By Stephen Gibson[1]

***Texas Uniform Fraudulent Transfer Act*: Good faith necessary to permit a transferee to retain a fraudulently transferred asset requires a transferee with reason to suspect fraud to diligently investigate, even if the investigation would not have revealed the suspected fraud.**

The Texas Uniform Fraudulent Act ("TUFTA") allows creditors to reverse a debtor's fraudulent transfer of assets to third parties. However, TUFTA provides that third-parties who receive assets from the debtor transferor may keep those assets by proving it acted in good faith. In *Janvey et al. v. GMAG, LLC, et al*., the court addressed the Fifth Circuit's certified question whether "good faith" requires a transferee who could or should reasonably suspect the transfer is fraudulent to investigate even if the investigation would not have disclosed the fraud. Through a unanimous opinion by Justice Busby, the court responded affirmatively.

The question arose under a bank's Ponzi scheme of selling fraudulent certificates of deposits to fund "returns" on CDs sold to previous investors. The bank's receiver sued one such investor to whom the bank paid nearly $90 million, ultimately yielding the investor an $8.5 million profit. The receiver sought return of this payment under TUFTA for redistribution spread the victim's losses more equally. The jury decided the investor knew facts that could or should have raised suspicion the transfer was fraudulent, but that diligent investigation would not have actually uncovered the fraud.

The Fifth Circuit wanted to know whether, under these circumstances, the investor could still be in good faith when it made no effort to investigate. Stated another way, is there a "no harm" rule that allows an non-investigating investor to claim "good faith" status when investigation would not have revealed the fraud? Neither the uniform nor Texas versions of the fraudulent transfer act define "good faith," so the court looked to *Black's* for its common law definition as "(1) honesty in belief or purpose, (2) faithfulness to … duty or obligation, (3) observance of reasonable commercial standards of fair dealing … , or (4) absence of intent to defraud or … seek unconscionable advantage." In sum, TUFTA's "good faith" requires honest–in–fact conduct free of improper motive or willful ignorance.

The opinion also analyzed when the transferee's duty to investigate arises in the first place. It ruled that the duty is triggered by either actual or *constructive* knowledge of facts raising suspicion of fraud. Facts are within the transferee's constructive knowledge if ascertainable at the time of the transfer through reasonable care and diligence. If the transferee actually knew facts that should have caused it to suspect fraud, the transferee cannot do nothing and still claim good faith, no matter whether the investigation would have confirmed the transfer was fraudulent.

The transferee might not be chargeable with knowledge of the fraud under these circumstances, but it did not accept the payment in good faith because the failure to investigate means the transferee did not confront its actual knowledge but elected to remain willfully ignorant even if the investigation would not have uncovered the fraud. Doing so is not "good faith" because it is not, in fact, honest behavior. In answering the Fifth Circuit's question, the opinion did not consider what type of investigative measures would have been necessary to act in "good faith." Once there is a basis for reasonable suspicion, good faith requires some investigation regardless of its likely outcome. In short, good faith turns on effort, not outcome.

***Legal Malpractice Limitations*: The litigation tolling exception only applies to attorney actions in prosecuting or defending a client in a claim that is or later results in litigation. The litigation tolling exception does not apply to that client's sole shareholder's legal malpractice claim based on advice rendered after the conclusion of that litigation to avoid its consequences.**

Speaking of asset transfers… In Erikson et al. v. Renda the client was a business entity that was both claimant and defendant in litigation with the federal government over work performed and payment due under a contract. Liability was imposed on the client to the tune of nearly $12 million. The same lawyer who defended the business against the government's contract claims later advised the business to transfer assets to various related creditor entities instead of seeking bankruptcy protection from the judgment.

By statute, these 2003 and 2005 asset transfers made the client's individual sole shareholder personally liable for the judgment against the business. The government sued the shareholder in 2009 to enforce its judgment. In the Texas Supreme Court, the parties agreed the shareholder's cause of action against counsel accrued when the government sued him. In that action, the government obtained a $12.5 million judgment against the shareholder. It became final and unalterable in November 2013. The shareholder sued the attorney in June 2014 for alleged malpractice due to the attorney's asset transfer advice.

Limitations for legal malpractice committed "in the prosecution or defense of a claim that results in litigation" is tolled until that litigation is concluded by a dismissal, a final judgment after any available appeals are concluded, or a settlement. The question is what actions by a legal professional are sufficiently connected with the prosecution or defense of a claim to benefit from the litigation malpractice tolling rule. The attorney claimed the suit was barred in 2011 by the two-year limitations statute. The shareholder countered that his legal malpractice action was timely under the litigation tolling rule because it was filed less than two years after the government's judgment became final and inalterable.

Resolution of this dispute depended on whether the attorney's asset transfer advice "arose out of" – i.e., was sufficiently causally connected with – defending the government's claim against the business. The court's unanimous opinion by Justice Guzman reviewed the significant cases involving tolling rule for litigation-related malpractice. It confirmed the litigation tolling rule applies whenever (1) the alleged malpractice occurred in the prosecution or defense of a claim and (2) the claim results in in litigation. Imposing these criteria avoid putting the client in the impossible position of pursuing a malpractice claim against the lawyer while that lawyer is representing the client. The opinion leave no doubt that the "predictability and consistency" of a "bright-line" rule for limitations is preferable to uncertainty that a less arbitrary rule would foment.

The litigation tolling rule is "categorical" and applies *regardless of whether its application furthers its policy underpinnings*. The only claims resulting in litigation that were relevant to the attorney's conduct were the contract claims between the business and the government. The asset transfers that later gave rise to the malpractice claim, though a *consequence* of the contract claims, were not part of the attorney's actions to *defend* against that claim. This outcome is hardly surprising from a court that has repeatedly held that proximate causation does not exist merely because an event or circumstance sets the stage for another's later negligence to cause harm.

As the opinion put it, "Litigation can have many ripple effects; [the shareholder]'s view of the [litigation] tolling rule would expand its application well beyond what is reasonably justifiable …." Thus, litigation tolling does not apply merely because the malpractice itself results in litigation. Instead, it applies only to malpractice that occurs in *prosecuting or defending* the assertion of any legal or equitable right or remedy.

The attorney's advice about the asset transfer may have been a *consequence* of the original contract claims by and against the business. But those claims concluded *before* the attorney opined on the asset transfer. Moreover, the business, not its sole shareholder, was the "client" in that litigation. The attorney's advice concerning the asset transfer was "distinct" from representation of the business in the contract litigation that had concluded before the attorney opined about the asset transfer. The litigation tolling exception, therefore, did not apply and the shareholder's malpractice claim based on advice about the asset transfer was barred by limitations.

***Texas Medical Liability Act*: When there is a healthcare liability suit in which an expert report has been filed pending against one health care provider, a different health care provider cannot avoid otherwise appropriate discovery by claiming the discovery is actually a pre-suit investigation that cannot proceed without a *separate* expert report that satisfies the Texas Medical Liability Act.**

In re Turner was a mandamus proceeding in a medical malpractice suit against a hospital for its staff's alleged negligence during a childbirth. Plaintiff sought to depose her obstetrician before the deadline for adding parties. Ostensibly, the deposition was non-party discovery in furtherance of plaintiff's suit against the hospital. The doctor, however, moved to quash the subpoena contending that it was actually pre-suit investigative discovery in support of naming his as a defendant.

Until the expert report is served, the [Texas Medical Liability Act § 74.351(s)] stays all but specified discovery procedures for information related to the patient's health care. The stay does not apply, however, to rule 205 non-party discovery. *In re Jorden*, 249 S.W.3d 416, 419–20, 424 (Tex. 2008), held when there is *no* pending health care liability claim, the statutory stay applied to rule 202 pre-suit depositions from a health care provider listed in the rule 202 petition as adversely interested in the potential suit.

The issue in *Turner* was whether the stay applied when, unlike *Jorden*, there *was* a pending health care liability claim against a different provider in which an expert report had been filed and when the deponent was plaintiff's health care provider whose interests had not been identified as adverse. In other words, the *Turner* problem was to identify the dividing line for purposes of the §74.351(s) discovery stay between a "health care liability claim" and non-party discovery when a "health care liability claim" had been deemed to include pre-suit discovery from a party identified as adverse?

The court's unanimous [opinion by Justice Lehrmann] answered that the difference related to the fundamental purpose of the TMLA: requiring expert reports under the TMLA to weed out patently unmeritorious suits. The pending litigation against the hospital in *Turner* satisfied that test; the pre-suit deposition in *Jorden* had not. Discovery in *Turner* was statutorily authorized by the pending claim against the hospital in which plaintiff had filed the necessary expert report. If the discovery was permissible in the claim against the hospital, it was subject to no stay even if it incidentally might reveal a viable claim against a different health care provider.

***Texas Citizens Participation Act*: To be a "matter of public concern" protected under the former version of the TCPA, statements about goods and services must be about an issue of interest to the larger community, not just those participating in an isolated private transaction.**

[*Creative Oil & Gas, LLC v. Lona Hills Ranch*] addressed the previous version of the [Texas Citizens Participation Act] ("TCPA"). Although the particular statutory definitions involved were changed effective September 1, 2019, Justice Blacklock's unanimous opinion articulates useful but seldom expressed common-sense observations about statutory construction.

In *Creative Oil*, the lessor sued the lessee and operator in trespass to try title. Lessor claimed an oil and gas the lease had expired. Lessee and operator counterclaimed the lessor repeated this allegedly false claim to purchasers of the lease's production. The lessee and operator also asserted lessor breached the lease by not giving them notice and opportunity to cure before filing the trespass-to-try-title suit and an administrative action before the Texas Railroad Commission to invalidate the lease. The lessor moved to dismiss the counterclaims under the pre-September 2019 version of the TCPA.

The TCPA was ostensibly enacted to protect free speech rights, but TCPA-protected speech is narrower than that protected by the First Amendment. First, the TCPA only protects statements that are about a matter of public concern, which the applicable version of the TCPA defined to include “a good, product or service in the marketplace.” The lessee and operator argued in the court of appeals that the lessor’s statements were not subject to dismissal under the TCPA because they were not “protected” free speech.

Whether an argument is included as part of an overarching issue so that it has been preserved for review appears to be an ad hoc*, case-by-case determination.*

However, they did not specifically argue the lessor’s statements did not involve matters of public concern. This lack of specificity led to a procedural fracas whether the “public concern” argument had been waived in the court of appeals. The supreme court refused to deem the argument waived. It reasoned the broader assertion the lessor’s statements involved no protected free speech preserved the right to later assert the narrower argument over whether the statements addressed a “public concern” protected by the TCPA.

The opinion invokes the oft-repeated and seldom explained rule that if the “issue” was presented below, the parties were free to present new and different arguments supporting its resolution. But the opinion does not go beyond the labels “issue” and “argument” to explain when and why this rule should or should not apply. Practitioners must look to the cases in which it is invoked to determine how broadly a litigant may frame the “issue” and still successfully claim that a less-than-obviously-included argument remains a less than precise case-by-case determination.

Telling purchasers of production of a single well that the mineral lease had expired addressed no “public concern” because its subject was not of interest to the larger community.

Reaching the substance of whether the lessor’s statement to the buyers was a “matter of public concern,” the opinion points out it is not enough that the statement concern a “good, product or service.” Were that the case, virtually every private contract dispute would be subject to TCPA dismissal. Instead, the Legislature specified that TCPA-protected statements were confined to goods, products or services “in the marketplace.” A TCPA-protected communication “must have some relevance to a *public audience* of potential buyers or sellers.” Here, the lessor’s statements were a private business communication to a limited audience – those buying the production of a single well. Therefore, they were not protected under the TCPA.

Unless specified otherwise, the Legislature is not presumed to have intended words carry a meaning at odds with its plain meaning – i.e., “dog” can’t be interpreted to include “cat” unless the Legislature says so.

Citing the now ubiquitous *Reading Law* by Scalia and Garner, the opinion explains that ordinary meaning of the words in a statutorily defined terms like “matter of public concern” must be considered in arriving at its proper interpretation. Unless the legislature specifies otherwise, its definition of a term must not directly conflict with the plain meaning of a defined term. In other words, without a clear statutory directive, the courts are not empowered to define “matters of *public* concern” to include the subjects of private dispute. A “public” concern, the opinion says, is a matter than relates to matters of political, social or other interests of the larger community. By adding “in the marketplace” to description of matters of public concern, the

TCPA eliminated protection for the lessor's statement that the lease had terminated merely because it concerned the good produced by that lease.

Suit and administrative action to terminate the lease is part of the right to petition the government and protected under the TCPA.

However, the TCPA protected the lessor from liability arising out of its litigation and administrative proceedings before the Railroad Commission attempting to invalidate the lease. The lessor's counterclaims that seeking these remedies in violation of the lease's notice and cure clause was a direct response to the lessor's right to petition the government. The TCPA protects that right and entitled the lessor to dismissal of these claims.

***Attorney Disqualification*: A party is not entitled to disqualification of counsel without proving prejudice by representation that violated the disciplinary rules against representing adverse parties in the same litigation.**

***Shareholder Derivative Suits*: Although the company is a nominal party, counsel's actual client in such suits is but one of the groups vying for control of the entity and such counsel is not representing opposing parties in the same litigation.**

This original proceeding arose from a struggle over control of Billy Bob's Texas (BBT) in Fort Worth. BBT LLC had six "governing persons," one of whom was elected BBT's president and managing member to manage BBT's "routine business." However, per the company agreement, "major decisions" required unanimous consent of *all* twelve owners. "[S]ettling, prosecuting, [or] defending … any lawsuit, administrative or similar actions concerning or affecting" BBT's business or property" was a "major decision." Four of the six managing members and nine of the twelve owners ("the majority") attempted to dismiss BBT's president by majority vote. The president claimed this was a "major decision" for which the company agreement required unanimity. The president and his supporters ("the minority") sued the majority seeking to enjoin the president's removal and for a judicial declaration the majority was powerless to do so. The minority asserted some of these claims both individually and derivatively as BBT shareholders.

The managing members and owners in the majority signed an engagement letter to retain Kelly Hart & Hallman to defend BBT and the individual defendants named in the minority's suit. BBT's funds were used to pay for KHH's representation of the company and part of the representation of the individuals. Three months before trial, the minority sought to disqualify KHH as counsel for the majority. The minority reasoned that, in representing the company, BBT, KHH effectively represented both majority and minority factions with respect to the derivative claims. Moreover, the minority asserted, KHH was also disqualified from defending the individual majority defendants against what was essentially a claim by BBT. The minority moved under TRCP 12 for KHH to show its authority to represent the BBT. The majority responded that a simple majority of the managing members could hire counsel under BBT's certificate of formation. The mandamus proceeding arose from the trial court's agreement with the majority in denying the motions to show authority and to disqualify counsel. In a unanimous opinion by Justice Blacklock, the court ruled in *In re Murrin Bros. 1885, Ltd*., the trial court did not abuse its discretion in refusing to disqualify KHH.

Disqualification depends on balancing several competing interests and requires prejudice in addition to a violation of attorney disciplinary rules.

The opinion explained that disqualification is a "severe remedy" that interferes with litigation, deprives a party of its chosen counsel and burdens that party with the substantial expense of getting replacement counsel up to speed in the case. For these reasons, the disciplinary rules may inform, but do not constrain, the trial court's discretion in deciding motions to disqualify. In making such determinations, the trial court must consider all the facts and circumstances that bear on whether justice mandates disqualification. In other words, disqualification is based on a balance of considerations, not the rigid application of a bright-line rule. Disqualification of counsel is a "severe remedy." Accordingly, the movant must show more than a violation of the disciplinary rules. The movant must establish prejudice from the violation.

Prejudice considers the interests of both parties, not just the movant.

The opinion doesn't say much about what constitutes prejudice to the movant. Apparently, the court considers prejudice from counsel representing both sides of litigation to be apparent. Counsel would have had access to client confidences and possibly privileged matters with divided loyalties between the opposing parties. Still, it would have been helpful for the bar's guidance had the opinion elaborated on prejudice to the movant.

But prejudice is a two-way street. The opinion focuses more on prejudice to the nonmovant by focusing on the expense of getting replacement counsel not familiar with the case and the resulting delay. The opinion also expresses concern about the tactical abuse of such motions and the need to impose an "exacting standard" to prevent their use as a mere dilatory tactic.

Labelling the company as both plaintiff and defendant in shareholder derivative actions is too simplistic. The test is whether the lawyer is required to take conflicting positions in representing the company and the majority against minority claims.

After articulating these general concerns, the opinion turned to whether there was a disqualifying conflict from KHH's representation of the company, BBT, LLC – in a shareholder's derivative suit. As previously mentioned, the minority movants claimed that in representing the entity, KHH simultaneously represented both majority and minority interests in a dispute between those interests over the operation of the entity. Noting that many jurisdictions take a practical approach by examining whether there the interests of the company and its controlling officers actually diverge, the opinion refused to adopt the simplistic dichotomy arising from nominal designations.

> Rather than labor over which party label applies to a company in derivative litigation, the proper inquiry is to look to whether the substance of the challenged representation requires the lawyer to take conflicting positions or to take a position that risks harming one of his clients….

Eschewing a "categorical rule," the opinion looked to test in comment 6 of DR 1.06. A representation is "directly adverse" to another client if "the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client." Here, there was no adversity because KHH only represented one of two factions struggling over control of BBT. By statute, a derivative suit by a member of an LLC may be considered a suit for that member's own benefit.

In *Murrin Bros.*, the case was set for trial, the parties' positions had been fully developed and there was no showing KHH had confidential information about BBT that was prejudicial to the minority. Interestingly, the opinion did not address the irrebuttable presumption of shared confidences when an attorney worked on a substantially related matter at a former firm. The opinion was particularly swayed by the delay in seeking disqualification. The circumstances on which the motion was based existed early in the case and were not asserted, conveniently enough, until the eve of trial. Any concerns that the jury might be confused by KHH's representation could be readily addressed by instruction to the jury clarifying the role of counsel. Accordingly, the opinion affirmed the trial court's refusal to grant the minority's motion to disqualify KHH.

A damage award adequately remedies any harm if KHH did not have sufficient authority to represent BBT; therefore, the movants were not entitled to mandamus relief removing KHH for want of authority.

The opinion then turns to the Rule 12 motion that burdens the lawyer with proving authority to prosecute or defend a claim for a party. The trial court denied that KHH lacked the authority to represent BBT due to the lack of unanimity among the owners, which was the ultimate issue in the case. The opinion reasoned the denial of the motion was no more dispositive of the ultimate issue in the case than the denial of a summary judgment motion in other types of litigation. Moreover, the minority failed to show the necessary irreparable harm necessary for relief by equitable mandamus. The opinion posits that any harm from a loss of control could largely be redressed by an award of damages. For these reasons, the court also declined to overturn the trial court's denial of the motion to remove KHH as counsel for want of authority.

***Summary Judgment Appeals*: When the relevant documents can be easily located in the electronic record, the appellate court may not affirm simply because the appellant did not cite to the correct page of the clerk's record.**

***Appellate Procedure*: Disposition on the merits, not procedural defencts, is preferred so that the appellate court must give the appellant the opportunity to correct procedural defects before disposing of the case on that basis.**

In a *per curiam* opinion, the court in *Horton v. Stovall* reversed an affirmation of a summary judgment solely for want of citation to the correct location of documents in the clerk's record. The appellant asserted the summary judgment was improper because material fact issues had been raised in the summary judgment evidence. However, rather than citing to the pages of the clerk's record to identify that evidence, appellant's brief identified them in reference to the appendix to her brief. The copies of the documents in the appendix were the same as the summary judgment evidence, but they were copies that had been attached to pleadings other than the summary judgment motion and response.

With one justice dissenting, the court of appeals held the appellant failed to show that the documents were in fact part of the summary judgment record and affirmed on that basis alone. The court of appeals relied on the general proposition that it the responsibility of the appellant, not a busy appellate court, to search for and locate those portions of the record showing the alleged error. But wait. Though "[p]rompt resolution of disputes is important," this objective "must be balanced against the need to achieve a just disposition."

Affirmation without consideration of the merits for citing to the right documents in the wrong place ignored this need in two ways. First, the rule excusing the appellate court from combing the record to find the documents showing the asserted error was developed when the clerk's record was a printed-on-paper copy that required an examination of each page. With electronic records, it is possible to quickly locate a particular document with a simple word search. In this case, the dissenter in the court of appeals was promptly able to locate where the documents were attached to the summary judgment motion and response in just this way. So it was not as if the court of appeals would have been burdened to establish that the documents appellant relied on were properly before the trial court when it ruled on the summary judgment motion.

Second, even if an electronic search would not have readily resolved the question, the court of appeals could have resolved the question with virtually no burden. Briefing rules only require substantial compliance and afford a litigant the opportunity to correct any easily remedied briefing inadequacies. Until the court of appeals affords this opportunity, it cannot use such defects as an easy shortcut around deciding cases the merits. Here, the court of appeals did not afford the appellant that opportunity before deciding the case on procedure rather than substance. It will have another chance at this one.

***Parental Termination*: Failure to give statutorily-required advice about an indigent's right to appointed counsel excuses failure to timely assert indigency.**

In re B.C. is a parental termination case that continues the theme that procedural quirks cannot control the outcome of case without a fair opportunity to exercise the substantive right. In parental termination cases, an indigent parent has a right to court-appointed counsel. The parent bears the burden of making a prima facie case of indigency, but must first be advised of that right. Here, the parent was not adequately advised about the availability of appointed counsel. She was initially informed that she could obtain appointed counsel if she indigent, but she would have to complete "some forms." She did not do so and appeared at all later proceedings without further reminders of her right to appointed counsel. The mother did not file an affidavit of indigency until after her case was tried.

In another *per curiam* opinion, the Texas Supreme Court disagreed with the court of appeals, overturning the intermediate court's ruling that the trial court should have continued to inquire about the mother's indigency status even when she neither attempted to claim it nor filed the necessary affidavit. However, the supreme court excused mother's failure to assert indigency because she had not been timely given the statutorily required admonition about her right to appointed counsel if she were indigent.