By Stephen Gibson[2]

***Specific Performance*: Stipulation that a party is entitled to specific performance if the trier of fact finds breach of an enforceable agreement eliminates the need to prove readiness, willingness and ability to perform.**

***Jury Charge:* Stipulation that a party is entitled to specific performance on certain affirmative findings renders other usually-required findings unnecessary because the stipulation eliminates all dispute about these other issues.**

To remove all doubt that Texas allows parties to ultimately define their legal rights differently than "the law," consider *Pathfinder Oil & Gas, Inc. v. Great Western Drilling, Ltd.* Great Western withdrew from a letter agreement to sell Pathfinder a fractional mineral interest because the parties allegedly failed to agree on specifics. To avoid potential liability for breaching any alleged agreement, Great Western sought declaratory judgment the letter agreement was not binding. Pathfinder countersued for specific performance.

At trial, the parties stipulated that, except for affirmative defenses, "the only issues … submitted [concerning contractual liability] … will be (a) whether the [l]etter [a]greement … is … enforceable; [and] (b) whether [it was] breached." Great Western further stipulated that affirmative responses "entitled [Pathfinder] to … specific performance" of the agreement. Ordinarily, the party seeking specific performance must also prove that it is ready, willing and able to perform, but the stipulation omitted this requirement. At the charge conference, Great Western asked for the submission of a ready-to-perform question, but the trial court held the parties to their stipulation. After all, Great Western was trying to change the necessary evidentiary elements *after* the Pathfinder had rested and closed its evidentiary presentation under the impression that readiness to perform was uncontested.

Stipulation to a right of specific performance on less than findings on all traditional elements of relief waives the need for such other elements of recovery.

For a unanimous court, Justice Guzman's opinion first tackled whether the parties' stipulation relieved Pathfinder from proving readiness to perform. The court reached the obvious conclusion that the "plain meaning" of the stipulation was the parties premised the right to specific performance *only* on proof of the stipulated elements. Proof of readiness to perform was unnecessary under the stipulation.

The court rejected attempts to parse the wording of the stipulation to apply only to damages for breach of contract and not equitable specific performance because the stipulation generally spoke in terms of what Pathfinder would be "entitled to recover." The majority ruled that, considered in context, "recovery" could only refer to specific performance because that was only remedy allowed under the stipulation. To rule that the stipulation applied only to an un-sought remedy was an interpretation that made the agreement meaningless.

Parties may agree to remove an essential element from the disputed issues in the case and thereby eliminate the right to try that issue.

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[2] 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.

In concluding that Great Western waived any need for Pathfinder to prove readiness to perform, the court distinguished its decision in *DiGiuseppe v. Lawler*. *DiGiuseppe* overturned a specific performance award without the requisite readiness-to-perform finding but readiness to perform was a disputed issue in *DiGiuseppe*. Between Great Western and Pathfinder, the stipulation eliminated any dispute about readiness to perform. The trier of fact need only decide disputed fact issues. *See* Tex. R. Civ. P. 278 ("The court shall submit the questions … *raised by the … evidence*"). The parties' objective intent in executing the stipulation was to eliminate any dispute about readiness to perform. Unless otherwise required by the issues to be resolved on remand, Pathfinder will be entitled to a specific performance decree against Great Western thanks to the stipulation.

"When the gods wish to punish us, they answer our prayers." Oscar Wilde, *An Ideal Husband* (1895). Be careful what you ask for.

***Defamation*:**

1. To support liability the "gist" of the collective assertion contained in a series of publications must be defamatory as determined collectively, and not on an article-by-article basis.

2. Whether accurately reporting third-party allegations before the effective date of Texas Civil Practice & Remedies Code §73.005 is a defense to liability for defamation remains undecided in Texas.

3. Whether a publication is protected because it is "substantially true" is a question for the trier of fact.

4. Whether a statement is an assertion of fact instead of protected opinion is a question of law that turns on whether the statement is "verifiably false."

***Appellate Jurisdiction*: A second interlocutory appeal from a summary judgment based on First Amendment rights is allowed if the particular grounds in the second motion differ from those in the first.**

The threshold issue in *Scripps NP Operating, LLC, et al. v. Carter* was whether appellate courts have jurisdiction to hear more than one interlocutory appeal in a single case. Texas Civil Practice & Remedies Code §51.014(a) allows an interlocutory appeal from the denial of a summary judgment about claims or defenses involving state or federal constitutional free speech or free press rights.

Carter arose from a second interlocutory appeal. A previous summary judgment appeal from the newspaper's motion yielded a remand in which the newspaper again sought summary judgment on free press grounds. When the trial court denied this motion, it pursued its second interlocutory appeal. In a unanimous opinion by Justice Devine, the court affirmed the denial of the newspaper's second summary judgment motion and remanded the case for trial.

Previously, the court had ruled that if the second summary judgment only re-urged the grounds of the previous summary judgment, the second motion was nothing more than an untimely motion for rehearing for which interlocutory appeal was not allowed. In *Carter*, however, the newspaper's second summary judgment motion asserted defenses not urged in the previous summary judgment motion.

For example, the first motion was based on the claim that the plaintiff was a public figure and the plaintiff's claim was legally invalid because there was no evidence of actual malice necessary to permit recovery by a public figure for defamation. The newspaper's second motion asserted different defenses – substantial truth, non-actionable opinion, lack of negligence or malice, etc. Simply because the grounds of the first and second motions generally concerned First Amendment rights was not enough to make the second motion to nothing more than an untimely rehearing of the first. Accordingly, the court had jurisdiction to entertain a second interlocutory appeal from a ruling on the newspaper's summary judgment motion.

The overall "gist" of the publication must be defamatory based on the collective thrust of a series of related publications, not from each publication individually.

The alleged defamation occurred in a series of articles suggesting circumstances indicated the CEO of the local Chamber of Commerce was using his position for private, personal advantage. One of the requirements of an actionable statement is that its "gist" be defamatory. When the statement consists of numerous related broadcasts or publications, that "gist" is determined by the *collective* thrust of *all* broadcasts or publications, not that of each article individually. Consideration of all reports is necessary because the circumstances surrounding the entire series articles must be taken into account. To establish the defamatory meaning of a publication, the gist of the publication is determined "as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it."

The newspaper did more than accurately report third-party allegations as such.

The allegedly defamatory publications were largely based third-party allegations about the CEO. By statute in effect since May 2015, accurately reporting third-party allegations about matters of public concern is a defamation defense. Tex. Civ. Prac. & Rem. Code § 73.005 (a). This defense was unavailable to the newspaper because the publications preceded the statute's effective date. Under Texas common law, whether the accurate reporting of such third-party allegations is defamatory may be a fact issue.

The court declined to consider whether a common-law privilege like the one created by stature existed under Texas law. Such a privilege would not have protected the paper in this case. Some of the publications asserted the CEO engaged in "questionable stewardship" of the chamber's finances, engaged in "duplicitous dealings" with its board members, and conducted the chamber's business in a way that maximized his personal income. In doing so, the paper failed to clarify that it was merely repeating the allegations of others. As such, the publications "went beyond merely restating the allegations of a third party." Recognition of a common-law analog of the statutory privilege for accurately reporting third-party allegations would not have protected the newspaper in this case.

A fact issue existed about whether the publications were substantially true.

The publications were deemed not substantially true because they incorrectly suggested a direct link in the CEO's contract between financial performance and his bonus. In fact, the chamber's financial performance was a factor, but it was not the *only* factor as the publications suggested. The court also rejected the newspaper's contention that an auditor's report of admittedly erroneous financial reports prepared by the plaintiff raised a fact issue whether the report was substantially true. The court deemed the report "ambiguous at best" and blamed the errors on "staff-prepared" financials containing "material misstatements" due to "omissions, accounting applications and or lack of current accounting requirements." The financials were later corrected and the auditor concluded that they ultimately "fairly represented the chamber's financial status." The CEO may have contributed to the errors reflected in the initial financial statement. However, the "gist" of the newspaper's reports was suggesting these errors amounted to illegal conduct motivated by the CEO's desire to maximize his bonus. The newspaper was not entitled to summary judgment because this "gist" had not been conclusively established.

Fact v. opinion is determined by verifiability; assertions that are verifiably false are not protected expressions of opinion.

A statement cannot be defamatory unless it is verifiably false and is more than opinion "masquerading as fact." Whether a statement is actionable – i.e., verifiably false – is a question of law. In *Carter*, the court rejected the newspaper's attempt to defend its editorials as protected expressions of opinion rather than fact because it considered them verifiably false. The editorials asserted that the chamber's "[f]unds were shifted [to] ma[k]e a loss look like a profit, entitling CEO to a bonus," stated that the prior news reports "describe duplicitous dealings by [the CEO] in his relations with the membership and the executive committee" and that the CEO removed"[t]wo executive committee members . . . after they attempted to bring transparency and accountability to the finances" in what was "nothing less than an attempt to intimidate [the CEO's] critics of [Carter's]." In context, the court considered these assertions as ones of fact, not merely opinion disguised as facts.

***Medical Practice Regulation*: The Texas Medical Board exceeded its authority when it sanctioned a physician for failing to submit a death certification electronically as required. Whether the certification was filed electronically or on paper was a medical practice that likely deceived or defrauded the public.**

Affidavits Supporting Board Complaints: **Ordinarily, affidavits must be based on personal knowledge, but personal knowledge is not necessary under the Medical Practice Act for an "affidavit" supporting a Board complaint.**

Aleman v. Texas Medical Board involved an appeal from a Texas Medical Board order sanctioning a doctor for allegedly violating the Medical Practice Act when he completed a death certificate in paper form. By statute, death certificates must be completed electronically. The doctor was unable to comply because he had not timely registered for the internet-based system for completing the form electronically. For this, he was assessed a $3,000 penalty, directed to 16 hours of continuing education, directed to take the board jurisprudence exam, and to distribute copies of the order to all the facilities where the doctor had privileges. The doctor appealed. Justice Lehrmann authored a 7:2:0 majority opinion vacating the sanctions.

Personal knowledge not necessary for legally sufficient "affidavit" as defined by statute for the Board complaint to be valid.

The majority first rejected a challenge to the complaint as insufficient because the person who signed the supporting "affidavit" lacked personal knowledge. An "affidavit" sufficient to support a complaint under the Texas Medical Practice Act (TMPA) is statutorily defined in the Code Construction Act as "a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office." Tex. Gov. Code § 312.011(1). Texas Occupations Code §164.005(b) provides that, "[u]nless otherwise specified, a proceeding under this subtitle or other applicable law and a charge against a license holder may be instituted by an authorized representative of the board." A complaint under the TMPA cannot require personal knowledge without making meaningless the authorization of a complaint based on the statement of a board representative.

The Board did not have the power to discipline the physician because the failure to submit the certification electronically was not connected to a medical practice that likely deceived or defrauded the public.

Under the Administrative Procedure Act, the Board's order may be reversed if its findings and conclusions are "not reasonably supported by substantial evidence" or are "arbitrary or capricious or characterized by abuse of discretion." Tex. Gov't Code §2001.174. In this case, the facts were undisputed. The only question was whether the TMPA authorized disciplinary action for Dr. Aleman's alleged transgression for not completing the form electronically.

The Texas Medical Board urged that Dr. Aleman's completion of the death certificate certification by pen and paper instead of doing it electronically violated Health & Safety Code §193.005(h) and that such violation was connected with his medical practice so that it was a proscribed "unprofessional or dishonorable conduct that is likely to deceive or defraud the public, … or [to] injure the public," Tex. Occup. Code §164.052(a), the Board was authorized to discipline.

The majority ruled otherwise because the form of certification was not sufficiently "connected" with Dr. Aleman's *medical* practice. The types of practices statutorily classified as "unprofessional or dishonorable conduct likely to deceive or defraud the public" included matters like keeping inadequate controlled substances records, prescribing drugs to known drug abusers, writing false or fictitious prescriptions for certain drugs, prescribing or administering controlled substances and dangerous drugs in a manner inconsistent with public health and welfare, billing for unperformed or medically unnecessary treatments, failing to adequately supervise, and delegating medical responsibilities to unqualified persons. The majority considered the general catch-all under §164.052(a)(1) for any "act that violates any state or federal law if the act is connected with the physician's practice of medicine" less precise, but nevertheless limited to practices that are likely to deceive or defraud the public like those specifically enumerated in the statute.

Merely because Dr. Aleman was acting as a physician when he completed the certification was not enough. The *form* of the certification's submission was not a medical practice likely to deceive or defraud the public the Board was authorized to discipline. The statute requiring electronic submission was intended to expedite the issuance of death certificates and thereby reduce delays in postmortem legal proceedings. Achieving efficiency had nothing to do with the reduction of fraud or deception and, more generally, protecting the public interest from the practice of medicine by charlatans and the unfit.

The State Office of Administrative Hearings did not have the power to award attorney's fees to the physician.

Administrative Procedure Act §2003.0421(a) authorizes an administrative law judge to "impose appropriate [certain specified] sanctions … for filing a pleading that is groundless and brought in bad faith or for an improper purpose. Attorney's fees is not among the listed sanctions available under this statute even though they are explicitly allowed by other statutes, such as that involving proceedings from the Public Utility Commission, for example.

The majority reasoned these circumstances indicated that the exclusion of attorney's fees as an available sanction in §2003.0421(a) was intended to disallow recovery of attorney's fees in this type of administrative proceedings. Attorney's fees as sanctions was not authorized by Texas Civil Procedure Rule 13 or Civil Practice & Remedies Code Chapter 10. Those only apply to judicial, not administrative, proceedings.

The concurring opinion reasons that the physician can only be sanctioned for acts *that violate state or federal law and that the physician's state law violation was an omission, not an act, in failing to register for the electronic filing system.*

Justices Blacklock and Brown agreed with the majority's decision to vacate the Board's order, but they did so because Texas Occupation Code §164.053 limited the ability to sanction to physicians who "*commit*[] an act that violates any state or federal law." By requiring conduct that "commits" a violation, the Legislature restricted the ability of the Board to punish acts of *omission*, such as failure to register for the electronic submission system. To allow an omission to support disciplinary action, the concurring justices reason, reads "act" out of the statute and impermissibly makes the Legislature's limitation to an "act" meaningless. From this foundation, the concurring justices reveal themselves to be caped crusaders against bureaucratic excess. They launch a Jeremiad against the plethora of state and federal regulations, concluding that it is "encouraging" that a "minute" violation of one of the regulation is not deemed "deceptive, fraudulent, [or] dishonorable conduct."

The dissent disavows all the interpretive dancing.

Justice Boyd boils the case down to nothing more complicated than applying the statute as written. In his view, doing so means that the Board was within its authority to discipline the physician. The doctor had four-and-a-half years to register for the required electronic filing but failed to do so. To Justice Boyd, this made certification of the death certificate on paper rather than electronically a "slam-dunk" case. He reasoned: (1) the Board can discipline a doctor who commits unprofessional or dishonorable conduct likely to deceive or defraud the public (2) which includes illegal acts connected with the practice of medicine; and (3) submission of the certification by other than electronic means was and illegal act (4) that subjected the doctor to the Board's disciplinary authority. He dismisses the majority's analysis, which it labels as construing the statute as "a whole," as nothing more than a disagreement with how the statute defines an illegal act connected to the practice of medicine.

Justice Boyd argues the Board did not disregard the Legislature's categorization in §164.053 and the majority's conclusion to the contrary is a misapplication of *noscitur a sociis*, which requires words included in a category be given similar meanings when the categorization suggests they have something in common.

Justice Boyd rejects the notion that the listed illegal acts are similar because not all are likely to deceive or defraud the public. He lists failure to adequately supervise or prescribing for a known narcotics user as two examples. Justice Boyd urges that the majority applied the *narrowest* commonality when *noscitur a sociis* mandates application of the *most general* commonality. "That one listed item does not seem to us to fit neatly within the general category's description does not grant us license to remove or revise that item."

Quoting the ubiquitous *Reading Law*, Justice Boyd maintains that "the correct approach is to recognize that, by describing a general category and then listing specific conduct "included" within that category, the statute makes "doubly sure that the broad (and intended-to-be-broad) general term is taken to include the specifics." Accordingly, he would hold that the Board was within its authority to sanction the physician.

***Attorney Ethics*: Great deference is due a trial court's carefully considered decision about an attorney's ability to represent a guardianship applicant when the potential ward was a long-time client.**

Texas Disciplinary Rule of Professional Conduct ("DR") 1.02(g) requires a lawyer to "take reasonable action to [obtain] a guardian or other legal representative for, or seek other protective orders with respect to, a client … the lawyer reasonably believes [to] lack[] legal competence … to protect the client['s]" best interests. DR 1.06(b) and DR 1.09(a)(3), on the other hand, spell out the guidelines that prohibit representation adverse to a current or former client in a substantially related matter. Lawyers who violate conflict-of-interest rules are irrebuttably presumed to have obtained client confidences and must be disqualified.

In re Thetford involved whether the lawyer was either obliged to seek a guardianship for someone who was or had been a client or was disqualified from representing the applicant for the guardianship due to conflicts of interest. In a 5:4 decision by Chief Justice Hecht for the majority, the court adopted no hard-and-fast resolution of the conflicting demands of the disciplinary rules, directing instead that "great deference" is due a trial court's decision on disqualification when it is based on a careful and thorough consideration of all the evidence.

The attorney represented the 84-year old Thetford for years. He prepared documents giving Thetford's niece power of attorney and drafted a will that left the niece a contingent interest in Thetford's estate. After Thetford displayed worsening dementia symptoms, the niece moved for a temporary guardianship and power to manage Thetford's estate. Thetford moved to disqualify the attorney due to conflicts of interest arising from his previous representation of her. The majority deemed it unnecessary to resolve whether Thetford was the lawyer's former or current client.

DR 1.02's "reasonable action" requirement does not require representing the applicant for the client or former client's guardianship.

The niece argued the attorney had a duty under DR 1.02 to get Thetford a guardian if he reasonably believed doing so necessary to protect her. Thetford urged the lawyer's was disqualified under DR 1.06 and DR 1.09 because he could not be adverse to a client or former client. The majority decided that the attorney's DR 1.02 obligation to take reasonable actions to get a guardianship does not override the conflict-of-interest rules. After all, reasonable action does not require the lawyer to represent the guardianship applicant. It can be satisfied by other means including finding another attorney or notifying the trial court of the potential incapacity, which triggers the court's statutory obligation to investigate.

Disqualification requires substantial relationship with prior representation in a proceeding that is adverse to the former client.

Concluding that DR 1.02 does not take precedence, the majority turned to whether disqualification was necessary. The majority begins by pointing out disqualification in any case is "a severe remedy" with the potential for disrupting court proceedings and depriving a party of counsel of choice. In guardianship hearings, there may be greater harm because a lawyer familiar with the ward's pre-incapacity needs and desires has potentially helpful information. Accordingly, a court evaluating disqualification in guardianship proceedings "must strictly adhere to an exacting standard" that requires the moving party to "establish with specificity" that (1) the lawyer's previous representation of the former client is substantially related to the matters in the guardianship proceeding, and (2) the guardianship proceeding is adverse to the former client.

Substantially related

A matter is "substantially related" if the similarity of the facts involved creates a genuine threat the attorney might divulge a client's previously revealed confidences to the client's current adversary. Similar or overlapping facts are essential for a substantial relationship but not alone sufficient without the genuine threat of disclosure. Drafting Thetford's will and power of attorney were substantially related to the guardianship proceeding. However, Thetford attached the documents to her pleadings in the guardianship, which the majority equated to neutralizing the threat of disclosure of confidential information.

Unanswered questions

The majority did not explain, however, why there could be no other information acquired during the representation of Thetford for which the guardianship proceeding genuinely threat of disclosure during. The majority also offered no

explanation of how the lawyer's prior knowledge could be useful to the court in the guardianship proceeding without the lawyer being a witness about contested facts in the guardianship. *See* DR 3.08.

Adverse to client

Representation of one client is "directly adverse" to another if the lawyer's independent judgment or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected. For this reason, a lawyer is prohibited from representing opposing parties in the same litigation. Parties are "opposing" if a favorable judgment for one unfavorably impacts the other. After mentioning these seeming obstacles, however, the majority notes guardianships are designed to "promote and protect the well-being of the incapacitated person so that "[p]roceedings for the appointment of a guardian are [generally] not adversary in character" according to Texas precedent.

However, the majority also acknowledges that the ABA's Commission on Ethics and Professional Responsibility does not agree with this outlook. It posits that a petition for a guardianship is necessarily adverse to the ward because its essence taking away the ward's "fundamental right of independence." The majority candidly acknowledges that "most" courts or ethics advisory committees in other states follow the ABA's view.

The majority then looks to the Restatement (Third) of the Law Governing Lawyers to support its application of the Texas view. Under Restatement §24A, the lawyer is obliged to act in the client's best interests by "pursu[ing] the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions on the matter." The majority views this declaration as supporting its view that the guardianship proceeding is not necessarily adverse to the putative ward's best interests. Its resort to the Restatement is interesting, if not downright ironic, given the fight in the Legislature's amendment to Texas Civil Practice & Remedies Code §5.001 to add the insurance-industry sponsored proviso that the Restatements "are not controlling" in any action concerning rights and obligations under Texas law. One wonders how the analysis in *Thetford* might have been different had the decision been issued after the effective date of §5.001. On this basis, the majority rejected the ABA's approach as "too narrow" and instead adopted the view that DR 1.02 must be read *together* with the conflict-of-interest rules DR 1.06 and DR 1.09 and not as an inconsistent exception.

> The majority explained:
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> > We find the Restatement's approach the most compelling …[I]ts flexible approach better accommodates the challenges lawyers, families, and trial courts face when trying to best protect the incapacitated elderly. …[F]or a guardianship proceeding to be adverse, the applicant's interests must be adverse to the proposed ward's objectives or interests as the proposed ward would have defined them when she had capacity. In the absence of evidence of how the proposed ward would have defined her interests, we think *adversity exists when the a lawyer may represent a third party seeking guardianship over his incapacitated client if the lawyer reasonably believes the representation is in his client's best interests as the client would have defined it when she had capacity*.

(Emphasis added). Notwithstanding this proofreading train wreck, in light of the ultimate holding it is fairly clear the majority meant to say that adversity exists *unless* the lawyer reasonably believes the representation of the would-be guardian is in the ward's best interests as the ward would have considered them before incapacity.

In this case, Thetford expressed the desire that her niece to serve as her guardian if the need arose. Nothing in the record showed the niece had any interest but Thetford's wellbeing. The majority[3] reached this conclusion

[3] According to the court's order, Justices Green and Guzman concurred in this part of the court's judgment. However, the concurring opinion is not available from either the court or Lexis. The dissenting justices describe the concurrence as concluding that not all guardianships are necessarily adversarial, but the proposing a definition for adversity so narrow it could never be satisfied. According to the dissenting justices, it requires showing the proposed ward had unrealistic foresight in raising adversity concerns or the proposed guardian has animus toward the proposed ward.

> Despite the admission that a guardianship proceeding "strips the ward of fundamental rights," the concurring justices argue that a proceeding is adverse only if the guardianship applicant's interests

notwithstanding the niece being a contingent beneficiary under Thetford's will because Thetford made her a beneficiary when Thetford possessed all of her faculties. The niece had also been indebted to Thetford on a documented loan. Because the loan was paid before a guardianship was needed, this did not make the niece's interests adverse.

Allen's representation of the niece in the guardianship proceeding was not adverse to Thetford. According to the majority, the trial court is in best position to evaluate the subtle mix of considerations that are part of calculating what the potential ward would have considered her best interests. While that resolution makes superficial sense because the trial court is closer and more directly involved with the actors involved in the proceeding, there is reason to question this preference. Unless off-the-record communications are an appropriate source of information on which trial courts can act, the only difference in the information presented in a written record in the appellate court and the information in the trial court proceeding is witness demeanor and presentation. In *Thetford*, however, the evidentiary presentation was entirely by affidavit and written record. There was no unrecorded intangible of witness demeanor or manner of presentation that only the trial court could have observed. Nevertheless, the majority ruled that this call was up to the umpire at the plate even though there was no pitch to observe.

The dissent

Justice Brown, joined by Justices Devine, Blacklock and Busby dissented because the situation was one that they believed called for a hard-and-fast rule: the potential ward's lawyer should never be able to represent the applicant in a proceeding to obtain a guardianship. The dissenters deemed the lawyer's decision to represent the applicant against his current or former client "troubling" and that DR 1.06 applies to current clients even though there is no resolution of whether Thetford is a current or former client. The dissent was also critical of the majority's assumption that attachment of the draft of Thetford's will dropped all the veils on the attorney client relationship. It points out that there may well have been more confidences shared in the preparation of the will than were disclosed on the face of that instrument.

Estate planning and capacity are substantially related.

The dissent points out that the lawyer's intimate involvement with Thetford's estate planning and the considerations that planning included were "clearly, specifically, and substantially related" to the guardianship. That planning inevitably concerned what happened when she became incapacitated and the lawyer necessarily gained significant insight into his client's thinking and capacity. Allowing dual representation threatens the client confidence in candid communications with the attorney.

> Estate planning involves more than writing words on a page, particularly for elderly clients. It involves the sharing of confidences, candid desires, and deep-seated fears. Clients might articulate rational concerns both poignant and personal in hopes that their attorney will help them plan accordingly. The most intimate confidences a client might convey … is her awareness that her mental capacity is beginning to slip and her request that an attorney help her plan for a future in which she can no longer care for herself. And that attorney will be in an advantaged position to later evaluate the extent to which his client's mental capacity has indeed degraded. *That information in the hands of a new client seeking a guardianship over the former client is an unfair advantage derived from a relationship of trust and confidence.*

(Emphasis added).

Guardianship is inherently adverse because it transfers personal sovereignty.

> are "adverse to the proposed ward's objectives or interests as the proposed ward would have defined them when she had capacity." … If there is no direct evidence of such pre-incapacity interests, "adversity exists when the applicant's interests would not promote and protect the proposed ward's well-being.

The dissent is equally *realschule* in deciding that guardianships proceedings are inherently adversarial. The ward wants to retain her right to personally control every controllable aspect of her future: financial, physical, and mental. The applicant, on the other hand, well intentioned or not, wants to limit the ward's powers. As the dissent succinctly puts it: "Of sound mind or not, a person who wishes to remain free is adverse to anyone who would take that freedom away." In a state that touts individuality as a virtue, that formulation of adversity fell one vote short. The lawyer was not disqualified from representing the putative guardian against his client – whether current or former.

***Texas Tort Claims Act*: A licensed peace officer is not acting outside the scope of employment for purposes of dismissal and substitution of the employer under the Tort Claims Act even if the officer is off duty, out of uniform, and outside the employer's territorial jurisdiction.**

Reyza v. Harrison, et al. involved whether a peace officer was acting as a such when, outside his territorial jurisdiction, he shot and killed a fleeing person suspected of possessing marijuana. If the defendant is allegedly acting within the scope of authority to act as a governmental employee, the employee is entitled to dismissal under Texas Tort Claims Act §101.106(f) and the plaintiff is permitted to substitute the governmental employer in the employee's stead. On the other hand, the suit may proceed against the employee individually only if the plaintiff seeks to recover on theory the defendant acted beyond the general scope of authority to act as a governmental employee.

In this case, the defendant was a licensed police officer who also moonlighted as a courtesy patrol officer at his apartment complex in an adjoining county. When the shooting occurred, the defendant was returning to his apartment after his shift with the police department. He was not in uniform and was not on duty as a courtesy patrol officer. As courtesy patrol officer, the defendant was not authorized by the apartment to act as a police officer or to apprehend criminal suspects. Evidence about the events leading to the shooting was disputed over whether defendant was in danger of being crushed between two vehicles when he fired the fatal shots.

Defendant moved for dismissal of the wrongful death suit under §101.106(f). The issue was whether defendant was acting in an official capacity when the shooting occurred so that the case against the officer should have been dismissed under §101.106(f). In a 7:2:0 opinion by Justice Guzman, the majority held the suit should have been dismissed. Regardless of the propriety of defendant's actions, he was acting as a peace officer. As a peace officer, he was authorized to make a warrantless arrests for an offense committed in his presence. The connection between this authority and the alleged tortious conduct was enough to bring it within "the general scope of the employee's employment" by the governmental entity to permit dismissal under §101.106(f).

The majority rejected the court of appeals suggestion the officer's "authority" to act within his employment was limited only to situations where he had a *duty* to act. The majority explained it made no difference that he was not instructed by his police department employer to pursue suspects when off duty so that he would have an *obligation* to do so. Regardless of whether he owed a *duty*, the defendant had discretionary *authority* solely because of his employment as a police officer to arrest for offenses committed in his presence. Under Code of Criminal Procedure article 14.03, peace officers may make arrests outside their employer's territorial jurisdiction.

Thus, when "attempting to arrest a suspect for a crime committed in plain view, city police officers—whether off- or on-duty and whether operating within their primary or extraterritorial jurisdiction—are acting within the general duties … as statutorily conferred by and through their employment with a governmental unit." *See* Tex. Code Crim. Proc. art. 6.06. The majority, therefore, "presume[d] the Legislature knew that "our longstanding approach to the scope-of-employment analysis" focuses on an objective assessment of whether the employee's acts are "of the same general nature as the conduct authorized or incidental [there]to…."

Finally, the majority rejected the contention that the agreement between the defendant and the apartment to function as a courtesy patrol officer in which the pursuit or arrest of offenders was prohibited had any ability to limit the defendant's pre-existing authority to perform the duties undertaken as a sworn peace officer.

Justice Boyd, joined by Justice Lehrmann, concurred with the court's judgment only to point out the third element necessary for dismissal under 101.106(f) – whether suit could have been maintained against the employer governmental unit – was not a question presented or decided. The parties did not dispute that plaintiffs could have brought their wrongful death suit against the city for which defendant served as a police officer.

***Causal Connection*: Even remote or tangential relationships between the activity and the injurious event satisfy the "in connection with" standard.**

***Lack of Recklessness or Conscious Indifference* may be shown by the acts taken in consideration of the risk of injury even if those acts are ineffective to prevent the injury.**

Tarrant County v. Bonner was a suit against the county for injuries allegedly sustained when a chair collapsed during a jail inmate's medical treatment. The chair was known to have a broken leg and had been placed in a locked storage room occasionally used by visiting nurses to provide medical care. The issue was whether, notwithstanding the general immunity waiver under the Texas Tort Claims Act, the county's immunity was preserved thanks to the higher culpability required by Texas Code of Criminal Procedure article 42.20 or Texas Government Code §497.096 for waiver of immunity.

Article 42.20 immunizes county and sheriff's departments and their employees from liability to inmates for treatment activities if the work was performed in an official capacity without conscious indifference. §497.096 provides similar protection for the individual employee if act or omission was "*not intentional, willfully or wantonly negligent, or performed with conscious indifference or reckless disregard* for the safety of others."

The inmate urged these statutes did not apply to his case because there was not a sufficient connection between the immunized activity – treatment – and the alleged cause of his injury – failure to mark the chair as broken when it was placed in the locked room. This is the classic conundrum in cases that turn on causation: how far down the chain is it permissible to look when searching for a causal connection between act or omission and injury?

Even a remote relationship satisfies the "in connection with" requirement.

In an 8:1:0 opinion by Justice Devine, the majority ruled that, unless context indicates otherwise, "in connection with" usually "does not imply a material or significant connection" and should not require anything more than a "tangential, tenuous, or remote relationship" with the designated activity. It was enough for the majority that the failure to warn the chair was broken did caused the harm when it was put to use for the inmate's medical treatment – an activity for which heightened culpability was statutorily required. The court rejected any attempt to limit the effects of article 42.20 and §497.096 to acts rather than omissions. Given that only an in direct causal relationship is required, the majority concluded that these statutes applied equally to an omission of failure to warn the chair was broken and the act of using the broken chair during medical treatment.

Evidence of care taken precluded possibility that the omission was reckless or consciously indifferent.

Concerning whether the evidence met the "conscious indifference" standard, the majority ruled that subjective awareness of an extreme risk of serious harm was necessary to result in a waiver of liability. The act of the officer in placing a chair in a locked room without a warning the chair was broken did not meet that standard. The previous collapse of the chair caused embarrassment, but no serious injury. The condition of the chair was reported and placed in a locked room. That room's periodic use for medical treatment was not on a regular schedule. This was sufficient evidence of care to show that the omission in question was not consciously indifferent or reckless. The county's immunity from liability was, therefore, preserved by both article 42.20 and §497.096.

Justice Boyd concurred separately in the judgment to note that he did "not agree that (1) conscious indifference [under these statutes] is "the same as" gross negligence or (2) a person cannot be consciously indifferent to a risk that is less than 'extreme.'"