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BUSINESS TORTS DEVELOPMENTS

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Cover: “Spring Break Footprints, White Sands National Monument”

Photograph by Larry Gustafson, Dallas, Texas

June 2015

Dear Section Members:

It is time for the spring edition of the *Journal*. This edition of the *Journal* features the annual business torts survey by Bill Katz and Reed Randel. Thank you Bill and Reed for once again preparing this interesting article.

We hope you were able to attend the State Bar annual meeting and the section's program, called *Inside the Insider Trading Trial of Mark Cuban*. Tom Melsheimer was outstanding. In addition, we awarded our annual Distinguished Counselor Award to James Spivey. Also at the Annual Meeting we elected our slate of officers for the next year. Bill Whitehill is the new Chair, Rick Milvenan is the new Chair-Elect, and Bruce McDonald is the new Secretary-Treasurer. I am sure you will all join me in wishing them a very successful term in office.

Let me take this opportunity to express my gratitude to the section for allowing me to serve this past year as its chair. I have enjoyed the year tremendously and I look forward to being a section member for many years to come.

The Antitrust and Business Litigation council is constantly looking for ways to improve our service to our members. To do that effectively, we need your suggestions for ways the Section could assist you or your practice. Please send your comments to me or any other council member. For a complete list of our council and for other important Section information, I invite you to visit the Section's website, <http://texbuslit.org>.

I hope you enjoy this edition of the *Journal*. If you are interested in submitting an article in a future edition, please contact Mike Ferrill (ferrill@earthlink.net).

Regards,

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Business Torts Update – Spring 2015

By William M. Katz, Jr. and Reed C. Randel¹

This survey examines significant business torts decisions by Texas courts for the period from March 2014 through May 2015. “Business torts” obviously covers a broad spectrum, and in narrowing the survey, we included cases that either decided new issues or examined issues of particular interest to business litigators. During the survey period, Texas courts addressed: (1) whether the economic loss rule precluded a contractor from recovering in tort delay damages from a project’s architect; (2) whether the conduct of a corporate director was “oppressive” under the Texas Business Organizations Code; (3) whether a permanent injunction prohibiting the future posting of defamatory statements on the Internet would be a prior restraint on free speech; (4) whether diligence in discovering alleged fraud in public records is a question of law or fact; (5) whether courts can consider circumstantial evidence when deciding whether to dismiss tort claims under the Texas Citizens Participation Act (“TCPA”); (6) whether tortious interference damages based on fair market valuations were too speculative; (7) whether a company’s statements to the Department of Justice (“DOJ”) during a Foreign Corrupt Practices Act (“FCPA”) investigation were absolutely privileged for purposes of a defamation claim; and (8) whether information freely available on a federal agency’s website satisfies the “public knowledge” exception to the discovery rule.

General Contractors Cannot Sue Architects for Negligent Misrepresentation.

In *LAN/STV v. Martin K. Eby Construction Company, Inc.*, 435 S.W.3d 234 (Tex. 2014), the Texas Supreme Court held that the economic loss rule prevents general contractors from recovering damages for negligent misrepresentation by the project’s architect.

The Dallas Area Rapid Transportation Authority (“DART”) contracted with LAN/STV to develop plans for a light rail transit line from Dallas’s downtown West End to the American Airlines Center. Martin K. Eby Construction Company was then awarded the construction contract, which included an administrative procedure for Eby to assert and resolve contractual disputes against DART, including any issues with the plans developed by LAN/STV. There was no contract between LAN/STV and Eby, however.

Early in the construction process, Eby discovered that there were significant issues with LAN/STV’s plans. Before the project began, Eby anticipated that 10% of the plans would have to be changed, but the actual number increased to about 80% after construction began, which significantly disrupted Eby’s construction schedule and required additional labor and materials. After calculating its loss on the project at \$14 million, suing DART in federal court, and then going through an administrative appeals process, Eby eventually settled with DART for \$4.7 million. It then filed suit against LAN/STV, alleging that it negligently misrepresented the work that needed to be done through its inaccurate plans.

At trial, a jury awarded Eby \$5 million in damages, but the trial court reduced the judgment to \$2.25 million, because the jury determined that DART was 40% negligent and Eby was 15% negligent. Both Eby and LAN/STV appealed, and the court of appeals affirmed the trial court’s decision.

The Texas Supreme Court reversed, holding that the economic loss rule prevented Eby from recovering in tort against LAN/STV based on negligent misrepresentation. The court departed from the Restatement (Second) of Torts' distinction between claims brought by a subcontractor against an architect for (a) negligent performance of services, and (b) negligent misrepresentations. Although the Restatement would have permitted Eby's claims for negligent misrepresentation, the Texas Supreme Court disagreed, finding that Eby's principal reliance would have been on the DART's presentation of LAN/STV's plans, and thus Eby's claims were really based on its contract with DART. Because Eby had no contract with LAN/STV, the duty to provide Eby with accurate plans was DART's, not LAN/STV's. Accordingly, the economic loss rule applied to bar Eby's tort claims against LAN/STV.

Interestingly, a few months later, the Texas Supreme Court held in *Chapman Custom Homes, Inc. v. Dallas Plumbing Co.*, 445 S.W.3d 716 (Tex. 2014), that the economic loss rule did not prevent a homeowner from suing a subcontractor for negligence in installing a plumbing system. The court concluded that the plumber's duty not to flood the plaintiff's home arose independently, rather than from the parties' contract. Accordingly, the homeowner could sue in tort and the economic loss rule did not apply.

There is no Common Law Claim for Shareholder Oppression under Texas Law.

In *Ritchie v. Rupe*, 443 S.W.3d 856 (Tex. 2014), the Texas Supreme Court held that to qualify as oppressive action justifying a rehabilitative receivership, a director's actions must be an abuse of authority, done with intent to harm at least one shareholder's interests, taken in a manner not comports with business judgment, and create a serious risk of harm and exigent circumstances for the corporation.

Upon his death, a shareholder left his 18% interest in RIC, a closely held corporation, to a trust for the benefit of his wife and their son, with his wife appointed as trustee. The trustee eventually decided to sell the trust's interest, after determining that RIC's board was acting in a hostile manner. RIC offered to buy the trust's 18% interest, but the trustee rejected the offer as being too low and decided to sell to an outside party. When RIC's president refused to meet with prospective buyers to facilitate the trust's sale, the trustee sued RIC and its board members, alleging that they engaged in oppressive conduct and breached their fiduciary duties. The trustee requested an accounting and valuation to force RIC to buy the trust's interest at fair market value, or alternatively, for the appointment of a receiver to liquidate RIC.

At trial, the jury found in the trustee's favor on all of her claims, and the trial court ordered RIC to redeem the trust's shares for \$7.3 million, which the jury found to be the fair market value of the trust's ownership interest. The court of appeals found that RIC's refusal to meet with prospective buyers constituted oppressive conduct as a matter of law, but concluded that the trial court erred by not instructing the jury to discount the fair market value due to the lack of marketability and control of the trust's ownership interest.

In a case of first impression, the Texas Supreme Court decided what "oppressive" means in section 11.404 of the Texas Business Organizations Code, which authorizes Texas courts to appoint a receiver to rehabilitate a domestic corporation under certain circumstances. After considering other courts' opinions and the Legislature's intent, the Texas Supreme Court

concluded that a corporation’s directors or managers engage in “oppressive” actions under section 11.404 when they abuse their authority over the corporation with the intent to harm the interests of one or more of the shareholders, in a manner that does not comport with the honest exercise of their business judgment, and by doing so create a serious risk of harm to the corporation. Relying upon this definition, the court concluded that RIC’s directors did not engage in oppressive conduct here. The court further held that there is no common law claim for “shareholder oppression” and that section 11.404 did not authorize the remedy awarded by the trial court, so it reversed the court of appeals’ decision.

The Texas Constitution Prohibits Injunctions Limiting Future Speech.

In *Kinney v. Barnes*, 443 S.W.3d 87 (Tex. 2014), the Texas Supreme Court held that a permanent injunction prohibiting future statements similar to those previously adjudicated as defamatory would be a prior restraint, and the Texas Constitution’s free speech clause does not permit such injunctions.

In 2004, the plaintiff legal recruiter left his employer to start a competing firm. Several years later, his former employer posted comments on several websites implying that the plaintiff was involved in a kickback scheme while working for his former employer. In response, the plaintiff sued his former employer, its president, and two other companies for defamation. The plaintiff sought no damages; he requested only a permanent injunction. The trial court granted summary judgment against the plaintiff, after one of the defendants argued that the relief sought would constitute an impermissible prior restraint on speech under the Texas Constitution. The court of appeals affirmed without deciding whether the comments at issue were defamatory.

The Texas Supreme Court reversed in part, finding that the appellate court improperly concluded that all of the relief sought by the plaintiff was improper. The court noted that the plaintiff’s requested relief fell into two categories: (1) an order that the defendant remove the comments at issue from his websites upon a finding that they were defamatory; and (2) an order that would permanently enjoin the defendant from making similar statements in the future. The Texas Supreme Court found that the first category of relief would not be an illegal prior restraint—because the order would not issue until after there was a finding of defamation—but that the second category would be an illegal prior restraint. The court then considered whether an injunction against future speech is permissible under the Texas Constitution, found that it is not, and rejected the plaintiff’s argument that the Internet was somehow a constitutional “game changer” because it allows for the rapid dissemination of defamatory statements.

The Reasonableness of Diligence in Discovering Alleged Fraud in Public Records for Purposes of the Discovery Rule is a Question of Fact.

In *Hooks III v. Samson Lone Star, LP*, No. 12-0920, 2015 WL 393380 (Tex. Jan. 2015), the Texas Supreme Court held that reasonableness of diligence in discovering alleged fraud in Railroad Commission records is a question of fact.

While seeking an amendment to the plaintiff’s oil and gas lease in 2001, the defendant gave the plaintiff a plat that incorrectly showed one of the defendant’s wells as being drilled outside an area that would have entitled the plaintiff to higher royalties. A plat similar to the one

given to the plaintiff had already been recorded with the Railroad Commission, but older Railroad Commission records contained the correct information—i.e., the well was, in fact, drilled in the area entitling the plaintiff to higher royalties.

The plaintiff filed suit in 2007, arguing that the statute of limitation was suspended by the discovery rule due to the defendant's fraud in delivering the inaccurate plat. After the case proceeded to trial, the jury found that, through the exercise of reasonable diligence, the plaintiff should have not discovered the fraud before 2007, the plaintiff's claim was timely filed, and the plaintiff was entitled to \$20 million in damages. The court of appeals reversed, however, holding that, as a matter of law, the plaintiff could have discovered the alleged fraud in 2000 or 2001 and thus the statute of limitations barred any recovery.

The Texas Supreme Court reversed, holding that whether the discovery rule applied was a question of fact, not a question of law. Although the defendant relied on cases finding that, as a matter of law, the discovery rule did not apply when publicly available documents contained information sufficient to reveal that a claim had accrued, the court distinguished those cases because the Railroad Commission records in *Hooks* were themselves tainted with fraud. The Texas Supreme Court concluded that it is possible for a party exercising reasonable diligence to “stop at more recent filings with the Railroad Commission, without needing to double check more recent filings against earlier filings.” Accordingly, the court of appeals' decision must be reversed because the application of the discovery rule was a question of fact, not law.

Courts May Consider Circumstantial Evidence When Deciding Whether to Dismiss Tort Claims Under the TCPA.

In the case of *In re Lipsky*, No. 13-0928, 2015 WL 1870073 (Tex. Apr. 2015) (orig. proceeding), the Texas Supreme Court held that circumstantial evidence is relevant when deciding if there is clear and specific evidence of an alleged tort sufficient to survive dismissal under the TCPA.

In 2005, the plaintiffs, a husband and wife, drilled a water well on their property in Weatherford, Texas, and in 2009 connected it to a new home they had built on the property. That same year, the defendant drilled two gas wells about a half-mile from the plaintiffs' property, and the plaintiffs began having problems with their well due to excess natural gas in the ground water.

After the husband made a video of himself igniting gas escaping from a garden hose attached to a faucet connected to the well, he shared it with the EPA, the media, and the Texas Railroad Commission, claiming that the defendant's well caused the problem. The EPA and the Railroad Commission investigated the issue, but reached different conclusions; the EPA initially concluded that the defendant's conduct caused the plaintiffs' health issues, but the Railroad Commission did not. The husband then publically spoke out against the Railroad Commission's decision and continued to blame the defendant.

The plaintiffs then sued the defendant for negligence, gross negligence, and nuisance, and the defendant answered and filed counterclaims for defamation, business disparagement, and civil conspiracy against the plaintiffs and a third party. The plaintiffs moved to dismiss under

the TCPA, which provides for expedited consideration of any suit that appears to stifle a party's communication on a matter of public concern, but the trial court denied their motion. In an original proceeding, the court of appeals found that the trial court abused its discretion as to the wife and the third party, but held that the TCPA did not require dismissal of the claims brought against the husband. The defendant and the husband both sought mandamus relief in the Texas Supreme Court.

While denying both mandamus petitions, the Texas Supreme Court held that the trial court properly considered circumstantial evidence when ruling on the husband's motion to dismiss. Trial courts must grant a TCPA motion to dismiss unless "clear and specific evidence" establishes the claimant's prima facie case. Because lower appellate courts disagreed about the quantum of evidence necessary to survive a TCPA motion, including whether the TCPA imposed a heightened evidentiary standard, the court reviewed several of those decisions and ultimately concluded that the TCPA neither imposed a higher evidentiary standard nor prohibited the use of circumstantial evidence to establish a prima facie case. Applying this standard, the court found that the trial court did not abuse its discretion in denying the husband's motion to dismiss.

Market Value Can be Used to Determine Lost Profits from a Speculative Oil and Gas Project.

In *Phillips v. Carlton Energy Group, LLC*, No. 12-0255, 2015 WL 2148951 (Tex. May 2015), the Texas Supreme Court held that, in a tortious interference case, market value could determine lost profits damages from a speculative oil and gas project to a reasonable certainty.

In 2003, the plaintiff entered a contract with an oil and gas company to explore for coalbed methane in Bulgaria and agreed to pay up to \$8 million in several stages for up to a 48% interest in the project. After proceeding through several stages and acquiring a 38% interest in the project, the plaintiff needed additional funding and offered the defendant a 10% share in the project, in exchange for \$8.5 million. Although the defendant initially accepted the offer, it later persuaded the oil and gas company to remove the plaintiff from the project and replace the plaintiff with the defendant. The oil and gas company returned the plaintiff's initial investment in the project, which the plaintiff accepted under protest. Exploratory wells were eventually drilled, but they were not particularly successful, and the defendant and another investor ultimately lost \$13 million on the project.

In 2006, the plaintiff sued the defendant for breach of contract and tortious interference and sought lost profits damages for its 38% interest in the project. At trial, the plaintiff's damages expert offered three models for determining the fair market value of the plaintiff's interest in the project: (1) the initially forecasted value of the gas in the ground; (2) the value of the gas near the wells that were actually drilled; and (3) an overall value of approximately \$31 million based on what the defendant agreed to pay for a 10% interest in the project. The defendant did not offer any damages evidence at trial, arguing that any damages should be based on what the plaintiff initially paid for its interest in the project, not what the defendant agreed to pay at a later date. After the jury found that the defendant tortiously interfered with the plaintiff's contract, it awarded the plaintiff \$66 million in actual damages, which the trial court reduced to \$31 million by way of a remittitur. Both parties appealed, and the court of appeals rendered judgment on the jury's verdict.

The Texas Supreme Court affirmed the appellate court's finding on the plaintiff's tortious interference claim, but remanded the case on the damages issue. The court acknowledged that determining lost profits from a speculative venture can be difficult, but it explained that the law should not require greater certainty of proof in projecting those profits than the market itself. The court also found that lost profits could be extrapolated from the amount the defendant paid for a 10% interest in the project. Because the court of appeals did not consider the sufficiency of the damages evidence, the supreme court remanded the case for further proceedings consistent with its opinion.

Statements Made to the DOJ During a FCPA Investigation Were Absolutely Privileged for a Defamation Claim.

In *Shell Oil Co. v. Witt*, No. 13-0552, 2015 WL 2328678 (Tex. May 2015), the Texas Supreme Court found that statements made by a corporation that was the target of a FCPA investigation by the DOJ were absolutely privileged in a defamation lawsuit brought by the company's former employee.

In February 2007, the defendant's third-party contractor entered into a plea agreement with the DOJ in connection with various FCPA violations. Several months later, the DOJ notified the defendant that it may have violated the FCPA as well. After meeting with the DOJ, the defendant conducted an internal investigation and agreed to provide additional information as requested by the DOJ. The plaintiff, one of the defendant's former employees, was interviewed several times during the internal investigation, and the defendant provided the DOJ with information regarding the plaintiff's alleged involvement in the FCPA violations. These allegations eventually led to the defendant terminating the plaintiff's employment at the same time the defendant provided its investigative report to the DOJ.

The plaintiff sued the defendant for wrongful termination and defamation, alleging that information submitted by the defendant to the DOJ was false. The defendant moved for summary judgment on the plaintiff's defamation claim, arguing that its statements to the DOJ were absolutely privileged. While the defendant's motion was pending, the DOJ filed an information charging the defendant with conspiracy to violate the FCPA. The defendant eventually entered into a deferred prosecution agreement in which the DOJ acknowledged the defendant's willingness to cooperate and payment of a large monetary penalty.

Although the trial court granted summary judgment on the plaintiff's defamation claim, finding that the defendant's statements were absolutely privileged, the case proceeded to trial on the plaintiff's wrongful termination claim, and the jury returned a verdict in the plaintiff's favor. On appeal, the plaintiff challenged the trial court's summary judgment dismissing his defamation claim, and the court of appeals reversed, finding that at the time the defendant provided its report to the DOJ, the evidence did not conclusively prove that there was no ongoing, actually contemplated, or seriously considered criminal judicial proceeding against the plaintiff or the defendant.

The Texas Supreme Court reversed, finding that the defendant was at all times a target of the DOJ's investigation and that the defendant seriously contemplated the possibility of a judicial proceeding when it furnished the results of its investigation to the DOJ. The court discussed the

recent rise in FCPA enforcement actions and the high penalties imposed on corporate violators. Because of the fear associated with a FCPA action, the court found that the defendant was essentially compelled to conduct its investigation and provide the results to the DOJ, even if a judicial proceeding had not officially started. The court concluded that the defendant's communications with the DOJ were absolutely privileged because: (1) the defendant was a target of the investigation when it provided its report to the DOJ; (2) the information in the report related to the DOJ's investigation; and (3) the defendant acted with serious contemplation of the possibility that it might be prosecuted. Therefore, the trial court's grant of summary judgment was proper, and the appellate court's decision was reversed.

The Discovery Rule Will Not Apply When Information is Available on a Government Website.

In *Velocity Databank, Inc. v. Shell Offshore, Inc.*, No. 01-13-00454-CV, 2014 WL 7473797 (Tex. App.—Houston [1st Dist.] Dec. 2014), the Houston Court of Appeals found that defamatory statements published on a federal agency's website, which were available without subscription or charge, are public knowledge such that the discovery rule did not apply.

In December 1998, the United States Minerals Management Service ("MMS") began a project to update the agency's historical data on wells drilled in off-shore blocks in the Gulf of Mexico by uploading all data received onto its web-based, publicly accessible database. In October 2000, an MMS analyst contacted the defendant, an oil and gas operator, requesting surveys for some of the defendant's projects. Based on information provided by the defendants, MMS then posted information on its website indicating that the surveys conducted by the plaintiff may have been fictitious. The plaintiff discovered this allegedly defamatory information on November 10, 2010, and sued for defamation on November 9, 2011, more than ten years after MMS initially published the allegedly defamatory statements in October 2000.

After the defendant moved for summary judgment based on the statute of limitations, the trial court granted the motion, and the plaintiff then appealed. On appeal, the plaintiff argued that the discovery rule tolled the statute of limitations because it did not discover its cause of action until November 10, 2010. The plaintiff argued that although newspapers and television broadcasts satisfied the "public knowledge" exception to the discovery rule, the information available on an agency's website did not. The court of appeals disagreed, holding that information available on an agency's website without subscription or payment constitutes public knowledge. Accordingly, the discovery rule did not suspend or toll the running of the statute of limitations, and the plaintiff's claim was time-barred.

¹ Mr. Katz is a partner and Mr. Randel is an associate in the Dallas office of Thompson & Knight LLP.

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