Texas Supreme Court Update

by Nick Guinn

In re Accident Fund General Ins. Co. & Kriste Henderson, (Dec. 15, 2017).

Quick and dirty statement of facts:

- Sayaz suffered a serious injury during his employment. His employer—a workers' compensation subscriber—notified its carrier, Accident Fund General Insurance Company. Accident Fund accepted coverage and paid income and medical benefits to Sayaz.
- While Sayaz was recuperating, his employer sent him two offers for modified-duty work labeled "Bona Fide Offer of Employment."
- Sayaz neither explicitly accepted nor rejected either modified-duty offer, but his wife emailed the employer her concerns about his ability to work. When Sayaz did not accept the offers or return to his former job, the employer terminated his employment.
- Sayaz did not seek resolution through the workers' compensation administrative process. Instead, Sayaz sued his employer, as well as Accident Fund, and its adjuster, alleging they aided and abetted the employer's Labor Code violation, tortiously interfered with Sayaz's employment

relationship, and conspired with the employer to unlawfully discharge and retaliate against him.
- Accident Fund and the adjuster filed a plea to the jurisdiction, asserting exclusive jurisdiction lies with the Division of Workers' Compensation.
- The trial court denied the plea, and the court of appeals summarily denied Accident Fund's petition for mandamus relief.

Issue(s):

- "[W]hether the Division of Workers' Compensation has exclusive jurisdiction over statutory and tort claims alleging the Act's 'bona fide offer of employment' process was misused to fabricate grounds for firing a covered employee"?

Holding(s):

- The TWCA "provides the exclusive process and remedies for claims arising out of a carrier's investigation, handling, or settling of a claim for workers' compensation benefits."
- When an agency has exclusive jurisdiction and the plaintiff has not exhausted administrative remedies, the trial court lacks subject-matter jurisdiction and must dismiss any claim within the agency's exclusive jurisdiction.
- The workers' compensation system includes a process that encourages employers to offer injured employees "a bona fide position of employment that the employee is reasonably capable of performing . . . ."
- In addition to facilitating a speedy return to work, the bona-

fide-employment-offer process is a benefits-determining mechanism.

- If a dispute concerning an offer of modified-duty employment arises, either the employee or the carrier may initiate the administrative dispute-resolution process, and the Division will determine if the offer is bona fide under the statutorily prescribed criteria.
- All the claims against Accident Fund derive from its participation in the bona-fide-job-offer process and Sayaz's dissatisfaction with those offers. Whether these offers were "bona fide" is the threshold factual determination for each of his claims against Accident Fund, which means the trial court is being tasked with making a determination about a matter committed to the Division's exclusive jurisdiction.
- Because the Division has exclusive jurisdiction over Sayaz's claims against Accident Fund and Sayaz did not exhaust administrative remedies through the workers' compensation system before filing suit, allowing those claims to proceed in the trial court would disrupt the orderly process of government. Thus, mandamus relief for Accident Fund is appropriate.

Editorial take:

- If a governmental agency administers dispute resolution for disputes similar to those of your client(s), it is wise to first determine whether to seek administrative relief before rushing to the Courthouse with your petition. Failing to exhaust administrative remedies could waste the time and

money of you and your client(s); discredit you with your client(s) and others; and potentially time bar your claims in one venue or another.

***In re Frank Coppola and Bridget Coppola*,**
(Dec. 15, 2017).

Quick and dirty statement of facts:

- The Coppolas sold an unimproved property to veterinarian Adams for use as a veterinary clinic and boarding facility. Adams hired two attorneys to assist with the transaction.
- At closing, the Coppolas provided Adams with a survey showing a particular right-of-way on the property. Adams later learned that the right-of-way was not large enough under the local ordinance for the intended commercial improvement.
- Adams sued the Coppolas for fraud and deceptive trade practices for failing to disclose the relevant right-of-way limitations.
- Seventy-six days before the third trial setting, the Coppolas asked for leave to designate Adams's attorneys as responsible third parties. The trial court summarily denied the motion without granting leave to replead, and the court of appeals denied mandamus relief.

Issue(s):

- Whether Tex. Civ. Prac. & Rem. Code § 33.004(a) should be

construed such that the phrase "the trial date" is limited to an initial trial setting rather than the upcoming trial setting at the time a motion to designate is filed?
- Whether a party is precluded from designating an attorney as a responsible third party?
- Whether an adequate appellate remedy exists in the context of a section 33.004 responsible-third-party designation?

Holding(s):

- If a party timely requests leave to designate responsible third parties (i.e., on or before the sixtieth day before the then pending trial date), the court must allow the designation unless the objecting party establishes (1) the defendant did not plead sufficient facts concerning the person's alleged responsibility and (2) the pleading defect persists after an opportunity to replead.
- The Court disagreed with Adams argument that parties should be categorically prohibited from designating attorneys as responsible third parties. "By special definition, a 'responsible third party' is 'any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought.'"
- "Allowing a case to proceed to trial despite erroneous denial of a responsible-third-party designation 'would skew the proceedings, potentially affect the outcome of the litigation, and compromise the presentation of [the relator's] defense in ways unlikely to be apparent in the appellate record.'"
- "[O]rdinarily, a relator need only establish a trial court's

abuse of discretion to demonstrate entitlement to mandamus relief with regard to a trial court's denial of a timely-filed section 33.004(a) motion."

Editorial take:

- The Court did not determine whether the Coppolas pleaded sufficient facts regarding the attorneys' alleged responsibility. It will be interesting to see whether the trial court finds the plaintiff's attorneys to be responsible.

In re Bertram Turner and Regulatory Licensing & Compliance, L.L.C.,
(Dec. 22, 2017).

Quick and dirty statement of facts:

- Paralegal Wright worked for the Vethan Law Firm for six weeks. During that time, she assisted with the representation of Turner and related parties.
- Eight months later, Wright started working for the Cweren firm. As it turned out, Cweren was already representing Turner's opposing party, Lopez. Cweren's interview of Wright was generally limited to matter described in Wright's resume—which did not list the Vethan law firm. Wright did not disclose her prior employment at Vethan. The record did not reveal that Cweren instructed Wright to refrain from working on matters that she might have worked during prior employment.

- Wright started working on the Turner/Lopez matter. Vethan eventually noticed Wright's initials on Cweren documents and brought the matter to Cweren's attention, and ultimately moved to disqualify Cweren.
- The trial court denied the motion and the court of appeals denied Vethan's petition for writ of mandamus.

Issue(s):

- Whether a law firm must be disqualified after it employed a paralegal who had previously worked for the opposing party's counsel?

Holding(s):

- "Deciding whether to disqualify counsel based on a nonlawyer employee's conduct involves a two-step process."
- "A trial court must grant a motion to disqualify a firm whose nonlawyer employee previously worked for opposing counsel if the nonlawyer (1) obtained confidential information about the matter while working at the opposing firm and (2) then shared that information with her current firm."
- With respect to the first prong, there is an irrebuttable presumption that the nonlawyer employee obtained confidential information about the matter if she actually worked on the matter at her former firm.
- As for the second prong, the law presumes that a nonlawyer employee who obtained confidential information at her former firm shared that information with her new firm. This presumption is sometimes rebuttable and sometimes

irrebuttable.

- When rebuttable, the second prong is rebutted when the responding party satisfies the following two-prong test:
  - (1) the employee was instructed not to perform work on any matter on which she worked during her prior employment, or regarding which the employee has information related to her former employer's representation, and
  - (2) the firm took other reasonable steps to ensure that the employee does not work in connection with matters on which the employee worked during the prior employment, absent client consent.
- Casual admonitions to refrain from working on conflicted matters are insufficient to meet the first prong.
- "Other reasonable measures" must include, formal, institutionalized screening measures that render the possibility of the nonlawyer having contact with the file less likely. This inquiry involves several considerations—which the Court did not reach in this case.
- The Court held that Cweren did not rebut the shared-confidences presumption because Cweren did not instruct Wright to refrain from working on the Turner matter until *after* learning of her conflict.

Editorial take:

- Business development and attorney marketing is practically a full time job. No practitioner wants to go through the effort of attracting and retaining a client if the practitioner

will be disqualified. This decision gives some guidance on minimizing this risk. First, attorneys and staff involved in the hiring process should inquire into a prospective or new employee's prior employment going several years back. How far back is likely dictated in part by the nature of the practitioner's practice area. The inquiry should not stop with the prospective or new employee's resume. Those hiring should expressly ask where the interviewee previously worked and create a timeline with the type of diligence and accuracy used in a deposition, making sure the gaps are filled in. Cweren likely would have avoided disqualification with a more detailed—yet appropriate—inquiry. Regardless of the outcome of the inquiry, the practitioner should include in its employee manual, welcome letter, or some other memorialized document, instructions not to perform work on any matter on which the employee worked during her prior employment, or regarding which she has information related to her former employer's representation. If the inquiry indicates potential conflict, the practitioner should make the letter/memorialization even more express. The letter/memorialization will likely serve as "Exhibit A" in a response to a motion for disqualification.

- While the *Bertram Turner* decision does not spell out "other reasonable measures," one can imagine password encrypted files, and similar practices, would be good steps to preventing an employee's access to the file.

***In the Interest of K.S.L., a Child*,**
(Dec. 22, 2017).

Quick and dirty statement of facts:

- The Department of Family and Protective Services in San Antonio brought a suit on behalf of K.S.L., an infant. The petition requested that the Department be appointed temporary managing conservator of K.S.L., and requested termination of the parents' parental rights if reunification could not be achieved.
- The Department presented a great deal of evidence at several hearings and ultimately at trial that spoke to the parents' "drug and lingering issues."
- After a permanency hearing, both parents demanded a jury trial but later signed affidavits of voluntary relinquishment of parental rights.
- The affidavits were presented at trial. The Court signed an order of termination as to both parents. The order found by clear and convincing evidence that (1) the parents signed irrevocable affidavits of relinquishment; and (2) the termination was in K.S.L.'s best interest.
- The court of appeals held that the trial court order terminating parental rights could be overturned on appeal on grounds that clear and convincing evidence of the child's best interest was lacking. The Supreme Court disagreed and reversed the court of appeals' judgment regarding termination of parental rights.

Issue(s):

- Does section 161.211(c) of the Family Code bar a terminating parent from challenging the factual and legal sufficiency of the best-interest determination?
- If yes, would such a bar violate the federal due process rights of the terminating parent?

Holding(s):[1]

- Family Code section 161.103 sets forth elements for a valid affidavit of voluntary relinquishment. "The parents' affidavits complied with all statutory directives."
- "We agree that the statute is unmistakably written in the conjunctive and requires both a statutory-compliant affidavit and a finding that termination is in the child's best interest."
- The attack-on-termination provision, section 161.211 states: "A direct or collateral attack on an order terminating parental rights based on an unrevoked affidavit of relinquishment of parental rights or affidavit of waiver of interest in a child is limited to issues relating to fraud, duress, or coercion in the execution of the affidavit."
- The Court disagreed with the parents' contention that section 161.211(c) applies only to challenges to the affidavit because the statute applies to attacks on any "order terminating parental rights."

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[1] For purposes of this discussion, the author limits this discussion to the Court's discussion of the interplay of Family Code sections 161.001(b) and 161.211, and does not address the Court's due process discussion.

Editorial take:

- The Court noted that parental rights are "far more precious than any property right." Thus, it is imperative for parents facing termination of their parental rights—and counsel representing such parents—to carefully consider the consequences of signing an affidavit of voluntary relinquishment. Given the Family Code's limits to attacks on these affidavits—fraud, duress, or coercion—there will rarely if ever be any "take backs."
- It also of note that on the same day as the *K.S.L.* decision, the Court issued its opinion in *In the Interest of M.M., a Child*, reaching a similar outcome given the signed affidavit of voluntary relinquishment.