Texas Supreme Court: Year in Review

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Makeup of 2013-2014 Court

- Still 7 male and 2 female Justices
- Chief Justice Jefferson resigned Sept. 1, 2013
- Gov. Perry appointed the most senior Justice (and longest serving ever), Nathan Hecht, as Chief Justice effective Oct. 1
- Gov. Perry appointed Jeff Brown in Sept. 2013 to fill the vacancy
- Brown is former 14th CA Justice, district court judge

Up for Re-Election 2014

- Four of the nine seats:
- Jeff Brown (R), has a Democrat opponent, Lawrence Meyers
- Chief Justice Nathan Hecht (R), has a Democrat opponent, William Moody
- Jeff Boyd (R), has a Democrat opponent, Gina Benavides
- Phil Johnson (R), has no Democrat opponent

Hot Topics 2013-14

- 85 total opinions (same as last year)
- Only 18 Per Curiam opinions (as compared to 30 PCs last year)
- Insurance, med mal, construction/economic loss rule
- Tort Claims Act, worker's comp, whistleblower/employment

- Defamation, family law, real property/oil & gas, products, premises
- Experts, causation, gross negligence
- Trial and appellate procedure, evidence spoliation, attorneys' fees

Medical Malpractice

Laser Hair Removal

- *Bioderm Skin Care, LLC v. Sok* : Whether negligence claims related to laser hair removal are "health care liability claims" under the Texas Medical Liability Act, Chapter 74 of CPRC

- Sok purchased numerous laser hair removal treatments from Bioderm. Sok was allegedly burned and scarred as a result of fifth treatment, performed by a technician.

- Sok sued Bioderm and Dr. Nguyen, who moved to dismiss after Sok failed to timely serve expert reports. TC denied motion and CoA affirmed, determining that laser hair removal did not constitute "treatment" as contemplated by TMLA.

Bioderm

- TSC applies rebuttable presumption of TMLA
- Bioderm is an “affiliate” of Dr. Nguyen and thus a “health care provider”
- Because Sok asserted she was injured while receiving care or treatment from a health care provider, the rebuttable presumption that Sok's claim is a health care liability claim must apply
  - Medical records indicated Sok was a “patient”
  - Signed medical records, including consent forms

Bioderm

- Sok did not rebut presumption that her claims did not constitute an alleged "departure[] from accepted standards of medical care or health care."
  - Expert health care testimony would be required to prove or refute Sok's claims
  - Laser device at issue is a surgical device regulated by FDA; necessitates testimony by licensed medical practitioner to determine if use of device departed from standard of care
  - Use of device required extensive training and experience, which indicates that such matters are not within the common knowledge of laypersons

Rio Grande Valley Vein Clinic, P.A. v. Guerrero

- Similar laser hair removal case as *Bioderm*. T/C denied MtD based on Guerrero's failure to serve expert report. Divided CoA affirmed
  - TSC: Same rebuttable presumption we discussed in *Bioderm* applies: Guerrero alleges injury due to care she received from RGV, a health care provider. Medical history, informed consent, and medical information disclosure forms indicate she was a patient.
  - Laser device is a surgical device regulated by FDA; necessitates expert health care testimony; Such matters are not within the common knowledge of laypersons
  - Fact that Guerrero may have been treat by nurse not dispositive. As in *Bioderm*, such a relationship can exist even if physician deals only indirectly with patient. And, RGV qualifies as a "physician" under the TMLA.

TMLA Statute of Repose

- *Tenet Hosp. Limited v. Rivera*: whether the TMLA's statute of repose constitutionally operates to extinguish minor's claim not brought within 10 years of the date of medical treatment
- Birth injury: 1996; Notice of claim: 2004; Suit filed 2011
- Open-courts challenge fails due to mother's lack of diligence in filing suit
- Mother asserted statute unconstitutional because it extinguished minor's claim before she could reach age of majority
- Court treats as "as-applied" challenge (statute operates unconstitutionally as to this claimant

Rivera

- TMLA Repose does not violate open courts provision of Texas Constitution
  - Open Courts provides litigants reasonable time to discover injuries and file suit
  - Court reviews other cases holding delays of 4, 17, and 22 months to constitute a lack of due diligence as a matter of law
  - Guardian's lack of diligence may operate to bar legally incompetent person's open court's challenge; next friend's lack of diligence may operate to bar minor child's open court's challenge

Rivera

- Here, Mom acted as next friend, and waited over 6-1/2 years to file suit after notice of claim, without explanation for delay
- Mom gave statutory notice 2 years prior to expiration of repose period; statute does not deprive minor of opportunity to be heard
- No compelling reason to overturn prior decisions holding next friend's lack of diligence is imputed to minor
- Court need not decide whether law violates open courts b/c imposes unreasonable remedy because Mom not diligent
- Statute affects minors and adults alike, so circumstances of Mom's lack of diligence and giving of suit prior to expiration of repose period are considered

Rivera

- Mom next argues that repose statute is unconstitutionally retroactive b/c requires minor to bring suit before age of majority
- Nature & strength of public interest served by statute: here, compelling public interest
- Nature of prior right impaired by statute: here, record provided no indication of strength of minor's claim
- Extent to which repose impaired claim: here grace period of 3 years from effective date until statute extinguished claim
- Holdings supported by Legislature's findings enacting TMLA

Ross v. St. Luke's Episcopal Hosp.

- Whether non-patient's slip-and-fall claim against hospital is a health care liability claim subject to Chapter 74
- Ct App: follows *Texas West Oaks Hosp. v. Williams*
- *Williams* cannot be ignored despite that TMLA swallows "garden-variety slip and fall case"
  - Alleges claim involves safety (floors are slippery)
- Visitor's SAF claim subject to expert report requirement
- *Supreme Court granted review and will hear arguments in November – stay tuned!*

Insurance

CGL Exclusion 2(b)

- *Ewing Constr. Co. v. Amerisure Ins. Co.* (unanimous)
- Answering certified questions from Fifth Circuit about CGL exclusion 2(b) – contractual liability exclusion
- Court ruled only on duty to defend, whether petition's allegations triggered exclusion 2(b)
- Court first re-examined *Gilbert v. Underwriters*, its first case interpreting 2(b)

Ewing

- Per *Gilbert*, "assumption of liability" in 2(b) means insured has assumed liability for damages that exceeds the liability it would have under general law
- Plaintiff pleaded breach of contract and negligence, asserting under both a failure to perform in a good and workmanlike manner
- Held: allegations of breach of contract for failing to perform in good and workmanlike manner are substantively the same as negligence

Ewing

- Negligence is a common-law obligation
- Held, a general contractor who agrees to perform its work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract beyond the general law; thus, it does not "assume liability" for damages arising out of its defective work so as to trigger exclusion 2(b)

Right of Reimbursement

- *Gotham Ins. V. Warren E&P, Inc.*: Issue is to determine proer role of equity claims when contractual provision addresses matter in dispute
- Insurance policy provides reimbursement of expenses in regaining control of oil well blowout, to extent of ownership in well. Insured represents it owns 100% working interest, but later-discovered agreement reflects insured might have less
- Insurer sues for return of payments under breach of contract (failure to use proper blowout prevention equip) and equity theories (restitution and unjust enrichment) and sued subcontractors (RTPs) to recoup portion of payments benefitting them under restitution, unjust enrichment, and subrogation
- Holding: Insurer may not proceed on equity claims b/c limited to contractual claims when policy addresses matter at issue

Gotham Ins. Co.

- Some evidence insured breached policy as alleged, and that insured suffered damages not reimbursed by subcontractor
- Rule: where valid contract prescribed particular remedies or imposes particular obligations, equity generally must yield unless contract violates positive law or offends public policy
- Contract provisions addressed matters at issue:
  - Due diligence (use a blowout preventer);
  - Material misrepresentation by insured regarding interest or subject of insurance (allowing insurer to void policy);
  - Salvage and recoveries clause (operates to apply payments and recoveries received after settling loss as if received before loss);
  - Reporting clause (insured reports status of all wells to insurer)
  - Subrogation clause (authority to pursue insured's right to recover against other parties that may be liable for loss)

Gotham Ins. Co.

- Contract will be enforced unless provisions violate positive law or offend public policy
- Public policy allows misrepresentation clauses to render insurance policy void or voidable only for fraudulent, material misreps that mislead insurers into waiving or losing defenses (Tex. Ins. Code 705.003)
- Gotham issued payments b/c insured reported it had 100% working interest in well, but genuine issue of material fact as to whether representation of ownership was false and fraudulently made; if allegations true, then misrep clause does not violate public policy and Gotham limited to contract claim
- Policy addresses right to recover from insured or RTPs, so Gotham may not proceed on equity claims against insured or RTPs

Gotham Ins. Co.

- Contract claim: Rule: Reimbursement clause may operate to allow insurer to recover payments previously made even if insured did not breach (here, no right of reimbursement for payment of non-covered claims)
- Absence of reimbursement clause does not necessarily foreclose insurer's ability to recover if insured breached policy
- Gotham's equity and contract claims sought return of payment made to or on behalf of insured because insured failed to use due diligence and made misrepresentations regarding working interest; some evidence in record of breach of contract
- Gotham must proceed on contract claim (must prove breach proximately caused damages and must overcome any applicable or affirmative defenses) and may rely on equity only if it prevails on misrepresentation theory and elects remedy of voiding the policy
- Whether reimbursement claim could proceed because insured reimbursed fully by RTP? SJ record: some evidence created fact issue that insured suffered loss and therefore entitled to reimbursement under policy provision

Dual Payee Settlement Checks

- *McAllen Hosps. v. State Farm* (unanimous)
- Plaintiffs injured in car accident, treated at McAllen Medical Center (MMC). MMC filed hospital lien for Plaintiffs' treatment.
- Plaintiffs sued driver, insured by State Farm. Settled plaintiffs' claims.
- State Farm issued settlement checks payable to each plaintiff and MMC, but delivered checks to plaintiffs without notice to hospital.

McAllen v. State Farm

- Plaintiffs cashed checks without getting MMC's endorsement.
- Under hospital lien statute, a release is invalid unless the hospital gets paid in full or the hospital gets paid in part, up to amount of settlement proceeds
- Court applies Uniform Commercial Code rules to State Farm's settlement checks to see whether they discharged SF's liability

McAllen v. State Farm

- Held: State Farm's checks made to non-alternative payees (plaintiffs and hospital) and delivered only to plaintiffs was constructive delivery to both payees
- But, under UCC, checks to non-alternative payees cannot be negotiated (cashed) by only one of the payees
- Thus, settlement checks did not constitute payment to hospital and did not discharge State Farm's obligation

Fire Insurance – Vacancy Clause

- *Greene v. Farmers Ins. Exch.:* Greene's house was damaged by a fire that spread from a neighboring house, about 4.5 months after Greene moved out of it. Farmers denied coverage based on policy condition stating that coverage for dwellings would be suspended effective 60 days after dwelling becomes vacant. Greene sued for B/o/K.

- Greene moves for SJ, argues that anti-technicality statute precludes Farmers from raising the vacancy clause as a defense. T/C grants SJ, but CoA reverses

- TSC affirms.

Greene v. Farmers Ins. Exch.

- Anti-technicality statute does not apply; Greene did not "breach" the vacancy clause within the meaning of the statute;

- Because she did not breach her obligations under the policy, including its vacancy clause, the question of materiality of a breach and its subsidiary issue of prejudice are not raised.

- TSC rejects Greene's public policy argument. The general public policy underlying the anti-technicality statute is outweighed here by the specific public policy expressed in TDI's prescribing the HO–A form for insurers to use in Texas.

Greene v. Farmers Ins. Exch.

- Boyd, J. and Willett, J. offer lengthy concurrence.
- Majority's opinion not consistent with prior decisions involving insurance provisions that defined the scope of coverage. Those prior decisions also did not involve a breach, and vacancy clause here is equally immaterial as the provisions in the other cases. Will lead to uncertainty.
- Majority needs to distinguish prior precedent

Password

Pumpkin

Evidence

Spoliation

- *Brookshire Brothers, Ltd. v. Aldridge:* Slip-and-fall case; Surveillance cameras captured incident, but store only preserved 8 minutes of video
- Because Aldridge sued under premises liability, a major issue was the length of time the hazard (chicken grease) was on floor and Brookshire's awareness of it.
- Aldridge sued and later requested 2.5 hours of video, but store's system had automatically recorded over it after 30 days
- TC allows jury to hear evidence on whether Brookshire Brothers spoliated the video, submits spoliation instruction to the jury, and permits the jury to decide whether spoliation occurred

Brookshire Brothers

- TC's instruction:
  - In this case, Brookshire Brothers permitted its video surveillance system to record over certain portions of the store surveillance video of the day of the occurrence in question. If you find that Brookshire Brothers knew or reasonably should have known that such portions of the store video not preserved contained relevant evidence to the issues in this case, and its non-preservation has not been satisfactorily explained, then you are instructed that you may consider such evidence would have been unfavorable to Brookshire Brothers.
- Jury returns $1M+ verdict for Aldridge; CoA affirms

Brookshire Brothers

- TSC: Spoliation, as an evidentiary concept, is a matter to be resolved by the trial court.

- Spoliation comprises two elements:
  - (1) the party alleging spoliation must establish that the nonproducing party had a duty to preserve the evidence;
  - (2) the party seeking the spoliation remedy must demonstrate that the other party breached its duty to preserve material and relevant evidence.

- TC has broad discretion to fashion remedy. However…

Brookshire Brothers

- Spoliation instruction is a proper only where a party *intentionally* spoliates evidence. Narrow exception if party negligently spoliates evidence and it so prejudices the nonspoliating party that it is irreparably deprived of having any meaningful ability to present a claim or defense

- Here, TC's admission of evidence and spoliation instruction improper; no evidence that Brookshire Brothers intentionally destroyed video; likelihood of harm from spoliation instruction and probably caused improper judgment

Spoliation

- *Petroleum Solutions, Inc. v. Head:* spoliation; indemnity
- Head sued after truck stop fuel storage system installed by Petroleum Solutions leaked. Petroleum determined leak was caused by flex connector and was allowed to retain it
- Flex connector >> Petroleum's attorney >> metallurgist >> warehouse >> warehouse destroyed
- Petroleum asserts S/o/L defense, sues Titeflex, alleging it manufactured flex connector. Head amends petition to make claims against Titeflex. Titeflex counter-claims, alleging Petroleum has duty to indemnify under CPRC Chapter 82

Petroleum Solutions

- Head and Titeflex move for sanctions against Petroleum, alleging it had spoliated evidence by failing to produce flex connector.
  - T/C struck Petroleum's affirmative defenses, including S/o/L defense, and gives a spoliation instruction to jury.
  - Jury awards Head $1.2 million, and $450k to Titeflex on its indemnity claim. CoA affirmed except as to prejudgment interest.
- TSC applies *Brookshire Brothers*. T/C abused discretion with spoliation sanctions. No proof existed that Petroleum intentionally concealed evidence or deprived Head of ability to present his claims.

Petroleum Solutions

- Under CPRC Chapter 82 (Tex. Products Liability Act), as a component manufacturer, Titeflex is entitled to indemnify from Petroleum, the manufacturer of the finished product (the fuel system). Petroleum did not procure finding that Titeflex was independently liable for its loss, which would have defeated indemnity claim

- Boyd, J. dissents: Petroleum has no duty to indemnify Titeflex because Titeflex's losses aren't related to Petroleum's product, but instead relate to defending claims that Titeflex's product was defective.

Construction Law

Certificate of Merit

- *Crosstex Energy Servs. v. Pro-Plus, Inc.* (unanimous)
- Crosstex hired Pro-Plus (engineers) to construct a gas compression station. Control valve gasket failed, causing massive fire ($10 million property damage)
- Crosstex sued Pro-Plus but did not serve certificate of merit required by CPRC 150.002

Crosstex v. Pro-Plus

- After limitations expired, Pro-Plus filed motion to dismiss. Crosstex asserted Pro-Plus waived 150.002 by its conduct and this was "good cause" to grant extension to file CoM. Trial court granted extension.
- On waiver, court held party can waive 150.002 certificate of merit requirement
- But, on facts, Pro-Plus' conduct did not show "clear intent" to waive right to dismissal under 150.002.

Crosstex v. Pro-Plus

- On extension, court construed 150.002(c) and held that a "good cause" extension may be granted only if:
  - Plaintiff sues w/in 10 days of limitations expiring
  - Alleges limitations prevented filing of CoM
- Gets 30-day extension and, upon motion showing "good cause," may get more time
- Plaintiff who sues outside 10-day window cannot seek or obtain "good cause" extension

Certificate of Merit

- *Jaster v. Comet II Construction, Inc.* (Plurality opinion)
- Issue: whether cross-claimant or third-party plaintiff must file certificate of merit
- Court interpreted CPRC 150.002(a), which required CoM from "the plaintiff" in "any action or arbitration" for damages arising out of the provision of professional services

Jaster v. Comet

- "Plaintiff" is party or person who files a civil suit or legal action
- "Action" refers to the entire lawsuit or cause or proceeding, not discrete claims or causes of action within it
- "Cause of action" is fact or facts entitling one to bring an action, which must be proved to obtain relief

Jaster v. Comet

- The “plaintiff” is the one who initiates the lawsuit, not a party who asserts causes of action within the lawsuit
- Cross-claimants and third-party plaintiffs do not initiate a lawsuit
- Considering entirety of statute and other codes and rules that use “plaintiff” vs. “claimant,” 150.002(a) only requires the plaintiff, not a cross-claimant or third-party plaintiff, to file CoM.

Attorneys' Fees, Interest

Attorney's Fees

- *City of Laredo v. Montano:* Eminent domain suit. After jury determined that City's condemnation of Montano's property was not proper, T/C awarded attorney's fees under § 21.019(c) of Property Code (fee-shifting statute). City appealed, complaining of sufficiency of proof of attorney's fees. CoA reduced award but affirmed judgment. City appealed.

- The City complained that the evidence of $422k in attorney's fees is insufficient because attorneys failed to produce time records, billing statements, or even a client agreement to substantiate their fee request.

City of Laredo

- While statute at issue does not require use of lodestar method, property owner chose to prove up fees using this method. Lodestar fees need not only be established through time records or billing statements.

- Attorney's testimony devoid of substance, thus insufficient to support lodestar determination of attorney's fees. Record contained no evidence of how attorney arrived at estimate of 6 hours per week working on case.

- Lodestar method requires basic proof, including itemizing specific tasks, time required for those tasks, and rate charged by the person performing the work. CoA erred in affirming award attributable to first attorney's claimed fee of $339k.

Long v. Griffin

- Assignment claim regarding contract included in suit for breach of contract and request for declaratory judgment. Sufficiency of evidence to prove reasonableness and necessity of attorney's fees under lodestar method.
- Fee application generally stated tasks performed, but failed to include any evidence containing requisite specificity.
- Affidavit indicates attorneys spent 644.5 hours on suit for total fee of $100,000 based on their hourly rates; segregated time spent on each claim in the suit, assigning 30% to assignment claim, which is alleged to be inextricably intertwined with claims on which attorneys spent 95% of their time.
- TC considered affidavit and awarded $30,000 in AF; SC: assignment claim inextricably intertwined with breach of contract and declaratory judgment request to support award of AF

Long v. Griffin

Rule: Sufficient evidence includes evidence of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required

- Here, affidavit only expresses generalities, no evidence informs time spent on specific tasks, so TC had insufficient information to meaningfully review

- In addition to lodestar, affidavit indicates parties agreed to a 35% contingency fee arrangement, claiming arrangement is reasonably and customary – set aside because no monetary award in judgment from which contingency could be awarded

Postjudgment Interest

- *Long v. Castle Tex. Prod. Ltd. P'ship*: Accrual date for postjudgment interest when remand requires further evidentiary proceedings

- Castle (O&G operator), prevailed in counterclaim against Long Trusts for amounts owed on joint interest billings. In 2001, T/C entered first judgment awarding $74k in prejudgment interest, but CoA said wrongly calculated. On remand, T/C said new evidence would be needed to recalculate prejudgment interest.

- In 2009, Castle waives claim for prejudgment interest and T/C entered judgment award postjudgment interest from date of 2001 original judgment. CoA affirmed, and trusts appealed.

Long v. Castle Tex. Prod. Ltd. P'ship

- TSC: When an appeal results in a retrial or a remand for further proceedings where new evidence is required, postjudgment interest will accrue from the trial court's subsequent judgment

- Ultimately, postjudgment interest will run from the date of the original judgment if the trial court possessed a sufficient record to render a correct judgment at that time. Otherwise, postjudgment interest will run from a later judgment rendered after the trial court acquired a sufficient record
  - Sub-issues: 1) Trial court decides whether the record must be reopened on remand; 2) at the time the court of appeals remanded the proceeding

Long v. Castle Tex. Prod. Ltd. P'ship

- Here, trial court determined additional evidence was needed to determine prejudgment interest under the joint operating agreement, a ruling that was not an abuse of discretion. Evidence of when the Long Trusts received the joint interest billings was not in the record, thus necessitating reopening of the record.
- And, Castle's waiver of right to prejudgment interest does not affect the date on which postjudgment interest accrues. Trial court did not possess sufficient record in 2001 to render correct judgment; sufficient record existed in 2009 after Castle amended pleadings. Castle entitled to postjudgment interest from the 2009 judgment.

Economic Loss Rule

LAN/STV v. Martin K. Eby Const. Co., Inc.

- Economic loss rule prevents general contractor from recovering the increased costs of performing its construction contract with the owner in tort action against project architect for negligent misrepresentations – errors in the plans and specifications

- DART contracts with LAN/STV to prepare plans, drawings, specs for construction of light rail transit line

- LAN/STV responsible for professional quality, technical accuracy, and liable for all damages to DART caused by LAN/STV's negligent performance of any of services furnished

- LAN/STV prepares plans and DART includes plans in solicitation for bids

LAN/STV

- Eby Construction awarded contract, discovers plans full of errors and 80% of LAN/STV's drawings had to be changed
- Eby's construction schedule changed, alleges lost nearly $14 million on project
- Eby sues DART, settles for $4.7 million
- Eby sues LAN/STV for neg, neg misrepresentation; jury awarded $5 million for damages caused by LAN/STV's, Eby's and DART's combined negligence
- LAN/STV claims Eby's recovery barred by economic loss rule

LAN/STV

- Rule: P may not recover for his economic loss resulting from bodily harm to another or from physical damage to property in which he has no proprietary interest, or reliance on negligent misrep not made directly to him or specifically on his behalf

- Court applies rule: DART contractually responsible to Eby to provide accurate plans for job, and Eby settled claims for $4.7 million. DART could have sued LAN/STV for breach of their contract to provide accurate plans, but Eby had no agreement with LAN/STV and not party to LAN/STV's agreement with DART

- Thus, Eby and its subcontractors barred by economic loss rule from recovering delay damages in negligence claims against LAN/STV; GC may not recover delay damages from owner's architect

Chapman Custom Homes, Inc. v. Dallas Plumbing Co.

- Whether homeowner stated cognizable negligence claim for water damage to new construction b/c plumber's negligent performance of subcontract with homeowner's general contractor
- CCH contracts to build home on property owned by Duncan Trust, and CCH contracts with Dallas Plumbing to put in plumbing
- After construction completed, plumbing leaks alleged to cause extensive damages to structure
- CCH and Trust sue plumber for damage: breach contract, express warranty, and negligence
- Ct App holds trust could not recover contract damages, even thoug owned damaged property b/c not party to subcontract, b/c builder did not own property, could not suffer compensable damage, and that negligence claims asserted breach of contract duties such that they must be dismissed under economic loss rule

Chapman Custom Homes

- Tex Sup Ct: allegations that plumber negligently failed to properly join water system to water heaters and was proximate cause of water damage to new house asserted negligence claim
- Party states tort when duty allegedly breached is independent of contractual undertaking and harm suffered is not merely economic loss of contractual benefit.
- Plumber's duty not to flood or otherwise damage home is independent of contractual obligation undertaken in plumbing subcontract with builder, and damages extend beyond economic loss of any anticipated benefit under plumbing contract
- Holding: Economic loss rule does not bar and negligence claim goes forward

Miscellaneous

Offer of Settlement Rule?

- *Amedisys, Inc. v. Kingwood Home Health* (unanimous)
- Amedisys and KHH are competitors; two Amedisys employees left for KHH and started soliciting business from Amedisys clients
- Amedisys sued. Kingwood made offer of settlement under TRCP 167 and CPRC Ch. 42, assuming Amedisys would reject and hoping it could recover its litigation costs later

Amedisys v. KHH

- CPRC Chap. 42 and TRCP 167 provide a method by which parties in certain cases who make certain offers to settle certain claims can recover certain litigation costs, if the offeree rejects the offer and 'the judgment to be awarded [on those claims] is significantly less favorable to the offeree than was the offer.'"
- TSC held the rule/statute govern only settlement offers made in compliance with the rule/statute

Amedisys v. KHH

- The rule/statute do not apply when the claim is for breach of contract (*i.e.*, breach of the settlement agreement). Contract law applies.
- Issue is whether Amedisys accepted KHH's offer of settlement
- Court held language of acceptance (accepting "settlement offer you sent") showed clear intent to accept, rather than make counteroffer
- Omission of claims that "could have been asserted" not material

Premises Liability

- *Henkel v. Norman* (per curiam)
- Norman was mail carrier. Hard freeze warning in effect. Henkel was at her door when he delivered her mail. As he was leaving, she said "don't slip."
- Norman slipped and fell on Henkel's sidewalk and sued her for his injuries.
- Norman is an invitee – so Henkel owed him a duty to protect against or warn about unreasonably dangerous conditions at home

Henkel v. Norman

- Under Texas law, to be adequate, warning cannot be general ("be careful")
- Warning must notify of particular condition
- Here, taking totality of circumstances, including freezing temps, "don't slip" was an adequate warning of a slippery walking surface
- Not required to warn of specific source of condition (here, ice) as long as warning conveys existence of condition (slippery)

The End