TADC

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

SPRING/SUMMER 2024

IN THIS ISSUE:

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Table of Contents

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TADC CALENDAR OF EVENTS

August 22, 2024	**TADC Motions Bootcamp – A Virtual Seminar**
September 18-22, 2024	**2024 TADC Annual Meeting** Horseshoe Bay Resort & Spa, Horseshoe Bay, Texas
October 17, 2024	**TADC Deposition Bootcamp – A Virtual Seminar**
January 29-February 2, 2025	**2025 TADC Winter Seminar** Steamboat Grand Resort, Steamboat Springs, Colorado
April 23-27, 2025	**2025 TADC Spring Meeting** The Historic Brown Hotel, Louisville, Kentucky
July 16-20, 2025	**2025 TADC Summer Meeting** The Grand Hyatt, Vail, Colorado
September 17-21, 2025	**2025 TADC Annual Meeting** Hotel Emma, San Antonio, Texas

President's Message

By: Gayla S. Corley
TADC President
MehaffyWeber, PC, San Antonio

"How did it get so late so soon?
It's night before it's afternoon.
December is here before it's June.
My goodness how the time has flewn.
How did it get so late so soon?" ~ Dr. Seuss

It's certainly been a whirlwind since the 2023 Annual Meeting in New York City, and I could not be more pleased with how things have gone since! This is due, in large part, to the efforts of the TADC Board and our tireless staff. Thanks to them, membership is steady, and programs and publications are going strong. Although legislative activity has been quiet in this off-year, that is certain to change once the session convenes. The early word is that non-economic damages and paid-or-incurred medical expenses are likely to be hot button issues as are the non-lawyer ownership of law firms and judcial compensation. Speaking of TADC staff, I'd like to extend a warm welcome back and word of thanks to Administrator Alexandra "Alex" Mangum who's jumped in with both feet to serve as Bobby's right-hand (wo)man.

On the programs front, Heidi Coughlin and Victor Vicinaiz put together a spectacular Winter Seminar in Crested Butte, Colorado which took place jointly with Illinois Defense Counsel. The Winter Seminar was soon followed by another sold-out Trial Academy at South Texas College of Law which featured a stand-out faculty and was expertly co-chaired by Christy Amuny and Dan Hernandez. The Spring Meeting in Key West, Florida included a private reception at Hemingway House and an excellent program assembled by Mitzi Mayfield and Mike Shipman. TADC also hosted our Young Lawyer-centric "Catch a CLE Wave" event at Margaritaville Hotel & Resort on South Padre Island which was a reimagination of the West Texas Seminar. Co-chaired by Valley local, Jim Hunter, and Young Lawyer Committee member, Uzo Okonkwo, the program included topics such as effective case management and proper billing before culminating with a three-judge panel that provided direct interaction in a Q&A format.

TADC has continued its free-to-members Lunch & Learn series, the first on law firm economics hosted by the inimitable Mike Bassett and the second by marketing guru Stacey Burke. In June, I had the pleasure of attending El Paso's annual CLE event that included cheering on the mighty Chihuahuas and was then able to take part in our service

project at the Central Texas Food Bank in Austin organized by Sarah Nicolas and Sean Swords. For two hours, our volunteers worked in a variety of capacities in the warehouse and, all told, provided 504 boxes totaling 15,120 pounds of food and 12,600 meals for Texans in need. Please consider putting together a local service project in your communities or signing up to volunteer with an organization! Not only is it great press for TADC, it's also very rewarding on a personal level.

The TADC held a successful Summer Seminar in Lake Tahoe that provided a welcome respite from the unrelenting Texas summer! Participants earned credit while enjoying the superb program put together by Arlene Matthews and Jennie Knapp. We were also honored to have Past Presidents David Chamberlain and the honorable Patricia Kerrigan in attendance! In September, the 2024 Annual Meeting will be held at Horseshoe Bay Resort with a stand-out program developed by Sarah Nicolas and Kristi Kautz that includes not one but two Texas Supreme Court Justices! Also, please be on the lookout for registration for TADC's inaugural Motions Bootcamp which will occur on August 22, 2024 via Zoom.

While in Key West, past TADC President Greg Curry discussed the importance of protecting the civil justice system and the right to trial by jury which, as we know, is core to TADC's mission. Coincidentally, I was called for jury duty shortly after returning from Key West with Greg's remarks still top of mind. Sitting among 500-600 other Bexar County citizens, I thought how lucky we are to have a system that – while not perfect - allows disputes to be resolved by a group of ordinary citizens rather than a single judge acting alone. Looking around the Central Jury Room, and as panel after panel filtered out, I was struck by the many different walks of life represented by those who answered the call and appeared to serve. Although I was ultimately dismissed before being on a panel, my brief stint as a potential juror served as a potent reminder that jury trials represent TADC's values in action. While not without certain challenges, such as a degree of unpredictability and the potential for added expense to see a case through trial, the benefits of our civil justice system are profound. On one hand, the system enhances the legitimacy, fairness, and integrity of the legal process, and on the other, ensures that justice is not only done but is seen by the very citizens it serves.

Over the past months, I've been reminded countless times of the dedication and passion of our members. Together, we are not just shaping the future; we are defining it. As we forge ahead, I encourage each of you to remain engaged, share your insights, and actively participate. In this way, the whole of TADC continues to be greater than the sum of its parts which is very exciting indeed!

TADC Legislative Update

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

Perhaps the most important story to emerge from this spring's primary election is the survival of House Speaker Dade Phelan (R-Beaumont), who was targeted in the GOP primary by a candidate backed by Lt. Governor Patrick and Attorney General Paxton. Despite trailing his challenger after the first round of balloting, Speaker Phelan turned things around enough to win a narrow victory in the runoff. Other Republican incumbents were not so fortunate. Those who lost their primary runoff elections include Rep. DeWayne Burns (R-Cleburne), Rep. Travis Clardy (R-Nacogdoches), Rep. Frederick Frazier (R-McKinney), Rep. Justin Holland (R-Rockwall), Rep. Stephanie Klick (R-Fort Worth), Rep. John Kuempel (R-Seguin), and Rep. Lynn Stuckey (R-Denton). They joined the unfortunate GOP incumbents who were defeated outright in the March primary, who include Rep. Jacey Jetton (R-Richmond), Rep. Glenn Rogers (R-Graford), Rep. Hugh Shine (R-Temple), Rep. Reggie Smith (R-Sherman), and Rep. Kronda Tiemesch (R-Carrollton). When added to the seats opened up by retirements (also GOP incumbents for the most part), the House will have at least 32 new members in 2025.

Little has changed on the Senate side. An open seat left by former Dean of the Senate and current Houston Mayor John Whitmire will be filled by ER nurse Molly Cook, while Sen. Drew Springer (R-Muenster) will turn his seat over to Brent Hagenbuch, former GOP Chair of Denton County. A third seat currently held by Sen. Morgan LaMantia (D-South Padre Island) is up for grabs in November, where the incumbent faces a serious GOP challenge.

The question now becomes whether Speaker Phelan can win re-election as Speaker when the Legislature comes to town in January. Some of his erstwhile colleages either have entered the race already or are making calls to gauge interest, but no clear alternative to the Speaker has yet emerged (and may not). Assuming that Speaker Phelan keeps the gavel, it will set up a scenario we have not seen in many, many years, if ever: an incumbent lieutenant governor who pulled out all the stops to defeat an incumbent speaker and the incumbent he tried to defeat will have to figure out how to get along during the ensuing legislative session. It doesn't help matters that the Governor withheld his support from the Speaker at the same time he supported numerous challengers to House incumbents who backed him. We could be in store for a long standoff.

There is also a question as to the possible impact of the national election. Speculation is rife that if former President Trump returns to the White House, he may pluck one or more Texas officials for service in D.C. Of course, it is way too early to prognosticate, but such a scenario could shuffle the deck of statewide officeholders, with unpredictable results for the Legislature.

In whatever way the dust eventually settles, it appears that 2025 will see a less than favorable environment for agenda items that bring the House and Senate into open conflict. We are thinking particularly of the school voucher issue, which failed in repeated special sessions last year when enough House Republicans and a nearly unanimous vote of House Democrats

scuttled the Governor's plan. Though the Governor had much to do with unseating some of the holdouts, he didn't get them all, so it's an open question whether vouchers will have an easier path in 2025.

As to issues affecting the civil justice system, we can expect to enjoy at least as busy a session as we had in 2023. To date, we are looking at some or all of the following matters to be on the table:

- Revisiting the 2019 commercial trucking legislation with an eye toward removing the House floor amendment that opened the door to evidence of the employer's compliance with various federal regulations in the first phase of the trial even when the employer has stipulated to course and scope;

- Reforming noneconomic damages on a broad scale to address nuclear verdicts;

- Revisiting medical expenses (again) to address letters of protection and other tactics for inflating the amount of medical damages;

- Addressing problems in UIM lawsuits created by *Allstate v. Irwin*; and

- Seeking further improvements in the quality of the judiciary, including increasing judicial compensation, providing incentives for better judicial performance, and expanding the disciplinary options for dealing with judges who persistently fail to rule or follow the law.

More generally, both the House and Senate are conducting interim studies of the rising cost of commercial and personal insurance. Obviously, these studies implicate the damages issues specified above. For those of us who remember the 1986 joint select committee on insurance and tort reform, the run-up to the 2025 session has something of the same feel. In fact, we may see reform proposals of a scope we last witnessed in 2003. What goes around surely and truly comes around, and we may find ourselves once again trying to solve problems that first surfaced in the 1980s.

Keep in mind as well that SCOTX has referred the issue of third-party litigation financing to the Supreme Court Advisory Commission for possible recommendation of a disclosure rule. Third Party Litigation Funding, particularly that supported by hedge funds and sovereign wealth funds, has undoubtedly contributed to raising settlement values and prolonging litigation under certain circumstances. We are hopeful that an effective disclosure rule will at least give the court and the parties information about who might be influencing the case, as well as reveal to the public the extent of non-party financial participation in Texas tort litigation.

There is more to say, but we will save some of the good news for a later date. We will, as always, keep you advised of developments and request your assistance in reviewing proposals and providing the kind of expert counsel and commentary upon which the Legislature has long relied.

Texas Association of Defense Counsel-PAC

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

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Surveillance Videos in Texas: Smile, You're on Candid Camera

By Thomas P. Sartwelle
Hicks, Davis Wynn PC, Houston

Candid Camera was a hidden camera reality television show various iterations of which were popular in the 50's and 60's and beyond. The format involved concealed cameras filming ordinary people's reactions to contrived situations and practical jokes often involving trick props. When the trick was revealed to the "victim," they were greeted with the show's catchphrase, "Smile, You're on Candid Camera."

A similar but much less public reality show involving hidden cameras was also going on in parallel to the television show in the personal injury litigation industry [1] and in fact continues today. [2] That show initially involved candid photographs, film, and, as technology improved, videos, of putative injured plaintiffs doing physical tasks they claimed in lawsuits they could not do because of injuries inflicted by defendants. But despite decades and decades of surveillance there are surprisingly few appellate cases throughout the country and especially in Texas guiding discovery and admissibility of surveillance videos.

Although the Texas Supreme Court's 2018 *Diamond Offshore* opinion was enlightening, instructive, and a badly needed surveillance video opinion, its scope was limited, and several questions were unanswered and remain unresolved today. For example, discovery---does a defendant need to disclose the surveillance video before trial and if so, when?; if there is no specific discovery request must a defendant still disclose the video before trial?; is surveillance video substantive or impeachment evidence or both, and does it matter?; is a video attorney work product protected from discovery?; after the *Diamond Offshore* opinion are there legitimate objections that will keep the video from being shown to the jury?

This article will attempt to explore answers to these questions. Be aware, however, that surveillance videos are the focus. There are dozens of other videos that are potential evidence that may engender far different authentication problems, discovery rules, and evidence rules. For example, day in the life videos, vehicle dash cameras, doorbell cameras, bystander cell phone videos, warehouse/retail store cameras, police body cam videos, selfies, and traffic cameras to mention a few.[3] And sometimes videos could contain audio which is another evidence problem not discussed herein.[4]

[1] The first plaintiff surveillance film is said to have been used in a "your streetcar injured me" case in California in the 1940's. Tricia E. Habert, "Day in the Life" and Surveillance Videos: Discovery of Videotaped Evidence in Personal Injury Suits, 97 Dick. L. Rev. 305 (1993).

[2] *E.g.*, *Cox v. David Copperfield, a.k.a. David S. Kotkin*, 507 P.3d 1216 (Nev. 2022) (hereinafter *Copperfield*); *Diamond Offshore Services Ltd. v. Williams,* 542 S.W.3d 539 (Tex. 2018) (hereinafter *Diamond Offshore*).

[3] *Diamond Offshore,* supra note 2 at 542, 548; Tex. R. Evid. 901; *See also* Brown & Rondon, *Texas Rules of Evidence Handbook*, Rule 901(b) (4) at 987 (2022 ed.); Leighton D'Antoni, *Making Boring Stuff Cool in Trial on a Budget,* State Bar of Tex. 48th Annual Advanced Criminal Law, Chp. 24 (July 2022).

[4] *Id.*

DIAMOND OFFSHORE

> "If, as is often said, a picture is worth a thousand words, then a video is worth exponentially more. Images have tremendous power to persuade, both in showing the truth and distorting it. A video can be the single most compelling piece of evidence in a case, captivating the jury's attention like no other evidence could." [5]

So emphasized the Supreme Court in the opening lines of one of the few Texas cases addressing personal injury plaintiff surveillance video. As noted, surveillance photos/film/video has been used for decades [6] to surveil plaintiffs thought to be exaggerating the extent of their claimed injuries. How often such surveillance has been used may never be known because such evidence is undoubtedly thought by most lawyers to be so potent as to have compelled settlements or unappealed low verdicts when disclosed, which may account for the dearth of appellate opinions. In fact, Justice Keyes in her well-articulated dissenting opinion in *Diamond Offshore* Appeals Court opinion, noted the lack of Texas case law imploring the supreme court to review the issues and establish criteria for admission of surveillance videos.[7]

Diamond Offshore was the quintessential Jones Act "I hurt my back on your offshore rig and can never work again" case. Williams was supposedly injured in January 2008. Despite extensive medical treatment and surgery, he continued complaining of chronic back pain. According to his testimony and his medical and lay witnesses, he was unemployable and unable to do any physical labor. Five years after his injury, however, in December 2012, Defendant's investigator on three consecutive days [8] obtained a date and time stamped one-hour long surveillance video of Williams as he, with ease, cleared debris from his home and surrounding property. Williams is recorded as he loads a trailer with debris, drives a vehicle with the trailer to unload the debris, walking around and engaged in extensive physical activities around his residence involving bending, stooping, reaching, and throwing the debris into the trailer, repairing his four-wheeler, and operating a mini excavator and other machinery for an extended period.

Defendant revealed the video before trial, a tactic that will be discussed in more detail, and extensively discussed the video with the trial court at a Motion in Limine hearing. Defendant also offered the video three times during trial as both impeachment and substantive evidence. At the Limine hearing as well as during trial the trial court reiterated that she had not watched the video but that it would not be admitted in evidence or shown to the jury. The jury assessed almost $10 million in damages including $4 million for pain and suffering.

On appeal Diamond's primary point was the exclusion of the surveillance video. The supreme court reversed and remanded for a new trial. Noting that the video was at the heart of defendant's case, the court held evidence admission is in the discretion of trial courts, but proper exercise of discretion requires courts to view video evidence before ruling on admissibility. The court concluded the trial court exclusion was harmful because the video went to Williams' credibility not only on damages but liability as well because Diamond contended Williams lied about the details of his alleged accident. [9]

Williams' argument was typical of those caught on surveillance video---I agree I can do the things shown in the video, but I can't do them for very long, and without pain, and afterward I have

[5] *Diamond Offshore*, supra note 2, at 542 (footnotes omitted).
[6] Habert, supra note 1.
[7] *Diamond Offshore Services Ltd. v. Williams,* 510 SW3d 57, 81 (Tex. Civ. App.—Houston (1st Dist.) 2016) (Keyes, J., dissenting) (hereinafter *Diamond Offshore Services Ltd.).*
[8] The supreme court opinion says two days, *Diamond Offshore,* supra note 2 at 542, while the Court of Appeals majority and dissenting opinions says three days. *Diamond Off Shores Services,* supra, note 7 at 68, 73, 81.
[9] *Diamond Offshore*, supra note 2 at 552.

severe pain, can't move, or do anything for weeks, and take copious amounts of pain medications. Thus, the video is a limited view of my life and is unfair and prejudicial and should be excluded under Evidence Rule 403---the probative value of evidence is outweighed by the potential for unfair prejudice, the potential to mislead the jury, and the presentation of cumulative evidence. [10]

The supreme court swept aside Williams' Rule 403 arguments noting that personal injury videos today come in a wide variety of modes and that each video should be evaluated by trial courts individually. Conducting their own Rule 403 analysis the Court found the Williams' surveillance video probative to critical allegations like malingering, before and after physical condition, pain and suffering, and credibility, noting that visual presentations often illustrate far better than words a plaintiff's actual physical abilities. Thus, the court held that despite Williams' admission he could do the activities depicted, the video should not be excluded as needlessly cumulative. [11]

Significantly, the court addressed Williams' Rule 403 prejudice argument, i.e., the video was inadmissible because it was prejudicial for suggesting he could work without rest or pain, which, as the court noted, is exactly why Diamond offered the video.

> "Testimony is not inadmissible on the sole ground that it is prejudicial because in our adversarial system, much of a proponent's evidence is legitimately intended to wound the opponent. Rather, *unfair* prejudice is the proper inquiry. Unfair prejudice within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." [12]

Noting that mere damage to an opponent's case is not unfair prejudice, the court wrote that surveillance videos are at best incomplete because it is impossible to record a claimant's entire post-injury life and thus videos are not misleading just because they do not support the plaintiff's factual scenario. "Alleged omissions or inaccuracies typically go to the weight of the evidence, not its admissibility." [13]

SOME UNANSWERED QUESTIONS

IMPEACHMENT VERSUS SUBSTANTIVE EVIDENCE: DOES IT MATTER?

Diamond Offshore prominently noted that the video was offered at trial as impeachment and substantive evidence.[14] But the court left unanswered the question whether the impeachment/substantive evidence distinction is important in deciding the case. The ultimate holding being simply that a trial court should not refuse to review a surveillance video before making a ruling on admissibility.[15]

The majority and dissenting opinions in the Appeals court, however, discussed the substantive versus impeachment distinction at length.[16] The majority opinion, despite noting that no Texas case addressed the distinction, cited and discussed Fifth Circuit cases and out of state opinions on the issue but ultimately did not decide the issue. Rather, they simply held that pursuant to Rule 403 the trial court could reasonably have decided that the prejudicial effect outweighed the probative value even though the trial court never articulated a reason for its ruling. [17]

Justice Keyes, on the other hand, after reviewing the substantive/impeachment cases, concluded that the video was substantive evidence relevant to the ultimate issue---damages---and the probative value outweighed any prejudicial effect---a Rule 403 analysis.

Why is the substantive/impeachment distinction important? Because a good surveillance video can be devastating. And a defendant wants to maximize its impact by keeping the video hidden until the plaintiff is on

[10] Tex. R. Evid. 403; *Diamond Offshore*, supra note 2 at 543, 547, 549.
[11] *Diamond Offshore*, supra note 2 at 549.
[12] *Id.* Quoting from two cases (quotation marks and footnotes omitted).
[13] *Id.* at 550 (footnote omitted).
[14] *Id.* at 544 and footnote 5.
[15] *Id.* at 542, 548.
[16] *Diamond Offshore Services Ltd.,* supra note 7 at 69-73; dissenting opinion at 84-89.
[17] *Id.* at 73.

the witness stand and has denied he can do the activities the video depicts. Thus, defendants have tried to hide surveillance videos until trial avoiding discovery requests using the "work product" and "the evidence is only for impeachment" exceptions to discovery. [18] But, for the most part, these efforts have been unsuccessful in Texas and the Fifth Circuit portending that today non-disclosure until trial is not a reality.

DISCOVERY OF SURVIELLANCE VIDEOS BEFORE TRIAL:

SUBTANTIVE EVIDENCE

In *Chiasson vs. Zapata Gulf Marine Corp.,* [19] a Jones Act Plaintiff served interrogatories asking for still or motion pictures taken of Plaintiff before, on, or after the accident date. Defendant objected on the grounds of attorney work product privilege but also answered none. Subsequently, however, defendant's investigator surveilled plaintiff over a nine-month period for a total 129 hours recording four hours of video. Discovery was never supplemented. The trial court allowed the video and denied plaintiff access to review the tape.

On appeal, Defendant argued that the surveillance was solely for impeachment and impeachment evidence was exempt from discovery as attorney work product. The court noted a lack of cases on discoverability of impeachment evidence with a few courts protecting such evidence from disclosure, others requiring Plaintiff's deposition and commitment to his position before the evidence must be produced, and, of course, those requiring full pretrial disclosure of all evidence citing all evidence must be disclosed discovery policies.

The court distinguished between impeachment evidence---that which is offered to discredit a witness---and substantive evidence----that which is offered to establish the truth of a matter---holding that the video was at least in part substantive evidence which should have been disclosed prior to trial.

In 2008 in *Baker v. Canadian National/Illinois Central Railroad*, [20] defendant disclosed video surveillance during discovery in two supplemental responses nine months before trial. Defendant argued the video was properly admitted by the trial court because it was both impeachment and substantive evidence. The court reiterated *Chiasson's* holding that surveillance video was substantive evidence required to be disclosed before trial. After a Rule 403 analysis the court upheld the trial court admission of the video.[21]

In a factual scenario almost identical to *Chiasson*, the Dallas appeals court reached the same result---reversed and remanded for new trial---without mentioning or characterizing the surveillance video as substantive or impeachment or citing or discussing *Chiasson*, one of the few opinions in the country involving discovery of surveillance videos. In *Lopez v. LaMadeleine of Texas, Inc.* [22] Lopez alleged head, neck, and back injuries from a slip and fall. Plaintiff's Request for Production requested tape recordings, pictures, or videos of plaintiff or any witness. Defendant answered the Request stating it was unaware of any such material. No videos or pictures were produced during discovery.

At trial Lopez testified as to his inability to physically do any work, specifically landscaping. Defendant then produced a video of Lopez doing landscaping work three weeks before

[18] Federal and state court work product doctrine originated with the Supreme Court opinion in *Hickman v. Taylor*, 329 U.S. 495 (1947), and has substantially evolved since then with the basic objective to preserve effective assistance of lawyers and others employed by them to prepare cases for trial. This article is not an exposition on work product or evidence for impeachment doctrine. There are thousands of cases and articles available for specific inquiry.

[19] 988 F.2d 513 (5th Cir. 1993).

[20] 536 F.3d 357 (5th Cir 2008). *See also, Olivarez v. GEO Group, Inc.,* 844 F.3d 200 (5th Cir. 2016) (audio recording is substantive evidence required to be produced pretrial).

[21] In *Olivarez v. GEO Group Inc.,* supra note 20, the court dealt with an audio tape in the same manner as *Chiasson* and *Baker* dealt with the surveillance videos, but making an even stronger case that the evidence was substantive and condemning the trial-by-ambush evil that an impeachment characterization encouraged.

[22] 200 SW3d 854 (Tex. App.—Dallas, 2006, no pet.) (hereinafter *LaMadeleine*).

trial. Defendant admitted it intentionally failed to disclose the video because it was attorney work product to be used solely for impeachment in the event Plaintiff testified he could not do the physical tasks depicted in the video. The trial court was apparently impressed with the video, allowing its use after commenting that he was concerned Plaintiff may have committed perjury.

The Dallas Court was not buying what the Defendant and trial judge were selling. The court never mentioned the substantive versus impeachment evidence distinction but rather decided the issue by the tried-and-true mantra that the purpose of discovery is to prevent unfair surprise, unfair prejudice, and trial-by-ambush. Thus, the court held the admission of the video as an abuse of discretion citing Rule 193.6(a) requiring the exclusion of any evidence not disclosed in response to discovery requests unless there is good cause, or the failure is not an unfair surprise.

The takeaway from these cases and from the courts' general expansive interpretation of discovery is surveillance videos cannot be hidden especially when specific discovery requests are propounded.

But wait! What if surveillance is done before a suit is filed? Can anticipation of litigation protect the video and investigation report? According to the San Antonio Court the answer is yes, but the practical effect is the surveillance becomes known to the plaintiff. *In re Weeks Marine, Inc. and Atlantic Sounding Co. Inc*., [23] another Jones Act case, the San Antonio appeals court held that a surveillance report, pictures, and surveillance video compiled by Defendant's investigator after Plaintiff hired a lawyer but before Plaintiff filed suit were privileged as attorney work product prepared in anticipation of litigation pursuant to Rule 192.5. [24] As noted, however, Plaintiff now knows all about surveillance, so unless the video is unhelpful Defendant has not accomplished anything except alerting Plaintiff that he or she is being surveilled.

AN OUTLIER?

There is at least one recent case where a defendant was able to surprise a plaintiff at trial with a surveillance video after cross examination when the court characterized the video as impeachment. Apparently, no discovery issues were involved as none are mentioned in the opinion.

In *Copperfield*, [25] the Nevada Supreme Court, after a lengthy analysis, concludes a surveillance video was admissible as impeachment-by-contradiction evidence. [26] Nevertheless, the court's ultimate analysis was whether the trial court abused its discretion which would not be disturbed without a showing of abuse, a standard that in reading the opinion seemed more like a Rule 403 analysis that a distinction between substantive versus impeachment evidence.

But *Copperfield* is also worthy of study for another reason---the four objections Plaintiff raised in opposition to the admission of the videos.[27] Why? Texas' lack of appellate guidance in surveillance videos means Texas defendants may well hear at least two of the objections the *Copperfield* Plaintiff raised because they are rather unique.

The six *Copperfield* surveillance videos were unusual. Plaintiff alleged debilitating injuries from a slip and fall at a Copperfield magic show. In court, Plaintiff used both his lawyer's and the bailiff's arm to walk to and from the witness stand during the two days he testified as well as using help throughout trial to and from the courtroom. Asked on cross if he used assistance to walk when not in court, he replied that he did.

[23] 31 S,W,3d 389 (Tex. App—San Antonio 2000, orig. proceeding).

[24] The San Antonio court followed the *Weeks Marine* holding and reliance on Rule 192.5 regarding an investigative report prepared in anticipation of litigation in 2016. *See*, *In re Jourdanton Hospital Corp. d/b/a South Texas Regional Med. Center*, No. 04-14-00356-CV (orig. proceeding).

[25] *Copperfield,* supra note 2.

[26] *Id.,* at 1219.

[27] The last two objections were procedural objections applicable to the case facts---a trial court bifurcation order and calling a rebuttal witness, an objection the court held was waived.

Defendant then offered six 30 second videos of Plaintiff walking without assistance outside the courtroom, at least one of which was him walking to the courthouse for the trial!

The first objection Plaintiff raised was that videos were inadmissible to impeach conduct because only sworn verbal testimony is impeachable. Second, the videos were extrinsic evidence, and extrinsic evidence cannot be used to prove a witness's bad character for truthfulness. The first argument was overruled with the court pointing out that conduct equally with words can constitute evidence. The second argument was also overruled, the court pointing out that impeachment by contradiction allows extrinsic evidence that specific testimony is false because contradicted by other evidence. In other words, a witness cannot engage in false testimony and then prevent his impeachment by avoiding evidence that he lied. [28]

Ultimately, it does not seem to matter how a surveillance video is classified for trial---substantive or impeachment---the trial analysis in most cases primarily turns on probative versus unfair prejudice---a Rule 403 analysis. But for purposes of pretrial discovery the distinction appears highly relevant. And it seems logical that Texas courts will follow the reasoning of the *LaMadeleine* opinion as well as those from the Fifth Circuit---surveillance videos must be disclosed before trial, otherwise they will be excluded. As noted momentarily, there are also practical considerations that compel disclosure before trial.

WHAT IF PLAINTIFF HAS NOT SENT DISCOVERY FOR SURVIELLANCE: DOES IT STILL HAVE TO BE DISCLOSED?

Today, it seems obvious that a defendant with surveillance video obtained after a suit is filed has to disclose the video when relevant discovery requests are propounded. Exactly when it must be disclosed before the trial will be discussed momentarily. Suppose, however, in a Texas court case one obtains video after a suit is filed but before trial, and the plaintiff never propounds discovery asking for pictures or video? Now, does the defendant have to disclose the evidence before cross examining the plaintiff at trial?

The answer is probably. The few Texas and Fifth Circuit cases discussed above involve discovery and offer no answer except for the anticipation of litigation opinions. Even looking at opinions throughout the country where various courts have reached different conclusions---a few protecting surveillance videos from discovery, others requiring disclosure, and others requiring plaintiff's deposition before disclosure is required---[29] offer no answer because it is unclear from the opinions whether discovery was propounded, answered, or objected to. The bottom line is there is no hard and fast rule to be discerned. However, Texas discovery philosophy, the existing discovery rules, and the practical problem of authenticating surveillance videos compels disclosure before trial in order not to lose its use altogether.

First, asserting any privilege will be dicey. Many years ago, it was said that privileges asserted to prevent discovery in lawsuits was not favored because privileges contravene "the fundamental principle that the public . . . has a right to every man's evidence. . . . Our rules of civil procedure encourage and permit liberal discovery practices, even including information reasonably calculated to lead to discovery of admissible evidence." [30] To comprehend this quote fully, one only need to substitute PLAINTIFF for the words THE PUBLIC and the word DEFENDANT for EVERY MAN.

In *Diamond Offshore*, the supreme court notes, albeit only in passing, that defendant's videographer was offered for a deposition and was available to testify at trial, implying that Defendant disclosed the video's existence along with the investigator's name sometime before

[28] *Copperfield*, supra note 2 at 1224.
[29] E.g., Tricia E. Habert, supra note 1.
[30] *Jordan v. Fourth Appeals Fourth District,* 701 S,W,2d 644, 647 (Tex. 1985), quoting from *Trammel v. United States,* 445 U.S. 40, 50 (1980), in turn quoting from *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quotation marks and citations omitted).

trial, [31] undoubtedly recognizing a possible authentication problem if plaintiff denied he was in the video [32] and anticipating the usual objections of selective recording and selective editing.[33] If a plaintiff denies he is in the video or questions the content, the defendant will have to call the videographer. Mandatory disclosures require listing of persons with knowledge of facts as well as witnesses to be called at trial and if there is an omission then plaintiff could invoke Rule 193.6 requiring the defendant to prove good cause for failing to disclose the witness and that the information will not unfairly surprise or prejudice the plaintiff. [34] Assuming a defendant can meet this heavy proof burden, the plaintiff may still get a continuance or short postponement which defeats the purpose of hiding the video and surprising plaintiff.

Another practical problem that could defeat trying to hide a video is that unedited surveillance videos are usually lengthy, often an hour or more long. And while the *Diamond Offshore* opinion held that "as a general rule, a trial court should view video evidence before ruling on admissibility," the court also noted that the "exigencies of trial, moreover, could make it difficult [for the trial court] to find time to view a late-offered video, especially if the video is lengthy." [35]

The "late-offered" video comment offers trial courts---uninterested in extra time-consuming tasks---a built in excuse to reject a trial offered unedited surveillance video. If the defendant edits the video plaintiff will object based on unfair editing, misleading etc. and demand a continuance to allow time to view the raw video footage and possibly have an expert review the video, again defeating the purpose of trying to surprise the plaintiff.

Finally, should your medical experts see the video? If so, materials the experts review must be disclosed. So, if you try to keep it a secret, then your experts cannot use it as a part of their opinion.

When To Disclose?

Good question. Obviously in time to avoid all the practical problems discussed above as well as avoiding any charge that the disclosure was not in "a timely manner" required by 193.6. When is that? That will only be known depending on the facts of each case and depending on the length of the judge's foot. [36]

CONCLUSION

Surveillance videos are undoubtedly potent evidence at trial. Despite their use for decades and decades there are surprisingly few opinions and still unanswered questions. *Diamond Offshore* has put a primary objection---Rule 403 unfair prejudice versus probative value---to rest for the most part although one should always expect a plaintiff to reiterate this as a routine objection.

The primary difficulty for defendants with surveillance videos is discovery and the timing of discovery. General rules do not seem to come from the cases; therefore, each case deserves considerable significant thought as to when and how a video needs to be disclosed. Nondisclosure seems not to be a viable option. David Copperfield's concealment magic both at his show and then with a video in the courtroom does not seem likely to be repeated in other cases.

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[31] *Diamond Offshore*, supra note 2 at 550.

[32] See Tex. R. Evid. 901 (a) (b); *Diamond Offshore*, supra note 2, at 547 n. 26 (plaintiff's admission that he was the person in the video and performing the activities depicted was sufficient to authenticate the video).

[33] These objections were made. The Supreme court disposed of plaintiff's complaints saying, "Alleged omissions or inaccuracies typically go to the weight of the evidence, not its admissibility." *Diamond Offshore*, supra note 2 at 550.

[34] Tex. R. Civ. Proc. 193.6; *LaMadeleine*, supra note 22.

[35] *Diamond Offshore*, supra note 2 at 546-547.

[36] Blackwell, Michael, *Measuring the Length of the Chancellor's Foot: Quantifying How Legal Outcomes Depend on the Judges Hearing the Case and Whether Such Variation Can Be Explained by Characteristics of the Judges* (May 30, 2011). Available at SSRN: https://ssrn.com/abstract=1855719 or http://dx.doi.org/10.2139/ssrn.1855719

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2024 Spring Meeting

April 24-28, 2024 – Beachside Resort – Key West, Florida

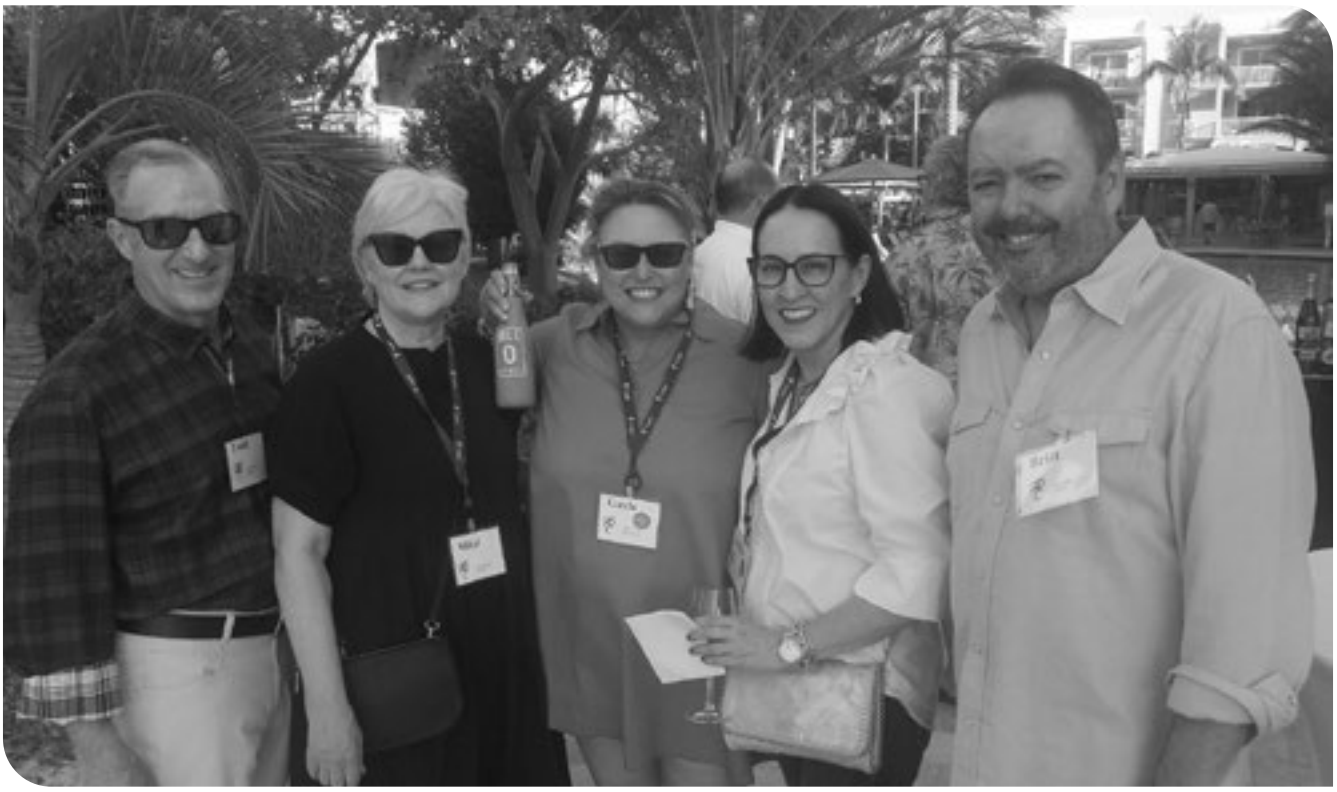
The TADC held its 2024 Spring Meeting in beautiful Key West, Florida at the Beachside Resort & Spa, from April 24-28, 2024.

Mitzi Mayfield with the Underwood Law Firm in Amarillo 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 "Preservation of the Jury Trial". A highlight included a luncheon presentation, "A Comprehensive Look at Damages" with Baylor Law Professor Elizabeth Fraley.

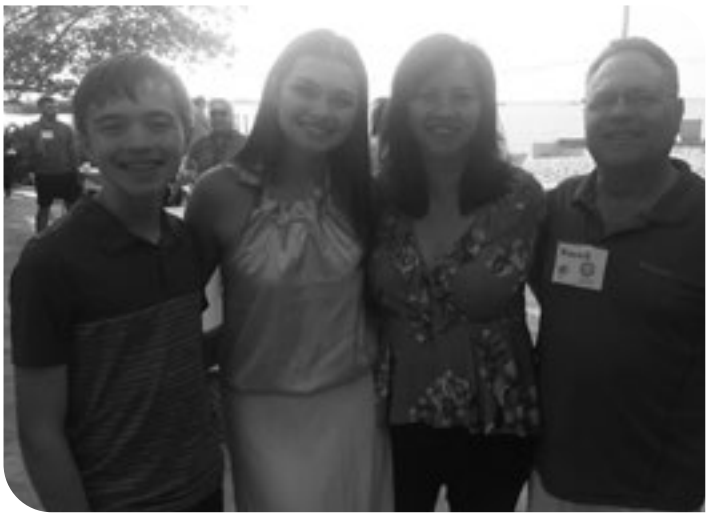
TADC opening reception at Hemingway House

Rosemary & Max Wright with Denise Selbst, Kyle Fridley & David Selbst

2024 Spring Meeting



Todd & Mitzi Mayfield with Gayla Corley, Arlene Matthews & Britt Pharris



Steele, Sterling, Trish & Russell Smith

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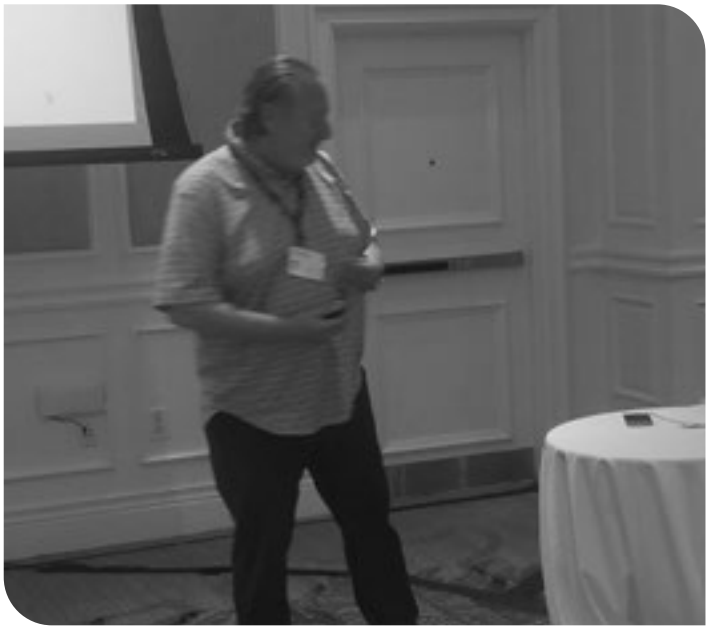

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The Admissibility of AI Depositions in Texas

By: Karl Seelbach
Doyle & Seelbach PLLC,
Skribe.ai, Bee Cave,

As attorneys in Texas defending personal injury cases, it's crucial to stay informed about the evolving landscape of deposition practices, particularly with the advent of AI technology. One area that has garnered attention is the admissibility of so-called "AI depositions." This article aims to clarify the admissibility of non-stenographic depositions under Texas and federal rules and address the nuances associated with using AI-powered software tools to create deposition transcripts.

Non-Stenographic Depositions: A Longstanding Practice

Both Texas and federal rules have long permitted non-stenographic recording of depositions. Under Federal Rule of Civil Procedure 30(b)(3), testimony may be recorded by "audio, audiovisual, or stenographic means." Texas rules echo this provision, as seen in Texas Rule of Civil Procedure 199.1(b), (c), which allows depositions to be recorded non-stenographically. These rules confirm that non-stenographic depositions are admissible by default, providing attorneys with the flexibility to use video or audio recordings without relying on stenographers.

The Official Record: Video and Audio

When it comes to non-stenographic depositions, the video or audio recording serves as the official record. If a transcript is prepared, it acts merely as a reference tool. This distinction is crucial: while the video or audio captures the exact testimony, the transcript is a secondary aid to navigate the non-stenographic deposition record.

That said, the federal rules require parties to provide transcripts of non-stenographic testimony for witnesses they intend to present by deposition at trial. Fed. R. Civ. P. 26(a)(3)(A)(ii). The Texas rules don't have the same requirement, but it is generally preferable to provide transcripts of referenced testimony in motion practice and trial, rather than rely exclusively on video recordings.

So, this begs the question: how do you know you can trust the transcript of a non-stenographic deposition if it was not prepared by a stenographer?

Transcript Reliability: Understanding ASR vs. Generative AI in Legal Transcripts

Automatic Speech Recognition (ASR) technology differs significantly from generative AI, and this distinction is important for attorneys concerned about the reliability of deposition transcripts. ASR is designed to convert spoken language into text by recognizing and transcribing the words as they are spoken. It relies on large datasets of speech and language patterns to accurately transcribe spoken words without altering the intended meaning.

On the other hand, generative AI, such as GPT or ChatGPT, is designed to generate human-like text based on prompts it receives. While generative AI can produce coherent and contextually relevant text, it can also create "hallucinations" or inaccuracies because it aims to generate plausible text rather than simply transcribe spoken words.

Attorneys should not worry about hallucinations in ASR transcripts because ASR systems do not generate new content. They only transcribe what is spoken, making them a reliable tool for creating deposition transcripts.

Trusted ASR vendors enhance this reliability by employing human reviewers to verify and correct the transcripts, ensuring their accuracy and consistency with the original audio or video recording. This process ensures the transcripts are not only accurate, but also legally formatted in a way that meets the standards expected by attorneys and judges.

Facilitating the Deposition Process

In addition to providing reliable non-stenographic recordings and transcripts, trusted legal vendors offer comprehensive solutions to streamline the deposition process. These services include the swearing in of witnesses by a notary public and facilitating the post-deposition review and sign (a.k.a. errata) process, ensuring legal compliance and accuracy. These services ensure the deposition process is efficient, cost-effective, and legally compliant.

Analyzing Depositions with AI Software

AI software can be used to analyze any deposition, whether it was taken with or without a stenographer. This technology allows attorneys to efficiently create summaries, highlight key testimony, and generate video clips, providing a comprehensive tool for case preparation and presentation. Using AI tools for analysis can streamline the review process, offering quick insights and facilitating strategic decisions. What used to take hours or even days, can now be done in seconds using AI. Want to find what the witness said about topic "x"? Simply ask the AI software and you will get a near-instant answer with a synced video clip of the supporting testimony. Sounds too good to be true? My law firm is using AI tools just like this in our personal injury defense practice, today.

Pros and Cons of Non-Stenographic Depositions

Pros:

1. **Cost-Effectiveness:** Non-stenographic depositions are generally more affordable than stenographic ones, as they eliminate the need for a stenographer's presence and fees.
2. **Speed:** The process is much faster, from recording to transcript preparation, especially with AI tools that offer same-day results.
3. **Modern AI Software:** Leveraging AI software can simplify analyzing and creating video clips and summaries of key testimony, aiding in case preparation and presentation.
4. **Video is the Record:** Video evidence is generally more engaging and persuasive with juries and even some judges.

Cons:

1. **Absence of a Stenographer:** Without a stenographer, the primary reliance is on the video or audio recording.
2. **Transcript Quality Can Vary:** The quality and reliability of ASR transcripts can vary, necessitating verification by trusted vendors to ensure accuracy and synchronization with the video record. Before filing a transcript with a court, you should make sure it has been professionally proofread by a trusted legal vendor.

Practical Considerations

Federal and state rules have long endorsed non-stenographic depositions, recognizing the validity and utility of this method. While the official record in non-stenographic depositions (so-called "AI depositions") is the video or audio recording, ensuring the reliability of any accompanying transcript is essential. Embracing modern technology, such as AI-powered transcription services with human verification, can streamline the deposition process and dramatically lower costs.

Video files or links to the official video record can also be filed with courts, similar to how other video evidence is handled. This practice aligns with the long-established admissibility of various forms of audio or video evidence in legal proceedings. Plus, it can make your briefs more compelling and engaging to include video hyperlinks to key testimony.

For Texas attorneys handling personal injury defense cases, understanding and leveraging how AI can be used to take and/or analyze depositions can offer significant advantages to firms and clients in terms of cost, speed, and technological integration and efficiency.

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National Law Journal, Best of 2023: Record Retrieval & Organization, Court Reporting & Deposition Services

Amicus Curiae Committee Update

Mike Eady (Thompson Coe) and Ruth Malinas (Mimari Anderson Cilfone & Watkins) filed an amicus to support the petition for review on *American Honda Motor Co. v. Milburn*, 668 S.W.3d 6 (Tex. App.—Dallas 2021, pet. granted) (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 the driver's responsibility. Oral argument was Sept. Sept. 13, 2023.

Jeanne Knapp (Underwood Law Firm) filed an amicus in *Alonzo v. John*, 647 S.W.3d 764 (Tex. App.--Houston [14th Dist.] 2022, pet. filed) (Wise, J., dissenting). This is an 18-wheeler rear-end collision case; jury awarded $12 million for pain and mental anguish. The main issue is voir dire commitment questions by Plaintiff – whether the jurors could consider awarding someone $10-12 million for pain and mental anguish. In voir dire Plaintiff asked if, hypothetically, could each venireperson consider awarding $10-12 million for pain and suffering and mental anguish. The 14th Court panel unanimously found there was no error in allowing the question and no evidence of harmful error. The Houston court concluded there was no error to allow damage questions that were purely hypothetical and did not commit them to award an amount on specific facts - *i.e.*, it was not really a "commitment" question. Further, the judge could rely on personal observation to judge the venirepersons' sincerity about their fairness and impartiality. Further, the error was not harmful because Defendants failed to show any objectionable juror was seated. This is an important case on what is a "commitment" question in voir dire. Merits briefing was requested.

Stephen Bosky (Ramon Worthington Nicolas & Cantu) filed an amicus to support the petition for review in *Werner Entr. v. Blake*, 672 S.W.3d 7554 (Tex. App.--Houston [14th Dist.] 2022, pet. filed) (en banc) (Christopher, C.J., dissenting). There are a number of important issues in a highway trucking accident on an icy interstate highway during freezing rain. First, the majority concluded that the truck driver's speed caused the collision when the passenger vehicle lost control on any icy road and crossed a forty-foot wide median into t he truck's lane. Plaintiff argued that, had the trucker driven at 15mph instead of 50mph, he could have braked or swerved to avoid collision. Second, stipulating that the truck driver was in scope of his employment did not preclude submitting direct negligence in supervision and training. Third, a *Casteel* objection that the liability question commingled valid with invalid theories was insufficient because the objection failed to specify the invalid theories. Merits briefing has been requested.

Roger Hughes (Adams & Graham LLP) and Tom Wright (Wright Close & Barger) filed an amicus to oppose the motion for rehearing in *Horton v. Kansas City So. Ry*, 2023 Tex. LEXIS 635 (Tex. June 30, 2023). This is a *Casteel* objection case to erroneously commingling valid and invalid negligence theories in one question. In a railroad crossing case, the question submitted two alleged defects in the railroad crossing. The supreme court determined there was no evidence to support submitting one of the two alleged defects and reversed under *Casteel*. On rehearing, Plaintiffs argued *Casteel* should be limited to commingling a legally invalid theory; it should not apply to

commingling a factually unsupported theory. The supreme court asked for response to the motion for rehearing. If rehearing is granted it could result in a substantial erosion in reversible error in jury charges.

Peter Hansen (Jackson Walker) filed an amicus to support defendants' petition for *Posada v. Lozada*, No. 08-22-0101-CV, 2023 WL 5671449, 2023 Tex. App. LEXIS 7019 (Tex. App.--El Paso Sept. 1, 2023, pet. filed) (mem. op.) (Soto, Jr., dissenting). This is a highway trucking accident between Defendants' 18-wheelers and Plaintiff's truck; the trial court granted a no-evidence MSJ on breach of standard of care and causation; the court of appeals reversed, with a dissent. This raises the question of whether ending up jack-knifed on the road is some evidence the driver was negligent in reacting to an unexpected tire-blow out. The majority concluded that evidence that Lozada driving his truck somehow resulted in blocking the lanes was "some evidence" of a failure to use ordinary care. The majority does not clarify what was the failure in driving. The dissent argues that merely blocking of the highway is not itself evidence of negligence in causing the truck to jack-knife or failure to regain control. This is an important opinion because it arguably requires all jack-knife collisions must go to the jury.

Mike Eady (Thompson Coe) has been authorized to file an amicus brief for defendant's PFR in *Hyundam Ind. Co. Ltd. v Swacina*, 2023 WL 8262721, 2023 Tex. App. LEXIS 8964 (Tex. App.--Corpus Christi Nov. 30, 2023, Rule 52.7 mtn filed). This is a special appearance in a products liability case by a Korean component part manufacturer; the Corpus Christi court affirmed the denial finding specific jurisdiction. Applying the stream-of-commerce-plus theory, it decided Hyundam intended to serve a Texas market because it developed the pump to meet North American specifications. Citing *State v. Volkswagen*, 669 SW3d 399 (Tex. 2023), Corpus decided designing the product for use in North America was designing it for use in Texas; it was not necessary that it be particularly designed for Texas. This is a potentially important case in which a component part manufacturer is subject to Texas jurisdiction because the finished product manufacturer designed the product for a "North American" market.

2024 Catch a CLE Wave

June 7-9, 2024 – Margaritaville Resort – South Padre Island, TX

The TADC held its first Young Lawyers "Catch a CLE Wave" Seminar in South Padre Island on June 7-9, 2024. Jim Hunter with Royston, Rayzor in Brownsville and Uzo Okonkwo chaired this successful event. Topics were designed with young lawyers in mind and ranged from Depositions to Discovery. Look for this event to happen again in the future!

Hannah Pfrang, Zachary Olvera, Lezly Cardenas,
Joshua Koltunchik, Ana Laura Delgado & Jim Hunter

Gayla Corley, Sean Swords, Kyle Fridley,
Trey Sandoval & Emma Adamcik

Well attended CLE session

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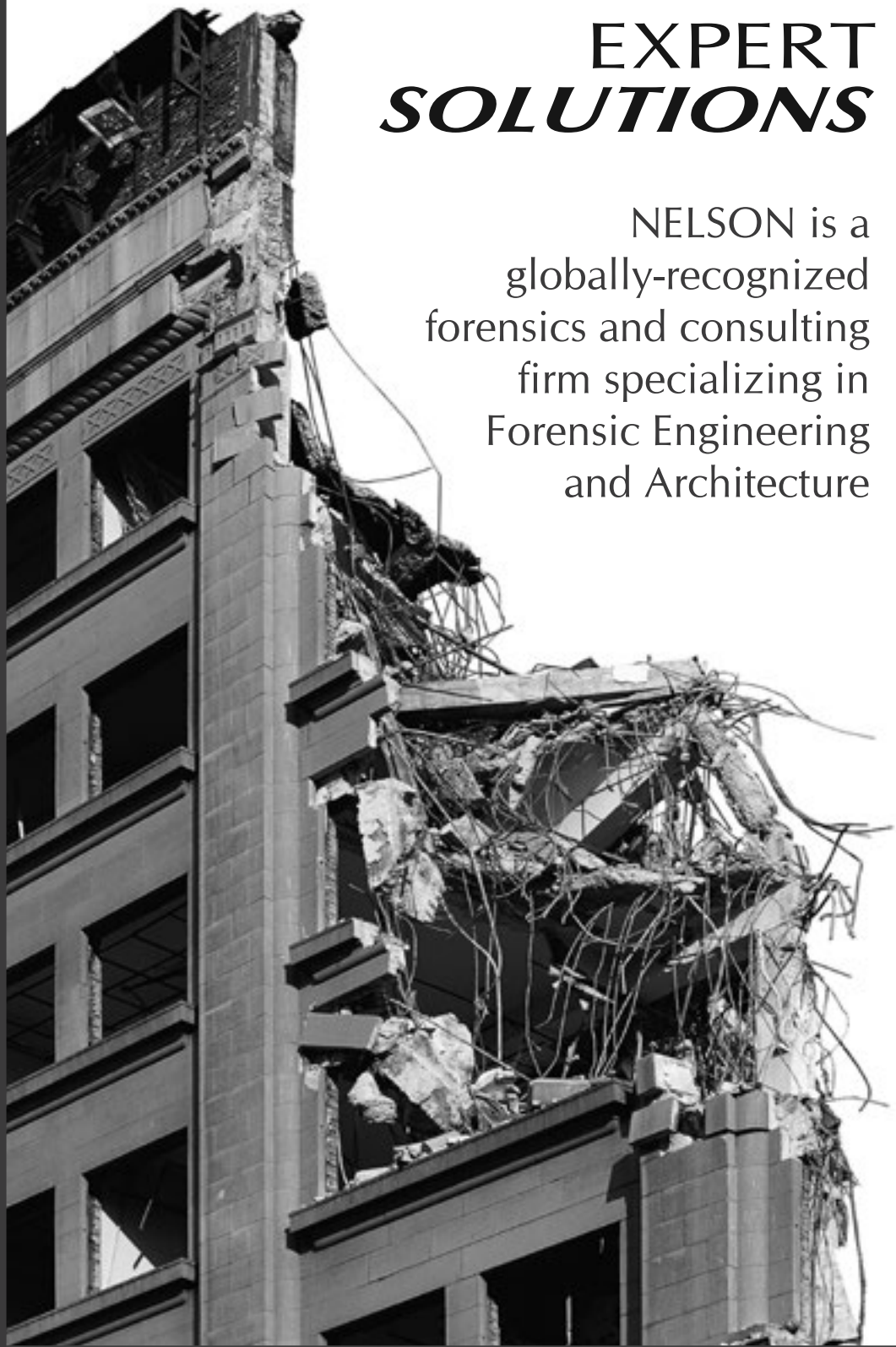

New Business Courts Start Accepting Cases on September 1, 2024

By: Robert E. Booth
Mills Shirley L.L.P., Galveston

On June 9, 2023, Governor Abbott signed two bills to: (1) create a new Statewide Business Court; and (2) create the Fifteenth Court of Appeals.

House Bill 19 ("HB 19") creates a Statewide Business Court which is a specialized forum dedicated to resolving complex commercial disputes involving more than $5 million. HB 19 creates 11 Business Court Divisions, one division for each of the 11 Administrative Judicial Regions. The Legislature has funded the first five divisions: Dallas, Fort Worth, Austin, Houston, and San Antonio. The funding for the remaining six divisions for the more rural parts of Texas has been deferred until 2025.

Similarly, Senate Bill 1045 creates the Fifteenth Court of Appeals which is the exclusive intermediate appellate court having jurisdiction involving certain lawsuits against the State of Texas, state agencies, and state officials. This new Court of Appeals will also have exclusive intermediate appellate jurisdiction over decisions from the newly created Statewide Business Court.

The Business Court is a statutory court created under Section 1, Article V of the Texas Constitution. Tex. Gov't Code § 25A.002. The statute took effect on September 1, 2023, but the newly created Business Court will not start accepting cases until September 1, 2024.

Business Court Jurisdiction

The Business Court has civil jurisdiction concurrent with district courts in the following actions when the amount in controversy exceeds $5 million, excluding interest, statutory damages, exemplary damages, penalties, attorney's fees, and court costs:

(1) A derivative proceeding;

(2) An action regarding the governance, governing documents, or internal affairs of an organization;

(3) An action in which a claim under a state or federal securities or trade regulation law is asserted against an organization or the organization's manager, securities underwriter, or auditor;

(4) An action by an organization, or an owner of an organization, if the action: (A) is brought against an owner, controlling person, or managerial official of the organization; and (B) alleges an act or omission by the person in the person's capacity as an owner, controlling person, or managerial official of the organization;

(5) An action alleging that an owner, controlling person, or managerial official breached a duty owed to an organization or an owner of an organization by reason of the person's status as an owner, controlling person, or managerial official, including the breach of a duty of loyalty or good faith;

(6) An action seeking to hold an owner or governing person of an organization liable for an obligation of the organization, other than on account of a written contract signed by the person to be held liable in a capacity other

than as an owner or governing person; and

(7) An action arising out of the Texas Business Organizations Code.

See Tex. Gov't Code § 25A.004(b).

Importantly, if the dispute involves a publicly traded company, the Business Court has concurrent jurisdiction over the above seven categories of cases, regardless of the amount in controversy. Tex. Gov't Code § 25A.004(c).

The Business Court also has civil jurisdiction concurrent with district courts in the following actions when the amount in controversy exceeds $10 million, excluding interest, statutory damages, exemplary damages, penalties, attorney's fees, and court costs:

(1) An action arising out of a "qualified transaction", defined as a non-bank transaction involving the consideration, payment, receipt, or lending of more than $10 million;

(2) An action that arises out of a contract or commercial transaction in which the parties to the contract or transaction agreed in the contract or a subsequent agreement that the Business Court has jurisdiction of the action, except an action arising out of an insurance contract; and

(3) An action that arising from a violation of the Texas Finance Code or the Texas Business and Commerce Code by an organization or its officer or governing person acting on behalf of the organization, excluding banks, credit unions, or savings and loan associations.

See Tex. Gov't Code §§ 25A.001(14), 25A.004(d).

For all of these categories, the Business Court has concurrent civil jurisdiction with district courts in an action seeking injunctive relief or a declaratory judgment under Chapter 37 of the Civil Practice and Remedies Code. Tex Gov't Code § 25A.004(e).

The Business Court also has supplemental jurisdiction over any claims related to a case or controversy within its jurisdiction that form part of the same case or controversy. A claim within the Business Court's supplemental jurisdiction may proceed in the Business Court only if all parties agree and a judge of the division of the court before which the action is pending approves it. If the parties involved in a claim within the Business Court's supplemental jurisdiction do not agree on the claim proceeding in the Business Court, the claim may proceed in a court of original jurisdiction concurrently with any related claims proceeding in the Business Court. Tex. Gov't Code § 25A.004(f).

Unless the claim falls within its supplemental jurisdiction, the Business Court does not have jurisdiction over:

(1) Suits against a Governmental entity;

(2) Suits to foreclose a lien or real or personal property;

(3) Claims arising out of Chapter 15 (Monopolies) and Chapter 17 (Deceptive Trade Practices) of the Texas Business and Commerce Code;

(4) Claims arising out of the Texas Estates Code, Family Code, Insurance Code, or Chapter 53 (Mechanic's Liens) of the Property Code;

(5) Claims arising out of the production or sale of farm products;

(6) Claims related to consumer transaction under Section 601.001 of the Texas Business and Commerce Code; or

(7) Claims related to duties and obligations under an insurance policy.

See Tex. Gov't Code § 25A.004(g).

Regardless of supplemental jurisdiction, the Business Court does not have jurisdiction over:

(1) Claims arising under Chapter 74 (Medical Liability) of the Civil Practice and Remedies Code;

(2) Personal injury claims; or

(3) Claims for legal malpractice.

See Tex. Gov't Code § 25A.004(h).

Procedure for Jury Trials

HB 19 permits jury trials to be held in the Business Court. Parties will have the right to a trial by jury when required by the constitution. Tex. Gov't Code § 25A.015(a).

Jury trials in the Business Court will be subject to the venue restrictions outlined in Section 15.002 of the Texas Civil Practice and Remedies Code. Tex. Gov't Code § 25A.015(b). However, a jury trial will take place in the county where a written contract specifies the venue. Tex. Gov't Code § 25A.015(d). For cases removed to the Business Court, the jury trial will take place in the county where the action was originally filed. Tex. Gov't Code § 25A.015(c).

The procedures for drawing jury panels, selecting jurors, and other jury-related practices in the Business Court will align with those of the district court in the county where the trial is conducted. Tex. Gov't Code § 25A.015(f). Additionally, the Business Court will follow the general practice, procedure, rules of evidence, issuance of process, and other trial-related matters as established by the district courts, unless otherwise provided by Chapter 25A (Business Courts) of the Texas Government Code. Tex. Gov't Code § 25A.015(g).

Procedure for Filing/Removal

An action within the jurisdiction of the Business Court may be filed in the Business Court directly. The party filing the action must plead facts to establish venue in a county in a division of the Business Court, and the Business Court shall assign the action to that division. Tex. Gov't Code § 25A.006(a).

Venue may be established as provided by law or, if a written contract specifies a county as venue for the action, as provided by the contract. Tex. Gov't Code § 25A.006(a).

If the Business Court does not have jurisdiction, it may transfer it to a district or county court of proper venue or dismiss the action without prejudice to refilling. Similarly, a division of the Business Court may transfer cases to another division of the Business Court. Tex. Gov't Code § 25A.006(b).

Actions filed in district or county court may be removed to the Business Court at any time during the pendency of the action if all parties agree; however, if all parties to the action have not agreed, the notice of removal of the action must be filed within 30 days of the discovery of facts establishing the Business Court's jurisdiction. Tex. Gov't Code § 25A.006(f)(1). Such removal does not constitute a general appearance or waive any venue defects, so challenges to personal jurisdiction or venue may still be raised. Tex. Gov't Code § 25A.006(j). Removal is not governed by the due order of pleading. Tex. Gov't Code § 25A.006(h)(i).

The Fifteenth Court of Appeals has exclusive jurisdiction over appeals from the Business Court. Tex. Gov't Code § 25A.007(a). The procedure for appealing or initiating an original proceeding from the Business Court is the same procedure for appealing or initiating an original proceeding from a district court. Tex. Gov't Code § 25A.007(c)

In conclusion, HB 19 represents a pivotal legislative initiative aimed at changing the venue for business disputes with the goal of developing specialized courts for the resolution of significant business disputes.

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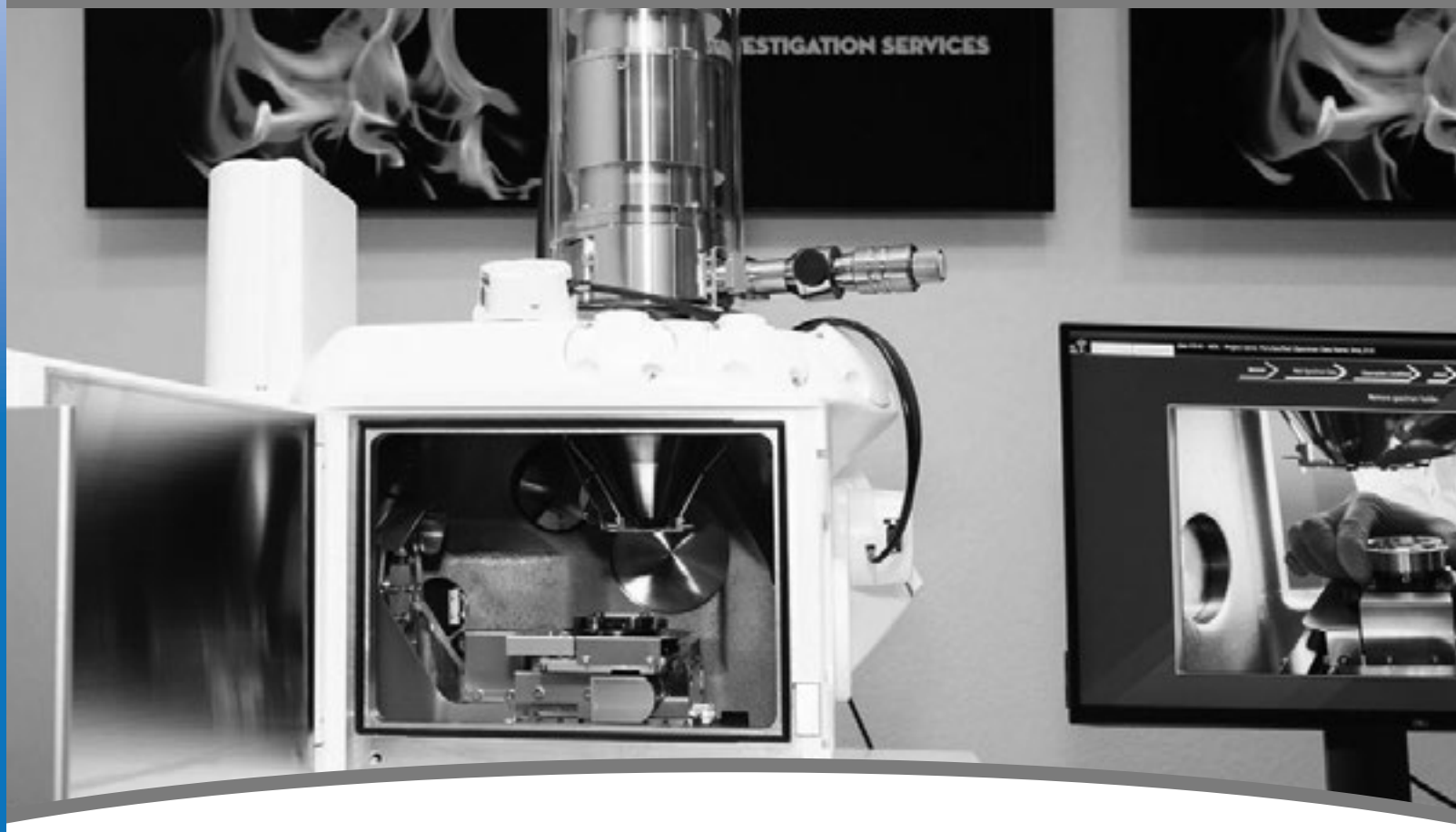

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2024 Milton C. Colia TADC Trial Academy

On February 23 and 24, the TADC held the Milton C. Colia Trial Academy at the South Texas College of Law in Houston, 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 Christy Amuny at Germer, PLLC in Beaumont, and Dan Hernandez with Ray Pena McChristian in El Paso, rallied TADC volunteers from around the state, as well as witness volunteers from the South Texas College of Law.

This year's Trial Academy was an incredible success with 42 young lawyer participants (many of whom are new TADC members) and dozens of TADC volunteers with years of experience, as faculty members.

Congratulations to the 2024 Trial Academy Graduates

Connar Allen, Craig, Terrill, Hamm, Grossman & Erwin, LLP, Lubbock
Christopher Anderson, The Bassett Firm, Dallas
Henry Becker, ScottHulse, P.C., El Paso
Reid Blackford, Fulbright Winniford PC, Waco
Alissa Cana, Adams and Reese LLP, Houston
Crystal Castaneda, Shafer, Davis, O'Leary & Stoker, Odessa
Melanie Cruthirds, Liskow & Lewis APLC, Houston
Christopher DeRose, Royston, Rayzor, Vickery & Williams, L.L.P., Corpus Christi
Jacey DuBois, Craig, Terrill, Hamm, Grossman & Erwin, LLP, Lubbock
Jordyn Emmert, Royston, Rayzor, Vickery & Williams, L.L.P., Houston
Victoria Espinoza, ScottHulse, P.C., El Paso
Kelsey Eyanson, Beck | Redden LLP, Houston
Marshall Feltus, Fletcher, Farley, Shipman & Salinas, LLP, Dallas
Kimberly Fojtik, Gieger, Laborde & Laperouse, LLC, Houston
Emily Fouts, Sprouse Shrader Smith P.L.L.C., Amarillo
Samantha Garza, Atlas, Hall & Rodriguez, L.L.P., McAllen
Raleigh Hart, Harris, Finley & Bogle, P.C., Fort Worth
James Jackson Hayden, Fletcher, Farley, Shipman & Salinas, LLP, Austin
Jacob Jason, Fletcher, Farley, Shipman & Salinas, LLP, Austin
Fariha Jawed, Beck | Redden LLP, Houston
Evan Johnson, Sprouse Shrader Smith P.L.L.C., Amarillo
Dilcia Jones, MehaffyWeber, PC, San Antonio
Carson Jones Lacy, Harris, Finley & Bogle, P.C., Fort Worth
Allison Koltunchik, Royston, Rayzor, Vickery & Williams, L.L.P., Brownsville
Carla Lassabe, Gieger, Laborde & Laperouse, LLC, Houston
Taylor Levine, Royston, Rayzor, Vickery & Williams, L.L.P., Corpus Christi
Sonia Lopez, Gieger, Laborde & Laperouse, LLC, Houston
Desiree Malone, Harris, Finley & Bogle, P.C., Fort Worth
Preston Meyers, Germer PLLC, Beaumont
Lauren Parker, Smith Parker Elliott PLLC, Houston
Clarissa Perez, Fletcher, Farley, Shipman & Salinas, LLP, Dallas
Heather Phillips, Harris, Finley & Bogle, P.C., Fort Worth
Jesse Potts, Mills Shirley L.L.P., Galveston
Zachary Ramon, Ramon Worthington Nicolas & Cantu, P.L.L.C., Edinburg
Robert Root, Germer PLLC, Beaumont
Jeffrey Saenz, McCoy Leavitt Laskey LLC, San Antonio
William Sharp, Fletcher, Farley, Shipman & Salinas, LLP, Dallas
Trevor Shoels, Sprouse Shrader Smith P.L.L.C., Amarillo
Lauren Simmons, Crenshaw, Dupree & Milam, L.L.P., Lubbock
Courtland Spotts, MehaffyWeber, PC, Beaumont
Christina VanSickle, Goldman & Peterson PLLC, San Antonio

"She Works Hard For The Money"

By: Rachel C. Moreno
KEMP SMITH LLP, EL PASO

I.
"What, Like It's Hard?" – Elle Woods, Legally Blonde
An Introduction to Rule 91a

Before Texas Rule of Civil Procedure 91a (hereafter, Rule 91a or, simply, the Rule), litigants in Texas state court lacked a reasonable means to seek early dismissal of a case that is groundless in fact and/or as a matter of law. That all changed in 2013 when the Legislature recognized the importance of a procedure similar to the federal courts' Rule 12(b)(6) to be available to parties in state court.

Rule 91a first went into effect on March 1, 2013. The Rule stemmed from the Legislature's desire to "implement rules intended to promote the prompt, efficient, and cost-effective resolution of civil actions."[2] In particular was the need for a procedure "to provide for the dismissal of causes of action that have no basis in law or in fact [by filing a] motion and without [the need for] evidence."[3]

Rule 91a allows a party to move to dismiss a cause of action on the grounds that it has no basis in law or fact.[4] A cause of action has no basis in law "if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought."[5] A cause of action has no basis in fact "if no reasonable person could believe the facts pleaded."[6]

This paper will discuss the fundamentals of the Rule, including its rigid and rapid filing deadlines; how it coexists among the other rules and requirements governing pleading; its treatment by various intermediate courts of appeals and the Texas Supreme Court across different practice areas; and reminders

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[1] Rachel Moreno is a partner in Kemp Smith LLP's El Paso office. Rachel joined TADC in 2013 and is in her sixth year on its Board of Directors, currently serving as the Vice President for West Texas. She specializes in appellate law, commercial litigation, and is expanding her expertise into the firm's robust environmental litigation practice. Rachel took a break from private practice in 2019 and worked as a staff attorney for the then-Chief Justice of the Court of Appeals for the Eighth District of Texas before returning to Kemp Smith in 2022.

[2] Tex. Gov't Code Ann. § 22.004(h).

[3] *Id*. § 22.04(g).

[4] Tex. R. Civ. P. 91a.1. Note that 91a does not apply to cases brought under the Texas Family Code or related to inmate litigation. *See id.*

[5] *Id*.

[6] *Id*.

and tips to aid defense attorneys using (and, hopefully, prevailing on) Rule 91a motions to dismiss in their own practices.

II.
"Life Moves Pretty Fast. If You Don't Stop and Look Around Once in a While, You Could Miss It." – Ferris Bueller, Ferris Bueller's Day Off
Motion Practice Procedure and Deadlines

A movant must file a Rule 91a motion to dismiss "within 60 days after the first pleading containing the challenged cause of action is served on the movant" and "at least 21 days before the motion is heard."[7] Importantly, the due order of pleading rules still apply in the context of filing 91a motions. A defendant intending to challenge personal jurisdiction or venue *and* the factual or legal bases of the plaintiff's claims must file a special appearance and/or motion to transfer venue *before* filing a 91a motion.[8] However, filing a Rule 91a motion does not waive the movant's rights as to venue or personal jurisdiction when it has otherwise adhered to the due order of pleading.[9] A Rule 91a movant consents to personal jurisdiction and venue only as to the Rule 91a motion.

The non-movant is entitled to a minimum of fourteen days' notice of any hearing or submission on the motion, and oral hearing is allowed but not mandatory.[10] Because dismissal is the potential outcome of a Rule 91a motion, a trial court must provide the parties with written notice of a hearing or submission before ruling on the 91a motion "regardless of whether the trial court will hold an oral hearing."[11]

A response to the motion must be filed at least seven days before the hearing date.[12] In lieu of a response, a nonmovant may amend or nonsuit the cause of action challenged in the motion.[13] However, amendment or nonsuiting of the challenged claim must be done at least three days before the hearing on the motion.[14] A timely nonsuit of the cause of action ahead of the hearing precludes a court from ruling on the motion as to that cause of action.[15] Timely amendment of the claim gives the movant until the day before the hearing to either stand on the merits of the original motion to dismiss, withdraw the motion to dismiss, or file an amended motion as to the amended cause of action.[16] A timely amended motion to a timely amended cause of action restarts the Rule's timeline.[17] If the nonmovant does not amend the cause of action after a motion to dismiss has been filed, the movant has until three days before the hearing in which to

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[7] Tex. R. Civ. P. 91a.3(a)-(b).

[8] *See id.* 91a.8.

[9] *See id.*

[10] *Id*. 91a.6.

[11] *See Gaskill v. VHS San Antonio Partners*, 456 S.W.3d 234, 239 (Tex. App.—San Antonio 2014, pet. denied).

[12] Tex. R. Civ. P. 91a.4.

[13] *Id.* at 91a.5(a)-(b).

[14] *Id.*

[15] *Id.*91a.5(a).

[16] *See id.* 91a.5(b).

[17] *See id.* 91a.5(d).

withdraw the motion.[18] Unless the parties agree otherwise, the nonmovant timely nonsuits the challenged claim, or the movant timely withdraws the motion, the trial court must rule on the motion.[19]

A court may not consider any evidence in ruling on the motion; its decision must be based solely on the pleadings "together with any pleading exhibits permitted by Rule 59."[20] This is true whether the motion is considered at oral hearing or by submission. The one exception to consideration of evidence is evidence regarding attorney fees, which is allowed under Rule 91a.7.

> ► ***Practice Tip****: Rule 59 limits the types of documents which can be attached to the pleadings to "[n]otes, accounts, bonds, mortgages, records, and all other written instruments, constituting, in whole or in part, the claim sued on, or the matter set up in defense[.]" If a plaintiff attached documents other than those permitted by Rule 59, make sure you specially except to those exhibits, particularly if you also intend to move for dismissal under Rule 91a.*[21]

Rule 91a requires the court to either grant or deny the motion to dismiss within 45 days of it being filed.[22] However, the 45-day deadline is "directory" rather than mandatory; the Rule provides no penalty for a trial court failing to rule by that deadline, nor prohibits ruling after the deadline.[23] Failing to rule by the deadline is unlikely to prejudice the nonmovant.[24] But prejudice to the movant is more likely, considering the movant could likely be required to engage in discovery in order to move for dismissal under other rules, like summary judgment.[25] For judges who simply refuse to rule on a Rule 91a motion, movants have another avenue for relief: mandamus.[26]

III.
"Let's Get Down to Brass Tacks. How Much for the Ape?" – Raoul Duke, Fear and Loathing in Las Vegas
GROUNDS FOR DISMISSAL

A motion brought under Rule 91a must state it is brought pursuant to Rule 91a, must specifically identify the claim or claims it challenges, and specify the particular reasons why the claim is baseless in

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[18] *Id.* 91a.5(a).

[19] *See id.* 91a.5(a), (c).

[20] *Id.* 91a.6.

[21] *See, e.g., Fawcett v. Grosu,* 498 S.W.3d 650, 659 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (failure to object to exhibits to petition which were improperly incorporated by reference permitted trial court to consider them in dismissal proceedings under the TCPA).

[22] *Id*. 91a.3.

[23] *See, e.g., Frankel v. Butler*, No. 05-21-01122-CV, 2022 WL 17883798, at *2 (Tex. App.—Dallas Dec. 23, 2022, no pet.) (mem. op.) (quoting *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001)).

[24] *See id.*

[25] *See Koenig v. Blaylock*, 497 S.W.3d 595, 599 (Tex. App.—Austin 2006, pet. denied).

[26] *See In re Joel Kelley Interests, Inc.*, No. 05-19-00559-CV, 2019 WL 2521725, at *2 (Tex. App.—Dallas June 19, 2019, orig. proceeding) (mem. op.).

law and/or fact.[27] But what does "no basis in law or fact" actually look like, and what can a trial court consider in its analysis of the claim under the Rule?

a. No Basis in Law

We have touched on the Rule's definition of what constitutes a cause of action that has no basis in law; that is, when "the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought."[28] One example is a cause of action "barred by an established legal rule [that] the plaintiff has failed to plead facts demonstrating . . . does not apply."[29] Another example is a cause of action which states too few facts demonstrating the claim is legitimate.[30] On the other hand, claimants who plead too many details may unwittingly plead themselves out of a lawsuit under the same standard.[31]

► ***Practice Tip****: Rule 194.2 Initial Disclosures may help ascertain whether the cause of action has a basis in law. Under a typical timeline, disclosures would be served at least 30 days before a Rule 91a Motion would need to be filed. Specifically pay attention to the requirements of Rule 194.2(b)(3), which requires stating "the legal theories and, in general, the factual bases of the responding party's claims or defenses[.]"*

b. No Basis in Fact

Claims with no basis in fact are those in which "no reasonable person could believe the facts pleaded."[32] Various courts have analogized the standard with a legal-sufficiency review.[33] Others have determined that if a cause of action passes muster under the notice pleading standard, then a motion to dismiss under Rule 91a for having no basis in fact should be denied.[34]

A survey of case law on Rule 91a motions indicates that claims alleged to have no basis in fact are much scarcer than those alleged to have no basis in law. There are, unfortunately, plenty of cases with facts that are completely bewildering and involve conduct so extreme and horrifying and yet they remain believable.[35] One case out of San Antonio in 2018 did involve "no basis in fact" dismissal.[36] There,

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[27] *See* Tex. R. Civ. P. 91a.2.

[28] Tex. R. Civ. P. 91a.1.

[29] *In re First Reserve Mgmt., L.P.*, 671 S.W.3d 653, 661 (Tex. 2023) (orig. proceeding).

[30] *Fiamma Statler, LP v. Challis*, No. 02-18-00374-CV, 2020 WL 6334470, at *8 (Tex. App.—Fort Worth Oct. 29, 2020, pet. denied) (collecting cases).

[31] *See, e.g.*, *1st and Trinity Super Majority, LLC v. Milligan*, 657 S.W.3d 349, 363-64 (Tex. App.—El Paso 2022, no pet.) (plaintiffs pleaded all of the facts that the defendant needed to prove his affirmative defense of quasi-judicial immunity); *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 656 (Tex. 2020) (91a dismissal proper where immunity was demonstrated as a matter of law from facts alleged in petition); *McDill v. McDill*, No. 03-19-00162-CV, 2020 WL 4726634, at *8 (Tex. App.—Austin July 30, 2020, pet. denied) (mem. op.) (pleadings themselves established defendant's affirmative defense of attorney immunity); *see also* Tex. R. Civ. P. 91a.1.

[32] Tex. R. Civ. P. 91a.1.

[33] *See, e.g., City of Dall. v. Sanchez*, 494 S.W.3d 722, 724 (Tex. 2016) (per curiam).

[34] *See, e.g., Darnell v. Rogers*, 588 S.W.3d 295, 301 (Tex. App.—El Paso 2019, no pet.).

[35] *See Davis v. Homeowners of Am. Ins. Co.*, No. 05-21-00092-CV, 2023 WL 3735115 (Tex. App.—Dallas May 31, 2023, no pet.).

[36] *Salazar v. HEB Grocery Co.*, No. 04-16-00734-CV, 2018 WL 1610942 (Tex. App.—San Antonio Apr. 4, 2018, pet. denied).

the *pro se* plaintiff alleged that HEB and Walmart conspired together to threaten and harass him to such a degree that he would shift his focus from investigating them for improperly accusing him of theft. The San Antonio Court of appeals also found no basis in law but specifically also noted no basis in fact because no reasonable person could believe the conspiracy allegation.

c. Special Exceptions and Fair Notice Pleading

The discussion of notice pleading as it relates to claims that are alleged to have no basis in fact is a good segue to discuss how Texas's fair-notice pleading standard coincides with Rule 91a motion practice as well as Rule 91's special exceptions procedure. As we all know, Texas employs a fair-notice pleading standard set out in subpart (b) of Rule 45 of the Rules of Civil Procedure (Rule 45). Rule 45 states, in pertinent part, "Pleadings in the district and county courts shall . . . (b) consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. That an allegation be evidentiary or be of legal conclusion shall not be grounds for an objection *when fair notice to the opponent is given by the allegations as a whole*[.]"[37]

Typically, if a defendant feels a pleading lacks adequate factual allegations, the procedural vehicle to address the deficiency is Rule 91 Special Exceptions.[38] When a trial court sustains special exceptions, the pleader is given an opportunity to amend its allegations or risk dismissal by summary judgment.[39] So when should the defendant file Special Exceptions and when should the defendant move for dismissal?

The Texas Supreme Court discussed this interplay in *In re First Reserve Mgmt., L.P.*[40] The facts of *First Reserve* are somewhat dense, but the Supreme Court's comments discussing pleading standards is worth including here. It noted that notice-pleading rules encompass not only giving notice of the claim and relief sought (which are the legal claims), but also of the essential factual allegations underpinning those claims. In other words, there has to be some connection between the facts alleged and the legal theories advanced in the pleading. Pleadings that state "many *legal accusations* but no *factual allegations* to show a cause of action with a basis in law" will not survive a Rule 91a motion to dismiss. Likewise, conclusory allegations of wrongful conduct will almost certainly not be sufficient going forward under the *First Reserve* standard.

[37] *Id.* (emphasis added).

[38] *See* Tex. R. Civ. P. 91.

[39] *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998).

[40] No. 22-0227, 66 Tex. Sup. J. 122, 2023 Tex. LEXIS 575, *1-2 (Tex. June 23, 2023) (orig. proceeding).

IV.
"Hope Is a Dangerous Thing."
– Ellis Boyd "Red" Redding, The Shawshank Redemption
Appellate Review of Orders Under Rule 91a

If the court grants a motion to dismiss, the nonmovant may appeal under the normal rules governing final judgments.[41] It is important to note that interlocutory appeal of an order dismissing a claim under Rule 91a (where other claims remain before the court) is not available to a claimant.[42] Where a Rule 91a motion is denied, the Texas Supreme Court has allowed mandamus review of the denial.[43] On appeal, including in mandamus actions, the standard of review "is effectively a de novo standard since courts have no discretion concerning questions of law like those Rule 91a presents."[44]

V.
"Show Me the Money!" – Jerry Maguire, Jerry Maguire
Attorney Fees Under Rule 91a

Prior to the 2019 legislative amendments, Rule 91a contained a mandatory fee award to the prevailing party. However, the Legislature determined that the Rule's mandatory fee award provision suppressed Rule 91a's intended purpose and "discouraged potential motions to dismiss an action as both parties are often reluctant to expose themselves to such costs and fees."[45] As a result, on September 1, 2019, the Legislature ordered the Texas Supreme Cout to amend the Rule to change the fee award from mandatory to discretionary.[46] Now, whether to award attorney fees to the prevailing party lies within the discretion of the trial court.

Rule 91a does not allow attorney fee awards in cases brought by or against a governmental entity or public official acting in his or her official capacity.[47] In these types of cases particularly, therefore, the risk of filing a Rule 91a motion that can be made in good faith is extremely low. Practitioners representing governmental entities should pay close attention to the pleadings and ascertaining whether Rule 91a relief should be pursued.

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[41] *See In re Shire PLC,* 633 S.W.3d 1, 11 n.3 (Tex. App.—Texarkana 2021, orig. proceeding [mand. denied]) (explaining that interlocutory appeal of an order dismissing a claim under Rule 91a is not available).

[42] *See In re Shire PLC*, 633 S.W.3d 1, 11 n.3 (Tex. App.—Texarkana 2021, orig. proceeding [mand. denied]).

[43] *See In re Farmers Tex. Cnty. Mut. Ins. Co.*¸621 S.W.3d 261, 266 (Tex. 2021) (orig. proceeding); *In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding).

[44] Meredith Helle and J. Joseph Vale, *Rule 91a Update*, *in* 2023 TXCLE Advanced Civil Appellate Practice 3-II, (State Bar of Texas, 2023) *available at* 2023 WL 9289319 (citing *In re Farmers Tex. Cnty. Mut. Ins. Co.*, 621 S.W.3d at 266)); *see also Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 654 (Tex. 2020).

[45] *See* Senate Research Center, Bill Analysis, Tex. H.B. 3300, 86th Leg., R.S. (2019).

[46] *See* Tex. Civ. Prac. & Rem. Code Ann. § 30.021.

[47] *See* Tex. R. Civ. P. 91a.7.

Keep in mind that attorney fees are not limited to those incurred in the trial court.[48] If the trial court's determination on a 91a Motion is appealed, the prevailing party on appeal is authorized by the Rule to seek its fees at both trial and appellate levels.[49]

VI.
"I Forgot You Were Sick the Day They Taught Law in Law School." – *Lt. Daniel Kaffee,* A Few Good Men
RULE 91A IN ACTION

a. General Negligence

Vasquez v. Legend Nat. Gas III, LP, 492 S.W.3d 448 (Tex. App.—San Antonio 2016, pet. denied).

Vasquez's late husband passed away in a single-vehicle accident on a road in La Salle County, Texas, where there was significant oil and gas production in the surrounding area. Vasquez sued ten entities who were operators or producers of wells in the area, claiming that they were operating extremely heavy equipment on the road where her husband's accident occurred, which the road infrastructure could not withstand and which they knew it could not handle. The defendants filed motions to dismiss under Rule 91a on the basis that Vasquez's claims had no basis in law because they did not owe her husband a legal duty under the facts alleged. Vasquez amended her petition to assert multiple theories of negligence and that under each theory, the defendants had created a dangerous condition on the road in question. The defendants' motions were granted, and Vasquez appealed on the sole question of whether the defendants-appellees owed a legal duty to act to prevent her husband's death from the dangerous condition they allegedly created by using their machinery on that road.

The San Antonio Court looked to the pleadings, construed them liberally in favor of Vasquez, and accepted the allegations as true. However, it noted the distinction between accepting the *factual* allegations as true rather than the *legal* conclusions or *conclusory statements* as true. Most of her factual allegations involved the logistics involved in bringing mineral wells into production, including the truck traffic required, as well as the "service life" of county roads subjected to that volume and severity of use. The appeals court then considered whether those facts sufficiently alleged a duty to Vasquez owed by the defendants-appellees. The seminal question was then whether defendants-appellees owed a duty either to repair the road in question or warn of the danger they allegedly created. The San Antonio Court determined that the duty to repair the road as a matter of law lay with La Salle County. As to the duty to warn, the court examined the situations where individuals created dangerous conditions on a public way where a duty to warn was imposed. In each situation, there were specific acts by the defendant that created the dangerous situation; for example, a sidewalk was being excavated, or a vehicle broke down in the roadway and created an obstruction. Those examples imposed a legal duty on the defendant to warn of the condition they created. However, where the public way became impassable simply as a result of the defendant's usual and normal use of it, there was no legal duty imposed. In the facts of the instant case, the allegations were merely that the defendants-appellees used the road in a usual and normal way, albeit with their heavy equipment. Under those facts, there was no duty to warn, and dismissal under 91a was proper.

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[48] *See Weizhong Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 187 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

[49] *See id.* (noting that Rule 91a authorizes recovery of "all costs and reasonable and necessary attorney fees" and makes no other limitation to that recovery).

In re Amazon.com Services, LLC, No. 03-23-00634-CV, 2023 WL 8791266
(Tex. App.—Austin Dec. 20, 2023, orig. proceeding).

This case arose from an accident between the plaintiff's vehicle and a delivery truck owned by Last Mile. The plaintiff initially sued the driver, individually, and Last Mile. Three years later, the plaintiff added Amazon as a defendant on vicarious liability claims based on Amazon's contract with Last Mile for delivery services. In its response, Amazon asserted a limitations defense and subsequently filed a Rule 91a motion to dismiss.

At the Rule 91a hearing, the plaintiff argued that Amazon fraudulently concealed its relationship with Last Mile, which Amazon disputed as having been done, if at all, by third parties. The trial court denied Amazon's 91a motion, and Amazon sought mandamus relief.

The Austin Court of Appeals conditionally granted the petition for mandamus. There was no doubt that plaintiff filed suit against Amazon outside the limitations period, and the main issue before the court was whether the trial court clearly abused its discretion by denying Amazon's Rule 91a motion on the strength of plaintiff's fraudulent concealment allegations. The Austin Court of Appeals determined that the plaintiff failed to show that Amazon itself engaged in any of the elements of fraudulent concealment. Amazon had no legal duty to disclose its contractual relationship with Last Mile, since they were not sued until well after the limitations period had passed. The fact that the driver, Last Mile, and Amazon all used the same attorney in responding to the Rule 91a motion was irrelevant, the court observed, since Amazon used a different attorney to file its answer in any event.

The court also rejected the plaintiff's unclean hands theory, as the alleged misconduct by the attorney occurred before representing Amazon. Finally, the court held that Amazon had no adequate remedy on appeal "because Amazon should not be required to spend time and money defending against claims that are precluded as a matter of law."

b. Employment

Minor v. Diverse Facility Solutions, Inc., No. 04-20-00526-CV, 2021 WL 5218000
(Tex. App.—San Antonio Nov. 10, 2021, pet. denied).

This case arose from an adverse employment action claim brought by an employee against his former employer alleging racial discrimination. The plaintiff *pro se* alleged that he was wrongfully terminated and, after he complained of the wrongful termination, he was rehired by the same employer, falsely accused of wrongdoing, and terminated again in retaliation for filing the initial complaint. The employer-defendant moved to dismiss the plaintiff's claims under Rule 91a. The trial court granted the motion and dismissed the case with prejudice. The plaintiff appealed.

The Court of Appeals reviewed the plaintiff's pleadings, applying the fair notice pleading standard and construing the allegations liberally in favor of the plaintiff. The court emphasized that pleadings must provide sufficient facts to support a cause of action, beyond mere conclusory statements. Despite procedural irregularities and the plaintiff's pro se status, the court found that the employee had pled enough facts to make a prima facie case for both claims of discrimination and retaliation.

More specifically, the Court of Appeals noted the procedural irregularities in the plaintiff's original and amended pleadings but found that the pro se plaintiff's intent was to file an amended pleading that the trial court should have considered. The defendant employer also committed some procedural irregularities by failing to either withdraw its original Rule 91a motion or file an amended motion if the plaintiff filed his

amended pleading at least three days before the hearing on the motion, as was the case. This required the trial court to consider the defendant's Rule 91a motion in light of the plaintiff's amended pleading. This procedural posture allowed the court of appeals to find that the plaintiff's amended pleading met the fair notice pleading standards (i.e., notice of the facts upon which the pleader bases his claim such that the opposing party has sufficient information to prepare a defense). The court of appeals reversed the trial court and remanded for further proceedings.

In re Odebrecht Const., Inc., 548 S.W.3d 739 (Tex. App.—Corpus Christi 2018, orig. proceeding).

Odebrecht involved an employment claim for wrongful termination. The facts alleged by the plaintiff was that the defendant terminated the plaintiff's employment because the plaintiff's son, who was also an employee of the defendant and worked on the same crew as the plaintiff, filed a worker's compensation claim following a work injury. The plaintiff was working with his son when the work injury happened and witnessed the incident. The employer sought dismissal under Rule 91a because the plaintiff failed to allege any facts demonstrating that he, personally, testified or was about to testify in a worker's compensation proceeding.

The Corpus Christi Court undertook a thoughtful analysis of the allegations and the then-recent decisions from the Texas Supreme Court regarding what may be considered in deciding a Rule 91a motion; that is, that review is narrowly focused on the plaintiff's challenged pleading and should address the deficiency of the cause of action rather than dismissal on other grounds.[50]

c. Intentional Torts – Defamation

Strickland v. iHeartMedia, Inc., 665 S.W.3d 739 (Tex. App.—San Antonio 2023, pet. denied).

Strickland was a musician who entered a song-writing contest hosted by iHeartMedia. When he discovered a problem on iHeart's website related to the online voting process, he notified iHeartMedia and they resolved the issue by holding a second voting period. Strickland was dissatisfied with the solution iHeart offered and ultimately lost the contest. He then sued iHeartMedia in small claims court over the incident. In its answer in small claims court, iHeartMedia alleged that Strickland threatened its employees over the voting issue. Strickland then filed suit against iHeartMedia in Bandera County District Court alleging defamation based on the allegations iHeartMedia made in its answer in small claims court. iHeartMedia moved for dismissal under Rule 91a, which the trial court granted, and Strickland appealed.

The San Antonio Court of Appeals upheld the dismissal, noting that "statements made in a judicial proceeding are privileged against defamation claims." Thus, Strickland's pleading demonstrated on its face that he had no right to recover against iHeartMedia for any statements it made in a pleading in small claims court. The court also upheld the trial court's award of attorney fees, noting that Strickland failed to brief any legal argument opposing the fee award.

► ***Practice Tip****: There is—or can be—a lot of overlap and interplay between dismissal options under Rule 91a and dismissal under the Texas Citizens Participation Act, or anti-SLAPP statute. That interplay could be its own paper, but defense attorneys should carefully consider whether it is a better option to file a motion to dismiss under the Rule or under the TCPA.*

[50] *See ConocoPhillips Co. v. Koopmann*, No. 16-0662, 547 S.W.3d 858, 880-81 (Tex. 2018); *AC Interests, L.P. v. Tex. Comm'n on Envtl. Quality*, 543 S.W.3d 703, 706-07 (Tex. 2018).

d. Professional Negligence

Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C., 595 S.W.3d 651 (Tex. 2020).

Here, the Texas Supreme Court considered whether a non-client's claim against a law firm had a basis in law under Rule 91a, and whether an affirmative defense can be the basis for moving for dismissal under the Rule. The plaintiff sued a law firm for its alleged intentional destruction of evidence in another lawsuit involving an accident in which her husband had been killed. The substance of her claims against the law firm was for fraud, trespass to chattel and conversion when it disassembled and tested a truck-trailer's brakes before she had a chance to examine them or document their original condition. The law firm moved to dismiss under Rule 91a, citing its immunity to claims by non-clients under the attorney immunity doctrine. The plaintiff responded that an affirmative defense cannot be the basis of dismissal under Rule 91a. The trial court and court of appeals disagreed and held that the allegations in her pleading demonstrated the law firm's immunity as a matter of law because it was clearly alleged to have been performed as duties in representing its client.

The Texas Supreme Court agreed with the lower courts. It noted that "Rule 91a limits the scope of a court's factual, but not legal, inquiry." It went on to note that while a factual inquiry is limited to those facts contained within the plaintiff's pleadings, the legal inquiry can extend to the defendant's pleadings "if doing so is necessary to make the legal determination of whether an affirmative defense is properly before the court." It therefore held that an affirmative defense can be the subject of a dismissal motion under Rule 91a, and the plaintiff's pleading alleged facts demonstrating the law firm's entitlement to attorney immunity as a matter of law.

VII. *"It's Supposed to be Hard. If it Wasn't Hard, Everyone Would Do It. The Hard is What Makes It Great." – Jimmy Dugan,* A League of Their Own
The Takeaway and Practical Reminders

91a Motion practice is certainly not for every case, and I venture to say it is not appropriate for most cases. But once in a while the right pleading comes along where the potential value of succeeding in early dismissal outweighs the relative risk of an adverse attorneys' fee award. Here is a quick reference for practice tips around Rule 91a:

- As with most aspects of the profession, calendaring is key. As soon as you have an inkling to file a Rule 91a motion, calendar all of the applicable guidelines and stay on top of them. If disclosures are past due, bring it to opposing counsel's attention immediately and move to compel, if necessary, but don't sit on filing a 91a motion waiting to see if the plaintiff's disclosures will provide clarity.

- If you're tempted to file a 91a Motion, you should almost certainly file Special Exceptions as well unless the facts alleged in the petition clearly demonstrate the plaintiff's claim is precluded. When in doubt, consider the propriety of filing a 91a Motion and Special Exceptions jointly and asking for alternative relief.

- If you pursue relief under Rule 91a, keep explicit records segregating your fees on time spent defending against the claims that are subject to the motion to dismiss.

- If your 91a Motion is denied, consider whether it is worth appealing the denial or waiting and filing a summary judgment later. Not appealing will avoid the risk of an adverse attorney's fee award but you will also waive your right to ask for fees if you prevail and risk your client enduring the time and expense of litigation on a meritless claim.

- Although the attorneys' fee award is no longer mandatory, counsel should be prudent in deciding whether to file a 91a Motion because the possibility of an adverse attorneys' fee award remains.

Welcome New Members!

D. Andrew Bailey, Martinez, Dieterick, and Zarcone, San Antonio

Valkyrie Buffa, Liskow & Lewis APLC, Houston

Benjamin Buford, Royston, Rayzor, Vickery & Williams, L.L.P., Corpus Christi

Alissa Cana, Adams and Reese LLP, Houston

Crystal Castaneda, Shafer, Davis, O'Leary & Stoker, Odessa

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Christopher DeRose, Royston, Rayzor, Vickery & Williams, L.L.P., Corpus Christi

Jessica Eaton, Steed Dunnill Reynolds Bailey Stephenson LLP, Dallas

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Victoria Espinoza, ScottHulse, P.C., El Paso

Rachael Favert, Fletcher, Farley, Shipman & Salinas, LLP, Dallas

Jordan Fine, Tyson & Mendes LLP, Houston

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Samantha Garza, Atlas, Hall & Rodriguez, L.L.P., McAllen

Khristopher Grantham, Owen & Fazio, P.C., Dallas

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Anna Heinemeyer, Krenek & Heinemeyer, San Antonio

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Nicole Hines-Glover, The Rudnicki Firm, McKinney

David Irwin, McCoy Leavitt Laskey LLC, San Antonio

David Jones, Hartline Barger LLP, Corpus Christi

Dilcia Jones, MehaffyWeber, PC, San Antonio

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Cristy Lindberg, Cavaretta, Katona & Leighner, San Antonio

Mikayla Longoria, McCoy Leavitt Laskey LLC, San Antonio

Matthew Loving, Steed Dunnill Reynolds Bailey Stephenson LLP, Dallas

Josephine Lue, McCoy Leavitt Laskey LLC, San Antonio

Bianca Lurate, Kane Russell Coleman Logan PC, Dallas

Christopher Madrid, Goldman & Peterson PLLC, San Antonio

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Hannah Pfrang, Royston, Rayzor, Vickery & Williams, L.L.P., San Antonio

Laura Pratt, Sprouse Shrader Smith P.L.L.C., Amarillo

Clarissa Price, Cooper & Scully, P.C., Dallas

Zachary Ramon, Ramon Worthington Nicolas & Cantu, P.L.L.C., Edinburg

Malcom Renwick, Renwick & Associates, P.C., Plano

Victor Ro, The Ro Firm PC, Spring

Nicholas Romero, Ramon Worthington Nicolas & Cantu, P.L.L.C., Bee Cave

James Sanders, Kershaw Anderson King, PLLC, Dallas

Trevor Shoels, Sprouse Shrader Smith P.L.L.C., Amarillo

Lauren Simmons, Crenshaw, Dupree & Milam, L.L.P., Lubbock

Justin Spears, Roberts Markel Weinberg Butler Hailey, Houston

Caitlyn Terebessy, Steed Dunnill Reynolds Bailey Stephenson LLP, Austin

Taylor Toups, MehaffyWeber, PC, Beaumont

Jason Truitt, Truitt, PLLC, Spring

Pryce Tucker, Schouest, Bamdas, Soshea, BenMaier & Eastham, P.L.L.C., Dallas

Christina VanSickle, Goldman & Peterson PLLC, San Antonio

George Vie, George W Vie III PC, Houston

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Matthew Welsh, Ware, Jackson, Lee, O'Neill, Smith & Barrow, L.L.P., Houston

Alekxander Zasypayko, Fletcher, Farley, Shipman & Salinas, LLP, Dallas

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TEXAS ASSOCIATION OF DEFENSE COUNSEL

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

a member in good standing of the State Bar of Texas, engaged in private practice; that I devote a substantial amount of my professional time to the practice of Civil Trial Law, Personal Injury Defense and Commercial Litigation. I am not now a member of any plaintiff or claimant oriented association, group, or firm. I further agree to support the Texas Association of Defense Counsel's aim to promote improvements in the administration of justice, to increase the quality of service and contribution which the legal profession renders to the community, state and nation, and to maintain the TADC's commitment to the goal of racial and ethnic diversity in its membership.

Preferred Name (if Different from above): _____

Firm: _____

Office Address: _____ City: _____ Zip: _____

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

Email Address: _____ Cell Phone: /

Home Address: _____ City: _____ Zip: _____

Spouse Name: _____ Home Phone: /

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

Dues Categories:

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

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

Applicant's signature: _____ Date: _____

Signature of Applicant's Sponsor:

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

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

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

Card #: _____ Exp. Date: /

Please return this application with payment to:
Texas Association of Defense Counsel
P.O. Box 92468
Austin, Texas 78709

Referring TADC Member:

_____
(print name)

For Office Use

Date: _____

Check # and type: _____

Approved: _____

2024 TADC ANNUAL MEETING

September 18-22, 2024 ~ Horseshoe Bay Resort ~ Horseshoe Bay, TX

Program Co-Chairs: Sarah Nicolas, Ramon Worthington Nicolas & Cantu, PLLC, Austin & Kristi Kautz, Fletcher, Farley, Shipman & Salinas, LLP, Dallas

CLE Approved for: 10.50 hours, including 2.15 hours of ethics

Wednesday, September 18, 2024

6pm – 8pm TADC Welcome Reception

Thursday, September 19, 2024

7:30-7:45am Welcome & Announcements
Gayla Corley, TADC President
Mehaffy Weber, P.C., San Antonio
Sarah Nicolas, Ramon Worthington Nicolas & Cantu, PLLC, Austin
Kristi Kautz, Fletcher, Farley, Shipman & Salinas, LLP, Dallas

7:45-8:30am *CRIMINAL/CIVIL INTERSECTION (.25hrs ethics)*
Sean B. Swords, Chamberlain McHaney, PLLC, Austin

8:30-9:15am *STRATEGIES FOR HANDLING CLAIMS FOR LOST WAGES AND FUTURE MEDICAL CARE*
Ashley Lastrapes, Stokes & Associates, Houston

9:15-10:00am *SPOLIATION/EVIDENCE PRESERVATION*
Paul Boyd, Boyd & Boyd, Tyler

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

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

11:15am-Noon *REAL-TIME DISCUSSION BETWEEN PARTNER AND ASSOCIATE ABOUT DEVELOPING AND COMMUNICATING WITH YOUNG ATTORNEYS*
Sarah Nicolas & Dania Sadi, Ramon Worthington Nicolas & Cantu, PLLC, Austin

Noon-1:30pm LUNCHEON: *PROFESSIONALISM IN THE LAW: WHAT WOULD TED LASSO DO? (1.0 ethics)*
Cindy Tisdale, Goranson Bain Ausley, PLLC, Granbury

1:30-2:15pm *DIGITAL DISCOVERY & CYBER FORENSICS*
Matthew Pooley, PhD, Exponent, New York

2:15-2:30pm *TADC BUSINESS MEETING*

Thursday Afternoon free to enjoy Horseshoe Bay!

Friday, September 20, 2024

7:00-9:00am Buffet Breakfast

7:30-7:45am Welcome & Announcements

7:45-8:30am *MEDIATION/NEGOTIATION STRATEGIES*
The Honorable Lori Massey Brissette, 4th Court of Appeals, San Antonio

8:30-9:30am *JUDICIAL PANEL DISCUSSION: ADVICE AND TIPS FOR LAWYERS (.25 hrs ethics)*
The Honorable Andrew M. Edison, U.S. Magistrate, Southern District of Texas, Galveston
The Honorable Karin Crump, 250th District Court, Travis County
The Honorable Patricia O. Alvarez (ret), 4th Court of Appeals, San Antonio

9:30-10:15am *AMICUS ACTIVITY UPDATE (.25 hrs ethics)*
Roger W. Hughes, Adams & Graham, LLP, Harlingen

10:15-10:30am *B R E A K*

10:30-11:15am *STRATEGIES TO AVOID POTENTIAL NUCLEAR VERDICTS*
Joanna Salinas & Derreck Brown, Fletcher, Farley, Shipman & Salinas, LLP, Dallas

11:15am-Noon *TRIAL OBJECTIONS*
Tim Zieger, Shackelford, McKinley & Norton LLP, Austin

12:00-12:45pm ***NON-ECONOMIC DAMAGES IN TEXAS AFTER GREGORY V. CHOHAN***
Justice Deborah Lehrmann, Texas Supreme Court, Austin & **Mike Bassett**, The Bassett Firm, Dallas

Friday Afternoon free to enjoy Horseshoe Bay!

6:30pm – 8:30pm
TADC Awards Dinner - Horseshoe Bay Yacht Club

Saturday, September 21, 2024

7:00-9:00am Buffet Breakfast

Saturday free to enjoy Horseshoe Bay!

Sunday, September 22, 2024

Annual Meeting Adjourned

2024 TADC ANNUAL MEETING
September 18-22, 2024
Horseshoe Bay Resort ~ 200 Hi Cir N ~ Horseshoe Bay, TX 78657

Pricing & Registration Options
Registration fees include Wednesday through Saturday group activities, including the Wednesday evening welcome reception, all breakfasts, Awards Dinner, 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)	$985.00
Registration for Member & Spouse/Guest (2 people)	$1,200.00

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

Hotel Reservation Information
For hotel reservations, **CONTACT THE HORSESHOE BAY RESORT DIRECTLY AT (877) 611-0112, option 1, and reference the TADC 2024 Annual Meeting.** The TADC has secured a block of rooms at a FANTASTIC rate. 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 19, 2024 —

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 5, 2024) to the meeting date. A $100.00 Administrative Fee will be deducted from any refund. Any cancellation made after SEPTEMBER 5, 2024 IS NON-REFUNDABLE

2024 TADC ANNUAL MEETING REGISTRATION FORM
September 18-22, 2024

For Hotel Reservations, contact The Horseshoe Bay Resort DIRECTLY at (877) 611-0112, option 1

CHECK ALL APPLICABLE BOXES TO CALCULATE YOUR REGISTRATION FEE:

- ☐ **$ 985.00 Member ONLY (One Person)**
- ☐ **$ 1,200.00 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:_____

ADDRESS:_____CITY:_____ZIP:_____

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

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

EMAIL ADDRESS:_____BAR CARD#_____

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

CHARGE TO: (circle one) **Visa** **Mastercard** **American Express**

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Austin, TX 78709
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P.O. Box 92468, Austin, Texas 78709 **PH: 512/476-5225**
Website: www.tadc.org **Email: tadc@tadc.org**

July 15, 2024

TO: Members of TADC

FROM: Gayla Corley, TADC President
Doug Rees, Nominating Committee Chair

RE: Nominations of Officers & Directors for 2024-2025

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

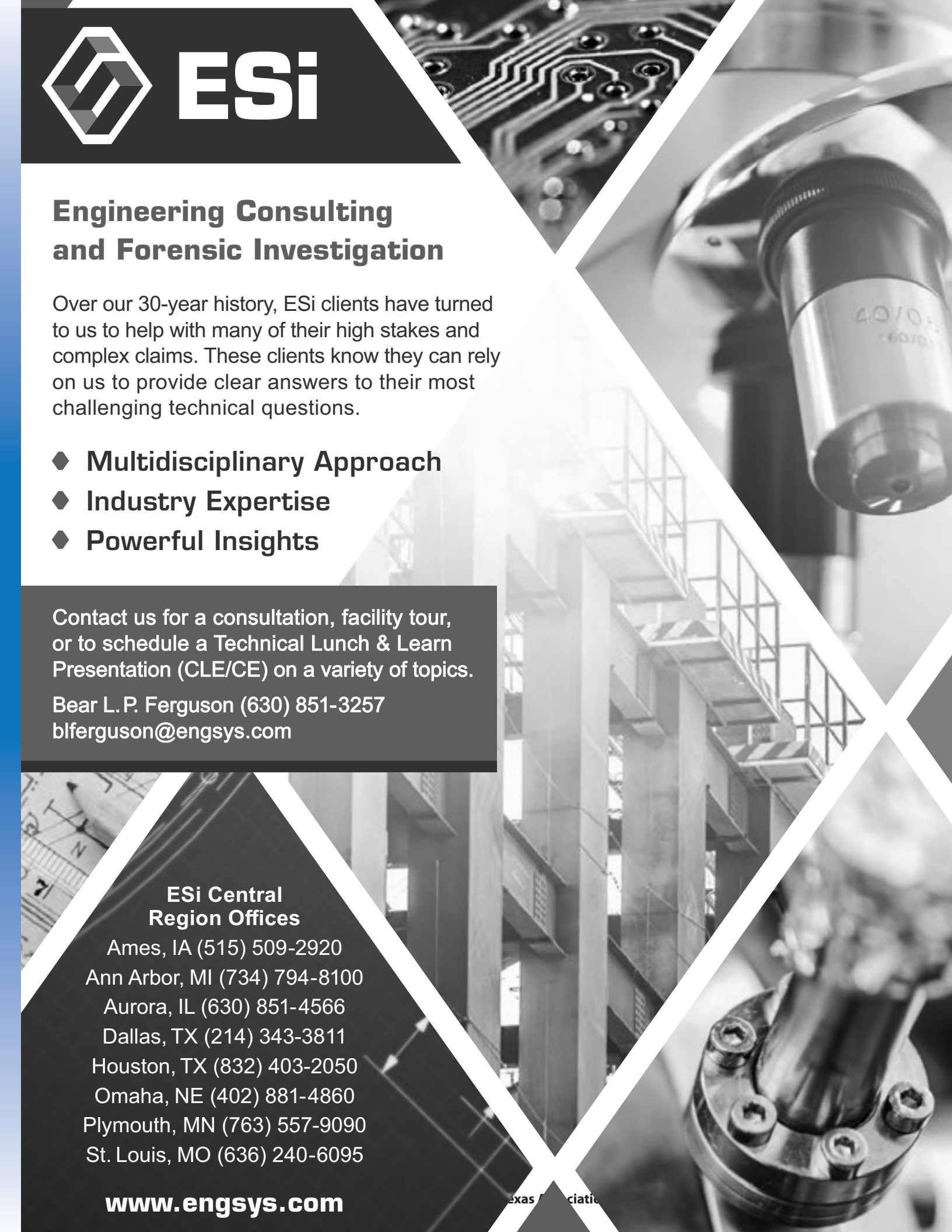
Please contact Doug Rees with the names of those TADC members who you would like to have considered for leadership through Board participation.

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



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Plymouth, MN (763) 557-9090
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2024 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.

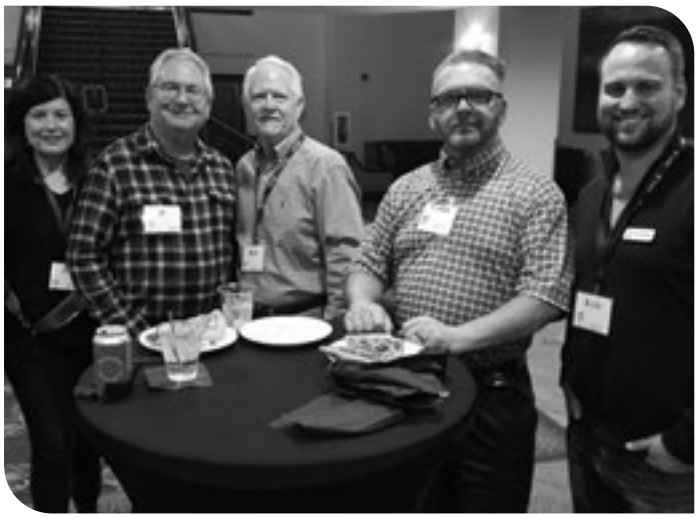
NOMINATIONS FOR BOTH AWARDS SHOULD BE SENT TO:

Gayla Corley, President
MehaffyWeber, PC
4040 Broadway St., Ste. 522 PH: 210/824-0009
San Antonio, TX 78209 FX: 210/824-9429
gaylacorley@mehaffyweber.com

2024 Winter Seminar

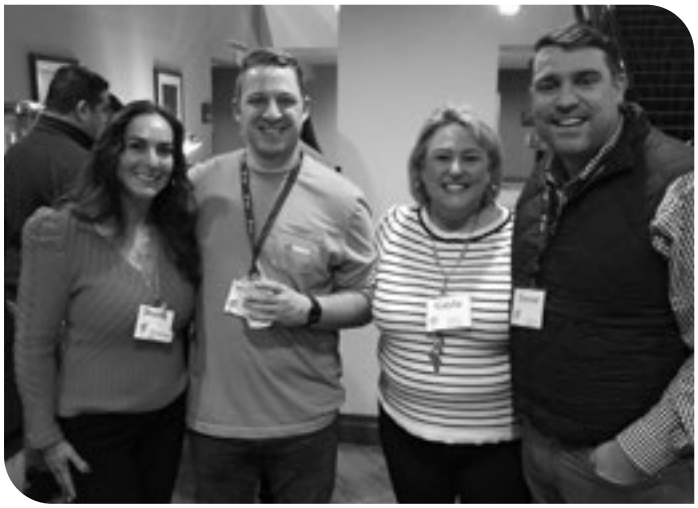
January 31 – February 4, 2024 – Elevation Resort & Spa – Crested Butte, CO

The 2024 TADC Winter Seminar was held at the Elevation Resort & Spa in Crested Butte, Colorado, January 31-February 4, 2024. Heidi Coughlin with Wright & Greenhill, PC, Austin and Victor Vicinaiz with Roerig, Oliveira & Fisher, L.L.P. in McAllen served as Program Co-Chairs. The program featured practical topics for the practicing litigator. Members enjoyed 9.00 hours of CLE and great skiing!

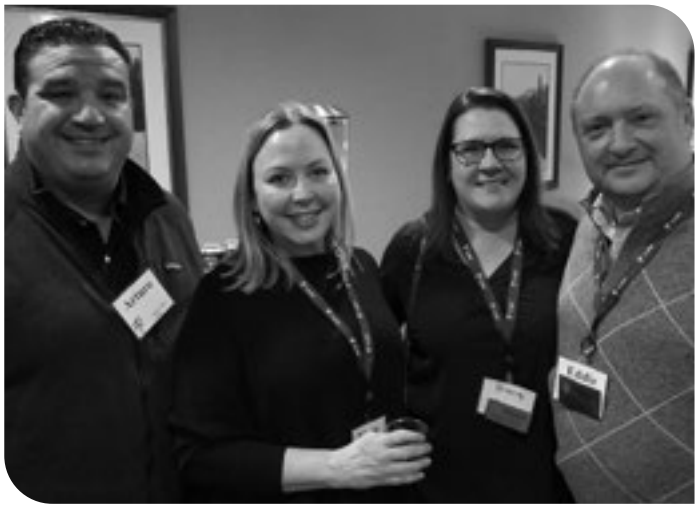


Jeni Shipman, Jeff Pruett,
Mike Shipman, Colin Hatcher & Kyle Fridley

Don Engles, Ana Laura Delgado & Jim Hunter



Denise Selbst, Mike Hyland, Gayla Corley &
Trevor Ewing



Art & Nicole Aviles with Brandy Bradley &
Eddie Yeagens

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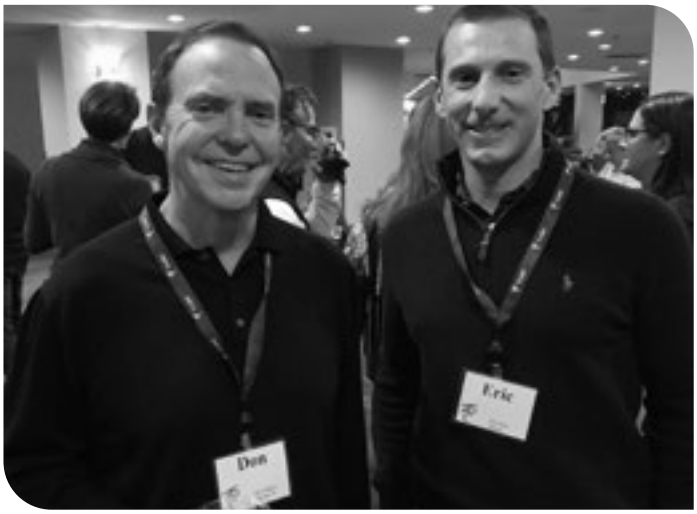
2024 Winter Seminar



Don Engles with Eric Rich


Jimmy, Karen & David Brenner with Curt Kuhajec


Hard at Work!

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Papers Available

2024 TADC Winter Seminar ~ Crested Butte, CO ~ Jan. 31 – Feb. 4, 2024

AI: It's Here! Part 2: "The Good, The Bad & The Unknown" - Arturo M. Aviles – 7 pg. PPT

Daubert; Crafting and Planning Your Motion to Strike - Stephen Barron – 14 pg. PPT

Legislative Update - David Brenner – 18 pg. PPT

AI: Part 1 - Slade Cutter – 6 pg. PPT

Strom Litigation/Chapter 542A Update - Raul De La Garza – 30 pg. PPT

The Current Social Milieu and Civil Litigation: Reptile Tactics, Third-Party Litigation Funding, and Legal Advertising - Donald Patrick Eckler – 34 pg. PPT

Social Media & Litigation - Callie Haley – 14 pg. PPT

Effective Use of Jury Research - David Oliveria – 42 pg. PPT

Ethical Lessons Learned The Hard Way; A Guide to Avoiding Discipline, Sanctions, and Client Complaints in Defense Cases - Lauren Ross – 50 pg. PPT

Updates and Trends in Personal Injury Defense - Morgan Shell – 21 pg. PPT

K & L Auto Crushers: Refuting "Reasonable" Medical Expenses, Discovery and 18.001 Update - Victor V. Vicinaiz – 22 pg. PPT

2024 TADC Spring Meeting ~ Key West, FL ~ April 24 – 28, 2024

The Tripartite Relationship and Stowers - Christy Amuny – 62 pg. PPT

AI and the Future of Law: Opportunities and Challenges - Robert Booth – 27 pg. PPT

Playing Offense As A Defense Strategy - Melissa Casey – 28 pg. PPT

Preservation of the Jury Trial - Is it Worth Preserving? - Greg W. Curry – 54 pgs. + 43 pg. ppt

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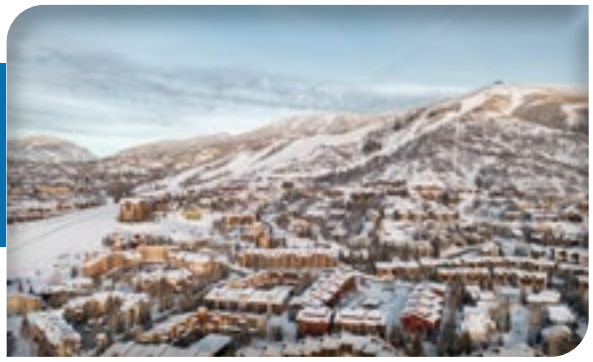

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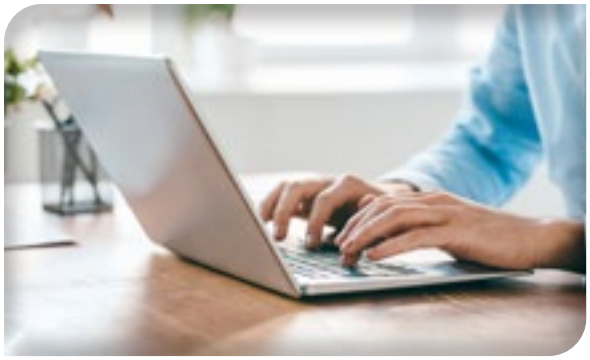

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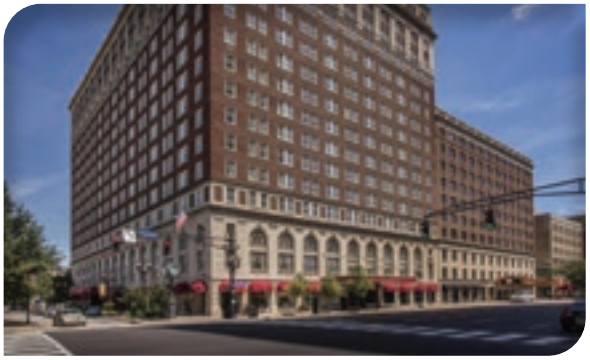

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