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This Issue's Epigram
"Injustice anywhere is a threat to justice everywhere."
Dr. Martin Luther King, Jr.

New Year.

New Start.

No Nonsense.

Here's what the Texas Supreme Court has been up to since the last edition of *The Update*.

December 2 *Per Curiam* Opinions

Courts Can't Change the Powers of a Dead Guardian.
In re Tonner involved a dispute over whether a ward for whom a guardian of the person and estate was appointed due to intellectual incapacity had partially or completely regained intellectual capacity. The Texas Supreme Court did not resolve that question. It could not reach the issue because the original guardian died and no replacement had ever been appointed. It ruled that the trial court could not alter the powers of a guardian under Texas Estates Code §1202.051(3) who no longer existed.

Medical Liability Improvement Act Expert Report Can Be Served Before Suit Commences.
Last May, in *Hebner v. Reddy*, 498 S.W.3d 37 (Tex. 2016), the court held that Texas Civil Practice & Remedies Code §74.351's reuirement that a "party" in a medical malpractice case be served with an expert report could be satisfied by delivery of the report to *any* party to the suit. In *Ransom v. Eaton*, the dentist defendant sought dismissal because the expert report addressing the dentist's alleged malpractice was served *before* suit was initiated, and not again served after litigation commenced to which the recipient could be a "party." The court held the "party" requirement did *not* mean that the report could only be served only after the defendant is *named* as a party in pending litigation. The purpose for the report – filtering out insubstantial claims – is fully satisfied if the report is served on the health care provider as part of a pre-suit notice.

Court Entertaining the First-filed Suit in a Proper Venue Acquires Dominant Jurisdiction.

In re Red Dot Bldg. Systems involved contract dispute that generated two suits. The first suit was in Henderson County to recover sums allegedly due under the contract for work on a building for an independent school district.

[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.

The second suit was filed in Hidalgo County alleging, among other things, that the Henderson plaintiff failed to properly perform the contract. Generally, the Henderson court would have acquired dominant jurisdiction as the first-filed action. This rule does not apply, however, if venue is improper in the first-filed suit.

The Hidalgo plaintiff urged that venue in Henderson was improper because the surety should have been joined in the suit for payment and mandatory venue for a suit against the surety would have been where the building was located. The court rejected this argument because the Henderson plaintiff was not obliged to join the surety to sue the principal, even though the principal must be joined to sue the surety.

Venue was have been proper in either Henderson or Hidalgo county. Accordingly, Hidalgo court had no duty to transfer the case to Henderson. Hidalgo, as the court entertaining the later-filed case, was obliged, however, to abate its proceedings because both actions arose between the same parties and arose out of the same contract.

December 2 Petitions Granted

Forest Oil Corp. v. El Rucio Land & Cattle Co. calls on the court to decide whether an **arbitrator's award** in an environmental **contamination** case invades the **Railroad Commission's jurisdiction** to regulate and control the wastes associated with **oil & gas** operations. The case is set for argument February 8.

Community Health Systems Professional Servs. Corp. v. Hansen is an **employment** case arising out of a **without-cause termination**. It questions whether the court of appeals decision allowing the employee's claims for breach of contract and tortious interference erroneously "abolishe[d] without[-]cause terminations by deciding the terminating party was burdened to prove the 'grounds' for" the termination. By cross-petition, the employer asks the court to resolve a split among the courts of appeals over whether communication of "truthful information" may be a defense to **tortious contractual interference**. The case is set for argument March 2 at Sam Houston State.

Marino v. Lenoir involves the propriety of refusing to dismiss for **governmental immunity** a **health care liability claim** against a resident doctor in a state-sponsored residency program. The case is set for argument at LeTourneau University February 16.

Somers v. Sandcastle Homes, Inc. and *Somers v. Newbiss Property, L.P.* questions whether the court of appeals ignored Texas Property Code § 12.0071 by permitting **expunction of a *lis pendens*** and treating the **purchasers as bona fide** even though they allegedly actually learned of the claim against the property independently of the *lis pendens.* These cases are to be argued jointly February 9.

Pinto Techonology Ventures L.P. v. Sheldon is a **shareholder derivative action** that questions whether a **forum selection clause** for claims "arising out of" a contract applies when the claimants assert non-contractual claims that are nonetheless dependent on the existence of the contract. The case is set for argument February 28.

December 9 Opinion

Subjective Intent Irrelevant to a Government Employee's Official Capacity Tort Claims Act Immunity.

Justice Brown wrote a unanimous opinion in *Laverie v Wetherbe*, holding that it was unnecessary to prove subjective intent to only act in the capacity as a government employee for the actor to be entitled to immunity under §101.106(f) of the Texas Tort Claims Act. Under this statute, if the governmental could have been sued but the suit is brought instead against the employee, then the suit is deemed to be against the employee only in the employee's official capacity and may be dismissed if the governmental unit is not substituted as the defendant in thirty days after the employee moves to dismiss the suit.

Both parties were professors at Texas Tech. Wetherbe was vying for a business school deanship. Wetherbe sued Laverie, a member of the selection committee, for defamation based on accusations that Laverie had accused Wetherbe of bugging conversations at the business school. Laverie moved to dismiss and for summary judgment under §101.106(f). Wetherbe denied that the statements were uttered in the course of employment, urging instead that the statements were for purely personal reasons.

Rejecting the court of appeals' reasoning that there was no evidence that conclusively established that Laverie's motives were purely in the course and scope of employment, the court ruled that nothing in the statute requires an examination of *subjective* motivations to determine whether an act is within the course and scope of employment with a governmental unit. Instead, the only analysis that applies is *objective.* Justice Brown explained that the only issue that matters is whether the conduct occurred in the "performance ... of the duties of an employee's office or employment" which is an objective assessment. This conclusion was bolstered by the observation that requiring proof of subjective intent would burden the government employees with the nearly impossible burden of proving a negative to attain dismissal and would require a merits-based analysis – which is exactly what the statues was intended to avoid. Personal motivations, if she had any, ultimately do not change her job responsibilities and whether the statement was in their performance.

December 23 Opinions

Governmental Immunity Waived for Disaster Recovery Construction Contracts Overseen by Local Governmental Entities.

In *Byrdson Services, LLC v. South East Regional Planning Commission* the court decided unanimously in an opinion authored by Justice Willett that a construction contractor's suit under a subcontract with the Commission for services rendered under a federally-funded program for repairing damage from Hurricane Ike to area homes. The statute in question was Local Government Code §§ 271.151 & .152 which provides for waiver of immunity for contracts "providing goods or services to the local governmental entity." The court rejected the argument that the waiver did not apply because the citizens, not the commission, were the direct recipients and beneficiaries of the contractor's services. It reasoned that the contractor's services discharged the Commission's obligations and, therefore, the contractor was providing a service to the local governmental entity within the meaning of the statute waving governmental immunity.

Legally Insufficient Evidence of Owner's Negligent Entrustment and Premises Liability; Remand for Reapportionment of Responsibility Between Remaining Defendants.

4Front Engineered Solutions, Inc. v. Carlos Rosales involved the tip over of an owner's forklift while being used by independent contractors to repair an electric sign. The accident occurred when one of the contractors drove the forklift off the edge of a sidewalk while the other electrician was riding in the forklift's elevated basket. The jury found the owner 75% responsible under theories of negligent entrustment and failure to warn or make safe a premises condition. The jury also imposed $5 million in punitives for gross negligence.

The plaintiff adduced no evidence that the owner knew that the operator was incompetent to operate the forklift or that he would operate it in a reckless manner. The court ruled that mere negligence in ascertaining whether the operator was unqualified to operate the forklift or that he *might* operate it negligently was not enough to impose liability under a negligent entrustment theory. Instead, to hold the owner liable for negligent entrustment obligated the plaintiff to "prove [the operator] *was also incompetent* to operate the forklift or *would operate it recklessly*, and that [the owner] knew or should have known of [the operator's] incompetence or recklessness." Doing so requires habit or history evidence that tended to show incompetence or reckless operation. Mere lack of qualification or training or the failure to have a legally required license would not be enough. Further, the momentary lapse in driving off the edge of the sidewalk showed only negligence, not incompetence or recklessness.

The court also overturned the jury's finding that the forklift operation was a "condition of the premises" necessary for owner premises liability. Premises conditions for which premises liability may be imposed must be independent of the contemporaneous use of the personal property. There was no other condition of the premises that was not – like the edge of the sidewalk – open and obvious. Accordingly, the court reversed and rendered a take-nothing judgment for the owner, but remanded the case to the trial court for a re-apportionment of responsibility between the other defendants. It reasoned that a fact finder not operating under the misimpression that the owner was liable might apportion responsibility differently.

December 23 Petitions Granted

Great American Ins. Co. v. Hamel asks the court to decide whether the rule in *State Farm Fire & Casualty Co. v Gandy* requiring proof of a **fully adversarial trial** is necessary to overcome collusion allegations applies when the defendant **assigns a bench-trial award to plaintiffs** seeking recovery from the defendant's insurer. The case is scheduled for February 28 argument.

Kinsel v. Lindsey presents the issue of whether Texas recognizes a cause of action for **tortious interference with inheritance rights**. Also at issue is legally sufficient evidence supported findings and damages for fraud, undue influence and lack of capacity to amend a trust. The case will be argued February 16.

First Bank v. Brumitt principally asks whether **extrinsic evidence** may be considered to show a **third party** was a **beneficiary** of an unambiguous contract. The case will be argued February 8.

Samson Exploration LLC v. T. S. Reed Properties, Inc. involves an **oil and gas** dispute over **royalties** involving two pooled-unit reconfigurations and whether property law or contract principles govern ownership interests. It will be argued February 28.

Longview Energy Co. v. The Huff Energy Fund, LP involves allegations that directors **usurped** a **corporation's** shale property **investment opportunity**. The central issues are whether the corporation **adequately pleaded** the directors competed without its informed consent and, if not, whether the trial court **properly submitted a liability question** based on the competition claim. Also at issue is whether Delaware corporate-opportunity law by recognizing a director's loyalty applies and may be breached by competing without authorization. Finally, the parties seek resolution of whether sufficient evidence supported a finding that the corporation had a protectable interest or expectancy in the prospective shale property investment. The court will hear the case February 9.

United Scaffolding Inc. v. Levine questions whether the case was **incorrectly submitted as general negligence instead of premises liability**. The court is also asked to decide if an order granting a **new trial** can be **reviewed in an appeal after the retrial**. This case is scheduled for argument March 2 at Sam Houston State.

December 30 Petition Granted

Hall v. McRaven involves a suit by a UT regent seeking student admissions records. At issue are (1) whether the regent **pleaded a valid claim** against the chancellor for ***ultra vires* action** when denying the request and (2) whether an individual regent has a **right to access otherwise confidential student records**. The case was argued January 11.

January 6 Opinions

Application of Electric Transmission Rate Regulation Statutes
Oncor Electric Delivery Co. LLC v. Public Utility Commission of Texas deals with the aftermath of electric deregulation and the forced unbundling of electrical services. In a unanimous opinion by Chief Justice Hecht the court held:

> 1) Texas Utilities Code §36.351 does not require transmission companies to provide discounts because the statute only applies to electricity retailers;
>
> 2) Former Texas Utilities Code §36.060(a) concerning the filing of consolidated returns with affiliates when permitted under federal law did not mandate the adoption of this kind of corporate structure; and
>
> 3) the franchise charges negotiated by the transmission company with various municipalities were reasonable and necessary operating expenses that could be passed on to electricity retailers under Texas Utilities Code § 33.008.9.

Those requiring additional details on these highly technical issues are encouraged to consult the opinion directly. It is available by clicking on the hyperlinked case name above.

Post-Construction Contract with Third-Party and Other Circumstances Sufficient to Prove Reasonable Probability of Public Service Sufficient to Imbue Pipeline Operator With Eminent Domain Authority
In *Denbury Green Pipeline Texas, LLC v. Texas Rice Land Partners, Ltd.*, the court decided the circumstances under which a pipeline operator was a "common carrier" granted eminent domain power under Texas Natural Resources Code §111.019(a). In an opinion by Justice Green joined by all but Justice Johnson, the court applied the common carrier test of "public service" announced in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*

363 S.W.3d 192, 202 (Tex. 2012). Under that test, a pipeline served the public sufficiently to be a common carrier if "a reasonable probability … exist[s] that the pipeline will *at some point* after construction … transport[] gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier." (Emphasis added). Simply obtaining a common carrier permit and negotiations to make the pipeline available to third parties was not enough in the face of operator statements that its intended use of the pipeline was for its own operations. *Id.* In applying this test, the Court clarified that its statement in the 2012 *Texas Rice* opinion that referred to "a person intending to build" did not mean that the intent to make the pipeline available for third-party use – an essential element of showing a probability, not mere possibility, of public use – must exist *before* the pipeline was built. Because the court of appeals understood otherwise, it refused to consider evidence the operator actually entered a contract for third-party use *after* the pipeline was constructed. The Texas Supreme Court ruled, however, that evidence of "[c]ontracts with unaffiliated entities [for transporting] non-pipeline-owned gas … for … the unaffiliated entity can be relevant to showing reasonable probability of future public use." The contract with the third-party, plus circumstantial evidence such as the pipeline route in relation to potential customer locations conclusively established the *reasonable probability* public service.

January 13 Orders

In last Friday's orders, the court granted no petitions and issued no opinions.