

Letter of the Law

November 2005

Volume 13 Issue 1

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

TEXAS SUPREME COURT

Arbitration

Nonsignatory Required To Arbitrate

Forsting, 78, contracted with Weekley for a 4,000-square-foot home in which he intended to live with his daughter, Von Bargen. The contract included an arbitration clause. After the home was completed, Von Bargen sued Weekley for defective construction and for damages from asthma resulting from Weekley's negligent repairs. Weekley moved to compel arbitration, which the trial court denied because Von Bargen did not sign the contract. The Texas Supreme Court granted mandamus requiring Von Bargen to arbitrate. Von Bargen's repeated invocation of the contract in directing how Weekley should construct and repair the home estopped her from objecting to the contractual arbitration agreement. In re Weekley Homes, L.P., 49 Tex. Sup. Ct. J. 55 (Oct. 28, 2005).

COURTS OF APPEALS

Agency

Drunk Employee Was Not In Course And Scope

While drunk and driving a company truck, Kittrell collided with Green, who sued Kittrell's employer, Ransor. The trial court granted Ransor summary judgment, which was affirmed except on an unaddressed claim. Although intoxication does not always take an employee out of course and scope, the summary-judgment evidence established that Kittrell not only violated

company policy about drinking, but that he did not have the general authority to drive the truck to and from a bar, only to and from work. Green v. Ransor, Inc., No. 02-04-00211-CV, Fort Worth, September 29, 2005.

Attorney Client Privilege

Party's Attorney Could Not Be Deposed About Factual Investigation

Baptist sued contractors and engineers over the construction of an ambulatory surgical center. A tenant at the center, BSA, intervened against Baptist and noticed the deposition of one of Baptist's attorneys. Baptist's motion to quash was denied. The appeals court granted mandamus quashing the deposition. Although Baptist's attorney had helped investigate and evaluate the technical problems at the surgical center once those problems surfaced, Baptist had hired him to represent it in the prosecution and defense of lawsuits arising out of those problems. The attorney-client privilege prevented opposing parties from deposing him about his investigation and evaluation. In re Baptist Hosp. of Southeast Texas, 172 S.W.3d 136 (Tex. App.—Beaumont 2005).

Causation

Utility's Disconnection Of Electricity Did Not Cause Deaths

Roberts's sons were living with foster parents, the Butlers. TXU disconnected the Butlers' electricity for nonpayment of the electrical bill. That evening, the

Butlers used candles to light their home, a fire started, and both boys were killed. Roberts sued TXU, which won summary judgment. The appeals court affirmed. TXU's disconnection of the electricity was not a substantial factor in causing the deaths. It merely created a condition that made harm possible, but was not a proximate cause. Roberts v. TXU Energy Retail Co., L.P., 171 S.W.3d 901 (Tex. App.—Beaumont 2005).

Defamation

Criticism Of Doctor In Peer Review Report Was Protected Opinion

Dr. Morris sued Dr. Blanchette for libel based on a peer review report Dr. Blanchette issued to a comp carrier criticizing Dr. Morris's treatment of a patient. The trial court granted Dr. Blanchette summary judgment, which was affirmed. Although Dr. Blanchette took issue with some of the treatment provided by Dr. Morris for the lower-back injury, the analysis was not inflammatory nor did it accuse Dr. Morris of criminal conduct. The report contained Dr. Blanchette's constitutionally protected expression of opinion and was not defamatory. Morris v. Blanchette, No. 10-05-00017-CV, Waco, October 26, 2005.

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RECENT OPINIONS: COURTS OF APPEALS

Duty

Company Owed Independent Contractors No Duty For Wreck

Four Kirby vacuum sales people were in a one-car wreck on their way home from a sales trip. Jeffrey and other plaintiffs sued Robertson, the Kirby franchisee, alleging that it negligently screened the driver and promoted unsafe business practices such as long hours and night travel. The trial court granted Robertson summary judgment, which was affirmed. Generally, a company owes no duty to ensure that an independent contractor performs her work in a safe manner. Although Robertson required Ramos, the driver, and her crew to show vacuum cleaners in potential customers' homes, Robertson did not retain control over Ramos's driving and had no duty to investigate her driving record, which was poor. Jeffery v. Robertson Sales & Serv., Inc., No. 11-04-00042-CV, Eastland, October 13, 2005.

Guardian Ad Litem

Ad Litem Did Not Prove Entitlement To Fees

In the underlying medical-malpractice suit, Dr. Jocson settled and the trial court awarded Crabb \$117,000 in guardian ad litem fees. The appeals court reversed and rendered the ad litem fee award. A court should only appoint a guardian ad litem when there is a conflict of interest between a plaintiff with a legal disability (e.g., a minor) and other plaintiffs. Although a settlement may create a conflict, Crabb offered no evidence about conflict over the division of settlement proceeds or the time he spent protecting the minor in the settlement. Instead, the evidence showed that Crabb's time was spent attending depositions and hearings and reviewing letters, not a proper role for an ad litem. Jocson v. Crabb, No. 01-01-01242-CV, Houston [1st Dist.], October 13, 2005.

Immunity

Church Was Not In Loco Parentis, Not Immune From Liability

Seventeen-year-old Laura Schubert participated in church-related activities while her parents were gone for a long weekend. At an evening service, Laura collapsed. She was physically restrained and was foaming at the mouth, crying, and hallucinating. Laura sued the church for assault and battery and false imprisonment. A jury awarded her damages and the appeals court affirmed. The evidence sharply conflicted over whether Laura collapsed from hypoglycemia or as a ploy for attention, whether her physical symptoms began before or after the restraint, and whether she was restrained for minutes or hours. Laura's participation at the church did not make the church stand in loco parentis, nor immunize the church from liability. Pleasant Glade Assembly of God v. Schubert, No. 02-02-00264-CV, Fort Worth, September 15, 2005, pet. filed.

Indemnity

Indemnitor Required To Defend Before Liability Established

BGP contracted with English to provide seismic explorations services. Forty-three landowners sued BGP and English for negligence and trespass, alleging that BGP conducted seismic exploration on their land without their permission. English demanded a defense from BGP under an indemnity agreement, a request BGP refused. English sued but the trial court dismissed the case as premature until the underlying lawsuit concluded. The appeals court reversed and rendered, holding that BGP owed English a defense based on the pleadings in the underlying case, not on the ultimate liability determination. English v. BGP Int'l, Inc., No. 14-04-00491-CV, Houston [14th Dist.], September 15, 2005.

Limitations

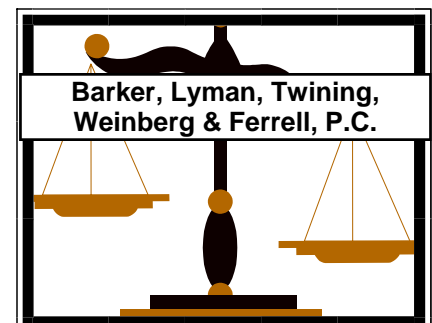
Claim For Medical Expenses For Daughter's Injury Was Time Barred

Fourteen-year-old Lauren was injured in a car wreck allegedly caused by the negligence of her grandmother, Garza. Almost six years later, Lauren sued Garza, who moved for partial summary judgment against the claim for medical expenses before Lauren turned 18. An amended petition added Lauren's mother, Mary, as plaintiff. The trial court granted summary judgment against Mary on limitations. The appeals court affirmed. Mary's claim did not relate back because she was a new party asserting a claim on which limitations had run before Lauren ever filed suit. Garza v. Garza, No. 04-05-00083-CV, San Antonio, October 19, 2005.

Negligence

Excuse To Negligence-Per-Se Claim Should Have Been Submitted

Following a collision between four tractor-trailer rigs, Torres, who survived, sued Omega, its driver, and others. The trial court submitted a negligence-per-se instruction based on evidence that two wheels came off the Omega rig because the lug nuts were not securely tightened. A jury awarded Torres \$500,000 but the appeals court reversed and remanded. An auto mechanic had installed the tires several weeks before the accident and may not have properly tightened the lug nuts. Omega was entitled to an instruction excusing its failure to comply with the



RECENT OPINIONS: COURTS OF APPEALS

statute, which required that a motor carrier not operate with loose lug nuts, if it neither knew nor should have known of the need for compliance. Omega Contracting, Inc. v. Torres, No. 02-03-00106-CV, Fort Worth, September 29, 2005.

Premises Liability

Contractor Not Strictly Liable For Injury

Reid was performing maintenance work in a university cafeteria when he came into contact with a live wire and allegedly suffered burns. He sued Compass, the company providing food services under contract with the university. The trial court granted Compass summary judgment, which was affirmed. There was no evidence that Compass or a company that had made renovations to the cafeteria created the dangerous condition, knew about it, or should have known about it. Compass's contract with the university did not make it strictly liable for injuries in the cafeteria. Reid v. Compass Group U.S.A., Inc., 172 S.W.3d 203 (Tex. App.—El Paso 2005).

Procedure

Trial Court Improperly Applied Settlement Credit

In this medical-malpractice case, plaintiffs sued Dr. Taveau and the hospital alleging that their negligence caused Evans to lose his arm and ultimately die. The hospital settled for \$250,000. A jury found the doctor 75% liable and the hospital 25% liable and awarded \$670,000 damages. The trial court entered judgment against Dr. Taveau for about \$300,000 after deducting the settlement credit and another 25% for the negligence assessed against the hospital. The appeals court reversed in part. Because Dr. Taveau elected a dollar-for-dollar settlement credit, the only proper deduction was for \$250,000. Deduction of the full settlement credit was proper because all

plaintiffs settled with the hospital and all claims arose from one death. Taveau v. Brenden, No. 11-02-00195-CV, Eastland, September 15, 2005, pet. filed.

Products Liability

Alleged Manufacturer Owed Seller Indemnity

Huddleston filed a products liability lawsuit alleging that he was injured by a brake-winch handle made by Dutton-Lainson and sold by DIB. On DIB's motion, the trial court granted it indemnity from Dutton-Lainson. The appeals court affirmed. Although Dutton-Lainson offered proof that it did not manufacture the winch in question, a seller need only prove that the manufacturer made products of the type at issue, not that the manufacturer made the specific product. TEX. CIV. PRAC. & REM. CODE § 82.002. DIB's proof that it was a distributor of Dutton-Lainson products, including brake winches, was sufficient for indemnity. Dutton-Lainson Co. v. Do It Best Corp., No. 04-04-00679-CV, San Antonio, September 28, 2005.

Texas Tort Claims Act

Overloaded Elevator Constituted A Dangerous Condition

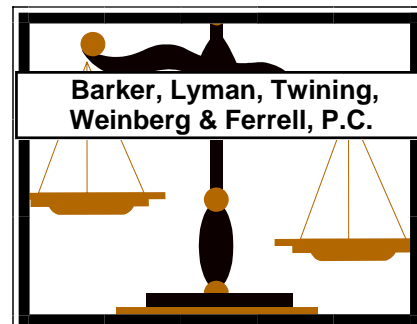
A guard loaded an elevator with himself and seventeen inmates. The elevator fell to the basement, allegedly injuring inmate Wadley. He sued Dallas County, which filed a plea to the jurisdiction that was denied. The appeals court affirmed. A governmental entity can be liable for a premises defect. Wadley's allegation that the elevator, which had a maximum weight capacity of 3,000 pounds, was severely overloaded stated a potentially dangerous condition and a premises defect. The elevator itself did not have to be defective. Dallas County v. Wadley, 168 S.W.3d 373 (Tex. App.—Dallas 2005, pet. filed).

Defendant Had No Actual Knowledge Of Premises Defect

Brooks sued the university for burn injuries he sustained while repairing a pipe on the campus. A jury awarded Brooks actual damages but the appeals court reversed and rendered. Under the Texas Tort Claims Act, a governmental entity is not liable unless it has actual knowledge of a premises defect. Here, although there was conflicting evidence about whether the university knew about a bypass line, there was no evidence that the university knew that the bypass line was open and that steam could enter the section of pipe Brooks was repairing. Prairie View A&M Univ. v. Brooks, No. 14-04-00501-CV, Houston [14th Dist.], October 20, 2005.

Overgrowth Of Vegetation Was A Premises Defect

Pate was killed when a pickup in which he was a passenger pulled away from a stop sign into the path of an 18-wheeler. Pate's family sued the Texas Dept. of Transportation ("TxDOT") alleging that vegetation in the highway right-of-way that had grown up after the stop sign was installed obscured the visibility of oncoming traffic. A jury found for plaintiffs. The appeals court affirmed. Although TxDOT has immunity for placement of stop signs, this case arose not from placement but from later vegetation growth, a premises defect. Sovereign immunity did not protect TxDOT. Texas Dept. of Transp. v. Pate, 170 S.W.3d 840 (Tex. App.—Texarkana 2005).



INSURANCE / WORKERS' COMPENSATION UPDATE

TEXAS SUPREME COURT

Bad Faith

No Breach Of Contract, No Bad Faith

Boyd made a claim with his auto insurer, Progressive, for uninsured motorist coverage alleging that a hit-and-run vehicle pushed him into a guardrail. Progressive denied the claim. Boyd sued. The trial court severed the extracontractual claims, granted summary judgment on them, then tried the breach-of-contract claim, which the jury found in favor of Progressive. The appeals court affirmed on the contract claim but reversed on the extracontractual claims. The Texas Supreme Court reversed and rendered. Because its denial of Boyd's claim did not cause damages independent of the policy, Progressive eliminated any extracontractual claims by winning the contract claim. Progressive County Mut. Ins. Co. v. Boyd, 48 Tex. Sup. Ct. J. 1020 (Aug. 26, 2005).

COURTS OF APPEALS

Bad Faith

Insurer Breached Contract But Was Not In Bad Faith

A plumbing leak under the Crofts' home caused foundation damage. The Crofts and USAA disagreed about the amount of damage and the remediation necessary, leading to this lawsuit. A jury awarded the Crofts \$650,000. The appeals court affirmed in part and reversed in part. The evidence did not support the jury's findings of bad faith and statutory violations because USAA had a bona fide coverage dispute. Its expert reported that four other factors as well as the plumbing leak caused the foundation damage. There was no evidence that the report was not objectively prepared or that USAA unreasonably relied on the report. United Servs. Automobile Ass'n v. Croft, No. 05-04-00045-CV, Dallas, August 26, 2005.

Evidence

Expert Evidence On Marijuana Use Did Not Defeat Comp Recovery

While working on a building, Hinson failed to tie off and fell about thirty feet. He made a comp claim with AIC that ended up before a jury, which found in Hinson's favor. The appeals court affirmed. A urinalysis taken an hour after the accident showed marijuana metabolite in Hinson's urine. AIC's expert testified that Hinson was intoxicated within the meaning of the comp act when the accident happened. The jury could disregard that testimony because much of it was conclusory, the expert conceded that some people with 5-10 times the amount of metabolite in their systems showed little or no mental deficits, and Hinson had been tied off earlier that morning and working without problems. American Interstate Ins. Co. v. Hinson, 172 S.W.3d 108 (Tex. App.—Beaumont 2005).

Insurance Policy Construction

Insurer Had To Defend Construction-Defect Claim

Braden sued Archon, a homebuilder, for defective construction of his house. Great American denied Archon a defense and this coverage lawsuit followed. The trial court granted Great American summary judgment, which was reversed and remanded. Braden's petition alleged that the intended construction work was negligently performed by Archon and its subcontractors, resulting in unintended harm. That claim stated a potential occurrence for which Great American owed a defense. Archon Invest., Inc. v. Great American Lloyd's Ins. Co., No. 01-03-01299-CV, Houston [1st Dist.], August 25, 2005.

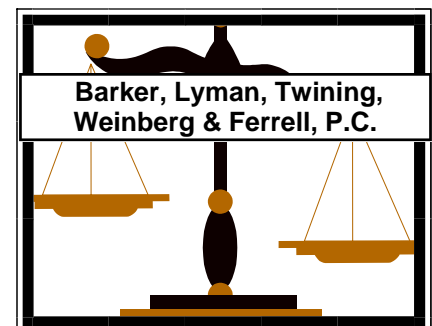
Late Premium Payment Eliminated Coverage

Avila had auto insurance with Home State that she paid for monthly. She did not timely renew. Three days after the

policy lapsed, Avila had an accident. That same day, her daughter tendered a premium payment to the Loya Agency, which accepted the premium without notice of the accident. Home State denied any coverage under the policy and this suit followed. The trial court granted Loya and Home State summary judgment, which was affirmed. Generally, an insured's failure to pay premiums when due causes a policy to lapse. Avila did not offer sufficient evidence of misrepresentations to raise a fact issue defeating the lapse. Avila v. Loya, No. 07-04-0096-CV, Amarillo, August 10, 2005.

Late Notice Of Advertising-Injury Claim Barred Coverage

On 12/8/98, Paj was served with a copyright-infringement lawsuit. It notified its general liability ("GL") insurer, Hanover, of the suit sometime between April and June 1999. Hanover denied a defense based on late notice and Paj sued it. The trial court granted Hanover summary judgment, which was affirmed. Timely notice is a condition precedent. Although a GL insurer must show prejudice from late notice if the claim involves bodily injury or property damage (Coverage A), that rule does not apply to claims, as here, that result from an alleged advertising injury (Coverage B). Because Paj did not notify Hanover as soon as practicable about the lawsuit, Paj violated a condition precedent to a defense or indemnity. Paj, Inc. v. The Hanover Ins. Co., 170 S.W.3d 258 (Tex. App.—Dallas 2005, pet. filed).



INSURANCE / WORKERS' COMPENSATION UPDATE

Leakage Exclusion Was Ambiguous

SMI made a claim with its property insurer, Underwriters, for foundation damage to its buildings caused by a leak. Underwriters denied coverage. SMI sued but lost on summary judgment. The appeals court reversed and remanded. The policy excluded gradual deterioration and leakage. SMI contested the summary-judgment motion by filing an expert's affidavit saying that the leakage was relatively sudden. The court held that the term "leakage" was ambiguous because it could mean any kind of leakage, sudden or gradual. Construing the policy in favor of SMI, sudden leakage would be covered and the expert's affidavit raised a fact issue. SMI Realty Mgmt. Corp. v. Underwriters at Lloyd's, No. 01-03-01340-CV, Houston [1st Dist.], August 31, 2005.

Insurer Does Not Have To Justify Request For EUO

The Trahans' home was destroyed by a fire. They filed a claim with FIE, their homeowners insurer. After receiving the Trahans' proof of loss, FIE requested examinations under oath ("EUOs"). The Trahans did not submit to EUOs until six months later. Once it had the EUOs, FIE paid the claim. The Trahans sued FIE for bad faith for delaying payment. The trial court granted FIE summary judgment, which was affirmed. Under the policy, FIE could take an EUO for any reason. It did not have to justify its request for an EUO by saying that it suspected arson. And it was entitled to delay payment until after the EUOs were taken. Trahan v. Fire Ins. Exch., No. 09-05-00022-CV, Beaumont, October 27, 2005.

Statutory Construction

Insurer Could Wait To Request EUO

Whitney's mobile home was destroyed by a fire. His property insurer, Foremost, suspected arson from the beginning but waited three months before

asking for Whitney's examination under oath ("EUO"). Whitney declined to give an EUO and sued Foremost, which moved for abatement. The trial court denied abatement but the appeals court granted mandamus requiring abatement for an EUO. Although art. 21.55, Tex. Ins. Code, requires insurers to ask for information within fifteen days after notice of a loss, an exception allows insurers to make later requests for other information deemed necessary as a result of investigation. Foremost timely made its request under that exception and did not waive its right to an EUO. In re Foremost County Mut. Ins. Co., 172 S.W.3d 128 (Tex. App.—Beaumont 2005, pet. filed).

Claim For Defense Costs Does Not Fall Under Art. 21.55

A class of plaintiffs sued Wink for violations of truth-in-lending laws. Wink tendered the defense to its general liability ("GL") insurer, SLIC, which denied a defense. This coverage lawsuit followed. The trial court granted Wink summary judgment on the duty to defend and awarded it damages under art. 21.55, Tex. Ins. Code. The appeals court reversed the art. 21.55 award because that statute applies to first-party claims, not to claims for a defense under a GL policy covering third-party claims. Service Lloyd's Ins. Co. v. J.C. Wink, Inc., No. 04-05-00038-CV, San Antonio, October 5, 2005.

FIFTH CIRCUIT

Agency

Intoxication Does Not Per Se Establish A Deviation From Permissive Use

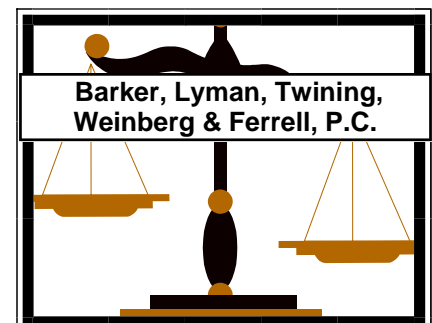
While drunk, Largent collided with Morris. Morris sued Largent, Largent's employer, Hammer Trucking, and JTM, the company to which Hammer leased the 18-wheeler. Morris obtained a large verdict against Largent and Hammer, who were pro se. Minter, as receiver

for Morris, sued JTM's auto insurers alleging that Largent was covered as an omnibus insured. After the primary insurer settled, the district court granted Great American, the excess insurer, summary judgment. The Fifth Circuit reversed and remanded, holding that there was a fact issue whether Largent was a permissive user of the truck and, therefore, an omnibus insured. Largent's intoxication did not, per se, take him outside the scope of permission of the truck's use. Minter v. Great American Ins. Co., 423 F.3d 460 (5th Cir. 2005).

Procedure

Insurer Could Intervene In Suit After Insured Cut Deal With Plaintiffs

Wayne Mathews burned a cross in the yard of the Rosses, an African American family, who sued Wayne and his father, Kent. A jury awarded \$10 million damages but found that Kent's conduct did not proximately cause the cross burning. The district court entered judgment against Kent, though, finding him vicariously liable for Wayne's conduct. After Kent appealed, he cut a deal. He agreed to dismiss his appeal and to assign plaintiffs all his rights against Allstate, his homeowners insurer, which had defended him throughout the case. Allstate moved to intervene, a motion the trial court denied. The Fifth Circuit reversed. Under these facts, Allstate's motion was timely and appropriate to challenge the district court's erroneous finding of vicarious liability. Ross v. Marshall, 426 F.3d 745 (5th Cir. 2005).



PROFESSIONAL LIABILITY UPDATE

TEXAS SUPREME COURT

Limitations

Sexual-Assault Claim Fell Within Medical Liability Act, Was Time Barred

Rubio, an Alzheimer's patient, was a resident of DiversiCare's nursing home for five years. In 2000, Rubio's daughter sued alleging that DiversiCare failed to protect Rubio from sexual abuse that occurred in 1995. The trial court granted DiversiCare summary judgment on limitations but the appeals court reversed. The Texas Supreme Court reversed and rendered. Rubio asserted health care claims because the supervision of Rubio and her assailant were inseparable from the health care and nursing services being provided. Thus, the two-year statute of limitations in the Medical Liability Act, which is not tolled by mental incapacity, applied and barred Rubio's claim. DiversiCare Gen. Partner, Inc. v. Rubio, 49 Tex. Sup. Ct. J. 19 (Oct. 14, 2005).

COURT OF APPEALS

Arbitration

Legal-Malpractice Claim Had To Be Arbitrated

Wilson hired Taylor to represent her in her claim against an investment firm. Unhappy with the settlement in that case, Wilson sued Taylor for legal malpractice. Taylor moved to compel arbitration, which the trial court denied. The appeals court granted mandamus ordering arbitration. Wilson signed a fee contract that included an arbitration clause. Because her claim against Taylor did not qualify as a claim for "personal injury," the arbitration clause did not violate § 171.002, Tex. Civ. Prac. & Rem. Code, which says that claims for personal injury cannot be arbitrated unless the arbitration agreement is not only signed by the party but by an attorney advising the party. Taylor v. Wilson, No. 14-04-00701-CV, Houston [14th Dist.], October 6, 2005.

Duty

Accountant Owed Undisclosed Third Party No Duty

Farmer audited ESS, a business college, for compliance with Department of Education requirements. ESS told Farmer that copies of the audit would go to Chase, the bank servicing the ESS loan. Later, Abrams took over ESS's loan from Chase. After ESS defaulted on its loans, Abrams sued Farmer for issuing an audit that negligently misrepresented ESS's condition. The trial court granted Farmer a no-duty summary judgment, which was affirmed. A negligent misrepresentation requires that the defendant have actual knowledge of the third party's reliance upon the information at issue. Although Farmers knew of Chase's interest, it had no knowledge of Abrams's interest and did not owe Abrams a duty. Abrams Centre Nat'l Bank v. Farmer, Fuqua, Huff, P.C., No. 08-05-00140-CV, El Paso, October 27, 2005.

Attorney Liable For Usurping Clients' Business Opportunity

Addison and others sued Bright, an attorney, for usurping a business opportunity to manage a casino in Aruba. Bright argued that he acted as Addison's business associate, not as an attorney. The trial court found that Bright acted as an attorney and entered judgment against Bright. The appeals court affirmed. Although the evidence conflicted, there was sufficient evidence to uphold the findings that Bright acted as Addison's attorney, that Bright breached his fiduciary duty, and that Bright usurped a business opportunity. Bright v. Addison, 171 S.W.3d 588 (Tex. App.—Dallas 2005).

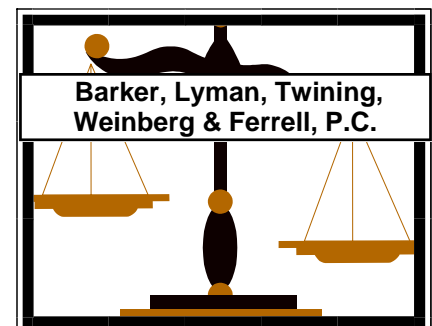
Attorney Owed A Duty Not To Defraud Opposing Party

Hong and her now ex-husband owned a doughnut shop. They agreed to sell the shop to buyers represented by attorney Chu. When the buyers changed the

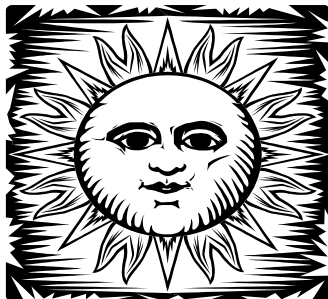
deal, Hong refused to sell. Her husband went to Chu's office, signed an amendment to the purchase agreement saying that he was the sole owner of the doughnut shop, and sold the shop. After learning of the sale, Hong sued her husband, the buyers, and Chu for fraud and conspiracy. The jury found Chu guilty of conspiring with the buyers and awarded Hong actual and punitive damages. The appeals court affirmed, upholding the verdict under the Uniform Fraudulent Transfer Act, Tex. Bus. & Com. Code § 24.001, et seq. By his conduct, Chu became an "insider" under that statute, making him liable for Hong's loss. Chu v. Hong, No. 02-04-00279-CV, Fort Worth, October 20, 2005.

Attorney Owed No Duty To Opposing Party

Alpert sued Riley, his former friend and attorney, over the administration of trusts set up by Riley for Alpert's children. Crain, Caton defended Riley. Alpert then sued Crain, Caton in a separate suit alleging Crain, Caton was conspiring with Riley to defraud him. The trial court granted Crain, Caton's special exceptions and dismissed the case. The appeals court affirmed. Generally, an attorney owes opposing parties no duty. Although courts have recognized a narrow exception for an attorney's knowingly committed fraudulent acts outside the attorney's legal duties to his own client, Alpert did not factually allege acts falling within that exception. Alpert v. Crain, Caton & James, P.C., No. 01-04-00101-CV, Houston [1st Dist.], September 22, 2005.



HOT ISSUES BEFORE THE TEXAS SUPREME COURT



HOT ISSUE 1 — Is employer liable for employee's off-duty conduct?

Tingle and fellow Loram employees began using crystal methamphetamine to stay awake during their 13–14 hour work days. One night after work, while on drugs, Tingle began abusing his wife. She screamed for help. Ianni, a police officer, responded and Tingle shot him. He sued Loram and recovered actual and punitive damages. The appeals court affirmed. The Texas Supreme Court granted review and will hear oral argument November 29, 2005. Loram Maint. of Way, Inc. v. Ianni, No. 04-0666, September 16, 2005 (CA 141 S.W.3d 722).

HOT ISSUE 2 — Was contingent fee agreement unconscionable?

Walton hired Hoover under a contingent fee agreement to represent him in disputes over oil and gas leases. Walton rejected a \$6 million settlement offer that required him to sell his property interests. He fired Hoover and later settled for less money without selling his interests. Hoover sued Walton on its contingent fee agreement and won \$900,000 attorney's fees. The appeals court reversed, holding that the contingent fee agreement was unconscionable as enforced. The Texas Supreme Court granted review and will hear oral argument December 1, 2005. Hoover, Slovacek, L.L.P. v. Walton, No. 04-1004, October 14, 2005 (CA 149 S.W.3d 834).

HOT ISSUE 3 — Is dram shop vicariously liable for drunk's negligence?

In a 5–4 decision, the Texas Supreme Court held that a seller of alcoholic beverages that sells alcohol to an obviously drunk patron is liable for both the seller's negligence and the patron's negligence in causing an accident by driving while drunk. The Texas Supreme Court has granted rehearing and will rehear oral argument November 30, 2005. F.F.P. Operating Partners, L.P. v. Dueñez, No. 02-0381, September 30, 2005 (47 Tex. Sup. Ct. J. 1068).

HOT ISSUE 4 — Should claim be dismissed for forum non conveniens?

Hernandez, a Mexican citizen, died when a tire blew out on a pickup truck in which he was riding in Mexico. His family sued Pirelli, the tire maker, in Brownsville, Texas, based on the fact that two years before the accident, the 14-year-old truck had been sold in Brownsville to a Mexican citizen. The trial and appeals courts denied Pirelli's motion to dismiss for forum non conveniens. The Texas Supreme Court granted review and will hear oral argument November 29, 2005. In re Pirelli Tire, L.L.C., No. 04-1129, September 16, 2005 (CA ___ S.W.3d ___).

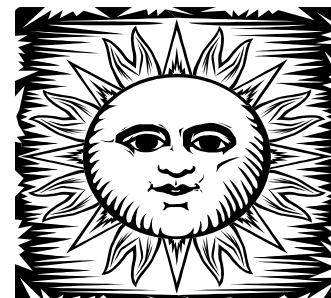
HOT ISSUE 5 — Does comp statute bar indemnity for third-party beneficiary?

Superior agreed to indemnify Mitchell and its subcontractors for injuries to Superior's employees. An employee was injured and sued another subcontractor, ESC, for damages. ESC settled, then sued Superior for indemnity. The trial court granted ESC summary judgment but the appeals court reversed and rendered, holding that the comp act barred indemnity for ESC absent a direct agreement between ESC and Superior. The Texas Supreme Court granted review and will hear oral

argument December 1, 2005. Energy Serv. Co. of Bowie, Inc. v. Superior Snubbing Serv., Inc., No. 05-0202, October 14, 2005 (CA 158 S.W.3d 112).

HOT ISSUE 6 — Are construction defects a covered occurrence?

The DiMares sued Lamar for defective construction of their house. Lamar's general liability ("GL") insurer, Mid-Continent, denied a defense. Lamar sued Mid-Continent and lost. On appeal, the Fifth Circuit certified the questions whether construction defects are an occurrence and whether damage to the house is property damage under a GL policy. The Texas Supreme Court granted review of those questions and will hear oral argument February 14, 2006. Lamar Homes, Inc. v. Mid-Continent Cas. Co., No. 05-0832, November 4, 2005 (___ F.3d ___).



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