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Serv. Corp. Int'l v. Guerra, ___ S.W.3d ___ (Tex. June 17, 2011) [09-0941].

What evidence is required to support findings of mental anguish and liability against a parent corporation? This case also considered whether the trial court erred in admitting evidence: (1) of other lawsuits against the defendants; and (2) that one of the plaintiffs would put any punitive damages awarded in a trust to benefit others.

After a funeral, employees of the cemetery realized the body had been buried in the wrong plot belonging to someone else. After the family refused permission to move the body, employees nevertheless moved the casket eighteen inches to another plot. The family sued the cemetery and its parent corporation. A jury awarded millions in both mental anguish damages and exemplary damages.

The Supreme Court held that there was no evidence to support the liability findings against the parent company because the cemetery employees were not employed by the parent company and could not be vicariously liable for their actions. The Court also concluded that, while one plaintiff had presented sufficient evidence of mental anguish, other plaintiffs had not because they presented no evidence of a high degree of mental pain and distress as required to prove mental anguish. The Court also held that mishandling a corpse is not an occurrence for which mental anguish can be inferred and damages are recoverable without evidence of the nature, duration, and severity of the mental anguish.

The Court also held that the trial court erred in admitting evidence of other lawsuits, holding that the other suits were irrelevant because they did not show a common scheme or pattern. The lawsuits involved other cemeteries owned by the Defendant, and did not involve common employees or circumstances. The Court held that the admission of the suits was harmful. The Court also found that the trial court erred in admitting testimony that one plaintiff said she would put any punitive damages she received into a trust to pay for funerals for people who cannot afford them. This evidence was not relevant to prove any factor to be considered by the jury in determining the amount of punitive damages.

BP America Prod. Co. v. Marshall, ____S.W.3d ____ (Tex. May 13, 2011) [09-0399].

These jointly tried oil and gas lease disputes raised an important issue for the Court as to whether limitations. The trial court had rendered judgment for the plaintiff, holding that the plaintiff could not have discovered the defendant's fraudulent misrepresentations before limitations expired.

The Supreme Court reversed, holding that the injury was not inherently undiscoverable and the alleged fraudulent representations could have been discovered with reasonable diligence before limitations expired.

In re Wolfe, ___S.W.3d ___ (Tex. June 10, 2011) [10-0294].

At issue in this case is whether the trial court abused its discretion in granting Rule 202 petitioners' motion to compel a pre-suit deposition. Wolfe asserted that only the county attorney could prosecute a removal action against him and, thus, pre-suit discovery under Rule 202 to investigate a possible removal action required the county attorney's participation. The trial court granted the Department's motion to compel discovery despite the absence of the county attorney from the proceedings.

The Texas Supreme Court conditionally granted mandamus relief, holding that Rule 202 could not be used to circumvent the requirement that only the county attorney cold prosecute such a suit. Instead, Rule 202 indicated that discovery must be "the same as if the anticipated suit or potential claim had been

filed." TEX. R. CIV. P. 202.5. The Court therefore held that the trial court abused its discretion in granting the Department's motion to compel discovery.

***Howard v. Burlington Ins. Co.*, No. 05-09-01234-CV, 2011 WL 2279067 (Tex. App.—Dallas June 10, 2011, no pet. h.)**

In this case appellant Marshall Howard d/b/a Four Seasons Automotive appealed from trial court judgments in favor appellees, The Burlington Insurance Company (TBIC) and McClelland & Hine Inc. (MHI). Howard obtained insurance coverage for his auto repair business from John Crist, an independent insurance broker. Crist obtained quotes for garage liability insurance from two different insurance companies and Howard selected the quote provided by MHI. Crist then completed an insurance application for Howard and submitted it to MHI. In the application, Crist specifically declined building and personal property coverage.

Upon receipt of Howard's signed and completed application from Crist, MHI provided Crist with an insurance binder confirmation of the coverage selected and premium quoted, and transmitted the application to TBIC. TBIC then issued the requested Garage Policy, which provided the coverage requested in the application. Upon receipt of the TBIC policy, Howard looked at it but did not read the entire policy. Howard did not attempt to verify whether the TBIC policy provided the coverage he asked Crist to obtain.

On September 3, 2005, a fire occurred at Howard's business. The fire damaged the building, equipment and personal effects as well as several vehicles owned by Howard's clients. Howard submitted a claim to TBIC for which partial payment was made. TBIC paid third-party liability claims covered under the policy. TBIC denied coverage for Howard's equipment and personal property.

Howard sued TBIC and MHI for false advertising, misrepresentation, negligent misrepresentation, breach of fiduciary duty, fraud and fraudulent inducement, and negligence. Howard asserted additional claims against TBIC for breach of good faith and fair dealing, breach of contract, violation of the unfair claims settlement practices act, violation of the prompt payment of claims act, promissory and equitable estoppel, and for selling insurance without a license.

TBIC and MHI both filed traditional and no-evidence motions for summary judgment, arguing there was no evidence that: (i) the garage liability policy, a third-party liability policy, provided coverage for first-party property damage, and (ii) an agency relationship existed between Crist and TBIC and/or MHI such that alleged misrepresentations by Crist could be imputed to TBIC or MHI. Howard responded, arguing the quote, binder, and policy indicated he had coverage for his equipment and property. He also asserted that TBIC and MHI were liable for the mistakes and misrepresentations of Crist. Howard then amended his petition to include additional claims. And MHI and TBIC filed amended and supplemental motions for summary judgment to address Howard's amended petition.

The trial court granted TBIC's and MHI's first amended and supplemental motions for summary judgment. The court of appeals affirmed the trial court's decision finding that the plain language of both the quote and the binder would not have caused a reasonable person to believe the insurance he was purchasing was first-party coverage for his equipment and personal property. The court of appeals noted that under Texas law an insured (1) has a duty to read and be familiar with the terms of his own insurance policy and (2) is bound to the terms of the policy whether he reads it or not. The court further explained that an insurance policy is not ambiguous merely because the parties interpret it differently.

***GSF Energy, LLC v. Padron*, No. 01-09-00622-CV, 2011 WL 2184368 (Tex. App.—Houston [1st Dist.] June 2, 2011, pet. filed)**

This case concerns Adan Padron, who was killed when debris fell on him while he was cleaning the inside of a processing-plant tank. Padron's wife and children sued the plant operator, GSF Energy LLC, and Padron's employer, CES Environmental Services, for negligence and premises liability. GSF Energy, LLC operates a landfill-gas processing plant. GSF hired CES Environmental Services to periodically come to the plant to clean out the iron-sponge tanks, which were used to remove hydrogen sulfide from the landfill gas. This is a somewhat difficult process because the iron sponge adheres to the tank walls.

The iron sponge is generally removed by hydroblasting the tank from above to break up the iron sponge, which is then vacuumed out through a hose. On this occasion, however, the hydroblasting did not work. As a result, a GSF representative directed the CES employees, including Padron, to enter the tank and clean it from inside. While inside the tank, Padron used a pick to break the iron sponge into chunks, while another person used a shovel to pile the debris into a pile to be vacuumed out later. Within 15 to 30 minutes of their entering the tank a huge chunk of iron sponge fell and hit Padron. Padron was later pronounced dead, and an autopsy determined that the cause of death was blunt-force injuries to the head and neck.

Adan Padron's wife sued GSF, individually and as next friend for her four minor children, for negligence and premises liability. The case was submitted to the jury based only on negligence. GSF requested, and the trial court refused to include Padron in the contributory negligence question. In its verdict, the jury found that (1) GSF exercised or retained some control over the manner in which CES's work was performed, (2) GSF's and CES's negligence proximately caused Padron's death, (3) apportioned responsibility between GSF and CES, and (4) awarded damages. The trial court rendered judgment on the verdict against GSF.

On appeal, GSF argued, among other things, that the trial court erred in refusing to submit questions in the charge on Padron's negligence. GSF argued, and the court of appeals agreed, that the testimony presented at trial raised the question of Padron's negligence. The court of appeal noted that under the circumstances, it would be within the common knowledge of laymen that hitting the iron sponge again and again with a pick might cause further portions of the sponge to fall. Accordingly, the court of appeals reversed the trial court's decision and remanded for a new trial.

***Zea v. Valley Feed & Supply, Inc., et al.*, No. 08-10-00280-CV, 2011 WL 3841401 (Tex. App.—El Paso August 31, 2011, no pet. h.)**

In April 2004, Urbano Zea – a Mexican businessman who was involved in the importation of pet food – acquired a 25 percent interest from Dean Travis in the limited partnership, United Valley Pet Foods, for the purchase price of $82,500. Zea paid $32,500 in cash and executed a $50,000 note for the balance. Travis maintained a 74 percent interest in the limited partnership. And the general partner, United Valley Pet Food Management, L.L.C., had the remaining 1 percent interest.

Zea executed a security agreement to secure payment of the note. Travis had the option to buy back Zea's 25 percent interest anytime before April 2009.

In 2008, Travis notified Zea that he was in arrears on the note. Zea disagreed claiming that his share of the annual partnership profits should have been applied to the note pursuant to an agreement of the parties. When the parties could not resolve the dispute, Travis exercised his option to purchase Zea's share of the limited partnership, but the purchase was never completed.

In May 2009, Travis filed his demand to arbitrate the dispute pursuant to an arbitration clause in the security agreement. Travis sought to enforce the option to purchase Zea's interest. Zea raised numerous defenses, including fraud in the inducement, laches, estoppel, waiver, fraud, failure of consideration, want

of consideration, illegality, and payment. The arbitrator ruled in favor of Travis and found that he was entitled to specific performance of the purchase option.

Prior to the arbitrator's award, Zea filed suit against Travis, United Valley Pet Foods, and United Valley Pet Food Management (the Valley Feed defendants). Zea's second amended petition included claims based on fraud, fraud by non-disclosure, breach of fiduciary duty, breach of contract, money had and received, unjust enrichment, and conspiracy. But all of Zea's claims related to his investment in United Valley Pet Foods, the promissory note, the partnership agreement, his partnership with Travis, and the representations made by Travis that induced Zea to enter into the partnership.

Travis filed a motion to confirm the arbitration award in Zea's suit. The trial court confirmed the award and severed both the suit against Travis and the judgment confirming the arbitration award from the remaining claims. The Valley Feed defendants moved for summary judgment on the ground of collateral estoppel. The trial court granted summary judgment.

Zea appealed claiming the trial court erred by granting summary judgment in favor of Valley Feed on the basis of collateral estoppel. The court of appeals first explained that an arbitration award is conclusive on the parties as to all matters of fact and law submitted to the arbitrators because the award has the effect of a judgment of a court of last resort. Consequently, in collateral proceedings, courts apply collateral estoppel principles to arbitration awards. Thus, because the summary judgment evidence established that Zea had a full and fair opportunity to litigate his claims against the Valley Feed defendants, the court of appeals held that his claims were barred by collateral estoppel and affirmed the trial court's judgment.

***In re Vicki Clark*, 345 S.W.3d 209 (Tex. App.—Beaumont 2011, orig. proceeding)**

In litigation between Texas Citizens Bank, N.A. (TCB) and a former loan officer, Vicki Clark, the trial court ordered Clark to produce her personal computers, electronic storage devices, and records relating to that equipment. Clark filed a petition for writ of mandamus challenging the trial court's discovery order. Clark claimed the trial court erred in its application of the discovery rules and abused its discretion by ordering the production of the devices without a prior showing that she had failed to comply with discovery responses or that she lacked good faith when she did so. Clark also maintained that the trial court's order failed to adequately shield privileged documents.

After considering the parties' arguments and reviewing the mandamus record, the court of appeals concluded that it was within the trial court's discretion to order production of the electronic information on Clark's personal electronic storage devices. The trial court's order, however, failed to address privilege, privacy, and confidentiality concerns adequately. The order essentially mandated production of information claimed to be privileged to the opposing party for that party to screen. The court of appeals explained that the trial court was required to provide a mechanism through which Clark could withhold from discovery any documents or information that is privileged or confidential and provide a privilege log subject to in camera review by the trial court. Thus, because the trial court's discovery order failed to include an adequate mechanism for screening potentially privileged information, the court of appeals conditionally granted the mandamus petition.

***Drewery v. Adventist Health Sys. of Tex., et al.*, 344 S.W.3d 498 (Tex. App.—Austin 2011, pet. filed)**

Chauncey Drewery, who was employed by Adventist Health System/Texas, Inc. and Metroplex Health System d/b/a Metroplex Hospital (collectively, "the Hospital") as a surgical technician, was admitted as a patient at the Hospital to undergo a tonsillectomy. Registered nurses Barbara Wiedebusch and Kristien Williams, who were at the time Drewery's coworkers, were assigned to assist in his surgery. In preparation for the procedure, Drewery received general anesthesia. According to Drewery, at some time while he was under anesthesia, Wiedebusch and Williams 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 bottoms of his feet, and (3) wrapping his thumb with tape. Only later, of course, did Drewery learn of these actions. Drewery then filed suit against Wiedebusch and Williams, alleging causes of action for assault and intentional infliction of emotional distress. He alleged the same causes of action against Wiedebusch and Williams' colleagues, Betty S. Thorp, R.N., and Warren Voegele, under a theory of "aider and encourager" liability, and against the Hospital under a theory of vicarious liability. In addition to the assault claim, Drewery alleged causes of action against Wiedebusch and Williams for intentional infliction of emotional distress, claiming that the incident and its aftermath created a hostile work environment that caused him severe emotional distress.

All defendants filed motions to dismiss Drewery's claims against them under chapter 74 of the civil practice and remedies code, asserting that they were health care liability claims in support of which Drewery had failed to file a medical expert report. The trial court granted the defendants' motions and dismissed all of Drewery's claims with prejudice.

On appeal, Drewery argued that the trial court erred by characterizing his assault and intentional infliction of emotional distress claims as health care liability claims subject to the expert-report requirement. In a 2-1 decision, the court of appeals agreed that neither of Drewery's claims were health care liability claims. The majority explained that neither cause of action (1) required expert testimony, (2) implicated any community standards of care, (3) involved hiring, training, supervision, or any other independent act on the part of the Hospital, or (4) related to a medical or health care procedure. And that many of the factual allegations asserted by Drewery did not even take place while he was a patient under the defendants' care, but occurred after the fact in the context of workplace discrimination. Of paramount importance to the majority was the fact that Drewery did not plead damages based on any physical injury resulting from a defendant's provision of medical treatment, lack of treatment, or other departure from the standard of care. Instead, the gravamen of Drewery's suit is that he suffered humiliation as a result of the intentional physical violation of his body by his co-workers while he was unconscious, and that he continued to feel extreme embarrassment after the assault because of negative impact on his work environment. Because Drewery's claims are not health care liability claims recast as intentional torts, the majority held that he was not required to furnish an expert report, sustained Drewery's issue on appeal, and reversed and remanded the case.

***Martinez v. ACCC Ins. Co., et al.*, 343 S.W.3d 924 (Tex. App.—Dallas 2011, no pet. h.)**

On July 2, 2002, Ann Martinez and Patricia Davilla were involved in an automobile accident with Carmensa Romero. At the time, Romero was insured under a personal automobile liability insurance policy issued by Best Texas General Agency, Inc. (Best Texas), acting as the authorized managing general agent for State and County Mutual Fire Insurance Company (State & County). Best Texas provided claims servicing for this policy through ACCC Claims Services, Inc. (ACCC Claims). Romero's policy included a standard cooperation clause.

After the collision, Martinez and Davilla presented claims for injury and damage to Best Texas through its claims servicing agent, ACCC Claims. They subsequently sued Romero in a Dallas county court at law. Romero failed and refused to cooperate with ACCC Claims' investigation of the loss. Romero also failed to notify ACCC Claims of the accident and failed to provide ACCC Claims service with suit papers. Ultimately, the trial court signed a default judgment against Romero, awarding damages in excess of $150,000.

After the default judgment was entered, Martinez and Davilla filed suit against Best Texas alleging that they were the intended beneficiaries/creditors under an indemnity agreement between Romero and the insurance company. Based on Romero's failure to cooperate, Best Texas sought a declaratory judgment that the company suffered actual prejudice, that no defense was owed to Romero in the underlying

lawsuit, and that no coverage or indemnity was afforded to satisfy the default judgment. The trial court granted Best Texas's motion and declared that Best Texas owed no duty to provide a defense on behalf of Romero in the underlying lawsuit, and that no coverage or indemnity was afforded under Romero's State & County policy for the default judgment taken against Romero in the underlying lawsuit.

Martinez and Davilla appealed the trial court's declaratory judgment. The court of appeals, however, found that Romero's failure to cooperate in the investigation, defense and settlement of the claims against her is sufficient grounds to support the summary judgment. Accordingly, the trial court's decision was affirmed.