

Letter of the Law

August 2006

Volume 13 Issue 4

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

TEXAS SUPREME COURT

Arbitration

Standard Construction Industry Form Required Arbitration

Brownsville ISD sued Wilson, a general contractor, for alleged defects in a school built by Wilson and its subcontractors. Wilson moved for arbitration, which the trial and appeals courts denied. The Texas Supreme Court granted mandamus requiring arbitration. An arbitration clause in the standard American Institute of Architects form A201 required arbitration. An additional clause in the standard supplementary conditions did not create an ambiguity nor negate the broader arbitration requirement. In re D. Wilson Constr. Co., 196 S.W.3d 774 (Tex. 2006).

At-Will Employee Accepted Arbitration When He Accepted Employment

When Harris began working for Peterbilt, he received a summary of a mutual agreement to arbitrate claims. He accepted employment and continued working. Peterbilt fired Harris, who sued for discrimination, retaliation, and other torts. Peterbilt moved for arbitration, which the trial court denied. The Texas Supreme Court granted mandamus requiring arbitration. Even if Harris did not receive the actual arbitration agreement, he was on notice based on the summary of the agreement. He agreed to employment with that knowledge, thereby accepting arbitration. In re Dallas Peterbilt Ltd., L.L.P., 196 S.W.3d 161 (Tex. 2006).

Opt-Out Provision Did Not Negate Arbitration Agreement

The Ripples bought a manufactured home made by Palm Harbor Homes and sold by its distributor, PHV. The Ripples sued both companies, which moved for arbitration under the Ripples' arbitration agreement with PHV. The trial court denied arbitration. The Texas Supreme Court granted mandamus requiring arbitration. A clause allowing the maker to opt out of arbitration within 20 days did not make the arbitration agreement illusory. The maker was a third-party beneficiary of the contract. It was not required to provide independent consideration to create a binding agreement. In re Palm Harbor Homes, Inc., 195 S.W.3d 672 (Tex. 2006).

Duty

Bar Not Liable For Off-Duty Peace Officer's Conduct

Ramirez was injured at Fifth Club's bar in an altercation with West, a peace officer hired to provide private security. Ramirez sued Fifth Club and West and recovered damages. The appeals court affirmed. The Texas Supreme Court reversed and rendered a take-nothing judgment for Fifth Club, which had hired West as an independent contractor. Fifth Club did not retain or exercise control over West in his security duties. It therefore owed Ramirez no duty. The court refused to adopt a rule making businesses vicariously liable for the conduct of independent contractors they hire to provide security. Fifth Club, Inc. v. Ramirez, 196 S.W.3d 788 (Tex. 2006).

Employer Not Liable For Employee's Off-Duty Conduct

Tingle and fellow Loram employees began using crystal methamphetamine to stay awake during their 13 to 14-hour work days. One night after work, while on drugs, Tingle began abusing his wife. She screamed for help. Police officer Ianni responded and Tingle shot him. He sued Loram and recovered actual and punitive damages. The appeals court affirmed. The Texas Supreme Court reversed and rendered. An employer owes no duty to protect the public from the wrongful acts of off-duty employees unless the employer exercises control over the off-duty activity that causes the harm. Here, although Loram knew of its employees' drug use, it owed no duty to Ianni because it never tried to exercise control over Tingle's off-duty behavior. Loram Maintenance of Way, Inc. v. Ianni, 49 Tex. Sup. Ct. J. 874 (June 30, 2006).

Bee Seller Owed Buyer's Employee No Duty

Wilhelm sold his 14 beehives to Black, a commercial beekeeper. Black hired Flores to move the hives and provided Flores with protective clothing. Bees got into the clothing and stung Flores, who died from an allergic reaction. His family sued Wilhelm, against

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RECENT OPINIONS: TEXAS SUPREME COURT

whom the jury awarded damages. The appeals court affirmed. The Texas Supreme Court reversed and rendered. Wilhelm did not hire Flores nor control his work. Wilhelm owed Flores no duty. Wilhelm v. Flores, 195 S.W.3d 96 (Tex. 2006).

Malicious Prosecution

No Evidence That Store Lacked Probable Cause To Call Police

As Suberu was leaving a Kroger store, she was stopped and eventually arrested for allegedly trying to steal \$200 in groceries. A jury acquitted her on theft charges and she sued Kroger for malicious prosecution. A jury awarded Suberu damages and the appeals court affirmed. The Texas Supreme Court reversed and rendered. Innocence on criminal charges is not the same as lack of probable cause to report a crime. Suberu did not overcome the presumption that Kroger reported the possible crime in good faith. Suberu offered no evidence that Kroger had a preexisting animus toward her, conspired to arrest her, or withheld exculpatory information from police. Kroger Texas Ltd. P'ship v. Suberu, 49 Tex. Sup. Ct. J. 592 (May 5, 2006).

Negligence

Employer Is Not Insurer Of Employee's Safety

While putting groceries into a car, Elwood was injured when the customer shut the car door on his hand. He sued his employer, Kroger, a nonsubscriber, for negligence. A jury awarded him damages and the appeals court affirmed. The Texas Supreme Court reversed and rendered. Employers do not insure the safety of their employees. Kroger owed Elwood no duty to warn him of the commonly known danger of putting his hand on a car doorjamb or to dissuade him from using a doorjamb for leverage. The Kroger Co. v. Elwood, 49 Tex. Sup. Ct. J. 623 (May 12, 2006).

Procedure

Instruction On "Independent Cause" Not Required

Dew, a subcontractor's employee, fell through a hole in a drilling rig to his death. His family sued the rig erector, Crown Derrick, and a jury awarded the family damages. The appeals court reversed, holding that Crown Derrick was entitled to a "new and independent cause" instruction. The Texas Supreme Court reversed and remanded. Crown Derrick left a double-rope barricade around the hole when it left the rig for a month. That barricade was not necessarily adequate and a change in the barricade was foreseeable, negating the right to an instruction because a new and independent cause must supersede the defendant's initial negligence. Dew v. Crown Derrick Erectors, Inc., 49 Tex. Sup. Ct. J. 851 (June 30, 2006).

Products Liability

No Evidence Of Manufacturing Defect

Mendez lost control of a minivan, which rolled over, killing six of seven occupants. Plaintiffs sued Cooper alleging the accident was caused by a defective tire. A jury found for plaintiffs and the appeals court affirmed. The Texas Supreme Court reversed and rendered. Evidence that the tire separation originated from contaminated skim stock rather than from a nail hole in the tire or from some other cause was legally insufficient. Plaintiffs' experts did not conduct the testing necessary or provide reliable peer-reviewed research to support their conclusions that contaminated skim stock caused the failure. Cooper Tire & Rubber Co. v. Mendez, 49 Tex. Sup. Ct. J. 751 (June 16, 2006).

Texas Tort Claims Act

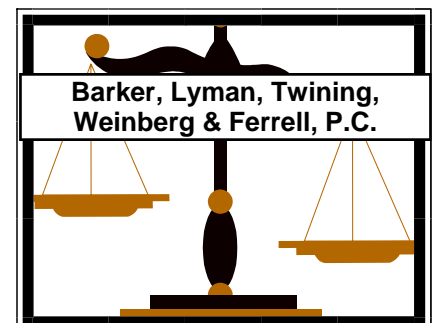
City Not Liable For Failing To Install Signal

While pulling out from a temporary stop sign, Sipes was hit by a truck com-

ing the other way. She sued the City under the Texas Tort Claims Act ("TTCA") alleging that the City had improperly delayed installing a permanent traffic signal. The trial court granted the City summary judgment but the appeals court reversed. The Texas Supreme Court reversed and rendered. The City's initial decision to install a traffic signal was discretionary. Although there was a delay in installation of the signal, that delay did not subject the City to liability because TTCA liability for the "absence" of a signal presumes a prior presence of the signal. The City of Grapevine v. Sipes, 195 S.W.3d 689 (Tex. 2006).

Recreational Use Statute Does Not Immunize A Governmental Entity

The Shumakes' young daughter, Kayla, drowned while tubing on the Blanco River after being sucked into an unscreened culvert. The Shumakes sued the State, which filed a plea to the jurisdiction based on the recreational use statute, Tex. Civ. Prac. & Rem. Code § 75.002. The trial and appeals courts denied the plea to the jurisdiction, holding that the recreational use statute does not bar premises-defect claims under the Texas Tort Claims Act. The Texas Supreme Court affirmed. Texas's recreational use statute requires proof of gross negligence, a higher than normal burden of proof, for liability for accidents on recreational land. But the statute does not immunize a governmental entity from a premises-defect claim altogether. State of Texas v. Shumake, 49 Tex. Sup. Ct. J. 769 (June 23, 2006).



RECENT OPINIONS: COURTS OF APPEALS

Flooding Created An Emergency Condition Precluding City's Liability

A downpour created widespread flooding in the City. Although the City tried to barricade a flooded intersection, a car with four people drove into the flood waters. All drowned. Their survivors sued the City. The City moved for dismissal based on governmental immunity in responding to an emergency. The trial and appeal courts denied the motion. The Texas Supreme Court reversed and dismissed. A 100-year flood created an emergency situation. At the time of the flooding, the City issued a declaration of a disaster. A city's governmental immunity is not waived during the city's response to an emergency situation, even if the response in one area is allegedly deficient. City of San Antonio v. Hartman, 49 Tex. Sup. Ct. J. 1011 (August 31, 2006).

COURTS OF APPEALS

Discovery

Expert Did Not Have To Produce Past Expert Reports In Other Cases

Rawls sued Plains over an auto wreck. Plains hired Dr. Levine to review Rawls's medical records and render an opinion. During Dr. Levine's deposition, he admitted that he worked primarily for the defense and that he had worked for the attorneys representing Plains at least 15 times. Rawls moved to compel Dr. Levine to produce his medical evaluation reports in prior lawsuits. The trial court granted the motion. The appeals court granted mandamus setting aside the order. Although Rule 192.3(e)(5), Tex. R. Civ. Pro., permits discovery of information regarding an expert witness's bias, that discovery must be narrowly tailored. Rawls's request for all reports in prior lawsuits was too broad and not well-tailored to the issue of bias. In re Plains Marketing, L.P., 195 S.W.3d 780 (Tex. App.—Beaumont 2006).

Employment

Church's Alleged Defamation After Firing Not Actionable

Patton was fired from his job as youth minister at a Methodist church. He sued Pastor Jones and others for tortious interference and defamation. The trial court dismissed the case for lack of jurisdiction based on the First Amendment. The appeals court affirmed. Employment decisions about a church "minister" are internal church matters not subject to court review. A "minister" includes all church employees whose primary functions serve the church's spiritual and pastoral mission. Patton served in that role, eliminating his claims. His claim for allegedly defamatory statements made after his firing failed because the claim flowed entirely from his employment dispute with the church, the defamatory statements were confined within the church, and there were no unusual or egregious circumstances surrounding the statements. Patton v. Jones, No. 03-04-00389-CV, Austin, July 28, 2006.

Experts

No Evidence That Exposure To Pesticides Caused Laryngeal Cancer

Torres worked as a foreman for Dietz on a farming operation. As part of his work, Torres used pesticides. He was diagnosed with laryngeal cancer and sued Dietz for negligently failing to provide protective equipment for handling pesticides. A jury awarded Torres \$6 million. The appeals court reversed and rendered. Torres's expert did not have any reliable studies establishing a scientific relationship between exposure to pesticides and laryngeal cancer. The expert's testimony was not sufficient to establish a general causal connection between pesticides and laryngeal cancer or a specific causal connection between Torres's exposure and his cancer. Matt Dietz Co. v. Torres, No. 04-05-00552-CV, San Antonio, May 24, 2006.

Premises Liability

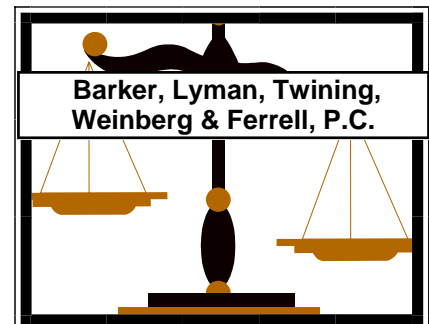
Condition May Have Been Unreasonably Dangerous

While in the parking lot of a Pappas restaurant, Eubanks slipped and fell, tearing his rotator cuff. He sued Pappas and lost on summary judgment. The appeals court reversed and remanded. Eubanks averred that he slipped on slime caused by decomposing leaves left behind by Pappas's landscaping employees. That evidence raised a fact issue of an unreasonably dangerous condition. Eubanks v. Pappas Restaurants, Inc., No. 01-05-00833-CV, Houston [1st Dist.], June 1, 2006.

Statutory Construction

Retroactive Application Of Law Limiting Asbestos Liability Upheld

Robinson sued Crown Cork and others over her husband's death of mesothelioma caused by asbestos exposure. Crown Cork admitted liability. Before the trial court entered judgment, though, the Legislature enacted legislation limiting the liability of successor corporations for asbestos-related claims. The law applied retroactively. Ch. 149 TEX. CIV. PRAC. & REM. CODE. Because Crown Cork was a successor corporation with newly limited liability, the trial court granted it judgment. The appeals court affirmed. It held that the statute does not violate the Texas Constitution's prohibition on retroactive laws. Robinson v. Crown Cork & Seal Co., No. 14-04-00658-CV, Houston [14th Dist.], May 4, 2006.



INSURANCE / WORKERS' COMPENSATION UPDATE

TEXAS SUPREME COURT

Insurance Policy Construction

Company Was An Additional Insured Except For Its Sole Negligence

A Triple S employee died while working at Atofina's refinery. His family sued. Atofina sought coverage as an additional insured under an umbrella policy issued to Triple S by Evanston, which denied Atofina's claim. Atofina sued Evanston and lost on summary judgment. The appeals court reversed. The Texas Supreme Court affirmed in part and reversed in part. Evanston's policy contained two sections under which Atofina qualified as an insured. The court read those two provisions in harmony and held that Atofina was an additional insured except for its sole negligence. The court remanded for a determination of whether Atofina's sole negligence caused the death. Evanston Ins. Co. v. Atofina Petrochemicals, Inc., 49 Tex. Sup. Ct. J. 589 (May 5, 2006).

Insurer Could Not Use Extrinsic Evidence To Defeat 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 church stipulated that the youth minister had ceased working at the church before the GuideOne policy went into effect, the trial court granted GuideOne summary judgment. The appeals court reversed and remanded. The Texas Supreme Court affirmed. Doe's pleadings alleged that the youth minister worked for the church during GuideOne's policy period. The court would not allow the use of extrinsic evidence that, as here, contradicted the underlying petition and touched on the merits of the underlying claim. GuideOne Elite Ins. Co. v. Fielder Rd. Bap. Church, 197 S.W.3d 305 (Tex. 2006).

Ensuing-Loss Provision Did Not Trump Mold Exclusion

The Fiesses sued State Farm, their homeowners insurer, for damages caused by mold growing in their house. They alleged that undetected water leaks had created the mold problem. The federal district court granted State Farm a no-coverage summary judgment. The Fifth Circuit certified the coverage question to the Texas Supreme Court, which held that the exclusion for "loss caused by mold" unambiguously eliminated coverage. An exception for ensuing losses did not apply because "ensuing" means something that follows from, not something that precedes. Thus, the ensuing-loss provision would only restore coverage for damage from water leaks caused by mold, not for mold caused by water leaks. Fiess v. State Farm Lloyds, 49 Tex. Sup. Ct. J. 996 (August 31, 2006).

COURTS OF APPEALS

Bad Faith

Insurer Properly Investigated And Paid Hospital Lien

After an auto accident, Richards incurred hospital expenses of over \$8,000. ANPAC, the insurer for the other driver, settled Richards's claim for \$20,000 and issued two checks, one of which included the hospital's name. Richards sued ANPAC for bad faith alleging that the hospital should not have been a payee on the settlement check because the hospital lien was not timely filed. The trial court granted ANPAC summary judgment, which was affirmed. The hospital lien was filed the day checks were issued and before Richards received the checks; thus, he was not "paid" before the filing, which was timely. TEX. PROP. CODE § 55.005 (a). ANPAC acted reasonably in investigating the lien and including the hospital as a payee on one settlement check. Richards v. American Nat'l Prop. & Cas. Co., 195 S.W.3d 758 (Tex. App.—Beaumont 2006).

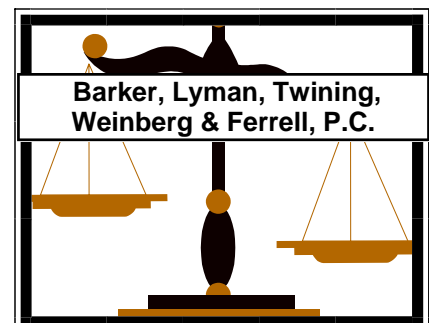
Insurance Policy Construction

Insurer Did Not Prove Prejudice From Late Notice

A contractor's employee was injured at a Coastal refinery. He sued Coastal, which began defending itself. A month before trial, Coastal notified USF&G, under whose policy it was an additional insured, about the suit. After the case settled, USF&G filed a declaratory-judgment action against Coastal. The trial court granted USF&G summary judgment holding that, based on late notice and noncooperation, it owed no duty to pay. The appeals court reversed and remanded. USF&G's policy explicitly required prejudice before late notice barred a claim. USF&G did not prove prejudice or noncooperation. Coastal Ref. Mktg., Inc. v. United States Fid. & Guar. Co., No. 14-04-00651-CV, Houston [14th Dist.], May 30, 2006.

Homeowners Insurer Owed Only One Policy Limit

Following Tropical Storm Allison, the Coatses filed a claim with their homeowners insurer, Farmers, for water and roof damage to their home. Farmers eventually paid policy limits on the dwelling loss. Four months later, the Coatses filed a new claim for damages caused by an HVAC overflow. Farmers denied that claim and the Coatses sued. The trial court granted Farmers summary judgment, which the appeals court affirmed in part and reversed in part. Farmers did not owe more money for the HVAC overflow because it had already paid a total loss under the policy. The Coatses raised a fact issue on



INSURANCE / WORKERS' COMPENSATION UPDATE

their prompt-payment claim, though, for Farmers's delay in paying the first loss. Coats v. Farmers Ins. Exch., No. 14-04-00686-CV, Houston [14th Dist.], June 29, 2006.

Appraisal Clause Triggered

After Johnson's roof was damaged by hail, she submitted a claim to State Farm, her homeowners insurer. State Farm concluded that only the ridgeline of the roof was damaged and that repairs cost less than the deductible. It denied payment. Johnson demanded an appraisal, then sued State Farm when it refused to submit to the appraisal process. The trial court granted State Farm summary judgment, which was reversed and remanded. The appraisal clause applied to disputes over the amount of loss. Johnson and State Farm disagreed about the extent of roof damage, not the potential coverage for it. Thus, the dispute concerned the amount of loss, an issue for the appraisal process. Johnson v. State Farm Lloyds, No. 05-05-00640-CV, Dallas, July 25, 2006.

Exposure Rule Applied In Construction Defect Case

Pine Oak, a homebuilder, was sued by five homeowners for damages resulting from defective exterior finishing systems. Great American, its commercial general liability insurer, denied a defense and, in the coverage action, won summary judgment. The appeals court reversed and remanded. The homes were built in the late 1990's. Great American policies were in effect from 1993 to 2001. The court applied an exposure trigger, holding that policies in effect for any period during which property damage was allegedly caused, even if unmanifested, potentially covered the claim. Because plaintiffs alleged that damage occurred with every rainfall after construction finished, Great American owed a defense. Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co., No. 14-05-00487-CV, Houston [14th Dist.], July 6, 2006.

Manifestation Rule Applied In Construction Defect Case

Summit, a homebuilder, was sued for damages to one of its houses resulting from a defective exterior finishing system. Great American, its commercial general liability insurer, denied a defense and, in the coverage action, won summary judgment. The appeals court reversed and remanded. Summit built the house in 1996 and Great American policies were in effect from 1996-2000. Although the court applied a manifestation trigger, and the underlying pleadings were vague about when damage manifested, Great American did not establish that damage did not manifest sometime during its policies periods. It owed a defense because claims for unintentionally negligent construction are potentially covered occurrences. Summit Custom Homes, Inc. v. Great Am. Lloyds Ins. Co., No. 05-05-00851-CV, Dallas, July 18, 2006.

Late Notice Barred Coverage Under D&O Policy

Prodigy was sued for alleged violations of federal securities laws. Eleven months after suit was filed, it gave written notice of the suit to AESIC, which covered Prodigy under a directors and officers ("D&O") liability policy. The trial court granted AESIC summary judgment based on late notice under the policy. The appeals court affirmed. Under the policy, Prodigy had to provide written notice of a claim "as soon as practicable." It failed to do so. Oral notice was not a substitute and, under a D&O policy, AESIC was not required to show that it was prejudiced by the late notice. Prodigy Communications Corp. v. Agricultural Excess & Surplus Ins. Co., 195 S.W.3d 764 (Tex. App.—Dallas 2006, pet filed).

Compliance With Cooperation Clause Is Condition Precedent To Coverage

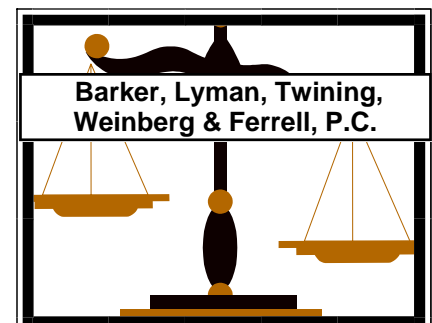
Treviño sued Alvarado, a Progressive insured, over a collision. Alvarado refused to cooperate with his defense at-

torney, who withdrew. Treviño took a postanswer default judgment against Alvarado, then sued Progressive to recover the damages awarded. The trial court granted Treviño judgment but the appeals court reversed and rendered. Because compliance with the cooperation clause is a condition precedent to coverage, Treviño had to offer evidence of Alvarado's cooperation. No such evidence was offered. Progressive proved that it was prejudiced by Alvarado's noncooperation. It showed that Alvarado's conduct prevented the defense attorney from mounting a defense. Progressive County Mut. Ins. Co. v. Treviño, No. 04-05-00113-CV, San Antonio, June 28, 2006.

Subrogation

Comp Carrier's Intervention Wrongly Denied

Ledbetter sued third parties over the on-the-job death of her husband. At a settlement hearing, the trial court denied the intervention of TMIC, the comp carrier for Ledbetter's husband's employer, and awarded the \$2.4 million settlement to the husband's estate rather than to Ledbetter individually. The appeals court reversed and remanded. TMIC had a right to intervene and the trial court did not deny the intervention based on delay. Further, given the undisputed evidence, the trial court could not circumvent the comp lien by apportioning all \$2.4 million to the estate for conscious pain and suffering when there was little evidence, if any, of such damages. Texas Mut. Ins. Co. v. Ledbetter, 192 S.W.3d 912 (Tex. App.—Eastland 2006).



PROFESSIONAL LIABILITY UPDATE

TEXAS SUPREME COURT

Contracts

Contingent Fee Agreement Was Unconscionable

Walton hired Hoover under a contingent fee agreement to represent him in disputes over oil and gas leases. Walton rejected a \$6 million settlement offer that required him to sell his property interests. He fired Hoover and later settled for less money without selling his interests. Hoover sued Walton on its contingent fee agreement, which required immediate payment of the present value of the contingent fee when the firm was discharged. Hoover won \$900,000 attorney's fees. The appeals court reversed. The Texas Supreme Court affirmed. The discharge clause was unconscionable because it required a fee payment before the case was concluded and based the payment on a then present value of the case rather than on the case's final settlement or judgment value. Hoover, Slovacek, L.L.P. v. Walton, 49 Tex. Sup. Ct. J. 895 (June 30, 2006).

Duty

Decedent's Estate May Sue The Attorneys Who Drafted The Will

Terk paid the law firm to draft his will. After Terk died, his estate sued the law firm alleging that because of the firm's negligence, Terk's estate paid more than \$1.5 million in unnecessary estate taxes. The trial court granted the law firm summary judgment based on the lack of privity between the estate and the law firm. The appeals court affirmed. The Texas Supreme Court reversed and remanded. Although an attorney is not in privity with the beneficiaries of an estate, and owes them no duty, an estate's representatives are extensions of the original client, to whom the attorneys owe a duty. Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780 (Tex. 2006).

Evidence

Medical-Malpractice Expert Was Properly Disqualified

Downing sued Dr. Larson for negligently performing two surgeries to correct a left orbital (eye) blowout fracture. The trial court granted Dr. Larson summary judgment after striking the testimony of Dr. Bell, Downing's expert, because Dr. Bell had not performed the same kind of surgery in 15 years. The appeals court reversed. The Texas Supreme Court reversed and rendered holding that the trial court did not abuse its discretion in striking Dr. Bell's testimony. Although a close call, the trial court could have properly concluded that Dr. Bell was too far removed from the relevant surgical practice and from teaching that practice. Larson v. Downing, 197 S.W.3d 303 (Tex. 2006).

Statutory Construction

Medical Expert Report Did Not Meet Statutory Requirements

Langley went to the emergency room with abdominal pain. He was treated by Dr. Jernigan but died two days later. His family sued Dr. Jernigan and others. The trial court dismissed the suit against Dr. Jernigan for an inadequate expert report but the appeals court reversed. The Texas Supreme Court reversed and rendered. Dr. Jernigan's name appeared in only one line of the report. It did not identify with specificity how Dr. Jernigan breached the standard of care or caused Langley's death. Jernigan v. Langley, 195 S.W.3d 91 (Tex. 2006).

COURTS OF APPEALS

Causes of Action

Plaintiff Raised Fact Issue On Express Warranty Claim

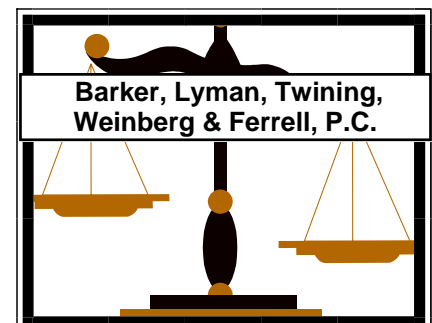
Mills sued Dr. Pate over the results of two liposuction surgeries. The trial court granted Dr. Pate a no-evidence

summary judgment, which the appeals court affirmed except on a claim for breach of express warranty. Mills sued untimely on the first surgery. She offered sufficient evidence that Dr. Pate made specific representations about the results of the second surgery, though, to raise a fact issue on an express-warranty claim. Dr. Pate argued that an express warranty in a medical-malpractice case requires a written agreement, but that argument raised an affirmative defense not part of Mills's burden of proof. Mills v. Pate, No. 08-04-00335-CV, El Paso, June 1, 2006.

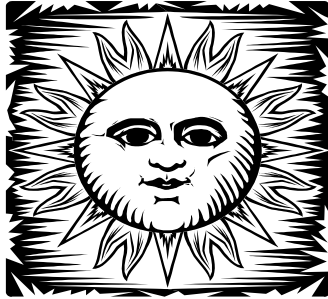
Duty

Doctor Owed Patient Duty On Followup Of Surgery He Did Not Perform

Surber suffered from allergic fungal sinusitis. Dr. Burke and others operated on him for that condition. During the surgery, Surber had a bleed in his sinus cavity that was cauterized. Weeks later, Surber underwent a second surgery for bleeding. Dr. Burke did not perform that surgery but was aware of it when he saw Surber for a followup visit ten days later. Six days after the followup visit, Surber died. His family sued alleging that Dr. Burke and others failed to timely diagnose bleeding of the internal carotid artery. A jury awarded the family damages and the appeals court affirmed. Although Dr. Burke did not perform the second surgery, he owed Surber a duty because he knew about the surgery when he saw Surber in followup for the first surgery. Brandt v. Surber, 194 S.W.3d 108 (Tex. App.—Corpus Christi 2006, pet. filed).



HOT ISSUES BEFORE THE TEXAS SUPREME COURT



HOT ISSUE 1 — Can independent contractor recover against landlord and tenant?

Moritz, a truck driver, was loading items onto his truck at a warehouse owned by TCLP and leased to GE. As Moritz loaded the items, a rubber tie-down strap broke. Moritz fell off the truck and was injured. He sued GE and TCLP and the trial court granted defendants summary judgment. The appeals court reversed and remanded, finding fact issues under premises-liability theories. The Texas Supreme Court granted review and will hear oral argument October 17, 2006. General Elec. Co. v. Moritz, No. 04-0871, May 5, 2006 (CA ___ S.W.3d ___).

HOT ISSUE 2 — Can manufacturer pay a proportionate share of seller's defense costs?

Plaintiffs sued 30 manufacturers and sellers of allegedly defective latex gloves. O&M, a seller, sued Ansell and other manufacturers for indemnity. The district court granted the manufacturers summary judgment, holding that they owed O&M a defense only in proportion to the alleged sale of each specific manufacturer's product. The Fifth Circuit certified the question whether each manufacturer owed a full defense or a proportional defense to the Texas Supreme Court, which granted review and will hear oral argument October 19, 2006. Owens & Minor, Inc. v. Ansell Health Care Prod., Inc., No. 06-0322, May 5, 2006 (447 F.3d 371).

HOT ISSUE 3 — Did evidence support finding that benzene exposure caused leukemia?

The Pollocks moved to a house abutting a landfill owned by the City. Two years later, they had a daughter. She was diagnosed with leukemia at age 4. The Pollocks sued the City alleging that during Mrs. Pollock's pregnancy, benzene gas from the landfill seeped into their home, causing their daughter to develop leukemia. A jury found for the Pollocks. The appeals court affirmed. The Texas Supreme Court granted review and will hear oral argument October 18, 2006. City of San Antonio v. Pollock, No. 04-1118, May 5, 2006 (CA 155 S.W.3d 322).

HOT ISSUE 4 — Did university's use of water sprinkler subject it to liability?

Flynn sued SFA alleging that as she rode her bicycle on a public trail, a water sprinkler on SFA property came on suddenly, hitting her in the head and causing her injuries. The trial and appeals courts denied SFA's plea to the jurisdiction, holding that use of a water sprinkler was not a discretionary function and that the recreational use statute did not bar the claim. The Texas Supreme Court granted review and will hear oral argument October 19, 2006. Stephen F. Austin State Univ. v. Flynn, No. 04-0515, June 30, 2006 (CA ___ S.W.3d ___).

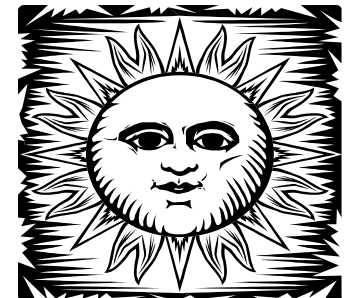
HOT ISSUE 5 — Does made-whole doctrine eliminate subrogation rights?

Cantu was rendered paraplegic in a car wreck. 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 Cantu summary judgment, which was affirmed, based on the holding that because the \$1.5 million did not "make Cantu whole," Fortis was not entitled to reim-

bursement. The Texas Supreme Court granted review and will hear oral argument November 16, 2006. Fortis Benefits v. Cantu, No. 05-0791, August 25, 2006 (CA 170 S.W.3d 755).

HOT ISSUE 6 — Did open-courts provision toll limitations on malpractice claim?

Boyd was diagnosed with Stage IV colorectal cancer in 2002. She sued various health care providers, who won summary judgment for all claims arising more than two years before suit was filed. The appeals court reversed and remanded, holding that Boyd did not have a reasonable opportunity to discover the incorrect diagnoses and file suit. The Texas Supreme Court granted review and will hear oral argument December 7, 2006. Kallam v. Boyd, No. 05-0027, September 1, 2006 (CA ___ S.W.3d ___).



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