Steve Hayes

From: Constant Contact <support@constantcontact.com>
Sent: Friday, September 02, 2016 2:34 PM
To: shayes@stevehayeslaw.com
Subject: Your campaign Second Court Newsletter has been sent

Dear Steven Hayes,

Your campaign **'Second Court Newsletter'** was sent on 9/2/2016 around 3:33 PM EDT.

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Subject: Second Court Newsletter

September 2, 2016

Dear All:

Well, it looks like we may have survived summer without having completely wilted. At least here around Fort Worth, I cannot recall when I have seen everything so lush and green in late August.

On to the matters at hand. **Issues Raised in Briefs filed in Civil Cases in the Second Court.** This is a reminder that it appears that the Court is making available, through its website, briefs it has received in civil and criminal cases, at least for cases filed after September 24, 2014. I cannot say that this service goes back to September 2014, but the Issues Pending publication on my website does, at least for issues in civil cases. To make use of this search tool on the Court's website, in terms of finding briefs which might relate to a case you have, do the following:

Decide what term you want to search for;
Go to the Court's website (www.txcourts.gov/2ndcoa);
Under the heading "Case Information," click on the phrase "Document Search;"
In the box labeled "Text String to Search," type in the search phrase you want to look for;
Click "Search;"
Once you get your search results, click on the word "Other" for whichever document you want to look at.

You might want to tinker around this a little and see how it works for you. It's a sort of a brave new world; anything you discover, I'd love to hear about it.

Error Preservation Blog: Don't forget the error preservation blog on WordPress. In that blog, I compile the holdings of the various courts of appeals and the Supreme Court concerning error preservation, arranged by topic. There are usually about 20-40 such holdings every couple of weeks, but with the headings I use, you can usually scan over it to see if any thing pertains to what you are doing, and skip the rest. I upload (or whatever you call it) the link to that blog to my LinkedIn page, and also publish the link on the pages of a number of LinkedIn Groups. I won't put the link to the blog here-every time I put a new link in this newsletter, it seems to trigger the security systems on a new group of law firm servers. So, if you would like to follow that error preservation blog, send me an e-mail and I'll give you the link to it. Or link to me on LinkedIn.

Issues in Opinions Issued by the Court in the last month in Civil Cases. The Court provided the following summaries on its website for opinions it issued in the last month (the following are copied verbatim from the Court's website, or are edited slightly for length):

Friendly Suit

J. Fuentes Colleyville, L.P., d/b/a Gloria's Rest. v. A.S., No. 02-15-00354-CV (Aug. 18, 2016) (Meier, J., joined by Walker and Sudderth, JJ.).

Held: Appellants have no justiciable interest in A.S.'s friendly suit to obtain judicial approval of the settlements that she made with Hayter and Consumers.

Modification of Temporary Orders

In re G.P. & D.P., No. 02-16-00236-CV (Aug. 17, 2016) (orig. proceeding) (Livingston, C.J.; joined by Dauphinot and Gardner, JJ.).

Held: The trial court abused its discretion by refusing to set a hearing and rule on a motion by relators-a child's grandparents-to modify temporary orders. The plain language of section 156.006 of the Texas Family Code limits the section's applicability to the modification of a final order, not a temporary order. Thus, the grandparents were not required to plead or prove one of the three grounds for modification under section 156.006. Because there is no adequate remedy at law, relators are entitled to relief.

Uniform Child Custody Jurisdiction and Enforcement Act

In re T.B., No. 02-16-00006-CV (July 14, 2016) (Walker, J., joined by Meier and Sudderth, JJ.).

Held: Under the unique facts presented here, we hold that the Florida court's failure to communicate with the trial court in Texas and failure to rule on Father's motion requesting that the Florida court assert its continuing jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act constituted an implied determination

by the Florida court to decline to exercise its home-state jurisdiction and an implied determination that Texas is a more convenient forum for litigation of Mother's modification suit affecting the parent-child relationship. And because the Florida court's initial child-custody order does not constitute a child-support order under the Uniform Interstate Family Support Act and because no prior child-support order exists concerning Mother and Father's children, the Texas trial court possessed jurisdiction under the UIFSA to issue a child-support order concerning Mother and Father's children.

You can find the compilation of previous summaries the Court has issued in civil cases on my website at Second Court Update WebPage. In addition to those cases on which the Court provided summaries, the Court also handed down opinions in the following cases since the last newsletter:

Attorney's Fees, and Homeowners' Association Assessment: *Lawry*, No. 02-15-00079-CV-the Court modifies and affirms two summary judgment rulings and a final judgment for fees in part, and reverses and remands it in part. The case involved a monthly fee assessed by a homeowners' association against its members to pay for a Fire Department to provide EMS services to the subdivision covered by the association. The Court concluded and held that the amendment to the bylaws of the homeowners' association which authorized an additional assessment for "fire protection and emergency services" did not conflict with the language in the Declaration of covenants of the subdivision, which provided that assessments may be used to provide "other services for the common benefit of all lot owners." The Court also held that the Appellant member of the Homeowners' Association was not a donee or creditor beneficiary of the indemnification agreement between the Association and the Fire Department, which had agreed to provide EMS services to the subdivision, and hence he could not sue the Fire Department as a party jointly and severally liable for the attorney's fees he owed to the Association on his suit. Because the homeowners' association bylaw is not void, the Court held that the trial court correctly entered judgment against Appellant on his suit against the Fire Department for return of assessments. The Court held that the attorney's fee award was not supported by legally sufficient evidence (and therefore remanded for trial the issue of fees at trial) because, while the attorney who testified as to fees testified regarding the type of work performed in detail, he did not attempt to ascribe specific tasks to each of the attorneys who worked on the matter, nor did the party seeking fees offer other supporting evidence that would have done so. The Court held that testimony was legally and factually sufficient to support the award of attorney's fees. The Court modifies the unconditional award of appellate fees to make them contingent upon the Appellees' success on appeal.

Bankruptcy: *Young*, No. 02-14-00224-CV-in this negligence and DTPA suit for damages from mold in a home allegedly caused by a leak in an air conditioning system, the Court reversed the trial court's summary judgment against the plaintiffs and remanded the same to the trial court. The court held that property (to wit, the claims of the plaintiffs which accrued after the filing of the Chapter 13 bankruptcy petition, acquired after the filing of a Chapter 13 bankruptcy petition and before the conversion to Chapter 7) is not property of the Chapter 7 case, and the debtors have standing to assert

the claims in the trial court here. The Court had a lengthy discussion of why fees were not properly awarded against the homeowners' children.

Bankruptcy: *Revell*: No. 02-15-00195-CV-in this negligence case, the Court reversed the trial court's summary judgment based on Appellant's lack of standing, and remanded the case for further proceedings. The court held "that under the plain language of section 349(b)(3), the dismissal of a bankruptcy [in this case, a Chapter 13 bankruptcy] case revests the property of the bankruptcy estate 'in the entity in which such property was vested immediately before the commencement of the case' even if the debtor did not properly disclose the property during the bankruptcy." The Court also engaged in an extensive discussion of its prior decision in another standing case involving a bankruptcy (Kilpatrick v. Kilpatrick), noting that several Texas courts and "[s]everal other courts across the country" had criticized it, and holding that to the extent that its decision in Kilpatrick was based on that the caveat to section 349(b)(3), which formed the basis of the Court's holding in Kilpatrick, that holding "is neither supported by the plain, unambiguous language of that section nor necessary to protect the interests of creditors or the integrity of the bankruptcy process."

Certificate of Merit: *Gosnell*, No. 02-15-00250-CV-the Court reversed the dismissal of Appellants' claims for failure to file a certificate of merit, holding the Appellee engineers waived their right for dismissal by waiting for three and a half years to seek dismissal, waiting until thirty days before trial to move for dismissal, and only did so after participating in both voluntary and court-ordered mediation and propounding and responding to discovery, designating experts, and seeking multiple continuances. The Court held that "the totality of circumstances here paints the picture of defendants who did not intend to take advantage of their right to dismissal." " [Appellees[had years to learn whether the Gosnells' claims had merit, and a party who waits until the eve of trial to move for dismissal has obviated much of the cost reduction a dismissal would allow, while inreasing the costs for the other party and for the court system. . . .
.Though not one factor alone indicates waiver, under the totality of circumstances, Engineers' engagement in the judicial process indicated their intention to litigate and amounted to waiver. In reaching this conclusion, we reiterate that our holding is based on and limited to the specific facts and circumstances of this case."

Child Support Modification: *H.L.*, No. 02-15-00202-CV-the Court affirmed the modification of child support over Father's contention that the trial court abused its discretion by refusing to reopen the evidence.

Condemnation: *Hankins*, No. 02-14-00299-CV: the Court held on its own motion that Appellee lacked standing to bring the inverse condemnation case on which the jury awarded Appellee damages, the Court reversed the trial court's judgment based on that verdict and rendered judgment Appellee take nothing. Appellee "alleged in his pleadings that the intentional governmental act that resulted in the taking, damaging, or destruction of his property for public use was the State's installation of the pipe in 1955, which was approximately thirty years before he acquired the property," but Appellee asserts the pipe was unknown to any prior owner in the chain of title and to him when he bought the property, and there was no diminution in market value until the discovery of

the pipe. The Court held that a prior owner granted the State the right of way easement in which the pipe was laid, and "there is no pleading or proof that no prior owner in the chain of title knew about the pipe." The Court held the alleged damage occurred when the drainage pipe was constructed, not when Appellee discovered it, and because Hankins did not own the property when the State constructed the pipe, he lacks standing to bring an inverse condemnation claim.

Contract: *Hobby Lobby*, No. 02-15-00124-CV-the Court reversed and remanded on a judgment on a breach of contract claim. Even though the Court agreed that the Appellee's fraud claim "was improper as a matter of law" because "the conduct that formed the basis of the fraud claim is no different than part of the conduct that [Appellee] relied upon" to subject Appellant to liability under Appellee's contract theory, the error of the trial court in allowing the trial of the case on and submitting a jury question on a fraud theory was harmless "not only because the jury award [Appellee] damages in the amount of $0 for . . . fraud, but also because [Appellee] unsurprisingly elected to recover under its breach-of-contract theory." The Court held that the trial court abused its discretion by instructing the jury on a waiver defense, as there was legally insufficient evidence to support its submission, but that the evidence was legally and factually sufficient to support the submission of a contract-modification defense instruction, and so the trial court did not abuse its discretion in submitting such an instruction. The Court held that the charge error was harmful because it was impossible for the Court to determine whether the jury relied upon the improper waiver instruction or the proper contract-modification instruction. Because the contract-modification instruction was proper, the Court could not render judgment that Appellee's breach was not excused as a matter of law. The Court also held the jury could have reasonably concluded that Appellee did not breach the contract first. The Court also held that the "Modified Contract" was not lacking any terms that were not already excluded form the "Original Contract." The Court also ruled on a few other fact intensive issues.

Contract: *HSM Wynngate 04*, No. 02-15-00281-CV-the Court affirms the summary judgment on Appellant's declaratory judgment claims and awarding interpleaded funds to Appellee. The Court held that it agreed "with Sotherby that an actual dispute or controversy existed between the parties when Sotherby failed to cure its default in response to HSM's April 2009 letter in which HSM recognized Sotherby's default, HSM's remedies, and the date by which HSM was entitled to seek those remedies." Because Appellant did not file its declaratory judgment action until over four years later, and the parties agree that a four year statute of limitations governs declaratory judgment actions, the Court held that limitations barred Appellant's claims. The Court also held that "we need not determine whether Sotherby's claims to the earnest money under the terms of the contract are barred by limitations because even if they were, Sotherby, as the depositor, retained legal title to those funds. In this particular instance, Sotherby's legal title to the funds prevails over HSM's equitable title."

Eviction: *Fulbright*, No. 02-15-00308-CV-the Court vacated the county court at law's judgment and dismissed as moot Appellant's appeal from that judgment in an eviction suit, involving a house owned by Appellant's Mother (in which Appellant had lived with

her Mother, without a lease and without an ownership interest in the house; Appellant's Mother was eventually placed in a nursing home by Adult Protective Services). The judgment in the eviction suit awarded possession of the house to Appellee, who had been appointed Guardian of Appellant's Mother. Appellant never filed a supersedeas bond, the writ of possession issued, and Appellee sold the property to a third party. Appellant did not present any basis upon which she could assert a meritorious claim of right to current, actual possession of the residence, any judgment on the merits of this appeal would have no practical effect on the current possession of the house, and hence the appeal was moot.

Forfeiture: *2009 Black Infinity*, No. 02-14-00342-CV-the Court affirms the judgment forfeiting the car over Appellant's contentions that the evidence was legally insufficient to show the car was contraband under Code of Criminal Procedure art. 59.01, and that the evidence was factually insufficient to contradict evidence supporting Appellant's innocent-owner affirmative defense. The Court held that the evidence [not summarized here] was legally sufficient to show by a preponderance of the evidence that Appellant used the car in possession fifteen grams of methamphetamine, and therefore the car was contraband. The Court also held that Appellant's innocent owner defense was waived, in that it was not plead as an affirmative defense, and was not tried by consent because any innocent owner evidence was also relevant to whether the car was contraband.

Guardianship: *Fulbright*, No. 02-16-00230-CV-the Court dismissed the appeal about a temporary guardianship as moot, since a permanent guardian had been appointed, and because the notice of appeal was filed 11 months too late.

Guardianship: *Jones*, No. 02-15-0367-CV, the Court affirms the trial court's order appointing Appellant's sister as the permanent guardian of their Mother, over Appellant's points arguing that there was insufficient evidence to find Appellant disqualified and unsuitable to serve as guardian and that the trial court erred by granting her sister's motion in limine and striking Appellant's pleadings.

Interlocutory Appeal: *Swanson*, No. 02-15-00351-CV-the Court held that the automatic stay of activities in the trial court dictated by the rules governing an interlocutory appeal of a ruling on a plea to the jurisdiction by a governmental unit (under TCPRC 51.014(a)(8)) was triggered by the fact that the government unit filing and getting a setting on its motions for summary judgment before the deadline set in the trial court's scheduling order. The trial court did not render any orders after the stay was in place (the clerk's issuance of citation are not actions of the trial court), so it has not made any rulings upon which the Court may issue mandamus relief. The Court also held that the interlocutory appeal filed by Cross-Appellant was untimely, since it was filed forty days after the trial court's rulings, because the 20 day time frame for filing an interlocutory appeal was not extended by the provisions of TRAP 26.1(d), which (on regular appeals) gave a cross-appellant ad additional 14 days to file a notice of appeal after the Appellate filed its notice.

Intervention: *Gloria's*, No. 02-15-00354-CV-the Court affirms the judgment of the trial court, which struck Appellants' plea in intervention in the settlement on behalf of a

minor child of her claim against the defendant driver of a motor vehicle and the insurance company which provided UIM coverage for the minor's next friend. After the filing of the foregoing "friendly suit," The minor's next friend sued Appellants under the Dram Shop Act, alleging Appellants had provided the defendant driver of the motor vehicle with alcoholic beverages when it was apparent he was "obviously intoxicated to the extent that he presented a clear danger to himself and other" and because that intoxication proximately caused the collision at issue in both suits. Appellants then intervened in the friendly suit to contest the defendant driver's intoxication and proximate cause of the collision. The friendly suit trial court struck the intervention, and approved the settlement with the defendant driver (and his insurance company) and the UIM carrier. Because the friendly suit petition "unambiguously demonstrates that the lawsuit was filed for the sole and specific purpose of obtaining judicial approval of the settlements that" the minor and her next friend had against the insurance companies and the defendant driver (you might read the opinion for the list of reasons why). For that reason, the Court held that "[i]t cannot be said with any seriousness that the original petition reflects a conventional effort to impose liability" on the defendant driver and the UIM carrier "for purpose of obtaining a judgment against them for damages," and thus Appellants' arguments that the next friend "could have joined them as defendants under" TRCP 40 were premised on characterizations of the friendly suit that was fundamentally inconsistent with the true nature of the friendly suit. The Court held that Appellants did not have a justiciable interest in the friendly suit, because the plea in intervention "alleged no facts indicating that [Appellants] have any interest whatsoever that will be affected by the unique litigation between" the minor, the defendant driver, and the UIM carrier. The Appellants are fully capable of protecting their interests in the lawsuit against them, and the friendly suit would be complicated by injecting Appellants claims in it. In addition to rejecting Appellants' Rule 39 arguments, because the only relief sought in the friendly suit was what the insurance policies would pay, and because the plea in intervention was stricken the later filed cross-claims of Appellants were of no legal effect, and properly dismissed. The Court held that the appeal was not frivolous.

Limitations: *St. John Backhoe*, No. 02-15-00098-CV-the Court reversed and remanded summary judgment granted by the trial court concerning claims about farm equipment destroyed by a fire which started during the cutting of hay on a nearby property. The Court held that Appellee "did not establish as a matter of law that [Appellant] failed to file its petition before limitations expired . . . because, under [TRCP] 5, [Appellant's] petition was deemed filed [two days before limitations expired]" by virtue of Appellant then mailing the same to the District Clerk, who received the same within ten days. The Court also held that, under the circumstances here (which the Court describes in detail), "the delays [in serving Appellees] in this case do not conclusively establish that [Appellant] did not use due diligence in its efforts to serve" two of the Appellees, and that findings of the trial court in its orders for substituted service that Appellant "made 'numerous and diligent attempts to serve' [Appellees] . . . combined with [Appellant's] evidence of its attempts to secure service, is sufficient to raise a fact issue regarding its due diligence." The Court declined to consider the other bases for summary judgment raised by Appellees, which the trial court did not rule on, because doing so "would not further the interest of judicial economy in this matter."

Mandamus: *G.P.*, No. 02-16-00236-CV-the Court conditionally grants a mandamus to compel the trial judge set a hearing on, and rule on, the Grandparents' second amended motion to modify temporary orders.

Parent Child Relationship: *E.P.*, No. 02-16-0049-CV-in a case involving an annulment and a bill of review, the Court affirmed the termination of Father's parental rights. The trial court found, in a docket entry, that Grandparents were not entitled to a hearing on their second amended motion to modify temporary orders because they did not plead one of the three grounds for modification under section 156.006(b)(1)-(3). The Court held the trial court's finding is clearly erroneous because: (1) section 156.006(b)(1)-(3)'s requirement for changing the person who has the exclusive right to designate the child's primary residence apply only when that designation has been previously set through a "final order," but the only final order in this case did not designate a person with such exclusive right-only a subsequent temporary order named such a person; and (2) even if 156.006(b)(1)-(3) applied, the trial court's statement that Grandparents did not allege a basis for modification under the section is no longer correct, because the Grandparents alleged that one circumstance under the section-i.e., that the child's present circumstances would significantly impair the child's physical health or emotional development.

Parent Child Relationship: *J.W.*, No. 02-16-00068-CV-the Court affirms the termination of parental rights of Father, holding that the evidence is legally and factually sufficient to support the jury's verdict that Father had engaged in conduct or knowingly placed the child with persons who had engaged in conduct which endangered the child's physical and emotional well-being, and that termination was in the best interest of the child.

Parent Child Relationship: B.U., No. 02-16-00 -CV-the Court affirmed the trial court's modification of child support and possession over the "litany of complaints" about the pro se Appellant's attorney, the Appellee, the trial court judge, the trial court's orders, and the court of appeals.

Permissive Appeals: Davis, No. 02-16-00191-CV -the Court held that a denial of a plea to the jurisdiction, which plea claimed that a suit should be dismissed because the Appellees lacked standing to sue on behalf of a church and because of the application of the ecclesiastical abstention doctrine,is not an appealable interlocutory order, in that rights secured by the Free Exercise of Religion Clause of the Constitution are not including in the list of rights for which a dismissal is allowed by TCPRC Section 27.001-3. The Court dismissed the appeal for lack of jurisdiction.

Pro Se: Buttler, No. 02-15-00319-CV-in this case in which Appellant asked for a declaratory judgment that a deed that purported to transfer her property to Appellee was invalid, the Court affirms the trial court's sanctions order and its final judgment dismissing Appellant's claims.

Temporary Injunction: McDowell, No. 02-16-00038-CV-the Court held that an "amended or modified temporary injunction supersedes and implicitly vacates a prior

temporary injunction. . . . neither the original temporary injunction, which was implicitly vacated, nor the modified temporary injunction, which the trial court explicitly vacated, may serve as live, appealable or ders. We therefore dismiss the appeal as moot."

Trespass: Raymax, No. 02-15-00298-CV-the Court affirmed a summary judgment on claims for declaratory judgment, trespass, and unjust enrichment. As to declaratory relief, the Court held that "[f]irst, Metro placed its equipment and moved the fence into the disputed area before RayMax filed suit. The relief sought by RayMax was not preventative but sought redress for alleged injuries it had already sustained. Second, RayMax raised a claim for trespass as well as a request that the trial court declare the boundaries of the leased premises. Both claims necessarily required a determination of the boundary of the leased premises, rendering the relief sought in the declaratory-judgment claim duplicative of the trespass claim. These two facts result in declaratory relief being unavailable to RayMax as a matter of law." Because the injury complained of was permanent as a matter of law, the Court held that the trespass claim was barred by limitations because it was not brought within the requisite two year statutory period following the first actionable injury. Because the unjust enrichment claim was based on the alleged trespass, and the trespass claim was time barred, so is the unjust enrichment claim. The concurrence points out that
"because we have held that the statute of limitations barred RayMax's unjust enrichment claim against Metro, the trial court's rendering of
summary judgment in favor of ATC and Asset Sub on the identical legal theory and facts, although error, falls within the narrow confines of the harmless error exception and, therefore, does not require reversal."

Issues in Opinions by the Court in the last month in Criminal Cases. The Court provided the following summaries on its website for opinions it issued in criminal cases in the last couple of months (the following are copied verbatim from the Court's website, or are edited slightly for length):

Driving While Intoxicated

Clement v. State, No. 02-14-00267-CR (July 14, 2016) (Walker, J., joined by Gabriel, J.; Dauphinot, J., dissents with opinion).

Held: The trial court did not abuse its discretion when it allowed Officer McCoy to test Clement in court for resting nystagmus because the testing did not elicit testimonial communications and therefore did not implicate Clement's rights under the Fifth Amendment to the United States Constitution or article 1, section 10 of the Texas constitution. Because Clement's performance during the resting nystagmus testing was not testimonial in nature, the trial court also did not abuse its discretion by admitting Officer McCoy's testimony regarding the HGN results. Moreover, after reviewing the entire record, we have fair assurance that the alleged error-in admitting the prosecutor's statement in front of the jury that "if she [Clement] had resting nystagmus three years ago, she absolutely would have it today" and Officer McCoy's comment that if Clement had resting nystagmus in 2011, then "[r]ight now she would have resting nystagmus"-did not influence the jury or had but a slight effect. And because Clement's right to a fair trial was not substantially affected by the admission of the

nontestimonial in-court nystagmus testing, the results of that testing, or Officer McCoy's comment concerning resting nystagmus, the trial court did not abuse its discretion in denying Clement's motion for new trial based solely on these grounds.

Dissent: The visiting trial judge reversibly erred by allowing the prosecutor and officer to make scientific statements regarding the presence or absence of resting nystagmus in Appellant's eyes at the time of her arrest and at the time of trial when neither the prosecutor nor the officer had been designated or qualified as an expert on resting nystagmus. The trial court abused its discretion by denying Appellant's motion for new trial. The evidence here was hotly contested, and therein lies the harm. The harm was exacerbated by the trial court's denial of a continuance to respond to a Brady notice dated the same date as voir dire regarding the first officer at the scene and another denial of a continuance to allow defense counsel to retain an expert to rebut the surprise testimony that contradicted the testifying officer's offense report.

Facial Unconstitutionality

State v. Empey, No. 02-14-00407-CR (Aug. 4, 2016) (Livingston, C.J.; Dauphinot, J., dissents with opinion; Sudderth, J., concurs with opinion).

Held: Section 31.03(e)(4)(F) of the Texas Penal Code, which makes theft of certain metals a state jail felony (when the theft might otherwise constitute a less serious offense when measured by the value of the metals), is not facially unconstitutional merely because a prosecutor may choose between pursuing alternative but clearly defined penalties that may apply to the same act of theft.

Dissent: Section 31.03(e)(4)(F) of the penal code is facially unconstitutional and void for vagueness because it does not provide adequate notice to citizens of the forbidden conduct or sufficient guidance to law enforcement to prevent its arbitrary or discriminatory enforcement. Due process demands that this court affirm the trial court and that the legislature revise the statute so that it does provide adequate notice and guidance.

Concurrence: Appellant did not establish that the statute always operates unconstitutionally as required to sustain a facial challenge to constitutionality, and the facts and circumstances in this case do not otherwise present an opportunity to address the concerns about the statute raised by the trial court's findings of fact and conclusions of law and the dissenting opinion.

Outcry Witness

Reed v. State, No. 02-15-00225-CR (July 14, 2016) (Dauphinot, J., joined by Livingston, C.J., and Gardner, J.).

Held: The testimony of the three witnesses identified as outcry witnesses was properly admitted on other grounds. Appellant impeached the complainant. Her statements to two of the challenged witnesses, who testified after her, were therefore admissible as prior consistent statements under rule 801(e)(1)(B). The complainant's statements to the medical professional who performed the sexual assault exam were admissible as statements made for medical

diagnosis or treatment under rule 803(4).

The trial court did not abuse its discretion by denying Appellant's motion for mistrial after the State played a video excerpt of a police officer asking Appellant if he would be willing to submit to a polygraph exam when the trial court found that the excerpt was published to the jury inadvertently.

You can find the compilation of previous summaries the Court has issued in criminal cases on my website at Second Court Update WebPage.

All for now. I hope this helps you keep track of any cases of interest to you as they pass through or are decided by the Second Court.

Best regards.

Yours,

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