

Letter of the Law

February 2005

Volume 12 Issue 2

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

TEXAS SUPREME COURT

Attorney Disqualification

Client's Work For Attorney Did Not Require Attorney's Disqualification

Bill Sanders hired McKnight to represent him in a bitterly fought divorce case. Because he could not afford to pay McKnight the full fee, Bill partially paid by performing remodeling work on McKnight's law office. One month before trial, Bill's wife, Joyce, moved to disqualify McKnight. The trial court denied disqualification but the appeals court reversed. The Texas Supreme Court granted mandamus holding that McKnight was not disqualified. Disqualification is appropriate only if the lawyer's testimony is necessary to establish an essential fact. Here, Joyce did not conclusively prove that McKnight's testimony was essential to her case. In re Sanders, 48 Tex. Sup. Ct. J. 201 (December 17, 2004).

Causation

No Probative Evidence Of Causation

Sperling collided head-on with Ramirez, killing both drivers and severely injuring a passenger. Ramirez's family sued VW alleging that a wheel separated from Sperling's car, causing the accident. A jury awarded \$17 million and the appeals court affirmed. The Texas Supreme Court reversed and rendered. Ramirez's expert testified that the wheel separated before, not during, the crash; his testimony was unreliable because he did not show the connection between the data he relied upon and the

opinion he offered. A TV crew's videotape of an unnamed eyewitness who said that the VW's tire separated before the collision was inadmissible hearsay because the witness was never located, deposed, or cross-examined. Thus, there was no probative evidence of causation. Volkswagen of America, Inc. v. Ramirez, 48 Tex. Sup. Ct. J. 256 (December 31, 2004).

Damages

Renter Owed Leasing Company Value Of Stolen Car

Barrios rented a Ford Explorer from Enterprise. While in Barrios's possession, the Explorer was stolen. Enterprise sued Barrios for the value of the Explorer. The trial court granted Enterprise summary judgment but the appeals court reversed and remanded. The Texas Supreme Court reversed and rendered. The rental agreement unambiguously required Barrios to replace or repair all losses and damages to the rented car. That language included replacing a stolen car. Enterprise Leasing Co. v. Barrios, 48 Tex. Sup. Ct. J. 124 (November 12, 2004).

Duty

Excavator Owed No Duty To Deviating Driver

While driving down a highway, Morin collided with a horse; Morin's car careened 500 feet, hit an excavation, and flipped over, killing Morin and a passenger. Their families sued Military Highway, which had dug the excavation 30 feet off the highway. Plaintiffs won a jury verdict and the appeals court af-

firmed. The Texas Supreme Court reversed and rendered. A premises owner with an excavation on its land owes a duty to those traveling with reasonable care on the highway who foreseeably deviate from the highway in the ordinary course of travel. Military Highway owed no duty because the deviation here was not reasonably foreseeable. Military Hwy. Water Supply Corp. v. Morin, 48 Tex. Sup. Ct. J. 364 (January 21, 2005).

Employment

Evidence Did Not Support Malice Finding

Garza was hit on the head by a bucket lowered by a co-employee. The two got into an argument that went to their supervisors. Four days later, Garza saw a doctor for neck pain and filed a comp claim. SWBT, his employer, tried to reassign Garza, then fired him. He sued SWBT for retaliating against him for his comp claim. A jury awarded Garza actual and punitive damages, an award affirmed on appeal. The Texas Supreme Court reversed and rendered the punitive-damages award. Based on some undisputed facts, the jury did not have clear and convincing evidence to conclude that SWBT acted with actual malice. Southwestern Bell Tel. Co. v. Garza, 48 Tex. Sup. Ct. J. 226 (December 31, 2004).

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RECENT OPINIONS: TEXAS SUPREME COURT

Gross Negligence

No Clear And Convincing Evidence That Defendant Was Grossly Negligent

Hall's husband died in a plant explosion. She sued his employer, DSRC, which had comp coverage, for gross negligence and punitive damages, winning a \$42 million award. The trial court capped the recovery at \$200,000, leading the appeals court to reverse and remand because the trial court had refused to admit evidence of actual damages that could have raised the punitive-damages cap. The Texas Supreme Court reversed and rendered judgment for DSRC. It found no clear and convincing evidence that DSRC was consciously indifferent to the hazards presented in operating a crude oil refinery. Diamond Shamrock Ref. Co., L.P. v. Hall, 48 Tex. Sup. Ct. J. 354 (January 21, 2005).

Products Liability

Trucker's Use Of Trailer Did Not Subject Trailer Owner To Strict Liability

Fulgham worked as an independent contractor for FFE driving his own tractor and hauling FFE trailers. As Fulgham drove down the highway, the trailer became detached, which caused the tractor to roll, injuring Fulgham. He sued FFE for negligence and strict products liability. The trial court directed a verdict for FFE but the appeals court reversed and remanded. The Texas Supreme Court reversed and rendered. By having Fulgham pull its trailers, FFE did not put the trailers in the stream of commerce and was not subject to a strict liability claim. Fulgham's negligent-inspection claim failed because the mechanics of coupler assemblies are not within common knowledge and require expert testimony; Fulgham did not offer expert testimony to establish the applicable standard of care. F.F.E. Transp. Serv., Inc. v. Fulgham, 48 Tex. Sup. Ct. J. 267 (December 31, 2004).

Texas Tort Claims Act

On Final Appeal, Dracula Loses His Case

While playing Dracula in an A&M play, Bishop was stabbed by another student, who missed the stab pad. Bishop sued A&M under the Texas Tort Claims Act ("TTCA") alleging a negligent use of tangible property in allowing a real knife to be used in the play. A jury found the A&M faculty advisors negligent and awarded Bishop damages. The appeals court affirmed. The Texas Supreme Court reversed and rendered. The play's director chose the knife; he was an independent contractor for whose conduct A&M was not liable. The faculty advisors' failure to properly supervise the props that the director chose was not a use of tangible personal property within the meaning of the TTCA. Texas A&M Univ. v. Bishop, 48 Tex. Sup. Ct. J. 361 (January 21, 2005).

COURTS OF APPEALS

Agency

Fact Issue Whether Truck Driver Could Invite Unauthorized Passenger Along

Smith died when a truck driven by Landry, a Builders' employee, overturned, ejecting Smith. His family sued Builders and Landry. A jury awarded the family \$4.4 million damages. The appeals court reversed and remanded. Builders did not allow unauthorized passengers in its trucks. Landry had not gotten authorization for Smith to ride with him. The trial court erred in failing to instruct the jury about whether Landry had apparent authority to invite Smith to ride. That instruction was critical because if Smith was an unauthorized passenger, Builders only owed him the duty owed a trespasser not to injure him intentionally or through gross negligence. Builders Transp., Inc. v. Grice-Smith, No. 10-01-00130-CV, Waco, November 3, 2004.

Attorney Disqualification

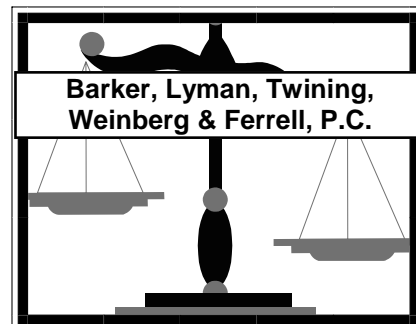
Insurer's Use Of Staff Counsel Is Not The Unauthorized Practice Of Law

Nationwide uses internal staff counsel to represent its insureds sued for negligence. In a declaratory-judgment action, the UPLC alleged that Nationwide's use of staff counsel to defend insureds constituted the unauthorized practice of law. The trial court granted Nationwide summary judgment, which was affirmed. Nothing in the use of staff counsel violates the State Bar Act, the Tex. Bus. Corp. Act, or Texas Supreme Court precedent. Nationwide does not engage in the unauthorized practice of law by using staff counsel to defend insureds. Unauthorized Practice of Law Comm. v. Nationwide Mut. Ins. Co., No. 04-04-00184-CV, San Antonio, December 8, 2004.

Causation

Teen's Assault On Another Teen Not Foreseeable

While visiting in the Coffees' home, teen Billy Corke assaulted teen Michael Spears. Michael and his parents sued the Corkes and the Coffees. The trial court granted the Coffees summary judgment, which was affirmed. Billy and Michael were frequent guests in the Coffee home. Billy had never exhibited any deliberately harmful conduct before. His assault was an extraordinary consequence of teenage roughhousing that was not foreseeable and was a superseding cause of Michael's injuries. Spears v. Coffee, No. 04-04-00370-CV, San Antonio, November 10, 2004.



RECENT OPINIONS: COURTS OF APPEALS

Duty

Property Owner That Did Not Create Attractive Nuisance Owed No Duty

Woolridge's four-year-old son drowned in a naturally occurring pool on a creek running through unimproved land owned by ETBU. Woolridge sued ETBU alleging that the pool was an attractive nuisance. The trial court granted ETBU a no-duty summary judgment, which was affirmed. Only artificially created and maintained conditions qualify as attractive nuisances. Otherwise, property owners would owe a duty to make safe all natural conditions. A premises owner is not required to fence or prevent injury from naturally occurring conditions such as creeks and ponds. Thus, ETBU owed Woolridge no duty. Woolridge v. East Texas Baptist Univ., No. 06-04-00048-CV, Texarkana, January 12, 2005.

Evidence

Expert That Switched Sides Should Have Been Disqualified

Kajima sued Formosa for fraud arising out of a construction project. Formosa retained Huyghe, an employee of AWH, as a consulting expert. Less than a year later, Kajima contacted Huyghe about AWH working on the case for Kajima. After two other AWH employees were designated as Kajima's testifying experts, Formosa moved to strike the experts for "side switching." The trial court denied the motion. Kajima won a \$30 million award but the appeals court reversed and remanded. Formosa had shared confidential information with Huyghe. That confidential relationship precluded AWH from switching sides. Kajima's experts should have been struck; their testimony for Kajima probably caused an improper verdict. Formosa Plastics Corp., U.S.A. v. Kajima Int'l, Inc., No. 13-02-00385-CV, Corpus Christi, November 10, 2004.

Premises Liability

Chapter 95 Applied To Bar Contractor's Claim

A pipe at Simpson's plant began leaking chlorine dioxide. The facility was shut down and the pipe purged. Dyall, an independent contractor, repaired the leak the next day. He sued Simpson alleging that while repairing the leak, he suffered chlorine dioxide exposure that severely injured him. The trial court granted Simpson summary judgment, which was affirmed. Under Ch. 95, Tex. Civ. Prac. & Rem. Code, a property owner is not liable for injuries to a contractor arising from a dangerous condition unless the owner controls the work and actually knows about the danger. Simpson did not control Dyall's work nor did it have actual knowledge of the danger. Dyall could not recover under Ch. 95 or on any other theory. Dyall v. Simpson Pasadena Paper Co., 152 S.W.3d 688 (Tex. App.—Houston [14th Dist.] 2004, pet. filed).

Landowner Had Knowledge Of Dangerous Condition

As Ogburn, a truck driver, opened Sanmina's warehouse door, a heavy roller fell off the door and hit him on the shoulder. He sued Sanmina and won judgment. The appeals court affirmed. Sanmina argued that its knowledge that the warehouse door was broken did not constitute knowledge that a roller would fall off the door and injure someone. The appeals court rejected that argument. Although Sanmina may not have been aware of the specific problems with the rollers, it knew of the dangerous condition created by the broken door. Sanmina-Sci Corp. v. Ogburn, No. 05-03-01576-CV, Dallas, November 30, 2004.

Products Liability

OSHA Regulation Admissible In Design-Defect Case

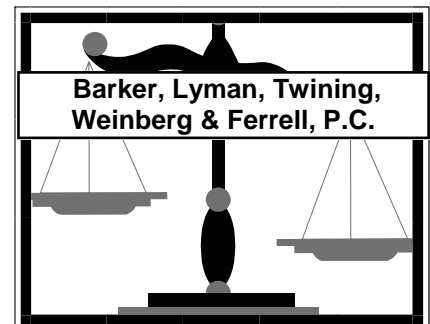
Costilla lost his leg in a forklift accident and sued the manufacturer, Crown,

for defective design. A jury found no design defect and the appeals court affirmed. Costilla complained about the admission into evidence of an OSHA regulation supporting Crown's argument that installing a door in a forklift did not make the forklift safer. Since one element of a design-defect case is proof of a safer alternative design, the OSHA regulation was relevant on the hotly disputed issue of whether a door would have made the forklift safer. The trial court did not abuse its discretion in admitting an OSHA regulation relevant to the central dispute. Costilla v. Crown Equip. Corp., 148 S.W.3d 376 (Tex. App.—Dallas 2004).

Release

Pre-Injury Release Barred Recovery

Tamez died when the tractor-trailer in which he was riding crashed into an interstate overpass. He and his co-driver were leased by their employer to SMT as drivers. SMT required that, before driving, leased drivers sign an agreement releasing SMT from any liability for its own negligent acts. When Tamez's family sued SMT, the trial court granted summary judgment based on the pre-injury release. The appeals court affirmed. Because the release expressly released SMT for its own negligence and because that agreement was conspicuous, the release was enforceable and barred the family's wrongful-death and survival claims. Tamez v. Southwestern Motor Transp., Inc., No. 04-04-00182-CV, San Antonio, December 8, 2004.



INSURANCE / WORKERS' COMPENSATION UPDATE

COURTS OF APPEALS

Appraisal

Appraiser With Financial Interest In Outcome May Not Be Impartial

As a result of a wind storm, Spring Creek filed a claim with its primary insurers. It invoked an appraisal provision that required each side to "select a competent and impartial appraiser," after which the two appraisers would select an umpire. Spring Creek received a favorable award and sought enforcement. The trial court granted Spring Creek summary judgment. The appeals court reversed and remanded. Spring Creek's appraiser had contracted to be paid 5% of the gross recovery. That contingent pecuniary interest raised a fact issue about the appraiser's impartiality that should have been submitted to a jury. General Star Indem. Co. v. Spring Creek Village Apts. Phase 5, Inc., 152 S.W.3d 733 (Tex. App.—Houston [14th Dist.] 2004).

Appraiser Who Investigated Loss For Insurer Was Not Disqualified For Bias

Franco had a plumbing leak at her house and filed a claim with Slavonic, her property insurer. Although Slavonic would pay part of the claim, it would not pay what Franco wanted. Franco invoked the policy's appraisal clause. Slavonic designated Garibay, an independent consultant who had initially investigated the loss for Slavonic, as its appraiser. Eventually, the parties' appraisers and an umpire agreed on a loss amount. Slavonic paid. Franco later sued to set aside the appraisal award and for a larger award. The trial court granted Slavonic summary judgment, which was affirmed. A preexisting relationship between insurer and appraiser, without more, did not show disqualifying bias by Garibay. Thus, the appraisal award was binding. Franco v. Slavonic Mut. Fire Ins. Ass'n, No. 14-03-01433-CV, Houston [14th Dist.], December 16, 2004.

Insurance Policy Construction

D&O Insurer Owed No Duty To Defend

Broussard, an officer and director of KCB, divorced his wife. Five years later, his ex-wife sued Broussard for breaching the divorce settlement agreement. Broussard requested a defense from National Union, KCB's directors and officers (D&O) liability insurer. National Union denied a defense. In the ensuing coverage action, the trial court granted the insurer summary judgment, which was affirmed. The D&O policy excluded coverage for claims arising out of an express contract and for claims arising out of prior litigation. Both exclusions applied because the ex-wife sued directly on the divorce settlement and her claims arose out of the earlier divorce litigation. King, Chapman & Broussard Consulting Group, Inc. v. National Union Fire Ins. Co., No. 01-03-00989-CV, Houston [1st Dist.], January 6, 2005.

No UIM Coverage Owed; Vehicle Was Not Occupied

McDonald was driving a tractor-trailer rig when a tire blew out. As he walked along the I-10 feeder road to get help, a driver struck him from behind. After that driver's insurer paid out its limits, McDonald sued Southern County, which insured the rig, for underinsured motorist ("UIM") benefits. The trial court granted Southern County summary judgment, which was affirmed. McDonald was not a named insured under the policy; he could only qualify as an insured by "occupying a covered auto." Walking down the feeder road did not qualify as "occupying" the rig. McDonald v. Southern County Mut. Ins. Co., No. 01-03-00646-CV, Houston [1st Dist.], November 24, 2004.

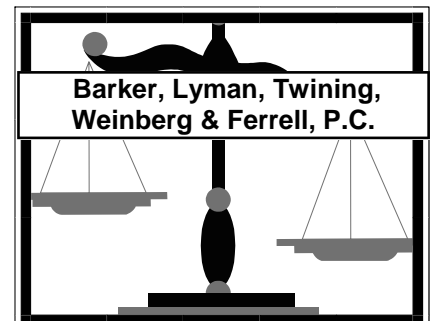
Breast Implant Insurers May Owe Doctors A Defense

Many plaintiffs sued doctors over breast implants made by Dow Corning.

TMLT and other medical insurers defended the doctors, then sued Dow's insurers alleging that the doctors were additional insureds under the Dow policy as "vendors." The trial court granted Dow's insurers summary judgment but the appeals court reversed and remanded. The master petition in the breast implant litigation alleged that the doctors bought the implants from Dow, inserted the implants into their patients, and were strictly liable as sellers of defective products. Given the breadth of the allegations, the trial court erred in holding that, as a matter of law, the doctors were not additional insureds. Texas Med. Liab. Trust v. Hartford Acc. & Indem. Co., 151 S.W.3d 706 (Tex. App.—Waco 2004).

Designated-Premises Endorsement Eliminated Coverage

Founders developed four acres of an eight-acre tract. Trinity issued Founders a commercial general liability policy that included an endorsement limiting coverage to the vacant land. A company sued Founders for dilution of trade name based on the way Founders marketed its apartment development. Trinity denied Founders a defense. In the resulting declaratory-judgment action, the trial court granted Trinity summary judgment, which was affirmed. The designated-premises endorsement was unambiguous. Because the underlying lawsuit did not arise from the vacant land, Trinity owed no duty to defend or indemnify. Founders Commercial, Ltd. v. Trinity Univ. Ins. Co., No. 01-03-01063-CV, Houston [1st Dist.], November 24, 2004.



INSURANCE / WORKERS' COMPENSATION UPDATE

Flood And Surface Waters Exclusion Barred Coverage

Tropical Storm Allison caused Buffalo Bayou to overflow its banks and flood the basement of the building occupied by HTL, a law firm. That building closed for three weeks, forcing HTL to conduct business at an alternate location. HTL filed a claim with Valley Forge, its premises insurer, for lost business income. Valley Forge denied the claim based on the flood and surface waters exclusion. HTL sued it and won summary judgment. The appeals court reversed and rendered. Water rushing into the building basement was flood and surface water, a cause of loss unambiguously excluded from coverage. Valley Forge Ins. Co. v. Hicks, Thomas & Lilienstern, L.L.P., No. 01-03-00708-CV, Houston [1st Dist.], December 16, 2004, pet. filed.

Liability Policy Covered Punitive Damages

On rehearing, the appeals court modified the opinion reported in The GieselGram Vol. 10, Issue 4. In the underlying suit, plaintiffs recovered actual and punitive damages. Westchester, the excess carrier, sued Admiral, the primary carrier, for failing to settle. The trial court granted Admiral a directed verdict because actual damages fell within the primary limits and neither insurer owed coverage for punitive damages. The appeals court reversed and remanded. Insurance coverage for punitive damages did not violate public policy when the two insurance policies were issued and the claims arose. Thus, Admiral could be liable to Westchester if Admiral violated its Stowers duty. Westchester Fire Ins. Co. v. Admiral Ins. Co., 152 S.W.3d 172 (Tex. App.—Fort Worth 2004, pet. filed).

Limitations

Late-Filed Comp Claim Was Time Barred

Krueger, a dispatcher for the sheriff's department, suffered post-traumatic

stress disorder from dealing with an October 1999 ambush in which three deputies were killed. She never missed work. In March 2001, she filed a claim for workers' compensation benefits. The Texas Workers' Compensation Commission ultimately found that Krueger's injury was not compensable because she failed to file her claim within one year of injury and lacked good cause for the delay. Krueger appealed and the trial and appeals courts affirmed. Krueger's ignorance of workers' compensation law could not constitute good cause. Krueger v. Atascosa County, No. 04-04-00242-CV, San Antonio, December 15, 2004.

Statutory Construction

Hospital Could Not Collect More Than Its Workers' Comp Reimbursement

Following an on-the-job auto collision, Linnstaedter was treated at a hospital owned by the Daughters, which filed a hospital lien. The comp carrier paid \$5,800 of the \$13,000 hospital charges. The other driver's insurer settled, paying off the comp lien and also paying Daughters to discharge the hospital lien. Linnstaedter then sued Daughters, arguing it could not recover under the hospital lien. The trial court granted Linnstaedter summary judgment, which was affirmed. The comp act fixed the amount to which Daughters was entitled for the services rendered. It could not collect more from Linnstaedter through a hospital lien. Daughters of Charity Health Serv. v. Linnstaedter, 151 S.W.3d 667 (Tex. App.—Waco 2004).

FIFTH CIRCUIT

Insurance Policy Construction

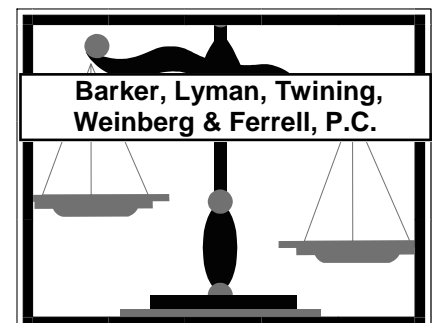
Property Insurer Required To Show Prejudice From Late Notice

In 11/2001, Ridglea submitted a claim to its property insurer, Lexington, for

hail damage that apparently occurred in 1995 to the roofs of its property. Lexington denied the claim based on late notice. In the ensuing lawsuit, the district court granted Lexington summary judgment but the Fifth Circuit reversed and remanded. Although Ridglea violated the policy provision requiring "prompt notice of the loss or damage" to covered property, under Texas law, Ridglea's breach of the policy provision was not material unless the breach prejudiced Lexington. Thus, the district court could not grant summary judgment without considering evidence of prejudice. Ridglea Estate Condo. Ass'n v. Lexington Ins. Co., No. 04-10447 (5th Cir., Jan. 21, 2005).

Two Insurers Both Owed Primary Coverage, Which Was Prorated

Riverside, a nursing home, was sued for the wrongful death of a resident. Hartford and Royal both provided Riverside with liability coverage. Royal settled the lawsuit, then sued Hartford for contribution. The district court granted Hartford summary judgment. The Fifth Circuit reversed and rendered judgment that Hartford owed half the settlement. Although Royal's "other insurance" clause provided for pro rata coverage and Hartford's clause provided for excess coverage, both policies were primary, the "other insurance" clauses conflicted, and both insurers owed indemnity pro rata. Royal Ins. Co. v. Hartford Underwriters Ins. Co., 391 F.3d 639 (5th Cir. 2004).



PROFESSIONAL LIABILITY UPDATE

TEXAS SUPREME COURT

Statutory Construction

Medical Liability Act Governed Credentialing Claim

Rose underwent several unsuccessful cosmetic surgeries and sued the hospital for negligently credentialing the doctor who performed the surgeries. The trial court dismissed Rose's claim for her failure to file an adequate expert report. The appeals court reversed and remanded, holding that a negligent-credentialing claim did not fall within the scope of former art. 4590i. The Texas Supreme Court reversed. Credentialing activities are an inseparable part of the medical services a patient receives. Thus, the negligent-credentialing claim fell within the scope of art. 4590i and Rose was required to file an adequate expert report. Garland Cmty. Hosp. v. Rose, 45 Tex. Sup. Ct. J. 111 (November 5, 2004).

COURTS OF APPEALS

Causation

Client Offered No Evidence That Ex-Attorney's Conduct Caused Harm

While driving a Honda car, Rangel suffered serious injuries in a collision. He hired Lapin to represent him. Lapin withdrew after establishing that the opposing driver had no insurance. Rangel sued Lapin alleging that the car's restraint system was defective and that Lapin destroyed any crashworthiness case by allowing sale of the car for salvage value. The trial court granted Lapin summary judgment, which was affirmed. An attorney expert said that he probably could have made a crashworthiness case had the car been preserved. But Rangel failed to offer any reliable expert testimony that his injuries were consistent with a design or manufacturing defect. Thus, he failed to raise a fact issue on causation. Rangel v. Lapin, No. 01-03-00351-CV, Houston [1st Dist.], January 13, 2005.

Evidence

Medical-Malpractice Expert Was Qualified

Downing sued Dr. Larson for negligently performing two surgeries to correct a left orbital (eye) blowout fracture. Dr. Larson moved for a no-evidence summary judgment, which the trial court granted after striking the testimony of Dr. Bell, Downing's expert. The appeals court reversed and remanded. Although Dr. Bell had not performed the same kind of surgery in 15 years, he explained why not and established his credentials as an expert in the field of plastic surgery. Downing v. Larson, No. 09-04-00167-CV, Beaumont, December 22, 2004.

Limitations

Plaintiff Successfully Raised Open-Courts Defense

In April 2002, a colonoscopy revealed that Boyd had Stage IV colorectal cancer. She sued Kallam and others who had treated her since 1996 alleging failure to properly diagnose her colorectal cancer earlier. The trial court granted defendants summary judgment on limitations. The appeals court reversed and remanded. Boyd had no reasonable opportunity to discover the alleged wrongs until the April 2002 diagnosis, after which she filed suit within four months. The open-courts provision of the Texas Constitution prevented the two-year statute of limitations from barring Boyd's claims. Boyd v. Kallam, 152 S.W.3d 670 (Tex. App.—Fort Worth 2004, pet. filed).

Negligence

Jury's Refusal To Find Attorney Negligent Was Supported By Evidence

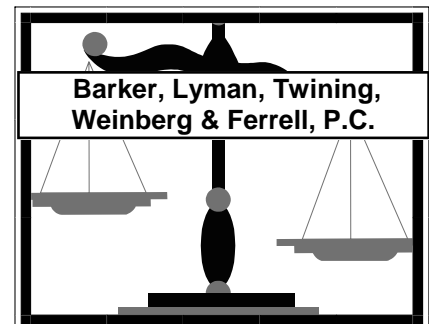
In an underlying case, the primary carrier tendered its policy limits on the day of trial to National Union, the excess carrier, which settled the case two

days later by paying an additional \$6 million. National Union then sued KMC for legal malpractice in handling the case. The jury refused to find KMC negligent and the appeals court affirmed. Although KMC had not deposed the corporate plaintiff's owner or experts and had not consulted with experts to help defend the case, KMC's evidence showed that the client was liable and that the client and KMC had agreed that they should focus on defending damages. This evidence supported the jury verdict. National Union Fire Ins. Co. v. Keck, Mahin & Cate, No. 14-03-00747-CV, Houston [14th Dist.], December 14, 2004.

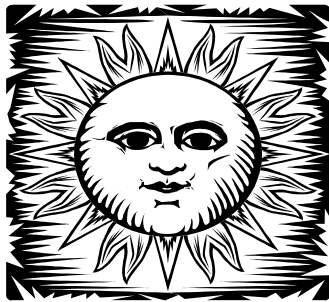
Release

Client Could Not Assign Legal-Malpractice Claim

Wright hired Sydow to prosecute suits for him under the federal False Claims Act against oil and gas companies for underpayment of royalties owed the federal government. Wright later discharged Sydow, who intervened in the pending lawsuits to protect his contingent fees. Sydow reached a settlement agreement with Wright that Wright tried to overturn in a suit filed a year later. The trial court granted Sydow summary judgment, which was affirmed. Wright offered no evidence of duress in executing the settlement agreement. Further, the legal-malpractice claim against Sydow that Wright assigned to another attorney before signing the settlement agreement was barred because the assignment violated public policy. Wright v. Sydow, No. 14-03-00222-CV, Houston [14th Dist.], November 24, 2004.



HOT ISSUES BEFORE THE TEXAS SUPREME COURT



HOT ISSUE 1 — Did premises owner have constructive knowledge of dangerous condition?

While Hicks shopped at Rice, a sign fell off a canopy and hit Hicks in the face. She sued Rice and recovered \$75,000 but the appeals court reversed and rendered. It held that even though Rice was aware of a safer alternative design for the sign, because the sign had never fallen before, Rice did not have constructive knowledge of a dangerous condition. The Texas Supreme Court granted review and heard oral argument January 5, 2005. Hicks v. Rice Food Mkt., Inc., No. 03-0848, December 3, 2004 (CA 111 S.W.3d 610).

HOT ISSUE 2 — Does Equine Activity Act bar plaintiff's recovery?

Steeg was injured when thrown from a horse during a trail ride at the camp. He sued the camp but lost on summary judgment because the trial court thought the injuries resulted from an inherent risk of an equine activity, recovery for which is barred by statute. TEX. CIV. PRAC. & REM. CODE § 87.003. The appeals court reversed and remanded because the fall might have resulted from a negligently cinched saddle. The Texas Supreme Court granted review and heard oral argument February 16, 2005. Baskin Family Camps, Inc. v. Steeg, No. 03-1107, January 21, 2005 (CA 124 S.W.3d 633).

HOT ISSUE 3 — Did attorney's conduct warrant sanctions?

Henry, an attorney, filed a medical-malpractice case against Drs. Low and Smith. Contemporaneously, Henry filed a motion to withdraw due to a conflict of interest. The doctors filed for sanctions against Henry and recovered \$50,000 against him. The appeals court reversed and rendered, holding that Henry's conduct did not warrant sanctions. The Texas Supreme Court granted review and heard oral argument February 15, 2005. Low v. Henry, No. 04-0452, December 17, 2004 (CA 132 S.W.3d 180).

HOT ISSUE 4 — Does an ensuing-loss provision provide coverage?

The Fiesses discovered black mold growing in their home's walls. They filed a claim with State Farm, their homeowners insurer, and eventually sued it in federal court. The district court granted State Farm a no-coverage summary judgment but the Fifth Circuit certified to the Texas Supreme Court the question whether the ensuing-loss provision of the policy covered mold contamination caused by preexisting water leaks. The Texas Supreme Court granted review and will hear oral argument March 30, 2005. Fiess v. State Farm Lloyd's, No. 04-1104, January 21, 2005 (392 F.3d 802, 5th Cir.).

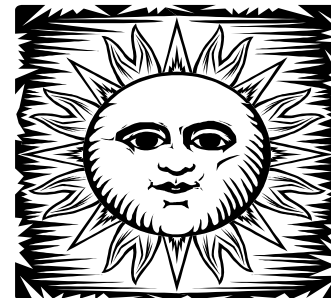
HOT ISSUE 5 — Did the economic-loss rule bar recovery?

Dresser sold Equistar two large compressors in 1975. In 1999, replacement impellers on the compressors failed. Equistar sued Dresser and won a large judgment. The appeals court reversed and rendered based on the economic-loss rule, holding that the contract claims accrued in 1975, not in 1996 when replacement impellers were installed. The Texas Supreme Court granted review and will hear oral argument March 22, 2005. Equistar Chem.,

LP v. Dresser-Rand Co., No. 04-0121, February 11, 2005 (CA 123 S.W.3d 584).

HOT ISSUE 6 — Did the State owe more than the duty owed to a trespasser?

While tubing on the Blanco River, the Shumakes' daughter, Kayla, a child, was sucked into an unscreened culvert and drowned. Her parents sued the State, which filed a plea to the jurisdiction. The trial and appeals courts denied the plea to the jurisdiction after finding that the Shumakes' gross-negligence pleading satisfied jurisdiction under the Texas Tort Claims Act. The Texas Supreme Court granted review and will hear oral argument April 12, 2005. State of Texas v. Shumake, No. 04-0460, February 11, 2005 (CA 131 S.W.3d 66).



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