TADC

TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

SUMMER 2022

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The TADC Magazine is a publication of the Texas Association of Defense Counsel

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TADC CALENDAR OF EVENTS

August 5, 2022	**TADC Nominating Committee** Slater C. Elza, Chair
August 12-13, 2022	**2022 TADC West Texas Seminar** Inn of the Mountain Gods – Ruidoso, New Mexico Registration information available at www.tadc.org
September 14-18, 2022	**2022 TADC Annual Meeting** La Cantera Resort & Spa – San Antonio, Texas Registration information available at www.tadc.org
October 6, 2022	**TADC Deposition Boot Camp – *A Virtual Seminar*** Registration information available after September 5, 2022
January 25-29, 2023	**2023 TADC Winter Seminar** Steamboat Grand – Steamboat Spring, Colorado Registration materials available after October 15, 2022

President's Message

By: Christy Amuny, TADC President
Germer PLLC, Beaumont

The world seems to have opened back up! Courthouses are buzzing, lots of counties are back to trying cases, people are on the move, airports are packed and people are enjoying vacation time. And through it all, TADC has continued working for the benefit of its members. Whether it was great programming, fighting for in-person jury trials or keeping an eye out for the upcoming Legislative year, TADC has been busy. With the year half gone (which is hard to believe), there is still a lot to look forward to.

Winter Meeting

The Winter Seminar was in Snowmass, Colorado and was a tremendous success. While the hotel was a little confusing (recently renovated, attaching two buildings and requiring bread crumbs to find your way back to your room), the snow was great, the mountain was beautiful and the CLE was rock solid. Thanks to Robert Sonnier and Jim Hunter for putting together a great program.

Trial Academy

The Milton C. Colia Trial Academy was held in March at the Texas Tech School of Law in Lubbock. A group of fifty plus young lawyers were in attendance and throughout the two-day academy, they were well prepared, hard working and did an outstanding job. The faculty could not say enough about the quality of the attendees. They were attentive, inquisitive and certainly seemed to enjoy the opportunity to interact with and learn from the TADC faculty. It was a rewarding experience for everyone involved. A special thanks to Arlene Matthews and Greg Curry for rounding up a great faculty and presenters.

Spring Meeting

The Spring Meeting was in Asheville, North Carolina and I believe there was not a single person who wanted to come home. The hotel was magnificent, and Asheville was absolutely stunning. If you have not been to Asheville, you should put it on your list of places to go. Sofia Ramon and Mike Shipman put together a terrific program full of diverse topics and speakers. And for all who spent quality time in the dual piano bar at the hotel, it did not disappoint!

Summer Meeting/Annual Meeting

We are looking forward to the Summer Meeting in Big Sky, Montana and Annual Meeting at La Cantera in San Antonio. The Meeting Chairs, Mike Bassett/Jennie Knapp and Trey Sandoval/ Rick Foster, respectively, have put together some excellent programs that you will not want to miss.

Lunch & Learn

Throughout the year TADC has made a concerted effort to focus on and promote its young lawyers. In addition to the Trial Academy and Deposition Boot Camp, we have continued with the "Lunch

& Learn" program that was started last year. With topics geared toward young lawyers, the program has picked up steam and the attendance has been remarkable, in no small part due to the quality presenters. We are shooting for a Lunch & Learn at least every other month. It is free for all TADC members. Be on the lookout for the emails and encourage your young lawyers to attend. If anyone has an idea for a topic for a Lunch & Learn, please let us know.

Local Events

Speaking of the young lawyers, the Young Lawyers Committee is in full swing and is working to help plan local events. If you are interested in a happy hour, lunch or other event in your area, please reach out and we will put you in touch with the YLC and your local Board Member and get things moving. The interaction with our friends and peers is what makes TADC such an incredible organization. Now that the world seems to have opened back up, let's get back to mixing and mingling.

Remote Proceedings Rules

Last fall, the Texas Supreme Court created the Remote Proceedings Task Force to review the Rules of Civil Procedure and Appellate Procedure in regard to remote proceedings. The task force split into three subcommittees with the goal of proposing rules to accommodate remote proceedings in the future. The new/amended rules were sent to the Supreme Court Advisory Committee to review and make recommendations. Without getting too deep in the weeds, one of the subcommittees proposed a new rule of civil procedure for notice of hearings and for remote appearances at court proceedings. The rule, as originally written, seemed to give a trial court the authority to allow or require participants to appear at a court proceeding either in person or remotely. Needless to say, the thought of mandated virtual jury trials sent shivers up the spines of trial lawyers everywhere. There was much debate and discussion and staunch proponents on both sides of the issue but it was ultimately decided that while a court may require a participant to appear remotely, it cannot require the parties to have a virtual jury trial. A joint letter was sent to the Supreme Court Advisory Committee (and to all the Supreme Court Justices) by TADC, TTLA, TEX-ABOTA, Texas Civil Justice League, The Litigation Section of the State Bar and the American College of Trial Lawyers expressing concerns about mandated remote appearances. We have not seen the final language of the proposed rules and the issues are still being debated, but for the time being, jury trials are off the table.

It has been a busy year and there is certainly more to come. Thank you to the TADC Board members and volunteers who work so hard for this organization and for the preservation of our civil justice system. I urge you all to take advantage of the many benefits TADC has to offer. Come to a happy hour, come to a seminar, speak at a seminar, hang out in the hospitality suite, get to know your fellow members – I assure you it is something you will not regret. Keep recruiting your friends and colleagues to join this remarkable organization. Both professionally and personally, the TADC people you know are the best people to know!

Have a great summer!

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TADC Legislative Update

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

The May 24 primary runoff elections more or less closed the books on the midterms in Texas, and little has changed. At the statewide level, incumbents won across the board, though Attorney General Ken Paxton and Railroad Commissioner Wayne Christian were pushed into runoffs (both won easily). On the Democratic side, Beto O'Rourke and Mike Collier (who ran a close race against Dan Patrick four years ago) will lead the charge in November but have little to no prospect of victory, barring a miraculous change of fortune. In short, with the exception of Sen. Dawn Buckingham (R-Lakeway) taking over for unsuccessful AG candidate George P. Bush, the leadership remains the same.

As always, redistricting has produced a large turnover in the Texas House, but the overall partisan split will stay about the same. Speaker Dade Phelan, again barring an unforeseen hiccup, will be elected by his colleagues for a second term. In the Senate, the GOP will pick up a seat in north Texas, where Rep. Phil King (R-Weatherford) is now running unopposed for the seat currently held by Sen. Beverly Powell (D-Fort Worth). Former Sen. Pete Flores (R-Pleasanton) returns to the Senate in redrawn District 24 (Buckingham), which now stretches from South Texas to Bell County. In the district represented by longtime incumbent Sen. Eddie Lucio, Jr. (D-Brownsville), lawyer and businesswoman Morgan LaMantia won the Democratic nomination and will likely succeed the retiring incumbent.

Turning to next year's legislative session, property tax relief appears poised to dominate the policy agenda. We can also expect a full raft of social issues, particularly arising from the fallout from the repeal of *Roe v. Wade*, but that's become the norm and should surprise no one. In that regard, however, we are clearly seeing a trend in which the legislature is turning to private causes of action to enforce social policy, such as SB 8 and abortion. If this trend continues, we should think long and hard about whether the courts should be used for this purpose or whether standing to sue should be granted to plaintiffs with no concrete injury. Once we start down that road, who knows where we'll end up?

Finally, as you know TADC, TTLA, TXABOTA, TCJL, and others submitted a joint letter to the Supreme Court Advisory Committee in opposition to a one-size-fits-all remote proceedings rule that puts the discretion entirely in the hands of the court with little the parties can do about. Thanks to the good work of a number of TADC, TTLA, TXABOTA and other members of the committee, some changes have been made, most importantly taking jury trials off the table unless the parties consent. But there are still issues to be resolved with respect to, among other things, other adversarial proceedings, jury selection, and how a party would make an effective objection to an order mandating a remote hearing or other proceeding. Be aware also that the SCAC is considering eliminating the 150-mile rule for subpoenas on the theory that any witness can be Zoomed in from anywhere at any time. The day may be approaching on which physical courtrooms disappear altogether; certainly the technological capability is moving in that direction in a hurry, and there are judges who are enthusiastically egging it on. It may behoove us to have a serious policy discussion about all of this because at some point we may have to ask the Legislature to weigh in.

Texas Association of Defense Counsel-PAC

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

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By: Slater C. Elza, TADC President
The Underwood Law Firm, P.C.,
Amarillo

A Quick Look at Recent Federal and State Court Decisions Regarding Expert Witnesses

This article will address recent reported decisions in state and federal courts regarding expert witnesses to assist practitioners with strategy in approaching the expert witness battle. More and more courts are exhibiting fatigue with the constant motions to strike expert witnesses. As defense lawyers, we must become better at understanding the law on expert testimony, preparing better to depose expert witnesses, and only moving to strike or limit expert testimony where the law supports our position. Otherwise, courts grow tired of the constant motions, and we risk losing credibility. A well planned and prepared attack on opposing experts can be the key to successfully resolving a lawsuit. Hopefully, this summary of some recent decisions will prove helpful with your practice.

1. Federal case update

In re: Taxotere (Docetaxel) Products Liab. Litig., No. 20-30184, 2022 WL 405298 (5th Cir. Feb. 10, 2022)

In *In re Taxotere (Docetaxel) Products Liab. Litig.*, the Fifth Circuit recently held that the testimony of a doctor, testifying as a lay witness and corporate representative for the defendant under Rule 701, amounted to improper expert testimony in contravention of Rule 702 and *Daubert.* Further, because the defendant's expert witness subsequently relied on the doctor's improper testimony, the court held that the expert witness's testimony was inadmissible.

In determining whether the trial court erroneously admitted the doctor's testimony, the court looked to the contents of the doctor's testimony, which contained information taken from a clinical trial known as TAX316. The court reiterated that lay witnesses are restricted to "testimony in the form of an opinion . . . not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." The court found that his testimony contained "highly specialized and technical information relating to Taxotere (a cancer drug) and drug studies in general. Thus, because "parts of [the doctor's] testimony . . . strayed beyond 'facts . . . subjective beliefs and opinions, within either his personal knowledge or his capacity [as a corporate representative]" it was erroneous for the district court to allow the doctor to testify on those issues.

Lastly, in considering the testimony provided by the defendant's expert witness, the court found that because the opinion was based on the doctor's TAX316 review, that it "amounted to an improper expert opinion" and that the opinion "was likewise tainted." Thus, the court held that the trial court erred in admitting both the doctor's and expert's opinions.

McGill v. BP Expl. & Prod., Inc., 830 Fed. Appx. 430 (5th Cir. 2020)

In *McGill,* the Fifth Circuit held that a pulmonologist's expert opinion that a worker's exposure to oil, dispersants, and other harmful chemicals caused his later-manifested physical conditions was unreliable. In making their decision, the court applied the *Daubert* factors to analyze the studies the pulmonologist utilized to reach his opinions. Although some of the studies the pulmonologist relied on were consistent with

the notion that oil could cause respiratory harm, the court found that each one of the studies had defects in their applicability. For instance, none supported the conclusion that oil caused the illness that the plaintiff suffered from, and none provided conclusive findings regarding the exposure level necessary for oil and Corexit to be harmful to humans. Further, the court found that the pulmonologist's conclusions were not based on reliable principles, between the facts he relied upon and the conclusions he reached pertaining to the toxicity of the oil and Corexit. The court came to this conclusion because the pulmonologist was unable to answer questions regarding how much time the worker spent around the oil, what quantity of Corexit was used, and how exposure levels would have changed depending on other facts like the worker's protective equipment. Thus, because of the "legitimate concerns regarding the pulmonologist's research and methodology, the court ruled that the trial court did not abuse its discretion in excluding the pulmonologist's opinion.

Puga v. RCX Sols., Inc., 922 F.3d 285 (5th Cir. 2019)

In *Puga*, the Fifth Circuit held that an accident investigator's causation testimony pertaining to a car accident was reliable under the *Daubert* standard because the expert based his testimony on a sufficient number of physical factors from the accident. The court noted that it had never applied *Daubert* and Rule 702 to an accident investigator. As such, the court considered prior district court cases and used a "contextual analysis" to determine whether the accident investigator based his opinion off a sufficient amount of physical evidence from the accident.

In applying this "contextual analysis," the court gave sufficient weight to the following facts: (1) that the accident investigator (trooper) witnessed the accident; (2) that the accident investigator took notice of the road conditions at the time of the accident; (3) that the accident investigator had knowledge that the defendant was on the phone at the time of the accident; and (4) the accident investigator's evaluations of the tire marks on the median and pavement where the accident occurred. Accordingly, the court reasoned that because the trooper had sufficiently used these facts to form his opinion, the district court correctly admitted the accident investigator's testimony.

Nikolova v. Univ. of Tex. at Austin, No. 1-19-CV-877-RP, 2022 WL 443783 (W.D. Tex. Feb. 14, 2022).

In *Nikolova*, the Court excluded the expert testimony of a social-science researcher opining on stereotypes, bias, and discrimination in the workplace pertaining to "social frameworks." The court applied the *Daubert* factors to the researcher's testimony and found that the researcher's opinions were not based on reliable scientific methods and that his opinions would not assist the trier of fact.

Specifically, the court looked to the researcher's deposition where he admitted that his methods were not based on scientific principles and methodology. Further, the court looked to the information that the researcher relied on to form his opinion. The court determined that because the information was provided solely by the party that hired him, that it was based on unrepresentative data. The court also looked to the researcher's ability to "rule out alternative explanations" for his findings; however, the researcher admitted in his deposition that he "[could not] rule out other possible non-discriminatory reasons" for bias shown to the plaintiff. Lastly, the court found that the researcher's opinions would not assist the trier of fact because "[t]he burden is on Plaintiff to prove that she was discriminated against because of her sex, not just that gender stereotyping or bias exists throughout society." Thus, the district court found that the researcher's testimony should be excluded.

Andrews v. Rosewood Hotels & Resorts, LLC, No. 3:19-CV-01374-L, 2021 WL 5866642 (N.D. Tex. Dec. 10, 2021)

In *Andrews,* the Court found that an expert's testimony on "human factors" regarding visual features of an infinity pool, and the surrounding area where the plaintiff was injured, was a proper subject for expert testimony. Specifically, the expert testified to information processing of an individual's perceptions and how those perceptions affect his or her navigation of an area or pathway; this included the signage, and other visual observations surrounding a swimming pool. The plaintiff contested that the jury needed no expert testimony because "the jury [was] fully

capable of reviewing the photographs of the accident scene, listening to the testimony of the witnesses' recollection of events, [and] draw[ing] final conclusions about the sequence of events resulting in [the Plaintiff's accident]." Further, the plaintiff argued that the expert lacked the requisite expertise to opine on the design, operation, or management of the pool.

The court applied the *Daubert* factors and reasoned that the expert's report focused on information provided through the application of "scientific, ergonomic analysis to specific visual or perceptual cues" that could not be reached based on the everyday experiences of jurors. This is because the opinions incorporated an analysis of human perceptions and effects on a person's ability to navigate an area or pathway. Accordingly, the Court found that the expert testimony did not overstep the bounds of *Daubert* and should not be excluded because the testimony was helpful to the jury. Further, the court determined that the expert was sufficiently qualified to testify on the issue because the expert "[did] not venture outside of his claimed expertise" when he rebutted the opinions of the plaintiff's experts.

2. Texas case update

Innovative Block v. Valley Builders Sup., 603 S.W.3d 409, 422 (Tex. 2020).

In *Innovative Block of South Texas, Ltd. v. Valley Builders Supply, Inc.,* the Texas Supreme Court ruled that an expert witness's testimony regarding reputational damages to support a defamation claim was unreliable and thus, inadmissible. The court considered the six non-exclusive Robinson factors in evaluating the expert's testimony but ultimately relied on its prior ruling in *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 499 (Tex. 2001) to articulate the following standard: "if an expert relies upon unreliable foundational data, any opinion drawn from that data is likewise unreliable."

In applying this standard, the Court evaluated the "Monte-Carlo method" used by the expert to estimate a range of possible damages resulting from the defamatory statements. The Monte Carlo method "in broad strokes is 'doing something millions of times to come up with the most probable outcome.'" However, the expert testified that for smaller data sets, the "Quasi Monte Carlo" method could be used to calculate a range of possible damages arising from the defamatory statements. Instead of running the scenario for damages millions of times, as in a full Monte Carlo analysis, the expert ran the scenario twice. The Court ruled that the expert's calculations were based on unreliable, irrelevant data that had little to do with the actual case, and that the expert's testimony improperly conflated special and general damages by substituting hypothesized special damages as proof by proxy for the defendant's general damages and noneconomic harm. Further, the Court held that the Quasi-Monte Carlo methodology and testimony [provided] no evidence of actual injury to the company's reputation and was insufficient to quantify any number of reputational damages.

Windrum v. Kareh, 581 S.W.3d 761 (Tex. 2019)

In *Windrum*, the Texas Supreme Court ruled that a neurosurgeon's expert testimony was not conclusory because his testimony was based on medical experience, data from the patient's MRI reports and CAT scans, and did not simply state a conclusion to the jury without an adequate basis. To make this determination, the Court outlined the standards that establish whether expert testimony is conclusory or not. The Court articulated that "[a] conclusory statement asserts a conclusion with no basis or explanation." Further, an "expert must explain the basis of his statement so to link his conclusions to the facts." Finally, an expert cannot provide the jury with unexplained conclusions or ask the jury to "take his word for it" because of his status as an expert.

In applying this standard, the Court looked to (1) the neurosurgeon's review of the patient's medical records, including his autopsy; (2) the chapters in textbooks the expert referenced; (3) a "number of literature searches" that the neurosurgeon relied on, some of which were conducted by other physicians in the case; and (4) the deposition testimony of other doctors involved in the case. The Court ruled that "the bases for [the neurosurgeon's] could have been better" but that his testimony "did not simply state a conclusion without any explanation or ask the jury to take his word for it, and therefore was not conclusory.

Wellons v. Valero Refining-New Orleans, L.L.C., 616 S.W.3d 220, 229 (Tex. App.—Houston [14th Dist.] 2020).

In *Wellons,* the Court held that the question of whether the actions or inactions of employees waiting to call 911 after the plaintiff suffered a heat stroke were intentional did not require expert testimony. The court relied on Texas Supreme Court precedent established in *K-Mart v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000), which reasoned that "when the jury is equally competent to form an opinion about an ultimate fact issue or an expert's testimony is within the common knowledge of the jury, the trial court should exclude the expert's testimony."

In applying the *Honeycutt* standard, the court held that plaintiff's counsel provided no reason why the jury needed the expert witness to tell them why the action of waiting to call 911 made the conduct intentional. Further, the plaintiff's counsel did not offer any explanation as to why the jury needed the expert testimony to decide any area of intent. Thus, the expert's proposed testimony would not have assisted the jury to understand evidence or determine the fact issue of intent and was properly excluded.

Cox v. Helena Chem. Co., 630 S.W.3d 234 (Tex. App.—Eastland 2020, pet. filed)

In *Cox*, the Eastland Court of Appeals examined whether the trial court abused its discretion when it struck the opinions and testimony of six expert witnesses testifying to damage done on cotton crops from drifting herbicide released from a plane. Petition for Review has been filed with the Texas Supreme Court. The court of appeals noted that the *Robinson* factors were applicable, but noted that "it is 'appropriate to analyze whether the expert's opinion actually fits the facts of the case.'" In doing so, courts determine "whether there are any significant analytical gaps in the expert's opinion that undermine its reliability." The defendant asserted that the experts' opinions were "not based on any reliable evidence or scientific principles, and none of the experts rule out potential alternate causes."

The court first addressed Roberts and Ward, two of the expert witnesses. Roberts provided an opinion about weather conditions at the target pastures based on data from Mesonet stations and Ward conducted germination testing on the soil. The court held that because Robert and Ward did not offer an expert opinion on causation, their opinions were erroneously excluded. Next, the court addressed the testimony of Royal, the third expert witness. Royal addressed the applicable standards of care and breach of those standards, rather than an opinion as to causation. Thus, the court held that his testimony should not have been excluded in its entirety, but rather, only to the extent that Royal attempted to offer an opinion as to causation. The court then addressed Rosenfeld, the fourth expert, who opined as to the herbicide's toxic and lasting effects on cotton and on the issue of drift. Lastly, the court considered Halfmann and Carillo, the last two expert witnesses, who offered extensive testimony and opinions related to causation. Halfmann and Carillo used a multitude of factors to arrive at their conclusions including flight records, lab tests, maps, and visual observations.

The court noted that "[w]hen an expert's opinion is based on assumed facts that vary materially from the actual, undisputed facts, the opinion is without probative value and cannot support a verdict or judgment." However, under these circumstances, the court held that the facts the experts based their opinions on were not assumed facts that varied from actual undisputed facts due to their investigations and observations; rather, even though their opinions were done in exacerbated drift conditions, they were done in the relevant time and place. Accordingly, the court could "see no analytical gap" in the conclusions reached by the experts. Thus, the court held that the expert's opinions about weather conditions at the farmer's pastures and germination testing on soil samples taken were admissible. Further, the court held that the experts' opinions as to causation were admissible.

Conclusion

It is incumbent on all of us to keep up with the constantly evolving law on expert witnesses. We must know what courts allow, and do not allow, so that we can properly choose and prepare our own experts while also being ready to effectively attack opposing experts. There are many court opinions regularly issued that address these issues. This article addresses just a few of the different types of matters that affect the types of cases of our members regularly handle.

2022 WINTER SEMINAR

January 26 - 30, 2022 – The Westin Snowmass Resort – Snowmass, CO

The 2022 TADC Winter Seminar was held at the Westin Snowmass Resort in Snowmass, Colorado, January 26-30, 2022. Robert Sonnier with Germer Beaman & Brown PLLC, Austin and Jim Hunter with Royston, Rayzor, Vickery & Williams, L.L.P., Brownsville served as Program Co-Chairs. The program featured practical topics for the practicing litigator. Members enjoyed 9.00 hours of CLE and great skiing!

Hard at Work

Victor Vicinaiz

Belinda Arambula & Jheris Jordan

Gayla Corley, Jim Hunter & Russell Smith

Texas Supreme Court Update

By: Roger W. Hughes
Adams & Graham, LLP, Harlingen

I. Discovery.

***In re ExxonMobil Corp*., 635 S.W.3d 631 (Tex. 2021).**

In mass tort case, providers charged millions for medical services under letters of protection. Exxon subpoenaed sums actually accepted by nine providers from their patients for similar services; Exxon then narrowed the request to discover just the sums accepted for the same services as rendered to plaintiffs during the same period.

The providers moved to quash and protection, arguing that

- *North Cypress* did not apply in personal injury cases
- The discovery was an undue burden on the providers
- Reimbursement rates were trade secrets

The trial court granted providers protection and denied the discovery.

The Supreme Court granted mandamus relief and ordered the trial court to reconsider. *North Cypress* applies in PI cases. Because reasonableness is a limitation on medical expenses, sums that providers actually charge and accept are relevant and discoverable. Exxon's second, narrower request was not overbroad. The LOPs gave providers a financial interest in recovery – a factor weighing against the discovery being burdensome. The discovery was not unduly burdensome because the requests were narrow requests and the providers had a financial interest in case. Trade secret is not a bar to discovery – trial court could grant a protective order.

Pointers:

- Actual discount practices are discoverable by narrow, targeted requests.
- LOPs are discoverable and relevant if provider argues undue burden.
- Unclear if discovery is unduly burdensome absent an LOP.

***In re Texan Millwork*, 631 S.W.3d 706 (Tex. 2021).**

Cabrera was Texan Millwork's former independent contractor; both were defendants. After a default judgment against Cabrera, Texan got his statement and filed for summary judgment. Plaintiff served Texan with notice under Tex. R. Civ. P. 199.3 to produce Cabrera for deposition. Trial court ordered Texan to produce him.

Held, mandamus granted. For the purposes of Rule 199.3, a party must employ or control the witness at the time production is sought. Former employment or control is insufficient.

Pointers:

- A cooperative former employee is not under the party's control.
- It is an open question whether informal control or continuing intermittent employment will suffice.

***In re Christianson Air Conditioning & Plumbing, LLC*, 639 S.W.3d 671 (Tex. 2022).**

Defendant filed a special appearance in a products liability suit. Plaintiff sought a corporate representative deposition on a variety of topics on jurisdiction that also addressed liability. Defendant sought protection.

The trial court denied protection and ordered the deposition proceed on thirty topics. The court of appeals granted mandamus and held the topics had to be strictly limited to jurisdiction.

The Supreme Court granted plaintiff's mandamus, but required the trial court revisit the scope of the deposition. The trial court has discretion under Tex. R. Civ. P. 120a to limit discovery to disputed 'essential facts' relevant to the special appearance and necessary to oppose the special appearance, even if overlaps with merits discovery. Under a claim of specific jurisdiction, the plaintiff may conduct discovery into 'purposeful availment' of the forum state and into substantial relation between the contacts and the litigation. In products case, discovery of defendant's general knowledge or activities are not 'essential facts.' Awareness of the conditions in which a product might be used is not specific to Texas; awareness of how the product would operate in Texas might be discoverable. Mandamus was granted for Plaintiff to narrow the deposition topics.

Pointers:

- The text of Rule 120a defines the scope of limited discovery.
- Discovery must be aimed at specific actions to avail conducting business in Texas.
- Narrow discovery requests and deposition topics are favored.

***In re UPS Ground Freight, Inc.*, 2022 Tex LEXIS 545 (Tex. June 17, 2022)**

This was a wrongful death case against UPS. Its driver tested positive for marijuana and admitted he and other drivers used it. UPS produced his drug testing records. To prove a pattern and practice of violating federal random drug testing regulations, Plaintiffs sought all of the random testing records for drivers in the preceding five years and the names of all the drivers at the location in the prior eleven years. The lower courts held that Plaintiffs were entitled only to the drug testing results with the drivers' identities redacted.

Held, the Supreme Court granted mandamus. The trial court erred in ordering the history of drug testing on nonparty drivers who not involved in the accident. The request was overbroad because the records were not relevant to either negligent entrustment to this driver or to claims of negligent hiring, supervision, or training. The records of drivers at only one location were irrelevant to UPS's nationwide compliance with federal regulations.

***In re Contract Freighters, Inc.*, 2022 Tex. LEXIS 551 (Tex. June 17, 2022).**

In a trucking accident case, Plaintiffs sought records of lawsuits against CFI for rear-end accidents in preceding five years. When the Supreme Court asked for a response to the mandamus petition, Plaintiffs unilaterally withdrew the discovery request and remained silent when whether they would reassert it later.

Held, the Supreme Court granted mandamus. First, withdrawing the discovery request did not moot the issue. Plaintiff gave no enforceable assurance that they would not seek the records later and withdrew the request to avoid appellate scrutiny. Discovery of all lawsuits nationwide in the prior five years over unrelated accidents is overbroad as a matter of law.

Pointers:

- Withdrawing challenged discovery will defeat appellate review only if Plaintiff stipulates that the request will not be re-asserted later.
- This case and *UPS Ground Freight* signal that broad discovery into unrelated employees and accidents +is probably overbroad.

II. Tex. Civ. Prac. & Rem. Code chap. 95.

***Sandridge Energy v. Barfield,* 642 S.W.3d 560 (Tex. 2022).**

Barfield was employee of Sandridge's subcontractor hired to work on overhead energized power lines. Barfield claims Sandridge refused to allow lines to be de-energized. While working in a bucket four feet from lines, he used a 'hot stick' pole to dislodge taps on the energized lines and was shocked. Barfield had six months training on dislodging taps with a hot stick.

Sandridge moved for a traditional summary under Chapter 95, arguing it had no duty to warn of known dangers or open/obvious dangers. The trial court granted summary judgment, but the court of appeals reversed, holding:

- Chap. 95 did incorporate open/obvious exception to duty of care
- Chap. 95 did not require Plaintiff be unaware of danger

The Supreme Court reversed. TCPRC Chap. 95 is not a pure codification common law. Nonetheless, what is an 'adequate warning' under §95.003(2) is co-extensive with the common law's purpose for a warning. No common law duty to warn if invitee has actual knowledge or the condition is objectively open and obvious. If plaintiff has actual knowledge of danger,
+ then Sandridge did not fail to give an adequate warning under §95.003(2). Necessary use doctrine did not apply because Plaintiff was trained on how to avoid the danger.

Pointers:

- Chap. 95 does not codify premises defect or negligence law; better to use text of Chap. 95 to mimic common law duties and defenses.
- Left for another day is whether an open/obvious danger satisfies §95.003(2).

***Energen Resources Corp. v. Wallace,* 642 S.W.3d 502 (Tex. 2022).**

Energen hired Nabors to drill oil well and Dubose Drilling to drill a water well nearby; Dubose subcontracted the work to Elite Drilling, Wallace's employer. A gas kick occurred at oil well, causing gas to migrate into water well's wellbore. Three days later, while Elite pumped mud into water well, the pressure increased due to migrated gas and an explosion at the water well followed.

Energen moved to dismiss under Chap. 95. Wallace argued the improvement on which he worked (water well) was not the improvement from which the claim arose (oil well). The trial court granted summary judgment, but court of appeals reversed – Energen did not conclusively prove the risk arose from the water well.

The Supreme Court reversed and upheld the summary judgment. Under Chap. 95, the claim must be caused by negligence that causes damages regarding the improvement on which claimant is working. There must be a causal connection between the damage-causing negligence and the condition or use of the improvement on which plaintiff is working. The key is whether there is negligence regarding the condition or use of the improvement on which claimant is working, not whether the claim is for active negligence or premises liability. The water well's dangerous condition was caused by negligence at the oil well; Chap. 95 applies to 'condition or use' of personal and real property. Energen had burden to prove lack of control over the water well only because it filed a traditional summary judgment motion instead of a 'no evidence' motion.

Pointers:

- Chap. 95 applies regardless of cause of action; not limited to premises liability/defect claims.
- The negligence need not occur at the location of injury provided the negligence affects the condition of plaintiff's workplace and causes the injury.
- Use a 'no evidence' motion to challenge lack of control under §95.003(1).

III. Premises Liability.

***In re Eagleridge Operating, LLC*, 642 S.W.3d 518 (Tex. 2022).**

Oilfield injury from defective pipeline. Before the injury, Aruba was minority owner and managed the well; during its tenure the pipeline at issue was built. Pre-injury, Aruba sold its interest to majority owner and ceased managing well; Eagleridge then bought the well and took over. Eagleridge moved to name Aruba as responsible third party because of its role as a well manager and general contractor, not as an owner.

Trial court struck the designation for lack of legal duty.

Held, Aruba was an 'owner' even though it was a partial owner that managed property; it could not be treated as an independent contractor; 'dual role' argument rejected. Aruba owed no duty for a premises liability claims once it ceased to be an owner.

Pointers:

- An owner remains an owner for premises liability purposes even if it contracts out construction of the dangerous condition.
- Generally, former owner has no liability for premises conditions after selling its ownership interest.
- Left open is former owner's liability for constructing dangerous condition that causes injury after ownership ceases.

IV. Liability Insurance.

***Monroe Guar. Ins. v. BITCO Gen. Ins.*, 640 S.W.3d 195 (Tex. 2022).**

Suit over negligent slant drilling into plaintiff's land. Plaintiff alleged the drill bit got stuck in wellbore and ultimately damaged an aquifer. Monroe denied the defendant a defense because petition did not allege that the property damage occurred during the policy period; the policy excluded damage of which insured knew began prior to policy inception date. The pleading did not allege when bit got stuck or when the aquifer was damaged. Parties stipulated that drill bit got stuck prior to policy inception.

Trial court applied 8-corners rule, disregarded the stipulation on date drill bit got stuck, and held Monroe had a duty to defend.

The Supreme Court affirmed that Monroe had to defend. It adopted a modified exception to 8-corners rule. If the underlying petition states a claim that could trigger the duty to defend, and the application of the eight-corners rule, due to a gap in the plaintiff's pleading, is not determinative of whether coverage exists, Texas law permits consideration of extrinsic evidence provided the evidence (1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved.

Here, the stipulation must be disregarded because date of damage overlaps with merits. Further, it would require insured to agree the stuck drill bit did damage to the aquifer.

Pointers:

- This is a very narrow exception to '8 corners' rule barring extrinsic evidence.
- Court adopts a narrower exception that the Fifth Circuit used to prevent trial courts from imagining possible scenarios and allow extrinsic evidence.
- The Court will not allow extrinsic evidence that could bear on the merits, particularly if it might impair the insured's defense on the merits.

***Pharr-San Juan Alamo Indep. Sch. Dist. v. Tex. Political Subdiv. Prop./Cas. Self Ins. Fund*, 642 S.W.3d 466 (Tex. 2022).**

Student was passenger in golf cart driven by coach in stadium; alleged excessive speed caused student to be thrown out. Fund denied PSJA ISD a defense under auto policy, arguing golf carts were not an "auto " – a vehicle designed mainly for use on public road; exclusion for vehicles designed mainly for use off public roads. PSJA settled the suit and sued the Fund for its defense and indemnity costs. This issue was the admissibility of that this golf cart was an "auto" under the policy.

The Supreme Court held *Monroe* did not apply and the Fund owed no defense and indemnity. Relying on dictionary and statutes, allegation of 'golf cart' did not plead facts showing it was an 'auto'; extrinsic evidence not admissible because no 'gap' in pleadings. The Fund had no duty to indemnify because evidence conclusively proved the golf cart was not designed for use on public roads.

Pointers:

- Finding a 'gap' in the pleading on the coverage issue is difficult.
- *Monroe* may allow extrinsic evidence in theory, but rarely will a case satisfy it.
- Evidence offered to prove no duty to defend can 'influence' the duty to defend issue.

***Elephant Ins. Co., LLC v. Kenyon*, 2022 WL 1202307, 2022 Tex. LEXIS 344 (Tex. Apr. 22, 2022).**

From rainy accident scene, Kenyon phoned her auto insurer Elephant to report claim (property damages, UM/UIM, etc.). Mrs. Kenyon asked if she should get photos, and Elephant's adjuster advised her to get them. While Mr. Kenyon was taking photos, a third party vehicle went off road and hit him. The

Kenyons brought a wrongful death suit arguing Elephant negligently gave Kenyon instructions to take photos at scene.
Trial court found 'no duty' but granted permissive appeal. The court of appeals *en banc* found a duty in common-law negligence and negligent undertaking.

The Supreme Court reversed. The issue was both the existence and scope of duty in these circumstances. Common law duty of good faith/fair dealing did not extend to post-accident advice about insured's safety; control over claims evaluation does not translate into liability for all events during claim investigation. No legal duty because the Kenyons had superior knowledge of facts and a warning was of negligible benefit. Negligent undertaking requires proof the defendant undertook to perform service that would protect plaintiff from harm and either (1) increased the risk or (2) detrimental reliance. Not enough that service might benefit Plaintiff. Responding to phone questions did not undertake to give safety advice; failure to give a warning is not an affirmative undertaking.

Justice Young wrote an important concurring opinion -- it is time to reconsider judiciary's role in 'recognizing' new legal duties. In the nineteenth and early twentieth century, the judiciary's role to recognize legal duties was a necessity because the legislative branch did not address considerable areas. Now the Legislature has made comprehensive legislative schemes and no longer a need for the judicial "gap filling." The judiciary should reconsider 'recognizing' new common law duties in areas subject to comprehensive legislative schemes.
Pointers:

- The liability insurer's duty of good faith and fair dealing in limited to decision on the merits of the claim.
- A 'no duty' motion should focus on scope of duty as well as its existence.
- "No duty" arguments in areas regulated by the Legislature may have traction.

V. Governmental and Official Immunity.

***City of San Antonio v. Maspero*, 640 S.W.3d 523 (Tex. 2022).**

Important case on governmental immunity against police pursuit cases.

Bystander was injured during a lengthy police pursuit of reckless driver; collision occurred as suspect evaded police vehicle by driving wrong way on an access road and hitting plaintiffs. Tex. Civ. Prac. & Rem. Code §101.055 emergency exception required compliance with 'laws or ordinances'; absent an applicable law or ordinance, it required the officer act without deliberate indifference. Plaintiff argued officer violated department police to use the vehicle's siren during pursuit.

The Supreme Court found immunity was not waived. Police Department guidelines/policies are not 'laws or ordinances.' Transp. Code §546.003 requires compliance with policies only when officer is otherwise violating traffic laws; here, the officer did not violate any traffic laws. Also, failure to use siren in compliance with policy was not a causal link to the accident. No conscious indifference because officer did some risk assessment and was not violating any traffic law at time of collision.

Pointers:

- Violating department policy may show conscious indifference, but does not defeat §101.055.
- Trans. Code §545.003 applies only if office commits a moving violation under traffic laws that causes the collision.
- The officer is not consciously indifferent if the officer did some risk assessment and was not committing moving violations.

***City of San Antonio v. Riojas*, 640 S.W.3d 534 (Tex. 2022)**

An important case about official immunity for police officers in routine law enforcement activities.

The police officer pulled onto shoulder to radio in a traffic violation that slowed traffic, turned on emergency lights to warn motorists of slowed traffic. Vehicles behind the plaintiff's vehicle slowed, plaintiff swerved to avoid them and rear-ended a another vehicle that had braked. Plaintiff sued for personal injury.

The trial court denied the City's plea to the jurisdiction based on the officer's official immunity; the court of appeals affirmed.
The Supreme Court reversed and found immunity.

The issue was the scope of official immunity for routine law enforcement activities. Official immunity includes a 'good faith' inquiry, i.e., whether the officer could have believed conduct was lawful and justified under the circumstances known to the officer. In police emergencies, this requires proof a reasonably prudent officer would balance the risk between action and inaction. However, the risk-balancing test is limited police emergencies – pursuit, arrest, etc. For routine law enforcement, official immunity does not require proof a reasonable officer would balance the risks. It requires only that a prudent officer would believe the conduct justified.

Pointers:

- This simplifies the official immunity standard for routine police law enforcement.
- The 'risk balancing test' for official immunity is limited to police emergencies.

***Dohlen v. City of San Antonio,* 643 S.W.3 387 (Tex. 2022).**

City denied Chik-Fil-A a concession at airport; during debate, city commissioners expressed concern Chik-Fil-A was anti-LGBT and should not receive a concession for that reason. The Legislature then enacted law prohibiting denial of contracts based on religious affiliation and waiving immunity. Five potential patrons sued for injunctive/declaratory relief, arguing the prior denial was proof the City was currently violating the statute, even though Chik-Fil-A had not reapplied.

The City moved to dismiss, arguing the petition failed to show standing or a waiver of immunity. The trial court denied the City's plea to the jurisdiction, but the court of appeals reversed and dismissed.

The Supreme Court held the petition failed to show waiver, but remanded to give the plaintiffs an opportunity to replead on standing and immunity. To waive immunity, plaintiffs had to allege facts showing City violated statute after it was enacted so as to injure them. The denial of the concession and pre-enactment statements were insufficient to show City will violate statute. The case was remanded to allow plaintiffs to amend petition (if they can) because it was now clear they could allege no set of facts establishing a statutory violation that waived immunity. The opinion also suggested that plaintiffs lacked an injury for 'standing,' but maybe they could fix that when they re-plead.

Pointers:

- The Court will favor giving the plaintiff a chance to re-plead unless it is clear the plaintiff cannot plead a valid waiver. *See also Perez v. Turner*, 2022 Tex. LEXIS 523 (Tex. June 10, 2022) (pleading did not state claim to recoup allegedly illegal tax; nonetheless, remanded to allow opportunity to assert unplead legal theory based on changes in tax law during appeal).
- The Court favors federal jurisprudence to establishing standing; derivative standing may be insufficient.
- Remains to be seen if statements by individual commissioners can establish the City's intent to violate or an actual violation the statute.

VI. Permissive Appeals.

***Industrial Specialists v. Blanchard Refining Co., L.L.C.*, 2022 Tex. LEXIS 512 (Tex. June 10, 2022).**

Important case on the appellate court's discretion to refuse to hear potentially meritorious applications for permissive interlocutory appeal. Tex. Civ. Prac. & Rem. Code §51.014(d) provides that the court of appeals may hear an interlocutory appeal (1) of an order that involves a controlling question of law on an issue to which there is a substantial difference of opinion, and (2) an immediate appeal will materially advance the ultimate termination of the litigation. Under section 51.014(f), the court of appeal may accept a timely filed permissive appeal that explains why an appeal is warranted under section 51.014(d).

Blanchard settled a personal injury suit and then sued Industrial to enforce contractual indemnity for the settlement. Both sides filed cross-motions for summary judgment; the trial court denied both motions, but granted Industrial's unopposed TRCP 168 motion for leave to file a permissive interlocutory appeal.

Industrial filed a petition section under section 51.014(d); both sides agreed the petition satisfied section 51.014(d) and should be accepted. However, the First Court of Appeals had a nearly unbroken

record of summarily declining review. It denied Industrial's petition, stating that it had reviewed the petition and determined in did not meet the requirements of section 51.014(d).

In a plurality opinion by Justice Boyd, three justices concluded that section 51.014(d) gave the court of appeals discretion to refuse a petition that otherwise satisfied both prongs of section 51.014(d). The plurality declined to decide if the discretion was absolute or could be abused. The court of appeal's opinion said it considered the petition and found it did not satisfy section 51.014(d). The plurality could not say that was an abuse on this record. Further, the court of appeals was not required to explain its conclusions. The plurality left open the possibility of amending the appellate rules to change the result.

Justice Blacklock's concurring opinion (joined by Justice Bland) argued the discretion to refuse even a meritorious petition was absolute.

Justice Buzbee (joined by Chief Justice Hecht and Justice Young) dissented. The discretion to refuse a meritorious petition was not absolute and Tex. R. App. P. 47.1 required the opinion explain the reasons for refusal.

Justice Lehrmann did not participate.

Pointers:

- Even unopposed, meritorious petition may be refused without explanation; counsel should consider this before requesting leave for a permissive appeal
- It is unresolved whether the discretion can be abused or what could establish an abuse of discretion.
- The Supreme Court could re-write the rules to limit the discretion.

VII. Medical Malpractice.

***In re LCS SP, LLC*, 640 S.W.3d 848 (Tex. 2022).**
Tex. Civ. Prac. & Rem. Code §74.351 limits discovery prior to providing expert report to information related to health care. Plaintiff sought discovery of nursing home's general policies required by state regulation; trial court denied production, but COA granted mandamus to produce policies relevant to standard of care that should have been given to Plaintiff.

The Supreme Court granted mandamus, but remanded to allow trial court to reconsider in light of the opinion. "Related to" under §74.351 is limited to materials that will assist the expert to determine breach as to specific patient. Discovery in to defendant's policy is limited to policies referring to plaintiff. General operating policies are not subject to pre-report discovery.

Pointers:

- Narrow targeted discovery requests for policies about the patient's specific care is discoverable.
- Defendants should require plaintiffs define the care at issue and explain why their expert needs the policy.

***Lake Jackson Med. Spa, Ltd. v. Gayton*, 640 S.W.3d 830 (Tex. 2022).**

Plaintiff filed a health care liability claim against Dr. Yarish's spa (Lake Jackson Medical Spa) for negligently performing skin treatments; after failing to file an expert report, Plaintiff amended to delete allegations this was a health care liability claim and references to 'medical treatment.'

The trial court denied the Spa's motion to dismiss.

The Supreme Court reversed. Trial court may consider and amended pleading filed after motion to dismiss, but the alleged facts control, not legal conclusions; decision is based on entire record. Clear factual allegation (not plead in alternative) is a judicial admission.
Here Plaintiff alleged Dr. Yarish (clinic owner) was a medical doctor and services provided were by his employee. "Health care" is service provided during treatment by a medical doctor to doctor's patient. This can be established by doctor's implied consent to render medical services and patient's implied consent to receive them. Implied consent is established by going to clinic for the services and receiving them, even if Plaintiff never saw Dr. Yarish or signed consent forms. Alleging that Dr. Yarish negligently provided services proves Plaintiff was his patient. Presumption that claim against medical provider is a health care liability claim; plaintiff must rebut it. Alleged skin care was 'medical' based on need for expert testimony and government regulation of procedure.

Pointers:

- Attempting to re-plead out of a health care liability claim is theoretically possible, but futile as a practical matter.
- Suing a licensed health care provider will trigger presumptions that this is a health care liability claim.
- Plaintiff's burden to rebut the presumption is heavy.

***Columbia Valley Healthcare Sys., L.P. v. A.M.A.*, 2022 WL 1194371, 2022 Tex. LEXIS 345 (Tex. Apr. 22, 2022, mtn for reh. filed).**

Issue was allocating periodic payments for future medicals under Tex. Civ. Prac. & Rem. Code §74.503. Plaintiff sued for baby brain injury resulting cerebral palsy. Trial court refused to submit to jury a question on child's life expectancy and annual future medical expenses. Jury awarded:

- $62,000 past medicals.
- $9 million future medicals through age 18.
- $1.2 million future medicals after age 18.

After post-trial motions, the trial judge allocated the $10.2 future medical into (1) a $7.3 million in special trust for child, on death payable to heirs, and (2) $603,000 a year for five years.

The Supreme Court reversed and remanded. No constitutional requirement to submit life expectancy and annual expenses to jury; jury questions on those issue are not essential to underlying malpractice claim and §74.503 requires judge make the findings for periodic payment. Evidence must support the division and amount of periodic payments. Here, the $7 million special needs trust violated §74.506 because the unused part is returned to the defendant if the minor dies prematurely. Error to award a large lump sum absent evidence minor had an immediate need for $7 million. Awarding only 5 years of periodic payments contradicted the verdict that minor would need and incur medical expenses after age 18.

Remanded for trial court to apply the allocation standard under *Regent Care of San Antonio. L.P. v. Detrick*, 610 S.W.3d 830 (Tex. 2020), which was decided after the trial court ruled. Trial court would have to revisit payment of attorney's fees under §74.507; opinion implies the fee on the $10 million future medical must be discounted to 'net present value' and could be paid lump sum or in periodic payments.

Pointers:

- It is unresolved whether §74.503 authorizes the trial court to create a special needs trust and allocate any part of the award to it.
- It is unresolved whether §74.507 authorizes the trial court to award payment of legal fees, either in a discounted lump sum or in periodic payments.
- Post-judgment hearings to request periodic payment probably require additional supporting evidence.

VIII. Summary Judgment Practice.

***Fieldturf USA, Inc. v. Pleasant Grove ISD*, 642 S.W.3d 829 (Tex. 2022).**

During summary judgment hearing, trial judge orally granted objection to evidence but did not sign a written order sustaining objection.

Held, ruling sufficed to strike evidence and any error was preserved for review. Merely granting summary judgment is not an 'implicit' ruling that preserves error. An on-the-record, unequivocal oral ruling on objection to summary judgment evidence preserves error, even if not reduced to writing.

Pointers:

- Press trial judges to make a clear ruling on the record.
- Order hearing transcript for any appeal.
- Include oral rulings on evidence in orders granting summary judgment.

2022 SPRING MEETING

May 4-8, 2022 – Omni Grove Park Inn – Asheville, NC

The TADC held its 2022 Spring Meeting Asheville, North Carolina at the historic Omni Grove Park Inn, May 4-8, 2022.

Sofia Ramon, with ***Ramon Worthington Nicolas & Cantu, P.L.L.C.,*** in Edinburg and **Mike Shipman** with ***Fletcher, Farley, Shipman & Salinas, LLP,*** in Dallas did a masterful job as the Meeting Program Chairs. The program included many great subjects for the practicing trial lawyer including "Jury Selection in a Post-COVID Age" and "Cyber-Security: What you Need to Know". A highlight included a luncheon presentation, "Implicit Bias" with **Justice Gina Benavides,** Chief of the Thirteenth Court of Appeals in Corpus Christi.

Trevor Ewing, Christy Amuny, Michael Golemi, Trey Sandoval, Jim Ramon, Liz Cantu, Sofia Ramon

Rick & Kathleen Foster with Jeni & Mike Shipman

Rusty Beard with Cathy & Mark Stradley

2022 SPRING MEETING

David Lauritzen, Lori Cuevas, Denise Selbst & Bud Grossman

Trish & Russell Smith with Paul Smith

Slater Elza

Class in Session

2022 SPRING MEETING

Rob Ford

Craig Reese

Program Chairs Mike Shipman, Sofia Ramon, Rudy Metayer, Justice Gina Benavides, Sylvia Firth & TADC President Christy Amuny.

Ignacio Mendoza

Roger Hughes

Milton C. Colia Trial Academy

On March 25 and 26, the TADC held the Milton C. Colia Trial Academy at the Texas Tech University School of Law in Lubbock, Texas. This biennial TADC-sponsored event provides a valuable opportunity for young lawyers to learn and practice courtroom skills that will help them make a positive difference in the lives or businesses of their clients.

The TADC Trial Academy was renamed in 2016 in honor of past TADC President Milton C. Colia. Milton was a wonderful mentor to so many attorneys across the state, and he always took the time to help young lawyers. He led by example in his practice and through his leadership in the TADC, and naming the Trial Academy in his honor was a fitting tribute to his legacy of service.

The TADC Trial Academy is a significant undertaking and requires recruiting volunteers, coordinating schedules, and managing the logistics of several breakout courtrooms, judges, lunches, and more. Such an event needs dedicated TADC leadership and members in order to run smoothly and successfully. Co-chairs Arlene Matthews at Crenshaw, Dupree & Milam in Lubbock, and Greg Curry with Holland & Knight, L.L.P. in Dallas, rallied TADC volunteers from around the state, as well as witness volunteers from the Tech law school and law firms.

This year's Trial Academy was an incredible success with 48 young lawyer participants (many of whom are new TADC members) and dozens of TADC volunteers with years of experience, as faculty members.

Thank you to the following judges and State Officials who helped Trial Academy participants this year:

The Honorable Phil Johnson, Texas Supreme Court (ret.), Lubbock
The Honorable Larry Doss, 7th Court of Appeals, Amarillo
The Honorable Dustin Burrows, Texas House of Representatives, Lubbock

Thank you to the TADC Trial Academy faculty and Witnesses:

Christy Amuny, Germer PLLC, Beaumont
Mike H. Bassett, The Bassett Firm, Dallas
Rusty Beard, Beard Law Firm, Abilene
Mark Blankenship, Crenshaw, Dupree & Milam, L.L.P., Lubbock
Robert E. Booth, Mills Shirley L.L.P., Galveston
Gayla Corley, Shelton & Valadez, P.C., San Antonio
Charles F. Russell, Crenshaw, Dupree & Milam, L.L.P., Lubbock
Joseph L. Hood Jr., Windle Hood Norton Brittain & Jay, LLP, El Paso
Denis C.Dennis, Kelly Morgan Dennis Corzine & Hansen, P.C., Odessa
Slater C. Elza, Underwood Law Firm, P.C., Amarillo
Leonard R. Grossman, Craig, Terrill, Hale & Grantham, L.L.P., Lubbock
Dick R. Holland, Shafer, Davis, O'Leary & Stoker, Odessa
Jennie C. Knapp, Underwood Law Firm, P.C., Amarillo
Arlene Matthews, Crenshaw, Dupree & Milam, L.L.P., Lubbock
Matt Matzner, Crenshaw, Dupree & Milam, L.L.P., Lubbock
Warren McCollum, Fenley & Bate, L.L.P., Lufkin
Eliott V. Nixon, Crenshaw, Dupree & Milam, L.L.P., Lubbock
Bernabe G. Sandoval III, MehaffyWeber, PC, Houston
Dax D. Voss, Field, Manning, Stone, Hawthorne & Aycock, P.C., Lubbock
Camie Wade, Kerby & Wade, P.C., Lubbock
Dan K. Worthington, Ramon Worthington Nicolas & Cantu, P.L.L.C., Edinburg
Max E. Wright, Shafer, Davis, O'Leary & Stoker, Midland

The next Milton C. Colia Trial Academy will be held in 2024. We look forward to seeing you there!

Trial Academy Graduates

Becca Aduddell, Gonzalez, Chiscano, Angulo & Kasson P.C., San Antonio
Katy Andrade, Orgain, Bell & Tucker, L.L.P., Beaumont
Walker Bauer, Porter, Rogers, Dahlman & Gordon, P.C., San Antonio
Emily Brown, Cotton, Bledsoe, Tighe & Dawson, P.C., Midland
Rifqa Calhoun, Skelton Slusher Barnhill Watkins Wells PLLC, Lufkin
Clayton Carter, Kane Russell Coleman Logan PC, Dallas
Jacob Casso, Colvin, Saenz, Rodriguez & Kennamer L.L.P., Edinburg
Trevor Chilton, Cotton, Bledsoe, Tighe & Dawson, P.C., Midland
Justin Click, Hartline Barger LLP, Houston
Andres Contreras, Rodriguez Law Firm, P.C., Dallas
Julia Edwards, Gray Reed & McGraw LLP, Houston
Taylor Ellison, Naman, Howell, Smith & Lee, PLLC, Fort Worth
Henry Falcon, Ramon Worthington Nicolas & Cantu, P.L.L.C., Edinburg
Marshall Gardner, McKibben, Martinez, Jarvis & Wood, L.L.P., Corpus Christi
Aly Guajardo, Royston, Rayzor, Vickery & Williams, L.L.P., Brownsville
Darien Harris, Gray Reed & McGraw LLP, Houston
Charlie Hayes, Clark Hill PLC, San Antonio
Jake Ingle, Fulbright Winniford, A Professional Corporation, Waco
Kathryn Laflin, Kane Russell Coleman Logan PC, Dallas
Saige Lee, Sprouse Shrader Smith P.L.L.C., Amarillo
Joe Marcus, Waddell Serafino Geary Rechner Jenevein, P.C., Dallas
Zach McClymond, Shafer, Davis, O'Leary & Stoker, Odessa
Cal Mundell, Mounce, Green, Myers, Safi, Paxson & Galatzan, P.C., El Paso
Zach Nelson, Beck | Redden LLP, Houston
Drake Pamilton, Brackett & Ellis, P.C., Fort Worth
Jon Peirce, Sheehy, Ware, Pappas & Grubbs, P.C., Houston
Selena Pena, The LeCrone Law Firm, P.C., Sherman
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Pedro Zavala, Brackett & Ellis, P.C., Fort Worth

Texas Supreme Court Justice Phil Johnson (ret.) and the 2022 TADC Trial Academy Graduating Class

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- Correctional Healthcare
- Human Factors
- Premises Security & Safety
- Workplace & Industrial Safety

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Amicus Curiae Committee Update

There have been several significant amicus submissions.

Mitch Smith (Germer PLLC) filed an amicus to support the petition for review on *Elephant Ins. Co. LLC v Kenyon, LLC*, 2022 WL 1202307, 2022 Tex. LEXIS 344 (Tex., Apr. 24, 2022). This is a permissive interlocutory appeal on the issue of duty from a summary judgment (traditional and no evidence) on whether Elephant had a legal duty. The core issue is whether an insurer owes a legal duty to an insured to prevent bodily injury to its insured after consenting that insured photograph property damage to the insured vehicle to support a claim. While the insured husband was taking a foto of the insured vehicle for the claim, a driver ran off a wet road and hit him. The Supreme Court held that the duty of good faith and fair dealing to investigate and evaluate a policy did not extend to post-accident advice on safety; the control over claims evaluation does not translate into liability for all events during investigation.

Mike Eady (Thompson Coe) filed an amicus to support the petition for review in *Virlar v. Puente*, 613 S.W.3d 652 (Tex. App.—San Antonio 2020, pet. granted) (en banc). This is a med mal appeal for causing a debilitating condition – Wernicke's encephalopathy. The two critical issues are (1) allocating a $3.3 million settlement credit between the patient and her child under TCPRC chap. 33, and (2) awarding most of the $13 million in future medical expenses in a lump sum instead of periodic payments under TCRPC chap. 74, subch. K. After oral argument to a panel, the San Antonio Court *sua sponte* went en banc without waiting for a panel opinion; two justices on the original panel dissented and the third wrote the opinion for the en banc majority. The majority concluded the Tex. Civ. Prac. & Rem. Code chap. 33 definition of 'claimant' for the purpose of settlement credits was unconstitutional. The Supreme Court has granted review.

TADC has authorized Scott Stolley to file an amicus to support the petition for review on *American Honda Motor Co. v. Milburn*, No. 04-19-0085, 2021 WL 5504887, 20212 Tex. App. LEXIS 9512 (Tex. App.—Dallas Nov. 24, 2021, pet. filed) (mem. op.). The case arises from an auto collision. The plaintiff was a passenger on an Uber ride in a Honda minivan. The plaintiff sued three Uber-related entities, the van's owner, the driver, and Honda. After settling with the Uber-related entities, the plaintiff went to trial against Honda on a design-defect claim related to the seat belt design. The case presents a number of issues of potential interest:

- What kind of expert testimony is needed to rebut the presumption of no liability under CPRC 82.008 for designs that comply with federal safety standards?

- Was the plaintiff's "human-factors" expert qualified to offer testimony on the exception and on plaintiff's design-defect claim?

- Should Uber have been submitted in the proportionate responsibility question? The court of appeals affirmed the trial court's refusal to include Uber on the basis that Uber's responsibility was merely "derivative" of the driver's responsibility. The Supreme Court has requested a response to the petition.

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The Blame Game: Spreading the Risk to Reduce Your Client's Liability

In cases where a defendant does have some liability, the best defense is often to reduce that liability by assigning as much responsibility as possible to other parties; i.e. playing the blame game to the client's advantage- as permitted by Texas law. Tex. Civ. Prac. & Rem. Code §33.013 affects the amount of liability a defendant might have to the plaintiff. As stated in the opening section of the provision, "except [for a joint and several liability situation], a liable defendant is liable to a claimant ***only for the percentage of the damages found by the trier of fact equal to that defendant's percentage of responsibility*** . . ." Tex. Civ. Prac. & Rem. Code § 33.013(a). In other words, the court puts on blinders as to the percentage of responsibility other parties (defendants, settling parties, responsible third parties) might bear, but rather focuses on what percentage of responsibility was placed on that particular defendant by the jury. There are multiple routes a defendant may take under the law to achieve maximum blame shifting.

I. Designate Responsible Third Parties

Chapter 33 defines a responsible third party as any person who is alleged to have caused or contributed to a plaintiff's injury or damages. Tex. Civ. Prac. & Rem. Code § 33.011(B)(6). In *Knight v. Cooper*, 2017 WL 10841352 (W.D.Tex.2017), the court directly addressed the issue of whether immunity prevented the designation of an entity as a responsible third party. Specifically, the plaintiff in *Knight* argued that the defendant had to comply with any notice requirements under a statute to bring suit against a governmental entity before being permitted to designate that entity as a responsible third party. But in rejecting the plaintiff's objection, the court noted that the definition of a responsible third party under Tex. Civ. Prac. & Rem. Code §33.011(B)(6) "encompasses a broad standard for the designation of responsible third parties, under which 'a responsible third party may include persons who are not subject to the court's jurisdiction or who are immune from liability to the claimant.'" *Id*. at *2 (*quoting In re Unitec Elevator Services Co*., 178 S.W.3d 53 n. 5 (Tex. App.—Houston [1st Dist.] 2005, no pet.)); *Brewer v. Suzuki Motor of Am., Inc*., 2016 WL 4159754, at *3 (S.D. Tex. 2016) ("even parties who are not subject to the court's jurisdiction or who are immune from liability to the claimant' can be designated responsible third parties under the statute."). The Court confirmed that a defendant seeking to designate an entity which may be immune from suit or subject to notice requirements before suit does not have to satisfy whatever statute would govern a party seeking affirmative relief from that entity. *Id.*

Importantly, a defendant seeking to designate responsible third parties does have a duty to identify potential responsible third parties in discovery responses as soon as possible. In *In re Dawson*, 550 S.W.3d 625, 628 (Tex. 2018), the Texas Supreme Court addressed the question of whether a defendant may designate a responsible third party after the limitations period for the plaintiff to bring an action against that party has expired. In addressing this question, the Court

opined on the options presented to the parties under the responsible third-party statute:

> "A plaintiff has the option to counter the impact of a responsible third party's designation by joining the "party as an additional defendant." In this way, all potentially culpable parties appear before the court, defend themselves, and face potential liability for their portion of responsibility. But a plaintiff may not join a "designated responsible third part[y] outside the limitations period." *Molinet v. Kimbrell*, 356 S.W.3d 407, 416 (Tex. 2011). And when a plaintiff is so barred, "an imbalance in the proportionate] responsibility framework" may arise. *Id.* "[W]hile the defendant may potentially cut down liability by blaming the third party, the plaintiff is precluded by limitations from seeking recovery on the basis of that third party's fault." *Withers v. Schneider Nat'l Carriers, Inc*., 13 F.Supp.3d 686, 689 (E.D. Tex. 2014).

Under the statute, a defendant's motion to designate a responsible third party is subject to certain time restrictions. First, the motion must be filed 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. Tex. Civ. Prac. & Rem. Code §33.004(a). Second, if the applicable statute of limitations has run, the defendant may not designate the responsible third party at all unless the defendant has complied with its obligations to timely disclose the identity of the potential responsible third party under the Texas Rules of Civil Procedure. Id.; *Dawson*, 550 S.W.3d 625, 628 (Tex. 2018). In *Dawson,* the defendant had failed to provide anything other than "will supplement" in its disclosure responses prior to the expiration of limitations and provided only the name and phone number of the independent contractor it sought to designate as a responsible third party after limitations had run. In holding that the defendant had not met its obligation to timely disclose the identity of the responsible third party before the expiration of limitations, the Court held that the rules "don't allow a party to drag its feet" on the obligation to timely respond to written discovery with a complete response and to supplement reasonably promptly after the party discovers the necessity to supplement. *Dawson*, 550 S.W.3d at 630-1.

Conversely, a defendant who does diligently identify responsible third parties in timely discovery responses even if such disclosure occurs after the expiration of Plaintiff's statute of limitations against the proposed responsible third party is entitled to the designation. *In re Mobile Mini, Inc.,* 596 S.W.3d 781, 785 (Tex. 2020). In *Mobile Mini*, the Texas Supreme Court held that a defendant cannot be denied the right to identify and designate a responsible third party simply because a Plaintiff waited to file suit until days before limitations expired and therefore created a natural consequence of being unable to file suit against any party designated by the original defendant. *Id.* In *Mobile Mini,* the Plaintiff filed suit days before the expiration of the statute of limitations and defendant's initial disclosure responses were not due until fifty days from the date of service of the petition, a deadline when occurred after limitations expired. Importantly, the defendant identified the proposed responsible third party in its timely served discovery responses and the Supreme Court agreed that there is no obligation on a defendant to disclose potential responsible third parties before disclosures are required simply to save a plaintiff from the consequences of a last-minute suit. *Id.*

The holdings in *Dawson* and *Mobile Mini* confirm the importance for all defendants to promptly investigate potential responsible third parties and identify each potential responsible third party promptly in discovery responses. Defendants must also be cognizant of the fact that in addition to timeliness there is also an evidentiary burden to obtain a designation. Tex. Civ. Prac. & Rem. Code § 33.004(g) provides that

the trial court "shall grant leave to designate ... a responsible third party" unless a party timely objects and establishes that (1) the defendant did not plead sufficient facts concerning the person's alleged responsibility to satisfy the pleading requirements in the rules of civil procedure, and (2) after an opportunity to replead, the pleading defect persists. The question presented therefore is what constitutes "sufficient facts" to satisfy this provision. In an opinion released on March 11th of this year, the Texas Supreme Court compared the initial pleading standard for a defendant to that required to defeat special exceptions and the standard for a plaintiff to strike a designation of a responsible third party as akin to a no-evidence motion for summary judgment. *In re Eagleridge Operating, LLC*, _____ S.W.3d _____, No. 20-0505, 2022 WL 727015, at *4 (Tex. Mar. 11, 2022). In *Eagleridge,* the defendant wellsite owner sought to designate the former owner of the wellsite as a responsible third party in a case alleging injuries from a burst gas pipeline constructed by the former owner. The defendant alleged that the former owner was responsible for the construction, installation, and placement of the pipeline and further that the former owner was responsible because it acted not only as the owner but as the operator of the pipeline for a fee paid by other minority owners. The trial court granted the plaintiff's motion to strike the designation of the former owner as a responsible third party and the Supreme Court affirmed. In holding that the defendant had not met its evidentiary burden to sustain the designation, the Court held that the defendant's designation of a former premises owner as a responsible third party was subject to the premises-liability principles for former owner liability and that since a former owner is not liable under premises liability law for the property's condition after he has conveyed his ownership interest, the former owner could not be designated as a responsible third party. The *Eagleridge* holding confirms that a defendant's designation of responsible third parties must be based on legally sufficient evidence or will not be permitted.

II. Join Third-Party Defendants

Unlike the responsible third party provision, joinder may be in the defendant's best interest when the responsible third party brings assets to the table with which to potentially aid in settlement or satisfy a judgment. Importantly, a third-party claim is not an independent cause of action; instead it is an extension of the causes of action asserted by the plaintiff. TEX. R. CIV. P. 38 provides that "a defending party, as a third-party plaintiff, may cause a citation and petition to be served upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him." TEX. R. CIV. P. 38.

Joinder rests on the concept of judicial efficiency and the policy of providing full and adequate relief to the parties. *Bennett v. Grant*, 460 S.W.3d 220, 239 (Tex. App.—Austin 2015), aff'd in part and rev'd in part on other grounds, 525 S.W.3d 642 (Tex. 2017), cert. denied, 138 S. Ct. 1264, 200 L. Ed. 2d 417 (2018); *In re Arthur Andersen LLP*, 121 S.W.3d 471, 483 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). A court's decision on joinder should be based on practical considerations with a view to what is fair and orderly. *In re Arthur Andersen LLP*, 121 S.W.3d 471, 483 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding). Leave of court is not required to join third parties if the Third-Party Petition is filed within 30 days after filing an original answer. Tex. R. Civ. P. 38(a). After 30 days, leave is required but the trial court has broad discretion, based on practical considerations and what is fair and orderly. Id.; *In re Arthur Andersen LLP*, 121 S.W.3d at 483.

As with timely designation of responsible third parties, it is important for a defendant not to unreasonably delay a third-party action. When a motion for leave to file a third-party petition is not filed for more than a year after original suit was filed and granting of the motion would result in unnecessary delay of scheduled trial, a court's

denial of leave is not an abuse of discretion. *Threeway Constructors, Inc. v. Aten,* 659 S.W.2d 700, 701-2 (Tex.App. –El Paso 1983, no writ). Conversely, a court does abuse its discretion when leave to file a third-party petition is denied when leave is sought promptly after the third-party's potential liability becomes known in the case. *In re Arthur Andersen, LLP,* 121 S.W.3d at 483. The underlying policy behind the joinder rule is that a defendant has the fundamental right to have the entire case tried at one time and have a single jury apportion liability among all responsible parties. *Id.* A defendant gives up this right by unreasonably delaying its third party action. *Threeway Constructors, Inc.,* 659 S.W.2d at 702. This principle is codified in Rule 37 of the Texas Rules of Civil Procedure which provides that so long as additional parties are not brought in "at a time nor in a manner to unreasonably delay the trial of the case," a party is permitted to join parties upon such terms as the trial court permits. A defendant should file a third-party petition to join any party whose inclusion is necessary for just adjudication of the claims as such joinder is compulsory under Texas law. Tex. R. Civ. P. 39(a). The most common scenario in which a defendant must join compulsory parties is a wrongful death claim where all potential wrongful death beneficiaries are not parties or represented by the original parties to the suit.

It is also important to ensure that the right to obtain compensation from any responsible third party is preserved. The rule regarding the accrual of a cause of action for contribution was codified with the Texas Legislature's passage of comparative negligence. Specifically, the contribution statute provides: "A person against whom a judgment is rendered has, on payment of the judgment, a right of action to recover payment from each codefendant against whom judgment is also rendered" [emphasis added]. Tex. Civ. Prac. & Rem. Code § 33.002. In other words, no cause of action for contribution accrues until a judgment has been rendered. The contributory negligence statute further addresses whether a third-party defendant can be joined in the original lawsuit before there has been a judgment in that lawsuit. Specifically, Tex. Civ. Prac. & Rem. Code § 33.016, affirms this prospect. The code provision defines a "contribution defendant" as "any defendant, counter defendant, or third-party defendant from whom any party seeks contribution with respect to any portion of damages for which that party may be liable, but from whom the claimant seeks no relief at the time of submission" [emphasis added]. Tex. Civ. Prac. & Rem. Code §33.016(a).

III. Claim Indemnity

Indemnity obligations whether statutory or contractual also shift liability. The most commonly asserted statutory indemnity arises under Chapter 82 of the Texas Civil Practice & Remedies Code which pertains to products liability actions. "[T]he purpose of section 82.002 is to protect innocent sellers who are drawn into products liability litigation solely because of the vicarious nature of that liability by assigning responsibility for the burden of the litigation to product manufacturers." *FLS Miljo, Inc. v. Munters Corp*., 682 F. Supp. 2d 681, 688 (N.D. Tex. 2010) (quoting *Hudiburg*, 199 S.W.3d at 262). Unlike the common law, a manufacturer's duty to indemnify arises from the injured claimant's pleadings alone. *Id*. (citing *Hudiburg*, 199 S.W.3d at 256). The *FLS Miljo* court does note that while the duty of a manufacturer to indemnify a seller is automatic when triggered by a plaintiff's pleadings, the contrary is not true, in that a plaintiff's pleading alleging separate acts of the seller which would be exclusions under §82.002 do not automatically trigger the exclusions. *Id*. at 689. "In order to escape its duty to indemnify, the manufacturer must prove the seller's independent culpability." *Id*. (citing *Hudiburg*, 199 S.W.3d at 255).

In each case where the defendant has a contractual relationship with either another party or a non-party, the contract should be evaluated to determine if it includes indemnity for the plaintiff's claims. Such contractual obligations must be

evaluated with the express negligence doctrine in mind. Because indemnity agreements involve "an extraordinary shifting of risk" from the exculpated party to the indemnitor, the Texas Supreme Court has developed the fair notice requirements of express negligence and conspicuousness. *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993). The express negligence requirement provides that when a party is seeking indemnity from the consequences of that party's own future negligence, that intent must be expressed in unambiguous terms within the four corners of the contract. *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987). The conspicuousness requirement provides that something must appear on the face of the contract indicating the intent to transfer liability so that it will attract the attention of a reasonable person when they look at the contract. *Dresser Indus.*, 853 S.W.2d at 508. Texas Courts determine "fair notice" based on the indemnity clause's compliance with the express negligence doctrine and the conspicuity requirement found in TEXAS BUSINESS & COMMERCE CODE §1.201(10). See *Dresser Indus., Inc*., 853 S.W.2d at 509. (adopting §1.201(10) as the "standard for conspicuousness"). If an indemnification clause fails to meet the express negligence test, the indemnitor has no duty to indemnify an indemnitee for costs and expenses of a claim even if the indemnitee is found not to be negligent. *Fisk Elec. Co. v. Constructors & Assocs., Inc*., 888 S.W.2d 813, 813–14 (Tex. 1994). Indemnity provisions that do not state the intent of the parties within the four corners of the instrument are unenforceable as a matter of law. *Fisk Elec. Co. v. Constructors & Assoc., Inc.*, 888 S.W. 2d 813, 814 (Tex. 1994); *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W. 2d 705, 708 (Tex. 1987). In order to satisfy the conspicuous requirement, the indemnity agreement must be printed in capitals, larger or other contrasting type, or set apart by color from the surrounding text. *Ling & Co. v. Trinity Sav. & Loan Ass'n,* 482 S.W.2d 841, 843 (Tex. 1972). An indemnity provision that does not "stand out" will not survive a conspicuousness challenge. *Id.*

Counsel representing defendants in construction defect claims should, however, be cognizant of the Anti-Indemnity Statute. Since 2012, Texas has, as a matter of statute, disallowed most forms of indemnity in contracts for construction. The Texas Anti-Indemnity Statute, Tex. Ins. Code § 151.102, provides that in any construction contract, or any agreement collateral to a construction contract, any provision proving that requires an indemnitor (the party agreeing to indemnify) to indemnify an indemnitee (the party being indemnified) for the indemnitee's own negligence, is void. But the indemnitor can still indemnify for the indemnitor's own negligence. Section 151.102 does not apply to a provision in a construction contract that requires a person to indemnify another party to the construction contract or a third-party for a claim for injury to or the death of an employee of the indemnitor, its agents, or subcontractors. Tex. Ins. Code § 151.103. The Anti-Indemnity Statute does not apply to certain agreements, including construction of single-family residences, duplexes, and townhomes, and agreements affecting workers' compensation benefits. Tex. Ins. Code § 151.105

In conclusion, strategy decisions are important for plaintiffs but are equally important for defendants, who are ultimately facing a financial obligation depending on the court or jury's decision. Whether the best defense strategy is a designation of responsible third parties, joinder of third parties including contribution claims, or asserting a claim of indemnity, strict compliance with the rules governing each option is key to a successful "sharing" of the blame.

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TADC 2022 ANNUAL MEETING

September 14-18, 2022 ~ La Cantera Resort & Spa ~ San Antonio, TX

Program Co-Chairs: Rick Foster, Porter Rogers, Dahlman & Gordon, PC, San Antonio & Trey Sandoval, Mehaffy Weber, Houston

CLE Approved for: 9.75 hours, including 2.25 hours ethics

Wednesday, September 14, 2022

6:00pm – 8:00pm TADC Welcome Reception

Thursday, September 15, 2022

7:00-9:00am Buffet Breakfast

7:30-7:45am Welcome & Announcements
Christy Amuny, TADC President
Germer PLLC, Beaumont
Rick Foster, Porter, Rogers, Dahlman & Gordon, PC, San Antonio
Trey Sandoval, MehaffyWeber, PC, Houston

7:45-8:15am *TRUCKING LITIGATION IN TEXAS: VICARIOUS LIABILITY AND THE RESPONSIBILITY OF THE COMPANY*
Brent Bishop, Atlas, Hall & Rodriguez, LLP, McAllen

8:15-8:45am *THE FIGHT CAN WAIT – BUT NOT FOREVER: STATUTES OF LIMITATION AND REPOSE IN CONSTRUCTION LITIGATION*
William S. Sommers & Thomas Lillibridge, Langley & Banack, Inc., San Antonio

8:45 -9:15am *THERE WILL BE TRIALS (AGAIN) - TRIAL TIPS LEARNED DURING 44 YEARS AT TADC*
Thomas C. Riney, Riney & Mayfield LLP, Amarillo

9:15-10:00am *ALL ALONG THE KING'S HIGHWAY: OIL IS STILL KING – LESSONS ON DEFENSE OF OIL & GAS LEASE DISPUTES*
Christopher M. Hogan, Hogan Thompson LLP, Houston

10:00-10:15am *B R E A K*

10:15-11:00am *SUPREME COURT UPDATE (.25hrs ethics)*
Justice Brett Busby, Texas Supreme Court, Austin

11:00-11:45pm *BANDITS AND ROBBERS AT THE WATER HOLES: PRESERVATION OF ERROR IN TRIAL*
Katherine Elrich, Cobb Martinez Woodward, PLLC, Dallas

11:45-1:15pm LUNCHEON: *AVOIDING THE DITCH ALONG THE ROAD – LESSONS FROM AN EXPERIENCED DRIVER (1.0 hrs ethics)*
Mike Bassett, The Bassett Firm, Dallas

1:15-1:45pm *THE CURRENCY CHANGES ALONG THE ROAD: PAID AND INCURRED AND DISCOVERY OF USUAL AND CUSTOMARY CHARGES FOR MEDICAL EXPENSES POST – K&L AUTO CRUSHERS, LLC*
Raj Aujla & Brandon Coony, Porter, Rogers, Dahlman & Gordon, P.C., San Antonio

Thursday Afternoon free to enjoy San Antonio

Friday, September 16, 2022

7:00-9:00am Buffet Breakfast

7:30-7:45am Welcome & Announcements

7:45-8:15am *TRUCKING BROKER LIABILITY – RISKS OF LINING UP THE MOVING OF WARES ALONG THE TRAIL*
Daniel H. Hernandez, Ray Pena McChristian, PC, El Paso

8:15-8:45am *LET'S FIND OUT IF WE REALLY HAVE TO RIDE THE WHOLE WAY FIRST: PERMISSIVE APPEAL IN TEXAS*
The Honorable Renée Yanta, Santoyo Wehmeyer P.C., San Antonio

8:45-9:45am *YOU'RE NOT ALONE ON THE ROAD TO JUDGMENT: CONTRIBUTION AND SETTLEMENT CREDITS*
Bradley K. Douglas, Naman, Howell, Smith & Lee, PLLC, Austin

9:45-10:00am *B R E A K*

10:00-11:00am *DILEMMAS ALONG THE TRAIL – LESSONS FROM THE MOVIES ABOUT ETHICS (1.0 hr ethics)*
Gayla Corley, MehaffyWeber, PC, San Antonio

11:00-11:30am *COMPLEX MEDICAL LITIGATION*
Denise Selbst, MedEx Reviews, LLC, Sugar Land

11:30am-12:30pm *MODERN DAY PINKERTONS: TRIAL LAWYERS ENFORCING THE FALSE CLAIMS ACT*
Mike Hendryx & Greg Dykeman, Strong Pipkin Bissell & Ledyard, L.L.P., Houston-Beaumont

12:30-12:45pm *TADC BUSINESS MEETING*

Friday Afternoon free to enjoy San Antonio!

6:30pm - 9:00pm
TADC Awards Dinner

Saturday, September 17, 2022

7:00-9:00am Buffet Breakfast

Saturday free to enjoy San Antonio!

Sunday, September 18, 2022

Annual Meeting Adjourned

2022 TADC ANNUAL MEETING

September 14-18, 2022

La Cantera Resort & Spa ~ 16641 La Cantera Pkwy. ~ San Antonio, TX 78256

Pricing & Registration Options

Registration fees include Wednesday through Saturday group activities, including the Wednesday evening welcome reception, Hospitality room, all breakfasts, CLE Program each day and related expenses. If you would like CLE credit for a state other than Texas, check the box below.

Registration for Member Only (one person)	$895.00
Registration for Member & Spouse/Guest (2 people)	$1,250.00

Spouse/Guest CLE Credit

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

Spouse/Guest CLE credit for Annual Meeting	$75.00

Service Project

TADC Gives Back: The TADC will participate in a service project in San Antonio. Details to follow.

Hotel Reservation Information

For hotel reservations, **CONTACT THE LA CANTERA RESORT DIRECTLY AT 855-499-2960 and reference the TADC 2022 Annual Meeting.** The TADC has secured a block of rooms at a FANTASTIC rate of $279 per night. It is **IMPORTANT** that you make your reservation as soon as possible ***as the room block will sell out***. Any room requests after the deadline date, or after the room block is filled, will be on a space available basis.

DEADLINE FOR HOTEL RESERVATIONS IS August 26, 2022

TADC Refund Policy Information

Registration Fees will be refunded ONLY if a written cancellation notice is received at least TEN (10) business days prior (SEPTEMBER 1, 2022) to the meeting date. A $100.00 Administrative Fee will be deducted from any refund. Any cancellation made after SEPTEMBER 11, 2022 IS NON-REFUNDABLE

2022 TADC ANNUAL MEETING REGISTRATION FORM

September 14-18, 2022

***For Hotel Reservations, contact The La Cantera Resort DIRECTLY at* 855-499-2960**

CHECK ALL APPLICABLE BOXES TO CALCULATE YOUR REGISTRATION FEE:

- ☐ **$ 895.00 Member ONLY (One Person)**
- ☐ **$ 1,250.00 Member & Spouse/Guest (2 people)**
- ☐ **$ 75.00 Spouse/Guest CLE Credit**
- ☐ **$ (no charge) CLE for a State OTHER than Texas - a certificate of attendance will be sent to you following the meeting**

TOTAL Registration Fee Enclosed $_____

NAME:_____ FOR NAME TAG:_____

FIRM:_____ OFFICE PHONE:_____

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

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PAYMENT METHOD:

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

Make checks payable to TADC. Registration forms can be mailed to: TADC, P.O. Box 92468, Austin, TX 78709 or emailed to tadc@tadc.org OR register online at www.tadc.org

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TEXAS LAWYER AUSTIN BEST OF 2021 TOP 3 EXPERT WITNESS

The changing landscape regarding the duty to defend

By: Craig L. Reese
Fletcher, Farley, Shipman & Salinas, LLP,
Dallas

The insurance industry in Texas has long complained that courts are simply too liberal when it comes to the duty to defend. There may be some truth to this statement given the admonition by the Fifth Circuit Court of Appeals in *Essex Ins. Co. v. Hines*, 358 F. App'x 596 (5th Cir. 2010), wherein the court noted, in instructing carriers about the issue of whether a duty to defend exists, it is a "seemingly simple task" given the rules regarding the obviously broad duty are well established, and carriers unfortunately constantly need to be reminded: "When in doubt, defend." *Id.* at 597. Historically, Texas courts have required carriers to determine the duty to defend under the "eight-corners" rule which requires a comparison of the four corners of the pleadings and the four corners of the policy. Too often, however, the pleadings lack information needed to determine whether a duty to defend exists, especially when it comes to the question of which policy, if any, is implicated because the petition does not allege any dates. Of course, some of the same problems can impact the insured when it seeks a defense from the carrier. If critical allegations are missing, the carrier may refuse to defend. Given these and other issues, carriers (and to some extent, insureds) have long sought to get courts to consider extrinsic evidence (evidence outside of the eight corners). For the most part, neither side has been very successful. However, after repeated efforts by the Fifth Circuit, the Texas Supreme Court has finally "adopted" the use of extrinsic evidence in certain situations. Of course, as is too often true when the court adopts new rules, a number of questions remain as to how these exceptions should be applied.

As recently as 2020, the Texas Supreme Court had unanimously ratified the eight-corners rule as the settled rule in Texas, rejected attempts to conflate the duty to defend with the duty to indemnify, and affirmed that extrinsic evidence should not impact an insurer's evaluation of the defense obligation owed to its insured. *Richards v. State Farm Lloyds*, 597 S.W.3d 492, 498-99 (Tex. 2020).

While the Texas Supreme Court seemed content to follow the eight-corners rule for determining the duty to defend, the Fifth Circuit was not. In 2004, the Fifth Circuit held the Texas Supreme Court would not permit the use of extrinsic evidence for purposes of determining the duty to defend, with no exceptions to this rule. *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 531 (5th Cir. 2004). It is interesting to note, however, that the court went on to say that it was always possible that the Texas Supreme Court would recognize an exception in very limited circumstances: (1) when it is initially impossible to discern whether coverage is potentially implicated; and (2) when the evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case. *Id.* The Fifth Circuit noted that any such exception would be limited to fundamental coverage issues, to include: (1) whether the person sued has been specifically excluded by name or description from any coverage; (2) whether the property in suit is included in or has been expressly excluded from any coverage; and (3) whether the policy exists. *Id.* at 530.

The dam finally saw its first noticeable crack in 2020 in a case styled *Loya Ins. Co. v. Avalos*, 610 S.W.3d 878 (Tex. 2020). This case arose out of a car accident involving the Hurtados and the insured's husband, Flores. On the day of the accident, Flores was moving Guevara's car outside of their home when he collided with the plaintiffs' vehicle. Although Guevara was insured by Loya Insurance Company, the policy contained a named driver exclusion for Flores. The record in the underlying case reflected that all parties involved reported to

the police and insurance company that Guevara, not Flores, was driving the vehicle at the time of the accident. *Id.* at 880. The Hurtados filed a lawsuit against Guevara alleging that she negligently operated her vehicle. Counsel appointed by Loya filed an answer on behalf of Guevara. *Id.* During the course of the discovery process, Guevara identified herself as the driver of the car. However, Loya later learned, after Guevara disclosed the lie to her counsel, that Flores was actually driving at the time of the accident and the carrier sent a letter to the plaintiffs denying coverage for the loss. The defense counsel withdrew and a judgment was rendered against Guevara for $450,343.34. *Id.* The Hurtados, as assignees of Guevara, filed suit against the carrier, alleging negligence, breach of contract, breach of the duty of good faith and fair dealing, and violations of the DTPA. According to the Hurtados, Loya Insurance Company had a duty to defend Guevara in the negligence suit and it breached that duty when counsel appointed by the carrier withdrew.

Loya sought declaratory relief that it had no duty to defend since Flores was driving and asserted claims for breach of contract and fraud. *Id.* In support of its motion, Loya Insurance Company attached portions of Guevara's deposition testimony from the negligence case in which she admitted that Flores was driving at the time of the accident. She also testified that she did not tell the carrier that he was driving until right before her deposition. Summary judgment was granted on behalf of Loya Insurance Company. *Id.*

The San Antonio Court of Appeals reversed concluding that "as logically contrary as it may seem, we hold that under the eight-corners" rule, it was the duty of Loya Insurance Company to defend Guevara against the allegations in the underlying lawsuit even if those allegations were false or fraudulent. The court of appeals also rejected the carrier's argument that Guevara materially breached the policy by falsely reporting that she was the driver. The court noted that if Loya knew the allegations against its insured were untrue, it had a duty to establish those facts in defense of Guevara in the underlying lawsuit.

In reversing the decision by the San Antonio Court of Appeals, the Texas Supreme Court recognized that it had twice before noted that collusive fraud by the insured might provide the basis for an exception to the eight-corners rule. *Id.* at 881. The court concluded that the case before it presented just such a circumstance. The court noted there was no dispute in the record regarding who was actually driving the vehicle that collided with the Hurtados. The court did note that had the Hurtardos pointed to any evidence indicating a factual dispute about the issue, summary judgment for the carrier would have been inappropriate. *Id.* at 882. Turning to the issue of collusion, the court found there was no dispute regarding whether the Hurtados agreed with the named insured and her husband to make false statements about who was driving in order to trigger coverage and a duty to defend. *Id.* The court went on to note that given the insured's own admissions under oath, the record conclusively established that these parties conspired to lie to trigger coverage. *Id.*

The court noted the following:

> [T]he duty to defend in liability insurance polices applies to fraudulent allegations against the insured *by third parties*. The insurer has not agreed to undertake, and the insured has not paid for, a duty to defend the insured against fraudulent allegations brought about *by the insured* itself. Thus, an insurer owes no duty to defend when there is conclusive evidence that groundless, false, or fraudulent claims against the insured have been manipulated by the insured's own hands in order to secure a defense and coverage where they would not otherwise exists.
>
> *Id.*

The *Northfield* exception came back before the Texas Supreme Court on a certified question from the Fifth Circuit last year. In *Bitco Gen. Ins. Corp. v. Monroe Guar. Ins. Co.*, 846 F. App'x 238 (5th Cir. 2021), the court of appeals certified to the Texas Supreme Court the question of whether the exception should apply in a particular case. In the case in question, both carriers provided coverage to an insured for different coverage periods. In 2014, the insured was hired to drill a commercial irrigation well. In 2016, the insured was sued for breach of contract and negligence. There were no date allegations in the pleading, but in the coverage action, both carriers stipulated that the drill bit was

stuck in the bore hole stopping drilling in or around November 2014. The carriers asked the court to consider the extrinsic evidence of a stipulated date to determine which carrier had the duty to defend. The court noted that ascertaining the date of an occurrence is a frequently encountered gap in third party pleadings and the omitted date can often be the key to the question of the duty to defend in the underlying lawsuit. *Id.* at 251.

Finding this presented an important question of state law, the Fifth Circuit certified two questions to the Texas Supreme Court:

(1) Is the *Northfield* exception permissible under Texas law?

(2) When applying such an exception, may a court consider extrinsic evidence of the date of an occurrence when (a) it is initially impossible to discern whether a duty to defend potentially exists from the eight corners of the policy and pleadings alone, (b) the date goes solely to the issue of coverage, and (c) the date does not engage the truth or falsity of any facts alleged in the third party pleadings.

Id. at 252.

On Friday, February 12, 2022, the Texas Supreme Court finally recognized an expanded exception to the prohibition against the use of extrinsic evidence to determine the duty to defend. *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, 640 S.W.3d 195 (Tex. 2022). The Texas Supreme Court answered the first certified question with a yes: Texas law permits consideration of extrinsic evidence, but under a standard different than the one articulated in *Northfield*. *Id.* at 202. The Texas Supreme Court noted, however, that it was not abandoning the eight-corners rule and that said rule remained the initial inquiry to be used in determining whether a duty to defend exists and further noted that the rule would resolve coverage determinations in most cases. *Id.* at 201. The court adopted the *Monroe* exception which states that extrinsic evidence may be considered provided the evidence (1) goes solely to an issue of coverage and does not overlap with the merits of liability, (2) does not contradict facts alleged in the pleading, and (3) conclusively establishes the coverage fact to be proved. *Id.* at 202. This exception will be applied only if the underlying petition states a claim that could trigger the duty to defend, and the application of the eight corners rule, due to a gap in the pleading, is not determinative of whether coverage exists.

The court rejected the *Northfield* element dealing with whether coverage is potentially implicated, finding this standard invited courts to read facts into the pleadings and imagine factual scenarios which might trigger coverage, both matters that Texas law does not permit. *Id.* The court determined that the better threshold inquiry was whether the pleading contains the facts necessary to resolve the question of whether the claim is covered. *Id.* The court also refined the Fifth Circuit test because that test required that the extrinsic evidence go to a fundamental issue of coverage. The Texas Supreme Court simply eliminated the fundamental question requirement. *Id.* at 203. Finally, unlike *Northfield*, the court found that the proffered evidence must conclusively establish the coverage fact at issue. *Id.* The court did note that the evidence need not be in the form of a stipulation and that other forms of proof may suffice, without identifying what that proof might be. But the evidence will not be considered if there would remain a genuine issue of material fact as to the coverage fact to be proved. *Id.*

Having answered yes to the first certified question, the court turned to the question of whether a court may consider evidence of the date of an occurrence. *Id.* The court concluded that evidence of the date of an occurrence can be considered if it otherwise meets the requirements of the *Monroe* exception. *Id.* at 204. However, the court concluded the stipulation as issue did not pass the test, noting that in cases of continuing damage like the kind alleged in the underlying lawsuit, evidence of the date of property damage overlaps with the merits of the lawsuit. "A dispute as to when property damage occurs also implicates whether property damage occurred on that date, forcing the insured to confess damages at a particular date to invoke coverage, when its position may very well be that no damage was sustained at all." *Id.* Finding that the coverage issue overlapped with liability, the court refused to consider the extrinsic evidence under the *Monroe* exception. *Id.*

The court discussed the *Monroe* exception in a case decided the same day. In *Pharr-San Juan-Alamo I.S.D. v. Texas Political Subdivisions Prop./Cas. Joint Self Ins. Fund*, 2022 WL 420491 (Tex. 2022), the issue before the court was whether the liability policy imposed a duty to defend and indemnify the insured for damages arising from an accident involving the use of a golf cart. Finding that the term golf cart does not refer to a vehicle

designed for travel on public roads, the court held that there was no duty to defend or indemnify. The Texas Supreme Court rejected the argument that the exception would apply to the facts of the case given that the ordinary meaning of the term "golf cart" did not refer to a vehicle designed for use on a public road (a requirement for coverage under the term "mobile equipment" in the policy at issue). The court found that applying the eight-corners rule, the carrier had no duty to defend because the plaintiff's allegations that the girl was thrown from a golf cart did not allege that she was thrown from a vehicle designed for travel on public roads. *Id.* at *8. Interestingly, the court agreed that the fact of whether the vehicle was designed for travel on public roads was one that related solely to coverage and did not overlap with the merits of the plaintiffs' case. *Id.* However, the remaining elements of the *Monroe* exception were not met. The Court found that the petition left no gap that would prevent a court from determining whether a duty to defend exists. *Id.* "Mere disagreements about the common, ordinary meaning of an undefined term do not create the type of 'gap' *Monroe* requires." *Id.* The court noted that if the petition had only alleged the girl was thrown from a vehicle, without identifying the type, a gap would exist. *Id.*

The Texas Supreme Court may have effectively turned the duty to defend in Texas on its head and left open a lot of questions that only subsequent cases will attempt to answer. However, the court noted that the eight-corners rule remains the initial inquiry and will control in most cases. We do know that extrinsic evidence will only be considered where a gap exists in the pleadings that would otherwise leave a court unable to determine whether coverage applies and the court rejected any "true facts" exception such that extrinsic evidence cannot be used to contradict allegations in a pleading, absent evidence of collusive fraud. There are a number of questions that simply were not answered i n *Monroe*. First, what kind of extrinsic evidence, if it otherwise meets the test, will be necessary. In *Loya*, the carrier had conclusive proof, by way of an admission and deposition testimony from the named insured, that the husband was driving the vehicle at the time of the accident. In *Monroe*, the two carriers had stipulated as to what they believed to be the controlling date for coverage. All we are sure of is that the Texas Supreme Court has noted that the coverage fact need not take the form of a stipulation and other forms of proof may suffice. *Monroe Guar. Ins. Co.*, 640 S.W.3d at 203. Second, how will the insurance industry respond to the court's invitation to modify the duty to defend language in hopes of avoiding situations where there is a question as to whether reliance on extrinsic evidence is permissible? Third, has the Texas Supreme Court reached its limit on how far it is willing to go with respect to the introduction of extrinsic evidence? Would it be willing to adopt a true facts exception in the right circumstances. Fourth, and potentially more problematic for insurers, is how does this impact the carrier's responsibility with respect to determining whether a duty to defend exists. While the Texas Supreme Court has indicated that the eight-corners rule remains the standard, will insureds now claim that if the carrier had just done additional investigation, it could have uncovered facts that gave rise to a duty to defend. If that becomes the standard, does a carrier now face potential Insurance Code claims for failing to undertake a reasonable investigation into potential extrinsic evidence. This last issue potentially impacts insureds also. Will carriers now spend more time looking for gap filling evidence to avoid the duty to defend? What impact might this have on the plaintiffs' bar when it comes time to plead facts?

While the Texas Supreme Court has reminded insurers, insureds, and coverage counsel that the eight-corners rule will still control most cases, it has now opened the door to the consideration of extrinsic evidence. There are a number of questions that remain to be answered, but coverage counsel will likely be busy in the next few years trying to figure out exactly where this issue is headed. Carriers will certainly push for consideration of extrinsic evidence in many cases through the declaratory judgment process. However, what is good for the goose is good for the gander and policyholders, and their counsel, will be arguing that carriers should be considering such evidence for purposes of imposing a duty to defend.

El PASO Baseball & CLE

Southwest University Park – June 16, 2022 – El Paso, Texas

El Paso area TADC Officers and Directors once again organized a very successful event for El Paso area members. Baseball and CLE at Southwest University Park with the Chihuahuas has become a fixture for El Paso Members! TADC President Christy Amuny provided an update on "A Little Ethics, A Little Evidence, A Little Procedure and Some Other Stuff," Look for this event to be back next baseball season.

Flame Effects Systems: Introduction to these Unique Appliances

By: Zachary J. Jason, PE, CFI, CFEI, Principal at AEI Corporation, Boulder, Colorado

Most people have likely been exposed to close-proximity flame effects at sporting events, concerts, amusement parks, and/or parades without thinking twice about the potential dangers and hazards associated with these brilliant theatrical displays. Although close-proximity flames can be safe, and the various dangers adequately mitigated, the use of flammable gasses and the general presence of fire in close proximity to an audience can create a unique set of potential hazards.

What are these close-proximity flame effects so commonly encountered by the general public? Stated simply, in a flame effect device, flammable gas is released and ignited outside the device in a controllable fashion to create the desired theatrical effect. NFPA 160, the industry standard for the use of flame effects before a proximate audience, defines a flame effect as *"the combustion of solids, liquids, or gases to produce thermal, physical, visual, or audible phenomena before an audience."* Some common examples include flame towers encountered during our favorite sporting events, a multitude of synchronized fire plumes emitted during a concert, or even a special effect used to aid in a movie production or live theatre (Figure 1). Once you start to identify these effects, it is obvious how common they are in our everyday lives.

A flame effect is created using a device that is typically designed and custom built to create a theatrical effect. Although these devices share many similarities with a typical gas-fired appliance, they are not your "ordinary appliance." They contain several exotic components and much more robust safety and control systems – making them more difficult to design, fabricate, and potentially investigate after an alleged accident. The various components that encompass the overall flame effect system (FES) are outlined below.

Figure 1. Flame towers in use.

Gas Supply

The fuel source most commonly used in the industry is propane. However, certain devices are designed for use with natural gas as well. The benefits associated with propane are that it is easily transportable, more easily stored as a compressed liquid, has a lower explosive limit, and contains more energy per unit volume than natural gas.

Regulator

As with any gas appliance, the operating pressures used by the device is typically lower than the standard delivery pressure. In a propane system, tank pressure is governed by the liquid temperature and naturally ranges from 10 – 200 pounds per square inch gauge (PSIG). A standard FES operates at higher pressures than a standard appliance and may also incorporate a series of adjustable pressure regulators used to modify the size and/or appearance of the overall fire effect.

Hoses, Piping, and Manifold

Due to the portable nature of most of these systems, flexible gas hose is used in lieu of hard piping. The exception to this is when the system is a permanent type of installation, in which case there is likely a combination of hard piping and flexible gas hose used to distribute the fuel (Figure 2). Some systems may encompass multiple flame effects separated over varying distances. In order to facilitate the multiple flame effects in the overall system, a central manifold may be used to distribute the fuel-gas between the various flame heads. Quick connects and other specialty fittings may also be used to aid in the rapid setup and breakdown of a modular/portable FES.

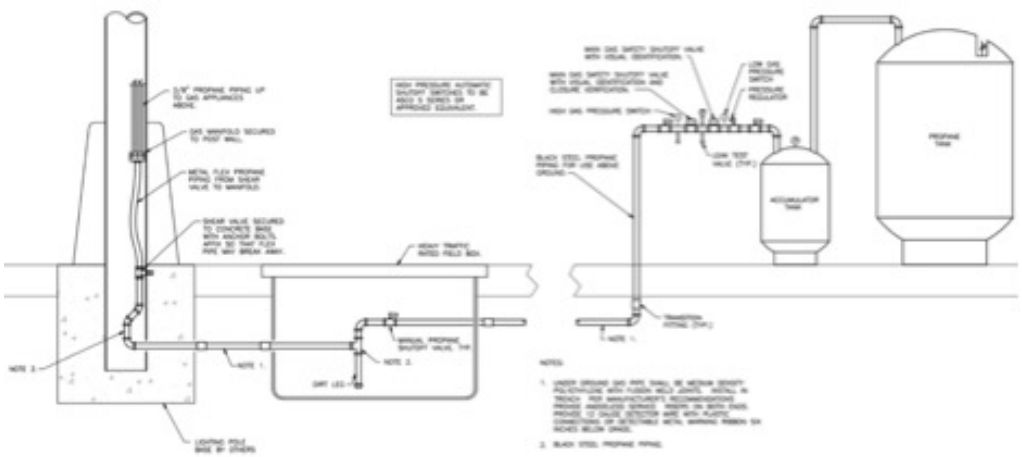

Figure 2. Piping diagram/schematic for a typical permanent FES.

Separation Cabinet

Codes and design standards require certain separation distances or compartmentalization between the flame head and the fuel source. In the more common liquid propane (LP) system, a metal cabinet is designed with multiple compartments – thus creating physical barriers between the fuel storage area and any open flames or gas release points. This design is more common in a modular-type system that is a stand-alone device (Figure 3).

Figure 3. Separation cabinet shown for a typical modular type FES.

Accumulator Tank

Certain types of devices are designed to produce extremely large effects, with flame heights generated in excess of 30+ feet. In order to accommodate this increased design capacity, a large volume of gas must be released and ignited simultaneously. Because standard system design and piping restrictions cannot accomplish the elevated flowrates necessary, a predetermined amount of gas is transferred into an accumulator tank located just upstream of the flame head prior to release and firing (Figure 4). When fired, quick acting solenoid valves open and release the large volume of gas, thereby achieving the high flowrate necessary to produce the larger flame effect. These accumulator tanks are required to meet the same American Society of Mechanical Engineers (ASME) pressure vessel code requirements as a standard LP storage container. Based on the design, several accumulator tanks may be used in a multi-effect system, which in turn can be fed from a single gas source.

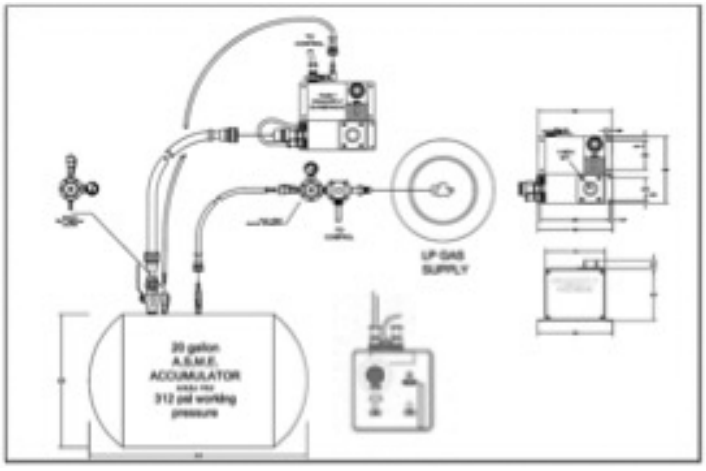

Figure 4. Piping diagram/schematic showing the interconnection of the accumulator tank.

Burner Head

The burner head is made up of both the nozzle/effect burner and the pilot ignition system. Specifically, the effect burner is designed to direct the gas being released into a variety of shapes and patterns while it is burned (Figure 5). Some nozzles may incorporate the concept of entraining air with the fuel-gas prior to ignition in order to accomplish an improved fuel-to-air mixture. This can result in an increased velocity of the flame front as it propagates through the unburned fuel, and significantly change both the audible and visual effect at the time of ignition.

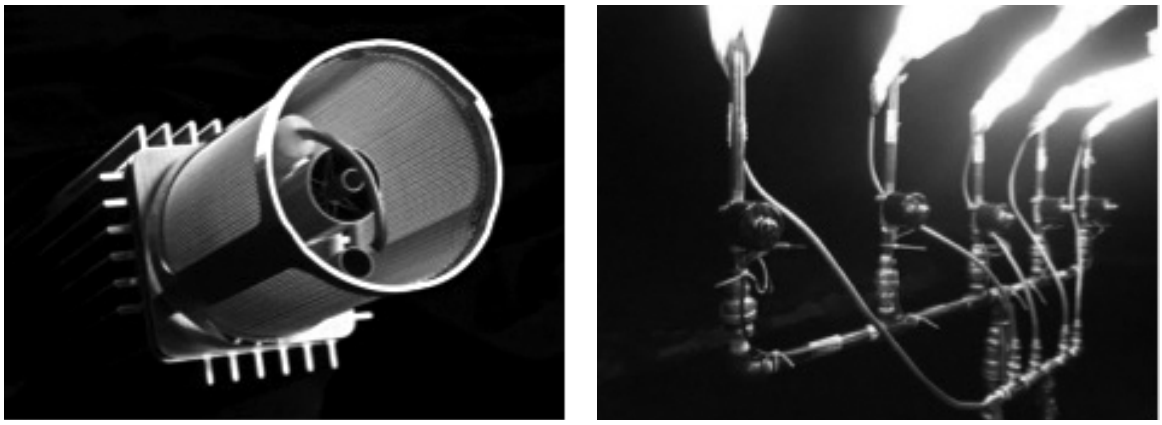

Figure 5. Various flame heads/effect burners.

Safety Circuit & Ignition System

Each burner head is equipped with an intermittent or standing pilot light to provide a source of ignition. Code requires that the pilot system is supervised and monitored by the primary safety control circuit. The pilot burner is typically fed from a dedicated low-pressure regulator and may have its own independent gas piping supply. The pilot burner, although more robust, is no different than those typically encountered on standard gas-fired appliances.

The ignition system can be controlled via an intermittent pilot module with built-in safety devices, including a flame rectification sensor to ensure the presence of a pilot flame before a gas release is allowed.

Control Valves

Typical control valves installed in a FES include a supervised manual fuel shutoff valve, an automated effect valve (fail-closed type) installed upstream of the burner, an accumulator charge valve used to control the flow of gas into the accumulator tanks, an automated fast-acting safety shutoff valve designed to stop the flow of fuel in response to a normal safety system shutdown, and an automated vent valve, which is located between the two safety shutoff valves.

Control System

Per code requirements, all flame effect control systems are designed to prevent unintended firing and the inadvertent release of gas. Coded arming systems, manual interlocks, and locked key switches are used to add a secondary layer of safety into the system and ensure that an authorized operator is present to arm/fire the system. All flame effect control systems should be designed to implement the following functions, through a series of automated and manual controls (Figure 6):

(1) Emergency stop capability
(2) Fuel management
(3) Controlled enabling of flame effect
(4) Controlled arming of flame effect
(5) Controlled and repeatable firing of flame effect

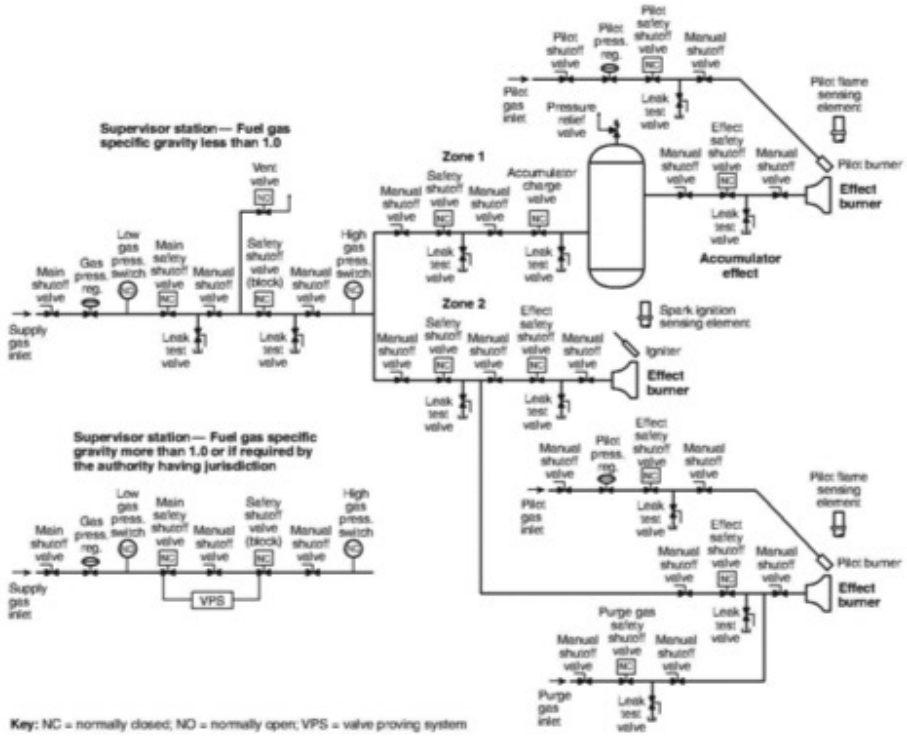

Figure 6. Example of various flame effect control and piping components (NFPA 160).

Given all these design requirements centered on safety, you may think FES accidents never occur. In the event you encounter a claim or potential litigation surrounding flame effect, retaining an expert can prove a significant advantage to understanding the intricate details that may be in play.

About the Author

Mr. Jason is a Principal Engineer with AEI Corporation and has over 15 years of consulting experience providing mechanical engineering and forensic analysis for investigations throughout the U.S., as well as internationally. Throughout his career, Mr. Jason's primary focus has been in fire origin and cause determination, explosion investigations, and various other combustion incidents and thermal sciences. Mr. Jason has been retained as a consulting and testifying expert by law firms, insurance companies, and Fortune 500 companies in pre-litigation incident investigations and complex litigation matters involving property loss, severe burns/catastrophic injuries, and fatality accidents. His expertise spans various industries across the energy sector, including natural gas and propane utilities, oil and gas exploration and production (E&P), petroleum/petrochemical refining, pipeline transportation, mining, explosives, and product manufacturing. He specializes in the failure analysis of fuel-gas systems, appliances, controls, mechanical/HVAC systems, plumbing components, explosives, and theatrical fireworks/pyrotechnics.

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Website: www.tadc.org **Email: tadc@tadc.org**

July 15, 2022

TO: Members of TADC

FROM: Christy Amuny, TADC President
Slater C. Elza, Nominating Committee Chair

RE: Nominations of Officers & Directors for 2022-2023

OFFICES TO BE FILLED:
*Executive Vice President
*Four (4) Administrative Vice Presidents
*Eight (8) Regional Vice Presidents
*District Directors from even numbered districts
(#1, #3, #5, #7, #9, #11, #13, #15, #17, #19)
*Directors At Large - Expired Terms

Nominating Committee Meeting – August 5, 2022

Please contact Bud Grossman with the names of those TADC members who you would like to have considered for leadership through Board participation.

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

NOTE:

ARTICLE VIII, SECTION I - Four Vice Presidents shall be elected from the membership at large and shall be designated as Administrative Vice Presidents. One of these elected Administrative Vice Presidents shall be specifically designated as Legislative Vice President. A Fifth Administrative Vice President may be elected and specifically designated as an additional Legislative Vice President. One of these elected Administrative Vice Presidents shall be specifically designated as Programs Vice President. A Sixth Administrative Vice President may be elected and specifically designated as an additional Program Vice President. One of these elected Administrative Vice Presidents shall be specifically designated as Membership Vice President. A Seventh Administrative Vice President may be elected and specifically designated as an additional Membership Vice President. One of these elected Administrative Vice Presidents shall be specifically designated as Publications Vice President. An Eighth Administrative Vice President may be elected and specifically designated as an additional Publications Vice President. Eight Vice Presidents shall be elected from the following specifically designated areas

1.) Districts 14 & 15
2.) Districts 1 & 2
3.) District 17
4.) Districts 3, 7, 8 & 16
5.) Districts 10 & 11
6.) Districts 9, 18, 19 & 20
7.) Districts 5 & 6
8.) Districts 4, 12 & 13

2022 TADC
Awards Nominations

PRESIDENT'S AWARD

A special recognition by the President for meritorious service by a member whose leadership and continuing dedication during the year has resulted in raising standards and achieving goals representing the ideals and objectives of TADC.

Possibly two, but no more than three such special awards, to be called the President's Award, will be announced annually during the fall meeting by the outgoing President.

Recommendations for the President's Award can be made by any member and should be in writing to the President, who will review such recommendations and, with the advice and consent of the Executive Committee, determine the recipient. The type and kind of award to be presented will be determined by the President, with the advice and consent of the Executive Committee.

Following the award, the outgoing President will address a letter to the Managing Partner of the recipient's law firm, advising of the award, with the request that the letter be distributed to members of the firm.

Notice of the award will appear in the TADC Membership Newsletter, along with a short description of the recipient's contributions upon which the award was based.

Members of the Executive Committee are not eligible to receive this award.

FOUNDERS AWARD

The Founders Award will be a special award to a member whose work with and for the Association has earned favorable attention for the organization and effected positive changes and results in the work of the Association.

While it is unnecessary to make this an annual award, it should be mentioned that probably no more than one should be presented annually. The Founders Award would, in essence, be for service, leadership and dedication "above and beyond the call of duty."

Recommendations for such award may be made by any member and should be in writing to the President. The President and Executive Committee will make the decision annually if such an award should be made. The type and kind of award to be presented will be determined by the President, with the advice and consent of the Executive Committee. If made, the award would be presented by the outgoing President during the fall meeting of the Association.

Members of the Executive Committee are not eligible for this award.

In connection with the Founders Award, consideration should be given to such things as:

- Length of time as a member and active participation in TADC activities;
- Participation in TADC efforts and programs and also involvement with other local, state and national bar associations and/or law school CLE programs;
- Active organizational work with TADC and participation in and with local and state bar committees and civic organizations.

NOMINATIONS FOR BOTH AWARDS SHOULD BE SENT TO:

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

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Defense attorney: "Medex has a better process in place for organization than every other vendor I have tried."

Defense paralegal: "You are the best! You know exactly what needs to be done on the projects I send you and YOU ARE SOOOO APPRECIATED!! You take the worry out of my job."

Defense attorney: "I very much enjoy you ladies and not only is it wonderful supporting you but I am grateful that you work hard to make what needs to get done – DONE!"

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Defense attorney: "I am all about efficiency and getting it done right the first time. They will help you do that."

Defense Paralegal: "They've done a great job so far and I think you should try them out (even though I want to keep them all to myself (JUST KIDDING)!"

Papers Available

2022 TADC WINTER SEMINAR ~ SNOWMASS, CO ~ JANUARY 26-30, 2022

A Little Ethics, A Little Evidence and a Little Procedure – Christy Amuny – 53 pgs.

Are You a Boss, Friend, Parent or Colleague? Effective Mentoring In the Challenging and Constantly Changing Legal World – J. Mitchell Smith – 34 pg. PPT

COVID-19 Business Interruption Litigation – Victor V. Vicinaiz – 15 pg. PPT

Employment Law – Lauren H. Whiting – 43 pg. PPT

Exceptions to the Evidence Remedy Defense – David Brenner, James E. Brenner – 14 pgs.

Insurance Update – Sarah A. Nicolas – 10 pgs.

Jury Trials in the Age of COVID-19 – OR – Who Moved My Cheese? – Russell Smith, Jim Hunter, Gayla Corley – 13 pg. PPT

Legislative Update – Kristi L. Kautz – 20 pg. PPT

Pay and Chase Allocation – R. Douglas Rees – 17 pg. PPT

Rolling Down the New Chapter 72 Highway – Belinda Arambula, Jheris Jordan, 11 pgs. + 21 pg. PPT

Texas Paid and Incurred Update – Ewing E. Sikes III – 13 pgs. + 61 pg. PPT

Texas Supreme Court Update – Rich Phillips – 53 pg. PPT

The Attack on Qualified Immunity and the Spillover Effect to Your Non-Civil Rights Practice – Matt D. Matzner – 32 pg. PPT

2022 TADC SPRING MEETING ~ ASHEVILLE, NC ~ MAY 4-8, 2022

Are We an Employee, Friend, Kid, or Colleague? What Young Lawyers Look for in a Boss and Mentor in the Challenging and Constantly Changing Legal World – Valerie Lewis – 17 pg. PPT

Be Careful What You Ask for, You Just Might Get It – The Changing Landscape Regarding the Duty to Defend – Craig L. Reese – 38 pgs.

Black Swans, Gray Swabs, and White Swans… Applying Experts to Complex Projects – Ryan J. Hart – 24 pg. PPT

Cybersecurity – What you and your clients need to know – Elizabeth Cantu and Clarissa Benavides – 121 pgs. + 57 pg. PPT

Digging into the Defenses of a Commercial Subcontractor – Ignacio Mendoza Jr. – 43pg. PPT

Papers Available

2022 TADC SPRING MEETING CONTINUED

Force Multipliers at Trial – Trial Strategies to Overwhelm your Opponents – Robert E. Booth – 7 pgs.

Insurance Law Update – Brian E. Waters – 36 pg. PPT

Jury Selection Issues in a Post-Covid Age – Christopher Martin – 76 pg. PPT

Pandemic Era Immunity Statute 74.115 – Paul G. Preston - 19pgs. + 15 pg. PPT

Some Thoughts on Mineral Liens for Defense Counsel – David W. Lauritzen – 7 pgs. + 21 pg. PPT

Strategies for Winning the Expert Witness Battle – Slater C. Elza – 28 pgs. + 27 pg. PPT

Texas Supreme Court Update 2022-Roger W. Hughes – 29 pg. PPT

Third Party Liability/Indemnity Shifting Responsibility – Kristi L. Kautz – 12 pgs. + 42pg. PPT

Update on Premises Liability & Chapter 95 – Robert H. Ford – 51 pg. PPT

What Appellate Lawyers Can Do for Trial Lawyers – Andy Love – 6 pgs. +10pg. PPT

What Kanye West can Teach Us About Litigation – Brent L. Turman – 39 pg. PPT

12 Books Lawyers Should Read to Improve Their Life and Practice – Scott P. Stolley – 77 pg. PPT

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- If the request is for a given named expert, please include as much information as possible (there are 15 James Jones in the database).
- If the request is for a defense expert within a given specialty, please include as much information as possible. For example, accident reconstruction can include experts with a specialty of seat belts, brakes, highway design, guardrail damage, vehicle dynamics, physics, human factors, warning signs, etc. If a given geographical region is preferred, please note it on the form.
- Send the form via email to tadcews@tadc.org
- Queries will be run against the Expert Witness Research Database. All available information will be sent via return email transmission. The TADC Contact information includes the attorney who consulted/confronted the witness, the attorney's firm, address, phone, date of contact, reference or file number, case and comments. To further assist in satisfying this request, an Internet search will also be performed (unless specifically requested NOT to be done). Any CV's, and/or trial transcripts that reside in the Expert Witness Research Service Library will be noted.
- Approximately six months after the request, an Expert Witness Research Service Follow-up Form will be sent. Please complete it so that we can keep the Expert Witness Database up-to-date, and better serve all members.

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*Expert Found In Database, Information Returned To Requestor	$25.00
A RUSH Request-Add an Additional	$ 10.00
A surcharge will be added to all non-member requests	$50.00

* Multiple names on a single request form and/or request for experts with a given specialty (i.e., MD specializing in Fybromyalgia) are billed at $80.00 per hour.

Generally, four to five names can be researched, extracted, formatted, and transmitted in an hour.

The amount of time to perform a specialty search depends upon the difficulty of the requested specialty, but usually requires an hour to extract, format, and transmit.

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Please EMAIL this completed form to: **tadc@tadc.org**

Date: _____ ☐ NORMAL ☐ **RUSH** (Surcharge applies)

Attorney: _____ ☐ TADC Member ☐ **Non-Member** (Surcharge applies)

Requestor Name (if different from Attorney): _____

Firm: _____ City: _____

Phone: _____ FAX: _____

Client Matter Number (for billing): _____

Case Name: _____

Cause #: _____ Court: _____

Case Description: _____

➢ ☐ **Search by NAME(S):** (Attach additional sheets, if required.)

Designated as: o Plaintiff o Defense o Unknown

Name: _____ Honorific: _____

Company: _____

Address: _____

City: _____ State: _____ Zip: _____ Phone: _____

Areas of expertise: _____

_____

➢ ☐ **SPECIALTY Search**: (Provide a list of experts within a given specialty.)

Describe type of expert, qualifications, and geographical area, if required (i.e., DFW metro, South TX, etc). Give as many key words as possible; for example, 'oil/gas rig expert' could include economics (present value), construction, engineering, offshore drilling, OSHA, etc. A detailed description of the case will help match requirements.

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➢ ☐ **INTERNET:** o INCLUDE Internet Material o DO NOT Include Internet Material

A research fee will be charged. For a fee schedule, please call 512 / 476-5225 or visit the TADC website www.tadc.org

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TADC

Calendar of Events

October 6, 2022
2022 TADC Deposition Boot Camp
A Virtual Event

August 12-13, 2022
2022 TADC West Texas Seminar
Inn of the Mountain Gods – Ruidoso, New Mexico

January 25-29, 2023
2023 TADC Winter Meeting
Steamboat Grand – Steamboat Springs, Colorado