TADC APPELLATE UPDATES

***Jody James Farms, JV v. Altman Group, Inc.*, No. 17-0062, __ S.W.3d __, 2018 WL 2168306 (Tex. May 11, 2018).**

Jody James Farms purchased crop insurance from Rain & Hail through the Altman Group, an independent insurance agency. The insurance policy contained an arbitration clause that required arbitration between Rain & Hail and Jody James, but did not name the Altman Group. The policy also contained language referencing rules under the American Arbitration Association for arbitration of disputes related to the policy.

Rain & Hail denied coverage for a grain sorghum crop loss Jody James suffered due to untimely notice of damage; Jody James alleges it timely reported the loss to the Altman Group. The insurer and farm arbitrated their disagreement per the insurance policy's terms.

In the arbitration between Jody James and Rain & Hail, the arbitrator agreed that Jody James did not timely present its notice of loss. Jody James then sued the Altman Group and its employee for breach of fiduciary duty and deceptive-trade practices for allegedly failing to submit the crop-loss claim to Rain & Hail. Altman moved to compel arbitration under the insurance policy. Over Jody James' objections, the trial court compelled arbitration. The arbitrator found for the Altman Group; the trial court confirmed the award. Jody James was unsuccessful in arguing to the court of appeals that it did not contract to arbitrate its claims with the Altman Group.

The Supreme Court reversed the lower courts' judgments. Acknowledging that the plain language of the arbitration provisions made no reference to the Altman Group, the Court held that mere reference to American Arbitration Association rules fails to show clearly and unmistakably that Jody James intended to arbitrate with non-signatories, such as the Altman Group. Moreover, because an agency relationship depends on the exercise of control and no control was exercised, arbitration could not be compelled under a theory that Altman Group was an agent for Rain & Hall. Finally, arbitration cannot be compelled under a theory of direct benefits estoppel; Jody James' claims against the Altman Group sound in tort and deceptive trade practices, not in contractual duties.

***Lujan v. Navistar, Inc.*, No. 16-0588, __ S.W.3d __, 2018 WL 1974473 (Tex. Apr. 27, 2018).**

This case – which involves the Supreme Court's first adoption of the "sham affidavit rule" – centers on whether Albert Lujan, individually, or his company, Wholesale Flower Company, owned flower delivery trucks that were the subject of the lawsuit. According to Wholesale Flower's corporate records, Lujan bought five trucks from Navistar and later transferred them to the company in a Section 351 transfer under the Internal Revenue Code.

Lujan, individually, filed suit against Navistar for breach of express and implied warranties, claiming he owned the trucks. Wholesale Flower sought to intervene, and Navistar opposed. In the documents filed with the court, Wholesale Flower submitted sworn documents of Lujan's to prove the company's ownership. The trial court struck the Corporation's intervention as untimely.

Two months later, Navistar filed motions for summary judgment against Lujan, arguing, in part, that Lujan did not have standing to assert claims for injuries sustained after the date in which Lujan transferred ownership to Wholesale Flowers. Lujan responded with his sworn affidavit that he owned the trucks.

The trial court struck Lujan's affidavit as a sham and granted summary judgment. A divided panel of the court of appeals affirmed and adopted the sham affidavit doctrine, holding Lujan could not use his affidavit to contradict prior sworn evidence. Lujan petitioned for review, claiming the existence of a genuine issue of material fact regarding whether he or Wholesale Flower owned the trucks.

The Supreme Court affirmed the summary judgment, holding that Texas Rule of Civil Procedure 166a emphasizes the existence of "genuine" fact issues before a non-movant may avoid summary

judgment. Referencing the approach used in federal courts, the Supreme Court defined "genuine" as meaning "authentic or real." The sham-affidavit rule is a tool that may be used to distinguish genuine fact issues from non-genuine fact issues to eliminate patently unmeritorious claims or untenable defenses. It is important to examine whether the so-called fact question depends on inconsistent sworn evidence (as contrasted with unsworn statements or statements by counsel). Here, the inconsistent sworn evidence clothed the trial court with sufficient discretion to disregard Lujan's affidavit claiming he owned the trucks.

***In re N. Cypress Med. Ctr. Operating Co., Ltd.*, No. 16-0851, __ S.W.3d __, 2018 WL 1974376 (Tex. Apr. 27, 2018).**

Crystal Roberts was involved in an automobile accident and was taken by ambulance to the emergency room at North Cypress Medical Center. Because Roberts was uninsured, North Cypress billed her for the services at its full "chargemaster" (non-discounted) prices. North Cypress also filed a hospital lien for this amount.

Roberts and the hospital were unable to resolve their differences on the amount owed by Roberts, so she sued, seeking a declaratory judgment that North Cypress's charges were unreasonable and its lien invalid to the extent it exceeds a reasonable and regular rate for services rendered. North Cypress counterclaimed on a sworn account.

Roberts served discovery requests asking North Cypress to produce all contracts with insurers, Medicare, and Medicaid for negotiated rates. The hospital objected and moved for a protective order, asserting the information was irrelevant and overly broad. The trial court ordered North Cypress to produce the requested information for the time period in which Roberts was receiving services. North Cypress filed an original proceeding (mandamus) in the court of appeals. The court denied the petition, so North Cypress sought mandamus relief in the Supreme Court.

The Supreme Court denied the petition, but wrote an opinion to explain its majority opinion. Pointing out that Texas' hospital lien statute is limited by reasonableness of the charges comprising the lien, the Court held that the negotiated rate contracts are relevant for showing how North Cypress is customarily and regularly paid.

Chief Justice Hecht, joined by Justices Green and Guzman, wrote a dissent that criticized the majority for employing circular logic: if contractually-negotiated reimbursement rates take into account a variety of factors and, standing alone, do not answer the question of what constitutes a reasonable and regular rate for a hospital's services, then why would the contracts memorializing such negotiations be relevant in the present case? The dissenting justices would have granted the writ of mandamus.

***USAA Texas Lloyds Co. v. Menchaca*, No. 14-0721, __ S.W.3d __, 2018 WL 1866041 (Tex. Apr. 13, 2018).**

In April 2017, the Supreme Court of Texas released its opinion in USAA Texas Lloyds Co. v. Menchaca, 14-0721, 2017 WL 1311752 (Tex. Apr. 7, 2017), reh'g granted (Dec. 15, 2017), opinion withdrawn and superseded, 14-0721, __ S.W.3d __, 2018 WL 1866041 (Tex. Apr. 13, 2018). One year later, the Supreme Court withdrew its earlier opinion and substituted its opinion with the analysis below.

The Court presented the issue before it as such: "[W]hether the insured can recover policy benefits based on the insurer's violation of the Texas Insurance Code even though the jury failed to find that the insurer failed to comply with its obligations under the policy." The Court sought to announce five rules pertaining to the relationship between contract claims (under the insurance policy) and tort claims for violations of the Texas Insurance Code.

After Hurricane Ike struck Galveston Island in September 2008, USAA Texas Lloyds declined to pay Gail Menchaca any insurance policy benefits, finding the total estimated repair costs for damage to

her home did not exceed her deductible. Menchaca sued USAA for breach of the insurance policy and for unfair settlement practices in violation of the Texas Insurance Code, but only sought benefits under the policy as her damages.

When the case was submitted to the jury, the jury answered "No" to the first question regarding whether USAA failed to comply with the terms of the insurance policy. However, with regard to the second question—whether USAA engaged in various unfair or deceptive practices, including whether USAA refused "to pay a claim without conducting a reasonable investigation with respect to" that claim—the jury answered "Yes." The question regarding damages permitted the jury to make an award based on either, or both, of their answers to the two preceding questions; the jury awarded $11,350.

Both parties moved for judgment in their favor based on the jury's verdict. USAA argued that because the jury's answer of "No" on whether USAA breached its obligations under the policy, Menchaca should take nothing. Menchaca argued the court should render judgment based on the jury's answers regarding deceptive trade practices and the award of damages. The trial court rendered judgment as urged by Menchaca, and the court of appeals affirmed.

On petition to the Supreme Court, the judgment was reversed. Justice Boyd delivered the Court's opinion; he was joined by six other justices as to the first part of the opinion (with Justice Johnson not participating, and Justice Blacklock concurring without opinion). In the first part of the opinion, the Court reaffirmed the holding that claims for breach of the policy are distinct from extra-contractual claims. The Court then discussed five rules supporting its unanimous holding that the trial court erred in disregarding the jury's answer of "No" to the question regarding whether USAA breached its obligations under the policy:

> *1. Generally, an insured cannot recover policy benefits as damages for an insurer's statutory violation if the policy does not provide the insured a right to receive those benefits.*
>
> *2. An insured who establishes a right to receive benefits under the policy can recover those benefits as actual damages under the Insurance Code if the insurer's statutory violation causes the loss of the benefits.*
>
> *3. Even if the insured cannot establish a present contractual right to policy benefits, the insured can recover benefits as actual damages under the Insurance Code if the insurer's statutory violation caused the insured to lose that contractual right.*
>
> *4. If an insurer's statutory violation causes an injury independent of the loss of policy benefits, the insured may recover damages for that injury even if the policy does not grant the insured a right to benefits.*
>
> *5. An insured cannot recover any damages based on an insurer's statutory violation if the insured had no right to receive benefits under the policy and sustained no injury independent of a right to benefits.*

Though the Court was in agreement that the trial court should not have disregarded the answer to Question 1, it splintered when attempting to fashion a remedy in light of the remainder of the jury's verdict. Three members of the court (Boyd, Hecht, and Lehrmann) found a fatal conflict between the jury's answer to Question 1 (breach of policy) and the remaining questions (failure to investigate and damages), requiring a new trial. Justice Devine would find USAA waived the conflict by failing to object before the trial court discharged the jury. Meanwhile, Justices Green, Guzman, and Brown would have rendered judgment that Menchaca take nothing due to the finding that USAA did not breach its policy obligations. The Supreme Court ultimately concluded that because the parties lacked the benefit of the clarity during trial that is offered in this opinion, the case should be remanded for a new trial in the interest of justice.

***Schlumberger Tech. Corp. v. Pasko*, 17-0231, __S.W.3d __, 2018 WL 1770298 (Tex. Apr. 13, 2018) (per curiam).**

While working at an oil well site on May 6, 2013, Michael Pasko (an employee of a contractor on the site) was instructed by an employee of Schlumberger Technology Corporation (another contractor) to clean up a spill of a fracking liquid; Schlumberger provided no protective equipment.

Pasko alleged he came in contact with the liquid, which that day caused his skin to burn to the point that he needed medical treatment; he also feared for his life. In September 2013, Pasko was diagnosed with squamous cell carcinoma cancer.

On May 5, 2015, Pasko sued several entities; he did not name Schlumberger as a defendant, though, until August 2015. In response to Schlumberger's motion for summary judgment based on limitations, Pasko urged that he sued Schlumberger timely because his cancer not discovered until September 2013, and that his cause of action did not accrue until he discovered the cancer. The trial court granted Schlumberger's motion for summary judgment.

The court of appeals applied the discovery rule and reversed, concluding that Pasko raised a genuine issue of material fact about whether he knew or should have known the nature of his injury before his cancer diagnosis. The Supreme Court held that the court of appeals erred in applying the discovery rule, reversed its judgment, and reinstated the summary judgment in Schlumberger's favor.

The Supreme Court described the latent occupational disease rule as deferring accrual of limitations until "a plaintiff's symptoms manifest themselves to a degree or for a duration that would put a reasonable person on notice that he or she suffers from some injury and he or she knows, or in the exercise of reasonable diligence should have known, that the injury is likely work-related." Here, however, the summary judgment record shows there was nothing latent about Pasko's injuries; he knew of some injury as early as May 2013. Having found that Pasko did not urge the Court to consider the alternative reasons he presented to the court of appeals that were never considered, the Court held that the judgment should be reversed, and that the summary judgment in favor of Schlumberger should be reinstated.

***Diamond Offshore Services Ltd. v. Williams*, 542 S.W.3d 539 (Tex. 2018).**

Willie David Williams, a senior mechanic on an offshore drilling rig who was employed by Diamond Offshore Services Limited and Diamond Offshore Services Company sued his employers under the Jones Act, alleging negligence that led to back injury. To support its defensive theory that Williams was overstating his injury, Diamond hired an investigator to surveil Williams. An investigator video recorded Williams operating a mini-excavator to clear away a run-down mobile home, bending over 34 times to pick up debris, and moving a large "monster wheel" onto his truck.

At trial, Williams argued his condition had worsened since his initial functional assessment; his friends and family suggested Williams would be immobile or wheelchair-bound within a few years. Diamond offered the surveillance video, but – despite not having viewed the video— the trial court sustained Williams' objection that the video was unfairly prejudicial and misleading under Texas Rule of Evidence 403.

The jury returned a verdict for Williams, finding nearly $10 million in lost earning capacity and other damages, and the trial court rendered judgment for Williams. Via a split decision, the court of appeals affirmed, holding the trial court had not abused its discretion in excluding the video. The dissent would have reversed and remanded, concluding that excluding the surveillance footage "goes to the heart of each of Williams' damages questions," and was constituted harmful error.

The Supreme Court held that, generally, trial courts should "undertake their best efforts" to view video evidence before ruling on admissibility when the contents of the video are at issue. Here, no exigency prevented the trial court from previewing the video before ruling on the objections; the court could not have been able to determine any potential confusion caused for the jury without knowing the video's contents.

The Court then conducted its own review and held the video should not have been excluded under Rule 403. Finding that the trial court abused its discretion in excluding the surveillance video, the judgment was reversed, and the case remanded for a new trial.

***SCI Texas Funeral Services, Inc. v. Nelson*, 540 S.W.3d 539 (Tex. 2018)**

Cody Nelson, the only adult offspring of Sharlene Lobban, deceased, sued SCI Texas for negligence in cremating his mother's body without his authorization. The Texas Health and Safety Code gives Nelson the authority to make the decision, but no one was able to locate Nelson in the days following Lobban's death; the funeral home relied on instructions provided by Lobban's siblings to cremate Lobban's remains. Nelson alleged mental anguish damages for having been denied the opportunity to pay his last respects to his mother.

Both parties moved for summary judgment: Nelson on liability only, and SCI on damages. The trial court granted Nelson's motion, concluding that SCI was negligent *per se* because it disposed of Lobban's remains in violation of Nelson's statutory rights. The trial court also granted SCI's motion and signed a take-nothing judgment, agreeing with SCI's argument that Nelson could not recover mental anguish damages absent a special relationship with SCI.

The Supreme Court recognized a disagreement among the lower courts regarding whether a plaintiff in Nelson's shoes is required to prove the special relationship through contractual privity as a prerequisite for obtaining mental anguish damages. The Court resolved the conflict by holding that privity of contract is not required if there is another way one can show a special relationship between the plaintiff and the defendant. Here, the relationship between a person disposing of a decedent's remains and the next of kin is special, even in the absence of a contract.

***Painter v. Amerimex Drilling I, Ltd.*, 16-0120, __S.W.3d__, 2017 WL 8794796, at *1 (Tex. Dec. 6, 2017).**

Amerimex Drilling I, Ltd., was hired to drill oil-and-gas wells, but the other company with which Amerimex contracted, Sandridge Energy, would not permit on-site mobile bunkhouses for its crew. As a result, Amerimex located the bunkhouses approximately 30 miles. The drilling contract provided a bonus payment for the crew's driller who transported the crew to the site. Amerimex did not require its crews to stay at the bunkhouse or ride with the driller, although the crew typically did both. Amerimex placed no restrictions on what route was required for transporting the crew.

On one occasion, the driller was driving the crew from the site to the bunkhouse after a work shift when their vehicle struck another vehicle, killing two crew members and injuring two others. Before the Texas Department of Insurance Workers' Compensation Division, Amerimex argued the driver was acting in the course and scope of his employment at the time of the accident.

Painter, one of the injured crew members, moved for summary judgment, arguing that Amerimex was vicariously liable the driver's negligence. Amerimex countered with its motion for summary judgment, asserting a lack of control over the driver. The trial court granted Amerimex's motion, and Painter appealed. The court of appeals affirmed, finding no evidence to demonstrate that Amerimex had the right to exercise control over the driver for carpooling the crew.

Via a 6-2 vote, the Supreme Court granted Painter's petition for review and reversed the summary judgment. The majority of the Court wrote that Amerimex's decision not to control the manner in which the crew was driven to and from the bunkhouse did not evidence an absence of control: instead, Amerimex "simply chose not to do so." The Court held a fact issue exists as to whether the driver was acting in the course and scope of his employment when the accident occurred.

Justices Green and Brown dissented, pointing out that Painter had also lost at summary judgment in claims against Sandridge due to an absence of control over the driver; the Court denied review of the court of appeals' affirmance in that case. These justices would have held that Amerimex

had no control over the driver in the same manner that Sandridge had no control, and would have affirmed the summary judgment in favor of Amerimex.