TADC e-Update
The Texas Association of Defense Counsel, Inc.

LEGISLATIVE & CASE LAW UPDATE

June 24, 2011

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The first called session of the 82nd Legislature is still in progress. Following the failure of the Legislature to agree on school finance legislation and other matters, Governor Perry called lawmakers back on May 31. What was expected to be a relatively short session devoted to finishing the budget has evolved into a contentious rehashing of numerous issues that bogged down in the spring, including TWIA, immigration (the so-called "sanctuary cities" bill), various abortion-related measures, and TSA security procedures at airports. The session ends on Wednesday, June 29, and it is beginning to look doubtful that the work will be finished.

The Governor has already indicated that if the Legislature fails to pass a TWIA reform bill, he will extend the special session into July. As of now, the House and Senate have not moved much off of the positions they took during the regular session. The House version of the bill, H.B. 3 by Rep. John Smithee (R-Amarillo), significantly curtails the ability of a policyholder to seek damages against TWIA. The Senate version, sponsored by Sen. John Carona (R-Dallas), is somewhat more generous in terms of remedies, allowing the recovery of consequential damages (the House version is limited to covered loss only) and doubling of damages under some aggravated circumstances. An 18% penalty if TWIA engages in unfair claims practices has been axed from the Senate bill at the Governor's insistence, but wide differences still remain between the two

houses. The bill passed the Senate on Wednesday, and it remains to be seen if House Senate conferees can work things out.

On June 17 Governor Perry signed legislation that generally bars broad-form indemnity provisions in construction contracts. The bill, H.B. 2093 by Rep. Senfronia Thompson (D Houston), began as a non-controversial consolidated insurance program regulatory bill, but was amended in the Senate with anti-indemnity language substantially the same as contained in S.B. 361 by Sen. Robert Duncan (R-Lubbock). S.B. 361 had passed the Senate earlier in the spring, but stalled in House committee. The anti-indemnity amendment survived a conference committee, and the conference committee report was easily adopted by both houses. In broad terms, H.B. 2093 prohibits indemnity provisions that hold the indemnitee harmless for the indemnitee's negligence. It also prohibits additional insured provisions that purport to cover such provisions. However, it continues to allow broad form indemnity provisions for claims for personal injury brought by the indemnitor's employee or agent, or the indemnitor's subcontractor of any tier (third party overactions). The bill further exempts certain construction contracts, such as those for single-family residences and municipal public works projects.

CASE LAW UPDATE

Case summaries prepared by James K. Spivey, Cox Smith Matthews Incorporated, San Antonio

TORTS

Beltran v. Brookshire Grocery Co

Dallas Court of Appeals, No. 05-09-01548-CV, 05-10-2011.

This case addresses allegedly irreconcilable jury findings. In this premises liability lawsuit, P slipped while shopping at store of D and sued D for negligence. The case was tried before a jury. Three issues were submitted to the jury. Issue No. 1 asked "[d]id the negligence, if any, of those named below [P and D] proximately cause the occurrence in question?" Issue No. 2 stated: "For each person you found caused or

contributed to cause the occurrence, find the percentage of responsibility attributable to each." Issue No. 3 concerned damages. During deliberations, the jury sent a note to the trial court asking, "Do we have to answer Special Issue No. 1 if we followed through and answered all of the other questions?" The trial court responded "yes." The jury then returned a unamimous verdict. It answered special issue one "no" for P and "yes" for D, but then apportioned responsibility in special issue two as 75% for P and 25% for D. As to Issue No. 3, the jury found $27,000 in damages for past medical care. D asked the court to enter a take-nothing judgment because the jury's finding in Issue No. 2 that P was more than 50% responsible barred P's recovery. The trial court granted D's motion and ordered that P take nothing. P appealed. On appeal, the Court of Appeals noted that when determining whether jury findings irreconcilably conflict, appellate courts are to apply a de novo standard of review. An appellate court may not strike down jury answers on the basis of conflict if there is any reasonable basis on which they may be reconciled. However, if one of the answers would require a judgment in favor of the plaintiff and the other would require a judgment in favor of the defendant, then the answers are fatally in conflict and the appellate court must remand to the trial court for a new trial. In general, a complaint regarding conflicting jury findings is waived if a party does not object before the jury is discharged. P did not object to the jury's findings before the jury was discharged and asked that the court receive the verdict. However, the Court of Appeals held that P did not waive his argument on appeal because it was P's position that there was no irreconcilable conflict in the jury's answers. As to the alleged conflict, the Court of Appeals noted that courts have long concluded that there is no fatal conflict when, as in this case, the jury finds a party is not negligent but then apportions to it a percentage of fault. Jury issues establishing or negating liability control over issues which apportion responsibility. Accordingly, the Court of Appeals reversed the trial court's judgment and rendered judgment in favor of P for $27,000. **READ THE OPINION**

Drewery v. Adventist Health System/Texas Inc.

Austin Court of Appeals, No. 03-10-00334-CV, 05-20-2011.

This case concerns whether certain claims asserted by P against Ds constitute a Health Care Liability Claim (HCLC). P was employed by the Hospital as a surgical technician. He was admitted as a patient at the hospital to undergo a tonsillectomy. According to P, during pre-surgery preparation and during surgery, two registered nurses of Hospital intentionally assaulted him by (1) painting his fingernails and toenails with pink nail polish, (2) defacing his body by writing "Barb was here" and "Kris was here" on the bottom of his feet, and (3) wrapping his thumb with tape. P sued the Nurses, the Hospital and others claiming assault and intentional infliction of emotional distress. In his Original Petition, P also alleged that the conduct of Ds had created medical risks for him as a surgical patient. P later amended his petition to delete the reference to medical

risks created by the Ds' conduct. Ds filed a motion to dismiss on the grounds that P had failed to serve an expert report under Chapter 74 of the Texas Civ. Prac. & Rem. Code. The trial court granted the motions to dismiss. On appeal, the Court of Appeals noted that a HCLC is defined as a claim "against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant." The Court of Appeals held that even considering P's original petition, which referenced medical risks caused by D's conduct, P did not allege a HCLC. The Court stated that of paramount importance is the fact that P did not plead damages based on any physical injury resulting from D's provision of medical treatment, lack of treatment or other departure. The Court of Appeals held that P's claims are not a HCLC "recast" as an intentional tort, but instead, the gravamen of P's suit is that he suffered humiliation as a result of the intentional physical violation of his body by his co-workers. Thus, the Court of Appeals held that P was not required to furnish an expert report and reversed the trial court's judgment dismissing P's claims. **READ THE OPINION**

Hyde v. Hoerauf

Texarkana Court of Appeals, No. 06-10-00101-CV, 03-02-2011.

This is a premises liability case. While driving home from a "pasture party" at which she had consumed alcohol, a 17 year old was killed in an automobile accident. The party had been held without permission on land owned by D. P brought a wrongful death and survival action based upon premise liability claims against D. It was undisputed that the attendees of the party were current or former high school students. The only adults at the party were in their early twenties. In addition, previous parties had taken place on D's property and the attendees had cut the fence to D's property on at least two different occasions. D was aware that his fence had been cut on two occasions and that there were tire tracks, empty beer cans and remnants of bonfires on his property. However, neither D nor his property manager had contacted the authorities to complain of the trespassing problem and no signs were posted to advise trespassers to keep off the property. D filed a motion for summary judgment contending that the decedent and others were trespassers and that P's premise liability claims were conclusively negated because he did not violate any duty owed a trespasser. In response to the motion, P claimed that material fact questions existed because D was on notice of the activities on his property and failed to take effective measures to ensure that such illicit gatherings were stopped. The trial court granted D's motion for summary judgment. On appeal, the Court of Appeals stated that the only duty a premise owner owes to a trespasser is not to cause

injury willfully, wantonly, or through gross negligence, and that the issue of whether D was grossly negligent presumes the injury in question occurred on D's property. The Court Appeals then held because the decedent was not injured by an unreasonably dangerous condition on D's property, there was no evidence of actionable gross negligence. The Court went on to state that "[i]f a trespasser comes to no harm on the property on which he or she is trespassing, but is harmed off-premises, a duty does not exist under a premises liability theory of recovery." Here the injury occurred on a street or roadway, while decedent was en route to her home. The Court of Appeals held that because D had no right of control over the injury-causing activity – driving after having ingested alcohol, any duty D may have owed to decedent in his capacity as a landowner pursuant ceased when decedent exited D's property. Thus, the Court of Appeals affirmed the summary judgment of the trial court. **READ THE OPINION**

Salinas v. Briggs Ranches

San Antonio Court of Appeals, No. 04-10-00388-CV, 05-25-2011

Ochoa was hired by D as a ranch hand and was invited to live on the ranch in a trailer house. D hired a construction company to build concrete water tanks on ranch. The Construction Company requested that that its crew be permitted to stay on ranch one evening to avoid renting motel rooms. Ochoa and several construction crew members drank and made several beer runs that evening. On the last beer run, Ochoa crashed a vehicle owned by D while driving at high speeds on the ranch and two passengers were killed and another was injured. Ochoa pleaded guilty to two counts of manslaughter. P brought an action against D for negligence and gross negligence, alleging theories of respondent superior and negligent hiring and retention. At trial, P argued that D should have checked Ochoa's driving record and criminal record before hiring him. D's general manager testified at trial that he did not check Ochoa's driving record because Ochoa was not hired to drive any ranch vehicles. With regard to criminal background checks, D's manager testified that he did not know of any ranching operation that conducted such checks on its ranch hands. The case was tried to a jury, and the jury returned a verdict in favor of D. On appeal, P argued that the jury's verdict was not supported by the evidence. In particular, P claimed that under *Otis Engineering Corp. v. Clark*, the Texas Supreme Court had established that an employer is liable for the off-duty torts of his employees which are committed on the employer's premises or with the employer's chattels. The Court of Appeals disagreed finding no support for P's reading of *Otis.* The Court of Appeals then analyzed Section 317 of the Restatement of Torts and held in order to establish D owed a duty to P under Section 317, Ochoa's conduct in causing the fatal accident must have been reasonably foreseeable. The Court of Appeals concluded that the evidence at trial established as a matter of law that Ochoa's conduct in causing the accident was not foreseeable to D. Other than Ochoa and his wife, no one from D was present at ranch on night of accident. In

addition, there was no evidence that D should have anticipated that Ochoa would drink and drive at an excessively high rate of speed on the ranch. Finally, D did not have reason to investigate Ochoa's criminal background, and if D had, it would not have discovered any previous DWI incidents and the criminal violations on Ochoa's record were remote in time and different from his actions on the night of the accident. Accordingly, the Court of Appeals affirmed the judgment in favor of D. **READ THE OPINION**

GSF Energy LLC v. Padron

Houston's 1st Court of Appeals, No. 01-09-00622-CV, 06-02-2011.

This case concerns whether a plant operator exercised or retained control over the manner in which an independent contractor performed work such that the plant operator could be liable for the death of an employee of the independent contractor. D operates a landfill-gas processing plant. D hired CES to periodically come to its plant to clean out the iron-sponge tanks. Padron was an employee of CES. Padron was killed when debris fell on him while cleaning D's processing-plant tank. P sued D for negligence and premises liability. In its verdict, the jury found that D exercised or retained some control over the manner in which CES's work was performed and that D's negligence was 60% and CES's was 40%. The trial court refused to submit an issue on the contributory negligence of Padron. D appealed the jury verdict. On appeal, the Court of Appeals noted that generally, a general contractor does not have a duty to see that a subcontractor performs work in a safe manner. However, a limited duty arises if a general contractor retains control over a subcontractor's methods of work or operative details to the point that the subcontractor is not entirely free to do the work in his own way. The Court of Appeals held there was legally sufficient evidence that D had exercised or retained control over the manner of its subcontractor's work. In particular, the Court noted that D's manager gave directions on how to carry out the work, told Padron and his co-workers to use nonsparking brass tools and approved the confined-space entry permit that authorized entry into the tank despite fact that the permit had two boxes checked "no" and the preprinted language of the permit stated: "Entry cannot be approved if any squares are marked in the 'no' column." Accordingly, the Court of Appeals overruled D's legal insufficiency challenge. However, the Court of Appeals reversed and remanded the case on the grounds that the trial court had erred by failing to submit a question as to Padron's own negligence. **READ THE OPINION**

Harris Methodist Fort Worth v. Ollie

Texas Supreme Court, No. 09-0025, 05-13-2011.

This case concerns whether P's claims against a hospital for injuries suffered when P slipped and fell on a wet bathroom floor during post-operative confinement constitutes a health care liability claim (HCLC). P underwent arthroplasty knee replacement surgery at D. During post surgery hospitalization, P slipped on wet floor while getting out of bathtub and injured her shoulder. P sued D for this alleged injury. In P's original petition she asserted under a general negligence theory that D owed her "the duty to provide a safe environment, maintained properly, so as to not cause harm and/or injury." In separate part of her pleading, P asserted what she labeled as a "medical malpractice" cause of action based on the same facts as her general negligence claim. On the same day that P filed suit, P sent D a statutory notice letter under Section 74.051(a) of Tex. Civ. Prac. & Rem. Code. P subsequently amended her petition and omitted the medical malpractice allegations. D filed a motion to dismiss on the grounds that P did not serve an expert report. The trial court denied D's motion. A divided court of appeals affirmed. On appeal, the Texas Supreme Court noted that the definition of HCLC includes the phrase "or professional or administrative services directly related to health care." The Court then stated that P's claim centers on the failure of D to act with a proper degree of care to furnish a dry floor and warn her of the hazards of a wet bathroom floor. The Court held that P's pleadings show that her action is a safety claim directly related to services, and thus, the claim falls with the definition of an HCLC. Because P was required to serve an expert report and failed to do so, the Texas Supreme Court held that the trial court should have dismissed her claim. Thus, the Court reversed the Court of Appeal's decision and remanded to the trial court with instructions to dismiss P's claims against D and to consider D's request for attorney's fees and costs. **READ THE OPINION**

Christus Health Gulf Coast v. Aetna, Inc.

Houston's 14th Court of Appeals, No. 14-09-01017-CV, 05-17-2011.

This case involves a group of hospitals claims against Aetna under the Texas Prompt Pay Statute. The Hospitals claim that Aetna is liable under the Prompt Pay Statute for failing to timely pay claims for healthcare services provided to Aetna Medicare HMO enrollees under agreements between the Hospitals and an intermediary. The Hospitals contracted with an intermediary to provide hospital services to the Aetna HMO enrollees. The hospitals had no contracts with Aetna. The trial court denied the Hospitals' motion for partial summary judgment and granted Aetna's cross motion for summary judgment. On appeal, the Hospitals acknowledged that they had no contracts with Aetna, but argued that the Prompt Pay Statute does not require contractual privity. In particular, the Hospitals pointed to the language of the Prompt Pay Statute that allows a provider to recover either "billed charges" or the "contracted penalty rate." The Hospitals argued that if contractual privity were required, there would be no reason for the statute to permit a provider to recover "billed charges," and the statute would

simply provide for recovery of a contracted for penalty rate. The Court of Appeals disagreed and noted that including "billed charges" as an alternative to the contractual penalty does not lead to the conclusion that contractual privity is not required. The Court of Appeals concluded Aetna cannot be liable to the Hospitals under the Prompt Pay Statute in the absence of a contract between Aetna and the Hospitals. Accordingly, the Court of Appeals held the trial court did not err in granting Aetna's cross-motion for summary judgment. **READ THE OPINION**

Covenant Health System v. Barnett

Amarillo Court of Appeals, No. 07-10-00361-CV, 05-13-2011.

D advertised its Fifth Annual Heart Symposium in the newspaper. The event was held at a hotel. D's advertisement offered "Free Heart Screenings" and instructed that participants consume "[w]ater only for 12 hours prior to your free health screening." P fasted as instructed and participated in the heart screening. P was told to step up and down on an aerobic step for 3 minutes. P lost her balance on the aerobic step, fell and shattered her risk. P then sued D under general negligent theories. P did not serve an expert report under Chapter 74 of the Civil Practices & Remedies Code. D filed a motion to dismiss claiming that P's claims were a health care liability claim (HCLC) and that a report was required. The trial court denied D's motion, and D thereafter filed an interlocutory appeal. On appeal, the Court of Appeals noted that Chapter 74 does not include a definition of "treatment," so its meaning in this context is one consistent with the common law. The Court also noted that Chapter 74's definition of "health care" includes any act performed, or that should have been performed, by a health care provider for a patient during the patient's treatment. The Court found that P's claims were a HCLC, and thus, P was required to serve an expert report. Thus, the Court of Appeals held that the trial court had abused its discretion by denying D's motion to dismiss. **READ THE OPINION**

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