

# TADC

## PRODUCTS LIABILITY NEWSLETTER

*Selected Case Summaries*  
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### I. SUMMARY

1. The Texas Supreme Court, on an issue of first impression, held that no adequate remedy by appeal existed for the denial of a timely Texas Civil Practice & Remedies Code § 33.004 motion to designate responsible third parties in a tort action. The Texas Supreme Court concluded that “a relator need only establish a trial court’s abuse of discretion to demonstrate entitlement to mandamus relief with regard to a trial court’s denial of a timely-filed section 33.004(a) motion.” *In re Coppola*, 535 S.W.3d 506 (Tex. 2017).

2. The Fifth Circuit Court of Appeals, in a case of first impression, held that the 30-day period for a defendant to remove an action under 28 U.S.C. § 1446(b) began upon the defendant’s receipt of the transcript of deposition testimony that alerted the defendant that the case was removable. Relying on the plain meaning of, purpose of, and policy considerations behind Section 1446(b), the Fifth Circuit concluded that “information giving notice of removal must be contained in a writing” and thus oral deposition testimony does not begin the 30-day countdown in which a defendant can remove the action. *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602 (5th Cir. 2018).

3. The Texas Supreme Court clarified the application of Texas Rule of Evidence 403 to video evidence in a personal-injury case. As a matter of first impression, the Texas Supreme Court set forth a bright line rule for trial courts confronted with the admissibility of a video during trial – the proper exercise of discretion requires the trial court to actually view the video evidence before ruling on its admissibility. *Diamond Offshore Servs. Ltd. v. Williams*, No. 16-0434, 2018 WL 1122368 (Tex. Mar. 2, 2018).

4. The Fifth Circuit Court of Appeals held that the district court did not abuse its discretion in a defective product design action by refusing to deviate from the Texas pattern jury instruction. The Fifth Circuit explained that the definition of “safer alternative design” included in the Texas pattern jury instruction tracked the relevant Texas statute and common law and thus was a sensible choice to properly guide the jury. Further, in its decision, the Fifth Circuit, citing its prior decision in *Walther v. Lone Star Gas Co.*, 952 F.2d 119 (5th Cir. 1992), held that the district court’s commingling of the plaintiffs’ four alternative design theories into one broad-form jury question did not require reversal because each theory was legally valid. *Nester v. Textron, Inc.*, No. 16-51115, 2018 WL 1835816 (5th Cir. Apr. 18, 2018).

## II. DISCUSSION

### 1. *In re Coppola*, 535 S.W.3d 506 (Tex. 2017).

On an issue of first impression, the Texas Supreme Court held that no adequate remedy by appeal existed for the denial of a timely Texas Civil Practice & Remedies Code § 33.004 motion to designate responsible third parties in a tort action.

Relators, Frank and Bridget Coppola, seller-financed the sale of unimproved real property to Plaintiffs, Nancy Adams and Adams Investment Properties, LLC, who intended to build a veterinary clinic and pet boarding facility. Before closing, Plaintiffs confirmed that the land was properly zoned. At closing, however, Relators provided Plaintiffs with “a survey showing the property bore a 15-foot right-of-way.” Thereafter, Plaintiffs discovered that “local ordinances require a 25-foot right-of-way for any commercial improvement.” Plaintiffs sued Relators, alleging fraud and deceptive trade practices for failing “to disclose the right-of-way limitations that render the property unusable for its intended purpose.”

Seventy-six days before the third trial setting, Relators requested leave to designate the Plaintiffs’ transactional attorneys as responsible third parties under Section 33.004, alleging the attorneys breached their duty of care to the Plaintiffs for failing to disclose the effect of the right-of-way ordinance on the Plaintiffs’ intended use of the land. Plaintiffs argued this motion was untimely, failed to plead sufficient facts regarding the attorneys’ third-party responsibility, and improperly sought to designate attorneys as responsible third parties. The trial court summarily denied the motion without granting leave to replead, and the court of appeals denied mandamus relief. Relators petitioned the Texas Supreme Court for writ of mandamus.

The Texas Supreme Court began its analysis by looking to Section 33.004, which “permits a tort defendant to designate a person as a responsible third party by filing a motion ‘on or before the 60th day before the trial date unless the court finds good cause to allow the motion to be filed at a later date.’” Section 33.004 further provides that the trial court “‘shall grant leave to designate . . . a responsible third party’ unless

another party objects within fifteen days after service.” Even when there is a timely filed objection, the court must allow the designation “unless the objecting party establishes (1) the defendant did not plead sufficient facts concerning the person’s alleged responsibility and (2) the pleading defect persists after an opportunity to replead.”

Based on the plain language of Section 33.004, the Texas Supreme Court held that “the trial court erroneously denied the [Relators’] motion because it was filed more than sixty days before the trial setting and the trial court did not afford an opportunity to cure any pleading deficiency.” The Texas Supreme Court emphasized that nothing in Section 33.004 limits the phrase “trial date” to the initial trial date rather than the applicable trial date at the time of the motion and that nothing precludes the designation of an attorney as a responsible third-party. Further, regardless of the sufficiency of the Relators’ pleaded facts against the attorneys, the Texas Supreme Court noted that “[t]rial courts have no discretion to deny a timely filed motion to designate absent a pleading defect and an opportunity to cure, which did not occur here.”

Following its analysis of Section 33.004, the Texas Supreme Court addressed the adequacy of appellate review. In weighing the benefits of mandamus relief, the Texas Supreme Court concluded, “consistent with the weight of appellate authority, that the benefits generally outweigh the detriments” because “[a]llowing a case to proceed to trial despite erroneous denial of a responsible-third-party designation ‘would skew the proceedings, potentially affect the outcome of the litigation, and compromise the presentation of [the relator’s] defense in ways unlikely to be apparent in the appellate record.’”

Accordingly, the Texas Supreme Court held that no adequate remedy by appeal existed for the denial of a timely Section 33.004 motion and thus “ordinarily, a relator need only establish a trial court’s abuse of discretion to demonstrate entitlement to mandamus relief with regard to a trial court’s denial of a timely-filed section 33.004(a) motion.” The Texas Supreme Court conditionally granted the Relators’ petition for writ of mandamus and directed the trial court to vacate its order denying the Relators’ motion.

**2. *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602 (5th Cir. 2018).**

In a case of first impression, the Fifth Circuit Court of Appeals held that the 30-day period for a defendant to remove an action under 28 U.S.C. § 1446(b) began upon the defendant's receipt of the transcript of deposition testimony that alerted the defendant that the case was removable.

In Texas state court, Plaintiff, a sheet metal tacker for Avondale Shipyards, sued his prior employers and various other entities, including Defendants Huntington Ingalls, Inc. and Avondale Shipyards (collectively, "Avondale"), alleging negligence and strict liability claims for exposure to asbestos at his employment, which allegedly resulted in his contracting asbestos-related mesothelioma. Notably, Plaintiff's pleading failed to identify any vessels on which he worked.

On March 20, 2017, Avondale deposed Plaintiff, at which time Plaintiff could not remember working on a particular vessel, but when confronted with medical records, Plaintiff admitted that "if the [medical] records indicate that he had those injuries aboard the [vessel], he would agree that he worked on the [vessel]." On March 28, 2017, Avondale received the deposition transcript.

Thirty days after receipt of the deposition transcript on April 27, 2017, Avondale removed the case and claimed that the deposition transcript constitutes "other paper" for purposes of removal under Section 1446(b)(3). Plaintiff contested removal for being untimely under Section 1446(b)(3). The district court held that removal was untimely because "section 1446's removal clock began running on the date of the relevant oral testimony" and remanded the case.

The Fifth Circuit was tasked with reviewing "whether oral deposition testimony can constitute other paper, and if so, whether the testimony or the transcript started the removal clock in this instance." To begin its analysis, the Fifth Circuit considered the language of Section 1446(b)(3), which states that "'if the case stated by the initial pleading is not removable,' a defendant can also remove 'within 30 days after receipt . . . of a copy of an amended pleading, motion, order or other paper from which it may

first be ascertained that the case is one which is or has become removable.'"

Relying on the plain meaning of, purpose of, and policy considerations behind Section 1446(b), the Fifth Circuit concluded that "information giving notice of removal must be contained in a writing" and thus oral deposition testimony does not begin the 30-day countdown in which a defendant can remove the action. In accordance with its analysis, the Fifth Circuit adopted the following bright line rule: "Section 1446(b)(3)'s removal clock begins ticking upon receipt of the deposition transcript."

Applying this new bright line rule, the Fifth Circuit held that Avondale "timely removed within thirty days of receiving the deposition transcript." The Fifth Circuit vacated the order of remand to state court and remanded this action to the district court for further proceedings.

**3. *Diamond Offshore Servs. Ltd. v. Williams*, No. 16-0434, 2018 WL 1122368 (Tex. Mar. 2, 2018).**

As a matter of first impression, the Texas Supreme Court clarified the application of Texas Rule of Evidence 403 to video evidence in a personal-injury case and set forth the following bright line rule for trial courts confronted with the admissibility of a video during trial: the proper exercise of discretion requires the trial court to actually view the video evidence before ruling on its admissibility.

Plaintiff, an offshore rig mechanic, sued Defendant, his employer, under the Jones Act after injuring his back while working with a large piece of equipment on the rig. Plaintiff's treating physician declared him totally disabled, and Plaintiff did not return to work.

At trial, Plaintiff testified that he still suffers from constant pain and is unable to work or perform the activities he used to enjoy. To counter this testimony, Defendant offered surveillance video that its private investigator had taken of Plaintiff engaging in various physical activities after the injury. Plaintiff objected to the video on two grounds: (1) the video was improper impeachment evidence because Plaintiff admitted he could engage in the activities shown in the video, just not for an extended time period and not without pain, and (2) the video was inadmissible under Rule 403 as

unfairly prejudicial, cumulative, and misleading because it did not show Plaintiff's home life or the amount of medication Plaintiff took to be able to perform the activities. Defendant offered the video several times at trial, but the trial court, which never watched the video, sustained Plaintiff's objection, and the video was not admitted into evidence.

The jury ultimately rendered a \$10 million verdict in favor of Plaintiff, which included almost \$4 million for pain and suffering. Defendant appealed the verdict, and the Houston Court of Appeals affirmed in a split decision, determining that the trial court had not abused its discretion in excluding the video. Defendant appealed to the Texas Supreme Court, arguing the trial court erred in excluding the surveillance video without first viewing it.

The Texas Supreme Court agreed with the Defendant and held that when determining the admissibility of video evidence, the proper exercise of discretion requires the trial court to view it before ruling on its admissibility. The Texas Supreme Court further stated that "[w]hile trial courts have discretion in making evidentiary rulings, we cannot defer to discretion that was not actually exercised." Here, because the trial court never viewed the video being offered into evidence, the court could not have exercised discretion in determining its admissibility. The Texas Supreme Court's holding states a bright line rule for video evidence: "as a general rule, a trial court should view video evidence before ruling on admissibility when the contents of the video are at issue." The general rule does not apply to video taken during depositions, unless the objection is specific to a visual aspect of the deposition, and parties should submit representative excerpts of video evidence that is particularly lengthy or late-offered.

Conducting its own Rule 403 analysis, the Texas Supreme Court held that the video was admissible because its probative value was not substantially outweighed by concerns such as unfair prejudice, the potential to mislead the jury, and the needless presentation of cumulative evidence. Video evidence of a personal injury plaintiff is probative as to critical allegations like pain and suffering and can also undermine a plaintiff's credibility. The Texas Supreme Court rejected Plaintiff's argument that the video was cumulative of his testimony that he could perform all the activities depicted, reasoning

videos "are qualitatively different than other types of evidence" and give "a more panoramic representation" of the evidence than a document, testimony, or even a photograph. The Texas Supreme Court also rejected Plaintiff's complaint that the video misled the jury because it was an incomplete depiction of Plaintiff's everyday life. Any omissions from or inaccuracies in the video go to the weight of the evidence, not its admissibility, and Plaintiff was free to argue to the jury that the video only presented a limited snapshot of his daily life. The Texas Supreme Court further held that the trial court's exclusion of the video was harmful because it was crucial to Defendant's defense of Plaintiff's pain and suffering claim and his credibility, both key issues at trial.

The Texas Supreme Court reversed and remanded for a new trial based on the failure of the trial court to properly exercise its discretion by viewing the surveillance video before ruling on its admissibility.

**4. *Nester v. Textron, Inc.*, No. 16-51115, 2018 WL 1835816 (5th Cir. Apr. 18, 2018).**

The Fifth Circuit Court of Appeals held that the district court did not abuse its discretion in a defective product design action by refusing to deviate from the Texas pattern jury instruction. The Fifth Circuit further held that the district court's commingling of the Plaintiffs' four alternative design theories into one broad-form jury question did not require reversal because each theory was legally valid.

Plaintiffs, owners of a utility vehicle, sued Defendant, utility vehicle manufacturer, for design defect, marketing defect, and gross negligence, seeking recovery for personal injuries sustained when one owner was run over by an unmanned vehicle. Following Plaintiffs' case-in-chief at trial, Defendant moved for judgment as a matter of law, which the district court denied. The jury then awarded the Plaintiffs a sizeable verdict. After trial, Defendant renewed its motion for judgment as a matter of law and, in the alternative, moved for a new trial. The district court denied both motions. Defendant appealed, seeking reversal and a new trial.

The Fifth Circuit focused its analysis on two of Defendant's grounds for appeal: (1) "the jury

received an erroneous definition of ‘safer alternative design’” and (2) “a single-answer jury question erroneously commingled both supported and unsupported alternative-design theories.”

First, with regards to the definition of “safer alternative design,” Defendant argued that the district court erred by “refusing to give a more expansive definition” that included “the longstanding Texas rule that a safer alternative design is not just one that would have prevented the injury in question but must also be one that would not have ‘impose[d] an equal or greater risk of harm’ under other circumstances.” The Fifth Circuit began its analysis by reviewing the district court’s definition of “safer alternative design,” which was defined in the following manner:

“Safer alternative design” means a product design other than the one actually used that in reasonable probability—

1. would have prevented or significantly reduced the risk of the injury in question without substantially impairing the product’s utility; and
2. was economically and technologically feasible at the time the product left the control of Textron by the application of existing or reasonably achievable scientific knowledge.

The Fifth Circuit explained that this definition not only tracked the relevant Texas statute, common law, and pattern jury instruction, but also substantially covered Defendant’s requested overall-safety component language by providing Defendant with the “practical means to raise its concerns about the [Plaintiffs’] proposed designs.”

In holding that the district court did not abuse its discretion by refusing to deviate from the Texas pattern jury instruction, the Fifth Circuit emphasized the policy considerations for allowing federal judges to utilize pattern jury instructions and stated:

Federal judges often face the workaday dilemma of *how much* state law to consolidate expressly into the jury charge. Must this one include overall

safety? How about the caveat about conceptual designs versus those actually built? The list of conceivable additions goes on. But, as our prior cases indicate, a commonly administered PJC is often an entirely sensible place to draw the line.

Accordingly, the Fifth Circuit held that the district court’s use of the Texas pattern jury instruction was not an abuse of discretion and instead was a sensible choice to properly guide the jury.

Second, the Fifth Circuit turned to Defendant’s argument that the district court erred by commingling the Plaintiffs’ four alternative design theories into one broad-form jury question. Defendant argued that this commingling was harmful because “we cannot discern which of the designs served as the basis for the jury’s ‘yes’ verdict” and two of the alternative designs lacked evidentiary support.

After providing a historical analysis of the commingling rule, the Fifth Circuit, citing its prior decision in *Walther v. Lone Star Gas Co.*, 952 F.2d 119 (5th Cir. 1992), stated: “[W]e will not reverse a verdict simply because the jury might have decided on a ground that was supported by insufficient evidence.” In accordance with *Walther*, the Fifth Circuit held that the district court’s commingling of the Plaintiffs’ four alternative design theories into one broad-form jury question did not require reversal because “no one suggests that any one of the [Plaintiffs’] alternative-design theories was legally invalid” and “[w]e therefore trust the jury to have sorted the factually supported from the unsupported.”

Ultimately, the Fifth Circuit affirmed the district court.