By Stephen Gibson[1]

In Memoriam: Russell L. Munsch
1955 – 2017
"No one is truly lost when they remain in the hearts and minds
of those who love them."
Kirsten Beyer, *Children of the Storm*

This edition of The Update covers the orders and opinions issued by the Texas Supreme Court since February 17, 2017. Orders and opinions issued after the January 20 edition of the Update and before February 17 will be covered later.

***Contamination from Oil & Gas Operations*: The Supreme Court Partially Weighs In on the Statute of Limitations, But Keeps Its Powder Dry on Whether Economic Feasibility Damages Limit Applies to Requested Injunctive Relief.**

After decades of operations on the Lazy R Ranch, ExxonMobil sold out to another operator. The following year, supported by an environmental manager's report, the Ranch sued ExxonMobil over four areas of contamination allegedly above state law maximums in *ExxonMobil Corp. v. Lazy R Ranch, LP.* The Ranch's damages claim was dropped due to the economic feasibility exception disallowing recovery of remediation or repair costs exceeding diminution in value. The suit proceeded as one for nuisance seeking injunctive relief to force ExxonMobil to clean up the allegedly contaminated areas to avoid groundwater contamination. ExxonMobil moved for summary judgment, urging the Ranch's suit was barred by limitations.

The question the parties and their *amici really* wanted answered was whether a plaintiff could skirt around the economic feasibility limit by seeking remediation as injunctive relief. This issue raises many tantalizing questions such as the vitality of the economic feasibility limitation when the potentially adversely affected include persons other than the particular property owners and, if so, whether the property owners are the appropriate persons to represent those larger interests. No matter how enticing the question or the intensity of the participants' desire for answers, they must await another day.

The supreme court refused to decide whether injunctive relief was limited by economic feasibility. ExxonMobil discussed the issue at the hearing, but its *motion* did not mention it. The court noted that TRCP 166(a)(c) requires a summary judgment motion to "state the specific grounds entitling the movant to judgment, identifying or addressing the cause of action or defense and its elements." Accordingly, the court ruled the summary judgment motion did not sufficiently "present" ExxonMobil's defense to the Ranch's request for injunctive relief.

Deeming the argument insufficiently presented below, the supreme court declined to consider whether an ongoing nuisance – the groundwater threat – could not be subject to limitations. It rejected, however, the Ranch's argument

[1] The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

that the cause of action could not have accrued and limitations could not have commenced expiration for the threatened groundwater contamination because the injury had not yet occurred. The supreme court ruled that limitations accrue when the injury occurs, not when its full extent is known. Although the court did not elaborate, it apparently meant that the cause of action accrued when the land was first contaminated. Any future groundwater pollution was a consequence of that contamination and did not present a separate cause of action.

The evidence showed that ExxonMobil stopped operations at two of the four sites more than four years before suit was filed. The court rejected the Ranch's contention that accrual was delayed by the discovery rule. The environmental manager's report obtained by the ranch alone established that the contamination was not inherently undiscoverable. To be within the discovery rule, the injury must be *both* objectively verifiable *and* inherently undiscoverable. Because the Ranch adduced no evidence that ExxonMobil ever misled or deceived the Ranch about the alleged contamination, the court also refused to toll limitations for fraudulent concealment. Thus, it ruled that Exxon Mobil was entitled to a take-nothing summary judgment as to the two abandoned sites. As to the other two sites, the court ruled without detailed explanation that ExxonMobil was not entitled to summary judgment based on limitations.

Justice Lehrmann sat this one out. Otherwise, Chief Justice Hecht's opinion was issued for a unanimous court.

***Supreme Court Conflicts Jurisdiction for Interlocutory Appeals*: Any Disagreement Suffices; *Certificates of Merit*: Merely Holding a License, Without More, Does Not Support an Inference of Sufficient Knowledge of the Practice Area Required by the Certificate of Merit Statute.**

In *Levinson Alcoser Assoc. v. El Pistolon II, Ltd.*, the court in an opinion by Justice Devine addressed two issues: 1) what is a sufficient conflict between the court of appeals decisions to confer jurisdiction over an interlocutory appeal and 2) whether knowledge of the practice area can be inferred from the mere fact that the affiant has a license to practice.

The court first examined whether a sufficient conflict existed between court of appeals decisions to confer jurisdiction over this interlocutory appeal. The certificate-of-merit statute requires the affiant to be "knowledgeable in the (defendant's) area of practice" and that the affidavit set forth the professional's negligence or other wrongdoing and its "factual basis." Tex. Civ. Prac. & Rem. Code § 150.002(a)-(b). A case without a sufficient affidavit must be dismissed, which may be with prejudice.

In this case, the court of appeals deemed it sufficient to have knowledge of the *general* area of practice. It, therefore, inferred the necessary area knowledge solely from the affiant's status as a similarly licensed professional. A different court of appeals also inferred sufficient knowledge but on a record that contained more detail about the affiant's practice and experience. This difference, even without a direct conflict or contradiction, was deemed enough to confer jurisdiction. Bottom line: it doesn't take much to have a jurisdictionally sufficient "conflict."

With respect to the merits, the argument centered on whether "knowledge of the area of practice" could be inferred from being licensed or registered for the relevant profession. The court ruled that it could not. It reasoned as a matter of statutory construction that the legislature would not have required knowledge in the practice area *separately* from holding the relevant license or registration. The court did not reject the idea that the requirement could be satisfied by inference from other information in the record. But, if the plaintiff intends to rely on portions of the record outside the affidavit, the plaintiff must be able to identify it and cogently explain why it supports the necessary inference.

Justice Brown filed a concurring opinion in which he argued that the flaw in the affidavit was that it was conclusory. Justice Brown rejected the imposition of the majority's requirement that the affidavit or record requires some additional explication or evidence reflecting the expert's familiarity or experience with the practice area…."

***Marriage & Family Therapists*: Providing Diagnostic Assessments Is Not the Unauthorized Practice of Medicine.**

The Therapists Board adopted a rule permitting Marriage & Family Therapists (MFTs) to provide a "diagnostic assessment" for mental, emotional and behavioral problems. The Texas Medical Association sought a declaratory

judgment that such diagnostic assessments were not authorized under the Occupations Code and constituted unauthorized practice of medicine. In *Texas State Board of Examiners of Marriage & Family Therapists v. Texas Medical Ass'n*, the supreme court in an opinion by Justice Boyd unanimously held that the rule allowing diagnostic assessments for mental, emotional and behavioral according to the American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders was not invalided by the Medical Practice Act.

The court reasoned that an "evaluation" authorized under the Therapists Act is the functional equivalent of an assessment. But a diagnostic "assessment" is not the same as a "diagnosis," which is only authorized under the Medical Practice Act. The court was careful to harmonize the Therapists Act with the Medical Practice Act to avoid irreconcilable conflicts. Thus, it limited the diagnostic assessment authorized by rule and the Therapist Act to those in the context of marriage or family. The court also rejected the TMA's argument that the Therapist Act did not authorize diagnosis by MFTs. The Therapists Act, the court said, only authorized evaluation of a dysfunction, which the TMA deemed a symptom. To be a "diagnosis" for purposes of the Medical Practice Act, the assessment must go to the underlying disease or disorder, and not the symptom of the disorder.

***D & O Insurance Insured v. Insured Exclusion Applied*: Suit by an Assignee of the Named Insured is by One Who "Succeeds" to the Named Insured's Interests.**

A former HOA director had been sued by the HOA's fidelity insurer pursuant to an assignment of the HOA's rights. The suit was for the alleged misappropriation of HOA funds. The former director sued the HOA in a third-party action. These suits were ultimately non-suited.

In *Great American Insurance Co. v. Primo*, the former director sought to recoup the attorney's fees incurred in defending the fidelity insurer's misappropriation suit from the HOA's director's & officer's liability (D&O) insurer. The D&O policy contained an insured v. insured exclusion eliminating coverage for claims made against an insured "by," "at the behest of," "for the benefit of," or for one who "succeeds to the interests of" the HOA. The disputed issue was whether the D&O insurer as the assignee of the HOA's claims against the former director was a "successor" to the HOA's interests.

In what seems to be a rising trend, the court of appeals looked to its definition of a similar term, "successor in interest," in an entirely different context –a corporate transaction contract. It then applied that definition to "succeed" in the insured v. insured exclusion. On that basis it ruled that the fidelity insurer did not "succeed" to the HOA's interests because it only received an assignment of benefits – the chose in action – without the HOA's corresponding obligations. In a unanimous opinion by Justice Brown, the supreme court bemoaned the court of appeals' indiscriminate resort to cases defining contractual terms without an appropriate appreciation that contracts are construed in accordance with, not divorced from, their commercial context.

In the context of a D&O policy, the objective of the insured v. insured exclusion is, according to the supreme court, to prevent collusive suits and coverage for disputes when the corporate "family" has a "falling out." The court ruled that the HOA's fidelity insurer "succeeded" to the HOA's interests under the assignment and that the insured v. insured exclusion eliminated Great American's obligation to indemnify the former director's costs in defending the fidelity insurer's suit.

***Employer Liability for Harassment v. Sexual Assault*: Texas Commission on Human Rights Act is Exclusive Remedy for the Former, But Does Not Pre-Empt Common Law Claim for the Latter.**

In *Waffle House, Inc. v. Williams*, 313 S.W.3d 796 (Tex. 2010), the Texas Supreme Court held that the Texas Commission on Human Rights Act (TCHRA) was the exclusive remedy for workplace sexual harassment, but not for claims that were actionable as common-law assaults. In *Williams*, the court held that the claimant's allegations of being the victim of a hostile work environment over a lengthy period of time was governed by the TCHRA's exclusive remedy notwithstanding that the claimant also alleged unwanted physical incidental to ordinary work activities. In *Waffle House*, the court ruled that the "slightest physical contact" did not permit the claimant to circumvent the TCHRA's procedural and substantive limitations by characterizing the claim as one for "assault."

B. C. v. Steak N Shake Ops., Inc., addresses the other side of the *Williams* "coin." In *Steak N Shake* the employee alleged a single incident in which she was accosted by her supervisor in a bathroom. The supervisor allegedly

exposed himself and fondled the employee while attempting to remove her clothing. In a unanimous opinion by Justice Green, the court deemed these allegations sufficient to allege a common-law assault against individual assailants for which the TCHRA's was not the exclusive remedy. The THCRA was designed for employee claims against their employers for harassment.

The opinion rejected the employer's call to subject this claim to the exclusive remedy provisions of the TCHRA not only to the difference in frequency and severity, but also the theory of the employer's liability. In *Waffle House*, the employee alleged that the employer was liable for a hostile work environment because it continued to retain the harassing employee. Because proof of employer liability depended on the same proof as the harassment claim, the *Waffle House* court ruled that Legislature intended the TCHRA to apply. In *Steak N Shake*, the employee alleged her assailant was a vice-principal of the company so that his conduct would have been the conduct of the company itself. The Opinion reasoned that if the TCHRA applied to these allegations, the TCHRA would apply to all employer conduct, no matter how extreme.

The Opinion then applied the clear repugnance test articulated in *Waffle House*. Under this test, the statute will abrogate the common-law remedy if a "clear repugnance" exists between the statutory and common-law remedies. The court found no such repugnance in *Steak N Shake* due to the difference in kind between assault and harassment and the lack of any evidence that the Legislature intended to abrogate the remedy for common-law assault.

The distinction that seemed the most critical to the court's analysis, however, was its perception that the *Waffle House* claimant was trying to artfully plead around the TCHRA's exclusive remedy whereas the employee in *Steak N Shake* was not perceived to be attempting to evade the statute. The difference in the facts alleged in these two cases makes the distinction understandable on an intuitive level. It will be interesting to see if, when the facts are more ambivalent, the supreme court will be willing to "waffle" on *Waffle House.*

***Texas Citizens Participation Act* Protects as Free Speech Employment-Related Communications Shown By Extrinsic Evidence to Involve Matters of Public Concern.**

Exxon Mobil Pipeline Co. v. Coleman continues the court's fascination with the Texas Citizens Participation Act (TCPA). At issue in *Coleman* is whether the TCPA applies to alleged e-mails among Exxon Mobile Pipeline (EMP) employees about a former EMP terminal technician who was terminated for allegedly falsely reporting that he measured the contents of a storage tank, an essential task in avoiding spills and detecting leaks. The former employee sued alleging the e-mails were defamatory.

The TCPA attempts to balance protecting free speech as part of government participation and right to file meritorious lawsuits for demonstrable injury. A defendant is entitled to dismissal of a suit by showing by an evidentiary preponderance the plaintiff's claim "is based on, relates to, or is in response to the [movant's] exercise of, among other things, any form of communication" about matters concerning health, safety, and environmental well-being. If the defendant meets that burden, then the plaintiff must adduce clear and convincing evidence of each element of the claim. If the plaintiff fails to do so or if the defendant establishes by preponderance every element of a defense, then the court must dismiss the action. The act applies to communications about matters of public *concern*, but the communication may otherwise be private in nature. The communications that were the subject of the action here were internal company e-mails about the alleged falsity of the plaintiff's tank measurement report.

In a *per curiam* opinion in which Justice Lehrmann did not participate, the court rejected the analysis of the court of appeals that the e-mails related to employment matters to which the TCPA "public concern" tripwire was merely "tangential." It deemed the exception for "tangential" matters an impermissible attempt to add words to the TCPA. Relying on *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 509 (Tex. 2015) (*per curiam*), the court ruled that communications about private employment could also address public concerns such as health, safety, and environmental well-being. Nothing in the TCPA requires that the communication itself demonstrates the public concern at issue. That may be established through extrinsic evidence.

***Ad Valorem Taxation*: Taxpayer May Contest Appraisal of All Property in an Account Without Contesting All Accounts for a Given Property; Comparable Properties Need Not Be Identical to Evidence Value.**

To comply with the constitutional mandate of equal and uniform property taxation, appraisal districts may divide a single tract into multiple accounts if the improvements on the property are varied and complex. In *Valero Refining-Texas, L. P. v. Galveston Central Appraisal District*, the appraisal district divided Valero's refinery facility into multiple accounts for this reason. Valero successfully challenged the equality and uniformity of the appraisals in less than all of these accounts based on an alleged 11% over-valuation on the basis of distillation capacity when compared to other refineries if the valuation *excluded* tax exempt pollution control equipment.

Valero challenged the valuation of less than all accounts for the tract. The appraisal district argued that filing to challenge all accounts for the tract deprived the trial court of jurisdiction. The supreme court ruled, however, the trial court had jurisdiction because "property" in the Tax Code valuation protest statute refers to any "property" capable of ownership included in an account, not the entire tract. When the property included in an account cannot be separately valued, creation of a separate account is "not appropriate." Challenging all accounts related to a single tract is not required, therefore, for the court to have jurisdiction to entertain the challenge to the valuation of property included in an account.

The court further rejected the argument that the valuation of another, smaller refinery was no evidence of comparable value. The opinion reasoned "comparable" does not mean "identical." Other property is "comparable" if it serves a similar function with similar facilities and amenities. Differences in capacity can be accounted for by adjustment.

Finally, the court addressed whether the appraisal should have included the value of pollution control equipment. These devices were mostly tax-exempt, but the refinery could not operate without it. The court recognized that the equipment affected the refinery's valuation. However, it ruled that this did not mean that the value of the equipment itself had to be included in the appraised value.

The opinion was authored by Chief Justice Hecht for a unanimous court.

Petitions Recently Granted

On February 17, the supreme court granted petitions for review in three cases:

Evictions & Non-Waiver Clauses

Shields Limited Partnership v. Boo Nathaniel Bradberry and 40/40 Enterprises, No. 15-0803 is an eviction case in which the central issue is whether the landlord's acceptance of late rent resulted in a waiver of a non-waiver clause that permitted an extension only if all the lease terms were fulfilled.

Conflicting Mineral Rights Deeds

James H. Davis and JD Minerals and JDMI LLC v. Mark Mueller, No. 16-0155 is a mineral rights dispute that arises out of conflicting deeds. The issue is whether a deed is ambiguous if the granting clause fails to describe land specifically but contains a clause purporting to convey all property owned by the grantor in the county.

Unemployment Benefits – Employment Status and Applicability of Judicial Employee Exception

Harris County Appraisal District v. Texas Workforce Commission, et al., No. 16-0346, is an unemployment benefits dispute. At issue is (1) whether Harris County Appraisal Review Board members are employees of the county appraisal district and, if so, (2) whether they are within the employment exception for members of the judiciary.

These cases will be argued March 23.