

Letter of the Law

May 2005

Volume 12 Issue 3

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

TEXAS SUPREME COURT

Defamation

Article Was Not Published With Actual Malice

The Houston Chronicle, owned by Hearst, published an article criticizing the Smith County criminal justice system. Three Smith County prosecutors sued the newspaper and its reporter for defamation. The trial and appeals courts denied the defendants' motion for summary judgment but the Texas Supreme Court reversed and rendered. A failure to investigate fully is not evidence of actual malice (knowledge of falsity or reckless disregard for the truth). The reporter spent five months researching the article, interviewed parties on both sides of the issue, and had many sources corroborating criticisms of the prosecutors' office. Based on the entirety of the evidence, plaintiffs did not raise a fact issue on actual malice. The Hearst Corp. v. Skeen, 48 Tex. Sup. Ct. J. 484 (March 11, 2005).

Employment

Borrowing Employer Did Not Prove Comp Coverage

Garza worked for Interim, a temporary employment agency, which placed him with Exel performing manual labor. He was hurt on the job and sued Exel. The trial court granted Exel summary judgment based on the workers' comp bar because Garza had received comp benefits. The appeals court affirmed. The Texas Supreme Court reversed and remanded. It agreed that the summary-judgment evidence established that Exel was Garza's employer.

But Exel relied on Interim's comp policy and that policy did not name Exel as an insured or additional insured. A temporary employment agency does not obtain comp coverage for a client simply by obtaining that coverage for itself. Garza v. Exel Logistics, Inc., 48 Tex. Sup. Ct. J. 544 (April 8, 2005).

Intentional Infliction

IIED Claim Not Viable Because Plaintiff Had Other Well-Recognized Claim

Jackson sued her employer, Creditwatch, for sexual harassment and intentional infliction of emotional distress ("IIED"). She dismissed her harassment claim and lost the IIED claim on summary judgment. The appeals court reversed and remanded but the Texas Supreme Court reversed and rendered judgment for Creditwatch. Jackson's complaints stemmed from a co-worker's lewd advances. She had a well-recognized statutory remedy, for sexual harassment, that precluded her IIED claim because IIED is a gap-filler tort. Creditwatch, Inc. v. Jackson, 157 S.W.3d 814 (Tex. 2005).

Premises Liability

No Proof That Landowners' Negligence Caused Sexual Assault

While walking from one apartment to another, LU was molested by a fellow tenant. Urena, LU's mother, sued the apartment complex's owners. The trial court granted defendants summary judgment but the appeals court reversed and remanded. The Texas Supreme

Court reversed and rendered. Even if defendants were negligent, there was no evidence that the negligence proximately caused the assault. The pedophile had no criminal record and the child willingly went to the pedophile's apartment. There was no outcry to alert a security guard, if defendants had hired one, that an assault was underway. Western Inv., Inc. v. Urena, 48 Tex. Sup. Ct. J. 556 (April 8, 2005).

Procedure

Defendant Not Entitled To More Than One Inferential Rebuttal Instruction

TEC's truck driver hit a cow on the roadway. Before the cow could be moved out of the way, another driver hit the cow and careened into the Dillard's car, killing Mr. Dillard. His family sued TEC and won. The appeals court reversed and remanded, holding that TEC was entitled to two inferential rebuttal instructions in the jury charge and only received one. The Texas Supreme Court disagreed. Courts should not give several inferential rebuttal instructions when, as here, the instructions overlap. An instruction on "unavoidable accident" sufficiently set out TEC's defenses. Dillard v. Texas Elec. Coop., 157 S.W.3d 429 (Tex. 2005).

**Barker, Lyman, Twining,
Weinberg & Ferrell, P.C.**
1221 McKinney St., Suite 3600
Houston, Texas 77010-2011
(713) 759-1990 [telephone]
(713) 652-2419 [facsimile]
Editor: John B. Wallace

RECENT OPINIONS: TEXAS SUPREME COURT

Potential Juror's Answer Did Not Disqualify Him

Cortez sued HCCI, a nursing home, for injuries suffered by Puentes. During voir dire, prospective juror Snider, an insurance adjuster, said that the defendant was "starting out ahead" but that he was "willing to try" to listen to the case and decide it on the evidence. The trial court refused to disqualify Snider for cause. A jury found against HCCI but awarded low damages. Cortez appealed. The appeals court and Texas Supreme Court affirmed. An initial "leaning" is not disqualifying if it represents skepticism rather than unshakeable conviction. Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87 (Tex. 2005).

Products Liability

Contradictory Expert Testimony Did Not Prove Defect

Iracheta crashed into a truck. A fire erupted before bystanders could help; Iracheta and her two sons died. The boys' grandmother sued GM. A jury found that a design defect in the fuel system caused the death of Edgar and awarded his estate \$10 million. The appeals court affirmed. The Texas Supreme Court reversed and rendered. Plaintiff's two experts offered inconsistent theories, contradicting each other and themselves, about what caused the fire. Inconsistent theories cannot be manipulated to form a hybrid for which no expert can offer support. Thus, there was no evidence that a fuel system defect caused the fire in which Edgar died. General Motors Corp. v. Iracheta, 48 Tex. Sup. Ct. J. 529 (April 8, 2005).

COURTS OF APPEALS

Agency

Employee May Not Have Had Authority To Permit Passenger In Truck

Landry worked for Builders Transport as a truck driver. He allowed Smith to

ride with him on a trip. Landry lost control of his truck, it overturned, and Smith was ejected and killed. Smith's family sued Landry and Builders Transport and recovered a large judgment. The appeals court reversed and remanded. Builders Transport had a written policy prohibiting drivers from transporting unauthorized passengers. It had not authorized Smith as a passenger. Because the trial court refused to give the jury an instruction about the unauthorized-passenger rule, Builders Transport was entitled to a new trial. Builders Transp., Inc. v. Grice-Smith, No. 10-01-00130-CV, Waco, March 9, 2005.

Causation

Truck's Presence On Shoulder Did Not Proximately Cause Accident

Reinicke's wife and two sons were killed when his wife's van drifted off the highway onto the shoulder and collided with the left rear corner of a parked Aeroground 18-wheeler, whose driver had run out of gas and pulled off onto the shoulder. Reinicke sued Aeroground and won a large jury verdict but the trial court granted judgment notwithstanding the verdict based on the absence of causation. The appeals court affirmed. Although the Aeroground driver had failed to put out emergency warning triangles behind the truck, there was no evidence that the presence of warning triangles would have prevented the van from leaving the roadway and hitting the truck. Reinicke v. Aeroground, Inc., No. 14-02-00680-CV, Houston [14th Dist.], March 22, 2005.

DTPA

Misrepresentation Of Fact By Professional Was Actionable

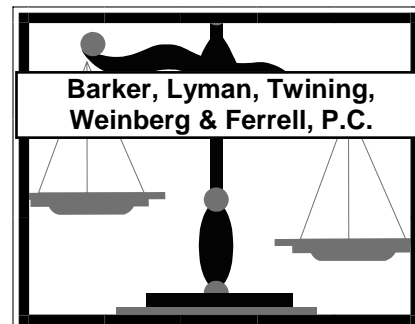
Before buying her house, Head hired U.S. Inspect to perform the real estate inspection. That inspection did not dis-

close defects in the roof. When the roof began leaking, Head sued U.S. Inspect under the Deceptive Trade Practices Act ("DTPA") and for breach of contract. The trial court granted U.S. Inspect summary judgment. The appeals court affirmed in part and reversed in part. Head conceded that the inspectors were professionals, who are generally exempt from DTPA liability. Head raised a fact issue on an exception to that exemption, though, for misrepresentations of fact. U.S. Inspect represented that it would use a licensed real estate inspector to inspect the roof; instead, it used an unlicensed, unsupervised apprentice. Head v. U.S. Inspect DFW, Inc., No. 02-03-00152-CV, Fort Worth, February 24, 2005.

Duty

Bus Owner Had No Reason To Foresee Bus Hijacking

Gibbs drove casino charter buses for his employer, ShuttleKing. During a trip to a casino, three passengers hijacked the bus and shot and seriously injured Gibbs. He sued ShuttleKing, a nonsubscriber, for negligence. The trial court granted ShuttleKing summary judgment, which was affirmed. Evidence of several hijacking crimes in other states involving other bus lines did not make this hijacking foreseeable. ShuttleKing had never experienced such an incident and Gibbs offered no evidence that the few hijackings that had occurred in the northeast were similar or were ever brought to ShuttleKing's attention. Gibbs v. ShuttleKing, Inc., No. 08-02-00037-CV, El Paso, February 3, 2005.



RECENT OPINIONS: COURTS OF APPEALS

Employer Did Not Owe Employee A Duty To Warn About His Work

Patino worked for CTI removing and repairing flat truck tires. He was injured while removing a tire and sued CTI, a nonsubscriber. The trial court granted CTI a no-evidence summary judgment, which was affirmed. An employer owes a duty to warn an employee when the work is of a dangerous character and the employer has reason to know the employee is unaware of the danger. Patino offered no evidence that he was inexperienced in changing and repairing truck tires or unaware of the dangers. He raised no evidence of a duty to warn. Patino v. Complete Tire, Inc., No. 05-04-00561-CV, Dallas, March 10, 2005.

Indemnity

Agreement Did Not Meet Express-Negligence Test

Dalton sued Delta and its subcontractor, ARC, for dropping him while transferring him from a seat to a wheelchair. Delta filed an indemnity claim against ARC but lost on summary judgment. The appeals court affirmed. ARC agreed to indemnify Delta for claims arising out of ARC's acts or omissions. The next sentence in the agreement said that the indemnity would apply regardless of whether the injury also arose out of Delta's negligence, meaning that ARC would indemnify Delta for ARC's negligence even if Delta was also negligent. The agreement did not specifically indemnify Delta for Delta's own negligence and did not meet the express-negligence test. Delta Airlines, Inc. v. ARC Security, Inc., No. 02-03-00371-CV, Fort Worth, April 28, 2005.

Comp Statute Eliminated Indemnity For Third-Party Beneficiary

Superior signed an agreement indemnifying Mitchell Energy and its contractors for any injuries to Superior's employees. An employee was injured and

sued another contractor, ESC, for damages. ESC settled the suit, then sued Superior for indemnity. The trial court granted ESC summary judgment but the appeals court reversed and rendered. An employer is not liable to a third party for indemnity for an employee's injuries absent a written agreement "with the third party" to assume liability. TEX. LAB. CODE § 417.004. Since ESC claimed indemnity as a third-party beneficiary of the Mitchell contract, and not through a direct contract with Superior, the statute precluded ESC's indemnity claim. Superior Snubbing Serv., Inc. v. Energy Serv. Co. of Bowie, Inc., 158 S.W.3d 112 (Tex. App.—Fort Worth 2005).

Premises Liability

Chapter 95 Barred Claims For Death Of Contractor And Employee

A water tank on which Urias and Pallanes were working at a well site exploded, killing both. Their families sued Chi and won an \$8 million judgment. The appeals court reversed and rendered. Chi owned and operated the well site. It hired independent contractors such as Pallanes and his employee, Urias, to perform routine tasks at the well site. Under Ch. 95, Tex. Civ. Prac. & Rem. Code, Chi was not liable unless it controlled the work and knew about the danger. Pallanes, not Chi, made the decision to work on the water tank during bad weather. Since Chi did not control the work or know about the potential danger, plaintiffs could not recover against it. Chi Energy, Inc. v. Urias, 156 S.W.3d 873 (Tex. App.—El Paso 2005, pet. filed).

U.S. SUPREME COURT

Preemption

FIFRA Did Not Preempt Suit Against Pesticide Maker

Twenty-nine Texas peanut farmers threatened Dow with a lawsuit alleging

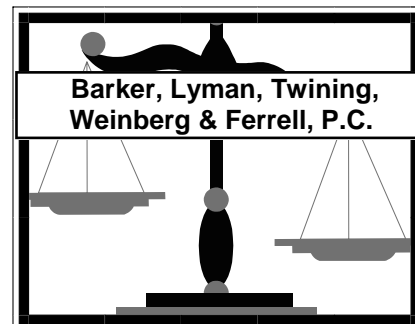
that Dow's pesticide "Strongarm" had damaged their crops. Dow filed suit asserting that plaintiffs' claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). The district court granted Dow summary judgment and the court of appeals affirmed. The U.S. Supreme Court reversed and remanded. FIFRA only preempts state law requirements that are in addition to or different from the labeling and packaging requirements under FIFRA. Most of plaintiffs' claims did not implicate preemption issues. Bates v. Dow Agrosciences LLC, 544 U.S. ____, 125 S.Ct. 1788 (2005).

FIFTH CIRCUIT

Duty

Company Without Knowledge Of Oil Spill Owed No Duty

Boudreaux sued Swift alleging that he slipped and fell after stepping in oil that had leaked from a Swift truck in a truck stop parking lot. The district court granted Swift summary judgment, which was affirmed. Boudreaux's testimony that a Swift truck was parked next to his truck overnight, and that he slipped in oil in the space where the Swift truck had been, raised a fact issue that the oil came from the Swift truck. The testimony did not create a fact issue on duty, though. Swift only owed Boudreaux a duty if it had actual or constructive knowledge that its truck was leaking oil and creating a dangerous condition. There was no such evidence. Boudreaux v. Swift Transp. Co., Inc., 402 F.3d 536 (5th Cir. 2005).



INSURANCE / WORKERS' COMPENSATION UPDATE

TEXAS SUPREME COURT

Insurance Policy Construction

Business Pursuits Exclusion Eliminated Duty To Defend

Hallman owned property that she leased to companies to mine for limestone. Neighboring property owners sued Hallman for damages related to the blasting of the stone. Hallman's homeowners insurer, Allstate, defended Hallman but also sued for a declaration of noncoverage. The trial court granted Allstate summary judgment but the appeals court reversed and remanded. The Texas Supreme Court reversed and rendered. An exclusion eliminated coverage for property damage arising out of a business engaged in by an insured. Although the underlying pleadings did not directly reference Hallman's pecuniary interest, a profit motive could be inferred from the nature of the activity. Allstate Ins. Co. v. Hallman, 48 Tex. Sup. Ct. J. 474 (March 11, 2005).

COURTS OF APPEALS

Evidence

Comp Claimant Not Required To Present Expert Testimony On Causation

Escalante was involved in a car wreck that left no visible injuries but from which he complained of headaches and neck pain, missing work for a year. He filed a comp claim. After the Texas Workers' Compensation Commission ruled against Escalante, he appealed to district court, where a jury found compensable injuries to his back and neck. The appeals court affirmed. Although Escalante did not offer testimony from a doctor tying his symptoms to the accident, he offered his medical records and his own testimony. Lay opinion testimony is sufficient to establish a compensable injury. State Office of Risk Mgmt. v. Escalante, No. 08-03-00436-CV, El Paso, February 17, 2005.

Insurance Contracts

Insured Could Not Recover Twice Under The Policy

Hail damaged Harris's shopping mall. He received \$700,000 for roof repairs from Aetna under a commercial property policy. APIC later reimbursed Aetna for half the payment because APIC also insured the property. Harris filed an additional claim for roof repairs from APIC, which denied the claim. A lawsuit resulted and the jury found in APIC's favor. The appeals court affirmed. The original roof repairs had only cost \$350,000. APIC fully discharged its contractual liability by paying half the repair costs to Aetna. Harris could not recover twice on that claim. Harris v. American Protection Ins. Co., 158 S.W.3d 614 (Tex. App.—Fort Worth 2005).

Insurance Policy Construction

Policy's Auto Exclusion Eliminated Coverage

Hanna, a road maintenance contractor, subcontracted a road-striping job to STI. The families of two people killed in a wreck with a slow-moving STI crash truck sued STI and Hanna. Those claims were settled under Hanna's and STI's auto policies with Employers and St. Paul, respectively. Employers then sued St. Paul claiming that Hanna was an additional insured under a general liability policy issued by St. Paul to STI. The trial court granted St. Paul summary judgment, which was affirmed. An exclusion eliminated coverage for the use or operation of an auto. Although the crash truck pulled a flashing arrow board, it still qualified as an auto for purposes of the exclusion. Employers Mut. Cas. Co. v. St. Paul Ins. Co., 154 S.W.3d 910 (Tex. App.—Dallas 2005).

Garage Policy Did Not Cover Dealer's Customers

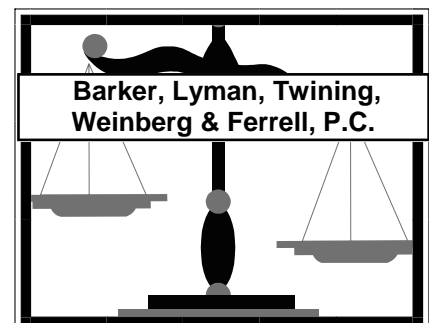
While test driving an auto dealer's car, Rodriguez crashed it, injuring a

passenger and his minor child. Haro, the child's mother, sued Rodriguez and recovered a judgment. She then sued Universal, which had issued the dealer a garage insurance policy. The trial court granted Universal summary judgment, which was affirmed. Rodriguez did not qualify as an insured because the policy excluded the dealer's customers from coverage. That exclusion complied with Texas Insurance Code art. 5.06-2(2) allowing garage policies to exclude coverage for dealers' customers. Haro v. Universal Underwriters Ins. Co., No. 14-03-01338-CV, Houston [14th Dist.], March 17, 2005.

Limitations

Reevaluation After Claim Denial Did Not Restart Limitations

Pace filed a claim against Travelers, his homeowners insurer. In 4/2000, Travelers denied the claim but left the door open for reevaluation if Pace requested it. Pace later forwarded an engineer's report favorable to him. In 9/2001, Travelers again denied the claim. Pace sued in 1/2003. The trial court granted Travelers summary judgment on limitations. The appeals court affirmed. Travelers unequivocally denied the claim in 4/2000. A reevaluation does not restart limitations. Otherwise, insurers facing a request for reevaluation would have to either refuse the claim outright, thereby risking a bad-faith suit, or reevaluate and restart limitations. Pace v. Travelers Lloyd's of Texas Ins. Co., No. 14-03-01401-CV, Houston [14th Dist.], February 24, 2005.



INSURANCE / WORKERS' COMPENSATION UPDATE

Statutory Construction

Insurer Failed To Exhaust Administrative Remedies In Dispute Over Prescription Drug Charges

TMIC sued Eckerd and other pharmacies for overcharging for prescription drugs dispensed to injured workers under the Texas Workers' Compensation Act. The trial court granted the pharmacies summary judgment. The appeals court reversed and dismissed TMIC's suit for want of jurisdiction. Under the comp act, a comp carrier reimburses a pharmacy according to a commission-established fee guideline. The comp commission has exclusive jurisdiction over medical fee disputes between providers and insurers, requiring that the parties exhaust administrative remedies before suing in state court. Here, TMIC failed to exhaust its administrative remedies before filing suit. Texas Mut. Ins. Co. v. Eckerd Corp., No. 03-03-00704-CV, Austin, January 21, 2005.

Waiver

Insurer Waived Credit For Comp Payments

In 1984, Starkey was rendered quadriplegic in an on-the-job car accident. Travelers paid him 919 weeks of comp benefits before his death 17 years later. His parents then sought death benefits from Travelers, which denied the claim. The Texas Workers' Compensation Commission ruled in favor of Travelers. After the parents appealed to state court, they won summary judgment, which was affirmed. When Starkey settled his lawsuit against others involved in the car accident, Travelers participated and waived its right to a credit for benefits paid Starkey. Thus, Travelers could not take a credit for the 919 weeks of benefits it had already paid. It owed the parents an additional 360 weeks of benefits. Travelers Indem. Co. v. Starkey, 157 S.W.3d 899 (Tex. App.—Dallas 2005).

FIFTH CIRCUIT

Insurance Contracts

Mortgage Insurer Could Waive Condition Precedent

Sondra and Alvin Hayes-Jenkins bought a house. MLIC sent them an unsolicited application for mortgage life insurance that offered a 30-day "risk free" period during which they could consider the insurance at no cost with coverage in place. They immediately applied. On 4/4, Alvin died; on 4/5 Sondra received the policy showing an effective date of 4/1. MLIC refused to pay off the mortgage on the house because Sondra had not yet paid the first premium as required by the policy. Sondra sued MLIC and lost on summary judgment. The Fifth Circuit reversed and remanded. Sondra raised a fact issue whether MLIC's application, which promised a 30-day trial period with coverage in place, waived the first premium payment. Monumental Ins. Co. v. Hayes-Jenkins, 403 F.3d 304 (5th Cir. 2005).

Insurance Policy Construction

Medical Services Exclusion Applied Broadly To Bar Claims

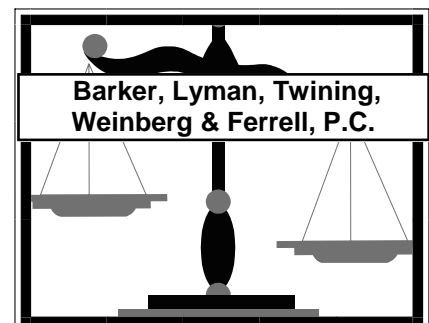
While using DSS's 24-hour shared attendant program, a quadriplegic died from a severe infection. His family sued DSS, which demanded a defense from Allstate, its general liability carrier. Allstate denied a defense and won summary judgment in the ensuing declaratory-judgment action. The Fifth Circuit affirmed. Plaintiffs sued DSS for failing to provide proper communication devices so that the patient could call for help when needed and for providing inadequate medical care. The claim over communication devices was inseparable from the claim alleging inadequate medical care, both of which were excluded by the policy's medical services exclusion. Allstate Ins. Co. v. Disability Serv. of the Southwest, Inc., 400 F.3d 260 (5th Cir. 2005).

Business Loss Governed By Historical Data, Not Prospective Earnings

Following Tropical Storm Allison, Finger was unable to open its stores on a Saturday. It filed a claim with Commonwealth under the business interruption provision of an insurance policy. Commonwealth denied the claim. The parties sued each other, stipulated that Finger suffered a loss of \$325,000, and filed cross-motions for summary judgment. The district court granted Finger summary judgment, which was affirmed. Commonwealth argued that Finger's earnings the weekend after the storm, when it held storewide sales, negated any loss. The Fifth Circuit rejected that argument because the business interruption coverage was based on historical sales figures, not on post-loss sales. Finger Furniture Co., Inc. v. Commonwealth Ins. Co., 404 F.3d 312.

Collision Not Within The Coverage Territory

While driving a bus in Mexico, Reyna's employee collided with a car, killing two occupants of the car. Their families sued Reyna in Texas. Reyna demanded a defense from his business auto insurer, Lincoln, which denied coverage. Reyna sued Lincoln. The district court granted Lincoln summary judgment, which was affirmed. Allegations that Reyna negligently hired and trained the bus driver in Texas did not trigger an "occurrence" in Texas. Because the accident happened in Mexico, outside the coverage territory, Lincoln owed no defense or indemnity. Lincoln Gen. Ins. Co. v. Reyna, 401 F.3d 347 (5th Cir. 2005).



PROFESSIONAL LIABILITY UPDATE

COURTS OF APPEAL

Causation

Hospital's Negligence Caused Patient's Suicide

Dowell, 21, was taken to Providence hospital because he had self-inflicted wounds and was talking about suicide. A nurse determined that Dowell was not actively suicidal and discharged him. That day and the next, Dowell went to a rodeo, visited friends, had lunch with his family, and helped bale hay. That next night, though, Dowell hung himself. His parents sued the hospital and won a judgment. The appeals court affirmed. Although 36 hours passed between the discharge and the suicide, that time difference and other facts did not establish as a matter of law that Providence's negligence was not a legal cause of Dowell's death. Providence Health Center v. Dowell, No. 10-02-00026-CV, Waco, March 30, 2005.

Evidence

Expert Testimony Required For Inadequate-Funding Claim

Penny died at SunBridge's nursing home after she was left unattended in a wheelchair, which rolled down a sidewalk, throwing her from the chair. Her family sued SunBridge and its parent, Sun, and recovered a large judgment. The appeals court affirmed against SunBridge but reversed and rendered judgment for Sun. There was competent expert testimony that SunBridge was negligent. Plaintiffs did not offer any expert testimony, though, that Sun underfunded SunBridge and that the underfunding proximately caused Penny's death. Corporate funding and staffing levels do not fall within the common knowledge of juries, requiring expert testimony. Because plaintiffs did not offer expert testimony against Sun, there was no evidence on those claims. SunBridge Health Care Corp. v. Penny, No. 06-03-00124-CV, Texarkana, March 11, 2005.

Negligence

Lawyer Potentially Liable For Making Client Calculate His Own Damages

GRTW, a law firm, represented Allbritton in a breach-of-contract suit against Allbritton's employer. When the case went to trial, GRTW instructed Allbritton to calculate his own damages. A jury awarded a co-plaintiff who had a financial background \$4 million but awarded Allbritton nothing. He sued GRTW for malpractice. The trial court granted GRTW summary judgment but the appeals court reversed and remanded. Allbritton's expert raised a fact issue over whether GRTW's negligence in failing to hire an economic expert to prove up Allbritton's damages proximately caused Allbritton harm. Allbritton v. Gillespie, Rozen, Tanner & Watsky, P.C., No. 05-04-00132-CV, Dallas, March 4, 2005.

Standing

Successor In Bankruptcy Did Not Obtain Legal-Malpractice Claims

Jackson Walker, a law firm, represented Coastal in bankruptcy. ICI bought Coastal's claims against Coastal's largest supplier, won the suit against the supplier at trial, but lost on appeal because the claims had not been listed on the bankruptcy schedules. As successor-in-interest to Coastal, ICI then sued the law firm for legal malpractice. The trial court granted the law firm summary judgment because ICI never acquired Coastal's malpractice claims. The appeals court affirmed. When a bankruptcy is closed, certain property (set out in the bankruptcy statute) not otherwise disposed of is automatically abandoned to the debtor or its successor. Here, though, the legal-malpractice claims were not that kind of property and did not revert to Coastal or ICI. Industrial Clearing House, Inc. v. Jackson Walker, LLP, No. 05-03-01752-CV, Dallas, April 18, 2005.

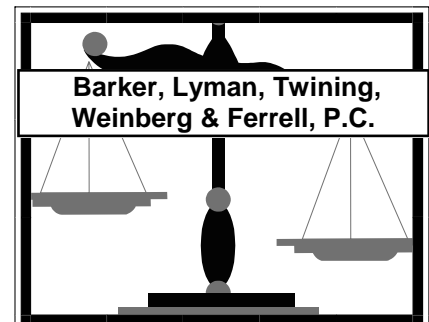
Statutory Construction

Plaintiff Could Not Recast Lack-Of-Informed-Consent Claim

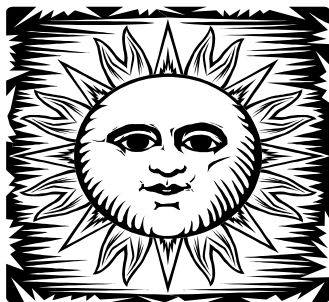
Theroux underwent surgery to donate a kidney to her husband. She sued Dr. Vick for fraud alleging that he misrepresented the scope of the surgery involved. When Theroux did not provide an expert report as required by former art. 4590i § 13.01, the trial court dismissed Theroux's case. The appeals court affirmed. Theroux's fraud claim was, in reality, a lack-of-informed-consent claim governed by art. 4590i. She could not recast that claim to avoid the statutory requirement for an expert report. Theroux v. Vick, No. 04-04-00538-CV, San Antonio, February 9, 2005.

Plaintiff Could Not Recast Her Negligence Claims

Smalling delivered a baby 17 weeks prematurely and was told that her baby died within minutes of birth. She later learned that the baby lived about two hours. She sued Dr. Gardner and others for breach of contract, fraud, and kidnapping alleging the baby was kept in a secret location and denied proper attention or palliative care. The trial court dismissed Smalling's case for failure to timely file an expert report. The appeals court affirmed. In essence, Smalling's complaints focused on the lack of treatment for the baby, implicating the standard of care for physicians and health care providers. Thus, Smalling's failure to file an expert report precluded her claims. Smalling v. Gardner, No. 14-03-01079-CV, Houston [14th Dist.], March 10, 2005.



HOT ISSUES BEFORE THE TEXAS SUPREME COURT



HOT ISSUE 1 — Should the patient's contributory negligence have been submitted?

Hogue went to the hospital emergency room, where he died from a leaking mitral (heart) valve. He did not tell ER personnel that he had a heart condition. His family sued the hospital for failing to timely diagnose the life-threatening condition. Plaintiffs recovered a large judgment. The appeals court affirmed, holding that the trial court properly refused to submit a jury question about Hogue's contributory negligence. The Texas Supreme Court granted review and heard oral argument April 12, 2005. Columbia Med. Center of Las Colinas, Inc. v. Hogue, No. 04-0575, February 11, 2005 (CA 132 S.W.3d 671).

HOT ISSUE 2 — May a decedent's estate sue the attorneys who drafted the will?

Terk paid the law firm to draft his will. After Terk died, his estate sued the law firm alleging that because of the firm's negligence, Terk's estate paid more than \$1.5 million in unnecessary estate taxes. The trial court granted the law firm summary judgment based on the lack of privity between the estate and the law firm. The appeals court affirmed. The Texas Supreme Court granted review but has not yet set oral argument. Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., No. 04-0681, March 8, 2005 (CA 141 S.W.3d 706).

HOT ISSUE 3 — Did insurer delay paying death benefits in bad faith?

When Vasquez's husband died, Minnesota Life delayed paying benefits under an accidental-death policy for six months, during five of which it was waiting for medical records. Vasquez sued the insurer for violating the Texas Insurance Code. A jury awarded her actual damages and the appeals court affirmed. The Texas Supreme Court granted review and heard oral argument April 13, 2005. Minnesota Life Ins. Co. v. Vasquez, No. 04-0477, March 11, 2005 (CA 133 S.W.3d 320).

HOT ISSUE 4 — Did insurer owe fees and interest on UIM case?

Brainard died in a collision. His family settled with the other driver for policy limits, then sued his auto insurer, Trinity, for underinsured motorist ("UIM") benefits. The family recovered damages, attorney's fees, and pre-judgment interest. The appeals court reversed and rendered the fee and interest awards, holding that those claims did not accrue until the family recovered a judgment, which Trinity promptly paid. The Texas Supreme Court granted review and heard oral argument April 14, 2005. Brainard v. Trinity Univ. Ins., No. 04-0537, March 11, 2005 (CA 153 S.W.3d 508); State Farm Mut. Auto. Ins. Co. v. Nickerson, No. 04-0427, March 11, 2005 (CA 130 S.W.3d 487); State Farm Mut. Auto. Ins. Co. v. Norris, No. 04-0514, March 11, 2005 (CA ___ S.W.3d ___).

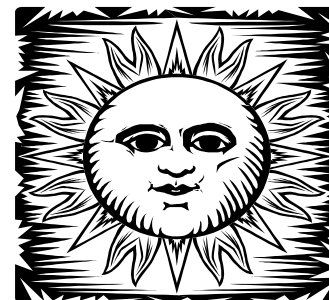
HOT ISSUE 5 — Did endorsement make company an additional insured?

A Triple S employee died while working at Atofina's refinery. His family sued. Atofina sought coverage as an additional insured under an umbrella policy issued to Triple S by Evanston, which denied Atofina's claim. Atofina

sued Evanston and lost on summary judgment. The appeals court reversed. The Texas Supreme Court granted review and heard oral argument April 13, 2005. Evanston Ins. Co. v. Atofina Petrochemicals, Inc., No. 03-0647, March 11, 2005 (CA 104 S.W.3d 247).

HOT ISSUE 6 — Can insurers use staff counsel to defend insureds?

American Home sued the UPLC, which had said that insurers cannot use staff counsel, lawyers employed directly by an insurer, to defend insureds under liability policies. The trial court granted the UPLC summary judgment but the appeals court reversed and rendered. The Texas Supreme Court granted review but has not yet set oral argument. Unauthorized Practice of Law Comm. v. American Home Assurance, Inc., No. 04-0138, April 8, 2005 (CA 121 S.W.3d 831).



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.