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WHEN ERROR IS HARMFUL IN THE EYE OF THE BEHOLDER

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HARM, IN THE EYE OF THE BEHOLDER

In his 1952 Law Review article, Justice Robert Calvert asked:

> "How can the practicing lawyer tell whether a particular error will be held to be reversible error, or whether the court will say that it is not convinced that the error was reasonably calculated to cause and probably did cause an improper judgment? There is no easy answer to this question."

Calvert, *The Development of the Doctrine of Harmless Error in Texas*, 31 Tex. L.Rev. 1, 18 (1952)).

In the intervening sixty-five years, the answer has not become any easier. For all of the factors, standards, and guidelines Courts have attempted to craft, there remains no test. *See McCraw v. Maris*, 828 S.W.2d 756, 757 (Tex. 1992) (noting the "impossibility of prescribing a specific test" for harmless-error review). Where there is no test, there is no predictability.

Compounding the difficulty is the truncated fashion in which a harm analysis is often treated. Depending upon the context of the error alleged, the meat of a Court's harm analysis may leave the losing party hungry and dissatisfied. Where harm like pornography, appears to litigants to be defined in by the sensibilities of a particular reviewing court, cynicism and frustration sets in.

This year's crop of cases which touch upon identifying harm or the import of establishing harm yield few lasting lessons. Nevertheless, in this paper, I will present several areas in which a harm analysis has developed or emerged over the past year. Those general areas are: (1) harmless error in summary judgment practice; (2) harmless error in mandamus practice; and (3) harmless error in venue practice. I include, in the end, a listing of the other most notable Texas harmless/harmful error cases for this 2016-17 period in a summary fashion because most of the cases follow the familiar patterns of old:

- Because Texas provides no bright line for a harmless error analysis, Texas Courts' handling of the harm analysis is unpredictable.
- Because a harm analysis is conducted by Texas Courts on the facts and circumstances of each case, the cases are largely cases of one.
- Texas Courts' harm analysis is often conclusory.
- Texas Courts' harmless-error holdings are frequently made in the alternative to the controlling holding.

I. Harmless error in summary judgment practice

Background: In 1993, the Texas Supreme Court held that a summary judgment may not be affirmed on a ground not raised in the motion for summary judgment. *Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993); *see also State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010) (reaffirming that a "[s]ummary judgment

may not be affirmed on appeal on a ground not presented to the trial court in the motion"). However, in *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) the Texas Supreme Court created an exception to the *Stiles* bright-line: Even if a trial court errs in granting summary judgment on a claim not addressed by any summary-judgment ground, the error is harmless when the unaddressed claim "is precluded as a matter of law by other grounds raised in the case." *Id*. at 298.

In *Magee*, a negligent entrustment case, plaintiffs sued not only the vehicle owner ("entrustor"), but also G & H Towing, alleging their vicarious liability for the entrustor's negligence. Entrustor moved for summary judgment on plaintiffs' vicarious liability claim. G & H Towing moved for summary judgment on other grounds, but failed to move specifically on the vicarious-liability theory. The trial court granted summary judgment for both entrustor and G & H Towing on all claims. Notwithstanding the trial court's error in granting a summary judgment not actually sought, the Texas Supreme Court affirmed. The Court held that because the entrustor obtained summary judgment establishing that he did not negligently entrust, G & H Towing "cannot have vicarious liability for [entrustor's] negligent entrustment." Stated differently, if the entrustor is not liable for an entrustment tort, G & H Towing cannot be vicariously liable.

Although the *Magee* Court explicitly crafted a single exception, it referenced without adopting two additional exceptions from *Wilson v. Davis,* 305 S.W.3d 57, 73 (Tex.App.-Houston [1st Dist.] 2009, no pet.): "(1) when the movant has conclusively proved or disproved a matter that would also preclude the unaddressed claim as a matter of law and (2) when the unaddressed claim is derivative of the addressed claim and the movant proved its entitlement to summary judgment on the addressed claim." Apparently, because these exceptions were mentioned in *Magee*, Courts of Appeals since *Magee* are adopting these exceptions, as well. *See e.g. Bridgestone Lakes Cmty. Improvement Assoc., Inc. v. Bridgestone Lakes Dev. Co.*, 489 S.W.3d 118, 130 (Tex. App.—Houston [14th Dist.] 2016, pet. filed) (Frost, C.J., concurring) (citing *Continental Cas. Co.,* 365 S.W.3d 165, 173 (Tex. App. – Houston [14th Dist.] 2012, pet. denied) as "articulat[ing] two other exceptions to the *Stiles* rule, apparently by judicial dictum").

And, in the context of post-motion amended petitions, Courts of Appeals will affirm a summary judgment that does not capture the new pleading if (1) the amended or supplemental petition essentially reiterates previously pleaded causes of action, (2) a ground asserted in the motion for summary judgment conclusively negates a common element of the newly and previously pleaded claims, or (3) the original motion is broad enough to encompass the newly asserted claims. *See e.g. Callahan v. Vitesse Aviation Serv., LLC*, 397 S.W.3d 342, 350 (Tex. App.–Dallas 2013, no pet.); *see also Coterill–Jenkins v. Texas Med. Ass'n Health Care Liability Claim Trust*, 383 S.W.3d 581, 592 (Tex. App.–Houston [14th Dist.] 2012, pet. denied).

In the past year, the Texas Supreme Court issued a single case in which it evaluated a participant's reliance upon a harmless error analysis. *See Ineos USA v. Elmgren*, 505 S.W.3d 555 (Tex. 2016). Johannes "Joe" Elmgren suffered burn injuries while working

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