



Texas Supreme Court Update

Opinions Issued March 5, 2021

By Stephen Gibson
(c) 2020

Tort Liability - Comparative Responsibility: *The procedures for naming a named person as a responsible third party are separate and distinct from, not an alternative to, those required for naming an unknown person.*

Mandamus – Adequate Remedy by Appeal: *There is no adequate remedy by appeal from a proceeding in which a responsible third party has been incorrectly added or incorrectly omitted.*

In re Gilberto Gonzalez involved a plaintiff's petition for writ of mandamus to challenge a trial court's order allowing the defendant in an auto collision case to designate an unknown driver as a responsible third party. [Texas Civil Practice & Remedies Code § 33.004](#) details the procedures for designating responsible third parties. This section sets out two differing procedures: one where the proposed responsible third-party is "named" and another when the person is unknown. Both require a motion for leave.

For named responsible third parties, the motion must be filed more than 60 days before trial. [Tex. Civ. Prac. & Rem. Code § 33.004\(a\)](#). Leave must be and is deemed granted unless an objection is filed within 15 days, the objecting party shows either that the pleading is factually insufficient to satisfy the procedural rules' pleading requirements. [Tex. Civ. Prac. & Rem. Code § 33.004\(f\)](#), (g). [Section 33.004\(j\)](#) provides a defendant may designate an *unknown* responsible third party if "not later than 60 days after ... filing ... [the] original answer" the defendant files an answer alleging "an unknown person committed a criminal act that was a cause of the loss or injury." Leave must be granted if: (1) defendant pleaded sufficient facts to support the court's determination a reasonable probability the act was criminal; (2) defendant stated in the answer all known identifying characteristics of the unknown person; and (3) the allegation satisfies the procedural rules' pleading requirements.

In *Gonzalez*, the trial court granted the defendant's first motion to designate an unidentified driver as a responsible third party even though the motion was untimely, failed to allege a criminal act and was timely objected to. More than two years later, after plaintiff moved for summary judgment, defendant alleged for the first time that this unknown third party was a proximate or contributing cause of the plaintiff's injuries. Plaintiff petitioned for writ of mandamus challenging this ruling after the trial court denied the plaintiff's summary judgment motion.

The Supreme Court of Texas granted the petition in a *per curiam* opinion. In doing so, it rejected defendant's argument that subsection (j) addressed specifically to the designation of unknown persons was but in addition to the procedures for designating responsible third parties provided under subsection (a). It explained that subsections (a) and (j) specifically and respectively separately addressed the requirements for designations of identified or named responsible third parties and those for the designation of *unknown* responsible third parties. Besides being untimely, the defendant's pleading never discharged the requirements for designating an unidentified responsible third party. Defendant never alleged, among other things, facts sufficient to show the *criminal* act. Moreover, it did not meet the pleading requirements for designating an unknown person which were more stringent than those for named persons. Further, because the designation was untimely, the defendant gained an unfair advantage of diluting its liability by the fault of a party against whom the plaintiff could not recover. Accordingly, the trial court abused its discretion in granting defendant leave to designate an unknown person as a responsible third party.

The opinion then addressed whether the improper designation of a responsible third party was an error for which an appeal was an adequate remedy. It concluded that whether the impropriety was in granting or denying leave, the erroneous disposition of a request to designate a responsible third-party had adverse effects “in ways unlikely to be apparent in the appellate record” if the plaintiff was required to try an “empty chair” or if the defendant was denied an appropriate opportunity to show that its conduct was not the sole cause of the accident or injury at issue. In this case, the court ordered the trial court to vacate its order granting the defendant leave to designate and submit the negligence of an alleged unknown driver as a responsible third party.