

PRESENTED AT

28th Annual Conference on State and Federal Appeals

June 14-15, 2018

Austin, TX

Recent Cases and Developments Regarding Harmful/Harmless Error

Tyler Somes & Philip Durst

Author Contact Information:

Tyler Somes & Philip Durst

Deats Durst & Owen, P.L.L.C.

Austin, TX

pdurst@ddollaw.com

512-474-6200

RECENT CASES AND DEVELOPMENTS REGARDING HARMFUL/HARMLESS ERROR

*Tyler Somes & Philip Durst*¹

Deats Durst & Owen, P.L.L.C.

707 West 34th St.

Austin, Texas 78705

512-474-6200

pdurst@ddollaw.com

TEXAS SUPREME COURT CASES

***Diamond Offshore Servs. v. Williams*, No. 16-0434, 2018 Tex. LEXIS 186 (Mar. 2, 2018):**

In this personal injury suit, the Supreme Court found an abuse of discretion where the trial court refused to admit surveillance video under TEX. R. EVID. 403 without viewing it first. *Id.* at *1. Because exclusion of the video probably caused the rendition of an improper judgment, the court reversed and rendered for a new trial. *Id.* at *4.

Diamond Offshore Services Limited and Diamond Offshore Services Company (collectively "Diamond") employed Willie Williams as a senior mechanic on an offshore drilling rig. *Id.* at *4. While working alone on a heavy piece of equipment, Williams hurt his back. *Id.* Williams has continuing pain and neurological issues despite two surgeries, and was characterized by his physician as "totally disabled." *Id.*

Diamond asserted a defensive theory that Williams was exaggerating his injuries. *Id.* at *4-5. They employed an investigator to follow Williams around and film him conduct yard work, house work and maintenance on his truck. *Id.* at *5. Williams argued that this footage should be excluded as unfairly prejudicial under Rule 403. *Id.* at *7. The trial judge excluded the evidence on Rule 403 grounds without reviewing the video. *Id.* The court of appeals affirmed. *Id.* at *8.

Although emphasizing the discretion of the trial court to exclude evidence under Rule 403, the Supreme Court held that excluding the video without viewing it constituted an abuse of discretion by the trial judge. *Id.* at *9. It wrote: "we hold that, as a general rule, a trial court should view video evidence before ruling on admissibility when the contents of the video are at issue." *Id.* at *11. It separately viewed the video and determined that it should not have been excluded under Rule 403 because its probative value to a key defensive theory outweighed the danger of unfair prejudice. *Id.* at 19.

The Supreme Court applied an abuse of discretion standard of appellate review. *Id.* at *9. Under that standard, it found that the errors probably caused the rendition of an improper verdict because the video was "crucial to the defensive theories of exaggeration and dishonesty." *Id.* at *22. The Court noted that two-thirds of the jury's nearly \$10 million damages consisted of "soft damages" such as pain and suffering. *Id.* It speculated that seeing the video could have altered those subjective numbers, as well as the amount due to the plaintiff for lost earning capacity if they believed he could do some type of job. *Id.* It also noted that the video could have affected the liability determination, because it may have impacted the jury's assessment of the plaintiff's credibility. *Id.* The video's exclusion therefore constituted harmful error and required a new trial. *Id.* at *22.

¹ Lee Palmer helped draft an earlier version of this paper.

***Caffe Ribs, Inc. v. State*, 487 S.W.3d 137 (Tex. 2016):**

In May 2005, the State of Texas initiated a statutory condemnation proceeding against Caffe Ribs, Inc., the owner of a contaminated tract of land that the state wanted for its expansion of Highway 10. *Id.* at *140. Special commissioners were appointed to value the property, but Caffe and the state both objected to the valuation and the case proceeded to trial. *Id.* The first trial was reversed for harmful error due to improperly excluded evidence. *Id.* This case concerns the second trial. *Id.*

Before the second trial, the state filed a motion to exclude all testimony concerning its role in delaying the property's remediation in the previous years. *Id.* at *141. Caffe made offers of proof for the testimony it would have elicited from two experts. *Id.* These experts would have stated that the state unnecessarily delayed the clean up of the property, resulting in a depressed value at the time of trial. *Id.* The trial court granted the motion to exclude. *Id.* At trial, the jury returned a valuation of just under \$5 million. *Id.* at *142. This was about \$1 million higher than the state's expert asserted, but several million dollars less than Caffe asserted. *Id.* Caffe's appealed on the basis that the exclusion of its experts was harmful error. *Id.* The court of appeals affirmed, holding that "even if the trial court abused its discretion in excluding [the experts'] proffered testimony, the exclusion was harmless." *Id.*

The Supreme Court disagreed under an abuse of discretion standard. *Id.* at *142. The Court determined that the project-influence rule, which holds that any change in value to a property resulting from the government's intention to take it must be excluded from the compensation value, did not justify excluding the experts' testimony. *Id.* at *143. On the contrary, it found that the rule required admission of the evidence. *Id.* In doing so, it overruled the court of appeals. *Id.*

Finally, the Court found that the exclusion of the evidence constituted harmful error because it probably caused the rendition of an improper judgment. *Id.* at 144-45. It reasoned that the error was harmful "because it allowed the State to use an eight-year holding period to reduce the property's value without allowing the jury to consider the role the State played in creating that holding period." *Id.* at *145. As a result, the Court remanded for a new trial. *Id.*

***JLG Trucking, LLC v. Garza*, 466 S.W.3d 157 (Tex. 2015):**

The Supreme Court considered whether a trial court abused its discretion by excluding evidence of a second accident in a lawsuit about an accident occurring two months prior. *Id.* at 158. It ruled that evidence about the second accident was relevant under Tex. R. Evid. 401 to the causation element of the plaintiff's negligence claim because the second accident could have been an alternative cause of the plaintiff's injuries. *Id.*

In 2008, plaintiff Lauren Garza was traveling South on U.S. Highway 83 when an 18-wheeler driven by a JLG Trucking, LLC employee rear-ended her truck. *Id.* at *159. Garza testified that her aunt immediately took her to an emergency clinic, where x-rays were taken. *Id.* Five days later, she saw an orthopedic surgeon, who noted straightening of the lordotic curve, which he attempted to muscle spasms. *Id.* Garza underwent physical therapy treatments for about eleven weeks on the surgeon's recommendation. *Id.* at *159-60.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

Title search: Recent Cases and Developments Regarding Harmful/Harmless Error

Also available as part of the eCourse

[2018 eConference on State and Federal Appeals](#)

First appeared as part of the conference materials for the 28th Annual Conference on State and Federal Appeals session "Harmless Error"