbor Resort – Savannah, Georgia *Registration available online at www.tadc.org after March 1, 2019*
July 16-20, 2019	**2019 TADC Summer Seminar** Hyatt Regency Maui – Maui, Hawaii *Registration available online at www.tadc.org after May 1, 2019*
August 9-11, 2019	**2019 TADC West Texas Seminar** Inn of the Mountain Gods – Ruidoso, New Mexico *Registration available online at www.tadc.org after May 15, 2019*
September 18-22, 2019	**2019 TADC Annual Meeting** Hotel Emma – San Antonio, Texas *Registration available online at www.tadc.org after July 1, 2019*

President's Message

By: Pam Madere
Jackson Walker, L.L.P. – Austin

Founded in 1960, the TADC is one of the two largest state organizations of civil trial lawyers in the United States. **Our members have served in the United States Senate, Texas Supreme Court, Federal Courts, intermediate Courts of Appeals, District/County Courts and the Texas Legislature**. The TADC is known as the voice of civil litigators and is routinely called upon to provide its expertise on judicial, legislative and political issues.

We are gearing up for the 86th Session, which convenes on January 8, 2019. The TADC is working on our legislative priorities and reviewing potential legislation of importance to your practice. TADC member and law firm support of our **Political Action Committee** is instrumental in this process. **Mike Hendryx** with Strong Pipkin Bissell & Ledyard, L.L.P. in Houston **and Clayton Devin** with Macdonald Devin, P.C. in Dallas **are continuing their difficult and diligent work on legislation to address issues with §18.001 affidavits.**

The TADC is hosting legislative events across the state and providing our members with access to the most current data related to significant legal issues that impact each local area. **There are so many opportunities for you to be involved, including writing an article for inclusion in this magazine, participating in our Construction and Commercial substantive law sections, attending events such as, the Deposition Boot Camp the Annual Meeting at the incredible 5 Diamond Hotel Emma in San Antonio and numerous other seminars (Steamboat, Savannah, Maui, and Ruidoso).** The TADC Young Lawyers Committee led by **Kyle Briscoe** with The Peavler Group in Grapevine. Young lawyers in our organization sit on the Board of Directors and assist with the ongoing evolution of our programming and communications.

The TADC Amicus Committee has drafted and filed approximately 22 briefs in the last few years. **Roger Hughes** at Adams Graham, L.L.P. in Harlingen continues to lead the significant work being performed by some of the brightest appellate lawyers in the state who donate their expertise and time on issues of importance which is appreciated by our members as well as the Judiciary.

The TADC needs your participation to help us continue our work. The relationships formed between our members serve as a basis for referrals and relationships that last for decades. **Immediate Past President Chantel Crews** with Ainsa Hutson Hester & Crews LLP in El Paso **had an incredible year with sold out events such as the Trial Academy and Deposition Boot Camp.** Her leadership has put the TADC in a strong position for the upcoming year. Please contact TADC Executive Director Bobby Walden if you would like information on how you can participate in our activities.

Amicus Curiae Committee News

There have been several significant amicus submissions.

TADC joined an amicus brief with TTLA, ABOTA and Tex-ABOTA, in support of the trial judge's sanctions in *Brewer v. Lennox Hearth Products*, 546 S.W.3d 866 (Tex. App.—Amarillo 2018, pet. filed). A petition for review was filed and the Texas Supreme Court has asked for merits briefing. Roger Hughes (Adams & Graham, L.L.P.) signed for TADC. This case has received national attention. The decision merits study to determine when juror pool studies cross the line into jury tampering. Briefly, in a high visibility products liability case in a small community, defense counsel conducted a survey that the trial judge found was used to intimidate local witnesses and prejudice potential jurors. The lawyer was sanctioned. The Texarkana Court held the trial judge had inherent authority to protect the venire and judicial process from intentional, bad faith conduct. The trial judge must conclude there was intentional conduct that interfered with the court's ability to empanel a fair and impartial jury. The possibility that the opponent can voir dire jurors to detect bias is not sufficient to avoid sanctions.

Roger Hughes (Adams & Graham, L.L.P.) filed an amicus to support Petitioners in *Gunn v. McCoy*, __ S.W.3d __, 2018 WL 3014984, 2018 Tex. LEXIS 560 (Tex. June 15, 2018). Mike Bassett (The Bassett Firm) filed an amicus to support the motion for rehearing, which has been denied. This appeal addressed two important issues. First, the Supreme Court approved admitting medical expense affidavits made by the claimant's subrogated health insurer. Second, the Court held it was harmless error to exclude defense medical expert testimony that the claimed $3.2 million in future medical was excessive by over 50%. The Court reasoned that the excluded expert's testimony was cumulative because plaintiff's expert mentioned the excluded expert's figures when explaining why they were wrong and it was unclear the testimony would have significantly affected the future medical award.

Roger Hughes (Adams & Graham, L.L.P.) filed an amicus brief to support Respondent in *Painter v. Amerimex Drilling, Ltd.*, __ S.W.3d __, 2018 Tex. LEXIS 310 (Tex. Apr. 13, 2018) and filed an amicus to support Respondent's motion for rehearing. This is an important case to define the employer's vicarious liability. This is an injury/wrongful death suit arising from an auto accident; the critical issue is the proper legal test to make an employer vicariously liable. Amerimex rented a bunkhouse 50 miles from the drilling rig; it reimbursed the crew leader $50 a day if he drove the employees to the rig. The El Paso court upheld the summary judgment for the employer because the employer did not have a right of control over the crew leader as he drove between the bunkhouse and the rig. The Supreme Court reversed. The 'scope and course of employment' issue does not turn on a right to control the specific task being performed. An employee's conduct is within 'scope and course' if it is within his general authority in furtherance of the employer's business and to accomplish an object for which he was hired. The act must be of the same general nature as authorized conduct or incident to authorized conduct. A motion for rehearing was filed.

J. Mitchell Smith (Germer PLLC) filed an amicus brief to support the petition for review in *JBS Carriers v. Washington*, 513 S.W.3d 703 (Tex. App.—San Antonio 2017, pet. granted)(Barnard, J., dissenting). Review was granted and argument was held on Sept. 19, 2018. This is an interesting auto/pedestrian wrongful death case; the jury put 50% on JBS Carriers and its driver and 20% on the pedestrian/deceased. This critical issue was whether the trial court erred in excluding evidence that deceased suffered from mental illness, had been prescribed medications but was not taking them, and evidence the deceased had been drinking and taking cocaine and oxycodone. The trial court excluded it under TRE 403 as unfairly prejudicial. The court of appeals reversed, holding that the evidence was unfairly prejudicial because it was not really probative. The dissent stressed that Rule 403 is to be used sparingly. If the defendant driver had this history and toxicology, it would come in – "sauce for the goose, sauce for the gander."

Roger Hughes (Adams & Graham, L.L.P.) filed an amicus to support the petition for review in *Medina v. Zuniga*, No. 04-16-0360-CV, 2017 WL 2261767 (Tex. App.—San Antonio, May 24, 2017, pet. granted)(memo. op.). Review was granted and oral argument is set for Dec. 4, 2018. This is a potentially important case concerning sanctions under Tex. R. Civ. P. 215.4(b) for denying a request to admit negligence and proximate cause. The trial court granted a directed verdict on those issues and plaintiff then moved for sanctions. This was an auto/pedestrian collision case; while exiting a parking lot, Medina ran over Zuniga because he did not look in her direction before driving out. After denying the admissions, Medina admitted in deposition that his interrogatory answers lied about looking both ways. At trial, his lawyer told the jury in opening argument the issue was damages and Zuniga asked too much. After a favorable verdict on damages, the plaintiff moved under Rule 215.4 to recover attorney's and expert witness fees for proving negligence and causation. The trial court awarded $37,000 in sanctions. The San Antonio court held Zuniga did not waive sanction by waiting until after trial because she did not clearly know until trial Medina should not have denied the admission. Whether Medina had a reasonable belief he could prevail was a fact question and the judge did not abuse his discretion to conclude Medina knew he would lose.

Roger Hughes (Adams & Graham, L.L.P.) filed an amicus brief to support the Texas Windstorm Ins. Ass'n's opposition to mandamus relief in *In re City of Dickinson*, Case No. 17-0020; the City seeks to reverse *In re Texas Windstorm Ins. Ass'n*, No. 14-16-677-CV, 2016 WL 7234466, 2016 Tex. App. LEXIS 13178 (Tex. App.-Houston [14th Dist.], Dec. 13, 2016, orig. proc.)(mem. op.). The Supreme Court heard oral argument on Sept. 12, 2018. This is a first-party insurance dispute for windstorm benefits and extra-contractual liability. It presents a potentially important question about the attorney-client privilege for discussions with party employees who may become testifying experts. After TWIA's claims examiner gave an affidavit on causation, the City demanded all communications between TWIA's counsel and the examiner, claiming counsel had "corrected" the affidavit. The trial court held that TRCP 192.3(e) implicitly waived the privilege for communications with a party-employee who was a testifying expert. The Houston Court granted mandamus to vacate the order, finding TRCP 192.3 did not waive the privilege.

Mike Thompson, Jr. (Wright & Greenhill, P.C.) submitted an amicus to support Petitioner in *In re Travis County*, No. 17-0947, on mandamus from *In re Travis County*, No. 03-17-0629-CV (Tex. App.—Austin, Nov. 2, 2017, orig. proc.)(mem. op.). This case may soon be dismissed for mootness.

This is to challenge the denial of discovery into a healthcare provider's agreed rates with plaintiff's medical insurer for treatment. This is a "don't-ask-don't-tell" case where plaintiff elected to not tell his provider of his insurance coverage and instead agreed to pay the maximum rates, with deferral of collection arranged via a letter of protection from his counsel. The plaintiff has recently withdrawn his claim for past and future medical; a motion to dismiss for mootness is pending.

An amicus has been approved to support petitioner in *DLA Piper LLP v. Linegar*, 537 SW3d 512 (Tex. App.--Eastland 2017, pet. filed). We have not had a volunteer to write; the Supreme Court has requested merits briefing. This is the appeal from the remand of *DLA Piper v. Linegar*, 495 S.W.3d 276 (Tex. 2016). This is a legal malpractice case arising from DLA's alleged failure to perfect the client's security for a loan resulting in nonpayment after default. DLA argued the trustee who loaned the money made an illegal loan and the assignee of the loan settled it too cheap after default. The court of appeals found no error, because neither the trustee nor the assignee caused the untimely perfection of security and thus legally did not cause the injury. This could be an important Chap. 33 case on defining the injury to decide contribution or responsible third parties.

An amicus has been approved to support Petitioner Truck Insurance in *Hernandez v. Truck Ins. Exchange*, 553 S.W.3d 689 (Tex. App.—Fort Worth 2018, pet. filed). This is a suit to collect an alleged *Stowers* claim against a medical malpractice insurer after a judgment against the insured for wrongful death was affirmed in *Yagnik v. Hernandez*, 2013 WL 1668304 (Tex. App.—Fort Worth Apr. 18, 2013, pet. denied)(mem. op.). The first issue is whether the former art. 4590i, §11.02, created a direct action/*Stowers* claim for plaintiffs against a medical malpractice insurer without first obtaining an assignment of the claim from the insured healthcare provider. The second issue is whether there is a *Stowers* claim if the verdict exceeded policy limits, but the judgment was capped under art. 4590i to an amount within policy limits and the insurer paid the judgment. Here, the jury awarded a $2.7 million verdict against Dr. Yagnik, but the judgment reduced the award to $1.8 million. In return for Dr. Yagnik's release of s potential *Stowers* claim, the insurer executed a supersedeas bond for the entire judgment. After Dr. Yagnik lost the appeal, the insurer paid the judgment. Then, the Hernandez family sued the insurer under *Stowers*, arguing art. 4590i, §11.02, created a direct action under *Stowers* to recover the difference between the capped judgment and the verdict. The trial court held they had no standing and granted summary judgment; the Fort Worth Court reversed, holding they had a direct action for the difference between the judgment and the verdict.

****

TADC Amicus Curiae Committee

Roger W. Hughes, Chair, Adams & Graham, L.L.P.; Harlingen
Ruth Malinas, Plunkett, Griesenbeck & Mimari, Inc.; San Antonio
George Muckleroy, Sheats & Muckleroy, LLP; Fort Worth
R. Brent Cooper, Cooper & Scully, P.C.; Dallas
Scott P. Stolley, Stolley Law, P.C.; Dallas
Robert Cain, Alderman Cain & Neill PLLC; Lufkin
J. Mitchell Smith, Germer PLLC.; Beaumont
Michael W. Eady, Thompson, Coe, Cousins & Irons, L.L.P.; Austin
Timothy Poteet, Chamberlain ♦ McHaney; Austin
William C. Little, Gus & Gilbert, P.C.; Waxhachie
Richard B. Phillips, Jr., Thompson & Knight LLP; Dallas
George W. Vie III, Feldman & Feldman P.C.; Houston
Henry Paoli, Scott Hulse, PC; El Paso

When Anti-SLAPP and Motions for Sanctions Meet

By: Kayla Tanner
Jackson Walker, L.L.P., San Antonio

Need a motion for sanctions dismissed? Consider a motion under Texas's anti-SLAPP statute, the Texas Citizens Participation Act (TCPA or the Act). We are witnessing a rise in the use of the TCPA dismissal mechanism for actions well beyond what was believed to be the original scope of the Act—namely that the right to petition protection be limited to a matter of public concern as is the case for free speech under the Act. Due to this increase, practitioners need to be aware of potential implications stemming from the Act's expansive application. Specifically, the Act's mandatory award of attorneys' fees upon dismissal under the Act.[1]

TCPA Highlights.

The Texas Citizens Participation Act was enacted "to encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent permitted by law, and, at the same time, protect the rights of a person to file meritorious lawsuits for demonstrable injury."[2] It accomplishes this goal through a motion to dismiss mechanism that concerns "legal actions" taken "based on, relate[d] to, or [] in response to a party's exercise of the right . . . to petition."[3] In order to do so, the Act sets out a two-step mechanism, which begins by requiring the party filing the TCPA motion to show that the *legal action* against it was made in response to or related to its right to petition.[4] Upon the movant making such a showing, the nonmovant is then required to put on clear and specific evidence of a prima facie case of all essential elements of their cause of action.[5] If the nonmovant fails to do so, the court must dismiss the action and award attorneys' fees and sanctions.[6] The statute affords no discretion once the nonmovant fails to meet its burden.

Recent Decisions.

With a cursory background understanding, we move to the case that is at the heart of this article: *Hawxhurst v. Austin's Boat Tours*.[7] In Hawxhurst, there was an underlying property damage dispute brought by Hawxhurst against Austin Boat Tours. Austin Boat Tours responded by answering and seeking sanctions, costs, and attorneys' fees for frivolous pleadings. Austin Boat Tours styled its request for sanctions as a counterclaim.[8] Thereafter, relying on the TCPA, Hawxhurst filed a motion to dismiss the counterclaim or motion for sanctions. In a somewhat winding opinion, the Third Court concludes that the broad language of the TCPA dismissal mechanism applies to and is a proper manner to challenge a counterclaim or motion for sanctions that is made in response to a lawsuit regardless of an independent connection to the government or public issues.[9] Admittedly, the court acknowledges that in this reading of the TCPA, the TCPA "encompasses most (if not all) claims filed in court."[10] The *Hawxhurst* opinion did draw a dissent from Justice Pemberton, wherein he explained that the TCPA required a closer reading that should limit the expanse of "legal action" to be "a 'legal action' in the sense of a procedural vehicle for the vindication of some *substantive cause* of action or right of relief."[11]

No other courts of appeals have yet cited or followed *Hawxhurst* for its interpretation of "legal action," to include requests for sanctions, but the opinion is still fresh.[12] Practitioners should be aware of this recent ruling and be wary of the interaction of motions to dismiss under Chapter 9 of the Texas Civil Practice and Remedies Code and those under the TCPA.

---

[1] *See* Tex. Civ. Prac. & Rem. Code § 27.009; *Sullivan v. Abraham*, 488 S.W.3d 294, 299 (Tex. 2016).
[2] TEX. CIV. PRAC. & REM. CODE § 27.002.
[3] TEX. CIV. PRAC. & REM. CODE § 27.003.
[4] *See Hawxhurst v. Austin Boat Tours*, 550 S.W.3d 220, 225 (Tex. App.—Austin 2018, no pet.).
[5] *Id.*
[6] TEX. CIV. PRAC. & REM. CODE § 27.009(a). While there is some cost-shifting that cuts the other way (afforded to a party who brings a frivolous or dilatory motion to dismiss) the costs and attorneys' fees are not mandatory. Nor is there a recovery of sanctions, making the risk far less for the movants of TCPA motions.
[7] *Hawxhurst v. Austin Boat Tours*, 550 S.W.3d 220, 220
[8] Ultimately whether it was a motion for sanctions or a counterclaim became immaterial as the Third Court of Appeals determined that both would qualify as a legal action under the TCPA. *See Hawxhurst*, 550 S.W.3d at 226.
[9] *Hawxhurst*, 550 S.W.3d at 227.
[10] *Hawxhurst*, 550 S.W.3d at 227.
[11] *Hawxhurst*, 550 S.W.3d at 234 (emphasis added).
[12] Another recent decision of the Third Court of Appeals addressed the use of the TCPA to challenge counterclaims, but unlike *Hawxhurst* the challenges were made to substantive causes of action. *See Peterson v. Overlook at Lake Austin, L.P.*, 2018 Tex. App. LEXIS 1907 (Tex. App.—Austin Mar. 15, 2018, no pet.)

Past President's Message

By: Chantel Crews,
Ainsa Hutson Hester & Crews LLP, El Paso

What a year for TADC! At the Annual Awards Dinner on September 21, 2018, which also happened to be World Gratitude Day, I had the distinct honor of thanking the many wonderful members of TADC for an incredible year of great work, growth, and genuine enthusiasm for our organization. The following is a recap of the accomplishments of this year.

The TADC Board works throughout the year, not only for members' respective districts and areas, but also in the four standing committees.

Programs

One of our most visible committees this year has been the Programs Committee. The TADC has presented excellent meetings and CLE throughout the year, and our meetings have been both well attended and well received. Part of the success of our meetings has been the Programs Committee's careful placement of speakers and pertinent topics for our various seminars.

Congratulations to our seminar chairs – Christy Amuny and Dan Hernandez (Winter Seminar), Mitzi Mayfield and Trey Sandoval (Spring Meeting), Gayla Corley and Rob Ford (Summer Seminar), Bud Grossman (West Texas Seminar), and Jennie Knapp and Mike Shipman (Annual Meeting) – for a job well done. Also a big thank you to our social chairs Hayes and Rosanne Fuller (Spring Meeting) and Tom and Lisa Ganucheau and Tom and Sandy Riney (Annual Meeting). We enjoyed record attendance at our meetings this year, which is a testament to the quality programming and the incomparable TADC camaraderie!

We brought TADC CLE presentations to our local members through our new TADC Roadshow. The Programs Committee compiled a wide-range of current topics which could be presented anywhere in the state for local programming. CPRC 18.001 and "The Weinstein Effect" were favorites on the circuit of presentations this year.

We trained 42 young lawyers at the Milton C. Colia Trial Academy in Fort Worth, under the great direction of chairs George Haratsis and Doug Rees and with invaluable help from TADC past president Judge Mike Wallach. I know Milton would have been proud of the weekend of training and mentoring young lawyers.

In October, TADC presented its first Deposition Boot Camp at Texas Tech University School of Law with chairs Jennie Knapp and Slater Elza and a who's who of speakers. Young lawyers who attended Trial Academy requested a seminar covering depositions, and the TADC answered the call.

Congratulations to all of the seminar chairs, the wonderful speakers, the Programs Committee and Programs Vice Presidents Barry Peterson and Rachel Moreno for doing such a great job with TADC Programs this year.

Legislative

Although this was a non-legislative year, our Legislative Committee did not take the year off. Instead, they worked on interim charges and helped our 18.001 task force led by past presidents Mike Hendryx and Clayton Devin.

The 18.001 task force gathered data and war stories from TADC members throughout the state to formulate proposed legislative changes to CPRC §18.001 in order to answer the needs of our members, our clients, and the civil justice system.

Mike, Clayton, and the 18.001 task force members Roger Hughes, David Chamberlain, Mike Bassett, and Brent Cooper are busy building coalitions with other attorney groups and other organizations in order to effectively work with legislators to remedy the unintended effects of the current version of CPRC §18.001.

The TADC stands ready for the upcoming legislative session, and we appreciate all of the work the Legislative Committee has done with the leadership of Vice Presidents Victor Vicinaiz and Christy Amuny.

Publications

Have you seen our incredible magazines? Well, you're reading one right now! TADC publications are no ordinary publications – they are professional, slick magazines full of excellent material for our members. The Publications Committee, led by Vice Presidents Gayla Corley and Doug Rees, with wonderful guidance and input from Bobby Walden, are to thank for getting the word out about the TADC in a great and effective way.

And our newly formed Construction Law Section, headed up by steering committee members David Wilson, Cara Kennemer, and J.P. Vogel, is up and running! David presented the new section and its goals at the Annual Meeting, and the Construction Law Section has already published its first newsletter. The TADC Construction Law Section will focus on the defense side of construction law, and its creation is another response to the needs of our members and the diversification of the practice of law.

Membership

The Membership Committee, lead by Vice Presidents K.B. Battaglini and Trey Sandoval, has done a great job this year, not only recruiting new members, but keeping the members we have happy and engaged. Our membership numbers are up this year, with ***two-thirds*** of our new members being young lawyers practicing 10 years or less!

The Young Lawyers Committee, chaired by the incomparable Jennie Knapp, was also very active this year working with the TADC Board Standing committees as well as the District Directors throughout the state. The Young Lawyers Committee is a snapshot of the future of the TADC, and we are very proud of all of the work they continue to do for our organization.

Amicus

One more group deserves kudos for their hard work. Our amicus committee, described at the Annual Meeting by chair Roger Hughes as the TADC's Dark Knight Committee with a very particular and special set of skills, continues to represent the TADC's interests through quality briefing and analysis. This committee deserves a special thank you for its continued great work.

TADC Office

The TADC runs as an efficient and effective machine due in great part to the support we have in the TADC office. Our Administrative Assistant Debbie Hutchinson keeps things moving forward with a wonderful positive attitude. Our Executive Director Bobby Walden works tirelessly and passionately for the TADC, and truly keeps the TADC train running - on time, and under budget. When you get a chance, drop a note to Debbie and Bobby to thank them for all they do for TADC.

Personal Thank You

Leading the TADC has been an exciting journey, and I truly feel energized each time I have the opportunity to work with TADC members. This organization has the best and brightest in our profession, but it also has so much heart. Where else do you have speakers introduced as "my best friend"? Where else do you sincerely hear about the difference a TADC mentor made on another member's career? Where else do we have members give presentations where they lay their souls bare to talk about the peaks and valleys of careers and personal lives? Where else do you have members looking forward to attending CLEs in order to reconnect with old friends and meet new ones? This organization simply has no equal.

Thank you for the honor of serving with each of you this year. The TADC is vibrant, relevant, and continuing to meet the needs of its members. Our organization's future is bright, and I have never been more excited to be a member of the TADC!

2018 Annual Meeting

La Fonda on the Plaza Hotel & Spa – September 19-23, 2018 – Santa Fe, NM

The TADC Annual Meeting was held in spectacular Santa Fe, New Mexico, September 19-23, 2018 at the historic La Fonda Hotel & Spa on the Plaza. Program Chairs Jennie Knapp and Mike Shipman assembled a program with over 10 hours of CLE including 2.25 hours ethics. Topics ranged from *"Civility in the Courtroom"* to the ever-popular *"Supreme Court Update"* provided by Justice Debra Lehrmann.

Jeni & Mike Shipman

Art Aviles, Genevieve Nauhaus, Hubert Biteau & Trey Sandoval

Don Kent, Doug McSwane & Doug Rees

Tony Valdevit & Mark Rogstad

www.tadc.org

2018 Annual Meeting

KaRynn & Keith O'Connell with Betty & Joe Crawford

Darin Brooks & Tom Ganucheau

Mo McSwane, Max Wright with Tom & Kathy Bishop

Britt Pharris & Arlene Matthews

Myra Dyer with Dan & Marissa Hernandez

Betty Battaglini with Meredith & Troy Okruhlik

2018 Annual Meeting

Bud & Karen Grossman, Clayton Devin with Mike Tighe & Mike McKinney

Justice Debra Lehrmann

Class Time!

President Chantel Crews & Founders Award recipient Barry Peterson

Special Recognition Award recipients Clayton Devin & Mike Hendryx with President Chantel Crews in the middle

2018 Annual Meeting

Chantel Crews receives the DRI Exceptional Performance Award from Southwest Regional Vice President Brian Garcia

President's Award recipients Jennie Knapp & Rachel Moreno with President Chantel Crews in the middle

Paige Thomas Award
Young Lawyer Service Award recipient Paige Thomas with managing partner Larry Goldman.

2018-2019
TADC Board of Directors

President
Pamela McClain Madere
Jackson Walker, L.L.P.
100 Congress Ave., Ste. 1100 PH: 512/236-2000
Austin, TX 78701 FX: 512/236-2002
Email: pmadere@jw.com

President Elect
Leonard R. Grossman
Craig, Terrill, Hale & Grantham, L.L.P.
9816 Slide Rd., Ste. 201 PH: 806/744-3232
Lubbock, TX 79424 FX: 806/744-2211
Email: budg@cthglawfirm.com

Executive Vice President
Slater C. Elza
Underwood Law Firm, P.C.
P.O. Box 9158 PH: 806/376-5613
Amarillo, TX 79105 FX: 806/379-0316
Email: slater.elza@uwlaw.com

Treasurer
Christy Amuny
Germer PLLC
P.O. Box 4915 PH: 409/654-6700
Beaumont, TX 77704 FX: 409/835-2115
Email: camuny@germer.com

Secretary
Mark E. Stradley
The Stradley Law Firm
9330 LBJ Fwy., Ste. 1185 PH: 972/231-6001
Dallas, TX 75243 FX: 972/231-7004
Email: mark@stradleylawfirm.com

Immediate Past President
Chantel Crews
Ainsa Hutson Hester & Crews LLP
5809 Acacia Cir. PH: 915/845-5300
El Paso, TX 79912 FX: 915/845-7800
Email: ccrews@acaciapark.com

Programs Vice President
Rachel C. Moreno
Kemp Smith LLP
P.O. Box 2800 PH: 915/533-4424
El Paso, TX 79999 FX: 915/546-5360
Email: rmoreno@kempsmith.com

Programs Vice President
M. Mitchell Moss
Moss Legal Group, PLLC
5845 Cromo Dr., Ste. 2 PH: 915/703-7307
El Paso, TX 79912 FX: 915/703-7618
Email: mitch@mosslegalsolutions.com

Legislative Vice President
Gayla Corley
Langley & Banack, Inc.
745 E. Mulberry Ave., Ste. 700 PH: 210/736-6600
San Antonio, TX 78212 FX: 210/735-6889
Email: gcorley@langleybanack.com

Legislative Vice President
Robert E. Booth
Mills Shirley L.L.P.
P.O. Box 1943 PH: 409/763-2341
Galveston, TX 77553 FX: 866/674-7808
Email: rbooth@millsshirley.com

Publications Vice President
R. Douglas Rees
Cooper & Scully, P.C.
900 Jackson St., Ste. 100 PH: 214/712-9500
Dallas, TX 75202 FX: 214/712-9540
Email: doug.rees@cooperscully.com

Publications Vice President
Darin L. Brooks
Gray Reed & McGraw LLP
1300 Post Oak Blvd., Ste. 2000 PH: 713/986-7000
Houston, TX 77056 FX: 713/986-7100
Email: dbrooks@grayreed.com

Membership Vice President
Bernabe G. Sandoval III
MehaffyWeber, PC
500 Dallas St., Ste. 1200 PH: 713/655-1200
Houston, TX 77002 FX: 713/655-0222
Email: treysandoval@mehaffyweber.com

Membership Vice President
Mitzi S. Mayfield
Riney & Mayfield LLP
320 S. Polk St., Ste. 600 PH: 806/468-3200
Amarillo, TX 79101 FX: 806/376-4509
Email: mmayfield@rineymayfield.com

East Texas Vice President
Russell R. Smith
Fairchild, Price, Haley & Smith, L.L.P.
P.O. Drawer 631668 PH: 936/569-2327
Nacogdoches, TX 75963 FX: 936/569-7932
Email: rsmith@fairchildlawfirm.com

Corpus Christi/Valley Vice President
Sofia A. Ramon
Ramon Worthington, PLLC
900 Kerria Ave. PH: 956/294-4800
McAllen, TX 78501 FX:
Email: sramon@ramonworthington.com

San Antonio Vice President
Elizabeth O'Connell Perez
MehaffyWeber, PC
4040 Broadway St., Ste. 522 PH: 210/824-0009
San Antonio, TX 78209 FX: 210/824-9429
Email: elizabethperez@mehaffyweber.com

West Texas Vice President
Daniel H. Hernandez Sr.
Ray, McChristian & Jeans, P.C.
5822 Cromo Dr. PH: 915/832-7200
El Paso, TX 79912 FX: 915/832-7333
Email: dhernandez@rmjfirm.com

Austin/Central Texas Vice President
Arturo M. Aviles
Segal McCambridge Singer & Mahoney, Ltd.
100 Congress Ave., Ste. 800 PH: 512/476-7834
Austin, TX 78701 FX: 512/476-7832
Email: aaviles@smsm.com

Houston/Galveston Vice President
Michael A. Golemi
Liskow & Lewis
1001 Fannin St., Ste. 1800 PH: 713/651-2900
Houston, TX 77002 FX: 713/651-2908
Email: magolemi@liskow.com

Fort Worth/North Texas Vice President
Gregory P. Blaies
Blaies & Hightower, L.L.P.
421 W. 3rd St., Ste. 900 PH: 817/334-0800
Fort Worth, TX 76102 FX: 817/334-0574
Email: gregblaies@bhilaw.com

Dallas Area Vice President
Michael J. Shipman
Fletcher, Farley, Shipman & Salinas, LLP
9201 N. Central Expy., Ste. 600 PH: 214/987-9600
Dallas, TX 75231 FX: 214/987-9866
Email: mike.shipman@fletcherfarley.com

District #1 Director
Brandon C. Cogburn
Atchley, Russell, Waldrop & Hlavinka, L.L.P.
1710 Moores Ln. PH: 903/792-8246
Texarkana, TX 75503 FX: 903/792-5801
Email: bcogburn@arwhlaw.com

District #2 Director
Nathan M. Brandimarte
Orgain, Bell & Tucker, L.L.P.
P.O. Box 1751 PH: 409/838-6412
Beaumont, TX 77704 FX: 409/838-6959
Email: nmb@obt.com

District #3 Director
Arlene C. Matthews
Crenshaw, Dupree & Milam, L.L.P.
P.O. Box 64479 PH: 806/762-5281
Lubbock, TX 79464 FX: 806/762-3510
Email: amatthews@cdmlaw.com

District #4 Director
Rusty Beard
Beard Law Firm
P.O. Box 1401 PH: 325/670-9011
Abilene, TX 79604 FX: 325/670-9525
Email: rcb@beardfirm.com

District #5 Director
Kenneth C. Riney
Kane Russell Coleman Logan PC
1601 Elm St., Ste. 3700 PH: 214/777-4200
Dallas, TX 75201 FX: 214/777-4299
Email: kriney@krcl.com

District #6 Director
Gregory D. Binns
Thompson & Knight LLP
1722 Routh St., Ste. 1500 PH: 214/969-1700
Dallas, TX 75201 FX: 214/969-1751
Email: gregory.binns@tklaw.com

District #7 Director
Carlos Rincon
Rincon Law Group, P.C.
1014 N. Mesa St., Ste. 200 PH: 915/532-6800
El Paso, TX 79902 FX: 915/532-6808
Email: crincon@rinconlaw.com

District #8 Director
Jennie C. Knapp
Underwood Law Firm, P.C.
500 S. Taylor St., Ste. 1200 PH: 806/376-5613
Amarillo, TX 79101 FX: 806/379-0316
Email: jennie.knapp@uwlaw.com

District #9 Director
Andy Soto
Mills Shirley L.L.P.
2228 Mechanic St., Ste. 400 PH: 409/763-2341
Galveston, TX 77550 FX: 866/674-7808
Email: asoto@millsshirley.com

District #10 Director
Derek T. Rollins
Ogletree, Deakins, Nash, Smoak & Stewart
301 Congress Ave., Ste. 1150 PH: 512/344-4702
Austin, TX 78701 FX:
Email: derek.rollins@ogletree.com

District #11 Director
Neal E. Pirkle
Naman, Howell, Smith & Lee, PLLC
P.O. Box 1470 PH: 254/755-4100
Waco, TX 76703 FX: 254/754-6331
Email: pirkle@namanhowell.com

District #12 Director
Brittani W. Rollen
McDonald Sanders, P.C.
777 Main St., Ste. 1300 PH: 817/336-8651
Fort Worth, TX 76102 FX: 817/334-0271
Email: brollen@mcdonaldlaw.com

District #13 Director
Troy D. Okruhlik
Harris, Finley & Bogle, P.C.
777 Main St., Ste. 1800 PH: 817/870-8700
Fort Worth, TX 76102 FX: 817/332-6121
Email: tokruhlik@hfblaw.com

District #14 Director
Lane K. Jarvis Jr.
McKibben, Martinez, Jarvis & Wood, L.L.P.
555 N. Carancahua St., Ste. 1100 PH: 361/882-6611
Corpus Christi, TX 78401 FX: 361/883-8353
Email: ljarvis@mmjw-law.com

District #15 Director
James H. Hunter Jr.
Royston, Rayzor, Vickery & Williams, L.L.P.
P.O. Box 3509 PH: 956/542-4377
Brownsville, TX 78523 FX: 956/542-4370
Email: jim.hunter@roystonlaw.com

District #16 Director
Max E. Wright
Kelly Hart & Hallman LLP
P.O. Box 3580 PH: 432/683-4691
Midland, TX 79702 FX: 432/683-6518
Email: max.wright@kellyhart.com

District #17 Director
Richard G. Foster
Porter, Rogers, Dahlman & Gordon, P.C.
745 E. Mulberry Ave., Ste. 450 PH: 210/736-3900
San Antonio, TX 78212 FX: 210/736-1992
Email: rfoster@prdg.com

District #18 Director
David A. Kirby
Strong Pipkin Bissell & Ledyard, L.L.P.
4900 Woodway Dr., Ste. 1200 PH: 713/651-1900
Houston, TX 77056 FX: 713/651-1920
Email: dkirby@strongpipkin.com

District #19 Director
Nicholas Zito
Ramey, Chandler, Quinn & Zito, P.C.
750 Bering Dr., Ste. 600 PH: 713/266-0074
Houston, TX 77057 FX: 713/266-1064
Email: nez@ramey-chandler.com

District #20 Director
Sam Houston
Scott, Clawater & Houston, L.L.P.
2727 Allen Pkwy., Ste. 500 PH: 713/650-6600
Houston, TX 77019 FX: 713/650-1720
Email: shouston@schlawyers.com

Director at Large
Mike H. Bassett
The Bassett Firm
3838 Oak Lawn Ave., Ste. 1300 PH: 214/219-9900
Dallas, TX 75219 FX: 214/219-9456
Email: mbassett@thebassettfirm.com

Director at Large
Brandon Strey
Davis, Cedillo & Mendoza, Inc.
755 E. Mulberry Ave., Ste. 500 PH: 210/822-6666
San Antonio, TX 78212 FX: 210/822-1151
Email: bstrey@lawdcm.com

Director at Large
Paul W. Smith
Ware, Jackson, Lee, O'Neill, Smith & Barrow, L.L.P.
2929 Allen Pkwy., 39th Fl. PH: 713/659-6400
Houston, TX 77019 FX: 713/659-6262
Email: paulsmith@warejackson.com

Director at Large
David W. Lauritzen
Cotton, Bledsoe, Tighe & Dawson, P.C.
P.O. Box 2776 PH: 432/684-5782
Midland, TX 79702 FX: 432/682-3672
Email: dlauritzen@cbtd.com

Director at Large
Jennifer Parker Ainsworth
Wilson, Robertson & Cornelius
P.O. Box 7339 PH: 903/509-5000
Tyler, TX 75711 FX: 903/509-5091
Email: jainsworth@wilsonlawfirm.com

Director at Large
David L. Brenner
Burns, Anderson, Jury & Brenner, L.L.P.
P.O. Box 26300 PH: 512/338-5322
Austin, TX 78755 FX: 512/338-5363
Email: dbrenner@bajb.com

Director at Large
Alex Roberts
Beck | Redden LLP
1221 McKinney St., Ste. 4500 PH: 713/951-3700
Houston, TX 77010 FX: 713/951-3720
Email: aroberts@beckredden.com

Director at Large
K.B. Battaglini
Strong Pipkin Bissell & Ledyard, L.L.P.
4900 Woodway Dr., Ste. 1200 PH: 713/651-1900
Houston, TX 77056 FX: 713/651-1920
Email: kbattaglini@strongpipkin.com

Director at Large
Seth Isgur
Norton Rose Fulbright US LLP
1301 McKinney St., Ste. 5100 PH: 713/651-5151
Houston, TX 77010 FX: 713/651-5246
Email: seth.isgur@nortonrosefulbright.com

Director at Large
Chris Mugica
Jackson Walker, L.L.P.
100 Congress Ave., Ste. 1100 PH: 512/236-2000
Austin, TX 78701 FX: 512/236-2002
Email: cmugica@jw.com

Director at Large
Victor V. Vicinaiz
Roerig, Oliveira & Fisher, L.L.P.
2305 Country Ln. PH: 956/393-6300
Palmhurst, TX 78573 FX: 956/386-1625
Email: vvicinaiz@rofllp.com

Young Lawyer Chair
Kyle Briscoe
The Peavler Group, PC
2215 Westgate Plz. PH: 214/999-0550
Grapevine, TX 76051 FX: 214/999-0551
Email: kbriscoe@peavlergroup.com

DRI State Representative
Michele Y. Smith
MehaffyWeber, PC
P.O. Box 16 PH: 409/835-5011
Beaumont, TX 77704 FX: 409/835-5177
Email: michelesmith@mehaffyweber.com

Executive Director
Bobby L. Walden
TADC
400 West 15th Street, Suite 420 PH: 512/476-5225
Austin, TX 78701 FX: 512/476-5384
Email: bwalden@tadc.org

Defending A Construction Site Accident Case

By: Daniel H. Hernandez, Sr.
Ray, McChristian & Jeans, P.C., El Paso

INTRODUCTION AND BACKGROUND

Serious construction site accidents are popular lawsuits for plaintiff attorneys because it affords a worker-plaintiff an opportunity to blame non-employer contractors for worksite accidents and thereby tapping into additional deep-pockets beyond worker's compensation insurance. These lawsuits, however, can present a challenge for defense counsel due to the complexity of the liability issues and the multiple moving parts and individuals involved in larger projects. To successfully defend these suits, defense counsel should have a sound understanding of the various components related to construction projects such as construction contracts, relationships, construction site hierarchy, scopes of work, responsibilities, construction phases, contractor work coordination, worker and contractor interaction, safety responsibilities, third party workers, general health and safety principles, and industry standards like those promulgated by the Occupational Safety and Health Administration, known as "OSHA."[1]

This article provides an overview of issues related to a construction site accident case and defense considerations common to these types of lawsuits.

Statistics

With over 130 million nationwide workers working in more than 8 million work sites, worker accidents are inevitable and common place. In the latest worker injury statistics, 5,190 workers were killed on the job (3.6 per 100,000 full-time equivalent workers) almost 100 a week or more than 14 deaths every day.[2] Fatal work injuries involving contractors accounted for a large percentage of all fatal work injuries in 2016.[3]

Construction projects may involve simple single story construction with a single contractor to multi-story steel and concrete reinforced buildings and structures involving multiple independent contractors, hundreds of workers and pieces of equipment interfacing with each other at different times and stages, working in a coordinated fashion toward a finished product. Worker accidents are inevitable with such a large and orchestrated activity. A construction project by its nature has many recognized hazards which, to the extent possible, must be anticipated and addressed to carryout everyone's responsibility for safety.

Construction Focus

Out of 4,693 worker fatalities in private industry in calendar year 2016, 991 or 20% were in construction which is one in five worker deaths in construction related activity. Texas alone reported 545 deaths, the largest count of individual states reporting. The leading causes of worker deaths on construction sites were falls (including slips and trips), followed by electrocution, being struck by an object, and a worker caught-in/between equipment/objects with first-line

[1] OSHA is an agency of the United States Department of Labor. Congress established the agency under the Occupational Safety and Health Act, which President Richard M. Nixon signed into law on December 29, 1970. OSHA's mission is to "assure safe and healthy working conditions for working men and women by setting and enforcing standards and by providing training, outreach, education and assistance". OSHA provisions, 29 U.S.C. Sec. 654.

[2] Bureau of Labor Statistics, Census of Fatal Occupational Injuries Summary, 2016; https://www.osha.gov/oshstats/commonstats.html.

[3] Bureau of Labor Statistics, Census of Fatal Occupational Injuries Summary, 2016.

supervisors of construction trades as the highest. These "Fatal Four" were responsible for more than half the construction worker deaths in 2016.[4]

Falls — 384 out of 991 total deaths in construction in CY 2016 (38.7%)
Struck by Object - 93 (9.4%)
Electrocutions - 82 (8.3%)
Caught-in/between[5] - 72 (7.3%)

In 2016, OSHA reported the following as the top 10 most frequently cited standards: [6]

1. Fall protection, construction (29 CFR 1926.501)
2. Hazard communication standard, general industry (29 CFR 1910.1200)
3. Scaffolding, general requirements, construction (29 CFR 1926.451)
4. Respiratory protection, general industry (29 CFR 1910.134)
5. Control of hazardous energy (lockout/tagout), general industry (29 CFR 1910.147)
6. Ladders, construction (29 CFR 1926.1053)
7. Powered industrial trucks, general industry (29 CFR 1910.178)
8. Machinery and Machine Guarding, general requirements (29 CFR 1910.212)
9. Fall protection-training requirements (29 CFR 1926.503)
10. Electrical, wiring methods, components and equipment, general industry (29 CFR 1910.305)

POTENTIAL PARTIES

Work on a construction project presents a monumental task of assembling and manufacturing of a building and related infrastructure which must be performed safely. This industry truly exemplifies the meaning of human multitasking. Construction projects require a team-approach to plan, design, construct and maintain the project with an acute emphasis on safety considerations at every step and level of the project.

A typical construction job hierarchy reflects a tiered approach to conducting the work which incorporates various professional job positions like project manager, design engineer, construction manager, architect, construction engineer and generally combines them with mid-level and a general labor force to coordinate multiple tasks to move progressively to an end product.

In a typical scenario, an owner of a project will engage an architect, civil engineering company and a general contractor to design and build a structure using a varied labor force. In larger projects, a separate safety professional company is hired to oversee site safety. The general contractor oversees, manages and coordinates the work while the actual work is usually subcontracted to specialty trade contractors but at times will retain smaller aspects of the work if it has the expertise. Subcontractors may also subcontract some portion of their own work to other specialty contractors. Miscellaneous companies may also be hired to provide a limited service or a small activity such as concrete companies or concrete pumping. This hierarchy of contractors and delegation of work affects how and why a defendant is blamed for work site accidents.

Construction site workers are either employees of the contractor or subcontractor, borrowed, loaned or temporary workers. They can be professional level employees, mid-level management, skilled and non-skilled workers, or service providers.

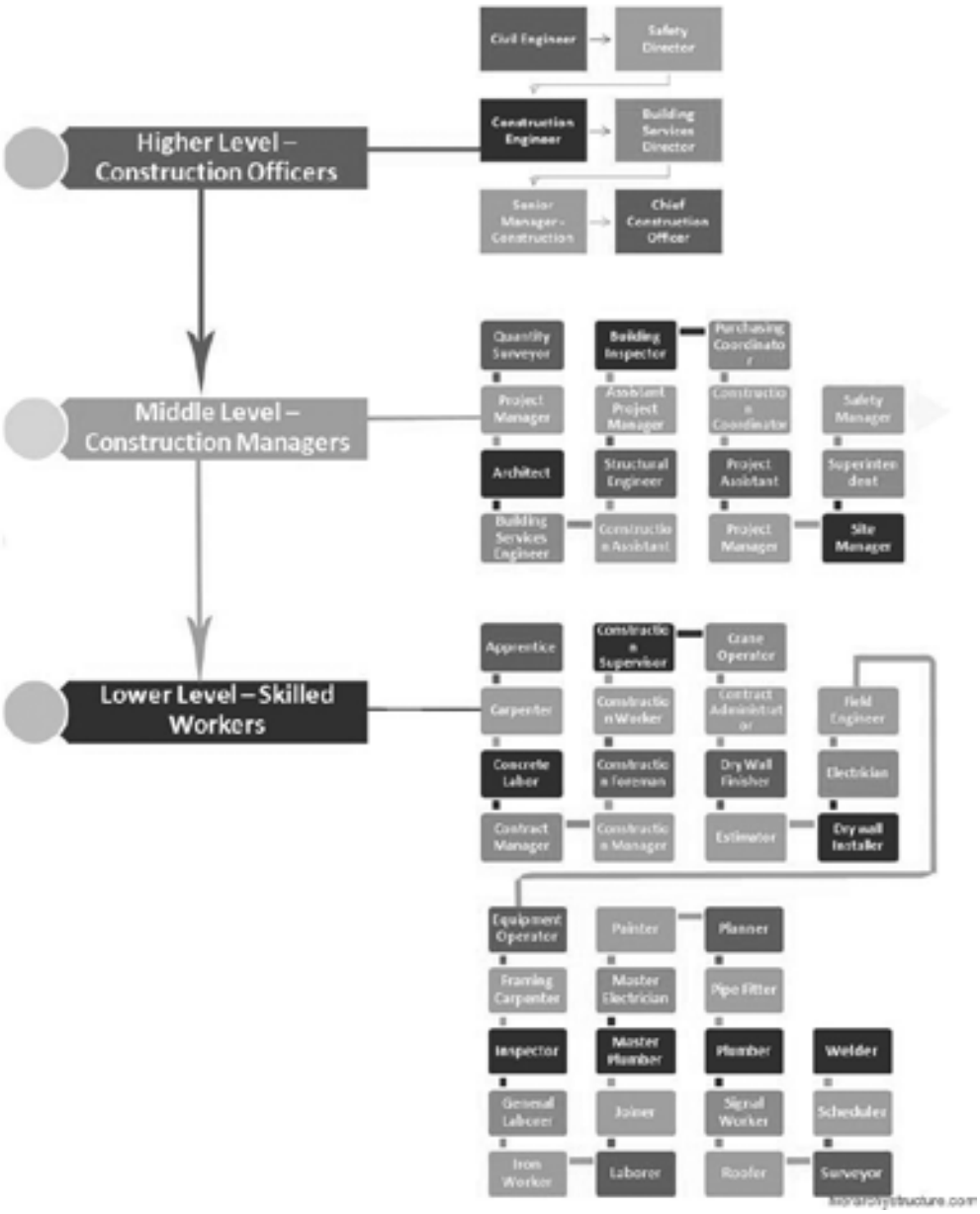
Construction equipment is usually provided by the specialty trade contractor unless arrangements are made with large construction equipment rental companies for the delivery of the equipment to the site. In all circumstances, the contractor with possession of the equipment is usually responsible for every aspect of its use and storage while rental companies and product manufacturers are normally responsible for equipment failures.

The construction job hierarchy chart on the next page illustrates the complexity of the work and the extensive work force needed in larger construction projects:

[4] Id.; https://www.osha.gov/oshstats/commonstats.html.

[5] This category includes construction workers killed when caught-in or compressed by equipment or objects, and struck, caught, or crushed in collapsing structure, equipment, or material.

[6] https://www.osha.gov/oshstats/commonstats.html



Therefore, typical defendants in a construction accident case are the contracting parties which may include the project owner, general contractor, subcontractors, employee leasing companies, safety professionals, and those with business on the premises like third-party vendors and product manufacturers. Occasionally, an architect will also be a defendant.[7]

Potential plaintiffs are most on-site workers including employees of general contractors, subcontractors, leased employees, and vendor or service provider employees. Plaintiffs may also include a member of the public who somehow interacts with the construction site or its surroundings.

[7] Suing an architect requires compliance with statutory prerequisites including expert reports which will not be covered here because by itself can be the subject of a separate paper.

THEORIES OF RECOVERY

Claims against construction defendants for construction site accidents and resulting injuries generally focus on premise defects, negligent activities or faulty equipment.

The first question which a Plaintiff must always answer is whether a duty of care is owed and who owes it. The existence of a duty is a question of law for the court to decide from the facts surrounding the occurrence in question. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 196 (Tex. 1995); *M-T Petroleum, Inc. v. Burris*, 926 S.W.2d 814, 816 (Tex. App.-El Paso 1996, no writ). The burden to establish the existence of a duty rests with the plaintiff. *Id*.; *see also Abalos v. Oil Development Co. of Texas*, 544 S.W.2d 627, 631 (Tex.1976).

CONTROL OF PREMISES, EMPLOYEE, ACTIVITY OR EQUIPMENT

Ultimately, in construction accident cases, establishing liability against a construction defendant will depend on whether the defendant had control of the injury-producing premises condition or control of the employee, activity or equipment. [8] *See, e.g., Lee Lewis Construction, Inc. v. Harrison*, 70 S.W.3d 778 (Tex. 2001).

While work site safety is the responsibility of all individuals on the site, the degree of responsibility for safety assigned to the various parties involved in a project depends upon the nature of the work being performed and the corresponding degree of knowledge and resources expected of the party.[9]

Premises Liability

Liability for premises conditions involving an employee construction site accident involves a two-part analysis as follows: 1) whether the defendant had control over the work or circumstances causing the injury, and 2) a traditional premises liability analysis. *See, e.g., Lee Lewis Construction, Inc. at* 778 (Tex. 2001); *Exxon Corp. v. Quinn*, 726 S.W.2d 17 (Tex. 1987); *Redinger v. Living, Inc.*, 689 S.W.2d 415 (Tex. 1985); *Shell Chemical Co. v. Lamb*, 493 S.W.2d 742 (Tex. 1973).

The right to control can arise in one of two ways--either by contract or implication through conduct. *See General Elec. Co. v. Moritz*, 257 S.W.3d 211, 214 (2008);[10] It is worth noting that, in most instances, these cases involve claims asserted by employees of subcontractors against general contractors and owners. *Id.*; *see also Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 527-28 (Tex. 1997) (discussing duties of general contractors in control of premises cases).

A general contractor owes the same duty as a premises owner to the employees of independent contractors. *Id.* at 527. The same is not necessarily true for subcontractors *vis-a-vis* employees of general contractors unless the subcontractor has possession or control of the work area. This is because subcontractors, being subordinate to general contractors, do not control the general construction site and do not retain rights to control the manner in which general contractors perform their work.

A premises owner can be liable to an independent contractor or the contractor's employees for a preexisting dangerous condition. *General Elec. at* 215 (Tex. 2008); *Central Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007). In that context, there are two categories of premises defect cases: (1) defects existing on the premises when the independent contractor entered; and (2) defects the independent contractor created by its work activity. *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002). Under the first category a premises owner has a duty to inspect the premises and warn the independent contractor of any concealed dangerous condition that the owner knows or should know exists. *General Elec.*, 257 S.W.3d 649, 651 (Tex. 2007).

For a subcontractor and other non-contractor defendants, the general rule is that a person who does not own or possess property assumes no liability for injury arising from a condition of the property. *See City of Denton v. Page*, 701 S.W.2d 831, 835 (Tex. 1986). Exceptions to the general rule exist when one (1) assumes control and responsibility over the premises in question, (2) creates a dangerous condition which results in the plaintiff's injuries, or (3) agrees to make the known dangerous condition safe. *Id*.

[8] Product liability claims involve standard strict liability and general negligence claims which will not be addressed in this paper since it is a separate topic.

[9] Generally, the applicable OSHA Safety and Health Regulations related to a construction site accident are 29 CFR 1910 General Industry and 29 CFR 1926, Construction Industry.

[10] *See* "Control of Premises" discussion below.

Control of Means, Methods and Manner

General Contractor

A general contractor does not owe a duty to ensure that an independent contractor performs its work in a safe manner. *Elliott-Williams Co. v. Diaz*, 9 S.W.3d 801, 803 (Tex.1999).[11] A duty may arise, however, when a general contractor retains some control over the manner in which the subcontractor's work is performed. *Lee Lewis Const.*, 70 S.W.3d at 783; *Elliott-Williams*, 9 S.W.3d at 803. This principle is explained in Section 414 of the Restatement (Second) of Torts, which the Supreme Court of Texas adopted in *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex.1985). Section 414 provides as follows:

> "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

Restatement (Second) of Torts ' 414 (1965).

In *Lee Lewis Construction*, the Supreme Court recognized that "[u]nder our decision in *Redinger*, a general contractor may owe a duty of reasonable care to a subcontractor's employee, and consequently may be liable for injury to that employee, if the general contractor retains control over part of the work to be performed...." *Lee Lewis Const.*, at 783 (citing *Redinger*, 689 S.W.2d at 418); *Koch Refining Co. v. Chapa*, 11 S.W.3d 153, 154 (Tex. 1999).

A plaintiff can prove that a general contractor had a right to control in two ways: first, a contractual agreement that explicitly assigns the right to control; and second, by evidence that the premises owner actually exercised control over the details and manner in which the subcontractor performed his work. *Bright* at 606 (Tex. 2002). The Second Restatement of Torts, Section 414, more fully explains the degree of control required to create a duty. *Id*. at 804. Section 414 cmt. c provides as follows:

> "[T]he employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such a retention of a right of supervisions that the contractor is not entirely free to do the work in his own way."

A contractual right to order work to stop and start, to inspect progress, or to recommend a safe manner for the independent contractor's employees to perform their work is insufficient to establish control. *See Bright*, 89 S.W.3d at 607-08. "[M]erely exercising or retaining a general right to recommend a safe manner for the independent contractor's employees to perform their work is not enough to subject the [general contractor] to liability." *Koch* at 155 (Tex.1999). That is, the retained right of control must be more than general or supervisory for liability to attach. *Hoechst–Celanese Corp. v. Mendez*, 967 S.W.2d 354, 356 (Tex. 1998). "[T]he retention of a general right to recommend a safe manner for employees to perform their work does not create liability. To hold otherwise would work against public policy by discouraging owners and general contractors from implementing any safety regulations for fear of incurring liability." *Legros v. Lone Star Striping and Paving, LLC*, No. 140500088CV, 2005 WL 3359740, at *3 (Tex.App.Houston [14th Dist.] Dec. 6, 2005, no pet.).

Thus, a duty may arise if a party retains the right to control by virtue of explicit language contained in a contract; such language, however, must retain the right to control the means, methods or details of the work to be performed by the subcontractor. *Bright*, 89 S.W.3d at 606. Additionally, the control must relate to the injury caused by the negligence. *Id*. Thus, a general contractor is not liable for an independent contractor's negligence unless the general contractor "retains the right of control or exercises actual control over the condition or activity that causes the injury." *Johnson v. Scott Fetzer Co.*, 124 S.W.3d 257, 26667 (Tex. App. Fort Worth 2003, pet. denied). Determining whether a contract gives a right to control is generally a question of law for the court and not a

[11] Cf. Some plaintiffs have alleged that an employer of an independent contractor is liable for negligently hiring, supervising, and retaining an independent contractor based on direct liability. *See Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 49 (Tex. App.—Fort Worth 2002, no pet.); *see TXI Transp. v. Hughes*, 224 S.W.3d 870, 901 (Tex. App.—Fort Worth 2007 (negligent hiring), *rev'd on other grounds*, 306 S.W.3d 230 (Tex. 2010). The elements of a negligent hiring, supervising, and retention claim are 1) The employer of the independent contractor owed the plaintiff a legal duty to hire, supervise, and retain competent independent contractors; 2) the employer breached that duty; and 3) the breach proximately caused the plaintiff's injuries. *See Hughes*, 224 S.W.3d 901.

fact question reserved for the jury. *Bright*, 89 S.W.3d at 606.

Control of Premises

A plaintiff must establish that the defendant had control over and responsibility for the premises before liability can be imposed. *Mayer v. Willowbrook Plaza Ltd. P'ship*, 278 S.W.3d 901, 909 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (*citing County of Cameron v. Brown*, 80 S.W.3d 549, 556 (Tex.2002)). The control over the premises in these cases must relate to the condition or activity that caused the injury. *Id*. (*citing Olivo*, 952 S.W.2d at 528.)

The duty in premises liability cases is premised on a defendant's "right to control." *See Pollard v. Missouri Pacific Railroad Co*., 759 S.W.2d 670 (Tex.1988); *See Olivo* at 528 (Tex. 1997); *See Elliott-Williams Co. at* 804 (Tex. 1999). The right to control element can be accomplished in two ways: 1) the right to control may be retained in a contract and 2) the party may have actually exercised control. Determining whether a contract gives a right of control is generally a question of law for the court rather than a question of fact for the jury. *Bright* at 606 (Tex. 2002); *Lee Lewis Constr. at* 783 (Tex.2001).

Warnings

A construction project by its nature has many recognized hazards and contractors are required to warn workers of all hazards. [12]An acceptable way for a landowner to discharge its duty to an invitee on the premises is to warn invitees about concealed hazards. *See Austin v. Kroger Texas, L.P.*, 465 S.W.3d 193, 203 (Texas 2015). With regard to employees of independent contractors, however, it is sufficient to warn the independent contractor or the one supervising the employee's work. *See Delhi-Taylor v. Henry*, 416 S.W.2d at 394; *see also Koppers Co., Inc. v. Haggerty*, 488 S.W.2d 600, 602-03 (Tex. Civ. App.-Beaumont 1972, no writ). That is because independent contractors owe a duty to their employees to warn them of known dangers on the premises where they are required to work, *see Delhi-Taylor v. Henry*, 416 S.W.2d at 394, and a property owner should not be required to foresee and anticipate that an independent contractor will not discharge its duty to its own employees. *Id*.

Subcontractor

Ordinarily, a person who does not own or possess property assumes no liability for injury under a premises liability theory, unless he assumes control over, and responsibility for, the premises. *City of Denton at* 835 (Tex.1986).

An independent contractor on a construction site who does not own but is in control of the premises, is charged with the same duty as an owner of the property. *Rendleman v. Clarke*, 909 S.W.2d 56, 60 (Tex. 1995). In that vein, a landowner owes a duty to either make safe or warn invitees of concealed, unreasonably dangerous conditions of which the owner knows or reasonably should know, but the invitee does not. *See Austin at* 203. The reason for imposing this duty on property owners is because they are typically in a better position than invitees to be aware of hidden hazards on the premises. *Id*. As a result, the law mandates that the landowner take precautions to protect invitees against such hazards if they are known or reasonably should be known by the property owner. *Id*. When a condition, however, is open and obvious or known to the invitee, the landowner is not in a better position to discover it. *Id.* Therefore, when an invitee is aware of dangerous premises conditions, whether because the danger is obvious or because the owner provided an adequate warning, the condition will, in most cases, no longer pose an unreasonable risk. *Id*. This is because the law presumes that invitees will take reasonable measures to protect themselves against known risks. *Id*.

When a general contractor is in control of the relevant premises, subcontractors do not owe any duty to employees of other subcontractors. *Pinkerton's v. Manriquez*, 964 S.W.2d 39, 46 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (When the owner or general contractor is in control of the premises, there is no special relationship between the employees of different subcontractors which would bring them within the scope of each other's duty.); *see, e.g., Rendleman*, 909 S.W.2d at 60; *Bennett v. Span Indus., Inc.*, 628 S.W.2d 470, 473 (Tex.App.—Texarkana 1982, writ ref'd n.r.e.).

Employer

An employer normally has superior control over the means, method and manner of its employee's work. A plaintiff's employer, however, is not typically a party to the lawsuit because it will enjoy immunity from suit under the exclusive remedy doctrine if it has

[12] *See* OSHA standards, 29 CFR 1926.

worker's compensation coverage for the employee.[13] Defendants, however, may still wish to blame or name the employer as having contributed to the work site accident by failing to protect the plaintiff against the accident-causing condition, activity or equipment. An employer in Texas has a nondelegable duty to provide its employees a safe place to work along with necessary and safe instrumentalities to perform the work. *See, e.g., Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex.2006); *Leitch v. Hornsby*, 935 S.W.2d 114, 117 (Tex.1996); *See Austin v. Kroger, LP., 465 S.W.3d 193 (Texas 2015) answer to certified question conformed to 614 Fed.Appx. 784, 2015 WL 5061653.*

COMMON CONSTRUCTION DOCUMENTS AS SOURCE OF DUTY

The standard of care for a negligence claim against a construction contractor is generally derived from a number of sources including ordinary negligence principles, contract language, contract specifications, industry and OSHA standards, construction safety rules and protocols, equipment manuals, and at times American National Standards Institute Standards ("ANSI") and government contract safety standards.[14]

Primary Contract and Industry Standards

The prime contract sets forth the scope of the project, construction specifications, and usually, legal responsibilities of the owner and general contractor with boilerplate language which ultimately makes the general contractor primarily responsible for completing the details of the construction project and all site activities including worker safety because it can exercise control over all site contractors to enforce its mandatory safety program. The general contractor has primary and overall authority and control of the job site. It will either direct, supervise, coordinate, or at least monitor the progress of the work and perform inspections to ensure that the work complies with provisions of the contract and associated plans and specifications. The general contractor may delegate work and related site safety to subcontractors but contractually and under OSHA, it remains ultimately responsible for overall job-site safety.[15] Proper delegation of the work and safety responsibilities may limit or absolve the general contractor of liability.[16]

A reasonable and prudent general contractor will normally continue to monitor the general safety of the work assigned to ensure compliance with reasonable safety practice and any specific safety requirements contained in the project plans and specifications. In the exercise of ordinary care, the general contractor does not relinquish its overall leadership role to ensure that a reasonable safety program is established and conducted at their work site.

Generally, a general contractor's contract language which requires that independent contractors comply with all federal, state, and municipal safety laws is insufficient to establish that a general contractor retains control to direct the means, methods, or details of the independent contractor's work. *Bright* at 606-07.

The following are examples of typical contract clauses used by Plaintiffs to establish a defendant's standard of care:

Prime contractor responsibilities:

> "The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the work under the contract, unless the contract documents give other specific instructions concerning these matters. If the contract documents give other specific instructions concerning construction means, methods, techniques, sequences or procedures, the contractor shall evaluate the jobsite safety of such means, methods, techniques, sequences or procedures."
>
> "The contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors."
>
> "The Contractor shall employ a competent superintendent and necessary assistants who

[13] Texas Labor Code 408.001.

[14] See generally OSHA standards for work site safety, 29 CFR 1926; ANSI at https://www.ansi.org.

[15] 29 CFR 1926.16(a): "In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this part (29 CFR 1926) for all work to be performed under the contract."

[16] Plaintiffs and their experts often argue that delegation simply allows the general contractor to share responsibility not relinquish it under OSHA.

shall be in attendance at the Project site during performance of the Work. The superintendent shall represent the Contractor, and communications given to the superintendent shall be as binding as if given to the Contractor, Important communications shall be confirmed in writing. Other communications shall be similarly confirmed on written request in each case."

"The prime contractor responsibility is for the protection of persons and property.

The contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the contract."

"The contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

1. Employees on the work site and other persons who may be affected thereby;

2. The Work and materials and equipment to be incorporated therein, whether in storage on or off the site, under care, custody or control of the Contractor or the Contractor's Subcontractors or Sub-subcontractors; and

3. Other property at the site or adjacent thereto, such as trees, shrubs, lawns, walks, pavements, roadways, structures and utilities not designated for removal, relocation or replacement in the course of construction."

Subcontract Provisions

Under low tier contracts, the subcontractor is responsible to complete a specific portion of the work as dictated by the prime contract, and answers to the general contractor and the owner for work performed. The subcontractor is an independent contractor who is responsible for the safety of its employees and its work area and activities. It shares a corresponding responsibility for overall worksite safety and bears sole responsibility for its assigned territory on the site.[17]

Examples of subcontractor clauses used to establish a claim or defense are as follows:

"Subcontractor shall furnish labor, supervision, services, materials, equipment, tools, scaffolds, hoisting facilities, transportation, storage and all other things necessary to perform the work described in Schedule A...."

"Subcontractor shall, at its own expense, obtain all necessary licenses and permits pertaining to the Work and comply with all statutes, ordinances, rules, regulations and orders of any governmental or quasi-governmental authority having jurisdiction over the Work or the performance therefor, or of the Project, or of Subcontractor, including, but not limited to, those relating to safety....."

"Subcontractor accepts complete responsibility for the health and safety of its employees and its subcontractors' employees, the safe performance of the Work, compliance with safety procedures and policies issued by the Contractor in the Contract Documents, and compliance with all applicable health and safety laws, including the regulations and standards of the Occupational Safety & Health Act of 1970 (OSHA) as amended."

"Contractor and Subcontractor recognize Subcontractor is an independent contractor, with primary responsibility for its methods and means and the safety of its workers. Contractor shall have no duty to monitor Subcontractor's practices or performance of the Work for safety and shall have no duty to stop Subcontractor's unsafe practices or to insure that Subcontractor's practices and methods of performing the Work are safe."

"Subcontractor, in performing the Work, acts as an independent contractor and not as an agent or employee of contractor and, consistent with the requirements of the Contract Documents, the Subcontract and the schedule shall have control of its means and methods of performing the work."

"Subcontract represents the Subcontractor is an independent contractor and agrees to accept full and exclusive liability for compliance with all applicable federal, state, and local laws, statutes and regulations and ordinances, including but not limited to the areas of safety and environment and to conform to the safety policies of the contractor, and the performance of the subcontractor."

OSHA Provisions and Admissibility

OSHA provisions are the most common form of construction standards urged by Plaintiffs in

[17] OSHA provisions, 29 U.S.C. Sec. 654 and 29 CFR 1926.

construction accident cases, mostly because the provisions can be read broadly to apply to a wide spectrum of employers, contractors and accidents. The provisions are persuasive and credible before a judge and jury because they set consensus safe work practices. Defense counsel should become very familiar with OSHA construction provisions to avoid the inappropriate use or misuse of the provisions against a defendant-contractor. OSHA publishes a number of helpful guides and resources for understanding and applying the provisions. [18] Plus, consulting with an expert early in the litigation will pay dividends later to defend against specific claims of violations.

Generally, OSHA regulations are admissible to establish industry standards but neither create an implied cause of action nor establish negligence per se. *McClure v. Denham*, 162 S.W.3d 346, 353 (Tex.App.Fort Worth 2005, no pet.) (citing *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 707 (5th Cir.1981) (recognizing that OSHA was adopted to assure safe and healthful working conditions)); *Perez v. Smart Corp.*, 2013 WL 6203358 at *3 (Tex.App.–San Antonio 2013, pet. denied)("OSHA regulations are admissible as being relevant to standards of conduct that should have been employed by a defendant") (citations omitted). Those regulations are recognized as relevant to the standard of conduct in an industry, and the "cumulative wisdom of the industry" on what is safe and what is unsafe. *Wal-Mart Stores, Inc. v. Seale*, 904 S.W.2d 718, 720 (Tex.App.–San Antonio 1995, no pet.).

OSHA regulations are admissible as evidence of negligence against an employer. *Carrillo v. Star Tool Co.*, 2005 WL 2848190, at 2, No. 14-04-00104-CV (Tex. App.-Houston [14th Dist.] 2005, no pet.) (not designated for publication) (noting OSHA standards are generally relevant as the cumulative wisdom of the industry on what is usage and that expert testimony regarding standards is relevant and admissible); *Seale*, 904 S.W.2d at 720 (held that OSHA regulations are admissible into evidence as being relevant to the standards of conduct which should have been employed by a defendant); *Baker Marine v. Herrera*, 704 S.W.2d 58 (Tex. App.-Corpus Christi 1985, no pet.) (Occupational Safety and Health (OSHA) regulations were admissible as evidence relevant to the standard of conduct that should have been employed by appellant).

Although OSHA regulations are generally admissible, some courts have determined that OSHA findings or non-findings, or citations and failures to cite covered employers, are inadmissible. "OSHA evidence beyond regulations, such as findings or citations, is not admissible because it is not relevant to the issue of common law negligence." *Perez*, 2013 WL 6203358 at *3, *citing Hill v. Consolidated Concepts, Inc.*, 2006 WL 2506403 at *4-6 (Tex.App.–Houston [14th Dist.] 2006, pet. denied). OSHA regulations are relevant to a defendant's standard of conduct, but do not expand a defendant's common-law duties. *Perez*, 2013 WL 6203358 at *3. Thus, in Hill, the Court affirmed the trial court's refusal to admit OSHA administrative records, because "the citations and fines paid had no bearing on liability." *Hill*, 2006 WL 2506403 at *4. *See also Carrillo v. Star Tool Co.*, 2005 WL 2848190 at *2 (Tex.App.–Houston [14th Dist.] 2005, no pet.) (affirming exclusion of letter stating that no citation would issue to plaintiff's employer). Other courts have determined that OSHA citations or non-citation may be admissible to rebut misleading claims of the applicability of OSHA regulations or for some other purpose such as fact observations, evidence of proper employer or to impeach an expert. *See Valenzuela v. Heldenfels Brothers, Inc.*, 2006 WL 2294562, No. 13-04-241-CV (Tex. App.-Corpus Christi 2006, no pet.) (unpublished op.) (under Texas Rule of Evidence, Rules of Evidence 803(3), 803(8), OSHA citations issued to deceased worker's employer following investigation into worker's death, which allegedly resulted from an on-the-job injury that worker sustained while trying to load an emulsion tank, were admissible as reports from a public agency in wrongful death action brought against the tank's manufacturer, even if used to establish fault). In *Valenzuela*, the court held, "Texas Rule of Evidence 803(8) permits the admission of records and reports of public offices or agencies, which set forth (1) the activities of the office or agency, (2) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, and (3) in civil cases, factual findings as to any party resulting from an investigation made pursuant to authority granted by law, unless the sources of information indicate lack of trustworthiness. Tex.R. Evid. 803(3)."

Application of OSHA to Employer and Employee

The OSHA Act of 1970, section 5(a)(1) and (2) establishes the responsibilities and duties of all employers, and 5(b) establishes the responsibilities and duties of all employees.[19]

[18] Https:/www.osha.gov

[19] Generally, the applicable OSHA Safety and Health Regulations related to a construction site accident are 29 CFR 1910, OSHA for General Industry and 29 CFR 1926, OSHA for Construction Industry.

OSHA regulations are made applicable to employers and employees by 29 U.S.C. § 654, which states:

(a) Each employer–

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

(b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

29 U.S.C. § 654

Section 654(a)(1) (sometimes referred to as the "general duty" provision of the statute) imposes on employers a general duty to their employees to furnish a safe workplace. Texas case law, however, might extend Sec. 654(a)(2) (the "specific duty" clause) to every employer to comply with OSHA regulations.

As the court stated in *Teal v. E.I. DuPont de Nemours & Co.*:

"We believe that Congress enacted Sec. 654(a)(2) for the special benefit of all employees, including the employees of an independent contractor, who perform work at another employer's workplace. The specific duty clause represents the primary means for furthering Congress' purpose of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions." The broad remedial nature of the Occupational Health and Safety Act of 1970 is the Act's primary characteristic. Consistent with the broad remedial nature of the Act, we interpret the scope of intended beneficiaries of the special duty provision in a broad fashion. In our view, once an employer is deemed responsible for complying with OSHA regulations, it is obligated to protect every employee who works at its workplace. Thus, [the plaintiff], an employee of an independent contractor, must be considered a member of the class of persons that the special duty provision was intended to protect." *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 804-805 (6th Cir. 1984). *Teal* thus held a general contractor owed to employees of subcontractors the obligation to comply with OSHA regulations. *Id*. *Cf. See Richard v. Cornerstone Constructers, Inc.*, 921 S.W.2d 465 (Tex.App.—Houston [1st Dist.], 1996, writ denied) (holding that OSHA standards did not apply and were not admissible where faulty scaffolding was installed and utilized by the independent contractor's crew, which had the responsibility to ensure that the materials they chose conformed with OSHA standards).

Other courts, however, have held that OSHA does not impose a duty on general contractors to provide a safe workplace to the employees of other subcontractors because by its terms it does not independently serve as the basis of imposing a duty on a non-employer contractor. The Fifth Circuit has stated that OSHA does not impose upon a contractor the duty to provide a subcontractor's employees with a safe working environment. *Melerine v. Avondale Shipyards, Inc.* at 710-11 (5th Cir. 1981) (*citing Horn v. C.L. Osborn Contracting Co.*, 591 F.2d 318, 321 (5th Cir. 1979)). This has been followed by Texas courts. *See e.g., Richard v. Cornerstone Constrs., Inc.*, 921 S.W.2d 465, 468 (Tex. App.–Houston [1st Dist.] 1996, writ denied) (op. on reh'g); *McClure v. Denham*, 162 S.W.3d 346, 353 (Tex. App.– Fort Worth 2005, no pet.) (finding that section 1926.16 does not create an additional liability for a general contractor under tort principles).

Hazard Creating and Controlling Employer

OSHA publishes an administrative investigative model it uses for determining responsibility for particular construction job-site hazards but which is commonly used by Plaintiffs to extend the net of responsibility and ultimately liability to contractors beyond the actual responsible parties. The model, however, is not a regulation or standard and it is important to distinguish it early in the litigation before the net is spread too far, causing contractor witnesses to make incorrect and harmful statements about responsibility for work site accidents.

In identifying a responsible entity, OSHA relies on the terms "exposing," "creating," "controlling," and "correcting" entity. For any particular hazard, it identifies the entity who exposed their worker to the hazard; who actually created the hazard; who is responsible, by contract or by actual practice, for controlling the hazard (for controlling safety and health conditions at the job-site); and who has the responsibility (ability and authority) to correct the hazard. Although OSHA uses this model for its process of issuing citations in multiple-contractor

construction sites,[20] plaintiff's experts use it to assign fault.

Common Construction Site Safety Policies

Typical construction site safety documents relied upon by parties in a construction accident case to establish a claim or defend one include owner-imposed safety policies, site-specific safety manuals or plans, accident prevention plans, steel erection plans, hazard/activity analyses, safety and inspection checklists, audit checklists, and equipment/manufacturer manuals.

Accident Prevention Plan/Manual

An Accident Prevention Plan provides site-specific safety and health information, identifies common known work site hazards, and safety planning and programming. These Plans which are generally prepared by a project owner or general contractor are commonly used by Plaintiffs to try to establish negligence for failing to comply with the precise terms of the plans. This argument has limited applicability because the plans cover general site safety and delegate specific activity safety to the specialty trade. Thus, the plan is not intended to dictate the means, method or detail of the job safety, unless there are specific instructions on a job task.

OSHA's construction standards require construction employers to have accident prevention programs that provide for frequent and regular inspection of the job-sites, materials and equipment by competent persons designated by the employers.[21] OSHA also provides on-line tools to assist contractors for creating their own plan.[22]

Most large construction projects require a general contractor and subcontractors to provide site-specific Accident Prevention Plans before being allowed to start work on a job site.

Job Safety Analysis/Activity Hazard Analysis

JHAs or AHAs are part of the general contractor mandatory safety program and are prepared by the specialty trade contractor before starting the job or a particular phase of a job. This is another tool commonly used to establish a claim of negligence or defend against it. But it may have limited applicability to a general contractor because the plans must be prepared by a specialty trade who has specific expertise with the activity. Therefore, it is generally only applicable to subcontractors, not a general contractor.

The responsible specialty trade contractor prepares the written analysis in anticipation of starting a new task or phase of the construction work. It lists major steps, tasks or job operations in the work process, corresponding risks and hazards of a particular phase and recommends generally accepted safe work practices to accomplish the job. A hazard is often associated with a condition or activity that, if not identified and controlled, can lead to injury. It focuses on the relationship and interaction between the worker, the task, the tools, and work environment. Left undone or incomplete, it can lead to injury and becomes an important piece of evidence for a plaintiff. It is designed to eliminate and prevent hazards in the workplace. OSHA provisions and materials are a good source of accepted safe work practices.

Control measures should follow an order of precedence and effectiveness of hazard control as follows:

1. *Engineering controls.*
2. *Administrative controls.*
3. *Personal protective equipment.*[23]

Other Construction Documents

In addition to construction contracts and safety policies, Plaintiffs will use a variety of other construction documents used in daily activities on a job site to attempt to establish and promote a violation of a standard or duty but which may also be used to defend against a claim of neglect or omission such as the following:

1. *Daily diaries*
2. *Progress reports*
3. *Daily inspection reports*
4. *Safety inspection and audit reports*
5. *Phase reports*
6. *Contractor meetings notes*
7. *Product manuals*
8. *Site photographs*

By its nature, large construction projects require constant monitoring of activities, maintaining timelines, coordination, and documenting activities for

[20] OSHA Instruction, CPL 2-00.124, Multi-Employer Citation Policy dated Dec. 10, 1999.

[21] *See* 29 CFR 1926.20(b).

[22] https://www.osha.gov/dcsp/compliance_assistance/quickstarts/construction/construction_step4.html

[23] https://www.osha.gov/Publications/osha3071.pdf.

evaluating work progress and making payments. Therefore, contractors will often detail and diary most construction activities performed on a regular basis that will likely contain information and a window of activities by which it will be judged, and can create a treasure trove of evidence for an attorney prosecuting or defending an accident case. Therefore, a thorough investigation of a contractor's compilation of construction documents is essential to developing and defending a case.

Government Contracts

Construction contracts involving the Department of the Army, U.S. Army Corps. of Engineers usually imposes an added layer of safety requirements beyond the prime contract and OSHA involving construction projects the Department oversees. It requires the use of a safety program called the Safety and Health Requirements Manual, EM 385-1-1.[24] This is yet another commonly exploited source for plaintiffs to establish liability.

THIRD PARTY VENDOR LIABILITY

Third party vendors without a direct contract related to the construction work may include companies which do business with an on-site contractor to provide services or equipment to it. It may include concrete, concrete pumping, hoisting equipment, building materials deliveries, and general rental equipment companies. Liability against such vendors depends on the amount of interaction and extent of their participation in on-going construction activities. For example, material or equipment deliveries will have very minimal involvement with construction activities while concrete pouring or pumping requires interaction with on-site workers who install frames and pour the cement. Or, steel workers erecting framework will work closely with crane and hoist operators which require advance planning and serious safety considerations.

Therefore, negligence claims against third party vendors depends on the involvement in the construction work and may include industry standards such as OSHA and other generally accepted standard, such as cement pumping or ANSI standards for hoisting.[25]

PLANNING AND DEFENSE CONSIDERATIONS

Investigation

At the outset, defense counsel should act quickly to obtain as many construction documents as possible because the passage of time is not a friend to the attorney who wants to show the details of the contractor's good safety practices. Construction documents related to large projects can be voluminous, and efforts should be made to avoid the loss of documents which will tend to support the defense of an accident. Efforts should also be made to head-off the destruction of documents or worse yet, warehousing of construction documents in a large facility to be lost in a sea of boxes.

In addition, counsel should utilize public information laws or its equivalent to obtain any investigation performed into the construction site accident.

At a minimum, the following documents should be obtained or activities undertaken:

1. *The prime contract and specifications, accident prevention plans, construction activity documents including daily inspection reports, daily diaries, phase/progress reports with photographs and safety audits.*
2. *All subcontracts and identify all companies involved in the project.*
3. *Subcontractor's accident prevention plans and related safety materials.*
4. *All company investigation documents and photographs including any prepared by other contractors, OSHA, and law enforcement.*
5. *Plaintiff's personnel file and all training materials from plaintiff's employer including employee leasing companies.*
6. *Document of related workers and witnesses.*
7. *Perform a site inspection, if possible.*
8. *Send demands for defense and indemnity claims early.*
9. *Send preservation of evidence letters to all parties and contractors involved.*
10. *Interview key company and non-company witnesses.*
11. *Locate and obtain applicable industry and consensus standards and materials such as OSHA, ANSI, Associated General Contractors of America (AGC) Manual of*

[24] http://www.usace.army.mil/SafetyandOccupationalHealth/EM38511,2008BeingRevised.aspx

[25] ANSI" at https://www.ansi.org; American Concrete Pumping Association at https://www.concretepumpers.com;

Accident Prevention in Construction and Manual of Accident Prevention in Construction, National Safety Council, Accident Prevention Manual, and other relevant primer materials.

12. *Locate and obtain product manufacturer's equipment manuals.*
13. *Obtain all federal, state and local licensing information.*

Defense Strategy and Trial Theme

A proper defense strategy depends on the role the contractor has in the construction project, not necessarily whether it was responsible for the worker's safety. While a contractor's responsibility for safety may be limited to its employees and geographic location, work site safety is the responsibility of all individuals on the site. The degree of responsibility for safety assigned to the various parties involved in a project depends upon the nature of the work being performed and the corresponding degree of knowledge and resources expected of the party.

An obvious and common defense strategy for a contractor is to try to disprove the elements necessary to establish liability under the general "control" analysis or premise liability. At a minimum, the defense should take the necessary steps to develop the following:

1. *Develop evidence to support contract defenses and to point to the responsibility of others.*
2. *Develop evidence to support lack of control and to point control of others.*
3. *Develop evidence to support premises liability defenses.*
4. *Develop evidence to support Plaintiff's employer's sole responsibility. Consider Responsible Third Party designations.*
5. *Develop evidence to support plaintiff's responsibility.*
6. *Use industry rules and OSHA standards to your contractor's advantage and distinguish application of such standards to your defendant contractor.*
7. *Consult with an industry expert early to properly analyze the case and to prepare for discovery and depositions.*

Important Witnesses

Early in the litigation, identify witnesses and consider interviewing key individuals to develop support for defending the contractor including obtaining a statement or affidavit from witnesses because construction personnel change often once projects are completed. Video recorded statements work just as well

Some key witnesses include the following:

1. *Representatives for the owner, architect, general contractor, subcontractor, safety contractor, and vendors.*
2. *Key company employees and lay experts including safety professionals including project engineers, project managers, superintendents, foremen, and safety auditors.*
3. *Subcontractors and third party vendor employees and lay experts.*
4. *Expert witnesses (safety professionals, OSHA experts, construction management and safety experts, civil engineer, human factors expert, product safety engineer).*
5. *Vendor and employment leasing company employees.*
6. *Product manufacturer witnesses.*
7. *OSHA investigators.*
8. *Law enforcement investigators.*

Conclusion

Due to the nature of a large construction project, Plaintiffs can easily blame a number of contractors, activities and construction site hazards and use a number of tools available to them in the plethora of written documents and standards to extract a duty where one is not necessarily owed or recognized. Therefore, the key for a successful defense of a contractor's case is to take a proactive strategy to develop its defense evidence. Once the case reaches trial, counsel should synthesize the complex nature of a large construction project with its many moving parts and players into a simple case of contract obligations and individual responsibility. Since the issue of control is a significant feature of these cases, serious consideration should be given to proving or disproving control, along with developing evidence of Plaintiff and his employer's contribution to the construction accident.

TADC Legislative Update

Election Review: A Purple Wave?

By: George S. Christian,
TADC Legislative Consultant
The Christian Company, Austin

Behind a strong showing by Governor Greg Abbott, Republican candidates swept the statewide offices for the 12th consecutive election. No Democrat has won a statewide election in Texas since 1994, and the well-funded campaigns of U.S. Senator Ted Cruz and the Governor helped keep it that way. According to available Texas Ethics Commission campaign finance reports, the Governor spent at least $50 million, the most ever by a statewide candidate. In addition to wins by Cruz over challenger Beto O'Rourke (D-El Paso) and Abbott over former Dallas County Sheriff Lupe Valdez, Lt. Governor Dan Patrick defeated Mike Collier, Attorney General Ken Paxton turned back a challenge from Justin Nelson, Comptroller Glenn Hegar easily bested Joi Chevalier, Land Commissioner George P. Bush beat Miguel Suazo, Agriculture Commissioner Sid Miller defeated Kim Olson, and Railroad Commissioner Christi Craddick won over Roman McAllen. Also notching victories were three Texas Supreme Court justices, Jimmy Blacklock, John Devine, and Jeff Brown, and three Court of Criminal Appeals judges Sharon Keller (the Presiding Judge), Barbara Hervey Parker, and Michelle Slaughter.

Despite the Governor's big spend, however, Democrats have to see a lot to like in last night's results. More than 4 million Texans cast their votes for the blue. Ted Cruz's unpopularity with the electorate almost beat him. Abbott polled 55% against an almost non-existent opponent. The Lt. Governor, Attorney General, and Agriculture Commissioner barely got a majority of the mid-term record 8.3 million votes cast. Even the more popular GOP state officials, Hegar, Bush, and Craddick, only netted 53% of the vote, as did the three incumbent Supreme Court justices. Two Republican incumbents in the Texas Senate lost their seats. Democrats picked up at 11 seats in the Texas House. Democratic judicial candidates swept the Courts of Appeals in Dallas, Harris, Travis, Bexar, and Nueces Counties, changing the face of the Texas judiciary overnight. Longtime Harris County Judge Ed Emmett lost re-election. As of today, Texas looks like a purple cake with red icing.

In the major metropolitan counties of Dallas, Austin, San Antonio, and Houston, Democrats turned out in numbers slightly lower than in the 2016 presidential election, but far in excess of the 2014 election, the last time the major statewide offices were on the ballot. Much of this local "blue wave" rode into shore on enormous early turnout numbers. For example, Dallas County early vote exceeded the 2014 levels by 22%, Harris County by 18%, Travis County by 26%, and Bexar County by 18%. Indeed, the top 15 counties in the state had *1.3 million more* registered voters than in 2014, reflecting the huge influx of new residents to Texas in the last four years, as well as a major push by both parties to register young voters. The strong early vote reflects a trend over the past few elections in which an increasing proportion of voters turn out early, a number that approached half the total vote in 2014 and 2016. This year more than half

of the total vote consisted of early ballots.

The early vote totals also show that voter enthusiasm remained high throughout the early voting period, rather than plateauing between Day 6 and about Day 10, as it did in the last two mid-term elections, 2010 and 2014. In 2018, 522,500 voters cast their ballots on the first day of early voting, as opposed to 240,653 in 2014 and 178,802 in 2010. By Day 6, more than 2.3 million early votes were cast this year, against 837,149 in 2014 and 681,512 in 2010. By the end of Day 12, however, an incredible 3.67 million voters had gone to the polls, over a half million more than in the last two mid-term elections *combined* (about 2.9 million). The 2018 early vote also has some interesting characteristics:

- By a margin of 51.8% to 43.2%, more women vote early than men (gender not listed equals the other 5%);
- Hispanic surname voters increased from 15.2% of early voters in 2014 to 19.2% in 2018;
- Almost twice the number of voters under the age of 20 and age 20-29 voted in 2018 as compared to 2014, while the number of early voters age 30-39 increased by about one-third;
- Older voters turned out early in lower numbers in 2018 than in 2014, most notably in age 60-69 (20% fewer voters) and age 70-79 (nearly 20% fewer);
- Despite somewhat lower turnouts in the higher age categories, age 50-79 voters still accounted for a majority of the early votes cast.

Key Legislative Races

Only two Senate races were in play on Tuesday, and Republican lost both. In District 10, Fort Worth businesswoman and civic activist Beverly Powell defeated Tea Party leader Sen. Konni Burton (R-Colleyville) with a little more than 51% of the vote. Across the county line in SD 16, Democrat Nathan Johnson of Dallas upended incumbent Don Huffines (R-Dallas) with more than 54% of the vote. With the victory by Republican Pete Flores in SD 19 in a special election in September, Lt. Governor Patrick still has a majority of 19-12 heading into the 2019 session, but we can expect a little tougher sledding for the Lt. Governor's agenda. In addition, Sen. Sylvia Garcia (D-Houston) won her race for a seat in Congress, which will trigger a special election to fill her seat. This will likely occur during the legislative session.

On the House side, the 95-55 GOP majority slipped by some 11 seats, the most significant loss since 2009. Seven incumbent Republican House members lost their seats to Democrats: Paul Workman (Austin), Tony Dale (Round Rock), Matt Rinaldi (Irving), Gary Elkins (Houston), Rodney Anderson (Irving), Linda Koop (Dallas), and Ron Simmons (Carrollton). An eighth, Mike Schofield (Katy), narrowly trails his Democratic challenger with 99% of the vote counted. Another four open seats in Republican districts went to Democratic candidates: John Turner (D-Dallas) won the seat formerly held by Jason Villalba; Erin Zwiener took the Hayes County district vacated by Rep. Jason Isaac; James Talarico won Rep. Larry Gonzales's seat in Williamson County; and Rhetta Bowers took the east Dallas County district formerly held by Rep. Cindy Burkett (R-Sunnyvale). While the GOP will still hold a substantial majority of around 84-66, there is no question that the House has shifted more to the center, spelling trouble for the Governor and Lt. Governor's legislative plans.

Now that the election is over, the newly elected House will turn its attention to selecting a new speaker to replace retiring five-term incumbent Joe Straus. That decision could theoretically be made when the House Republican Caucus meets in early December, but GOP losses have made that task much more difficult. The hard-right "Liberty" Caucus had

hoped to swing the election to their candidate, but losing Reps. Simmons and Rinaldi have probably put paid to that strategy. More centrist Republicans who can make deals with the Democrats will likely emerge as the favorites, such as Rep. Four Price (R-Amarillo), Rep. Drew Darby (R-San Angelo), Rep. Travis Clardy (R-Nacogdoches), or Rep. Dennis Bonnen (R-Angleton). Others in the running may include Rep. Todd Hunter (R-Corpus Christi) and Rep. Phil King (R-Weatherford).

Key Congressional Races

Two Republican incumbents from suburban districts around Houston and Dallas lost their seats: John Culberson in CD 7 and Pete Sessions in CD 32. Others narrowly held on against strong Democratic challengers, including Will Hurd in CD 23 and John Carter in CD 31.

Texas Supreme Court and Courts of Appeals

The outcome of judicial races, however, will probably have the biggest impact for the longest time. Although three Republican Supreme Court incumbents—Justices Jimmy Blacklock, Jeff Brown, and John Devine—won re-election, the margins of victory are undoubtedly slipping. Remember, too, that in the 2020 election straight ticket voting, which gives relatively unknown judicial candidates a lift, will not be available in any race. At least two vacancies are expected on the court in the near future: Justice Jeff Brown is likely to head to a federal district bench in Galveston County soon after the first of the year, and Justice Phil Johnson will hit mandatory retirement age before the next election. Consequently, as many as five Supreme Court seats could be on the ballot in a wide-open presidential election year.

As mentioned previously, four courts of appeals with Republican majorities flipped last night. In the Third Court of Appeals (Austin), incumbent justices David Puryear, Scott Field, Cindy Bourland, and Mike Toth (recently appointed by Gov. Abbott) lost by significant margins to Thomas Baker, Chari Kelly, Edward Smith, and Gisela Triana, respectively. Five incumbents on the Fourteenth Court (Houston) were defeated: Brett Busby, Marc Brown, Martha Hill Jamison, Bill Boyce, and Donavan. The same thing happened to the First Court of Appeals (Houston), which lost incumbents Jane Bland, Harvey Brown, Michael Massengale, and Terry Yates. The blue wave hit the Dallas Court of Appeals as well, sweeping out Chief Justice Douglas Lang and Justices Molly Francis, David Evans, Craig Stoddart, and Jason Boatright. A sixth seat went to Democrat Cory Carlyle over Republican John Browning in an open contest. Democrats also built their majority on the Fourth (San Antonio), re-electing Justices Pat Alvarez, Luz Chapa, and Rebecca Martinez, defeating Marialyn Barnard (the lone remaining Republican incumbent on the court), and winning an open seat (Lisa Rodriguez over Rebecca Simmons). Democrats Gina Benavides and Nora Longoria were re-elected to the Thirteenth Court (Corpus Christi), while Rudy Delgado narrowly defeated Jaime Tijerina for an open seat.

TADC PAC Report

By: Leonard R. (Bud) Grossman, Trustee Chairman
Craig, Terrill, Hale & Grantham, L.L.P.; Lubbock

Now, more than ever, is the time to commit to our slogan: "I BACK THE PAC". We are entering a very busy, and extremely important legislative session. In one voice, our TADC Political Action Committee (PAC) has made very important contributions. We need the PAC to make a difference especially this year for our profession and sustaining our civil justice system.

Over the years, there have been plenty of special interest groups who have attempted to erode our civil jury system. The TADC does more than counteract such interests. The PAC advocates for the independence of the legal profession and fairness in our judicial system.

On January 8, 2019, the 86th Legislature convenes in Austin. Here are just a small number of items we expect will be considered during this upcoming Session:

- Medical costs affidavit from CPRC §18.001: Last Session we were working closely with our legislature to curb the recent abuses of this statute. Much work has already gone into continuing the efforts gained through the tireless efforts of our committee. This Session we plan to get this much improved bill enacted. We also plan to stem the controversy caused by the use of third party factoring companies.

- Chancery Court: Last Session, the TADC worked diligently to stop an attempt to establish a Chancery Court system similar to that in Delaware. We anticipate a proposal (disguised in a different form) will be used in an attempt to establish an appointment business. We need to be proactive in addressing these concerns.

The PAC's activities are funded in large part by your donations, and those that volunteer their time and resources. It is critical we raise awareness of our mutual interests by supporting the various legislators and judicial candidates, regardless of their political party affiliation. The TADC supports the integrity of the judicial system, the right to trial by jury, and our independence as a profession. The PAC helps us achieve these goals by devoting our time and interest towards candidates and leaders who likewise support our values.

Our mission starts now - BACK THE PAC! TADC encourages our members to donate $300, or more if you are able, to the PAC. Your donation not only earns you a bright green sticker on your nametag proclaiming your support through our organization, but more importantly, it supports the TADC's ability to recognize appropriate legislation and to be heard throughout the halls of the State Capitol and through the courts across the state.

Help us make positive and sustained impact – make your contribution now!

2019 TADC PAC Trustees

Leonard R. Grossman, Trustee Chair
Craig, Terrill, Hale & Grantham, L.L.P.
9816 Slide Rd., Ste. 201 PH: 806/744-3232
Lubbock, TX 79424 FX: 806/744-2211
Email: budg@cthglawfirm.com

Pamela McClain Madere
Jackson Walker, L.L.P.
100 Congress Ave., Ste. 1100 PH: 512/236-2000
Austin, TX 78701 FX: 512/236-2002
Email: pmadere@jw.com

Slater C. Elza
Underwood Law Firm, P.C.
P.O. Box 9158 PH: 806/376-5613
Amarillo, TX 79105 FX: 806/379-0316
Email: slater.elza@uwlaw.com

Chantel Crews
Ainsa Hutson Hester & Crews LLP
5809 Acacia Cir. PH: 915/845-5300
El Paso, TX 79912 FX: 915/845-7800
Email: ccrews@acaciapark.com

3 YEAR TERM

Keith B. O'Connell
MehaffyWeber, PC
4040 Broadway St., Ste. 522 PH: 210/824-0009
San Antonio, TX 78209 FX: 210/824-9429
Email: keithoconnell@mehaffyweber.com

J. Dennis Chambers
Atchley, Russell, Waldrop & Hlavinka, L.L.P.
P.O. Box 5517 PH: 903/792-8246
Texarkana, TX 75505 FX: 903/792-5801
Email: dchambers@arwhlaw.com

Joseph L. Hood, Jr.
Windle Hood Norton Brittain & Jay, LLP
201 E. Main Dr., Ste. 1350 PH: 915/545-4902
El Paso,, TX 79912 FX: 915/545-4911
Email: hood@windlehood.com

Brantley Ross Pringle Jr.
Wright & Greenhill, P.C.
900 Congress Ave., Ste. 500 PH: 512/476-4600
Austin, TX 78701 FX: 512/476-5382
Email: rpringle@w-g.com

Fred D. Raschke
Mills Shirley L.L.P.
P.O. Box 1943 PH: 409/763-2341
Galveston, TX 77553-1943 FX: 866/674-7808
Email: fraschke@millsshirley.com

2 YEAR TERM

Clayton E. Devin
Macdonald Devin, P.C.
1201 Elm St., Ste. 3800 PH: 214/744-3300
Dallas, TX 75270 FX: 214/747-0942
Email: cdevin@macdonalddevin.com

Brock C. Akers
The Akers Firm, PLLC
3401 Allen Pkwy., Ste. 101 PH: 713/877-2500
Houston, TX 77019 FX: 713/583-8662
Email: bca@akersfirm.com

W. Bruce Williams
Cotton, Bledsoe, Tighe & Dawson, P.C.
P.O. Box 2776 PH: 432/684-5782
Midland, TX 79702 FX: 432/682-3672
Email: bwilliams@cbtd.com

Nicholas Zito
Ramey, Chandler, Quinn & Zito, P.C.
750 Bering Dr., Ste. 600 PH: 713/266-0074
Houston, TX 77057 FX: 713/266-1064
Email: nez@ramey-chandler.com

James R. Old Jr.
Hicks Thomas LLP
111 Congress Ave., Ste. 1010 PH: 512/827-7990
Austin, TX 78701 FX: 409/419-1733
Email: jold@hicks-thomas.com

1 YEAR TERM

Michele Y. Smith
MehaffyWeber, PC
P.O. Box 16 PH: 409/835-5011
Beaumont, TX 77704 FX: 409/835-5177
Email: michelesmith@mehaffyweber.com

Andrew L. Kerr
Clark Hill Strasburger
2301 Broadway St. PH: 210/250-6000
San Antonio, TX 78215-1157 FX: 210/250-6100
Email: andy.kerr@strasburger.com

Mike Mills
Atlas, Hall & Rodriguez, L.L.P.
P.O. Box 3725 PH: 956/682-5501
McAllen, TX 78502-3725 FX: 956/686-6109
Email: mkmills@atlashall.com

Thomas C. Riney
Riney & Mayfield LLP
320 S. Polk St., Ste. 600 PH: 806/468-3200
Amarillo, TX 79101 FX: 806/376-4509
Email: triney@rineymayfield.com

V. Elizabeth Ledbetter Broyles
Hicks Thomas LLP
111 Congress Ave. Ste. 1010 PH: 512/827-7990
Austin, TX 78701 FX: 409/419-1733
Email: jbroyles@hicks-thomas.com

SECRETARY/TREASURER

Bobby Walden
Texas Association of Defense Counsel
400 West 15th St., Ste. 420 PH: 512/476-5225
Austin, TX 78701 FX: 512/476-5384
Email: bwalden@tadc.org

Texas Association of Defense Counsel-PAC

The Political Action Committee of the Texas Association of Defense Counsel ~ TADC-PAC

THE TADC WILL WORK TIRELESSLY DURING THE LEGISLATIVE SESSION PROTECTING THE CIVIL JUSTICE SYSTEM!
Show Your Support for the TADC PAC

Your contribution allows the TADC PAC to support ***Qualified*** candidates for the Texas Supreme Court, Texas Legislature & other key positions

CAN YOU AFFORD NOT TO CONTRIBUTE?

- **Over 95% of Candidates & Incumbents Supported by the TADC PAC are elected to office**
- **The TADC PAC supports candidates based on record & qualifications, NOT political affiliation**
- **The TADC PAC supports candidates who favor a strong and independent judiciary, oppose infringement on the right to jury trials and agree with the need to preserve the civil justice system.**
- **The TADC PAC opposes Statutory Employer and Collaborative Law Legislation**
- **The TADC PAC supports efforts to end the capricious enforcement of arbitration clauses and to limit their applicability to matters where the parties to the agreement have equal bargaining power**
- **Your PAC Trustees represent Your interests to candidates and office holders**
- **Other Associations ARE giving; if you don't, that WILL put you at a distinct disadvantage**

As a thank-you for your support, contributions of $250 or more will receive a fantastic chrome refillable rollerball pen with the TADC Brand. Sign those letters in style!

I BACK THE TADC PAC

Enclosed is my TADC PAC Contribution in the amount of:

$150.00_____ $250.00_____ $300.00_____ Other $_____

_____Yes, my contribution is for $250.00 or more, please send me the chrome refillable rollerball pen with the TADC Brand.

Payment Enclosed:

$_____
amount enclosed

I am paying by: (circle one)
Check Visa Mastercard Amex

Make checks payable to the TADC PAC, return order form and payment to the TADC, 400 West 15th St., Ste. 420, Austin, Texas 78701 FAX: 512/476-5384

Name_____

Firm_____

Address_____

City/State/Zip_____

Email_____
If a receipt is requested, please provide an email address

_____
Card Number **Exp. Date**

_____
Signature as it appears on card

2018-2019
TADC Young Lawyers Committee

Kyle Briscoe, Chair
The Peavler Group, PC
2215 Westgate Plz. PH: 214/999-0550
Grapevine, TX 76051 FX: 214/999-0551
Email: kbriscoe@peavlergroup.com

Jesse Beck
MehaffyWeber, PC
P.O. Box 16 PH: 409/835-5011
Beaumont, TX 77704 FX: 409/835-5177
Email: jessebeck@mehaffyweber.com

Lauren Burgess
Segal McCambridge Singer & Mahoney, Ltd.
100 Congress Ave., Ste. 800 PH: 512/476-7834
Austin, TX 78701 FX: 512/476-7832
Email: lburges1@gmail.com

Raul De La Garza
Roerig, Oliveira & Fisher, L.L.P.
10225 N. 10th St. PH: 956/393-6300
McAllen, TX 78504 FX: 956/386-1625
Email: rdelagarza@rofllp.com

M. Blake Downey
ScottHulse, P.C.
201 E. Main Dr., 11th Fl. PH: 915/533-2493
El Paso, TX 79901 FX: 915/546-8333
Email: bdow@scotthulse.com

Liliana Elizondo
Royston, Rayzor, Vickery & Williams, L.L.P.
55 Cove Cir. PH: 956/542-4377
Brownsville, TX 78521 FX: 956/542-4370
Email: liliana.elizondo@roystonlaw.com

Elizabeth A. Fitch
Hallett & Perrin, P.C.
1445 Ross Ave., Ste. 2400 PH: 214/953-0053
Dallas, TX 75202 FX: 214/922-4142
Email: efitch@hallettperrin.com

Lauren Goerbig
Burns, Anderson, Jury & Brenner, L.L.P.
P.O. Box 26300 PH: 512/338-5322
Austin, TX 78755 FX: 512/338-5363
Email: lgoerbig@bajb.com

Alma F. Gomez
Liskow & Lewis
1001 Fannin St., Ste. 1800 PH: 713/651-2900
Houston, TX 77002 FX: 713/651-2908
Email: afgomez@liskow.com

Rebekah Hudgins
Kane Russell Coleman Logan PC
1601 Elm St., Ste. 3700 PH: 214/777-4200
Dallas, TX 75201 FX: 214/777-4299
Email: rhudgins@krcl.com

Peyton Kampas
Cowen & Garza, LLP
506 E. Dove Ave. PH: 956/994-9170
McAllen, TX 78504 FX: 956/618-2324
Email: peyton@cowengarza.com

John T. Kovach
Law Office of John T. Kovach, PLLC
214 Morton St. PH: 281/232-8378
Richmond, TX 77469 FX: 713/308-4079
Email: john@lawkovach.com

Eliott V. Nixon
Crenshaw, Dupree & Milam, L.L.P.
P.O. Box 64479 PH: 806/762-5281
Lubbock, TX 79464 FX: 806/762-3510
Email: enixon@cdmlaw.com

Mary Kate Raffetto
Beck | Redden LLP
1221 McKinney St., Ste. 4500 PH: 713/951-3700
Houston, TX 77010 FX: 713/951-3720
Email: mkraffetto@beckredden.com

Bradley Reeves
Pillsbury Winthrop Shaw Pittman LLP
909 Fannin St., Ste. 2000 PH: 713/276-7628
Houston, TX 77010 FX: 713/276-7673
Email: bradley.reeves@pillsburylaw.com

Katherine Kassabian Reid
McDonald Sanders, P.C.
777 Main St., Ste. 1300 PH: 817/336-8651
Fort Worth, TX 76102 FX: 817/334-0271
Email: kkassabian@mcdonaldlaw.com

Eric S. Rich
Shafer, Davis, O'Leary & Stoker
P.O. Drawer 1552 PH: 432/332-0893
Odessa, TX 79760 FX: 432/333-5002
Email: erich@shaferfirm.com

Paige A. Thomas
Goldman & Peterson PLLC
10100 Reunion Pl., Ste. 800 PH: 210/340-9800
San Antonio, TX 78216 FX: 210/340-9888
Email: paige@ljglaw.com

Alex Yarbrough
Riney & Mayfield LLP
320 S. Polk St., Ste. 600 PH: 806/468-3200
Amarillo, TX 79101 FX: 806/376-4509
Email: ayarbrough@rineymayfield.com

2018 TADC Summer Seminar

Argonaut Hotel ~ July 25-29, 2018 ~ San Francisco, California

The TADC held its 2018 Summer Seminar in fabulous San Francisco, California! The Argonaut Hotel on Fisherman's Wharf provided the perfect venue for this family-friendly CLE. Program Chairs Gayla Corley and Robert Ford assembled a top-notch program including Judge Mark Davidson speaking on *"The Rock and Roll Rules of Court"* as well as topics ranging from Legal Malpractice for the Trial Lawyer to the Changing Realities in Marijuana Law.

Gayla Corley, Claire & Chantel Ancell, John & Dawn Crews

Elizabeth, Andrew & Alex Roberts with Rob Ford and Anne Roberts

Frances & Darin Brooks with Bud & Karen Grossman, Monica & Greg Wilkins and Laura Frase

Jennie & Nick Knapp with Jacqueline & Brad Reeves

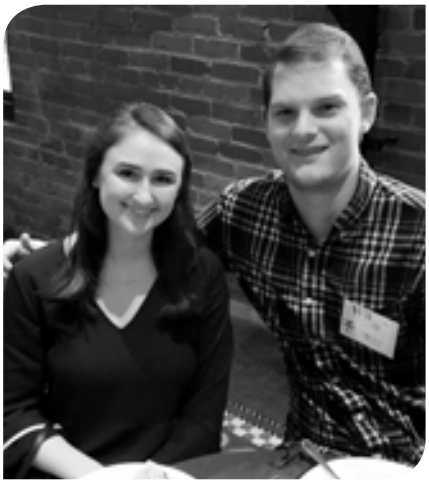
www.tadc.org

2018 TADC Summer Seminar

George Arnold, Frances Brooks & David Chanthachone

Chantel, Claire & Michael Ancell with
Ana Delgado & Jim Hunter

Harrison, Sierra, Steele, Sarene & Sterling Smith



Kate Broussard & Wil Thorne

Judge Mark Davidson

Class Time!

By: Steven K. Hayes
Law Offices of Steven K. Hayes,
Fort Worth

When and How to Fuss

Attorney Fee Segregation, Summary Judgment Evidence, and Discovery Objections—Oh My!

Dorothy, the Tin Man, and the Scarecrow had their own "Oh, my" moment in the forest, but we're not going to worry about lions, or tigers, or bears right now. We're going to fret about what several relatively recent cases pointed out about another worrisome triumvirate: segregating attorney's fees, objecting to summary judgment evidence, and making discovery objection.

Courts of appeal disagree as to when—or, in bench trials, even whether—a party has to object to the failure to segregate its attorney's fees when evidence of those fees comes in.

As we know, some lawsuits involve claims as to which party can recover attorney's fees, and some claims as to which no attorney's fees can be recovered. Absent an intertwining of those claims, we know that the party (or parties) seeking fees must segregate their fees on those claims for which they can recover fees from their fees incurred on non-fee claims. We also know that a party can waive its objection as to the failure of the other party to so segregate its fees. *Green Int'l v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997). But the question of when, in a bench trial, the other party has to object to a failure to segregate its fees, remains a source of conflict among the various courts of appeals. And the fact that some courts recognize that a failure to segregate fees in a bench trial can be raised for the first time on appeal in the guise of a legal or factual sufficiency complaint makes the issue even more problematic. Before we look at some of the ramifications these holdings have for how one proves up, and objects to evidence concerning, a claim for fees, let's look at what some of the courts have held.

> **There is no consistent rule among the courts of appeals as to whether a post-evidentiary objection will preserve a complaint about a lack of fee segregation.**

In its recent opinion in *Home Comfortable Supplies, Inc. v. Cooper*, the Houston 14th Court noted "there is as yet no consistent rule about when an objection to the failure to segregate attorneys' fees must be raised in a case tried without a jury," pointing out that:

- "[s]ome courts have held that the objection must be raised when the fee testimony and billing records are offered as evidence," directing attention to cases from the Houston 1st and San Antonio Courts.

- "[s]ome courts, including this one, have held that an objection to the failure to segregate can be raised in a post-judgment motion," citing its own cases;

- "[s]ome courts—again including this one—have held that a post-judgment motion does not preserve the complaint," pointing to one of its own cases, and cases from the Austin and Fort Worth Courts. The Fort Worth Court had held that

"the objection that attorney's fees are not segregated as to specific claims must be raised before the trial court issues its ruling. Raising the issue for the first time post-judgment, such as in a motion for new trial, is untimely and any error is waived." *Huey-You v. Huey-You*, No. 02-16-00332-CV, 2017 WL 4053943, 2017 Tex. App. LEXIS 8750, at *7 (App.—Fort Worth Sep. 14, 2017, no pet.) (mem. op.); and

- "[s]ometimes a combination of holdings is found even in a single case," citing a case from the Corpus Christi Court

544 S.W.3d 899, 908-909 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

The *Cooper* Court decided it "need not resolve the conflicts in the case law," because "in . . . closing argument" the objecting party's attorney "first pointed out" the other side had failed to segregate its fees. *Id.,* at 909. The Court focused on what was said in closing argument "even though no party has cited" that closing argument in its briefing on the waiver issue. *Id.*, at 909, n. 5. *Cooper* "conclude[d] that this statement, made before the case was submitted to the factfinder, preserved the complaint," declaring that "[t]his conclusion is consistent both with our prior holding that such a complaint must be raised before fees are awarded . . . and our cases permitting a fee-segregation complaint to be raised in a post-judgment motion." *Id.*, at 909-910.

Recent cases have indicated that a party can first complaint about the failure to segregate fees after the evidentiary phase—and perhaps can do so for the first time on appeal, through a legal or factual sufficiency challenge.

More recently, the Dallas Court decided a fee segregation preservation issue, in a case involving both a majority and concurring opinion:

- The majority held that "on this record"—always a scary qualifier if you want to rely on a case—the party objecting to the failure of the other side to segregate its attorney's fees did not waive that objection, even though by the time the objection was made, "the evidence was closed, trial had concluded, and the trial court had already made its ruling awarding" the other side its fees. *Anderton v. Green*, No. 05-17-00024-CV, 2018 WL 3526162, 2018 Tex. App. LEXIS 5573, at *20 n.4 (Tex. App.—Dallas July 23, 2018, no pet. hist.). *Anderto*n involved (among other claims) declaratory judgment actions brought by both sides, with the losing party first asserting such an action. In fact, the losing party—which complained about the trial court awarding the winning party its fees, and in particular complained about the winner party failing to segregate its fees—had actually argued in the trial court that it should recover *all* of its fees on its declaratory judgment action, and proved up those fees without engaging in any fee segregation. So why did the *Anderton* majority hold that the fee segregation complaint not too late to preserve error? Because after the trial court had sent out a letter announcing what it's ruling would be, the losing party then complained about the winning party's failure to segregate fees. The trial court thereafter "could, and did, rule on [the losing party's objection], stating in a letter to the parties that 'Attorney Fees are not limited to legal work segregated to the declaratory judgment action.'" *Id.*

- The concurring opinion, on the other hand, said that the complaint about the failure to segregate fees "is substantively a complaint about the sufficiency of the evidence to

> support the amount awarded . . . . As such, that issue could have been raised for the first time on appeal from this nonjury case. Tex. R. App. P. 33.1(d). Therefore, future appellate courts should not need to address the error preservation issues" on complaints about the failure to segregate recoverable attorneys' fees. *Id.,* 2018 WL 3526162, ____ Tex. App. LEXIS ____ (App.—Dallas July 23, 2018) (Whitehill, J., concurrence).

Interestingly, in *Huey-You* (one of the cases mentioned by the Fourteenth Court in its opinion in *Cooper*, *supra*), the Fort Worth Court had foreshadowed the concurrence in *Anderton*, pointing out that in a bench trial, an objection about the sufficiency of the evidence can first be raised on appeal, and "a challenge to the reasonableness of fees is a challenge to the sufficiency of the evidence to support the award, which may be raised for the first time on appeal." *Huey-You*, at *7-8.

So, what to do in a fee segregation fight?

So—without dealing with the egg-headed consternation about whether a post-evidentiary complaint concerning fee segregation leads to the most efficient accomplishment of the goals of error preservation—where does that leave us, in terms of segregating your fees in a bench trial? Here's what I think:

- First of all, you might give some thought to trying your attorney's fee claim to a jury. Doing so at least forecloses your opponent from invoking a legal or factual sufficiency argument to first raise the fee segregation complaint on appeal;

- Know the exact position on this issue taken by the court of appeals to which an appeal will be taken in your case. But, as *Cooper* pointed out, sometimes even a given court of appeals is not consistent on the issue. Furthermore, sooner or later, the Supreme Court will step in on this issue, meaning that your roll of the dice may make you the test case. If you have a bench trial on fees, realize that it is at your own peril that you fail to segregate your fees. The same can be said about not objecting, during the evidentiary phase of the trial, to the other side's failure to segregate.

- As of now, that peril in a bench trial is a retrial on the issues of attorney's fees, i.e., a "remand . . . to determine the recoverable amount." *Anderton*, at *27, citing *Tony Gullo Motors I, L.P. v. Chapa,* 212 S.W.3d 299, 314 (Tex. 2006);

- In any event, if you fail to object to the failure to segregate fees in the trial court, or at the evidentiary phase of the trial, use a legal and/or factual sufficiency complaint on appeal to complain about the failure to segregate fees.

If your legitimate discovery objections get obscured by unfounded objections, you will waive them all.

If you get a chance to hear my buddy Bob Wise speak about *Texas Discovery: Twenty Things You Don't Know and May be Doing Wrong*, you really should do so. You should also get a copy of the book he and Keenon Wooten wrote, *Texas Discovery: A Guide to Taking and Resisting Discovery under the Texas Rules of Civil Procedure* (2d ed. 2018).

A recent court of appeals decision case emphasized one of the things Bob pointed out in his speech. In *De Anda v. Webster*, the Houston 14th Court noted that many of the objections which the Appellant asserted in response to discovery requests "were unfounded," including privilege objections which "the rules prohibit . . . . *See* Tex. R. Civ. P. 193.2(f)." The court also noted

that the Appellant had "lodged the same global, prophylactic string of objections . . . to every interrogatory and request for production." No. 14-17-00020-CV, ___ WL___, 2018 Tex. App. LEXIS 5727, at *19-20 (Tex. App.—Houston [14th Dist.] July 26, 2018) (memo. op.). The court "therefore conclude[d] that [Appellant] waived his objections to [the] discovery requests. See Tex. R. Civ. P. 193.2(e) ("An objection . . . that is obscured by numerous unfounded objections, is waived unless the court excuses the waiver for good cause shown.")." *Id.*

Keep this in mind in responding to discovery requests.

To avoid being a test case, get a signed written order on your objections to summary judgment evidence.

For almost twenty years, the courts of appeals have disagreed as to whether an order granting a motion for summary judgment can serve as an implicit ruling on objections to summary judgment evidence. *See* Section 5.Q, *supra*; Patton, *Summary Judgments in Texas*, §6.10[4][e]. For that reason—and because it is a best practice, recommended by all trial judges I've talked to—I recommended and still recommend that you provide the trial court with a proposed order concerning your objections to summary judgment evidence, and make sure the judge signs it. The order serves as a road map for the judge, a checklist for you, and an assurance that a ruling has occurred.

In two recent cases, the Supreme Court addressed this issue. One case has held that a signed written order is necessary to preserve a complaint about evidentiary objections for a summary judgment proceeding, but the other case has waffled, and indicated that an implied ruling might be good enough. In those cases, the Supreme Court held:

- In 2017, the Court held that an objection to "late-filed summary-judgment evidence. . . . has been waived," because "[e]ven objected-to evidence remains valid summary-judgment proof 'unless an order sustaining the objection is reduced to writing, signed, and entered of record.' *Mitchell v. Baylor Univ. Med. Ctr.*, 109 S.W.3d 838, 842 (Tex. App.—Austin [*sic*-Dallas] 2003, no pet.)." *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572 (Tex. 2017);

- Then, in June of this year, the Supreme Court dealt with an objection to the form of a summary judgment affidavit—apparently, the failure of a notary to sign a jurat—and held that the objection as to the form of a summary judgment affidavit was waived because the Defendant "failed to obtain a ruling from the trial court on its objection to the affidavit's form." *Seim v. Allstate Tex. Lloyds*, No. 17-0488, ___WL___, 2018 Tex. LEXIS 648, *12-13 (June 29, 2018).

Both these decisions leave a lot to desire:

- *Rincones* did not mention the fact that Tex. R. App. P. 33.1 allows an implied ruling, nor did it mention the
- disagreements among the courts of appeals;

- *Seim* did not mention *Rincones*, and then had these seemingly contradictory statements, in terms of whether a written ruling was necessary to preserve a complaint about summary judgment evidence:

- In *Seim*, the Supreme Court said that "[w]e hold the Fourth and Fourteenth courts have it right," expressly endorsing the following holdings from those courts that a party objecting to an affidavit's form has to "obtain a written ruling at, before, or very near the time the trial court rules on the motion for summary judgment or risk waiver," and that "a trial court's ruling on an objection to summary[-]judgment evidence is not implicit in its ruling on the motion for summary judgment." *Seim*, at *10, citing *Dolcefino v. Randolph*, 19 S.W.3d 906, 926 (Tex. App.-Houston [14th Dist.] 2000, pet. denied), and at *11, citing *Well Sols., Inc. v. Stafford*, 32 S.W.3d 313, 317 (Tex. App.-San Antonio 2000, no pet.);

- Having said that, the Court then focused on whether the trial court had made an implied ruling on the objection. For example, *Seim* said that "nothing in this record serves as a clearly implied ruling by the trial court on Allstate's objections" to the summary judgment affidavit. In support of that assertion, the Supreme Court pointed out that "even without the objections, the trial court could have granted summary judgment against the [Plaintiffs] if it found that their evidence did not generate a genuine issue of material fact." *Seim*, at *11-12.

Interestingly, about a week after the Supreme Court decision in *Seim*, the San Antonio Court issued an opinion in a case with one very practical, if informal, guide as to what to do if you get to the summary judgment hearing and either have not prepared, or cannot find, your proposed order on your evidentiary objections: have your trial judge take a copy of your objections to summary judgment evidence, write his or her rulings beside each objection, inscribe "Ordered as noted & Bench filed 2-23-2016," and then date and sign the document. If all that happens, you have your ruling—at least in the San Antonio Court's district. *Yarbrough v. McCormick*, No. 04-17-00283-CV, ___WL___, 2018 Tex. App. LEXIS 4719, at *8 (Tex. App.—San Antonio June 27, 2018, no pet. h.). Just be careful that you don't think that a ruling set out on a docket sheet will get the job done—"[e]ntries made in a judge's docket are not accepted as a substitute for that record. The order must be reduced to writing, signed by the trial court, and entered in the record." *See In re Bill Heard Chevrolet, Ltd.*, 209 S.W.3d 311, 314 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

Having said all that—take a proposed order concerning your summary judgment evidentiary objections to the hearing. And make sure the trial judge signs it. Otherwise, you may not have preserved your complaint.

Steve Hayes is a solo appellate practitioner in Fort Worth, Texas. He Chaired the Appellate Section of the State Bar (2016-2017), and served on the Litigation Section Council from 2011-2017. He has previously served on the Amicus Committee of the TADC. You can reach him at shayes@stevehayeslaw.com. His website is at www.stevehayeslaw.com.

2018 West Texas Seminar

Inn of the Mountain Gods ~ August 10-11, 2018 ~ Ruidoso, NM

The TADC held its 8th installment, 6th held jointly with New Mexico, of the 2018 West Texas Seminar in nice and cool Ruidoso, New Mexico on August 10-11. The Inn of the Mountain Gods provided the perfect venue for this family-friendly CLE. Program Chairs Bud Grossman from TADC and Mark Standridge from NMDLA assembled a top-notch program including lawyers and judges from both states. Reciprocity well underway, this seminar needs to be on your radar if you hold both a Texas and New Mexico Law License and if not, the weather is outstanding for a nice cool, inexpensive August CLE.

Robert Kellahin, Deena Buchanan, Dan Hernandez & Samantha Link

Denis Dennis & Dick Holland

Alex & Kelsey Yarbrough with Chantel Crews

Program Chair Bud Grossman

Carol Chavez, Priscilla Griffin, Marissa Hernandez with Rebecca & Michael Dean

By: Gregory R. Schuelke, CPA/CFF/CGMA, CVA, CFE
HSSK, Houston

Construction, Fraud and Tone at the Top

Entities small and large implement internal controls to minimize operational fraud and abuse as well as to strengthen the reliability of financial statements. The construction industry is not immune to fraud. Weak internal controls lead to overcharges, decreased profits, loss of future work and even preventable lawsuits.

Seasoned professionals in both business and construction can lay out objectives such as limiting access to assets (security) and implementing procedures to insure proper authorization of materials and consumables, and fraud experts can design a program for internal controls with strong consideration given to the potential opportunity, pressure, and rationalization of likely fraudsters. However, the best procedures can still fail if the tone at the top (owner/general contractor) is complacent, if procedures are not routinely tested, and internal controls are not regularly updated for new schemes and industry changes.

The tone at the top refers to the organization's general ethical climate and its dedication to preventing occupational fraud and abuse. From the entities' perspective, it refers to owner(s), board of directors, audit committee, and senior management. When new and evolving external factors are affecting the industry or when engaging in a new venture or practice area, the tone at the top will influence how the organization responds.

The management is responsible for internal controls, but the internal controls need to be monitored and tested on an ongoing basis. New or enhanced technologies improve processes and operations; however, that same technology may cause the modification of existing internal control environment and create new opportunities for fraud, by creating new pressures, opportunities, and rationalization to commit fraud not previously contemplated. For example, a technician who inspects five welds a day may, with new technology, be able to inspect eight. Although there is an increased efficiency benefiting the company, the technician may rationalize that hourly pay should also increase proportionally and therefore look for weaknesses in the current internal controls.

The mindset of investigators, accountants and auditors may be to catch fraud when it strikes, but the underlying attitude should be to minimize fraud and definitely prevent reoccurrence of similar schemes. Admittedly, a great number of improvements to internal controls will be reactionary; however, technology works in both directions. Fraud experts help management identify fraud exposures, but the tone at the top decides on materiality. Therefore, the cost of implementing additional internal controls is compared to the risk tolerance of the entity. Stated differently, an entity may be willing to assume some risk of fraud and the financial impact when the perceived cost to audit, monitor, and revise

business operations and related internal controls are taken into consideration.

Below, are two examples showing a lack of a strong ethical environment causing potentially fraudulent activity to exist and persist.

Insulation Contractor Scheme

A contractor provided all the insulation work at two similar refineries owned by one entity. Internal controls were developed at the direction of the entity's management that separated duties and provided for proper authorization for each purchase of insulation material and work. The internal controls provided for proper reporting of costs and were tested for proper authorization on a regular basis.

When a reasonableness test was performed that indicated the insulation work at one refinery far exceeded the cost at the second refinery, an investigation was initiated.

The investigation found that the first refinery purchased more insulation material than was required for numerous authorized work orders. All material requisitions were properly authorized and the supporting receiving documents were in order. Nevertheless, there was a fraudulent scheme as theorized by the investigators that:

(1) the contractor would submit excessive material requests on active work orders;
(2) the contractor would send an employee to pick up the material directly from the insulation vendor; and,
(3) the employee would deliver the material to a third person or entity. Thus, the insulation material never entered the refinery.

The internal controls were strong as written, but weak as executed.

The scheme spanned several years which may have been assisted by a high-risk tolerance established by the board of directors, audit committee and/or owners. The internal controls were assumed to be effective but needed to be physically tested after a reasonableness test failed. For years, internal accountants and construction oversite focused their efforts on verifying proper documentation in support of costs but ignored the reasonableness of the charges to the respective projects.

It was not until the management shifted to investigate and test the controls beyond mere documentation that the scheme unfolded. Whether the entity revises its internal controls to prevent similar future fraud schemes and tests those revisions is a question for the entity's management and owners who set the tone at the top.

Delay – Aggressive Claim or Fraud

Subcontractor allegedly causes damage to the project while performing its work on site. The ensuing delay claim by the general contractor is several million dollars covering a forty-day period. Initially, the claim averaged over $100,000 per day but was later reduced to an average of $70,000 per day for the cost of idle heavy equipment (graders, backhoes, bulldozers, etc.) and operators on site. The contract, which was a cost-plus contract, documented the equipment and labor cost each month. The claim period and amounts submitted for the delay were consistent with the prior period's billing submissions and procedures.

However, the claim had two critical

flaws. First, a concurrent delay. Second, a billing protocol that did not hold up to scrutiny.

The project was delayed by workmanship issues prior to the subcontractor beginning its work on site. The same issue continued for another thirty days. Only after repairs, modifications, and related corrections were made to resolve the issue, were testing and inspections performed and modifications made to the work of the subcontractor. The delay period was successfully challenged and limited to less than a ten-day period.

Both operational records and financial records were tested. The billing protocol was to charge for all heavy equipment on-site and the cost of operators. This was the practice throughout the project. However, as the project progressed, it was found that efficiency was decreasing. In fact, as more records were scrutinized, more of the submitted delay costs appeared to be inappropriate.

First, there were fewer operators than heavy equipment charged to the delay claim. Therefore, the cost of labor for operators was successfully challenged.

Second, analysis of equipment usage was performed and found that most of the heavy equipment had completed its planned work or was "stacked" waiting for the contractor's next project. That equipment was eliminated from the analysis leaving only equipment necessary for site maintenance (water trucks) and future planned work. Thus, the daily cost of heavy equipment and related labor was successfully challenged and reduced to less than $5,000 per day.

A conclusion may be that the general contractor took an aggressive approach in computing the delay claim. However, the general contractor should have known that the owner would have also been involved in the delay claim(s) process. As stated previously, the billing practice predated the delay claim at hand. Therefore "stacked" equipment charges were also billed to owner in non-delay periods. The delay claim was scrutinized for both days and costs and how the event increased the cost of the construction project. This in-depth analysis should have been expected when the delay claim was formulated and submitted.

The owner sets the tone of the overall project management and may have initiated controls to monitor construction and verify costs. But, the owner did not have the controls tested and updated as warranted throughout the project. Again, this may be due to the risk tolerance established at the project's inception. When contractor began charging idle heavy equipment to the project, those initial controls were ineffective. Luckily for the owner, there was a delay claim submitted by the contractor and a third party that analyzed those alleged construction costs. Otherwise, the owner would have continued to overpay for the project.

For the contractor, if the tone at the top followed a higher ethical standard, the damages originating from the delay would be more transparent and the delay claim itself would have been resolved less contentiously and the loss of future work would not be at issue.

The "tone at the top" can provide a strong ethical environment. The ethical environment will either increase or decrease risks and put significant pressure on internal controls; therefore, limiting overcharges, loss of future work and lawsuits.

Papers Available

2018 TADC Summer Seminar ~ San Francisco, California ~ July 25-29, 2018

Planning Today for Tomorrow's Catastrophic Accident – Mike Bassett – 20 pg. PPT

Legal Malpractice in Texas – Third Edition – David J. Beck, Alex B. Roberts – 314 pgs.

Check Your Contracts: Additional Insured Coverage and Other Insurance Tidbits – Darin Brooks – 32 pg. PPT

"Self-Driving" Cars and Human Operators – Caroline Crump – 48 pg. PPT + 14 pg. PPT

TUTSA, the DTSA, *Berry-Helfand* and More: A Fresh Look at the Recoverable Damages in Trade Secrets Cases – Christopher D. Porter, Robert H. Ford – 17 pgs. + 25 pg. PPT

Measley's Emerging Toxic Torts – When Strategies Go Awry – Part 2 in a Series on Cognitive Biases and Their Impact – Laura A. Frase – 10 pgs. + 15 pg. PPT

The Rockin' Rules of Court – Judge Mark Davidson – 62 pg. PPT

Interlocutory Appeals 101 – Jamie Matuska – 33 pg. PPT

CPRC 18.001 (and friends) – Chantel Crews – 23 pg. PPT

Trends in Marijuana Laws – Robert Raich – 4 pg. PPT

Opposing Experts: Bias and How to Find It – Bradley J. Reeves – 16 pg. PPT

Reverse Mentoring with a Technological Twist – Marie Trimble Holvick – 13 pg. PPT

Employment Law Update – Diana Macias Valdez – 30 pgs

2018 West Texas Seminar ~ Ruidoso, New Mexico ~ August 10-11, 2018

Update on Energy Litigation – David W. Lauritzen, presented by Bradley Bains – 50 pgs. + 54 pg. PPT

Seven Things You Need to Know About 18.001 Affidavits – Mike H. Bassett, presented by Leonard R. Grossman – 43 pg. PPT

Litigating Like a Hometowner – Highlights of New Mexico and Texas Law for Litigators – Deena Buchanan, Dan Hernandez, Michael Dean and William Anderson – 15 pg. PPT

2017-2018 NMDLA Amicus Update – Mark D. Standridge – 5 pgs.

The Texas Lawyer's Creed – 2 pg. PPT

Papers Available

2018 Annual Meeting ~ Santa Fe, New Mexico ~ September 19-23, 2018

Amicus Briefs and Your Practice – Roger W. Hughes – 7 pgs.

Civility in Litigation – Slater C. Elza – 13 pgs. + 37 pg. PPT

Cross Examination of Treating Physicians – Joshua L. Nicholls – 13 pgs. + 18 pg. PPT

Defending Government Investigations and Regulatory Proceedings – Jenny Lee Smith – 49 pgs. + 31 pg. PPT

Ethics in the Practice of Law – Robert D. Dinsmoor – 19 pgs. + 96 pg. PPT

Jury Selection – Mark Stradley – 25 pg. PPT

Lewy and the Law – Alzheimer's and Dementia and Their Intersection with the Law – Don W. Kent – 28 pg. PPT

Preserving Error: Post-Verdict – Lisa Bowlin Hobbs – 27 pg. PPT

Proving a Better Damages Case – Elizabeth M. Fraley – 44 pg. PPT

Recent Developments in Texas Trade Secret Law – John S. Collins – 16 pgs. + 36 pg. PPT

Reptile Mania – What Drives the Hysteria and the Process to De-Bunk It – Carlos Rincon – 25 pg. PPT

Supreme Court of Texas Update – The Honorable Debra Lehrmann – 102 pgs. + 108 pg. PPT

The New World of Mandamus – Lawrence M. Doss – 26 pgs. + 20 pg. PPT

Update on Indemnity Contracts and Insurance Coverage for Indemnity Obligations – Sandra Liser – 29 pgs.

What the Trial Lawyer Needs to Know About the Jury Charge – Craig L. Reese – 39 pgs.

2018 Deposition Boot Camp ~ Lubbock, Texas ~ October 5, 2018

Preparing for and Taking the Deposition – Thomas C. Riney – 14 pg. PPT

Deposing Medical Witnesses – Scott Mann – 33 pg. PPT

Effective and Ethical Witness Preparation – John C. Shea – 15 pgs.

Example Outline for Deposition of Treating Physicians – Josh L. Nicholls – 9 pgs.

Example Outline for Deposition Preparation of Witness – Slater C. Elza – 3 pgs.

Papers Available

2018 Deposition Boot Camp Continued

Example Outline for Witness Preparation – Kyle Briscoe – 10 pgs.

How Far Can You Go In Preparing a Witness? – Slater C. Elza – 34 pg. PPT

Objections – 1 pg.

Preparing and Defending the Corporate Representative – Mitzi S. Mayfield – 36 pg. PPT

Preparing Your Expert to Testify – Janet Colaneri – 32 pg. PPT

Purposes of a Deposition – Max Wright – 5 pg. PPT

The Ethics of Preparing a Witness – Vianei Lopez Braun, Jo Ann Merica, The Honorable Melody M. Wilkinson and Jordan P. Woody – 11 pgs.

Witness Preparation – Karl E. Hays, Jennifer L. Tull, Edwin J. Terry Jr. and James A. Vaught – 12 pgs.

COST OF PAPERS

10 pages or less..... $10.00
11-25 pages..... $20.00
26-40 pages..... $30.00
41-65 pages……..…....$40.00
66-80 pages..... $50.00
81 pages or more $60.00

HOW TO ORDER

YOU MAY ORDER THESE PAPERS BY FAX, E-MAIL, OR U.S. MAIL.

Please indicate the title of the paper, the author & meeting where the paper was presented when ordering. TADC will invoice you when the papers are sent. Papers will be sent to you via email unless otherwise requested.

A searchable database of papers is available on the TADC website: www.tadc.org

Buyers Beware of the "As Is" Clause When Purchasing Commercial or Residential Property

By: Tara L. Sohlman
Cooper & Scully, P.C., Dallas

Texas permits buyers and sellers to enter into real estate contracts containing "as is" clauses, and such clauses will be enforced barring evidence showing the clause is invalid. Commercial and residential property purchase agreements can contain a clause stating the buyer is purchasing the property "as is" or "in its present condition," which has been interpreted by Texas courts to operate the same as an "as is" clause. *See Lutfak v. Gainsborough,* No. 01-15-01068-CV, 2017 WL 2180716, at *3 (Tex. App.—Houston [1st Dist.] May 18, 2017, no pet.) (mem. op). If the clause is valid, the "as is" clause will provide protection for the seller on many claims a buyer could assert relating to the property as the clause will negate the key elements of reliance and causation.

A. What Is a Buyer Doing When Agreeing to Purchase a Property "As Is"?

By agreeing to an "as is" clause, a buyer assumes the responsibility of the assessing a property's value and condition. Further, the buyer assumes the risk that the property will be less than the purchase price. The Texas Supreme Court explained that "[b]y agreeing to purchase something "as is," a buyer agrees to make his own appraisal of the bargain and to accept the risk that he may be wrong. The seller gives no assurances, express or implied, concerning the value or condition of the thing sold." *Prudential Insurance Company of America v. Jefferson Associates, Ltd.,* 896 S.W.2d 156, 161 (Tex. 1995) (citations omitted).

A valid "as is" clause prevents a buyer from holding a seller liable if the property is worth less than the price paid. When a buyer agrees to an "as is" clause, the buyer assumes the risk on his own. He agrees to take on the risk in determining the value of the property. A buyer need not undertake this risk; the option is to require that the seller assume part or all of that risk by providing warranties. As a result, the buyer becomes the sole cause of his injury as he removed the possibility that the seller's acts or omissions would cause him to suffer damage. *Id.* The buyer's assumption of the responsibility and risk constitutes a new and independent basis for the purchase, and the result is that the buyer disavows reliance on the seller's representations. *Id.*; *Lutfak,* 2017 WL 2180716, at *3.

An "as is" clause protects the seller from many claims that a buyer could raise in relation to the purchase of the property. The "as is" clause negates the essential elements of reliance and causation for many of these claims, such as breach of contract, negligence, fraud, violations of Texas' Deceptive Trade Practices Act ("DTPA"), and breach of express or implied warranties. *Prudential Insurance Company of America,* 896 S.W.2d at 160 (proof that conduct caused damages was a necessary element under fraud, negligence, DTPA, and breach of duty of good faith and fair dealing theories); *Barnett v. Coppell North Texas Court, Ltd.*, 123 S.W.3d 804, 815 (Tex. App.-Dallas 2003, pet. denied) (in breach of contract action, plaintiff must prove that breach caused damages).

B. Is the "As Is" Clause an Important "Basis of the Bargain"?

To assess whether an "as is" clause is enforceable, Texas courts will examine "the nature of the transaction and the totality of the circumstances." The clause must be an important "basis of the bargain," not an incidental or boilerplate provision in the contract. Further, the parties should be of relatively equal bargaining power. *See Kupchynsky v. Nardiello*, 230 S.W.3d 685, 691 (Tex. App.—Dallas 2007, pet. denied) ("as is" clause was not an important "basis of the bargain" as there was no evidence that it was a bargained for contract term in the parties' agreement); *Fletcher v. Fletcher v. Edwards*, 26 S.W.3d 66, 70 (Tex. App.—Waco 2000, pet. denied); *see also Johnson v. Perry Homes*, No. 14-96-01391-CV, 1998 WL 751945, at *9-*10 (Tex. App.—Houston [14th Dist.] Oct. 29, 1998, pet. denied) (concluding that because numerous disclaimers in contract were part of the "boiler-plate" provisions in the contracts, there was no evidence the disclaimers were the "basis of the bargain" between appellants and Perry, nor were they part of a release executed in settlement of a dispute).

The "in its present condition" clause in *Van Duren v. Chife,* ___ S.W.3d ____, No. 01-17-00607-CV, 2018 WL 2246213 (Tex. App.—Houston [1st Dist.] May 17, 2018, no pet. h.) was unsuccessfully challenged as ambiguous and constituting a boilerplate clause. The Van Durens also argued that they were tricked into signing the contract version with the "in its present condition" clause. The Van Durens purchased a house from the Chifes. They signed a Texas Real Estate Commission form contract which provides two options for acceptance of the property: "in its present condition" or subject to the seller's completion of specific repairs. The Van Durens' contract selected the "in present condition" clause. Two years after moving in, the Van Durens discovered water intrusion and wet, rotting wood throughout the structure of the house. *Id.,* 2018 WL 2246213, at *2.

The "in present condition" clause failed to constitute boilerplate language or be ambiguous. As addressed, the contract gave the parties two choices to accept the property "in its present condition" or subject to the seller's completion of repairs. When a contract clause gives the parties the option to choose from two or more options, the clause is negotiable and will not be construed as boilerplate. Further, the "in present condition" clause is not ambiguous and operates as an "as is" clause. 2018 WL 2246213, at *6.

The Van Durens also asserted that they were tricked into agreeing to the "in present condition" clause. The original version of the contract did not contain the language "in its present condition," however, the evidence established that the clause was added after negotiations between the Van Durens and Chifes. 2018 WL 2246213, at *7. The Van Durens did not present evidence that they were tricked into signing the final version with the "as is" clause. They tried to argue that they did not read it word for word, but failing to read the contract will not be a ground for avoiding its terms. *Id.* In fact, in Texas, parties who sign a contract are deemed to know and understand its contents and will be bound by the terms set forth therein. *See Royston, Razor, Vickery & Williams, LLP v. Lopez,* 467 S.W.3d 494, 500 (Tex. 2015).

C. The Buyer's Inspection: Creating an Independent Basis for the Purchase and Negating the Elements of Causation and Reliance

The buyer's inspection creates a new and independent basis for the purchase and results in negating the elements of reliance and causation on the buyer's claims against the seller. The buyer's inspection constituted pivotal point in the case in *Lutfak v. Gainsborough,* No. 01-15-01068-CV, 2017 WL 2180716 (Tex. App.—Houston [1st Dist.] May 18, 2017, no pet.) (mem. op.). In

this case, the "in present condition" clause from a standard Texas Real Estate Commission One to Four Residential Resale Contract protected the seller of the property from the buyer's claims. Jeff Gainsborough purchased a townhome owned by Giliad Luftak in 2010. Luftak was the townhome's original purchaser and owned the townhouse since 2009. Prior to the sale, Luftak completed a Seller's Disclosure Notice pursuant to Texas Property Code section 5.008. The Disclosure Notice gave Gainsborough the right to inspect the property and, for consideration of $100.00, the right to terminate the contract during a ten-day period. *Id.*, 2017 WL 2180716, at *1.

One day after signing the contract, Gainsborough inspected the house, and numerous problems were identified. Two days after the original contract was signed, the parties amended the contract to add the home inspection report and identify items that were to be repaired by Luftak. The parties later supplemented the amended terms; Gainsborough placed $2,500 of the purchase price in escrow. If Gilad made the repairs within thirty (30) days of escrow, he could demand release of the $2,500 from escrow. Otherwise, Gainsborough could demand release of the money and make the repairs himself. The amendment and supplement of the amendment did not alter or supersede the "in present condition" purchase of the house as agreed under the original contract. *Id.*, 2017 WL 2180716, at *2 & *4. After closing on the townhouse, receiving the $2,500 because Luftak did not make the repairs, and moving in, Gainsborough discovered additional problems with the house, including it leaked when it rained and that the air conditioning was insufficient to cool the home. He hired two contractors to make repairs. *Id.*

Gainsborough argued he was fraudulently induced to accept the house "in its present condition." He asserted that the Seller's Disclosure Notice identified only an unwrapped pipe in the attic broke in winter 2009 and that repairs were made, including replacing sheetrock and insulation. Gainsborough asserted that Luftak knew the townhouse had suffered water penetration and wood rot but did not disclose these facts. A letter showed that the 2009 burst pipe actually flooded the home and cost Luftak $150,000 in repairs; there were also photos of the damage taken by his insurer. However, Gainsborough conducted his own independent inspection which revealed several areas of concern that he argued Luftak concealed from him. His inspector concluded that there were areas of water penetration and damage, but the causes could not be determined. Gainsborough did not renegotiate the contract after the inspection to remove the "as is" provision. "[T]exas courts consistently have concluded that a buyer's independent inspection precludes a showing of causation and reliance if the buyer continued to complete the purchase after the inspection revealed the same information that the seller allegedly failed to disclose." *Id.*, 2017 WL 2180716, at *5 (citations omitted). This principle becomes particularly true when the buyer does not renegotiate the purchase agreement after the inspection reveals the information and the buyer chooses to rely on the inspection. *Id.* As a result, the "as is" clause prevents Gainsborough from establishing the elements of causation and reliance that are necessary for his claims for fraud, DTPA violations, and negligent misrepresentation. *Id.*

D. Fraudulent Concealment: Can It Destroy a Buyer's Reliance?

Exceptions exist to the enforceability of an "as is" clause. A seller will not be protected by an "as is" clause that the seller induced the buyer to enter into through fraudulent representations or by concealing information. A seller cannot assure the buyer of a specific condition to induce the buyer to enter into the "as is" agreement and then later disavow that assurance. Likewise, a seller can also not be protected if a buyer is entitled to inspect the property and that inspection is impaired or obstructed by the seller. In these types of situations, an "as is" clause will not bar the buyer's recovery against the seller. *Prudential Insurance Company of America,* 896 S.W.2d at 162. To defeat an "as is" clause with a fraudulent concealment type

argument, the buyer must establish that the seller possessed the information that the seller allegedly conceals or misrepresents.

The type of information required for fraudulent concealment to defeat an "as is" clause can be found in *Nelson v. Najm,* 127 S.W.3d 170 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). In this case, Najm purchased a gas station from the Nelsons "as is" without conducting an inspection. The Nelsons did not disclose the existence of an underground waste oil tank and specifically told Najm that no inspections were necessary. *Id.* at 172-173. After purchasing the gas station, Najm discovered the underground tank and that the property did not comply with environmental standards. *Id.* at 173. In this situation, the "as is" case will not protect the sellers from a fraud claim. The Nelsons concealed a known fact and said an inspection was not necessary. There was no independent inspection that would eliminate the buyer's reliance on their representations. An "as is" clause entered into as a result of fraudulent misrepresentations will not negate the causation element of fraud. *Id.* at 175-176.

Establishing what the seller should know or may know was insufficient to defeat the "as is" clause in *Prudential Insurance Company of America v. Jefferson Associates, Ltd.,* 896 S.W.2d 156 (Tex. 1995). In this case, the purchaser sued the seller for misrepresentation and concealment with respect to the existence of asbestos in the building. Asbestos was discovered in the building three years after the purchase. The contract for the purchase of the building contained the following provision:

> As a material part of the consideration for this Agreement, Seller and Purchaser agree that Purchaser is taking the Property "AS IS" with any and all latent and patent defects and that there is no warranty by Seller that the Property is fit for a particular purpose. Purchaser acknowledges that it is not relying upon any representation, statement or other assertion with respect to the Property condition, but is relying upon its examination of the Property. Purchaser takes the Property under the express understanding there are no express or implied warranties . . . .

Id. at 160. The bargaining power and knowledge of the purchaser and seller were not issues in this case. The buyer challenged the "as is" clause on the basis that the seller concealed information.

The purchaser argued that the "as is" clause could not be enforced because the seller fraudulently concealed information. The evidence showed that the buyer requested the building plans and specifications, and the seller produced only the "as built" plans. The seller had the plans and specifications but asserted it could not locate them at the time the buyer requested them. In viewing the evidence in the light most favorable to the buyer, the Supreme Court assumed that the seller concealed the plans and specifications. Even that concealment was not sufficient to overcome the "as is" clause.

The plans and specifications did not establish that the building contained asbestos. Instead, they only showed that the building may contain asbestos. The specifications called for the use of a fireproofing material called Monokote, which contained asbestos (based on earlier published information), or an approved substitute. Thus, the seller could not be certain if Monokote was used in the building. The seller also knew that buildings built about the same time as this one, in the early 1970s, contained asbestos. Overall, the evidence showed that the seller knew there was a good chance that the building could contain asbestos. *Id.* at 159-160. However, there was no evidence showing the seller *actually knew* the building contained asbestos. "A seller has no duty for failing to disclose facts he does not know. Nor is a seller liable for failing to disclose what he only should have known." *Id.* at 162. The seller was not liable for failing to disclose the possibility

of asbestos as the seller did not possess specific knowledge that the building contained asbestos. *Id.*

Later discovered defects may also not support a fraudulent concealment or inducement challenge to an "as is" clause. In *Van Duren v. Chife,* ___ S.W.3d ____, No. 01-17-00607-CV, 2018 WL 2246213 (Tex. App.—Houston [1st Dist.] May 17, 2018, no pet. h.), as addressed previously, the Van Durens discovered water intrusion and resulting wood rot and structural damage two years after purchasing the house from the sellers. They claimed that the sellers' broker, Stacy Mathews, fraudulently induced them to enter into the contract by failing to inform them about misrepresentations in the Seller's Disclosure. A Seller's Disclosure is required by Texas Property Code section 5.008. The seller, not the broker, completes the Seller's Disclosure. Under the statute, the Disclosure must only be completed "to the best of the seller's belief and knowledge as of the date the notice is completed and signed." Tex. Prop. Code § 5.008(d). A seller does not possess an ongoing duty to update the Disclosure. A broker cannot be held liable for misrepresentations or omissions in the Disclosure as they are not his; only the seller makes the representations in the Disclosure. *Id.* A broker possesses a duty to come forward if he has reason to believe the Disclosure is false or inaccurate, and he can be liable if a plaintiff shows that he knew the Disclosure to be untrue. *Id.*; Tex. Occ. Code § 1101.805(e). Similarly, repaired defects will not rise to the level of fraudulent concealment. A repaired defect differs from having awareness of an existing defect. "[K]nowledge of a leak that was repaired, without more, does not support a reasonable inference of knowledge of an existing defect." 2018 WL 2246213, *8.

The Van Durens asserted they relied on the Chifes' Seller Disclosure, which indicated that the Chifes were not aware of any defects or malfunctions in the house, roof repairs, other structural repairs, water penetration, wood rot, or conditions that would materially affect one's health or safety. The Van Durens argued that the Sellers' Disclosure was false and that the Chifes and Mathews knew of water penetration before they sold the house. The evidence available showed prior emails from November 2012 between the Chifes and builder about "construction anomalies" and "code violations" and asking that repairs be made. The Chifes were not happy that the builder sent a carpenter to make the repairs. Mr. Chife testified that the builder fixed everything, and they experienced no further problems with the house. November 2013 e-mails were also introduced to show that Mathews informed the Chifes of several issues with the house, including an exterior leak at the front door from the balcony above wherein he advised that this could be a structural issue. Mrs. Chife told him to have the area checked and fixed. The Chifes and Mathews testified the e-mails were written after the Van Durens brought the balcony leak to Mathews' attention. Mathews testified he photographed the area and other issues that the Van Durens pointed out during one of their visits to the house. 2018 WL 2246213, *2-*3. Overall, evidence showed Mathews knew of the November 2013 e-mails. However, the evidence failed to support that he knew of undisclosed defects. 2018 WL 2246213, *8. There was no evidence that Mathews fraudulently induced the Van Durens to enter into the contract.

As these cases demonstrate, a buyer must be very cautious when entering into a bargained for "as is" clause and should build in protections such as a termination period during which an inspection can be conducted. After an inspection, if defects are found, the buyer must determine if they are acceptable, and if the buyer wants to renegotiate the contract or terminate the contract. Otherwise, the buyer may face very difficult challenges in overcoming an "as is" clause. Texas law supports enforcement of these clauses, and they will have the effect of negating key elements in most of the claims a buyer would bring against a seller.

Welcome New Members!

Lindsey Wetterau Alagha, Chamblee Ryan, P.C., Dallas

Nacer Aounallah, Royston, Rayzor, Vickery & Williams, L.L.P., Brownsville

Bradley H. Bains, Cotton, Bledsoe, Tighe & Dawson, PC, Midland

Nicholas S. Baldo, Stevens Baldo & Lighty, P.L.L.C., Beaumont

Richard Barton III, MehaffyWeber, PC, Houston

Thomas P. Brandt, Fanning Harper Martinson Brandt & Kutchin, PC, Dallas

Chad Castille, Germer PLLC, Houston

Frank Catalano, Fee, Smith, Sharp & Vitullo, L.L.P., Dallas

Mark Chisholm, Craig, Terrill, Hale & Grantham, L.L.P., Lubbock

Patrick Clerkin, Clerkin, Sinclair & Mahfouz, LLP, Richardson

Jeryn R. Crabb, Cotton, Bledsoe, Tighe & Dawson, P.C., Midland

David Criss, Criss Law Group, PLLC, Dallas

Jennifer D. Cully, Sheehy, Ware & Pappas, P.C., Houston

Jennifer Dancy, Payne & Blanchard, L.L.P., Dallas

Katarzyna Daniec, Brock Person Guerra Reyna, P.C., San Antonio

Tyler DiMarino, Sprouse Shrader Smith, PLLC, Amarillo

Brendan Doherty, Gieger Laborde & Laperouse, LLC, Houston

Joanne Early, Foley Gardere, Dallas

Amy C. Falcon, Porter Hedges LLP, Houston

Lane Fletcher, Henry Oddo Austin & Fletcher, P.C., Dallas

Efrain Forte, Payne & Blanchard, L.L.P., Dallas

Titiana D. Frausto, Underwood Law Firm, P.C., Amarillo

Jonathan Galley, Craig, Terrill, Hale & Grantham, L.L.P., Lubbock

Joel E. Geary, Vincent, Serafino, Geary, Waddell & Jenevein, Dallas

Ryan K. Geddie, Martin, Disiere, Jefferson & Wisdom, L.L.P., Dallas

Bryan J. Guymon, Underwood Law Firm, P.C., Pampa

Sandra Howard, Germer PLLC, Beaumont

Jeffrey Kuhnhenn, Kelly Hart & Hallman LLP, Midland

John S. Langley, Uzick & Oncken, P.C., Austin

Laura Canada Lewis, Mullin Law PC, Richardson

Randy Edward Lopez, Gault, Nye & Quintana, L.L.P., McAllen

Jamie Matuska, MehaffyWeber, PC, Beaumont

Matthew McCracken, Germer PLLC, Houston

Welcome New Members!

Tiffany Means, Kelly Hart & Hallman LLP, Midland

Ashley Menage, Walker Wilcox Matousek LLC, Houston

Katherine Mendiola, Cowen & Garza, LLP, McAllen

Chris Mugica, Jackson Walker, L.L.P., Austin

Nathaniel Navey, Royston, Rayzor, Vickery & Williams, L.L.P., Brownsville

Shabaz Nizami, Clerkin, Sinclair & Mahfouz, LLP, Richardson

J. Kevin Oncken, Cooper & Scully, P.C., Austin

W. Todd Parker, The Parker Firm, P.C., Tyler

Samuel J. Polak, Payne & Blanchard, L.L.P., Dallas

Meagan Z. Polk, Clerkin, Sinclair & Mahfouz, LLP, Richardson

Aaron Pool, Donato, Minx, Brown & Pool, P.C., Houston

Teresa E. Porter, Sheehy, Ware & Pappas, P.C., Houston

Lara Price, Sheehy, Ware & Pappas, P.C., Houston

Daena G. Ramsey, Vaughan & Ramsey, Arlington

Amber D. Reece, Figari + Davenport, LLP, Dallas

Jacob L. Richardson, Orgain, Bell & Tucker, L.L.P., Houston

Joshua Ritter, Fairchild, Price, Haley & Smith, L.L.P., Center

Christina K. Schovajsa, Eastham, Watson, Dale & Forney, L.L.P., Houston

Laura W. Slay, Rymer, Echols, Slay, Wilkerson & Nelson-Archer,P.C., Houston

Kevin C. Smith, Brackett & Ellis, P.C., Fort Worth

Robert Stearns, Brock Guerra Strandmo Dimaline Jones PC, San Antonio

Natalie Stevens, Payne & Blanchard, L.L.P., Dallas

Shawn Stewart, Payne & Blanchard, L.L.P., Dallas

Fred A. Stormer, Underwood Law Firm, P.C., Amarillo

Guillermo Tijerina, Vidaurri, Lyde, Rodriguez & Haynes, LLP, Edinburg

Gregory C. Ulmer, Baker & Hostetler LLP, Houston

Erica Valladares, Langley & Banack, Inc., San Antonio

John Wilson, Kelly Hart & Hallman LLP, Midland

Chauntelle R. Wood, Liskow & Lewis, APLC, Houston

Download Your Membership Application Today!

www.tadc.org

TEXAS ASSOCIATION OF DEFENSE COUNSEL

An Association of Civil Trial, Commercial Litigation & Personal Injury Defense Attorneys ~ Est. 1960

400 West 15th Street, Suite 420, Austin, Texas 78701 512/476-5225 Fax 512/476-5384 Email: tadc@tadc.org

Mr.
Mrs.
I, Ms. _____ hereby apply for membership in the Association and certify that I am
(circle one) Please print

a member in good standing of the State Bar of Texas, engaged in private practice; that I devote a substantial amount of my professional time to the practice of Civil Trial Law, Commercial Litigation and Personal Injury Defense and do not regularly and consistently represent plaintiffs in personal injury cases. I further agree to support the Texas Association of Defense Counsel's aim to promote improvements in the administration of justice, to increase the quality of service and contribution which the legal profession renders to the community, state and nation, and to maintain the TADC's commitment to the goal of racial and ethnic diversity in its membership.

Preferred Name (if different from above): _____

Firm: _____

Office Address: _____ City: _____ Zip: _____

Main Office Phone: / Direct Dial: / Office Fax: /

Email Address: _____ Cell: /

Home Address: _____ City: _____ Zip: _____

Spouse Name: _____ Home Phone: /

Bar Card No.: _____ Year Licensed: _____ Birth Date: _____ ☐ DRI Member?

Dues Categories:

***If joining October – July:**	**$185.00 Licensed less than five years (from date of license)**	**$295.00 Licensed five years or more**
If joining August:	$ 50.00 Licensed less than five years (from date of license)	$100.00 Licensed five years or more
If joining September:	$ 35.00 Licensed less than five years (from date of license)	$ 50.00 Licensed five years or more

*If joining in October, November or December, you will pay full dues and your Membership Dues will be considered paid for the following year. However, New Members joining after October 15 will not have their names printed in the following year's TADC Roster because of printing deadlines.

Applicant's signature: _____ Date: _____

Signature & Printed Name of Applicant's Sponsor:

_____
(TADC member) **Please print name under signature**

I agree to abide by the Bylaws of the Association and attach hereto my check for $_____ ***-OR-***

Please charge $_____ to my ☐ Visa ☐ MasterCard ☐ American Express

Card #: _____ Exp. Date: /

Please return this application with payment to:
Texas Association of Defense Counsel
400 West 15th Street, Suite 420

For Office Use

Date: _____

2019 TADC WINTER SEMINAR

January 30-February 3, 2019 | Steamboat Springs, Colorado

Program Co-Chairs: David Brenner, Burns, Anderson, Jury & Brenner, L.L.P., Austin
Megan Schmid, Thompson & Knight LLP, Houston

CLE Approved for: 8.5 hours including 2.25 hours ethics

Wednesday, January 30, 2019

6pm - 8pm TADC/LADC Welcome Reception

Thursday, January 31, 2019

6:45 - 9:00am Buffet Breakfast with LADC

7:15 - 7:30am Welcome & Announcements
Pam Madere, TADC President
Jackson Walker, L.L.P., Austin
David Brenner, Burns, Anderson, Jury & Brenner, L.L.P., Austin, Program Co-Chair
Megan Schmid, Thompson & Knight LLP, Houston, Program Co-Chair

7:30 - 8:05am *SHREDDIN' THE FRESH POWDER: COMMERCIAL LITIGATION UPDATE*
Megan Schmid, Thompson & Knight LLP, Houston

8:05 - 8:40am *THE SUPER G: VOIR DIRE*
Victor Vicinaiz, Roerig, Oliveira & Fisher, L.L.P., McAllen

8:40 - 9:25am *SWEEPING THE ICE WITH 18.001 AFFIDAVITS*
Lauren Goerbig, Burns, Anderson, Jury **&** Brenner, L.L.P., Austin

9:25 - 10:00am *SHARPENING YOUR EDGES: TOOLS FOR CROSS-EXAMINING EXPERTS*
Christy Amuny, Germer PLLC, Beaumont

10:00 - 10:35am *THE GIANT SLALOM: PRESENTING DAUBERT CHALLENGES*
David Boyce, Wright & Greenhill, P.C., Austin

Friday, February 1, 2019

6:45 - 9:00am Buffet Breakfast with LADC

7:15 - 7:30am Welcome & Announcements
Pam Madere, TADC President
Jackson Walker, L.L.P., Austin
Mickey S. deLaup, LADC President
Mickey deLaup, APLC, Metairie

7:30 - 8:45am *SKATING ON THIN ICE - ETHICS PANEL DISCUSSION (1.25 hrs ethics)*
Dane Ciolino - Moderator, Louisiana Association of Defense Counsel, Baton Rouge
The Honorable Frances Pitman, Second Circuit Court of Appeals, Shreveport
The Honorable Mike Pitman, First District Court, Shreveport
Max E. Wright, Kelly Hart & Hallman LLP, Midland
Darryl J. Foster, Bradley, Murchison, Kelly & Shea LLC, New Orleans

8:45 - 9:35am *PREVENTING THE AVALANCHE: FEDERAL PROCEDURE AND E-DISCOVERY UPDATE*
Dan K. Worthington, Ramon Worthington PLLC, McAllen
Sarah Stogner, Carver Darden, New Orleans

9:45 - 10:25am *ABRAHAM LINCOLN: LESSONS IN PROFESSIONALISM (.75 hrs ethics)*
E. Phelps Gay, Christovitch & Kearney, L.L.P., New Orleans

Saturday, February 2 2019

6:45 - 9:00am Buffet Breakfast with LADC

7:15 - 7:30am **Pam Madere**, TADC President
David Brenner, Program Co-Chair
Megan Schmid, Program Co-Chair

7:30 - 8:15am *COUNTING THE MEDALS: TEXAS SUPREME COURT & APPELLATE COURT UPDATE (.25 hrs ethics)*
Rich Phillips, Thompson & Knight LLP, Dallas

8:15 - 8:45am *THE TRIPLE AXEL: SHIFTING RESPONSIBILITY IN CONSTRUCTION*
David Wilson, MehaffyWeber, PC, Houston

8:45 - 9:25am *SKIS AND GUNS, BIATHALON: CHALLENGING OR ENFORCING ARBITRATION AND MEDIATION AGREEMENTS*
Jeff Jury, Burns, Anderson, Jury & Brenner, L.L.P., Austin

9:25 - 10:00am *CONTROLLING THE PUCK: GENERAL NEGLIGENCE UPDATE*
Curt Kurhajec, Naman, Howell, Smith & Lee, PLLC, Austin

10:00 - 10:35 *DISTRACTED DRIVING – UPDATE ON IMPACT IN PRODUCT LIABILITY AND TRUCKING CASES*
Robert Sonnier, Germer PLLC, Austin

Sunday, February 3, 2019

Depart for Texas

2019 TADC Winter Seminar

January 30-February 3, 2019 | Steamboat Grand | Steamboat Springs, CO

2300 Mt. Werner Circle - Steamboat Springs, CO 80487

Pricing & Registration Options

Registration fees include Wednesday evening through Saturday group activities, including the Wednesday evening welcome reception, all breakfasts, CLE Program each day and related expenses and hospitality room.

Registration for Member Only (one person)	$675.00
Registration for Member & Spouse/Guest (2 people)	$875.00

Children's Registration

Registration fee for children includes Wednesday evening welcome reception, Thursday, Friday & Saturday breakfast

Children Age 12 and Older	$120.00
Children Age 6-11	$80.00

Spouse/Guest CLE Credit

If your spouse/guest is also an attorney and would like to attend the Winter Seminar for CLE credit, there is an additional charge to cover written materials, meeting materials, and coffee breaks.

Spouse/Guest CLE credit for Winter Seminar	$75.00

Hotel Reservation Information

For hotel reservations, **CONTACT THE STEAMBOAT GRAND DIRECTLY AT 877-269-2628 and reference the TADC Winter Seminar.** The TADC has secured a block of rooms at an EXTREMELY reasonable rate. It is **IMPORTANT** that you make your reservations as soon as possible ***as the room block will fill quickly***. Any room requests after the deadline date, or after the room block is filled, will be on a wait list basis.

DEADLINE F0R HOTEL RESERVATIONS IS DECEMBER 19, 2018

TADC Refund Policy Information

Registration Fees will be refunded ONLY if a written cancellation notice is received at least SEVEN (7) DAYS PRIOR (JANUARY 23, 2019) to the meeting date. A $75.00 ADMINISTRATIVE FEE will be deducted from any refund. Any cancellation made after January 23, 2019 IS NON-REFUNDABLE.

2019 TADC WINTER SEMINAR REGISTRATION FORM

January 30 - February 3, 2019

***For Hotel Reservations, contact the Steamboat Grand DIRECTLY at* 877-269-2628**

CHECK ALL APPLICABLE BOXES TO CALCULATE YOUR REGISTRATION FEE:

- ☐ **$ 675.00 Member ONLY (One Person)**
- ☐ **$ 875.00 Member & Spouse/Guest (2 people)**
- ☐ **$ 75.00 Spouse/Guest CLE Credit**
- ☐ **$ 120.00 Children 12 & Older _____**
- ☐ **$ 80.00 Children 6-11 _____**
- ☐ **$ (no charge) CLE for a State OTHER than Texas - a certificate of attendance will be sent to you following the meeting**
- ☐ **Save $50 on your total registration fee if postmarked by December 19, 2018. If registering online, use discount code EB50 and register by December 19, 2018.**

TOTAL Registration Fee Enclosed $_____

NAME:_____FOR NAME TAG:_____

FIRM:_____OFFICE PHONE:_____

ADDRESS:_____CITY:_____ZIP:_____

SPOUSE/GUEST (IF ATTENDING) FOR NAME TAG:_____

☐ *Check if your spouse/guest is a TADC member*

CHILDREN'S NAME TAGS:_____

EMAIL ADDRESS:_____

In order to ensure that we have adequate materials available for all registrants, it is suggested that meeting registrations be submitted to TADC by December 19, 2018.

PAYMENT METHOD:

A CHECK in the amount of $_____ is enclosed with this form.

MAKE PAYABLE & MAIL THIS FORM TO: TADC, 400 West 15th Street, Suite 420, Austin, Texas 78701 or register online at www.tadc.org

CHARGE TO: (circle one) Visa Mastercard American Express

_____

Card Number **Expiration Date**

Signature:_____ (as it appears on card)

TADC
400 W. 15th Street
Suite 420
Austin, TX 78701
PH: 512/476-5225
FX: 512/476-5384

(For TADC Office Use Only)

Date Received_____ Payment-Check#_____ (F or I) Amount_____ ID#_____

Exponent®

Exponent provides consulting and expert witness services to attorneys and insurers through a network of 20 U.S. offices

Some of our specialties in our Houston office include:

- Chemical Engineering
- Civil Engineering
- Environmental Forensics
- Environmental Sciences
- Explosion Investigations
- Fire Cause & Origin
- Human Health Exposure & Risk Assessment
- Hurricane Risk Assessment
- Intellectual Property Evaluation
- Mechanical & Materials Engineering
- Risk & Reliability Assessments
- Structural Analysis
- Toxicology

www.exponent.com
888.656.EXPO

10850 Richmond Avenue, Suite 175 | Houston, TX 77042 | 832.325.5700 | houston-office@exponent.com

Exponent is certified to ISO 9001

A Short Course on Online Notarization

By: Patrick T. Sharkey
Jackson Walker, L.L.P., Houston

Notary publics are the Rodney Dangerfields of the legal industry. They get no respect, yet their contributions to the legal community are priceless, particularly to real estate attorneys and title companies seeking to record documents in the Real Property Records of the 254 Counties in the State of Texas. Given the escalating technological advances associated with the practice of law, it is not surprising that, effective as of August 19, 2018, notary publics in Texas now have the ability to legally provide their notarization services online. This article will provide an overview of legal components of online notarization in Texas.

1. **Legal Authority**.

Notary publics in Texas derive their legal authority from three (3) sources: (1) Texas Government Code, Chapter 406, Subchapter C, (2) Texas Civil Practice and Remedies Code, Chapter 121, and Texas Administrative Code, title 1, Chapter 87. Although a detailed discussion of the qualifications required to be an online notary public in Texas is beyond the scope of this article, suffice it to say that a comprehensive review and understanding of each of the foregoing three (3) legal authorities is essential to assess the legitimacy of a purported online notarization.

The short course on online notarization requires one's appreciation of, and adherence to, the following principles. First, an "online notary public" must apply to the Texas Secretary of State and be appointed and commissioned by the Secretary of State as an "online notary public." Tex. Gov't. Code §§ 406.101(10), 406.105. Thus, current notary publics do not automatically become "online notary publics." As a result of this new appointment and commissioning requirement, it is imperative that Texas attorneys verify the validity of any notary public's claim to be an "online notary public."

Second, the Texas Secretary of State was charged by the Texas Legislature in Section 406.104 of the Texas Government Code to develop and maintain "standards for online notarization." These "standards" include standards for an online notary public to perform credential analysis and identity proofing. Effective as of August 19, 2018, the Texas Secretary of State promulgated the required "standards," which are published in Texas Administrative Code, Title 1, Chapter 87, Sections 87.70 and 87.71. Compliance with these promulgated standards is essential.

Third, as stipulated in Section 121.006 of the Texas Civil Practice and Remedies Code, the word "acknowledged" as used in Texas approved acknowledgement forms means the individual executing the document "personally appeared" before the notary public. Satisfaction of this "personally appeared" requirement is the crux of the validity of online notarization. In order to comply with the "personally appeared" element of "acknowledged," the Texas Legislature revised Section 121.006(c) of the Texas Civil Practice and Remedies Code to stipulate that a person may personally appear before the person taking the acknowledgment by "appearing by an interactive two-way audio and video communication that meets the online notarization requirements under Subchapter C, Chapter 406, Government Code, and rules adopted under that subchapter."

Thus, current technologies such as audio-video conferencing in offices and Facetime on cell phones allow an online notary public to validly acknowledge the appearance and signature of an individual located off-site. Of course, as noted in the Secretary of State's promulgated standards, the online notary public is charged with responsibility for implementing means of authentication of the identity of the parties, insuring the document presented for online notarization is the same document electronically signed by the principal, and securely creating and storing an electronic recording of the audio-video conference. As with all technological frontiers, there are many hurdles to overcome to insure the legal viability of an acknowledgment performed via online notarization.

2. **Online Notarization Forms**.

The first step in implementing the arrival of online notarization is to promulgate new acknowledgments which accommodate online notarization. Fortunately, the legal draftsmen in Texas quickly stepped up with universal acknowledgement forms for use in Texas. The following online notarization forms can be adapted to cover acknowledgments by attorneys-in-fact, executors, trustees, etc. In order to provide maximum flexibility for the online notary public and the principal, the new acknowledgments contain optional text to cover both the principal signing in the presence of the notary public as well as the principal signing remotely via an interactive two-way audio and video communication. The online notary public, as well as the attorneys present at the execution of the document, must insure the appropriate box is checked to preclude future disputes regarding the validity of the notarization.

To be clear, we are in the embryonic age of online notarization. There are no doubt numerous questions which have not been asked, much less answered, with respect to the implementation of online notarization. However, we do know the first step rests with the notary publics in Texas. They must apply to the Texas Secretary of State to be appointed and commissioned as "online notary publics." Once this initial implementation hurdle is overcome, the waterfall of new issues, concerns and challenges inevitably will follow. For now, let's enjoy the fact that a late night closing may not come to an abrupt halt due to the lack of an available notary public to personally witness the execution of the closing documents. Like 24-hour pharmacies, it will not be long before the legal community is besieged with advertisements for 24-hour online notarization services.

THESE ONLINE ACKNOWLEDGEMENTS ARE SAMPLE FORMS ONLY. OBTAIN LEGAL ADVICE BEFORE USING THESE SAMPLE FORMS.

STATE OF TEXAS §
§
COUNTY OF _____ §

{Long-form acknowledgment for individual}

Before me, the undersigned, a Notary Public in and for the State of Texas, on this day personally appeared {X name of person acknowledging}, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that {X he/she} executed it for the purposes and consideration expressed in it. The acknowledging person personally appeared by:

☐ physically appearing before me.

☐ appearing by an interactive two-way audio and video communication that meets the requirements for online notarization under Texas Government Code chapter 406, subchapter C.

Given under my hand and seal of office, this ____ day of _____, 20____.

_____
Notary Public – State of Texas

STATE OF TEXAS §
§
COUNTY OF _____ §

{Long-form acknowledgment for corporation}

Before me, the undersigned, a Notary Public in and for the State of Texas, on this day personally appeared {X officer's name}, {X officer's title} of {X name of corporation}, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that {X he/she} executed it as the act of {X name of corporation}, a {X state of incorporation} corporation, for the purposes and consideration expressed in the instrument, and in the capacity stated in it. The acknowledging person personally appeared by:

☐ physically appearing before me.

☐ appearing by an interactive two-way audio and video communication that meets the requirements for online notarization under Texas Government Code chapter 406, subchapter C.

Given under my hand and seal of office, this ____ day of _____, 20____.

_____
Notary Public – State of Texas

TADC Expert Witness Library

THANK YOU FOR YOUR CONTRIBUTION TO THE EXPERT WITNESS DATABANK:

Mr. Thomas D. Farris, Peterson Farris Byrd & Parker, P.C. (Amarillo)
Mr. Stewart K. Schmella, Lanza Law Firm, PC (Bellaire)
Mr. Ronald E. Mendoza, Davis, Cedillo & Mendoza, Inc. (San Antonio)
Mr. John T. Kovach, Law Offices of John T. Kovach (Richmond)
Mr. Mike H. Bassett, The Bassett Firm (Dallas)
Mr. Michael A. Golemi, Liskow & Lewis APLC (Houston)
Ms. Karen R. Bennett, Germer PLLC (Beaumont)
Mr. Brandon C. Cogburn, Atchley, Russell, Waldrop & Hlavinka, L.L.P. (Texarkana)
Mr. David E. Chamberlain, Chamberlain McHaney (Austin)
Mr. Nicholas E. Zito, Ramey, Chandler, Quinn & Zito, P.C. (Houston)
Mr. Paul M. Boyd, Boyd & Boyd (Tyler)
Mr. Thomas C. Riney, Riney & Mayfield LLP (Amarillo)
Mr. Ronald E. Tigner, Cozen O'Connor, P.C. (Houston)
Mr. Marc A. Sheiness, Sheiness, Glover & Grossman, LLP (Houston)

and a *Special Thank You* to all the Members who completed and returned the Expert Witness Follow-up Forms

EXPERT WITNESS DATABASE

The Texas Association of Defense Counsel, Inc. maintains an Expert Witness Index which is open only to TADC members or member firms. This index includes thousands of experts by name and topic or areas of specialty ranging from "abdomen" to "zoology." Please visit the TADC website (www.tadc.org) or call the office at 512/476-5225 or FAX 512/476-5384 for additional information. To contribute material to the Expert Witness Library, mail to TADC Expert Witness Service, 400 West 15th St, Suite 420 Austin, TX 78701 or email **tadcews@tadc.org.**

There is a minimum charge of $15.00, with the average billing being approximately $25.00, depending upon research time. You can specify geographical locations, in or out of state. Note that out-of-state attorneys may only access the Expert Witness Index upon referral from a TADC member.

A thousand things can go wrong out here. We can tell you which one actually did.

S-E-A has been investigating, researching, revealing and replicating the cause of accidents and failures on land and sea for over 40 years.

It doesn't matter whether it's a cargo ship, an offshore oil platform or a dockside loading machine, the harsh realities are the same. In the marine environment, permanence is a relative concept. While we aren't capable of changing that, we do have the expertise, experience and ability to find, illuminate and preserve the facts.

For more information please visit us at SEAlimited.com or call Wade Wilson or Dan Orlich at 800-880-7324.

800-880-7324 **Scientific Expert Analysis™** **www.SEAlimited.com**

TEXAS ASSOCIATION
OF DEFENSE COUNSEL

400 W. 15th Street
Suite 420
Austin, Texas 78701

Presorted
Standard
US Postage
PAID
Craftsman
Printers, Inc.

TADC

Calendar of Events

www.tadc.org

January 30-February 3, 2019
Winter Seminar
Steamboat Grand Hotel & Spa - Steamboat Springs, CO

May 1-5, 2019
Spring Meeting
Westin Savannah Harbor Resort - Savannah, Georgia

July 16-20, 2019
Summer Meeting
Hyatt Regency Maui - Maui, Hawaii