

# Letter of the Law

August 2005

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## RECENT OPINIONS : THE GOOD, THE BAD, AND THE UGLY

### TEXAS SUPREME COURT

#### Arbitration

#### **Non-Signatory Not Required To Arbitrate**

Unidynamics agreed to fabricate for MacGregor a set of elevator trunks for a cruise ship. Their contract included an arbitration clause. Unidynamics subcontracted with KBR to furnish labor for the fabrication. That contract did not include an arbitration clause. MacGregor and Unidynamics got into a dispute, which was arbitrated. In the meantime, KBR sued both companies for unpaid work. MacGregor moved to abate the state-court suit and force KBR to arbitrate. The trial court denied the motion but the appeals court required KBR to arbitrate. The Texas Supreme Court granted mandamus vacating the appeals court's order. KBR's quantum meruit claim against MacGregor did not require arbitration because KBR was not claiming a direct benefit under the MacGregor-Unidynamics contract. *In re Kellogg Brown & Root, Inc.*, 48 Tex. Sup. Ct. J. 678 (May 20, 2005).

#### **Party Cannot Defeat Arbitration Agreement Through Ignorance**

Rohlack signed a customer account agreement with his broker, McKinney. That agreement included an arbitration clause. Unhappy with margin sales that substantially reduced his account, Rohlack sued. McKinney moved to compel arbitration, a motion that was denied. The Texas Supreme Court granted mandamus requiring arbitration. Rohlack claimed that he did not understand that by signing the customer account agree-

ment, he was agreeing to arbitration of disputes. That excuse did not negate the arbitration clause. Absent fraud, when parties sign an unambiguous contract, that contract is given effect. *In re McKinney*, 48 Tex. Sup. Ct. J. 947 (July 1, 2005).

#### Attorney Disqualification

#### **No Disqualification Because Client Waived Potential Conflict Of Interest**

WSNet Holdings hired Vinson & Elkins ("V&E") to draft an asset purchase agreement for assets of another company. That purchase was never consummated. A year later, a WSNet shareholder sued Cerberus alleging that it had usurped WSNet's corporate opportunity to buy the assets of the other company. Cerberus hired V&E to represent it. V&E obtained a waiver letter from WSNet for any potential conflicts. WSNet later went into bankruptcy and the trustee sought V&E's disqualification, which the trial court granted. The Texas Supreme Court granted mandamus reversing the disqualification. WSNet knowingly waived any conflict and could not disqualify V&E. *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379 (Tex. 2005).

#### Defamation

#### **Public Figure Did Not Prove Actual Malice**

After Cantu ran for and won election as sheriff, he sued FNT for defamation for a pre-election article headlined "Cantu: No Anglo Can Be Sheriff Of Cameron County." The day after the

article appeared, FNT published a second article in which Cantu said that he meant candidates in the Valley must be bicultural. FNT moved for summary judgment on the absence of actual malice. The trial and appeals courts denied FNT summary judgment. The Texas Supreme Court reversed and rendered. Although Cantu never used the explicit words in the paper's first headline, the two articles were a rational interpretation of what Cantu actually said. Those articles were no evidence of actual malice. *Freedom Newspapers of Texas v. Cantu*, 48 Tex. Sup. Ct. J. 916 (June 24, 2005).

#### Employment

#### **Employer's Absence Control Policy Protected It From Wrongful-Discharge Suit**

Hernandez was injured at work and filed a workers' comp claim against Haggar. After Hernandez had been off work for a year, Haggar fired her under a leave-of-absence policy establishing one year as the maximum time an employee could remain on leave, regardless of the reason. Hernandez sued Haggar for retaliatory discharge. A jury found for Hernandez; the appeals court affirmed. The Texas Supreme Court reversed and rendered. Although Hernandez offered some evidence of retaliatory discharge, an employer who

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# RECENT OPINIONS: TEXAS SUPREME COURT

fires an employee under a reasonable, uniformly-enforced absence control policy, as here, is not liable for retaliatory discharge. Haggar Clothing Co. v. Hernandez, 164 S.W.3d 386 (Tex. 2005).

## Gross Negligence

### **No Gross Negligence Shown In Cutting Of Competitor's Fiberoptic Cables**

Qwest and AT&T compete in fiberoptic communications. While laying fiberoptic cables on a large project, Qwest cut AT&T's fiberoptic cable on three occasions. AT&T sued Qwest and recovered actual and punitive damages. The appeals court affirmed but the Texas Supreme Court reversed and rendered the punitive-damages award. Although Qwest had a general corporate policy to work rapidly, a policy AT&T claimed led to the cable cuts, that policy, standing alone, did not involve an extreme degree of risk considering the probability and magnitude of potential harm to others. Qwest Int'l Communications, Inc. v. AT&T Corp., 48 Tex. Sup. Ct. J. 911 (June 24, 2005).

## Negligence

### **Conspiracy Could Not Be Predicated On Negligence**

Two sisters were sexually assaulted by a Buddhist monk. They sued the monk's superiors and various Buddhist organizations. A jury found the defendants negligent, found a conspiracy, and awarded large damages. The trial court disregarded the conspiracy finding but the appeals court reversed, finding a conspiracy and holding each defendant liable for the entire judgment. The Texas Supreme Court reversed and rendered. Parties cannot conspire to be negligent. A joint intent to engage in conduct that results in an injury does not establish a conspiracy unless the parties intentionally, not negligently, caused injury. Tri v. J.T.T., 162 S.W.3d 552 (Tex. 2005).

## COURTS OF APPEALS

### Causation

#### **Rube Goldberg Events Do Not Establish Causation**

Swan was hired to install and reseal five roof drains on Fidelity's insured's building. Evidently, a small leak soaked a ceiling tile that fell, bounced off a bathroom mirror, hit a faucet and turned it on, then blocked the sink drain so that the sink overflowed, flooding the building over a weekend. Fidelity paid its insured then sued Swan, which won summary judgment on the absence of causation. The appeals court affirmed. This unlikely chain of events was too remotely connected with Swan's work to constitute a legal cause of the flooding. Fidelity & Deposit Ins. v. Swan Roofing, L.L.C., No. 05-04-00434-CV, Dallas, July 15, 2005.

#### **Expert Not Needed To Establish Causation In Death Of Filly**

Lovewell boarded a mare and filly with the Gabriels. The filly died while in the Gabriels' care. Lovewell sued and recovered a \$60,000 judgment. The appeals court affirmed. Although the Gabriels eventually called in veterinarians, they self-treated the filly's respiratory distress and diarrhea for four days before asking for veterinary help. The jury could have concluded that the Gabriels caused the filly's death based on Lovewell's recounting of his conversation with one of the treating veterinarians. Lovewell did not need to offer direct expert testimony on causation. Gabriel v. Lovewell, 164 S.W.3d 835 (Tex. App.—Texarkana 2005).

### Damages

#### **No Evidence Of Future Mental Anguish Over Sexual Assault**

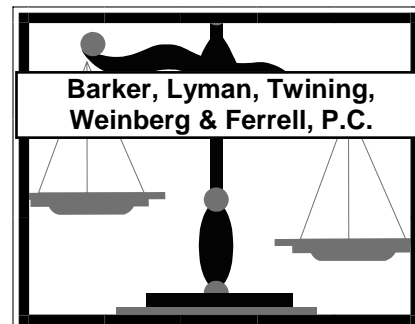
A.B., who was undergoing rehabilitation therapy at TIRR, reported that she had been sexually assaulted by another

brain-injured patient. Her mother, N.N., sued TIRR and a jury awarded A.B. past mental anguish and \$625,000 future mental anguish. The trial court vacated the award for future anguish; the appeals court affirmed. A.B.'s case went to trial five years after the assault. She did not directly testify about the nature, duration, or severity of her mental anguish. Other testimony related solely to her past-mental-anguish claim. Her expert did not adequately address future mental anguish, either. N.N. v. The Institute for Rehabilitation & Research, No. 01-02-01101-CV, Houston [1st Dist.], July 21, 2005.

### Duty

#### **Nonsubscriber Owed Its Employee Duty To Furnish Safe Equipment**

Skiles worked for Jack-in-the-Box as a truck driver. When he tried to unload meat from a truck, the lift gates would not function. Skiles called in the problem but used a ladder to climb into the truck because the local restaurant needed the meat right then. He injured his knee climbing into the truck and sued Jack-in-the-Box. The trial court granted Jack-in-the-Box summary judgment, which was reversed and remanded. Jack-in-the-Box owed Skiles a duty to furnish him with a working lift gate and also owed him a duty when he called in to warn him against using a ladder to access the meat. There was some evidence that it breached those duties and that the breach proximately caused the injury. Skiles v. Jack-in-the-Box, Inc., No. 05-04-00412-CV, Dallas, July 7, 2005.



# RECENT OPINIONS: COURTS OF APPEALS

## Evidence

### **Expert Testimony Struck Because Expert Could Not Validate Independent Lab's Testing**

The State of Texas sought to terminate parental rights to two children. A jury found that termination was in the children's best interest, but the appeals court reversed and remanded. The State offered an expert to testify that hair samples taken from the parents tested positive for cocaine. Although the expert was an expert on collecting specimens for testing, he sent the hairs to an out-of-state laboratory for evaluation. The expert knew and testified about what kinds of tests were run, but he had no expertise in the actual testing of the samples or the reliability of the instruments used by the lab. Thus, he could not vouch for the reliability of the test results, which were therefore inadmissible. In re S.E.W., No. 05-03-01175-CV, Dallas, May 19, 2005.

## Limitations

### **Discovery Rule Did Not Toll Limitations In Construction-Defect Case**

After closing on their new house in 12/96, the Deans began noticing cracks in the foundation and throughout the house. By 10/97, they had met with the house's engineer, Neal, and others to discuss chemically injecting the soil underneath the house to stop potential foundation movement. Meetings continued over the next four years before the Deans sued Neal and others in 1/2002. The trial court granted all defendants a limitations-based summary judgment, which was affirmed. The Deans knew or should have known of the injury to their home by 10/97. There was no evidence that any of the defendants affirmatively misled the Deans into delaying the filing of suit. Dean v. Frank W. Neal Assoc., Inc., No. 02-04-00034-CV, Fort Worth, May 19, 2005.

## Negligence

### **Sudden-Emergency Instruction Proper For Stopped Traffic**

As Moore crested a hill on Loop 610 in Houston, the traffic in his lane was stopped dead, stacked up at a freeway exit. He swerved into the emergency lane but rear-ended Jordan's car. She sued Moore and his employer, Sava. The jury refused to find Moore negligent and the appeals court affirmed a take-nothing judgment. A sudden-emergency instruction was proper because there was evidence that when Moore crested the hill, he faced an emergency condition that arose suddenly and unexpectedly from his viewpoint. Jordan v. Sava, Inc., No. 01-03-00554-CV, Houston [1st Dist.], May 19, 2005.

## Premises Liability

### **Chapter 95 Barred Claims For Injuries To Subcontractor's Employee**

The Paschals hired contractors to assist in construction on their ranch. Rueda, a subcontractor's employee, was seriously injured while using the Paschals' wooden ladder, which slipped. He sued. The trial court granted the Paschals summary judgment, which was affirmed. Under Ch. 95, Tex. Civ. Prac. & Rem. Code, the Paschals were not liable unless they controlled the work and knew about the dangerous condition. Rueda offered no evidence that the Paschals knew about the allegedly dangerous condition of the ladder. Thus, Rueda could not recover against them. Rueda v. Paschal, No. 01-04-00744-CV, Houston [1st Dist.], June 23, 2004.

### **No Constructive Notice Of Premises Defect**

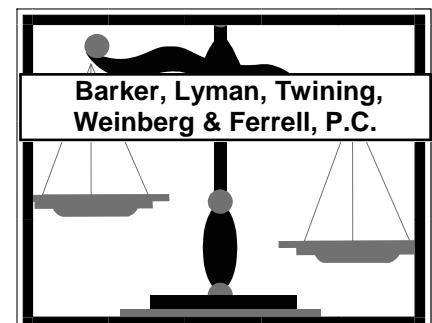
As Bendigo walked down a parking garage stairwell at the airport, she slipped on a disposable cup and fell, injuring her ankle. She sued the city and

the parking garage managers. The managers won summary judgment, which was affirmed. Bendigo offered no evidence that the managers had actual or constructive knowledge of the allegedly dangerous condition. A 14-hour gap between stairwell inspections did not establish constructive notice because the cup could have fallen on the stairwell at any time, 13 hours before the accident or five minutes before. Bendigo v. City of Houston, No. 01-04-00443-CV, Houston [1st Dist.], June 23, 2005.

## Settlement

### **No Settlement Credit Between Tort And Contract Defendants**

K&O sued CTTI, the general contractor, and also sued the architect and the engineer over a cracked foundation in the building defendants designed and built. K&O recovered \$1 million against CTTI from a jury. The trial court refused to give CTTI a settlement credit for a co-defendant's settlement of \$200,000. The appeals court affirmed. CTTI was liable to K&O for breach of contract; the co-defendants were liable in tort. The one-satisfaction rule says that a plaintiff should not be compensated twice for the same injury. But that rule did not apply here because, legally, the injury from a tort is not the same injury as from a breach of contract. Defendants liable in tort are not joint tortfeasors of a defendant liable in contract. CTTI Priesmeyer, Inc. v. K&O Ltd. P'ship, 164 S.W.3d 675 (Tex. App.—Austin 2005).



# INSURANCE / WORKERS' COMPENSATION UPDATE

## TEXAS SUPREME COURT

### Insurance Contracts

#### **Excess Carrier Entitled To Recover Settlement Payment From Its Insured**

Frank's installed a drilling platform for ARCO that collapsed. ARCO sued and sent Frank's a settlement offer within the excess policy limits. Frank's demanded that Underwriters pay the full amount regardless of coverage issues. Underwriters did so, then sued Frank's for reimbursement. The trial court granted Frank's summary judgment, finding there was no coverage but that Underwriters had no right to reimbursement. The appeals court affirmed. The Texas Supreme Court reversed and rendered. An insured made aware of coverage issues cannot force an insurer to settle, then argue that the insurer waived its coverage defenses. Once the insured demands a settlement which the insurer pays, the insurer is entitled to reimbursement on a finding of no coverage. Excess Underwriters at Lloyd's, London v. Frank's Casing Crew and Rental Tools, Inc., 48 Tex. Sup. Ct. J. 735 (May 27, 2005).

## COURTS OF APPEALS

### Insurance Contracts

#### **Insurer Did Not Waive Appraisal Provision**

A fire damaged Johnson's home. She made a claim with her homeowners insurer, State Farm, which invoked the policy's appraisal provision. Johnson filed suit. State Farm moved to abate until an appraisal process was completed; the trial court denied the motion based on waiver. The court of appeals granted mandamus requiring abatement for the appraisal process. Johnson offered no evidence that State Farm failed to comply with any policy provisions or that it intentionally relinquished its right to enforce the appraisal provision. In re State Farm Lloyds, Inc., No. 08-05-00054-CV, El Paso, May 19, 2005.

### Insurance Policy Construction

#### **Insurer Owed No Duty To Defend Misrepresentation Claim**

The Heaton's sued the Huffhineses for failing to disclose defects in a town home they sold to the Heaton's. An amended complaint alleged that the Huffhineses negligently failed to repair water problems and to disclose defects in the property. State Farm, the Huffhineses' homeowners insurer, accepted a defense on the amended petition but would not pay for defense costs incurred defending the original petition. In a coverage action, the trial court granted State Farm summary judgment, which was affirmed. The Heaton's original allegations of failure to disclose known defects did not trigger coverage for an occurrence. Huffhines v. State Farm Lloyds, No. 14-04-00681-CV, Houston [14th Dist.], June 2, 2005.

#### **Construction Defect Claim Was An Occurrence; SIR Limited Coverage**

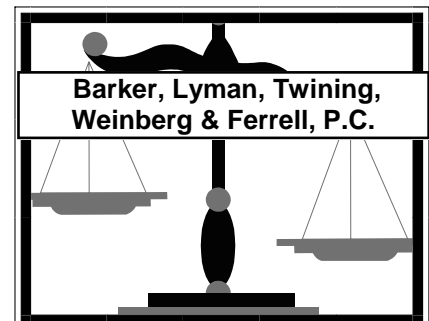
Lennar built about 400 homes using synthetic stucco ("EIFS"). When it realized the EIFS was a defective product, it voluntarily replaced the EIFS with traditional stucco, then requested indemnity from its general liability carriers for its repair and replacement costs. The carriers declined to indemnify Lennar and won summary judgment. The appeals court affirmed in part and remanded in part. It found an occurrence because the damage resulting from the EIFS was unexpected and unintended. It also found property damage coverage for the cost of repairing water damage to the homes. But most insurers owed no indemnity because Lennar's \$250,000 per occurrence self-insured retention ("SIR") applied to each house separately (i.e., each house was a separate occurrence) and the covered damages to each house did not exceed the SIR. Lennar Corp. v. Great American Ins. Co., No. 14-02-00860-CV, Houston [14th Dist.], June 2, 2005.

#### **Settling Insurer Owed Continuing Defense**

Six children sued alleging that a counselor at a YMCA camp sexually assaulted them. The YMCA had general liability coverage with TIG, which contributed a \$1 million occurrence limit towards settling three claims. It then filed a coverage action alleging that it no longer owed a duty to defend the YMCA. The trial court granted the YMCA summary judgment, which was affirmed. Although TIG's sexual-abuse endorsement limited coverage to one occurrence limit, the remaining plaintiffs' pleadings arguably alleged physical abuse unrelated to the sexual abuse, thereby triggering TIG's bodily injury aggregate limit and a continuing duty to defend. TIG Ins. Co. v. San Antonio YMCA, No. 04-04-00017-CV, San Antonio, July 13, 2005.

#### **Insurer Did Not Owe Additional Insured A Defense**

Doolin, a construction worker, was injured when a construction trailer blew over in high winds. He sued TIP, the owner of the unit. TIP requested a defense from Continental, Doolin's employer's insurer, as an additional insured. Continental denied a defense and won summary judgment in the subsequent coverage action. The appeals court affirmed. Continental's policy excluded coverage for bodily injury arising out of the sole negligence of the additional insured. Doolin's petition did not allege negligence on the part of anyone other than TIP; therefore, the exclusion applied. Transport Int'l Pool, Inc. v. Continental Ins. Co., No. 02-04-00176-CV, Fort Worth, June 2, 2005.



# INSURANCE / WORKERS' COMPENSATION UPDATE

## Limitations

### **Fact Question Existed About Limitations**

A Via Net employee was injured and sued Safety Lights, which was supposed to be an additional insured under the Via Net liability policy. A pre-accident certificate of insurance showed Safety Lights as an additional insured but included the usual disclaimer language. On 12/9/1997, Safety Lights learned it was not an additional insured. After settling with the employee, Safety Lights's insurer, TIG, sued Via Net for breach of contract on 12/9/2001. The trial court granted Via Net summary judgment on limitations, holding that the certificate's disclaimer put Safety Lights on notice to ask about its additional-insured status. The appeals court reversed and remanded. The certificate's disclaimer language did not conclusively put Safety Lights on notice that it was not an additional insured. TIG Ins. Co. v. Via Net, No. 01-04-00102-CV, Houston [1st Dist.], May 19, 2005.

## Statutory Construction

### **Only Two Impairment Ratings Were Relevant In The Trial Court**

Ragsdale was injured at work after falling down a flight of stairs. He filed a claim under the workers' comp act. FIC's doctor gave Ragsdale a 0% impairment rating ("IR"). A designated reviewing doctor said that preexisting problems combined with the fall down the stairs gave Ragsdale a 67% IR. The commission awarded Ragsdale a 67% IR, which FIC appealed. The trial court asked the jury whether Ragsdale had a 0% or 67% IR; the jury found 67%. The appeals court affirmed. Under the comp act, the jury must adopt the specific rating of one of the doctors. TEX. LAB. CODE § 410.306. Since the jury could not split the difference, the either/or choice of IRs was proper. Financial Ins. Co. v. Ragsdale, No. 08-04-00018-CV, El Paso, June 30, 2005.

### **Worker Entitled To Lifetime Income Benefits**

While working, Barchus sustained a traumatic brain injury. He sought lifetime income benefits ("LIBs") under the workers' comp act but the comp commission denied his claim. Barchus appealed to the district court, which granted summary judgment against him. The appeals court reversed and rendered. At the time, the comp act provided LIBs for an injury to the skull resulting in incurable insanity or imbecility. TEX. LAB. CODE § 408.161. The statute did not require a fractured skull. Because Barchus sustained an injury to his skull that resulted in imbecility, State Farm owed him LIBs. Barchus v. State Farm Fire & Cas. Co., No. 14-04-00320-CV, Houston [14th Dist.], June 28, 2005.

## Subrogation

### **Made-Whole Doctrine Eliminated Subrogation Rights**

Cantu was rendered a paraplegic in a car accident. She recovered \$1.5 million in settlements, after which her health insurer, Fortis, demanded reimbursement of \$250,000 in medical payments. The trial court granted summary judgment for Cantu, which was affirmed. Cantu proved past and future medical expenses totaling at least \$2 million. Because the \$1.5 million did not "make her whole," Fortis was not entitled to reimbursement. A boilerplate provision in the Fortis policy that it was entitled to first monies received by the insured could not override the made-whole doctrine. Fortis Benefits v. Cantu, No. 10-04-00080-CV, Waco, July 13, 2005.

## Waiver

### **Insurer Waived Its Right To Contest Compensability**

Serpas worked for Tandem, a staffing agency. While assigned to Igloo, he was injured. Hartford was the workers' comp carrier for Tandem and ICSP for

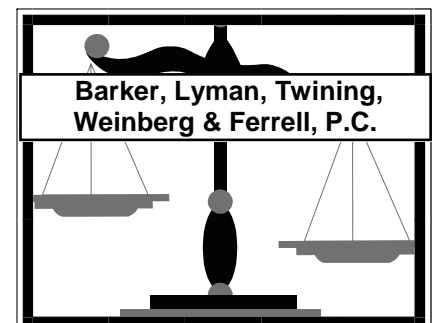
Igloo. Hartford began paying Serpas comp benefits; years later, Hartford requested a comp commission ruling that ICSP owed comp payments. The commission denied Hartford's claim but the trial court granted Hartford summary judgment against ICSP. The appeals court reversed and rendered. Under the comp statute, Hartford had 60 days to contest the claim. It did not meet that deadline and waived its rights. Insurance Co. of the State of Pennsylvania v. Hartford Underwriters Ins. Co., 164 S.W.3d 747 (Tex. App.—Houston [14th Dist.] 2005).

## **FIFTH CIRCUIT**

### Insurance Policy Construction

### **Insurer Did Not Waive Proof Of Loss Under Flood Policy**

Wright bought a flood insurance policy, written through the National Flood Insurance Program, from Allstate. After Tropical Storm Allison damaged his house, Wright made a claim. He and Allstate disagreed on the claim amount and Wright refused to sign a proof of loss ("POL"). Wright sued Allstate. The district court held that Allstate was equitably estopped from denying the claim based on the lack of a POL. The Fifth Circuit reversed. An insured pursuing a federal flood insurance claim must file a POL within 60 days. Because federal funds were involved, Allstate could not be equitably estopped from raising that defense to Wright's claim. Wright v. Allstate Ins. Co., No. 04-20493 (5th Cir., June 28, 2005).



# PROFESSIONAL LIABILITY UPDATE

## TEXAS SUPREME COURT

### Arbitration

#### **Plaintiffs Required To Arbitrate Malpractice Claim**

When Lyman was admitted to Nexion's nursing home, his wife Marjorie signed an arbitration agreement with the home providing that any disputes over care would be arbitrated. Lyman died and Marjorie sued the home for medical malpractice. The home's motion to compel arbitration was denied. The Texas Supreme Court granted mandamus ordering arbitration. Medicare paid for some of the services rendered to Lyman. Evidence of the Medicare payments established a connection to interstate commerce that made the Federal Arbitration Act ("FAA") applicable. Under the FAA, the arbitration clause was enforceable even though the Lymans did not have an attorney review and sign the agreement (a requirement under the Texas Arbitration Act in personal-injury cases). In re Nexion Health at Humble, Inc., 48 Tex. Sup. Ct. J. 805 (May 27, 2005).

### Negligence

#### **PAs Were Jointly And Severally Liable For Direct Negligence**

Alexander died while undergoing routine arthroscopic surgery. His family sued the hospital, a nurse anesthetist, and two doctors and their professional associations ("PAs"). Although the hospital paid the nurse anesthetist, the PAs selected, trained, and supervised her. A jury found both PAs negligent, found the nurse was their employee, and found a joint venture. The trial court entered judgment for joint and several liability against the PAs. The appeals court and Texas Supreme Court affirmed. There was legally sufficient expert evidence that the PAs fell below the standard of care in training and supervising the anesthetist. The PAs were directly liable. Battaglia v. Alexander, 48 Tex. Sup. Ct. J. 720 (May 27, 2005).

#### **Hospital Defeated Negligent-Credentialing Claim By Standing On Its Privilege**

During back surgery performed by Dr. Baker, Romero suffered severe brain damage. He sued the hospital for negligence and grossly negligent credentialing and won \$23 million. The appeals court reversed, a reversal the Texas Supreme Court affirmed. Romero had no access to the hospital's credentialing records because the hospital would not waive its privilege to keep those records confidential. Without those records, Romero could not prove that the hospital's response to Dr. Baker's known drug abuse problem was consciously indifferent. That absence of clear and convincing evidence of conscious indifference precluded a punitive-damages recovery. A retrial was required because the jury charge erroneously mixed the valid negligence claim with the unsupported credentialing claim. Romero v. KPH Consolidation, Inc., 48 Tex. Sup. Ct. J. 752 (May 27, 2005).

### Statutory Construction

#### **Expert Report Needed In Lack-Of-Informed-Consent Case**

Russell sued Dr. Murphy alleging that during a biopsy, he gave her general anesthesia without her consent. The trial court dismissed Russell's suit because she failed to provide an expert report under former art. 4590i. The appeals court reversed, holding that Russell's allegation that Dr. Murphy gave her a general anesthetic when he had promised to use only a local anesthetic stated a claim that did not require an expert report. The Texas Supreme Court reversed and dismissed. Dr. Murphy may have needed to give a general anesthetic despite his promise not to do so; only an expert could say whether a general anesthetic was needed. Since Russell was required to file an expert report and did not do so, the trial court properly dismissed. Murphy v. Russell, 48 Tex. Sup. Ct. J. 943 (July 1, 2005).

## COURTS OF APPEALS

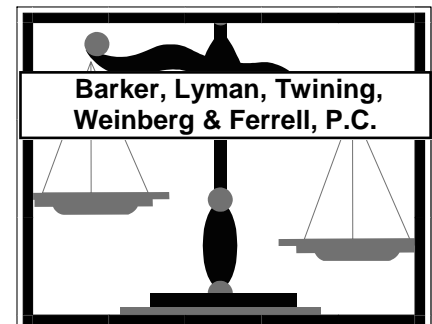
### Statutory Construction

#### **Affidavit Faulting Engineer Not Filed; Case Dismissed**

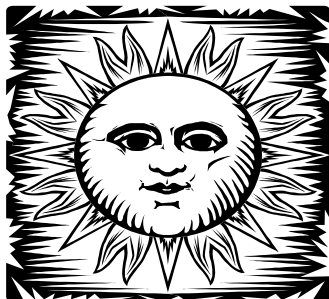
Palladian sued Nortex for engineering negligence but did not file the statutorily required expert engineer's affidavit setting forth negligent conduct by Nortex. See TEX. CIV. PRAC. & REM. CODE § 150.002. The trial court dismissed the case without prejudice. The appeals court affirmed. Although Palladian said that it had an expert affidavit, it never produced the affidavit. The trial court did not abuse its discretion by dismissing under § 150.002. Palladian Bldg. Co., Inc. v. Nortex Found. Designs, Inc., 165 S.W.3d 430 (Tex. App.—Fort Worth 2005).

#### **Anesthesiologist Proper Expert Against Chiropractor**

Vicento sued Dr. Group, a chiropractor, for failure to properly treat his back injury. Dr. Saqer, an anesthesiologist, provided an expert report criticizing Dr. Group's work. Dr. Group moved to dismiss Vicento's case, arguing that Dr. Saqer could not render an opinion on the chiropractic standard of care. The trial court denied dismissal and the appeals court affirmed. Dr. Saqer was a qualified specialist in pain management who treated patients with the same therapies used by chiropractors. Nothing in Tex. Civ. Prac. & Rem. Code § 74.402 requires a qualified expert to have the same specialty as the defendant. Group v. Vicento, 164 S.W.3d 724 (Tex. App.—Houston [14th Dist.] 2005).



# HOT ISSUES BEFORE THE TEXAS SUPREME COURT



## **HOT ISSUE 1 — Does an insurer owe a co-insurer a duty not to undervalue the case?**

Kinsel was sued for injuries arising out of a highway accident. Liberty Mutual and Mid-Continent both provided primary coverage (Liberty Mutual also had umbrella coverage) and jointly defended the case, which settled for \$1.5 million. Mid-Continent evaluated the case at \$300,000 and would only pay \$150,000 of the settlement. Liberty Mutual sued Mid-Continent for an additional \$600,000 contribution to the settlement and a federal court entered judgment for Liberty Mutual. On appeal, the Fifth Circuit certified the issue to the Texas Supreme Court, which granted review and will hear oral argument October 18, 2005. Liberty Mut. Ins. Co. v. Mid-Continent Ins. Co., No. 05-0261, May 13, 2005 (405 F.3d 296).

## **HOT ISSUE 2 — May extrinsic evidence be used to defeat a duty to defend?**

Doe sued the church alleging that a youth minister engaged in sexual misconduct with her. GuideOne defended under reservation of rights and filed a coverage action because the youth minister had ceased working at the church before the GuideOne policy went into effect. The trial court granted GuideOne summary judgment but the appeals court reversed and remanded because Doe's pleadings alleged that the youth minister worked for the church during GuideOne's policy period. The Texas Supreme Court granted review and will

hear oral argument October 20, 2005. GuideOne Elite Ins. Co. v. Fielder Road Baptist Church, No. 04-0692, June 17, 2005 (CA 139 S.W.3d 384).

## **HOT ISSUE 3 — Can plaintiff recover for fraud in addition to breach of contract?**

Chapa sued the car dealership for failing to deliver a car with the features promised. A jury found in favor of Chapa on all claims, but the trial court entered judgment only on her contract claim. The appeals court reversed, upholding recovery on fraud and DTPA claims and for punitive damages. The Texas Supreme Court granted review and will hear oral argument October 19, 2005. Tony Gullo Motors I, L.P. v. Chapa, No. 04-0961, June 10, 2005 (CA \_\_\_ S.W.3d \_\_\_).

## **HOT ISSUE 4 — Was there sufficient evidence of gross negligence?**

Ramirez was injured at Fifth Club's bar in an altercation with police officers hired to provide private security. Ramirez sued Fifth Club and recovered actual and punitive damages based on a gross-negligence finding. The appeals court affirmed. The Texas Supreme Court granted review and will hear oral argument October 18, 2005. Fifth Club, Inc. v. Ramirez, No. 04-0550, June 10, 2005 (CA 144 S.W.3d 574).

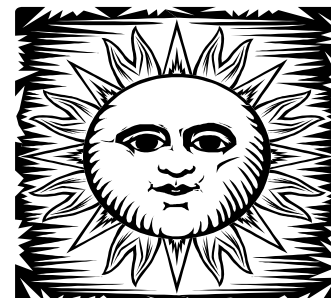
## **HOT ISSUE 5 — Can plaintiff directly sue defendant's liability insurer for indemnity coverage for the defendant?**

Foose sued Cox and others over a multi-vehicle wreck. She added Central as a defendant alleging that a policy issued by Central to a separate entity required Central to defend and indemnify Cox. Central moved to dismiss for want of jurisdiction but the trial court denied the motion. Central filed a mandamus petition that was denied by the

appeals court. The Texas Supreme Court granted review and will hear oral argument September 27, 2005. In re Central Mut. Ins. Co., No. 04-0014, May 13, 2005 (CA \_\_\_ S.W.3d \_\_\_).

## **HOT ISSUE 6 — May plaintiff's counsel retain an insurer's confidential materials?**

Cowan sued FIE over disputes arising under a homeowners policy. During discovery, FIE agreed to produce, subject to protective order, confidential and proprietary claims handling manuals and other materials. The protective order allowed plaintiff's attorneys to retain and use the documents in future cases. FIE's request for mandamus on that issue was denied by the appeals court. The Texas Supreme Court granted review and will hear oral argument October 19, 2005. In re Fire Ins. Exch., No. 04-1010, June 10, 2005 (CA \_\_\_ S.W.3d \_\_\_).



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