

Letter of the Law

February 2007

Volume 14 Issue 2

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

TEXAS SUPREME COURT

Alcohol Liability

Dram Shop Defendant Is Not Responsible For Drunk Driver's Negligence

On rehearing, the result is the opposite of the result reported in Letter of the Law Vol. 12, Issue 1. Ruiz drank a case and a half of beer while cutting firewood, then bought another case of beer from F.F.P.'s convenience store. After leaving the store, Ruiz collided with the Dueñez family, seriously injuring family members. They sued F.F.P., which sued Ruiz. A jury awarded \$35 million against F.F.P.; Ruiz's negligence was not submitted. The appeals court affirmed, but the Texas Supreme Court reversed and remanded. Ruiz's negligence should have been submitted to the jury. A dram shop defendant is liable to injured third parties for its own negligence but not for its patron's negligent conduct. F.F.P. Operating Partners, L.P. v. Dueñez, 50 Tex. Sup. Ct. J. 102 (November 3, 2006).

Arbitration

Nonparties To Agreement Could Enforce Arbitration Provision

Ford Motor Company had an assignable right of first refusal to buy BMC. BMC agreed to sell its dealership to WMCO in a contract that acknowledged Ford's right of first refusal and also included an arbitration provision. Ford assigned its right to Meyer, who bought BMC's dealership. WMCO sued Meyer, Ford, and BMC. Meyer moved to compel arbitration. The trial

and appeals courts denied the motion. The Texas Supreme Court reversed and ordered arbitration. Although Meyer and Ford did not sign the contract, all WMCO's claims against them arose out of its contract with BMC. WMCO was equitably estopped from denying arbitration under these circumstances. Meyer v. WMCO-GP, L.L.C., 211 S.W.3d 302 (Tex. 2006).

Guardian Ad Litem

Guardian Ad Litem's Fee Was Not Reasonable

Tyler Hirn, a minor, and his parents were injured in a rollover accident. They sued Land Rover and others. The trial court appointed Hinojosa guardian ad litem to represent Tyler's interests and awarded Hinojosa \$100,000 in ad litem fees. The appeals court affirmed. The Texas Supreme Court reversed and remanded. A reasonable hourly rate multiplied by the number of hours spent performing necessary services yields a reasonable ad litem fee. Hinojosa recovered an award exceeding the necessary time spent multiplied by his hourly rate. Land Rover U.K. v. Hinojosa, 210 S.W.3d 604 (Tex. 2006).

Premises Liability

Soft-Drink Dispenser Was Not An Unreasonably Dangerous Condition

Taylor slipped and fell on ice that had fallen from a soft-drink dispenser. She sued Brookshire and recovered damages. The appeals court affirmed. The Texas Supreme Court reversed and rendered. Although a grocery store em-

ployee testified that ice from the dispenser fell to the floor daily, the dangerous condition was not the dispenser, which was no more dangerous than any other dispenser, but the ice on the floor. There was no evidence that Brookshire knew or should have known that the ice on which Taylor slipped was on the floor. Brookshire Grocery Co. v. Taylor, 50 Tex. Sup. Ct. J. 170 (December 1, 2006).

Defendant Did Not Know Of Premises Defect

Thompson sued the City for injuries she sustained when she tripped over a cover plate protruding from the floor of the Love Field lobby. The trial court dismissed the case because the City did not have actual knowledge of the protruding cover plate. The appeals court reversed. The Texas Supreme Court reversed and rendered. A government entity must have actual knowledge of the unreasonably dangerous condition before plaintiff can recover. The City's knowledge of the need for periodic maintenance of the cover plate, and the fact that its employees probably walked near the cover plate daily, did not establish that it had actual knowledge of the protrusion when Thompson's accident occurred. City of Dallas v. Thompson, 210 S.W.3d 601 (Tex. 2006).

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RECENT OPINIONS: TEXAS SUPREME COURT

Punitive Damages

Punitive-Damages Award Excessive

Chapa sued the car dealership for promising one model car and delivering a different model. She recovered in contract, fraud, and under the Deceptive Trade Practices Act (“DTPA”). A jury awarded her \$30,000 actual damages and \$250,000 punitive damages. The trial court would only award Chapa recovery in contract, eliminating punitive damages; the appeals court reinstated the award but reduced punitive damages to \$125,000. The Texas Supreme Court affirmed in part and reversed in part. It agreed that Chapa proved conduct by the dealership, an intentional bait-and-switch, that went beyond mere breach of contract and supported recovery in fraud or DTPA. The court found the punitive-damages award, even as reduced by the court of appeals, excessive and remanded for further consideration. Tony Gullo Motors 1, L.P. v. Chapa, 212 S.W.3d 299 (Tex. 2006).

COURTS OF APPEALS

Causation

Gas Station’s Alleged Negligence Did Not Cause Accident

Luedtke filled up at a Diamond Shamrock gas station and drove off without paying for the gas. An attendant ran outside trying to get Luedtke’s license plate number. Luedtke accelerated, ran a red light, and collided with the Pichardos, who sued the gas station over the incident. The trial court granted defendants summary judgment, which the appeals court affirmed. Luedtke’s criminal conduct was a superseding cause of the accident. Diamond Shamrock had no reason to foresee that by trying to get Luedtke’s license number, it would cause Luedtke to run a red light and have an accident. Pichardo v. Big Diamond, Inc., 215 S.W.3d 497 (Tex. App.—Fort Worth 2007).

Damages

Evidence Of Future Mental Anguish Over Sexual Assault Sufficient

On rehearing, the result is the opposite of the result reported in Letter of the Law Vol. 12, Issue 4. AB, who was undergoing rehabilitation therapy at TIRR, reported that she had been sexually assaulted by another brain-injured patient. Her mother, NN, sued TIRR. A jury awarded AB past mental anguish and \$625,000 future mental anguish. The trial court vacated the award for future anguish; the appeals court reinstated the award. AB could not directly testify about the nature of her own mental anguish. But the severity of the assault, evidence of AB’s past mental anguish, and evidence that AB was incapable of treatment due to her preexisting brain injury provided an adequate basis for the jury’s award. N.N. v. The Institute for Rehabilitation & Research, No. 01-02-01101-CV, Houston [1st Dist.], December 7, 2006.

Discovery

Net Worth Information Was Discoverable

Kaiser sued Garth and others for actual and punitive damages. Her claims included a claim of conspiracy. The trial court required defendants to produce net worth information and tax returns. The appeals court granted mandamus in part and denied it in part. A prima facie right to punitive damages need not be established before a party’s net worth is discoverable. Thus, the trial court did not abuse its discretion in requiring production of balance sheets showing net worth. Kaiser was not entitled to discover defendants’ tax returns, though, because tax returns do not show net worth, include substantial personal financial information unrelated to net worth, and, once balance sheets were produced, were not relevant. In re Garth, 214 S.W.3d 190 (Tex. App.—Beaumont 2007).

Duty

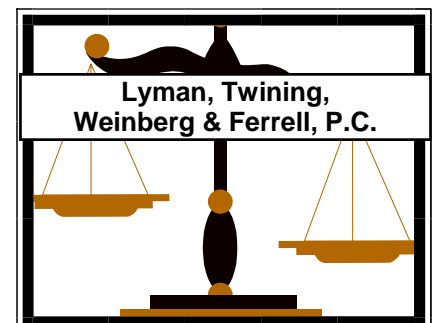
Employer Had Duty To Warn About Lowboy Carts

While working for Brookshire, a non-subscriber, Goss banged into a lowboy cart in a cooler and hurt her back while trying to prevent herself from falling. She sued Brookshire and recovered over \$700,000. The appeals court affirmed. An employer owes a duty to provide a safe workplace, including providing warnings, but not to warn about obvious dangers. Goss offered evidence that Brookshire provided training about the hazards of lowboy carts on the sales floor but not about the hazards of carts in the coolers, where carts stacked with food were placed at holiday times. Brookshire owed a duty to warn about or to prohibit lowboy carts in the coolers. Brookshire Grocery Co. v. Goss, 208 S.W.3d 706 (Tex. App.—Texarkana 2006, pet. filed).

Limitations

Fact Issue Raised On Due Diligence In Service

In May 2001, Auten fell at Clark’s restaurant and was injured. She sued Clark less than two years later but did not serve Clark until more than three years later. Clark moved for and won summary judgment on limitations. The appeals court reversed and remanded. Auten’s counsel adequately explained his efforts at service and the medical problems that led to delays in requesting substituted service. These explanations sufficiently raised a fact issue on whether Auten exercised the diligence necessary for service to relate back to



RECENT OPINIONS: COURTS OF APPEALS

the timely filed lawsuit. Auten v. D.J. Clark, Inc., 209 S.W.3d 695 (Tex. App.—Houston [14th Dist.] 2006).

Negligence

Comp Bar Eliminated Claim Against Borrowing Employer

Mosqueda was hired by a labor agency and placed for work with G&H, where she was hurt while cleaning a machine. She sued G&H for negligence. A jury found Mosqueda was not G&H's borrowed employee, but the trial court disagreed and granted G&H's motion for judgment notwithstanding the verdict based on the workers' compensation bar. The appeals court affirmed. G&H controlled the work Mosqueda was doing when she was injured, making Mosqueda its borrowed employee. Because G&H had comp coverage, Mosqueda's claim against G&H was barred. Mosqueda v. G&H Diversified Mfg., Inc., No. 14-04-00183-CV, Houston [14th Dist.], January 31, 2007.

Premises Liability

Hiring Company Did Not Control Subcontractor's Work

Ellwood hired a subcontractor to remove and replace an air conditioning unit on top of a large machine. While doing that work, Jones, an employee of the subcontractor, fell off the machine and was injured. He sued Ellwood and recovered damages. The appeals court reversed and rendered. Chapter 95, Tex. Civ. Prac. & Rem. Code, applied to this case and required Jones to show Ellwood's actual control over the work. Ellwood's safety rules and regulations and its right to forbid the subcontractor from doing the work in a dangerous manner was not evidence of actual control. Ellwood Texas Forge Corp. v. Jones, 214 S.W.3d 693 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

Mud Was Not An Unreasonably Dangerous Condition

On rehearing, the result is the opposite of the result reported in Letter of the Law Vol. 13, Issue 4. 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 affirmed. Eubanks claimed that he slipped on slime or mud created by decomposing leaves left behind by Pappas's landscaping crew. He offered no evidence other than his speculation that the crew created the mud, a natural condition not posing an unreasonable risk of harm. Eubanks v. Pappas Restaurants, Inc., 212 S.W.3d 838 (Tex. App.—Houston [1st Dist.] 2006).

Shooting Was Not Foreseeable

Wingfield shot his wife, Amy, and Stewart, who went to Amy's aid, in the hospital parking lot. Stewart sued the hospital alleging that it failed to provide adequate security. The trial court granted the hospital summary judgment, which was affirmed. Amy and Stewart worked in an adjacent office building and parked in the hospital parking lot. Before Wingfield's shooting spree, no similar criminal activity had occurred in the parking lot or at the hospital. Further, Wingfield and Amy had not had any prior physical altercations in the office building or parking lot. On these facts, the hospital owed no duty to protect Stewart from Wingfield's unforeseeable criminal conduct. Stewart v. Columbia Medical Ctr. of McKinney Subsidiary, L.P., 214 S.W.3d 659 (Tex. App.—Dallas 2007, pet. filed).

Premises Owner Liable For Shooting

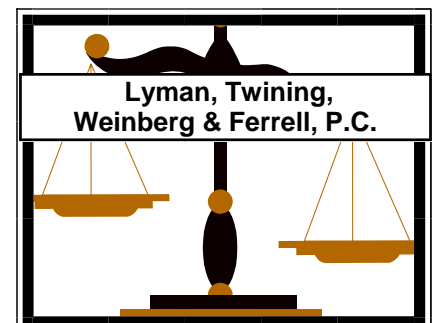
While leaving a movie theater at a mall managed by Trammell Crow, Gutierrez was shot to death. His family sued Trammell Crow and won a \$5 million judgment. The appeals court

affirmed. Based on ten robberies involving deadly weapons or bodily injury during the two years before the shooting, a majority found that Trammell Crow owed Gutierrez a duty that it breached, causing his death. The dissent characterized the prior crimes as nine robberies and one aggravated assault and would not have found a duty based on dissimilarity of the crimes and on evidence that Gutierrez was a "fence" who was killed for cooperating with police. Trammell Crow Central Texas, Ltd. v. Gutierrez, No. 04-05-00056-CV, San Antonio, December 20, 2006, pet. filed.

Punitive Damages

Credit Eliminated Actual Damages; Punitive Damages Still Recoverable

Gilcrease died from mesothelioma, an asbestos-related disease. His family sued many asbestos defendants, including Garlock, the only defendant to go to trial. A jury awarded plaintiffs \$2.5 million actual damages and \$1 million punitive damages. The trial court entered a take-nothing judgment after applying more than \$4 million in settlement credits to the entire judgment. The appeals court reversed and reinstated the \$1 million punitive damages award. Settlement credits do not apply to awards of punitive damages. Further, punitive damages calculations are based on the jury's award of actual damages, not on the amount actually recovered by the plaintiff after settlement credits. Gilcrease v. Garlock, Inc., 211 S.W.3d 448 (Tex. App.—El Paso 2006).



INSURANCE / WORKERS' COMPENSATION UPDATE

TEXAS SUPREME COURT

Insurance Policy Construction

Insurer Owed Prejudgment Interest But Not Attorney's Fees

Brainard was killed in a collision with a truck. His family eventually sued Trinity, their auto insurer, seeking underinsured motorist ("UIM") benefits, and recovered \$5,000 actual damages (after the credit for the settlement with the truck driver) plus \$100,000 attorney's fees. The appeals court reversed the fee award and affirmed the denial of prejudgment interest. The Texas Supreme Court affirmed in part and reversed in part. Trinity did not owe attorney's fees because plaintiffs' contract claim did not mature until the judgment. But prejudgment interest owed by an underinsured motorist qualifies as damages falling within the UIM limit. Trinity owed the family prejudgment interest. Brainard v. Trinity Universal Ins. Co., 50 Tex. Sup. Ct. J. 271 (December 22, 2006).

Limitations

Certificate of Insurance Did Not Extend Limitations

Via Net supplied materials to Safety Lights. In 2/1997, pursuant to contract, Via Net told Safety Lights that it was an additional insured on Via Net's liability policy and provided it a certificate of insurance. After an injured Via Net employee sued it, Safety Lights learned in 12/1997 it was not an additional insured. Its insurer, TIG, settled with the employee. In 12/2001, TIG sued Via Net for breach of contract. The trial court granted Via Net summary judgment on limitations but the appeals court reversed. The Texas Supreme Court reversed and rendered. The certificate of insurance said that it did not confer any rights or extend coverage. It did not toll limitations, which began running in 2/1997, when Via Net breached, not later. Via Net v. TIG Ins. Co., Inc., 211 S.W.3d 310 (Tex. 2006).

COURTS OF APPEALS

Course and Scope

Worker Not In Course Of Employment While Driving To Job Site

Tarrant rolled his pickup and died while on his way from Odessa to a job site 60 miles away. His wife sought workers' comp benefits for his death and lost at the Texas Workers' Compensation Commission. She filed suit and lost on summary judgment. The appeals court affirmed. Tarrant was paid a per diem for lodging and meals while working outside Odessa. He chose to drive home every night rather than using the per diem for lodging near the job site. Tarrant was simply on his way to work, not furthering the business of his employer, when the accident occurred; he was not in course and scope and his wife could not recover comp benefits. Dunlap-Tarrant v. Association Cas. Ins. Co., 213 S.W.3d 452 (Tex. App.—Eastland 2006).

Insurance Policy Construction

Corrosion Exclusion Was Ambiguous On These Facts

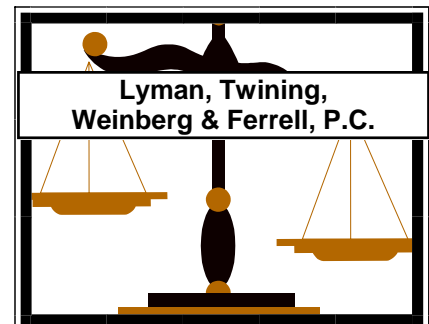
KKM owned a building that collapsed due to corrosion of the steel reinforcers in the concrete beams and columns. KKM made a claim with Lloyd's, its property insurer, which denied coverage and filed this declaratory-judgment action. KKM won at trial. The appeals court reversed and remanded. It found an exclusion for corrosion ambiguous because the policy provided coverage for collapse of a building caused by decay hidden from view. Disintegration of the steel reinforcers could represent decay, a covered loss, as well as corrosion. The court remanded the case, though, because the trial court erred in not submitting a jury question whether KKM knew of the problem before the Lloyd's policy inception. Certain Underwriters at Lloyd's v. KKM, Inc., 215 S.W.3d 486 (Tex. App.—Corpus Christi 2006, pet. filed).

Surface Water Exclusion Barred Coverage

The Crockers had an aggregate-rock surface installed on top of their existing patio. Years later, they realized that water collecting on the patio ran off into their home, causing water damage and mold. Their homeowners insurer, ANGIC, denied coverage based on an exclusion for damage caused by surface water. The Crockers sued and lost on summary judgment. The appeals court affirmed. Water on the patio that ran off into the house was water on "the surface of the ground" within the meaning of the exclusion, which applied to bar coverage. Crocker v. American Nat'l Gen. Ins. Co., 211 S.W.3d 928 (Tex. App.—Dallas 2007).

No Duty To Defend; Claims Known Before Policy Period Began

Plaintiffs sued Warrantech for fraud in administering consumer product warranties. Steadfast, Warrantech's professional liability insurer, refused to defend. Warrantech sued it. The trial court granted Steadfast summary judgment, which was affirmed. The fortuity doctrine precludes coverage for known losses and losses in progress at policy inception. That doctrine applied to bar coverage because plaintiffs' pleadings in the underlying case alleged that Warrantech knew about the losses caused by its mishandling of warranty claims at a time preceding the inception date of Steadfast's policy. Warrantech Corp. v. Steadfast Ins. Co., 210 S.W.3d 760 (Tex. App.—Fort Worth 2006, pet. filed).



INSURANCE / WORKERS' COMPENSATION UPDATE

Procedure

Judgment In Dec Action Against Insured Did Not Bind Third-Party Plaintiff

El Nagggar sued the general contractor, Traxel, and others over construction defects. IHIC, which insured a subcontractor, got a federal court to declare that Traxel was not an additional insured under the IHIC policy. El Nagggar later won a multimillion dollar judgment against Traxel, then sued IHIC for indemnity, arguing that the IHIC policy covered Traxel. The trial court granted IHIC summary judgment based on the federal court ruling. The appeals court reversed and remanded. Because IHIC did not join El Nagggar in the federal court case, that case was not res judicata of El Nagggar's claims. El Nagggar Fine Arts Furniture, Inc. v. Indian Harbor Ins. Co., No. 01-05-01069-CV, Houston [1st Dist.], March 1, 2007.

Insurer Failed To Exhaust Administrative Remedies

After an employment-related injury, Cupps began receiving comp benefits from GuideOne, including supplemental income benefits ("SIBs"). GuideOne later determined that Cupps was not totally disabled and sued her in state court for fraud. She moved for summary judgment because GuideOne had never contested her SIBs before the workers' comp commission. The trial court granted Cupps summary judgment, which was affirmed. The commission had exclusive original jurisdiction to determine whether Cupps was entitled to SIBs and whether she had fraudulently obtained those benefits. GuideOne Ins. Co. v. Cupps, 207 S.W.3d 900 (Tex. App.—Fort Worth 2006, pet. denied).

Attorney For Insurer Could Not Represent Defendant

Perez, a passenger in a car driven by Garza, was injured in a collision with a car driven by Kleinert. Perez sued Garza, Kleinert, and State Farm, the

auto insurer of the people who had loaned Garza the car. State Farm initially provided Garza a defense but later sued her in a separate case and won a default judgment that it did not owe Garza a defense. Garza's defense attorney withdrew. At the Perez trial, State Farm's attorney acted as though he represented Garza, worked with Kleinert's attorney, and won a finding of no liability on either driver. The appeals court reversed and remanded. An attorney cannot deliberately misrepresent his status before the jury. The deception created a conflict of interest aligning State Farm with an uninsured motorist, Garza, against its insured, Perez. Perez v. Kleinert, 211 S.W.3d 468 (Tex. App.—Corpus Christi 2006).

Subrogation

Insurer Did Not Necessarily Owe Attorney's Fees For Subrogation Recovery

After Edminster was hurt in a collision, Allstate paid her \$4,000 in medical benefits under an auto policy. Edminster settled with the other driver for \$12,000, \$4,000 of which was paid directly to Allstate. Edminster demanded that Allstate reduce its subrogation lien by one-third for attorney's fees. When it refused, Edminster sued and the trial court granted her summary judgment. The appeals court reversed and remanded. Allstate took steps to protect its subrogation rights independent of Edminster's efforts, creating a fact issue whether Allstate owed fees to Edminster's attorney. Allstate Ins. Co. v. Edminster, No. 05-05-01492-CV, Dallas, January 26, 2007.

FIFTH CIRCUIT

Insurance Policy Construction

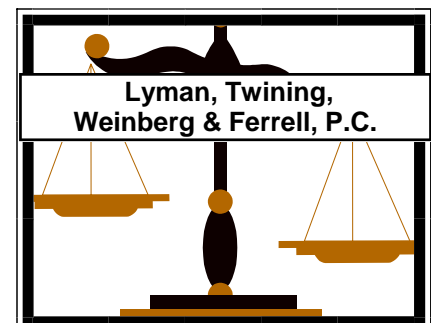
Insurer Properly Calculated Insured's Deductible

Factory Mutual issued the hospital district a property policy. A bad leak in a chilled-water system led to \$550,000 in repairs and \$1 million in rental ex-

penses for temporary water chillers needed to keep a hospital open. The parties disagreed about the deductible applicable to the rental expense and this suit followed. The trial court granted Factory Mutual summary judgment, which was affirmed. Rental of the chillers was a time-element loss. Factory Mutual correctly interpreted the policy to apply as a time-element deductible the value of one day's worth of the district's total projected operating revenue, a deductible exceeding \$600,000. Bexar County Hosp. Dist. v. Factory Mut. Ins. Co., 475 F.3d 274 (5th Cir. 2007).

Extrinsic Evidence Could Not Defeat Duty To Defend

While driving a company truck belonging to his employer, Eagle, Graham ran into the back of a motorcycle, injuring two people who sued Graham and Eagle. Liberty Mutual, Eagle's auto insurer, sued Graham alleging that it had no duty to defend him because he used the truck without proper consent. The federal district court granted Liberty Mutual summary judgment. The Fifth Circuit reversed and rendered judgment that Liberty Mutual owed a duty to defend Graham. Pleadings in the plaintiff's suit against Graham factually alleged that Graham had implied permission to use the truck as he did. Liberty Mutual could not defeat those pleadings by extrinsic evidence that Graham had consumed too much alcohol and fallen asleep while driving the company truck. Liberty Mut. Ins. Co. v. Graham, 473 F.3d 596 (5th Cir. 2006).



PROFESSIONAL LIABILITY UPDATE

COURTS OF APPEALS

Causation

Prenatal Care Did Not Cause Birthing Injury

When Jaimes first saw Dr. Diaz for prenatal care, Dr. Diaz worked for LMG. He left his position there two weeks before Jaimes's baby was born with a brachial plexus injury after Dr. Diaz failed to perform a C-section. Jaimes sued Dr. Diaz and LMG and recovered a judgment against LMG based on vicarious liability. The appeals court reversed and rendered. Although one expert testified about negligent prenatal care, that expert and all others testified that the baby would not have suffered any injuries if Dr. Diaz had performed a C-section. Thus, the prenatal negligence was not a proximate cause of the injury. LMG was not vicariously liable for the unperformed C-section because Dr. Diaz no longer worked there when the omission occurred. Laredo Medical Group v. Jaimes, No. 04-05-00216-CV, San Antonio, January 31, 2007.

Experts

Infectious-Disease Expert Could Testify Against Cardiothoracic Surgeon

Ragston, who had end-stage renal disease, underwent a graft performed by Dr. McKowen, a cardiothoracic surgeon. The graft became infected and Ragston ultimately died from sepsis. Her family sued Dr. McKowen and served an expert report from an infectious-disease expert. The trial court denied Dr. McKowen's motion to dismiss and the appeals court affirmed. The expert had treated many patients with graft infections. He was qualified to address the standard of care and to give his opinion that Dr. McKowen breached the standard by failing to remove the graft immediately when the graft became infected. McKowen v. Ragston, No. 01-06-00665-CV, Houston [1st Dist.], January 11, 2007.

Limitations

Patient's Claim Was Barred By Limitations

In 4/2000, Dr. Boeke performed oral surgery on Bratcher. He also placed a lower denture in her mouth in 3/2001. She sent a notice letter in 3/2003 saying that she intended to sue Dr. Boeke over the denture placement, but when suit was filed, the only claim was over the 4/2000 surgery. Dr. Boeke moved for summary judgment on limitations, Bratcher amended her petition to allege negligent care in 3/2001. The trial court granted Dr. Boeke summary judgment, which was affirmed. The claim filed in Bratcher's amended petition did not relate back to the original petition which, therefore, did not toll limitations. Bratcher v. Boeke, 207 S.W.3d 431 (Tex. App.—Dallas 2006).

Negligence

Consent to Use Associates Eliminated Battery Claim

Drs. Kuhl and Beceiro performed an unsuccessful surgery on Haynes, who sued Dr. Beceiro for battery. The trial court granted Dr. Beceiro summary judgment, which was affirmed. It was undisputed that Haynes had requested that Dr. Kuhl alone perform the surgery. On the morning of the surgery, though, Haynes signed a disclosure and consent form at the hospital allowing Dr. Kuhl and such "associates" as he deemed necessary to perform the surgery. Dr. Beceiro, one of Dr. Kuhl's partners, qualified as an associate; Haynes's written consent eliminated her claim of battery. Haynes v. Beceiro, No. 04-06-00099-CV, San Antonio, November 1, 2006, pet. denied.

Statutory Construction

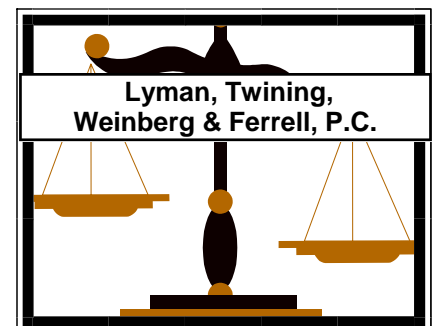
Nonsuit Did Not Supercede Motion To Dismiss

Hinderliter sued Dr. Fox for medical negligence in treating multiple sclerosis. He timely served an expert report

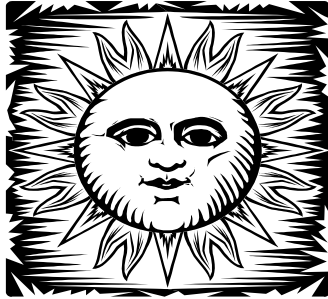
from Dr. Dollinger. Dr. Fox moved to dismiss because the report was inadequate. Hinderliter nonsuited, re-filed, and timely served an expert report from another expert. Dr. Fox again moved to dismiss. The trial court denied the motion. The appeals court reversed and dismissed. A nonsuit does not affect an adverse party's right to be heard on a motion for sanctions pending at the time of dismissal. Dr. Fox's motion to dismiss the first suit constituted a request for statutory sanctions under § 74.351(b), Tex. Civ. Prac. & Rem. Code. Because the first expert's report was inadequate, Dr. Fox was entitled to dismissal with prejudice. Fox v. Hinderliter, No. 04-06-00430-CV, San Antonio, December 27, 2006.

Plaintiff Could Not Depose Doctor Before Serving Expert Report

Plaintiff filed a Rule 202 petition, a procedure for taking depositions before suit, seeking to depose two doctors about a potential medical malpractice case. The hospital and doctors opposed the petition but the trial court held that plaintiffs could depose the doctors. The appeals court quashed the depositions. It found Rule 202 in conflict with § 74.351(s), (u), Tex. Civ. Prac. & Rem. Code, the medical-malpractice statute, which prohibits oral depositions of defendant doctors until after a plaintiff serves an expert report. Plaintiffs cannot use Rule 202 to avoid serving an expert report before deposing defendants. In re Memorial Hermann Hosp. Sys., 209 S.W.3d 835 (Tex. App.—Houston [14th Dist.] 2006).



HOT ISSUES BEFORE THE TEXAS SUPREME COURT



HOT ISSUE 1 — Does mental incapacity toll limitations on a malpractice claim?

Yates suffered a severe injury during surgery. Her mother was appointed her guardian and sued United after the two-year limitations period expired. The trial court granted United summary judgment over Yates's objection that her daughter's continuous mental incapacity since the date of surgery tolled limitations. The appeals court affirmed. The Texas Supreme Court granted review and heard oral argument February 14, 2007. Yates v. United Surgical Partners Int'l, Inc., No. 05-0925, October 27, 2006 (CA 170 S.W.3d 185).

HOT ISSUE 2 — Did party owe independent contractor duty to warn?

Central hired Taylor to perform periodic cleaning of its cement truck drums. Central did not discuss with Taylor the risks inherent in the cleaning process. Islas, one of Taylor's employees, was injured while working on a Central truck and sued Central. A jury found Central 20% liable but the trial court granted judgment notwithstanding the verdict for Central. The appeals court reversed, holding that because Central was outsourcing an inherently dangerous activity, it owed independent contractors a duty to warn. The Texas Supreme Court granted review and heard oral argument March 21, 2007. Central Redi-Mix Concrete Co., Inc. v. Islas, No. 05-0940, December 15, 2006 (CA ___ S.W.3d ___).

HOT ISSUE 3 — Can company that did not make a product owe indemnity?

SSP sold a cigarette lighter that allegedly started a fire that killed one child and injured two others, whose parents sued SSP and Gladstrong. After Gladstrong settled, a jury awarded damages against SSP, which demanded indemnity from Gladstrong. The trial court granted Gladstrong summary judgment because its parent company, not it, had made the lighter. The appeals court reversed and remanded. The Texas Supreme Court granted review and heard oral argument March 20, 2007. SSP Partners v. Gladstrong Investments (USA) Corp., No. 05-0721, December 1, 2006 (CA 169 S.W.3d 27).

HOT ISSUE 4 — Did discovery rule save plaintiff's claims from limitations?

After Emerald began reworking wells plugged by Exxon, it sued Exxon for misrepresentations in Exxon's public filings about the condition of the wells. Exxon's former royalty owners joined Emerald's suit and recovered a large verdict against Exxon. The appeals court affirmed, holding that the royalty owners' claims were not time barred. The Texas Supreme Court granted review and heard oral argument February 13, 2007. Exxon Corp. v. Emerald Oil & Gas Co., L.P., No. 05-1076, December 1, 2006 (CA 180 S.W.3d 299).

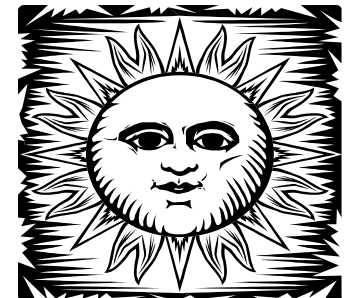
HOT ISSUE 5 — Did party waive right to arbitration?

The Culls bought a home from Perry and eventually sued Perry and the home warranty company for structural problems. After objecting to arbitration early in the litigation, the Culls moved for arbitration four days before trial. The trial court granted the motion and the Culls recovered \$800,000 in arbitration, an award the trial court confirmed. The appeals court affirmed, finding that the Culls had not waived their right to arbitration. The Texas Supreme Court

granted review and heard oral argument March 20, 2007. Perry Homes v. Cull, No. 05-0882, December 2, 2006 (CA 173 S.W.3d 565).

HOT ISSUE 6 — Was evidence of medical causation sufficient?

Labao was involved in a car wreck. He died seven months later. His daughter, Ferrer, sued the other driver, Guevara, and recovered \$1 million for past medical expenses without offering evidence from a medical expert. The trial court granted Guevara a judgment notwithstanding the verdict because there was no expert testimony relating the medical expenses to the accident. The appeals court reversed and reinstated the jury award. The Texas Supreme Court granted review and heard oral argument February 14, 2007. Guevara v. Ferrer, No. 05-1100, October 27, 2006 (CA 192 S.W.3d 39).



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