

# Letter of the Law

May 2006

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

### TEXAS SUPREME COURT

#### Arbitration

#### **By Continuing Her Employment, Employee Accepted Arbitration Agreement**

Garcia worked for Dillard, which adopted an arbitration policy covering employment disputes. Two years after Dillard adopted that policy, Garcia was fired and sued Dillard for wrongful discharge. The trial and appeals courts denied Dillard's motion to compel arbitration. The Texas Supreme Court granted mandamus compelling arbitration. Although Garcia had refused to sign the acknowledgment of the arbitration policy, she had received the acknowledgment form, which warned that employees accepted the policy if they continued their employment. Garcia's continued employment with Dillard constituted acceptance of the arbitration policy. In re Dillard Dept. Stores, Inc., 49 Tex. Sup. Ct. J. 411 (March 3, 2006).

#### **Plaintiff Had To Arbitrate Claims Against Non-signatories**

Cashion worked for an insurer as an independent agent under a contract providing for arbitration of disputes. When the insurer terminated the contract, Cashion sued the insurer's parent, Vesta, and two corporate officers for tortious interference. The trial and appeals courts refused to compel arbitration. The Texas Supreme Court granted mandamus compelling arbitration. Tortious-interference claims between a signatory to an arbitration agreement and agents or affiliates of the other signatory arise more from the contract than

from general law. Thus, a signatory must arbitrate claims against the agents or affiliates of the other signatory. In re Vesta Ins. Group, Inc., 49 Tex. Sup. Ct. J. 445 (March 17, 2006).

#### Employment

#### **Personnel Manual Did Not Modify At-Will Relationship**

After being employed by the hospital district for ten years, Burwell was placed on probation, then fired. She sued for breach of contract and won. The appeals court affirmed. The Texas Supreme Court reversed and rendered. Although the personnel manual provided that the district could fire employees for cause, the manual did not state that the district could only fire employees for cause. Because the manual did not specifically modify the at-will relationship, the district could fire Burwell for any reason and did not breach a contract by doing so. Matagorda County Hosp. Dist. v. Burwell, 49 Tex. Sup. Ct. J. 370 (February 24, 2006).

#### **No Expansion Of Common-Law Cause Of Action For Whistleblowers**

The Foundation fired D'Unger, who sued alleging that he was fired for refusing to cover up criminal conduct involving the mistreatment of illegal immigrants on Foundation property. D'Unger won a jury verdict, which was affirmed. The Texas Supreme Court reversed and rendered. An employee cannot be fired for the sole reason that he refuses to perform an illegal act. Here, D'Unger claimed that he was

fired for reporting a possibly illegal act when the Foundation had asked him not to do so. The law only protects employees asked to commit a crime, not those asked to keep silent about possible criminal conduct. The Ed Rachal Found. v. D'Unger, 49 Tex. Sup. Ct. J. 537 (April 21, 2006).

#### Premises Liability

#### **Proximity To Dangerous Condition Did Not Give Constructive Notice**

Spates fell when her foot became entangled in an empty plastic six-pack ring at a Wal-Mart store. She sued Wal-Mart for an injury to her shoulder and lost on summary judgment. The appeals court reversed and remanded, holding that although there was no evidence how long the six-pack ring had been on the floor, evidence of an employee's proximity to the ring established constructive notice. The Texas Supreme Court reversed and rendered. Proximity does not establish notice. Even if the ring had been on the floor behind the employee's back for 30-45 seconds, that evidence did not establish constructive notice. Wal-Mart Stores, Inc. v. Spates, 49 Tex. Sup. Ct. J. 373 (February 24, 2006).

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# RECENT OPINIONS: TEXAS SUPREME COURT

## Procedure

### **Trial Court Did Not Unfairly Prohibit Questions On Voir Dire**

Amber Vasquez, four, was killed in a car accident when an air bag deployed and hit her. Her family sued Hyundai for defective air bag design. During voir dire, two panels were dismissed after prospective jurors indicated that Amber's lack of a seatbelt would determine their verdict. When a third panel was called, the trial court allowed general questions about seatbelt use but forbade disclosure that Amber was not wearing a seatbelt. A jury found for Hyundai. The appeals court reversed based on the voir dire restrictions. The Texas Supreme Court reversed. A trial court does not abuse its discretion in refusing questions that seek to determine the weight a prospective juror will give a particular fact. Hyundai Motor Co. v. Vasquez, 49 Tex. Sup. Ct. J. 420 (March 10, 2006).

## Products Liability

### **Pleadings Did Not Trigger Indemnity From Part Maker To Seller**

A fire that erupted from a truck following a collision killed one man and injured another. Plaintiffs sued Hudiburg, the dealership which had the truck cab and truck bed assembled, and GM, the cab maker. Hudiburg joined Koenig, maker of the truck bed. After settling with plaintiffs, Hudiburg pursued claims for common law and statutory indemnity against Koenig and GM. The trial court granted defendants summary judgment. The appeals court reversed and remanded. The Texas Supreme Court reversed in part and affirmed in part. It held that Hudiburg could not recover statutory indemnity from Koenig because the underlying plaintiffs' pleadings did not allege a defect in the truck bed. Otherwise, the court found fact issues on the indemnity claims and discussed when sellers of products are entitled to indemnity from

each other. General Motors Corp. v. Hudiburg Chevrolet, Inc., 49 Tex. Sup. Ct. J. 464 (March 24, 2006).

## **COURTS OF APPEALS**

### Alcohol Liability

### **Provider Must Prove That It Enforced Alcohol Policies**

Parker attended the grand opening of 20801's pool hall and bar. Late in the evening, another patron punched Parker, who fell, fracturing his skull and suffering brain damage. Parker sued 20801 under the Dram Shop Act (Ch. 2, Texas Alcoholic Beverages Code) and for premises liability. The trial court granted 20801 summary judgment. The appeals court reversed in part. Although the Dram Shop Act preempted Parker's common-law premises-liability claim, 20801 did not defeat the Dram Shop Act claim. It failed to conclusively establish its safe harbor defense with evidence that it was enforcing its alcohol policies on the grand opening night. Parker v. 20801, Inc., No. 14-05-00250-CV, Houston [14th Dist.], April 11, 2006.

### Arbitration

### **Trial Court Could Not Order Mediation Before Arbitration**

Bohler bought materials from Heritage to construct a prefabricated building. He sued Heritage alleging that the building materials were improperly made. Heritage moved for arbitration under the Federal Arbitration Act ("FAA"). The trial court ordered the parties to mediation before ruling on the motion to compel arbitration. The appeals court granted mandamus requiring arbitration. Under the FAA, the trial court had to rule on the arbitration motion without taking other action and had to send the case directly to arbitration if arbitration was required. In re Heritage Bldg. Sys., Inc., 185 S.W.3d 539 (Tex. App.—Beaumont 2006).

## Causation

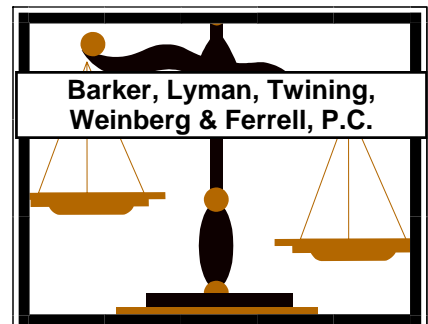
### **Bar Patron Dragged Off Stage Did Not Show Causation Of Injuries**

Loeser sued Sans One, a bar, after he was unceremoniously removed from the bar's stage while demanding that the bar turn up the air conditioning. The trial court granted Sans One summary judgment, which was affirmed. Loeser offered no evidence that the manner in which he was removed from the stage caused him injury or that, under the circumstances, the manner of his removal constituted a failure to exercise ordinary care. Loeser v. Sans One, Inc., No. 14-04-00162-CV, Houston [14th Dist.], February 9, 2006.

## Causes of Action

### **No Jurisdiction Over Voluntary Organization's Affairs**

Donnan's horse was certified as an "accredited Texas-bred" horse by the TTBA, an accreditation that allowed the horse to race in select Texas races. TTBA later withdrew the accreditation. Donnan sued and recovered \$250,000. The appeals court reversed and dismissed the lawsuit. The TTBA is a voluntary organization. Under the doctrine of judicial noninterference, a trial court has no subject-matter jurisdiction over the affairs of a voluntary organization so long as the organization does not violate public policy or state law. Donnan's dispute with TTBA was an internal dispute not subject to adjudication in the courts. Texas Thoroughbred Breeders Ass'n v. Donnan, No. 12-04-00129-CV, Tyler, February 28, 2006.



# RECENT OPINIONS: COURTS OF APPEALS

## Discovery

### **General Objection To Production Of Personnel Files Was Inadequate**

Clements sued Crestcare for negligently caring for a nursing home resident. During discovery, Clements requested nursing personnel files. Crestcare objected. The trial court ordered production without an in camera review. The appeals court denied mandamus. Crestcare's affidavit that personnel files were intended to remain privileged and confidential was too broad and conclusory. Crestcare had to show a particular, articulated, and demonstrable injury to confidentiality from production of the files. It failed to make that showing. In re Crestcare Nursing & Rehab. Center, No. 12-05-00167-CV, Tyler, February 22, 2006.

## Employment

### **Oral Agreement Modified At-Will Status**

Zendejas worked for El Expreso, a subsidiary of Coach USA. Several times, Zendejas contacted Wagner, regional safety director at Coach, about concerns over complying with safety laws. Each time, Wagner told Zendejas to enforce the safety laws and told him that he would not be fired for making sure El Expreso complied with the law. Zendejas cancelled bus routes when eligible drivers had logged too much time or hired substitute drivers from outside sources. Eventually, El Expreso fired him. He sued and recovered actual damages. The appeals court affirmed. Zendejas was an at-will employee subject to termination at will, but Wagner's conversations with Zendejas created a contract that El Expreso would not terminate Zendejas for enforcing safety laws. Since El Expreso fired Zendejas for that reason, he could recover against it for breach of contract. El Expreso, Inc. v. Zendejas, No. 01-03-00795-CV, Houston [1st Dist.], March 9, 2006.

## Experts

### **No Evidence That Asbestos Exposure Caused Fatal Lung Cancer**

Bailey died from lung cancer. His family sued Mobil alleging that during his work on Mobil's premises over a six-year period, he was exposed to asbestos. Bailey's work history indicated exposure to asbestos at other work sites, too. The jury awarded the family damages but the appeals court reversed and rendered. Bailey smoked a pack of cigarettes a day for 40 years. On autopsy, Bailey's lungs contained no evidence of asbestos-related disease. Plaintiffs' medical experts did not have epidemiological studies or other peer-reviewed research supporting their causation testimony linking Bailey's lung cancer to asbestos exposure. That testimony was no evidence of causation. Mobil Oil Corp. v. Bailey, No. 09-04-00225-CV, Beaumont, March 9, 2006.

## Premises Liability

### **Risk Of The Particular Criminal Conduct Was Unforeseeable**

While staying at a motel owned by JJLG, LeRibeus was assaulted in the parking lot, kidnapped, and robbed. She sued JJLG. A jury found the motel 24% responsible and awarded LeRibeus damages. The appeals court reversed and rendered. Five factors—proximity, recency, frequency, similarity, and publicity—are considered together in determining whether criminal conduct was foreseeable. Although LeRibeus's expert offered evidence of much crime in a one-mile radius from the motel, little of that crime was similar, violent crime and the crime was not publicized. The court concluded that the motel could not have foreseen the risk of the particular criminal conduct perpetrated against LeRibeus. Jai Jalaram Lodging Group, L.L.C. v. LeRibeus, No. 08-04-00192-CV, El Paso, February 9, 2006.

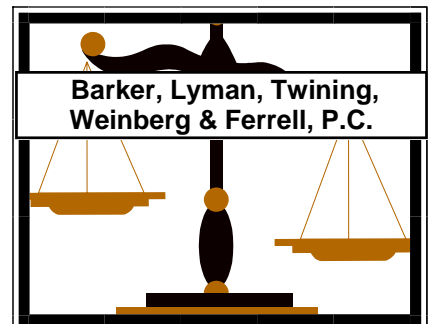
## Statutory Construction

### **Tort Claims Act Damages Cap Did Not Apply**

Cammerino sued Castro for injuries she sustained when struck by a Dallas Area Rapid Transit ("DART") bus driven by Castro. She recovered a \$2 million judgment against him. The appeals court affirmed. The Texas Tort Claims Act sets a \$100,000 statutory damages cap for claims against state and municipal entities. Although Castro wore a DART uniform, he was actually employed by an independent contractor. The Transportation Code and Texas Tort Claims Act extend the \$100,000 damages cap to the independent contractor but not to the contractor's employees. No cap protected Castro. Castro v. Cammerino, No. 05-04-01792-CV, Dallas, March 7, 2006.

### **RCLA Does Not Preempt DTPA Claims**

Squires built a house for the Gentrys. After the Gentrys refused to make the final payment, this litigation resulted. The trial court entered judgment for Squires with each party bearing its own fees. The appeals court reversed and remanded the Gentrys' Deceptive Trade Practices Act ("DTPA") claim against Squires. That claim was not preempted by the Residential Construction Liability Act ("RCLA"). Although the trial court properly allowed Squires's recovery based on quantum meruit, the case was remanded for an award of attorney's fees to Squires and for trial of the Gentrys' DTPA claim. Gentry v. Squires Constr., Inc., No. 05-04-00762-CV, Dallas, March 27, 2006.



# INSURANCE / WORKERS' COMPENSATION UPDATE

## TEXAS SUPREME COURT

### Bad Faith

#### **Insurer's Delay In Paying Death Benefits Did Not Rise To Bad Faith**

Minnesota Life issued the Vasquezes a mortgage accidental death policy. After Mr. Vasquez died, the insurer delayed paying off the mortgage for six months. Vasquez sued and recovered actual damages and additional damages for bad faith. The appeals court affirmed. The Texas Supreme Court reversed the bad-faith award. Minnesota Life owed benefits if death resulted directly, and independently of all other causes, from an accidental injury. The death certificate raised questions about the cause of death. Although Minnesota Life should have investigated more promptly, it was negligent (and paid the 18% interest penalty for delay damages) but not in bad faith. It was not actually aware that it was handling the claim in a deceptive or unfair manner. Minnesota Life Ins. Co. v. Vasquez, 49 Tex. Sup. Ct. J. 498 (April 7, 2006).

### Procedure

#### **Insured Had No Standing To Sue Insurer For Settling Her Medical Bills**

Forth's daughter was injured in an auto wreck. Allstate, Forth's auto insurer, settled the medical bills under the personal injury protection coverage for less than the actual amount billed. Forth sued Allstate for unreasonably reducing the bills. The trial court dismissed Forth's claims for lack of standing but the appeals court reversed in part. The Texas Supreme Court reversed and dismissed. Forth did not claim that she had any unreimbursed, out-of-pocket medical expenses nor that Allstate's reduction of the bills affected her medical treatment or her daughter's medical treatment. Without injury, Forth had no standing to sue. Allstate Indem. Co. v. Forth, 49 Tex. Sup. Ct. J. 542 (April 21, 2006).

## COURTS OF APPEALS

### Bad Faith

#### **Insurer Liable For Unfair Settlement Practices**

Hyman's SUV was badly damaged in a collision. She made a claim with her auto insurer, Allstate. When the parties could not agree on the SUV's value, Hyman sued Allstate and recovered actual and enhanced damages. The appeals court affirmed. Post-loss, Allstate claimed that it had to protect a lienholder and that it had surveyed the comparable market for valuation purposes. Neither statement was true. Combined with a low offer, this evidence supported a finding that Allstate violated art. 21.21, Texas Insurance Code. Allstate Indem. Co. v. Hyman, No. 06-05-00064-CV, Texarkana, March 21, 2006.

#### **Presuit Payment Exceeded Jury Award, No More Owed**

FIE insured the Sullivans' home, which suffered damage. In response to the Sullivans' claims, FIE paid them \$84,000. Dissatisfied, the Sullivans sued FIE and won actual damages, penalty interest, and attorney's fees. The appeals court reversed and rendered. The trial court improperly ignored jury findings attributing causation for some damages to excluded perils. Proper calculation of the damages brought the Sullivans' recovery below the amount FIE had already paid. The statutory interest penalty for three months delay in payment did not increase the Sullivans recovery over the amount already paid. Thus, FIE owed nothing further. Fire Ins. Exch. v. Sullivan, No. 14-04-00082-CV, Houston [14th Dist.], February 7, 2006, pet. filed.

### Experts

#### **Damages Expert's Testimony Properly Excluded**

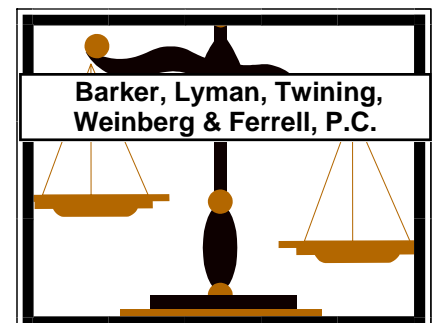
Wyndham sued its insurers alleging that the events of 9/11/2001 caused it a

\$66 million business interruption loss at its 163 hotel properties worldwide. The trial court excluded the testimony of Wyndham's damages expert and granted the insurers summary judgment. The appeals court affirmed. Wyndham's expert relied for his calculations on forecasts of occupancy and earnings by Wyndham employees at each individual hotel. Those forecasts did not adhere to a standard model. From past experience, at least two-thirds of the forecasts were not accurate within 5% of actual revenue realized. Further, the expert did not consider other causes that could have affected Wyndham's profitability besides the events of 9/11. Wyndham Int'l, Inc. v. Ace American Ins. Co., No. 05-04-01443-CV, Dallas, March 10, 2006.

### Insurance Policy Construction

#### **Pilot Inexperience Did Not Cause Crash**

Holt sued AIG to recover on its property insurance policy for damage to a helicopter that crashed. A jury found coverage and awarded Holt damages. The appeals court affirmed. It was undisputed that at the time of the crash, the pilot did not have the minimum number of logged hours required by the insurance policy for coverage. But under Texas law, AIG had to show a causal connection between the pilot's inexperience and the crash. It did not conclusively prove that pilot inexperience caused the crash. AIG Aviation, Inc. v. Holt Helicopters, Inc., No. 04-05-00291-CV, San Antonio, April 26, 2006.



# INSURANCE / WORKERS' COMPENSATION UPDATE

## Insured's Delay In Notice Prejudiced Insurer

Blanton leased a retail store to Burgess, who eventually sued Blanton over recurring roof leaks. Months later, Blanton forwarded the lawsuit to Vesta, his general liability insurer, which filed a declaratory-judgment action against Blanton. The trial court granted Vesta summary judgment based on delayed notice and prejudice. The appeals court affirmed. Blanton received 30 complaints about the roof over an 18-month period and never notified Vesta. This lack of notice prejudiced Vesta because it prevented Vesta from investigating the claims, adjusting covered claims, seeing the damage, and urging the insured to correct any premises defects. Blanton v. Vesta Lloyds Ins. Co., No. 05-04-00156-CV, Dallas, March 9, 2006.

## Insurer Owed No Duty To Defend Construction Defect Case

Grimes built a house for the Coxes, who did not fully pay under the contract. When Grimes sued the Coxes for payment, they counterclaimed for faulty construction. Grimes's commercial general liability ("CGL") insurer, Great American, refused to defend Grimes and filed a declaratory-judgment action against it. The trial court granted Great American summary judgment, which was affirmed. Although the Coxes asserted negligence claims against Great American, the factual basis for those claims arose out of the contract and warranties. Such claims did not state an "occurrence" under a CGL policy. Great American owed Grimes no duty to defend. Grimes Constr., Inc. v. Great American Lloyds Ins. Co., No. 02-04-00335-CV, Fort Worth, March 9, 2006.

## Employment Exclusion In Policy Barred Coverage

Arrellano died when a trench caved in on him. His family sued his employer, a nonsubscriber, which State Farm, the employer's liability insurer, defended

under reservation of rights. State Farm filed a declaratory-judgment action that the employment exclusion barred coverage. The trial court found for State Farm and the appeals court affirmed. Although none of the witnesses knew why Arrellano went back to the trench, the company was still working at the job site. This evidence supported the trial court's conclusion, as trier of fact, that Arrellano was in the scope of employment when the trench collapsed. The employment exclusion barred coverage. Arrellano v. State Farm Fire & Cas. Co., No. 14-05-00466-CV, Houston [14th Dist.], April 11, 2006.

## President Had No UM Coverage Under Corporation's Auto Policy

TIE issued CCI, a corporation of which Chalfant was president, a business auto policy. While driving his personal auto, Chalfant was injured in a collision with an uninsured motorist ("UM"). He sued TIE for UM coverage. The trial court found coverage but the appeals court reversed and rendered. TIE's policy provided UM coverage for any person designated on the policy or any person occupying a scheduled auto. CCI, not Chalfant, was the designated person on the TIE policy and Chalfant's personal auto was not a scheduled auto. TIE did not owe Chalfant UM coverage. Truck Ins. Exch. v. Chalfant, No. 01-05-00546-CV, Houston [1st Dist.] April 13, 2006.

### Statutory Construction

## Employer Waived Right To Contest Compensability Of Comp Claim

While working at Lockheed, a self-insurer, Alexander suffered an injury for which she filed a comp claim. Lockheed did not contest compensability under Tex. Lab. Code § 409.021(c) until more than 60 days after the claim was filed. It argued that it could contest compensability late because it did not receive Alexander's records, which

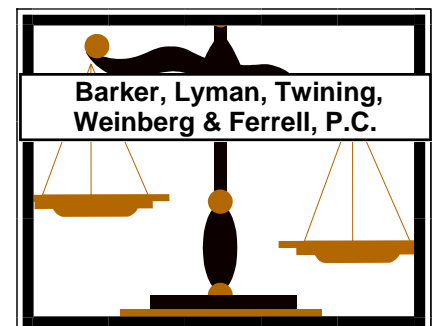
showed a previous injury, until after the 60-day deadline passed. The workers' compensation commission found for Alexander. Lockheed appealed to state court and won summary judgment finding no compensability. The appeals court reversed and rendered. Lockheed failed to timely contest compensability, waiving its defense to Alexander's claim. Alexander v. Lockheed Martin Corp., No. 02-05-00081-CV, Fort Worth, March 2, 2006, pet. filed.

### **FIFTH CIRCUIT**

#### Insurance Policy Construction

## Insured's Breach Of Consent-To-Settle Clause Prejudiced Insurer

A sulfuric acid storage tank at Motiva's refinery exploded, killing one person and injuring others. After the primary insurer, St. Paul, exhausted its limits, National Union began defending Motiva in a later lawsuit under reservation of rights. Motiva made National Union leave mediation, settled the suit, then sued National Union for reimbursement. The district court granted National Union summary judgment. The Fifth Circuit affirmed. Assuming, without deciding, that an insurer must show prejudice when the consent-to-settle clause of an insurance policy is breached, the court held that National Union suffered prejudice as a matter of law when Motiva settled without its consent. Motiva Enter., L.L.C. v. St. Paul Fire & Marine Ins. Co., No. 05-20139 (5th Cir., March 28, 2006).



# PROFESSIONAL LIABILITY UPDATE

## COURTS OF APPEALS

### Causation

#### **No Evidence That Chance Of Survival Exceeded 50%**

The Arredondos sued Dr. Rodriguez alleging that his failure to timely treat their 4-day-old infant with antibiotics caused their infant's death. The trial court granted Dr. Rodriguez summary judgment, which was affirmed. No expert could say whether earlier administration of antibiotics would have prevented the death. One expert gave conclusory testimony that if four things had been done differently, the infant would have had more than a 51% chance of survival, but the testimony lacked any support in the medical literature. Arredondo v. Rodriguez, No. 04-05-00258-CV, Austin, March 22, 2006.

#### **Attorney's Conduct Did Not Cause Plaintiff Damages**

Hoover hired Larkin, an attorney, to represent her in a suit against her brother-in-law for the mishandling of funds in a family estate. At trial, the parties settled. Hoover tried to revoke the agreement, could not do so, then sued Larkin for legal malpractice. The trial court granted Larkin a no-evidence summary judgment on causation. The appeals court affirmed. Larkin complained that she thought the settlement was for \$20,000 net, not gross. Yet she offered no evidence that if she had not settled, she would have prevailed at trial or that her brother-in-law would have later agreed to pay her \$20,000 net. Thus, she did not raise a fact issue on causation. Hoover v. Larkin, No. 02-05-00191-CV, Houston [1st Dist.], April 27, 2006.

### Experts

#### **Expert Opinion Lacked Support In Medical Literature Or Research**

Brazil underwent lens implantation surgery to correct congenital defects in

his eyes. Dissatisfied with the results, he sued the surgeon, Dr. Khater. The trial court struck Brazil's expert's testimony on causation and the parties agreed to an interlocutory appeal. The appeals court affirmed. No medical literature or research about this rare surgery, and how it should be performed, existed. Absent any peer review of this surgery or of Brazil's expert's opinions, the expert's personal opinions on causation were unreliable and speculative. Brazil v. Khater, No. 07-05-00351-CV, Amarillo, February 24, 2006, pet. filed.

### Limitations

#### **No Tolling Of Limitations In Suit Against Attorney**

Gregg, an attorney, represented J.M.K.6, a company that bought apartment complexes, converted them to condominiums, and sold the condos. When a condo buyer sued J.M.K., it joined Gregg as a third-party defendant. The trial court granted Gregg summary judgment on limitations. The appeals court affirmed. The legal proceedings arose out of the failure of a zoning commission to approve a condominium conversion on one of J.M.K.'s projects. J.M.K. knew about the adverse decision more than two years before it sued Gregg. Because there was no litigation pending with the zoning commission, only attempts to have it reconsider, a tolling of the statute did not occur. Limitations barred J.M.K.'s claim against Gregg. J.M.K.6, Inc. v. Gregg, P.C., No. 14-04-00849-CV, Houston [14th Dist.], March 28, 2006.

### Negligence

#### **Doctors May Have Acted Outside Scope Of Consent**

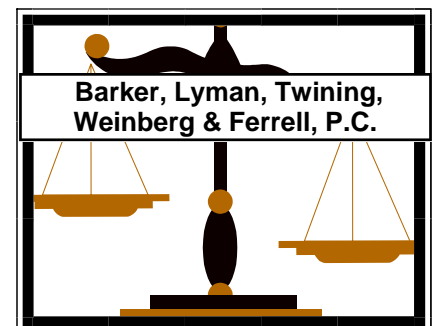
After undergoing stellate ganglion blocks, Sanchez told Dr. Crawford that she did not want any more blocks. Drs. Schaub and Crawford then did a wrist manipulation under general anesthesia. They also performed a third block, which caused a large abscess and other

injury. Sanchez sued the doctors, who won summary judgment. The appeals court reversed and remanded. Although Sanchez had signed consent forms giving the doctors the right to proceed with the manipulation and administer anesthetics, the written consent was limited by concepts such as necessity, judgment, and advisability. Sanchez produced expert testimony that once Sanchez denied consent for another block, the doctors should not have given her the block absent an emergency condition. The doctors offered no proof that an emergency necessitated the third block. Sanchez v. Schaub, 184 S.W.3d 901 (Tex. App.—Amarillo 2006).

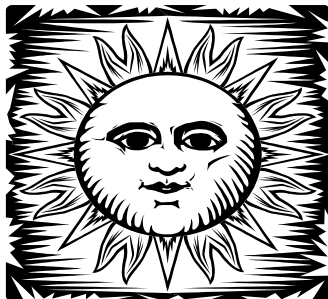
### Statutory Construction

#### **Psychologist Became A "Health Care Provider"**

MacPete, father of JMM, sued Bolomey, a licensed psychologist, for misdiagnosing JMM as a sexual-abuse victim. The trial court dismissed MacPete's case for failure to timely file an expert report. The appeals court affirmed. Although psychologists are not directly defined as "health care providers" under the Medical Liability Act, the definition of health care providers includes employees and agents of providers and doctors. Because a doctor referred JMM to Bolomey, who was under contract with a hospital, Bolomey qualified as a health care provider. MacPete failed to timely serve an expert report under Ch. 74, Tex. Civ. Prac. & Rem. Code, and his case was properly dismissed. MacPete v. Bolomey, No. 05-04-01695-CV, Dallas, March 9, 2006.



# HOT ISSUES BEFORE THE TEXAS SUPREME COURT



## **HOT ISSUE 1 — Did flooding create an emergency condition precluding city's liability?**

A downpour created widespread flooding in the city. Although the city tried to barricade a flooded intersection, a car with four people drove into the flood waters. All drowned. Their survivors sued the city. The trial and appeals courts denied the city's request for dismissal, which was based on governmental immunity in responding to an emergency. The Texas Supreme Court granted review and heard oral argument March 23, 2006. City of San Antonio v. Hartman, No. 05-0147, February 24, 2006 (CA 155 S.W.3d 460).

## **HOT ISSUE 2 — Did First Amendment bar suit against pastor?**

Penley and her now ex-husband saw Westbrook, pastor of their church, for marital counseling. When the counseling failed, Penley filed for divorce. Westbrook sent the congregation a letter saying that Penley should be shunned for having had an affair. Penley sued Westbrook. The trial court dismissed based on the First Amendment, which bars claims involving a church's internal operations. The appeals court reversed and remanded, holding that Penley had a nonbarred claim for professional negligence. The Texas Supreme Court granted review but has not yet set oral argument. Westbrook v. Penley, No. 04-0838, April 21, 2006 (CA 146 S.W.3d 220).

## **HOT ISSUE 3 — Did self-insured employer waive contest of comp claim?**

Mitchell worked for SBC when she contracted Legionnaire's Disease and died. Her husband filed a workers' comp claim. SBC did not contest compensability until 43 days after the claim was filed. The comp commission and lower courts found that SBC had waived its contest by not disputing the claim within seven days. The Texas Supreme Court granted review and heard oral argument March 23, 2006. Southwestern Bell Tel. Co., L.P. v. Mitchell, No. 05-0171, February 24, 2006 (CA \_\_\_ S.W.3d \_\_\_).

## **HOT ISSUE 4 — Did defendant cause plaintiff's asbestos-related injury?**

Flores worked as a mechanic for 35 years during which he ground new brake pads before installation. That grinding process produced visible dust, which Flores inhaled. For three of the years, he ground brake pads made by Borg Warner. Eventually, Flores was diagnosed with asbestosis. He sued Borg Warner and recovered damages. The appeals court affirmed, holding that evidence that the grinding of brake pads can produce respirable asbestos fibers established causation. The Texas Supreme Court granted review but has not yet set oral argument. Borg Warner Corp. v. Flores, No. 05-0189, April 21, 2006 (CA 153 S.W.3d 209).

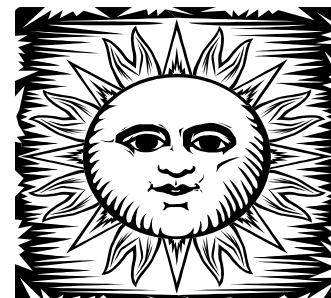
## **HOT ISSUE 5 — Did comp bar protect plant owner from nonemployee's claim?**

Entergy purchased workers' compensation insurance for the employees of independent contractors at its plant. A contractor's employee was injured and sued Entergy. The trial court granted Entergy summary judgment based on the comp bar. The appeals court reversed and remanded. The Texas Supreme Court granted review but has not

yet set oral argument. Entergy Gulf States, Inc. v. Summers, No. 05-0272, April 21, 2006, 2006 (CA \_\_\_ S.W.3d \_\_\_).

## **HOT ISSUE 6 — Was insurer required to show prejudice from late notice?**

Paj was served with a copyright infringement lawsuit and did not notify its general liability insurer, Hanover, of the suit until six months later. Hanover denied a defense based on late notice. Paj sued it. The trial court granted Hanover summary judgment, holding that the insurer did not need to prove prejudice because the claim did not involve bodily injury or property damage. The appeals court affirmed. The Texas Supreme Court granted review but has not yet set oral argument. Paj, Inc. v. The Hanover Ins. Co., No. 05-0849, May 5, 2006 (CA 170 S.W.3d 258).



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