

TADC APPELLATE  
LAW NEWSLETTER

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*Nabors Well Servs., Ltd. v. Romero*, \_\_\_ S.W.3d \_\_\_, No. 13-0136, 2015 WL 648858 (Tex. Feb. 13, 2015)

**Evidence that a plaintiff was not wearing a seatbelt should not be automatically excluded in car-accident cases.**

Nabors's transport truck collided with a Chevrolet Suburban containing eight passengers, killing one and injuring the others. There was conflicting evidence as to which occupants wore seatbelts.

Following *Carnation Co. v. Wong*, 516 S.W.2d 116 (Tex. 1974), the trial and appellate courts ruled that evidence of seatbelt nonuse should be excluded.

The Texas Supreme Court overruled *Carnation* and held that courts should not automatically exclude evidence that a plaintiff was not wearing a seatbelt.

The Court found that the *Carnation* rationale no longer applies for two reasons. First, Texas now has a comparative-negligence system, rather than the contributory-negligence system that was in effect when *Carnation* was decided. Second, Texas law now requires the use of seatbelts, and such use is more common than when *Carnation* was decided.

*In re Deepwater Horizon*, \_\_\_ S.W.3d \_\_\_, No. 13-0670, 2015 WL 374744 (Tex. Feb. 13, 2015)

**The extent of BP's entitlement to coverage as an additional insured must be determined by looking to the drilling contract between BP and Transocean.**

The Fifth Circuit certified two questions to the Texas Supreme Court related to insurance coverage for the explosion and sinking of the Deepwater Horizon oil rig in the Gulf of Mexico. The questions concerned the interplay between the additional-insured provisions of the drilling contract between Transocean and BP and the provisions of the insurance policy.

The first question was whether "the language of the umbrella policies alone determines the extent of BP's coverage as an additional insured" or whether the court had to look to the language of the drilling contract. Because the Texas Supreme Court determined that the insurance policies include language that necessitated looking to the drilling contract to determine BP's status as an additional insured, and because the drilling contract's language required a conclusion that BP was not an additional insured, the Court did not need to address the second question.

The Texas Supreme Court specifically held that: (1) the language of Transocean's insurance policies required that a court look to the drilling contract to determine whether BP was an "additional insured"; (2) whether BP could be an additional insured under the terms of the drilling contract was "inextricably intertwined with limitations on the extent of coverage to be afforded under the Transocean policies"; (3) BP's additional-insured status was limited to those liabilities that Transocean assumed in

the drilling contract; and (4) in the drilling contract, Transocean assumed liability for above-surface pollution, and BP assumed liability for damages arising from subsurface pollution. Accordingly, because Transocean did not assume liability for subsurface pollution, BP was not covered as an additional insured under Transocean's policies for damages arising from subsurface pollution.

Justice Johnson dissented. He would have concluded that whether BP was covered as an additional insured was not controlled by the drilling contract's language, and the insurance policy's additional-insured language was broad enough to cover BP.

*Environmental Processing Sys., L.C. v. FPL Farming Ltd.*, \_\_\_ S.W.3d \_\_\_, No. 12-0905, 2015 WL 496336 (Tex. Feb. 6, 2015)

**Property owners asserting a trespass claim bear the burden of proof to show lack of consent.**

FPL Farming, a landowner, sued EPS, an adjoining landowner, for subsurface trespass. FPL Farming claimed that EPS's wastewater was migrating beneath FPL Farming's land and causing damage. EPS's injection of the wastewater was allowed under a permit issued by the Texas Commission on Environmental Quality ("TCEQ").

FPL Farming objected that the issue of lack of consent should be treated as an affirmative defense to the trespass claim. The trial court instructed the jury that trespass meant "entry onto the property of another without having consent of the owner." The jury found for EPS on all claims.

The court of appeals affirmed, concluding that FPL Farming could not recover because the TCEQ authorized EPS's injection of the wastewater. The Texas Supreme Court's first opinion reversed and held that a permit did not shield EPS from civil tort liability.

On remand, the court of appeals held, among other things, that consent was an affirmative defense to trespass. It also held that Texas law recognizes a cause of action for subsurface trespass for deep subsurface water migration. Both parties appealed.

The Texas Supreme Court concluded that lack of consent is an element of the plaintiff's trespass cause of action. Thus, the plaintiff bears the burden in a trespass case to prove that the entry was without the plaintiff's consent. The jury was therefore properly instructed that consent was an element of trespass.

The Court declined to address whether deep subsurface wastewater migration is actionable as a common-law trespass in Texas. Any error in submitting that question to the jury was harmless, because the jury found for EPS on the trespass claim.

*Richmont Holdings, Inc. v. Superior Recharge Sys., LLC*, \_\_\_ S.W.3d \_\_\_, No. 13-0907, 2014 WL 7204482 (Tex. Dec. 19, 2014)

**A defendant did not waive the right to enforce an arbitration clause even though it filed a related suit in state court, moved to transfer venue of the related suit, and delayed in moving to compel arbitration.**

Richmont purchased the assets of Superior Recharge. The Asset Purchase Agreement contained an arbitration clause. Blake, Superior Recharge's part-owner, agreed to stay on as general manager. Blake's

employment contract contained a covenant not to compete, but it did not contain an arbitration clause. After six months, Blake was terminated.

Superior Recharge and Blake then sued Richmond in Denton County. Richmond sued Blake in Dallas County to enforce the covenant not to compete. Richmond moved to transfer the Denton County suit to Dallas County, but this motion was never decided. Richmond also failed to answer certain discovery in the Denton County suit. After 19 months, Richmond moved to compel arbitration.

The trial court denied the motion to compel arbitration, and the court of appeals affirmed. The court of appeals concluded that Blake's claims were not covered by the arbitration provision. On the first appeal to the Texas Supreme Court, the Court reversed. On remand, the court of appeals concluded that Richmond waived arbitration.

In the second appeal to the Texas Supreme Court, the Court again reversed. It concluded that "[m]erely filing suit does not waive arbitration . . . [n]or, we think, does moving to transfer venue." Richmond engaged in minimal discovery, and while it delayed in moving to compel arbitration, mere delay was insufficient to establish waiver. In short, the Court concluded that "[t]he circumstances here, considered as a whole, do not approach substantial invocation of the judicial process."

*Hooks v. Samson Lone Star, L.P.*, \_\_\_ S.W.3d \_\_\_, No. 12-0920, 2015 WL 393380 (Tex. Jan. 30, 2015)

**Where recent Railroad Commission filings reflected inaccurate information, but prior filings reflected correct information, the plaintiff could rely on the more recent, incorrect filings to toll the statute of limitations.**

Hooks signed three oil-and-gas leases with Samson Lone Star. He sued Samson Lone Star for fraud, among other claims. The fraud claim arose from an alleged misrepresentation about where a well had "bottomed out." Samson Lone Star argued that limitations barred Hooks's fraud claim because Hooks could have found the true location by searching Railroad Commission records.

The Texas Supreme Court rejected Samson Lone Star's argument. The Court noted that while earlier Railroad Commission records contained accurate information about the well's location, later records contained inaccurate information. The Court held that "when the defendant's fraudulent misrepresentations extend to the Railroad Commission records itself, earlier inconsistent filings cannot be used to establish, as a matter of law," that the plaintiff was not diligent in discovering the injury.

Hooks also claimed that Samson Lone Star breached the most-favored-nations clause in the three leases by effectively paying royalties to the State of Texas at a higher rate than to Hooks. Samson Lone Star argued that the rate it paid to the State was the result of increasing the State's "unit royalty interest" to induce the State to agree to a pooling agreement and that it was not the result of a higher royalty.

The Court rejected Samson Lone Star's argument. Instead, the Court found that the effect of pooling is that production anywhere in the pooled unit is treated as production on the lessor's tract. Therefore, increasing the royalty payable from the unit is the same as increasing the royalty paid on the lessor's tract.

Finally, Hooks argued that Samson Lone Star incorrectly paid gas royalties, because it paid royalties on proceeds from gas sales rather than the total amount of production from the formation. The leases required that Samson Lone Star pay royalties "based on formation production."

Hooks's argument on this issue, however, sought to require Samson Lone Star to pay royalties on condensate twice. The Court rejected this interpretation and held that Samson Lone Star was required to pay the royalty only once.

*In re Bridgestone Americas Tire Operations LLC*, \_\_\_ S.W.3d \_\_\_, No. 12-0946, 2015 WL 1869908 (Tex. Apr. 24, 2015)

**The Texas residency of a next friend does not trigger the forum-non-conveniens statute's Texas-resident exception.**

The case concerned a car accident that occurred in Mexico and involved Mexican citizens. The parents of two minor children, both Mexican citizens, died. The children's uncle, a Texas resident, sued in a Texas court as next friend of the minor children.

Both the trial court and the appellate court determined that dismissal on forum-non-conveniens grounds was unwarranted, because the plaintiff, as next-friend of the two minor children, was a Texas resident.

The Texas Supreme Court reversed, finding that the Texas-resident exception did not apply. First, the Court addressed Bridgestone's argument that because the children, who were Mexican residents, had legal guardians in Mexico under Mexican law, Rule 44 of the Texas Rule of Civil Procedure, which allows a party to sue as a "next friend" if he or she has no legal guardian, would not apply. The Court concluded that the children could sue by next friend for purposes of Rule 44, because the children's grandparents, who were their guardians under Mexican law, could not sue on the children's behalf in Texas.

The Court ultimately concluded, however, that even though the children's uncle could sue on their behalf under Rule 44, the children were the real plaintiffs. Therefore, the Texas-resident exception to the forum-non-conveniens statute did not apply. In short, a next friend's Texas residency did not trigger the forum-non-conveniens statute's Texas-resident exception.

The Court proceeded to analyze whether dismissal was required under the forum-non-conveniens statute and concluded that it was. The Court concluded that "the forum-non-conveniens factors 'clearly and overwhelming favor a Mexican forum for resolution of this dispute.'"

*JAW The Point LLC v. Lexington Ins. Co.*, \_\_\_ S.W.3d \_\_\_, No. 13-0711, 2015 WL 1870054 (Tex. Apr. 24, 2015)

**An insurer was not liable for demolition and rebuilding costs required by Galveston's ordinances because the policy's anti-concurrent-causation clause excluded coverage.**

Hurricane Ike damaged JAW's apartment complex in Galveston. JAW's property insurance policy covered wind damage but excluded flood damage. The policy also had an anti-concurrent-causation clause.

Lexington paid JAW for the portion of the loss determined to have been caused by wind, less the applicable deductible. Lexington refused to pay any portion of the loss caused by flooding, and it also refused to pay for the cost to demolish and rebuild the structure to comply with the current Galveston ordinances.

JAW sued Lexington, its insurer, in part because Lexington denied coverage related to the costs of complying with the Galveston ordinances. Lexington denied coverage because it determined that the complex was substantially damaged by flooding or a combination of wind and flooding. JAW alleged that Lexington acted in bad faith in denying coverage.

The Texas Supreme Court determined that JAW could not recover on its bad-faith claim, because the policy's anti-concurrent-causation clause excluded coverage for JAW's cost of compliance with the Galveston ordinances. The anti-concurrent-causation clause applied because both wind, a covered loss, and flooding, an excluded loss, combined to cause JAW's losses.

JAW argued that the evidence indicated that wind damage alone would have been enough to trigger the Galveston ordinances' demolition requirement. The Court rejected this argument, however, and found that the relevant inquiry was what actually triggered the enforcement of the Galveston ordinances (both wind and flood damage) and not what, in theory, would have been sufficient to do so.

*JLG Trucking LLC v. Garza*, \_\_\_ S.W.3d \_\_\_, No. 13-0978, 2015 WL 1870072 (Tex. Apr. 24, 2015)

**The trial and appellate courts reversibly erred in excluding evidence of a second car accident that occurred just three months after the accident at issue.**

Garza was involved in a car accident with a JLG Trucking employee. After the accident, she complained of pain in her back and neck. Less than three months later, Garza was in a second car accident. After the second accident, she complained of pain in her head and neck.

Before the trial against JLG, the trial court granted Garza's motion to exclude evidence related to the second car accident on relevance grounds. The court of appeals affirmed, holding that the trial court's ruling was not an abuse of discretion because "expert testimony would be required to establish . . . any causal link between the second collision and Garza's injuries."

The Texas Supreme Court reversed. It held that evidence of the second accident was relevant to the issue of causation. Garza had the burden to prove that JLG's conduct caused her injuries, and evidence related to the second car accident was relevant to this issue.

The Court also held that the court of appeals improperly conflated relevance with evidentiary sufficiency and improperly placed the burden of proof on JLG. Garza had to prove that JLG caused the accident and that the accident with JLG's truck caused her injuries. JLG was entitled to present evidence of the second injury to the jury, irrespective of whether it did so via expert testimony.

Finally, the Court concluded that the exclusion of this evidence was harmful error, because it "was crucial to whether JLG's negligence caused Garza's injuries, and the harm in its exclusion was compounded by JLG's curtailed examination of" Garza's expert witness.