Texas Supreme Court Update

by Nick Guinn

In re Norma Heredia,
(September 30, 2016).

Quick and dirty statement of facts:

- After Wal-Mart Stores filed, and the trial court granted, a motion for no-evidence summary judgment, Heredia timely filed a notice of appeal and an affidavit of indigence.
- Heredia's affidavit was not challenged within the following ten days. The court of appeals, however, issued a *sua sponte* order allowing interested parties to challenge the affidavit in the ten days following the date of that order.
- The court reporter filed a challenge to the affidavit three days later: indicating that she was unaware of the affidavit until the *sua sponte* order. The trial court set a hearing to determine indigence. Heredia moved to stay the hearing and petitioned the Supreme Court for writ of mandamus.

Issue:

- May a court reporter challenge an appellant's indigence claim after the ten-day deadline set forth in Texas Rule of Appellate Procedure 20.1?

Holding(s):

- A challenge to an affidavit of indigence must be filed within ten days after the date the affidavit was filed. If no one timely contests the affidavit, the affidavit's allegations will be deemed true.
- Texas Rule of Appellate Procedure 20.1 does not allow for an untimely challenge, even if the court reporter did not receive notice of the indigence claim.
- The Supreme Court conditionally granted the writ of mandamus, directing the court of appeals to vacate its March 23, 2016 order.

Editorial take:

- It is important for persons or parties who may wish to challenge an affidavit of indigence to regularly monitor all filings so as to not miss the ten-day deadline after the filing of an affidavit.

Laverie v. Wetherbe,
(December 9, 2016).

Quick and dirty statement of facts:

- Texas Tech professor, James Wetherbe, sued his fellow professor, Debra Laverie, for defamation after he was passed over for promotion.
- A search was conducted to select a new dean of the business school at Texas Tech. Laverie, who oversaw faculty recruiting

and hiring, was consulted for her opinions throughout the search. Wetherbe sought the deanship.

- Sometime during the search, Laverie informed the provost that a staff member reported that Wetherbe was using "some kind of listening device or other to eavesdrop on people's conversations in the Rawls College."
- Nine candidates, including Wetherbe, received interviews. The search committee then selected Wetherbe as one of four finalists. Wetherbe was ultimately dropped from consideration.
- Wetherbe later sued for defamation. He claimed several statements made by Laverie, including her statement about his supposed use of a "listening device" torpedoed his chances for promotion.

Appellate procedural posture:

- Laverie filed a traditional motion for summary judgment arguing the Tort Claims Act required Wetherbe to name Texas Tech as a defendant and dismiss her from the lawsuit. Wetherbe responded that Laverie was not entitled to dismissal because she did not act within the scope of her employment when she defamed him.
- The trial court denied Laverie's motion for summary judgment and the court of appeals affirmed on the ground that Laverie failed to offer evidence that showed she was not furthering her own purposes, rather than her employer's, when she made the allegedly defamatory statements.
- The Supreme Court reversed the court of appeals and

rendered judgment dismissing Laverie from Wetherbe's suit.

Issue:

- Did Laverie act within the scope of her employment when she made the allegedly defamatory statements?

Holding(s):

- The Tort Claims Act contains an election-of-remedies provision intended to force a plaintiff to decide whether an employee acted independently and is thus solely liable, or acted within the general scope of her employment such that the governmental unit is vicariously liable.
- A defendant is entitled to dismissal upon proof that the plaintiff's suit is (1) based on conduct within the scope of the defendant's employment with a governmental unit and (2) could have been brought against the governmental unit under the Tort Claims Act.
- "Scope of employment" is further defined as "the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority." Subjective intent is not a necessary component of the scope-of-employment analysis. Instead, the Tort Claims Act calls for an objective assessment of whether the employee was doing her job when she committed an alleged tort, not her state of mind when she was doing it.

- The Court held even if Laverie defamed Wetherbe, she did so while fulfilling her job duties. Accordingly, Laverie was entitled to dismissal when she furnished conclusive evidence that she was acting within the scope of her employment. She was not required to offer evidence of her motives for making the allegedly defamatory statements.

Editorial take:

- A defamed party should consider the objective assessment described above when contemplating a lawsuit against a governmental employee.

***In re Carolyn Frost Keenan*,**
(September 30, 2016).

Quick and dirty statement of facts:

- Keenan's home is subject to deed restrictions enforced by the River Oaks Property Owners, Inc. (ROPO).
- In 2014, ROPO sought injunction against Keenan requiring her to remove improvements that allegedly violated a limit on impervious cover. The limit was included in the 2006 amendments to the neighborhood's deed restrictions.
- Keenan filed a declaratory judgment counterclaim asserting that the restrictions were unenforceable. Keenan contended that an insufficient number of homeowners had voted for the 2006 restrictions to make them legally valid.
- Keenan served a discovery request for production of the

homeowner ballots from 2006. ROPO objected that the ballots were confidential and privileged voting records and were irrelevant to the dispute. Keenan moved to compel production. The trial court signed a January 27, 2015 order granting Keenan access to the ballots. Only Keenan's counsel could review the ballots, however, and Keenan could not copy the ballots. The order also provided that the contents of the ballots could not be disclosed "to anyone else" without further court order.

- After inspecting the ballots, Keenan's counsel asked for a modification of the January 27, 2015 order that would remove the restrictions on access to the ballots.
- On June 1, 2015 the trial court held a hearing. Before and during the hearing, Keenan's counsel argued based on his inspection of the ballots that ROPO had received insufficient votes. He complained that he cannot himself be a witness at trial. The trial court refused to order production of the ballots, but stated that it might let Kennan subpoena them at trial. The court also stated that counsel could share his notes on the ballots with Kennan's expert.

Appellate procedural posture:

- Keenan sought mandamus relief in the court of appeals, which denied relief.
- The Supreme Court conditionally granted mandamus relief "directing the trial court to permit Keenan to copy the ballots and disclose them for purposes of discovery, expert analysis, trial preparation, and trial. The ballots should be

included in the record. The court may order the redaction of names of the voters, or require the ballots to be filed under seal, or impose some other appropriate protective order to protect confidentiality."

Issue:

- Did the trial court abuse its discretion by preventing Kennan's counsel from copying the contents of the ballots or disclosing their contents to anyone?

Holding(s):

- Under the trial court's rulings, Keenan cannot introduce the ballots themselves to prove an insufficient vote to approve of the amendment in issue, nor will the ballots be a part of the record for purposes of appellate review. Keenan's attorney cannot reveal the contents of the ballots at trial under the January 27, 2015 order. Keenan's counsel could in theory testify on this key factual dispute because he reviewed the ballots. But Keenan's counsel should not be forced to do so.
- Under Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct, "A lawyer shall not . . . continue employment . . . if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client." Keenan's lawyer should not be forced to withdraw because the trial court's discovery rulings have made his knowledge the only means of presenting the factual support on a key issue.

Editorial take:

- Although the Court did not set forth a hard and fast rule, this opinion suggests that a client could be entitled to review documents previously designated Attorneys Eyes Only where certain documents establish important facts to the case and would make the attorney a fact witness, but for disclosure to the client.

***In re Tonner*,**
(December 2, 2016).

Quick and dirty statement of facts:

- In 2003, Beatriz Burton was appointed guardian of her grandson, Ryan Keith Tonner.
- Tonner was later placed in the Lubbock State Supported Living Center ("Living Center") operated by the Texas Department of Aging and Disability Services ("the Department"). Burton passed away in 2007. The Department would not allow a community placement on the ground that Tonner could not consent to placement and medical treatment because he had been adjudicated an incapacitated person.
- An application was filed on Tonner's behalf to restore his capacity. Living Center doctors and staff testified that Tonner became able to make informed decisions. A court-appointed psychiatrist, however, testified that Tonner's condition had not changed, and that he would always

require assistance and supervision.

Appellate procedural posture:

- The trial court dismissed the application, finding Tonner's capacity had not been restored. The Supreme Court agreed with the court of appeals that the evidence supported the trial court's refusal to restore Tonner's capacity fully. The Court, however, concluded that the lower courts could not determine whether petitioner's capacity should be partly restored without appointing a successor guardian, which Tonner did not seek.

Issue:

- Did the trial court lack authority to determine whether a ward's capacity should be partly restored where a successor guardian had not been appointed?

Holding:

- Award may apply for an order finding that he is only partly incapacitated and limit the guardian's powers or duties accordingly.
- After Burton's death, Tonner had no guardian and he did not request that one be appointed when he applied to have his incapacity redetermined. The trial court could certainly have appointed a successor guardian at any time, and while this appeal has been pending, it has done so. But the court could not determine whether a non-existent guardian's powers should be restricted or remain unchanged.

Editorial take:

- A guardian must be in place before the trial court may determine whether a guardian's powers should be restricted.

4Front Engineered Solutions, Inc. v. Rosales,
(December 23, 2016).

Quick and dirty statement of facts:

- 4Front Engineered Solutions owns a warehouse and its safety manager contracted with Francisco Reyes, a license electrician, to repair a lighted sign that hung on an exterior wall above the warehouse's entrance. Reyes subcontracted with Carlos Rosales, another electrician, to assist him.
- Reyes operated a forklift on a sidewalk under the sign. Rosales stood in the basket attached to the forklift while Reyes lifted and positioned the basket so that Rosales could reach the sign. On the second day of their two day project, Reyes drove the lift off the sidewalk's edge, causing the lift to topple over. Rosales fell and suffered injuries.

Appellate procedural posture:

- The trial court entered judgment on jury verdict in favor of Rosales under theories of negligent entrustment, premises liability, and gross negligence. The court of appeals reversed the gross negligence finding and affirmed the remainder of judgment.

Issue:

- Whether the property owner's decision to hire Reyes or failure to sufficiently screen in advance of hiring him constituted negligent entrustment?

Holdings:[1]

- With respect to the negligent entrustment claim, the parties disputed whether Rosales had established (1) Reyes was an unlicensed, incompetent, or reckless forklift operator; and (2) at the time of the entrustment, 4Front knew or should have known that Reyes was an unlicensed, incompetent, or reckless operator.
- The Court acknowledged a distinction between an operator who is incompetent or reckless and one who is merely negligent. The claim requires a showing of more than just general negligence. Rosales had to prove that Reyes operated the forklift negligently, however, Rosales had to prove more than just that 4Front knew or should have known Reyes would or might operate the forklift negligently. Instead, he had to prove that Reyes was also incompetent to operate the forklift or would operate it recklessly, and that 4Front knew or should have known of Reyes's incompetence or recklessness.
- A claimant can prove that a defendant "should have known" a fact by relying on evidence that the defendant should reasonably have inquired about that fact but failed to do so. "But to 'sustain such a claim based on a failure to

[1] For purposes of this discussion, the author limits this discussion to the Court's discussion of Rosales' claim for negligent entrustment.

screen,' Rosales had to prove that the inquiries that 4Front did not make would have 'revealed the risk' that establishes liability for negligent entrustment."

- Although no one disputes that Reyes negligently drove the forklift off the sidewalk's edge and caused Rosales to fall, there is no evidence that he was incompetent or acting recklessly when he did so. It is not enough to show that 4Front knew or should have known that Reyes would have a momentary lapse in judgment or otherwise act negligently.
- Reversed and remanded.

Editorial take:

- The name "negligent entrustment" is perhaps misleading. Establishing such a claim requires more than a showing of general negligence.