

Letter of the Law

February 2006

Volume 13 Issue 2

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

TEXAS SUPREME COURT

Arbitration

Arbitration Agreement Enforceable Against Employee In Termination Case

Martinez worked for Dillard for almost 20 years. In 2000, she signed an arbitration agreement that required, among other things, arbitration of personal injuries arising from termination. Dillard later fired Martinez, who sued Dillard for defamation. Dillard moved to compel arbitration, which was denied. The Texas Supreme Court granted mandamus under the Federal Arbitration Act and compelled arbitration. Martinez ratified the arbitration agreement, which was valid and enforceable because both parties agreed to it and Dillard did not retain a unilateral right to modify it. Martinez's defamation claim fell within the agreement because defamation is a personal injury. In re Dillard Dept. Stores, Inc., 49 Tex. Sup. Ct. J. 295 (January 27, 2006).

COURTS OF APPEALS

Causes of Action

Granddaughter Not Closely Related For Purposes Of Bystander Claim

Billington's grandmother was killed in a car accident. Although Billington did not see the accident, she turned the corner immediately following the accident and saw the aftermath. Billington sued Lamberson, the other driver, on a bystander claim. The trial court granted Lamberson summary judgment, which was affirmed. One element of a by-

stander claim requires that the plaintiff and the victim be "closely related." Although Billington was the decedent's granddaughter, Billington never shared a house with her grandmother and lived in an adjoining county. She did not show the close relationship necessary for a bystander claim. Billington v. Lamberson, No. 07-04-00370-CV, Amarillo, December 8, 2005.

No Independent Claim For Railroad's Failure To Eliminate Sight Restrictions

A train struck and killed Limmer at a railroad crossing. His family sued and won a \$9 million judgment. The appeals court reversed and remanded. A jury question asked whether the railroad was negligent in failing to eliminate sight restrictions. Texas law does not consider sight restrictions an independent basis of liability, only as a factor in determining the railroad's negligence in operating its train at the crossing. Because the error could have affected the entire verdict, the court reversed and remanded for a new trial. Missouri Pacific R.R. Co. v. Limmer, 180 S.W.3d 803 (Tex. App.—Houston [14th Dist.] 2005).

Causation

Many Possible Liability Theories Did Not Establish Causation As To Any

Knapp's home suffered substantial damage following a fire. Chubb paid the loss then sued H.C.B., which had been doing renovation work at the house about four hours before the fire started. A jury awarded Chubb low

damages. Both sides appealed and the appeals court reversed and rendered. Chubb's expert suggested that the fire could have been started by a drop light or plumbing torch used by H.C.B., by a cigarette carelessly discarded by an H.C.B. worker, or by an arsonist who gained entry due to H.C.B.'s negligence. All theories relied on multiple inferences and conjecture that did not suffice to establish that any one theory was the proximate cause of the fire. Chubb Lloyds Ins. Co. v. H.C.B. Mech., Inc., No. 01-04-00572-CV, Houston [1st Dist.], December 8, 2005.

No Evidence More Security Would Have Prevented Robbery And Shooting

Jea was shot during a robbery while working at a food store owned by Cho, a nonsubscriber. Jea sued Cho, won a jury verdict, but lost on judgment notwithstanding the verdict based on the absence of causation. The appeals court affirmed. Although Jea claimed that if there had been better lighting or a second employee he would not have been shot during a robbery, he offered no empirical data or expert opinion that such measures would have actually helped prevent the robbery and shooting. Without that evidence, Jea did not prove causation. Jea v. Cho, No. 14-04-00015-CV, Houston [14th Dist.], November 15, 2005.

**Barker, Lyman, Twining,
Weinberg & Ferrell, P.C.**
1221 McKinney St., Suite 3600
Houston, Texas 77010-2009
(713) 759-1990 [telephone]
(713) 652-2419 [facsimile]
Editor: John B. Wallace

RECENT OPINIONS: COURTS OF APPEALS

DTPA

Repair Company Engaged In Unconscionable Conduct

Jacobs took his 1960 Jaguar to Daugherty for repairs. Daugherty estimated the repairs would cost \$16,000 and take about three months. One year and \$30,000 later, the car still needed work. Jacobs stopped payment on a check and took the car to another company. Under a mechanic's lien, Daugherty seized the car. Jacobs sued him and won actual damages and additional damages for unconscionable conduct. The appeals court affirmed. Daugherty would not provide details about the work performed until a lawsuit was filed. His backup to the invoices did not match the work reflected on the invoices. He double-charged Jacobs. This and other evidence supported the jury finding of unconscionable conduct. Daugherty v. Jacobs, No. 14-04-00682-CV, Houston [14th Dist.], January 19, 2006.

Termite Inspection Did Not Fall Below Standard

The Shkolnicks hired Coastal to perform a termite inspection on the house they intended to buy. Coastal inspected the house. It found no visible evidence of termites. It provided the Shkolnicks with a report stating its conclusions and pointing out that its inspection was limited to what was visible and accessible. Two years later, a handyman discovered termites after removing wood from a window sill. The Shkolnicks sued Coastal and lost on summary judgment. The appeals court affirmed. There was no evidence that Coastal could have seen termite damage on the window sill when it inspected; it had no obligation or right to remove wood from a house the Shkolnicks did not own. Coastal did not commit a wrongful act under the Deceptive Trade Practices Act because it properly inspected the visible, accessible areas. Shkolnick v. Coastal Fumigators, Inc., No. 01-04-00405-CV, Houston [1st Dist.], November 23, 2005.

Employment

Employee Was Defamed In Termination

Mendivil worked for Rosen managing its stores in New Mexico. He was successful but when his relationship with management began souring, Mendivil resigned. Rather than allowing Mendivil to stay for an agreed transition period, Rosen made Mendivil leave and told employees and others that he had been fired. Mendivil sued Rosen for defamation and for intentional infliction of emotional distress ("IIED"). The jury found for Mendivil; the appeals court reversed in part. There was no evidence to support the IIED finding. But evidence that Rosen officers had falsely told some managers, who had no business reason for knowing, that Mendivil had been fired supported the defamation finding. Richard Rosen, Inc. v. Mendivil, No. 08-04-00077-CV, El Paso, November 23, 2005.

Gross Negligence

Evidence Did Not Establish Gross Negligence

While working for Agrium, Clark died attempting to replace a discharge valve in a line that had not been completely depressurized. His family sued Agrium for gross negligence and punitive damages and won. The appeals court reversed and rendered. The subjective element of gross negligence requires that an actor have actual awareness of the risk involved and proceed with conscious indifference to the safety of others. Agrium's general policy required that lines being repaired be depressurized and tagged out before repairs began. It did not know that its employees had not completely depressurized the lines before Clark began his work. Agrium did not have redundant safety systems, but there was no evidence that it was consciously indifferent to the risks in dealing with highly pressurized lines. Agrium U.S., Inc. v. Clark, 179 S.W.3d 765 (Tex. App.—Amarillo 2005).

Negligence

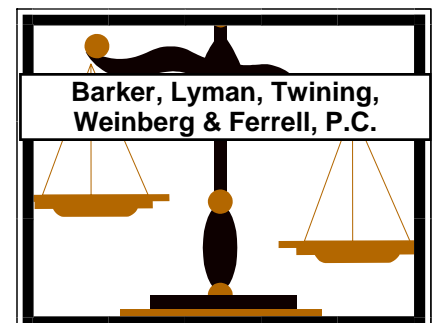
Res Ipsa Doctrine Did Not Apply To Plaintiff's Claim

Trejo sued LNB alleging that as she tried to make a deposit at a drive-thru facility, the unit's automatic sliding door closed on her left hand. The trial court granted LNB summary judgment, which was affirmed. Trejo sued LNB under, among other legal theories, the doctrine of res ipsa loquitur, an evidentiary doctrine that allows the jury to infer negligence merely from the circumstances of the accident itself. That doctrine requires that the defendant have exclusive management and control of the instrumentality causing the injury. Although LNB owned the teller machine, the machine was in a public area easily accessible by others who could have tampered with it. Trejo failed to establish that LNB had exclusive management or control over the machine. Trejo v. Laredo Nat'l Bank, No. 04-04-00319-CV, San Antonio, November 16, 2005.

Preemption

Federal Law Preempted Passenger's Claims

After passing through airport security, Henson was detained and searched by DEA agents who found an unloaded handgun in his baggage. He faced a civil administrative action that the DEA eventually dismissed. Henson then sued Southwest for malicious prosecution and negligence. The trial court granted Southwest summary judgment based on the preemptive effect of the Airline Deregulation Act. The appeals



RECENT OPINIONS: COURTS OF APPEALS

court affirmed. The Act preempts state laws related to the price, route, or service of an air carrier. Henson's claims related to airline services because federal regulations require airlines to screen passengers and property. Federal law preempted complaints about security screening. Henson v. Southwest Airlines Co., 180 S.W.3d 841 (Tex. App.—Dallas 2005).

Premises Liability

Owner Did Not Have Actual Knowledge Of Defect

While working for a contractor at the Dow plant, Stewart fell from scaffolding and died. Her family sued Dow and lost on summary judgment. The appeals court affirmed. Chapter 95, Tex. Civ. Prac. & Rem. Code, applied to plaintiffs' claims against Dow. Under Ch. 95, a property owner is not liable for injuries to contractors working on its real property unless it exercised or retained control over the work and had actual knowledge of the defect. Dow had relinquished control over the repair work to its contractors and had no actual knowledge of the defect. Phillips v. Dow Chemical Co., No. 01-03-00451-CV, Houston [1st Dist.], November 30, 2005.

Hospital Visitor Was A Licensee

Wong was going to visit her mother in the hospital and tripped over a bush in the hospital's landscaping. She sued alleging that the bush was distressed and presented a dangerous condition. The trial court granted the hospital a no-evidence summary judgment, which was affirmed. A hospital visitor is, at best, a licensee owed only the duty not to be injured by willful or wanton acts or gross negligence. Wong offered no evidence that the bush created an unreasonably dangerous condition or that the hospital acted willfully or with gross negligence. Wong v. Tenet Hospitals, Ltd., No. 08-04-00337-CV, El Paso, December 15, 2005.

Settlement

Attorney's Signature On Settlement Agreement Bound Client

The Whis sued Breceda and Reyes over a breach of a commercial lease agreement. At mediation, the parties reached a settlement. Gutierrez, the attorney for Breceda and Reyes, signed the agreement, as did Reyes. Breceda did not sign because he was not present. When Breceda tried to back out of the agreement, the trial court granted the Whis summary judgment enforcing the settlement agreement. The appeals court affirmed. An attorney-client relationship is one of agent and principal. Absent specific evidence that Gutierrez did not have Breceda's authority to make the agreement, Gutierrez's signature bound Breceda. Breceda offered no evidence that Gutierrez did not have his permission to settle the case. Breceda v. Whi, No. 08-04-00376-CV, El Paso, January 26, 2006.

Standing

Case Against State May Be Assigned

Ochoa and Danziger were wrongfully imprisoned for over 12 years. Danziger, through his guardian Oakley, sued Ochoa for falsely implicating him in the crime, a murder. Ochoa settled that case by assigning his right to compensation from the State under Ch. 103, Tex. Civ. Prac. & Rem. Code, to Danziger. Chapter 103 waives sovereign immunity for claims brought by persons falsely imprisoned. Oakley sued the State, which argued that the waiver of sovereign immunity contained in Ch. 103 did not extend to Ochoa's suit assigned to Oakley. The trial court denied the State's plea to the jurisdiction and the appeals court affirmed. Nothing in Ch. 103 or public policy prevented the assignment. Ochoa could assign his claims to Danziger. State v. Oakley, No. 03-05-00007-CV, Austin, December 16, 2005.

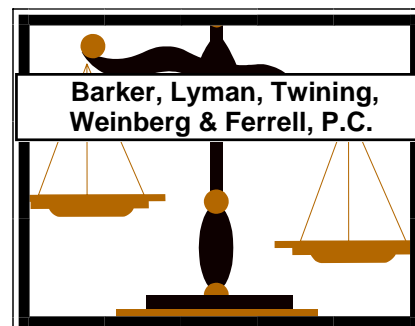
Statutory Construction

Equine Activity Act Does Not Apply To Employee

While giving an untamed horse medicine, Dodge was kicked in the stomach and injured. She sued her employer, Durdin, a nonsubscriber, for negligence. The trial court granted Durdin summary judgment based on the Equine Activity Act, Ch. 87, Tex. Civ. Prac. & Rem. Code. The appeals court reversed and remanded. The Act insulates equine activity professionals from liability for dangers that are an inherent risk of an equine activity. It applies to claims of participants who engage in the activity. An employee is not a "participant" for purposes of the Act, so Dodge's claim was not barred. Dodge v. Durdin, No. 01-04-00015-CV, Houston [1st Dist.], December 1, 2005.

Horse's Jumping Due To Fire Ant Bites Was Inherent Risk Of Riding

Gamble was dismounting a horse, Gabe, that she had just bought from the Peytons. Gabe started jumping from being stung by fire ants. Gamble fell to the ground and injured her back. She sued the Peytons, who won summary judgment. The appeals court affirmed. Under the Equine Activity Act, Ch. 87, Tex. Civ. Prac. & Rem. Code, a participant in an equine activity cannot recover if her injury results from dangers that are an inherent risk of the activity. The horse's reaction to fire ant bites was an inherent risk of riding. Gamble v. Peyton, No. 09-05-00109-CV, Beaumont, December 22, 2005.



INSURANCE / WORKERS' COMPENSATION UPDATE

TEXAS SUPREME COURT

Insurance Policy Construction

Owner Was Additional Insured; Exclusion Did Not Bar Coverage

Fina hired A&B Builders to do steel work on a project. Wisdom, an A&B employee, got hurt on the job and sued Fina. After settling with Wisdom, Fina sued Continental, A&B's general liability insurer, claiming additional-insured status. The trial court granted Fina summary judgment but the appeals court reversed and rendered. The Texas Supreme Court reversed and rendered for Fina. A&B's written construction proposal triggered Continental's blanket additional-insured endorsement. An exclusion for liability arising out of the additional insured's acts or omissions only excluded Fina's sole negligence because any other construction would render the additional insurance largely illusory. Atofina Petrochemicals, Inc. v. Continental Cas. Co., 49 Tex. Sup. Ct. J. 225 (December 16, 2005).

Procedure

Insurer Could Intervene On Appeal After Insured Cut Deal On Other Claims

Cudd worked on Sonat's gas wells. When four Cudd employees were killed in an explosion, their families sued Cudd and Sonat. Cudd refused to indemnify Sonat, which settled, then sued Cudd for indemnity and recovered a \$20 million verdict. Cudd filed an appeal, for which its liability insurer, Lumbermens, posted a \$29 million supersedeas bond. Cudd and Sonat settled part of the claim in exchange for Cudd dropping its appeal on a critical choice-of-law question. Lumbermens sought to intervene in the appeal, a motion the appeals court denied. The Texas Supreme Court reversed and allowed intervention. Under these facts, Lumbermens was entitled to intervene. In re Lumbermens Mut. Cas. Co., 49 Tex. Sup. Ct. J. 329 (February 3, 2006).

COURTS OF APPEALS

Causation

Insured Offered Sufficient Evidence To Allocate Between Causes Of Damages

The McClellands submitted a foundation claim to their homeowners insurer, Travelers. The policy excluded coverage for foundation damage due to natural causes but not for foundation movement due to plumbing leaks. After the parties disagreed about the cause of the damage, they sued each other. At trial, both sides offered expert testimony about the causes of the damage. A jury awarded the McClellands actual and bad-faith damages. The trial court entered judgment for actual damages only. The appeals court affirmed. The McClellands offered sufficient evidence on causation to allocate between covered and noncovered causes. Travelers Personal Security Ins. Co. v. McClelland, No. 01-05-00093-CV, Houston [1st Dist.], January 19, 2006.

Insurance Policy Construction

Allegation Of Wrongful Eviction Did Not Trigger Personal-Injury Coverage

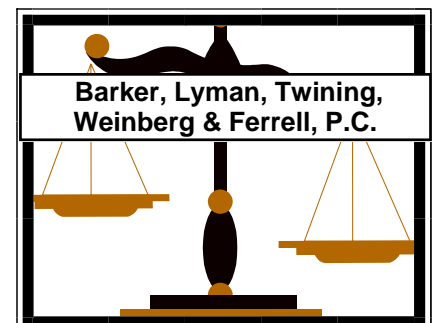
Hettler and Brenholtz got into a dispute over their insurance business, leading to Brenholtz's termination. He sued Hettler for fraud and conversion. Hettler tendered the suit to the insurance agency's general liability carrier, Travelers, which denied a defense. This coverage suit followed. The trial court granted Travelers summary judgment, which was affirmed. Hettler argued that pleadings saying he would deny Brenholtz entry to the business triggered coverage for wrongful eviction under Coverage B (personal injury) of the policy. The court disagreed because there were no allegations that Brenholtz had any rights in a premises from which he was evicted. Hettler v. Travelers Lloyd Ins. Co., No. 07-04-00056-CV, Amarillo, October 6, 2005, pet. filed.

Aircraft Exclusion Did Not Bar Defense Of Claim

Hartless was hurt while he and Tucker were trying to weigh Tucker's homemade light plane on scales. Hartless sued Tucker, who tendered the defense to Allstate, his homeowners insurer. This declaratory-judgment action followed. The trial court granted Allstate summary judgment but the appeals court reversed and remanded. An aircraft exclusion barring coverage for claims arising out of the ownership or use of an airplane did not apply. The men weighed the airplane, which could not fly, merely to satisfy their curiosity. There was not a substantial enough causal connection with ownership or use to trigger the exclusion. Tucker v. Allstate Texas Loyds Ins. Co., No. 06-05-00086-CV, Texarkana, December 6, 2005.

UM Policy May Cover Injuries Caused By Contact With Runaway Axle

As Alchehimi drove down the freeway, an axle and wheels broke away from a truck tractor and hit his car. Alchehimi sued Nationwide, his auto insurer, for uninsured motorist ("UM") benefits. The trial court granted Nationwide summary judgment but the appeals court reversed and remanded. An unknown vehicle qualifies as an uninsured motorist if actual physical contact with the unknown vehicle occurs. Because Alchehimi offered evidence that an integral part of the unknown vehicle collided with his car, he raised a fact issue on potential UM coverage. Alchehimi v. Nationwide Ins. Co., No. 10-04-00298-CV, Waco, December 28, 2005.



INSURANCE / WORKERS' COMPENSATION UPDATE

Homeowners Policy Excluded Mold Loss

The Lundstrums suffered water intrusions in their town home over a two-year period. They sued their builder and settled with him. They then sued their homeowners insurer, USAA. The trial court granted USAA summary judgment, which the appeals court affirmed. Among other issues, the appeals court addressed whether the policy covered mold damage, holding that exclusions for mold and for defective construction barred coverage. The ensuing-loss exception did not bring the claim back within coverage because the water intrusion preceded the mold damage. A covered ensuing loss must follow after the excluded risk. Lundstrum v. United Serv. Auto. Ass'n, No. 14-04-00357-CV, Houston [14th Dist.], January 26, 2006.

Pollution Exclusion Did Not Bar Coverage

The Turners suffered personal injury from exposure to MDI, a chemical that spilled from containers during transport. The Turners sued Urethane, the container maker. Mid-Continent, Urethane's commercial general liability insurer, initially denied a defense but ultimately settled the case. Urethane then sued Mid-Continent to recover its defense costs. The trial court granted Mid-Continent summary judgment based on the pollution exclusion. The appeals court reversed and rendered. Coverage was excluded for pollutants "transported, handled, stored, treated, disposed of, or processed as waste" Because the MDI was a chemical raw material, not waste, the pollution exclusion did not apply. Urethane Int'l Products v. Mid-Continent Cas. Co., No. 10-04-00177-CV, Waco, February 1, 2006.

Statutory Construction

Insurer Did Not Violate Art. 21.55

De la Garza was injured in a car accident with an uninsured motorist

("UM"). He submitted a claim to his auto insurer, State Farm, for UM coverage. State Farm timely responded but did not pay de la Garza policy limits until after he filed suit. The trial court granted State Farm summary judgment on de la Garza's art. 21.55 claim. The appeals court affirmed. Texas Insurance Code art. 21.55 sets out deadlines by which an insurer must respond. Here, State Farm timely responded at each stage of the process and did not violate the statute. De la Garza v. State Farm Mut. Auto. Ins. Co., 175 S.W.3d 29 (Tex. App.—Dallas 2005).

Waiver

Insurer Waived Late-Notice Defense Under Claims-Made Policy

A group of pilots sued the APA alleging that it breached its duty of fair representation to them. Plaintiffs served the APA on 10/25, before the APA's claims-made liability policy with Ulico expired, but the APA did not notify Ulico of the suit until 11/5, after the policy had expired. On 3/1, Ulico accepted the defense subject to a reservation of rights that did not reserve a late-notice defense. Eighteen months later, Ulico filed a coverage suit alleging late notice and refusing to pay \$600,000 in defense fees. The trial court awarded the APA judgment, which was affirmed. Although Ulico did not control the APA's defense (the APA hired and paid its own lawyer), Ulico's silence about the APA's late notice waived that defense to coverage. Ulico Cas. Co. v. Allied Pilots Ass'n, No. 02-04-00120-CV, Fort Worth, December 15, 2005.

FIFTH CIRCUIT

Insurance Policy Construction

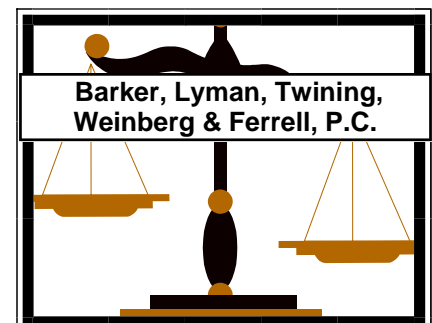
CGL Or Auto Policy May Have Provided Coverage

Langston skidded on mud on a country road and hit a tree, killing her passenger, her young son. She sued WRI,

the operator of a sand pit near the accident site. Emcasco, WRI's commercial auto insurer, settled the case, then sued AISLIC, WRI's general liability insurer, for contribution. The district court granted AISLIC summary judgment. The Fifth Circuit reversed and remanded. Although Langston alleged that WRI's trucks tracked mud onto the roadway, she also alleged that WRI created an unpaved roadway from which mud washed onto the public roadway. If mud that washed onto the roadway independently caused the accident, then AISLIC could be liable. Emcasco Ins. Co. v. American Int'l Specialty Lines Ins. Co., No. 04-11345 (5th Cir., Jan. 27, 2006).

Insurer Did Not Show Prejudice From Late Notice

A plaintiff sued Dr. Gibbons-Markey for medical malpractice and took a default against her. The doctor never received notice of the suit. After learning of the default, the doctor waited about five months before notifying TMLT, her malpractice insurer, which denied a defense. Dr. Gibbons-Markey filed a bill of review that vacated the judgment, then sued TMLT for her costs. The district court granted TMLT summary judgment. The Fifth Circuit reversed and remanded. An insurer who pleads a late-notice defense must show prejudice from the delay. TMLT did not show prejudice because it would have had to take essentially the same steps to vacate the judgment even with prompt notice. Gibbons-Markey v. Texas Medical Liab. Trust, No. 04-51345 (5th Cir., Jan. 23, 2006).



PROFESSIONAL LIABILITY UPDATE

COURT OF APPEALS

Causation

No Evidence That Accounting Error Caused Loss

The Fund hired Towers, an accounting firm, to determine the appropriate contribution rate from the City and from employees for the retirement fund so that the Fund could meet future obligations. After the Fund signed a collective bargaining agreement with the City reflecting Towers's recommendations, it learned that the contribution rate would not be adequate. It sued Towers for accounting malpractice. The trial court granted Towers summary judgment, which was affirmed. The Fund offered no evidence that if it had suggested higher contribution rates, which would have cost the City up to \$20 million more, the City would have agreed to those rates. Thus, the Fund did not raise a fact issue on causation. Board of Trustees of the Fire & Police Retiree Health Fund, San Antonio v. Towers, Perrin, Forester & Crosby, Inc., No. 04-04-00027-CV, San Antonio, November 23, 2005.

Duty

No Doctor–Patient Relationship; No Duty

Stutes found a knot around her collar bone for which she underwent surgery. During the surgery, the primary surgeon consulted with another surgeon, Dr. Samuelson, about whether the mass was likely malignant or benign. The primary surgeon removed the tumor, which was benign. Stutes suffered nerve damage and sued both doctors. The trial court granted Dr. Samuelson summary judgment, which was affirmed. Dr. Samuelson did not have a doctor–patient relationship with Stutes. His role was that of a question answerer who did not scrub in, did not prepare a report, never spoke with Stutes, and did not bill for his time. Stutes v. Samuelson, No. 02-04-00227-CV, Fort Worth, November 3, 2005, pet. filed.

Premises Liability

No Evidence That Architect Had Control Over Premises

A property owner hired RKL, an architecture firm, to evaluate whether a commercial building could be converted to residential use. RKL requested construction bids from three contractors, one of whom asked Mathis to provide a bid for wrought ironwork. While walking the property, Mathis fell into a 12-foot-deep hole and was hurt. He sued RKL and others. The trial court granted RKL a no-evidence summary judgment, which was affirmed. RKL's contract with the owner did not give RKL control over the property and RKL did not create the hole into which Mathis fell. Mathis v. RKL Design/Build, No. 01-04-01318-CV, Houston [1st Dist.], January 19, 2006.

Statutory Construction

Plaintiff Could Not Recast Medical-Malpractice Case

Dixon underwent laser eye surgery performed by Dr. Boothe, with bad results. Dr. Boothe performed another laser surgery unsuccessfully, but told Dixon that custom abrasion would restore better vision. Dr. Boothe refunded Dixon's money for the surgeries and Dixon executed a release. Dixon later learned that custom abrasion would not help. He sued Dr. Boothe for fraud and for DTPA violations. The trial court dismissed the case because Dixon never filed an expert report. The appeals court affirmed. Dixon's claims ultimately related to poor medical treatment. Those claims fell under the Medical Liability Act, which required dismissal when Dixon did not file an expert report. Boothe v. Dixon, No. 05-04-01260-CV, Dallas, December 13, 2005.

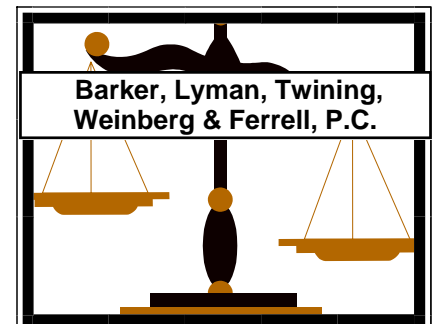
Employer Not Liable For Sexual Exploitation

Kennerson worked for Methodist as a counselor for psychiatric patients. NP

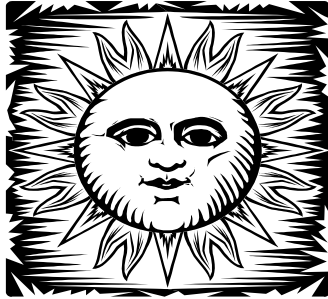
sued Methodist under the sexual exploitation statute, Ch. 81, Tex. Civ. Prac. & Rem. Code, alleging that Kennerson engaged in sexually explicit conduct with her. The trial court granted Methodist summary judgment, which was affirmed. Section 81.003 imposes liability on an employer when the employer should have known that its employee engaged in sexual exploitation of the patient and failed to report or prevent that exploitation. Although Methodist had a report that Kennerson behaved inappropriately with another patient, the statute does not hold an employer liable unless it had reason to know of previous exploitation of the specific patient who sues. N.P. v. Methodist Hosp., No. 01-04-00213-CV, Houston [1st Dist.], January 5, 2006.

Medical Expert Report Met Standards

Rodriguez arrived at the hospital complaining of headaches and right-arm numbness. Her cerebral hemorrhage was not diagnosed until 12 hours later. She died following emergency surgery and her family sued the doctors and hospital. The trial court dismissed the case against the hospital based on an inadequate expert report. The appeals court reversed and remanded, finding the report adequate. Plaintiffs' expert discussed what the nurses failed to do to track Rodriguez's declining clinical status and how those breaches of the standard of care probably contributed to Rodriguez's death. Tovar v. Methodist Health Care Sys. of San Antonio, Ltd., LLP, No. 04-05-00054-CV, San Antonio, November 16, 2005, pet. filed.



HOT ISSUES BEFORE THE TEXAS SUPREME COURT



HOT ISSUE 1 — Did defendant discharge duty by posting a speed limit sign?

Perry was injured when the truck he was driving in a sandpit hit a hole, causing his head to hit the roof of the truck. He sued TXI, which maintained the private road, and recovered a judgment. The appeals court affirmed, holding that TXI did not discharge its duty to warn of the hole by posting a speed limit of 15 mph. The Texas Supreme Court granted review and heard oral argument January 5, 2006. TXI Operations L.P. v. Perry, No. 05-0030, November 4, 2005 (CA ___ S.W.3d ___).

HOT ISSUE 2 — May hospital collect more than 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. After a third-party suit was settled, and Daughters was paid for all the hospital charges, Linnstaedter sued arguing that Daughters could not recover more than the \$5,800 set by the comp act. The trial court agreed and the appeals court affirmed. The Texas Supreme Court granted review and heard oral argument February 14, 2006. Daughters of Charity Health Serv. v. Linnstaedter, No. 05-0108, November 23, 2005 (CA 151 S.W.3d 667).

HOT ISSUE 3 — Did plaintiff sufficiently prove a 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, holding that plaintiffs adequately proved that the tire deviated from manufacturing specifications in a way that made it unreasonably dangerous. The Texas Supreme Court granted review and heard oral argument January 24, 2006. Cooper Tire & Rubber Co. v. Mendez, No. 04-1039, November 18, 2005 (CA 155 S.W.3d 382).

HOT ISSUE 4 — Is ambiguity in contract resolved in favor of arbitration?

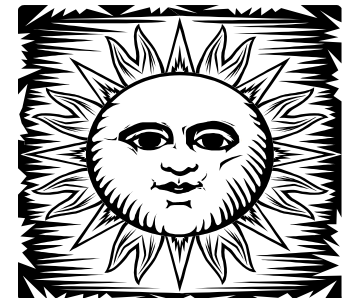
BISD sued Trane and others for defects in a construction project. Trane moved to compel arbitration, which was denied. The appeals court affirmed because it found the arbitration provisions ambiguous and held the trial court did not abuse its discretion by refusing to compel arbitration. The Texas Supreme Court granted review and heard oral argument February 14, 2006. American Standard & The Trane Co. v. Brownsville I.S.D., No. 05-0327, December 16, 2005 (CA ___ S.W.3d ___).

HOT ISSUE 5 — When may an insurer recover settlement payments from its insured?

In May 2005, the Texas Supreme Court held that an excess carrier was entitled to recoup settlement payments from its insured when the insured demanded a settlement regardless of significant coverage issues. The Texas Supreme Court has granted rehearing and reheard oral argument February 15, 2006. Excess Underwriters at Lloyds, London v. Frank's Casing Crew & Rental Tools, Inc., No. 02-0730, January 6, 2006 (48 Tex. Sup. Ct. J. 735).

HOT ISSUE 6 — Was medical-malpractice patient comparatively negligent?

Dr. Axelrad saw Dr. Jackson for serious pain in his abdomen. Dr. Jackson ran some tests, which were normal, and prescribed a laxative and enemas. Dr. Axelrad later underwent emergency surgery for diverticulitis and a perforated colon. He sued Dr. Jackson for misdiagnosis. A jury found Dr. Axelrad 51% responsible for his damages by not disclosing his full medical history; the trial court rendered a take-nothing judgment. The appeals court reversed and remanded, finding no evidence to support a comparative-negligence question. The Texas Supreme Court granted review and heard oral argument February 16, 2006. Jackson v. Axelrad, No. 04-0923, January 20, 2006 (CA 142 S.W.3d 418).



Letter of the Law is a newsletter provided by Barker, Lyman, Twining, Weinberg & Ferrell, P.C., to its clients and business associates. ***Although the newsletter is designed to alert you to recent decisions, it is not legal advice or a legal opinion. The applicability of recent decisions to a particular case depends on a thorough investigation of the facts unique to any situation.*** If you would like additional copies of the newsletter or you want to be deleted from the circulation list, please contact the firm. We welcome your comments.