

Letter of the Law

November 2006

Volume 14 Issue 1

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

TEXAS SUPREME COURT

Discovery

Discovery Request About Other Products Was Overbroad

When Galnares rolled her Jeep, her five-week-old son suffered fatal head injuries. She sued Graco alleging that its infant car seat failed to restrain her son. Two weeks before trial, Galnares learned of new civil sanctions against Graco for failing to report defects in a dozen products, none of which included the car seat at issue. She immediately issued a request for production for all documents about the defects. Over objection, the trial court ordered Graco to produce the documents. The Texas Supreme Court granted mandamus vacating the discovery order. None of the products or product defects had any apparent connection with the product at issue and, therefore, the discovery was improper. In re Graco Children's Prod., Inc., 210 S.W.3d 598 (Tex. 2006).

Employment

Covenant Not To Compete Was Enforceable Based On Subsequent Performance

Four years after hiring Johnson, ASM had Johnson, an at-will employee, sign a covenant not to compete. Johnson later went to work for ASM's direct competitor. ASM sued Johnson to enforce the covenant not to compete, which both the trial and appeals courts held invalid because ASM did not provide consideration for the agreement when Johnson signed it. The Texas Supreme Court reversed and remanded,

modifying prior law. As it promised in the noncompete agreement, ASM regularly gave Johnson access to confidential information after he signed the agreement. That subsequent performance by ASM made the noncompete agreement enforceable. Alex Sheshunoff Mgmt. Serv., L.P. v. Johnson, 209 S.W.3d 644 (Tex. 2006).

Experts

Expert's Causation Opinion Was Not Reliable

Tamez died when the Mack truck he was driving overturned and caught fire. His family sued Mack. The trial court excluded plaintiffs' expert's causation opinions and granted Mack summary judgment. The appeals court reversed and remanded. The Texas Supreme Court reversed and rendered judgment for Mack. Because the expert could not point to any research that supported his conclusions and because he had no process for ruling out alternative causes of the post-accident fire, his testimony did not meet reliability standards. Therefore, the family had no evidence of causation. Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572 (Tex. 2006).

Premises Liability

No Evidence That Dangerous Condition Caused Injuries And Death

While suffering from cancer, Moreno was hit by a car in LMB's parking lot. Moreno died a year later. Her family sued LMB, which won a no-evidence summary judgment. The court of appeals reversed. The Texas Supreme

Court reversed and rendered. The family offered an affidavit from a doctor that generally concluded that LMB's conduct substantially caused Moreno's injuries and death. That conclusory affidavit was no evidence, though, because it did not set out specific facts of some premises condition or conduct by LMB that caused the accident, the injuries, or the death. LMB, Ltd. v. Moreno, 201 S.W.3d 686 (Tex. 2006).

COURTS OF APPEALS

Attorney Disqualification

No Disqualification For Seeing Other Side's Privileged Documents

Harris sued Parnham, her former attorney, for breach of fiduciary duty. During discovery, Parnham's attorneys reviewed documents at Harris's attorney's office. Documents that Harris's attorneys intended for Parnham's attorneys to review were Bates stamped. By error, though, the conference room held the entire litigation file and the parties disagreed whether Parnham's attorneys were told they could review everything in the room. Parnham's attorneys reviewed the attorney-client correspondence file and other files. Harris moved for their disqualification, a motion the trial court granted. The court of appeals granted mandamus reversing disqualifi-

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cation. Rule 193.3, known as the “snap-back rule,” applied. That rule allowed Harris to retrieve the materials inadvertently produced, as she did, but the rule did not authorize disqualification. In re Parnham, No. 01-06-00236-CV, Houston [1st Dist.], September 21, 2006.

Causation

No Evidence That Farm Caused Dust Cloud That Caused Accident

As the Connaways drove their motorcycle through a dust cloud, they collided with an SUV making a U-turn to avoid the dust cloud. Both Connaways were injured and sued Village Farms for negligence, alleging that its clearing of land for its tomato farm caused the dust cloud that caused the accident. The trial court granted Village Farms summary judgment, which was affirmed. Plaintiffs offered evidence of a windy day and a bad dust storm. But evidence that the dust came from the particular property owned by Village Farms was conclusory and speculative at best since dust storms in West Texas are not an uncommon event. Connaway v. Village Farms, L.P., 200 S.W.3d 353 (Tex. App.—Dallas 2006).

Damages

Plaintiff Did Not Prove Damages With Reasonable Certainty

Anglo-Dutch wanted to buy development rights in a potentially lucrative oil and gas field in Kazakhstan. After Ramco acquired those development rights, Anglo-Dutch sued it for misappropriation of confidential information and of trade secrets. A jury awarded Anglo-Dutch \$6.4 million in lost profits. The appeals court reversed and rendered. Anglo-Dutch did not establish with reasonable certainty that it could have purchased the oil and gas interests necessary, nor that it could have paid for the purchase without giving up eq-

uity in the oil and gas venture, nor that the field would have produced at the rate it suggested. Ramco Oil & Gas Ltd. v. Anglo-Dutch (Tenge) L.L.C., 207 S.W.3d 801 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

Discovery

Expert Not Required To Produce Personal Documents

Makris collided with the Vasquezes. The trial court ordered Makris’s expert, a doctor, to produce five years of 1099 forms, expert reports and depositions given over a three-year period, and correspondence between the doctor and Makris’s attorneys and insurers. The appeals court granted mandamus overruling the discovery order. A party may discover information about an expert’s bias. But personal financial records are not discoverable for the sole purpose of showing bias. Further, the doctor’s denial of any bias in favor of defendants did not, by itself, raise a fact issue that the doctor actually had a pro-defendant bias that would allow broad discovery into his personal documents. In re Makris, No. 04-06-00401-CV, San Antonio, October 4, 2006.

Trial Court Had To Review Allegedly Stolen Documents In Camera

Strategic sued defendants for breach of contract and fraud. During discovery, Strategic anonymously received three separate packages of documents illegally obtained from defendants by an unknown party. Strategic took the documents to its attorney, who reviewed them, then told defendants’ attorney about them. At a hearing, the trial court held that Strategic could not use or discuss any of the documents. The appeals court granted mandamus ordering the trial court to review the documents in camera. In civil cases, even illegally obtained evidence may be admissible at trial. Strategic was entitled to production of the nonprivileged

documents. In re Strategic Impact Corp., No. 14-06-00727-CV, Houston [14th Dist.], October 10, 2006.

DTPA

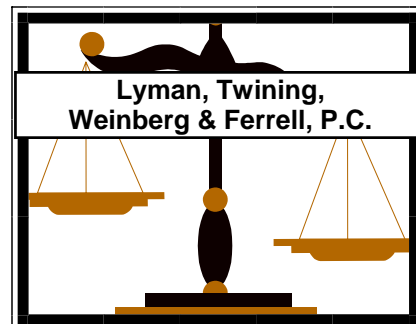
Plaintiffs Had A Breach-Of-Contract Case, Not A DTPA Case

Pierce signed a contract with Mays under which Mays agreed to perform mold remediation work at Pierce’s home. Halfway through, Mays walked off the job. Pierce sued Mays and recovered \$43,000 actual damages, \$43,000 additional damages under the Deceptive Trade Practices Act (“DTPA”), and attorney’s fees. The appeals court affirmed all but the DTPA award. Pierce offered no evidence that Mays misrepresented the presence of mold or its risks, that Mays entered into the contract with no intent of performing, or that Mays caused harm beyond the failure to perform the contract. Thus, Pierce had no DTPA claim. Mays v. Pierce, 203 S.W.3d 564 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

Employment

Employer Did Not Wrongfully Discharge Employee For Filing Comp Claim

While working for Wal-Mart, Santillan suffered a back injury. She received treatment and went back to work in a light-duty position consistent with her doctor’s restrictions. Santillan, a non-citizen, missed the deadline for presenting renewed permission to legally work



RECENT OPINIONS: COURTS OF APPEALS

in the U.S. Wal-Mart fired her and would not reinstate her after she presented updated documents because there were no available jobs. She sued for wrongful discharge under the Workers' Comp Act. The trial court granted Wal-Mart summary judgment, which was affirmed. Under federal law, Wal-Mart was required to fire Santillan. She offered no evidence that Wal-Mart had rehired any other employees after telling her no jobs were available, thereby failing to raise a fact issue on retaliatory motive. Santillan v. Wal-Mart Stores, Inc., 203 S.W.3d 502 (Tex. App.—El Paso 2006, pet. denied).

Indemnity

Reading Overall Agreement Not Conclusive On Knowledge Of Indemnity Clause

After settling a personal-injury suit, American Home sought contractual indemnity from LaHorgue. The trial court granted LaHorgue summary judgment because the indemnity agreement was not conspicuous. The appeals court reversed and remanded. Although the indemnity clause was not conspicuous, American Home raised a fact issue whether LaHorgue had actual knowledge of the indemnity clause. LaHorgue's admission that he read the agreement, though, did not establish his actual knowledge of the indemnity provision as a matter of law. American Home Shield Corp. v. LaHorgue, 201 S.W.3d 181 (Tex. App.—Dallas 2006, pet. denied).

Negligence

Borrowed Employee's Claims Barred By Comp Act

Wesby was hired by Labor Express, a temporary-employment agency, and assigned to work at Act Pipe. While there, Wesby was injured. He sued Act Pipe for negligence and the trial court granted summary judgment against him. The appeals court affirmed. Wesby was Act Pipe's borrowed ser-

vant and Act Pipe had workers' comp coverage. Act Pipe's alleged failure to give Wesby notice that it had comp coverage did not negate application of the exclusive remedy provision of the comp act to bar the negligence claim. Wesby v. Act Pipe & Supply, Inc., 199 S.W.3d 614 (Tex. App.—Dallas 2006).

Premises Liability

Bar Brawl Was Foreseeable

Smith received severe injuries during a bar fight at Del Lago's resort. He sued Del Lago and recovered \$1.5 million. The appeals court affirmed. Smith was part of a fraternity group that got into a verbal altercation with a wedding party at the bar. The groups clashed verbally for an hour and a half before the fight started. Based on the hour-and-a-half buildup and on the record of prior alcohol-related assaults and fights at Del Lago, the bar fight was foreseeable and Del Lago breached its duty by not properly training staff how to prevent the fight. Del Lago Partners, Inc. v. Smith, 206 S.W.3d 146 (Tex. App.—Waco 2006, pet. filed).

Plaintiff Raised A Fact Issue On Area Crime And Defendant's Duty

About 2:00 p.m., while at work, Rivera was assaulted by a knife-wielding assailant. She sued the building owner, South Green, for her injuries. The trial court granted South Green summary judgment but the appeals court reversed and remanded. Rivera offered enough evidence about previous criminal conduct of a similar nature on or near the property that her assault could have been foreseeable. Within two-tenths of a mile of the building, there had been four robberies, six aggravated assaults, and four sexual assaults. South Green did not conclusively negate its duty to Rivera. Rivera v. South Green Ltd. P'ship, 208 S.W.3d 12 (Tex. App.—Houston [14th Dist.] 2006, pet. filed).

Release

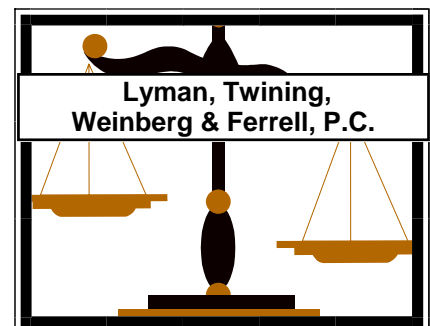
Pre-Injury Release For Self-Defense Class Upheld

Willis broke her ankle during a class on self-defense and sued the instructor, Willoughby. The trial court granted Willoughby summary judgment based on a release. The appeals court affirmed. In the release, Willis acknowledged the inherent dangers of self-defense training, assumed all risk of injury, and released her teachers from any liability for injuries sustained during the training. Willis contractually assumed the risk of her injuries, eliminating her claim against Willoughby. Willis v. Willoughby, 202 S.W.3d 450 (Tex. App.—Amarillo 2006, pet. denied).

Statutory Construction

Trial Court Did Not Properly Apportion Damages

A Pilgrim's chicken truck rear-ended Cernat and Ciupitu, who sued. The jury awarded Cernat \$120,000, Ciupitu \$75,000, and apportioned negligence 50% to Pilgrim's and 25% to each plaintiff. The trial court entered judgment against Pilgrim's Pride awarding Cernat \$80,000 and Ciupitu \$50,000. The appeals court reversed and modified the judgment. Under the proportionate responsibility statute, Pilgrim's only owed 50% of the damages and was not jointly and severally liable. Therefore, Cernat could recover \$60,000 and Ciupitu \$37,500. Pilgrim's Pride Corp. v. Cernat, 205 S.W.3d 110 (Tex. App.—Texarkana 2006, pet. denied).



INSURANCE / WORKERS' COMPENSATION UPDATE

COURTS OF APPEALS

Bad Faith

Insurer Did Not Act In Bad Faith

Angela Coats died in a car wreck. Hammons was also in the car, which her parents owned. State Farm insured both the Hammonses and the Coatses. After various settlements were achieved, the Coatses sued State Farm and its adjusters for breach of contract and bad faith. The trial court granted defendants summary judgment, which was affirmed. Although the Coatses claimed that State Farm wrongfully determined that Angela was driving the car, they offered no evidence of bad faith. State Farm settled and paid the Coatses on their claim against Hammons. It owed no first-party duties to the Coatses for their claims against the Hammonses' policy. Coats v. Ruiz, 198 S.W.3d 863 (Tex. App.—Dallas 2006).

Insurance Policy Construction

Airplane Policy's Per-Passenger Limit Did Not Apply In Death Case

Maria Grassley died in the crash of a private airplane. Her two sons, the Pinsons, sued the pilot's insurer and agent to establish the liability insurance policy's limits. On cross-motions for summary judgment, the trial court held that the \$100,000 per passenger limit did not apply and that the policy limit was \$1 million. The appeals court affirmed. Under the main insuring provision, the insurer agreed to pay damages because of bodily injury, including mental anguish, sustained by any person caused by a crash. Its liability was limited to \$100,000 "because of bodily injury sustained by any passenger." Because the Pinsons sustained bodily injury and were not passengers, the \$100,000 restrictive limit did not apply. Global Aerospace v. Pinson, 208 S.W.3d 687 (Tex. App.—Corpus Christi 2006).

Driver Rendering Aid May Have Been Occupying Car

Goudeau pulled off on the shoulder to help another motorist who had collided with a retaining wall. As Goudeau began to walk from his car, another car collided with the driver's side door of his car, causing Goudeau to be pinned between his car and the retaining wall. Goudeau sued his auto insurer, USF&G, for underinsured motorist ("UIM") benefits. The trial court granted USF&G summary judgment holding that Goudeau was not "occupying" ("in, upon, getting in, on, out, or off") the covered auto when the accident occurred. The appeals court reversed and remanded. Goudeau could have been "occupying" the auto given the causal relationship between the auto and the injury. Goudeau v. United States Fid. & Guar. Co., No. 01-04-01168-CV, Houston [1st Dist.], August 31, 2006, pet. filed.

Plaintiff Could Recover From Liability And UM Limits Of The Same Policy

Jankowiak, a passenger, was injured when the car in which he was riding, driven by Dellasala, collided with an uninsured motorist ("UM"). Allstate provided auto insurance for Dellasala's car. Jankowiak settled with Allstate for the \$25,000 liability limit for Dellasala's negligence, then sued Allstate for an additional \$25,000 under the UM limit for the UM's negligence. The trial court granted Allstate summary judgment. The appeals court reversed and remanded. Language in the liability and UM sections saying that the limit for "each person" was the most Allstate would pay regardless of the number of claims or vehicles involved in the accident provided a \$25,000 limit under each coverage, not a policy-wide limit. Allstate's construction would eliminate one coverage or the other, violating public policy. Jankowiak could recover under both coverages. Jankowiak v. Allstate Prop. & Cas. Ins. Co., 201 S.W.3d 200 (Tex. App.—Houston [14th Dist.] 2006).

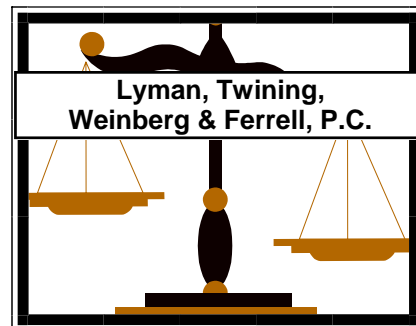
Insurer Owed Defense Of Claim For Cellular Damage

Plaintiffs filed class-action suits against Samsung alleging that use of its cell phones without a headset caused cellular dysfunction and biological injury. Federal, Samsung's general liability ("GL") insurer defended under reservations of rights but sought a declaratory judgment that it owed no duty to defend because the plaintiffs did not state a claim for bodily injury. The trial court granted Federal summary judgment, which the appeals court reversed and remanded. Injury to human cells can constitute bodily injury under GL policies. Samsung Electronics America, Inc. v. Federal Ins. Co., 202 S.W.3d 372 (Tex. App.—Dallas 2006, pet. filed).

Severance

Trial Court Not Required To Sever And Abate Extracontractual Claims

Martinez sued Allstate for breach of contract and bad faith under a homeowners policy. The trial court denied a motion to sever and abate the extracontractual claims but ordered that evidence about those claims would be bifurcated from the other evidence in the case. The appeals court denied mandamus relief. Severance of bad-faith claims from a contract claim is not always mandatory. Allstate had to show how it would be prejudiced by denial of its motion for severance and offered no specific evidence of prejudice. In re Allstate Texas Lloyds, 202 S.W.3d 895 (Tex. App.—Corpus Christi 2006).



INSURANCE / WORKERS' COMPENSATION UPDATE

Trial Court Properly Severed And Abated Extracontractual Claims

Miller sued State Farm for uninsured motorist ("UM") benefits under an auto policy. After State Farm answered, Miller amended, leaving out his contractual claim and suing State Farm for bad faith only. State Farm moved to sever and abate Miller's bad-faith claim until the contractual claim for UM benefits was adjudicated. The trial court granted the motion and the appeals court denied Miller mandamus relief. Miller's contract claim had to be tried first because it underlay his bad-faith claim for a low settlement offer. Evidence of that offer would have been so prejudicial on the contract claim that a severance and abatement was appropriate. In re Miller, No. 12-06-00195-CV, Tyler, September 29, 2006.

Statutory Construction

Award Of Lifetime Income Benefits Affirmed

While working for EPISD as a custodian, Pabon contracted carpal tunnel syndrome. She filed a workers' comp claim and, at the commission level, recovered benefits but not lifetime income benefits. On appeal to the trial court, a jury found that Pabon had total loss of use of both hands at or above the wrist and was entitled to lifetime benefits. The appeals court affirmed. Evidence that Pabon could not grasp objects, had constant pain in her hands and elbows and shoulders, and that Pabon could not find work due to her disability and educational level supported the jury's finding. El Paso Indep. School Dist. v. Pabon, No. 08-05-00214-CV, El Paso, August 29, 2006.

Subrogation

Bar To Insurer's Subrogation Rights Not Established

Overturf was injured in a collision. AIG paid him benefits under an accident policy. He sued the other driver

and received a \$55,000 settlement paid by Federated. Neither Federated nor Overturf reimbursed AIG, which sued both. The trial court granted defendants summary judgment. The appeals court reversed and remanded. There was a fact issue whether the made-whole doctrine eliminated any recovery by AIG. Although Overturf claimed he had \$120,000 in economic losses, so the settlement did not make him whole, he settled because he had a long prior history of back problems. Defendants failed to prove as a matter of law that Overturf's true losses exceeded the \$55,000 settlement amount. AIG Life Ins. Co. v. Federated Mut. Ins. Co., 200 S.W.3d 280 (Tex. App.—Dallas 2006, pet. denied).

FIFTH CIRCUIT

Insurance Policy Construction

Employee May Have Been Permissive User And, Therefore, An Insured

At 2:00 a.m., Adams fell asleep at the wheel of a Goodyear company truck and collided with Mayes, who sued. Travelers, Goodyear's auto insurer, refused to defend Adams, who sued it. The federal district court granted Travelers summary judgment because Adams was not a permissive user of the truck. The Fifth Circuit reversed and remanded. Goodyear had given Adams express permission to use the truck for business commuting but had also tolerated personal use of the truck in the past. Adams's personal use that night involved an errand of a short distance that a jury could find was a minor deviation within permissive use. Adams v. Travelers Indem. Co., 465 F.3d 156 (5th Cir. 2006).

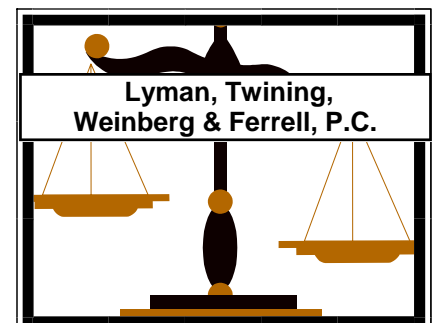
Auto Exclusion In CGL Policy Applied To Bar Coverage

An ALC employee left a two-year-old child in a parked van for about seven hours, causing the child to suffer severe

injuries. When the child's mother sued ALC, Lincoln denied coverage under its commercial general liability ("CGL") policy based on an auto exclusion. In the ensuing coverage action, a federal district court granted Lincoln summary judgment. The Fifth Circuit affirmed. The policy excluded bodily injury arising out of the "use" of an auto. ALC's driver transported the child to ALC's center but forgot to take the child out of the van. These facts showed a "use" of the van as a matter of law. Lincoln Gen. Ins. Co. v. Aisha's Learning Ctr., 468 F.3d 857 (5th Cir. 2006).

Excess Carrier Entitled To Subrogation From Primary Carrier

After the death of a nursing home patient, two primary carriers, Caliber and Hartford, and an excess carrier, Royal, paid \$2 million to settle the case. Royal then sued the primary carriers to recover the \$1 million it paid. A federal magistrate judge granted the primary carriers summary judgment. The Fifth Circuit reversed. The underlying plaintiffs offered evidence of medical negligence that occurred in the Hartford policy period separate and apart from the medical negligence and death that occurred during Caliber's policy period. Hartford's policy preceded Caliber's policy and the two primary policies did not overlap. Royal's policy was excess of the Caliber policy only. Royal could not recover reimbursement from Hartford but could recover reimbursement from Caliber on an equitable subrogation theory. Royal Ins. Co. v. Caliber One Indem. Co., 465 F.3d 614 (5th Cir. 2006).



PROFESSIONAL LIABILITY UPDATE

COURTS OF APPEALS

Causation

Plaintiffs Offered No Evidence Of Cause Of Death

Gray, an 80-year-old man suffering from Parkinson's disease, died while at Woodville's nursing home. His family sued. The trial court granted defendants summary judgment and the appeals court affirmed. Plaintiffs offered evidence from a doctor that Gray had contracted several infections that could have been prevented by better care. Two nurses also offered conclusory affidavits that Gray suffered from dehydration. But none of the testimony explained how the breaches caused Gray's death from cardiac failure and malnutrition. Gray v. Woodville Health Care Ctr., No. 08-05-00033-CV, El Paso, August 3, 2006, pet. denied.

Damages

\$500,000 Award For Two Hours Of Pain And Suffering Upheld

A nursing home employee dropped Mrs. Peñalver, 90, causing her to suffer an intracerebral hemorrhage. She was conscious for about two hours, lapsed into unconsciousness, and died the next day. Her sons sued. The nursing home stipulated liability and the jury awarded \$500,000 for Mrs. Peñalver's pain and anguish. The appeals court affirmed based on evidence that Mrs. Peñalver, while conscious, was moaning and in pain. Although the period of conscious pain and suffering was short, the large award was within the jury's discretion. The court also held that plaintiffs' attorney's final argument was not incurably improper. That argument compared the nursing home's attitude toward old people to Nazi Germany's attitude toward old people (invoking the T-4 program in which the Nazis experimented on and killed old people and others deemed unworthy of life). Living Ctrs. of Texas, Inc. v. Peñalver, No. 04-05-00565-CV, San Antonio, September 13, 2006.

Experts

Expert Did Not Establish His Qualifications In His Report

Brandal saw Dr. Leland to obtain dentures. Dr. Leland allegedly instructed Brandal to stop taking anticoagulant medication before Dr. Leland extracted some of Brandal's teeth. Four days after an extraction of nine teeth, Brandal suffered a paralyzing stroke. He sued Dr. Leland and filed an expert report. Dr. Leland moved to dismiss on the expert's lack of qualifications but the trial court denied the motion. The appeals court reversed and remanded. Brandal's expert anesthesiologist did not establish his qualifications to testify that the cessation of Brandal's anticoagulants caused the stroke. The court remanded so that the trial court could consider whether to give the family a 30-day extension to correct deficiencies in the expert report. Leland v. Brandal, No. 04-05-00855-CV, San Antonio, September 13, 2006.

Statutory Construction

Patient Injured In Melee Was Alleging Health Care Claim

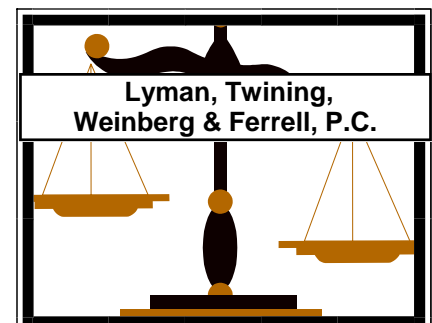
Harrison was admitted to Oak Park's treatment facility for in-patient detoxification. While there, he suffered injuries when a female psychological patient tried to escape and during the ensuing melee, Harrison was slammed into a wall. He sued Oak Park for negligence. After Harrison failed to timely file an expert report, Oak Park moved for dismissal, which the trial court denied. The appeals court reversed and dismissed. Essentially, Harrison claimed that Oak Park knew the female patient posed a danger to other patients and failed to protect the other patients from her. This and similar claims involved health care decisions, requiring an expert report. Oak Park, Inc. v. Harrison, 206 S.W.3d 133 (Tex. App.—Eastland 2006).

Expert Report Did Not Sufficiently Set Out Proximate Cause

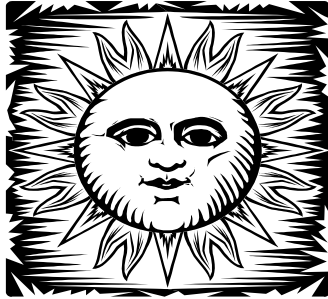
Ashmore had a heart attack and went to the hospital. While under Dr. Wells's care, Ashmore developed seizures and died. His family sued Dr. Wells and served an expert report. Dr. Wells moved to dismiss for an inadequate expert report but the trial court denied the motion. The appeals court reversed and dismissed. The expert report did not explain the causal link between Dr. Wells's alleged malpractice and Ashmore's death. An expert report that does not explain the causal relationship between the substandard care and the harm that occurs is inadequate. Wells v. Ashmore, 202 S.W.3d 465 (Tex. App.—Amarillo 2006).

Trial Court Cannot Extend The 120-Day Deadline For Serving An Expert Report

Regis's estate sued HCHD for negligent treatment of a stroke. HCHD filed a motion to dismiss for the estate's failure to serve an expert report within the 120-day deadline. The trial court dismissed the case and the appeals court affirmed. Although HCHD had allegedly withheld the medical records on Regis for more than a year, the medical malpractice statute does not give the trial court discretion to extend the 120-day deadline for serving an expert report. When a plaintiff does not timely serve the report, the trial court must dismiss the case as it did here. Estate of Regis v. Harris County Hosp. Dist., 208 S.W.3d 64 (Tex. App.—Houston [14th Dist.] 2006).



HOT ISSUES BEFORE THE TEXAS SUPREME COURT



HOT ISSUE 1 — Did life insurer that interpleaded funds owe statutory penalty?

Martinez died with a State Farm life insurance policy in effect. His ex-wife, his current wife, and his daughter all claimed benefits under the policy. Twelve days after the statutory 60-day period for paying death benefits, State Farm interpleaded the proceeds. The trial court awarded them to the current wife and also awarded statutory penalties and attorney's fees against State Farm. The appeals court affirmed. The Texas Supreme Court granted review and heard oral argument December 7, 2006. State Farm Life Ins. Co. v. Martinez, No. 05-0812, September 1, 2006 (CA 174 S.W.3d 772).

HOT ISSUE 2 — Did plaintiff make a good-faith attempt to file an expert report?

Wade arrived at the Hillcrest ER with chest pains and coughing. She allegedly sustained permanent heart damage as a result of delays in administering tests. She sued Hillcrest and two doctors. The trial court held that combining three expert reports together, Wade met the expert-report requirements against Hillcrest. The appeals court affirmed. The Texas Supreme Court granted review and heard oral argument January 23, 2007. Hillcrest Baptist Medical Ctr. v. Wade, No. 05-0773, September 22, 2006 (CA 172 S.W.3d 61).

HOT ISSUE 3 — Was post-traumatic stress syndrome foreseeable?

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. Laura sued the church for assault and battery and false imprisonment and recovered large damages for post-traumatic stress syndrome. The appeals court affirmed. The Texas Supreme Court granted review and heard oral argument January 24, 2007. Pleasant Glade Assembly of God v. Schubert, No. 05-0916, September 22, 2006 (CA 174 S.W.3d 388).

HOT ISSUE 4 — Must insurer inform potential additional insured of available coverage?

Crocker sued a nursing home and its employee, Morris, for negligence. National Union defended the home. Although Morris appeared for deposition, he never requested a defense and suffered a default judgment. Crocker then sued National Union as a third-party beneficiary on the policy. A federal district court granted National Union summary judgment. The Fifth Circuit certified the question whether National Union owed Morris a duty to inform him of potential coverage. The Texas Supreme Court granted review and heard oral argument January 25, 2007. National Union Fire Ins. Co. v. Crocker, No. 06-0868, October 13, 2006 (5th Cir. 466 F.3d 347).

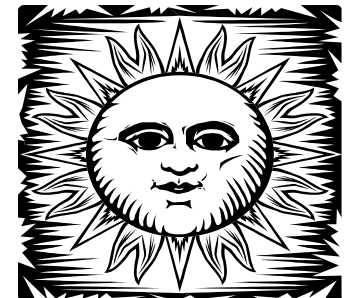
HOT ISSUE 5 — Was design defect in lighter a proximate cause of burns?

Brittany Carter received severe burns when her five-year-old brother set fire to her dress with a Bic cigarette lighter. Her mother sued Bic. A jury awarded large damages and the appeals court affirmed despite Bic's arguments on causation (alleging no evidence that a dif-

ferent design would have prevented the accident) and preemption. The Texas Supreme Court granted review and heard oral argument February 13, 2007. Bic Pen Corp. v. Carter, No. 05-0835, October 27, 2006 (CA 171 S.W.3d 657).

HOT ISSUE 6 — What is required to prove a manufacturing defect?

Ledesma was driving a new Ford truck when he struck several parked cars. He sued Ford alleging that a manufacturing defect caused the accident. In a battle of experts, the trial court entered judgment for Ledesma. The appeals court affirmed. The Texas Supreme Court granted review and heard oral argument February 14, 2007. Ford Motor Co. v. Ledesma, No. 05-0895, October 27, 2006 (CA 173 S.W.3d 78).



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