Texas Supreme Court – Year in Review

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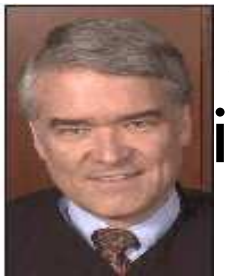
Makeup of the 2012-13 Court

- Nine Justices (7 men, 2 women)

- Two new in 2012:
  - Jeff Boyd – appointed Dec. 2012
  - John Devine – elected Nov. 2012

- Chief Justice Jefferson resigned Sept. 1

- 
  Justice Nathan Hecht inted Chief Justice effective Oct. 1
- Vacancy to be filled by Governor (with Senate approval)

Hot Topics 2012-13

- 55 majority opinions, 30 per curiam
- Tax (sales, franchise)
- Labor (union, WC, whistleblower)
- Real property (nuisance, zoning, condemnation, home equity)
- Oil & gas
- Defamation
- Procedure, statutory interpretation

INSURANCE

Christus v. Aetna

- May hospitals seek prompt-pay penalties against an HMO for nonpayment of medical services provided to patients under contracts the hospitals had with the HMO's delegated network, rather than with the HMO itself?

- Hospitals brought action against a Medicare HMO and parent company (Aetna), contending they were liable under prompt pay statute for failing to timely pay claims for healthcare services provided to Medicare HMO enrollees under agreements between the hospitals and an intermediary that failed to pay the hospitals.

- Lower courts held that Prompt Pay Statute requires contractual privity between the HMO and the provider.

Christus v. Aetna

- Held: Affirmed. The Prompt Pay Statute (TEX. INS. CODE § 843.336–.344) contemplates contractual privity between HMOs and providers.

- Pure statutory construction case

- An HMO is only required to pay within the 45–day deadline "the total amount of the claim *in accordance with the contract between the physician or provider and the health maintenance organization*...."

- 2001 Amendments to Prompt Pay Statue provide for administrative relief, but not private action.

City of Bellaire v. Johnson

- Magnum Furnished Workers for City, Including Johnson
- City Paid Magnum Who Paid Johnson
- City Sets Work Schedule, Assignments and Supervises Johnson, Not Magnum
- Magnum Provided Workers' Comp and Statute Required City to Provide Work Comp to Employees
- Johnson Injured – Sues City & EE

- Labor Code: Recovery of WC Benefits is Exclusive Remedy of EE Covered by WC Insurance
- Plea to Jurisdiction – Govt Immunity B/C Exclusive Remedy is WC Comp
- TC Dismissed; CA Reverse/Remand: Exclusive Remedy Bar Did Not Apply

- City Self-Insured under WC Act, Subject to Interlocal Agmt:
  - Statutory worker's compensation benefits are provided for paid employees of the Employer Pool Member only
- Johnson was "Paid Employee" Under Interlocal Agmt Applying *Limestone*
- Johnson's Exclusive Remedy: WC Benefits

Lennar v. Markel

- Second round of appeals
- Very important decision
- Tune in September 26 for webinar about it with Brent and Tarron

Liberty Mutual v. Adcock

- 6-3 decision: majority by Justice Guzman, dissent by Green
- Whether Worker's Comp Act contains any provision allowing TWCC to reopen WC determination of permanent lifetime income benefits (LIBs)
- Held: Act contains no such provision
- In 1989, Legislature expressly removed provision allowing reopening of LIB determinations

- Act states LIBs "are paid until the death of the employee for" specified injury
- In matters of statutory construction, we must enforce the law as written
- Act is a comprehensive WC system that should not be altered, per *Ruttiger*
- Because Act contains no provision to reopen LIB determination, court will not judicially engraft one

- In dissent, Green asserts he reads the state's WC scheme as giving TWCC jurisdiction to ensure that only claimants who meet the eligibility criteria receive LIBs; he would hold the LIB determination could be reopened
- If a statute is ambiguous, the TWCC's interpretation of the statute is entitled to "serious consideration"
- TWCC should be allowed to determine Adcock's continuing eligibility

CONSTRUCTION

CTL/Thompson v. Starwood HOA

- Certificate of merit statute – Chapter 150 of Civil Practice & Remedies Code
- Claims against design professionals require affidavit (Certificate of Merit) to establish threshold viability of claim
- Failure to file CoM requires dismissal without prejudice, and dismissal may be with prejudice

- If trial court denies motion to dismiss, statute authorizes interlocutory appeal
- Here, defendant lost and appealed
- Plaintiff nonsuited before appeal decided; CA held appeal mooted
- TSC held: motion under Ch. 150 is a motion for sanctions to deter meritless claims, and it survives a nonsuit
- Thus, nonsuit did not moot appeal

MEDICAL MALPRACTICE

Certified EMS v. Potts

- Claim Involved Direct & Vicarious Liability Arising Out of Alleged Sexual Assault by Nurse
- Report Addressed Vicarious & Alleged Inadequacy as to Direct
- Ct App: No Requirement to Address Each Theory of Liability
- S Ct: Rejects requirement of report for each theory of liability alleged

- Focus is on Function of Report
- Report Need Not Require Litigation-Ready Evidence
- Examines Report as to "Particular Liability Theory Addressed"
- Report Must Sufficiently Describe Defendant's Alleged Conduct
- If Any Valid Theory, Case Proceeds Regardless of Merit of Other Theories

TTHR v. Moreno

- Claims Against Hospital – Birth Injury
  - Vicarious – Conduct of Doctors
  - Direct & Vicarious (Conduct of Nurses)
- Report Timely; Hospital Objects Qual (OB/Gyn - Causation) & Conclusory
- P Serves 2nd Report by Pediatric Nephrologist – Hospital Objects
- TC: No Causal Relation: Hosp & Nurses Breach & Baby's Injury

- P Serves 3rd Report to Cure
- Hospital Objects: Fails to Address Hospital or Link Nurses to Injury
- TC: Reports Together = Adequate
- Ct App: Adequate as to Vic Liab of Hospital for Doctor Conduct
- Sup Ct: Adequate re Doctor Conduct
- *Potts* Governs: B/C Adequate as to One Claim, All May Proceed

Zanchi v. Lane

- Does a health care liability claimant comply with section 74.351(a)'s mandate to serve an expert report on a "party" by serving the report on a defendant who has not been served with process?
- Plaintiff filed medical negligence suit against physician. Plaintiff mailed expert's report to physician before served.
- Physician: I'm not a "party" until served with process, so pre-service report could not satisfy section 74.351(a).
- Trial court denied physician's motion to dismiss; court of appeals affirmed.

Zanchi v. Lane

- Held: In TMLA, "party" means one named in a lawsuit. Service of the expert report before being served with process satisfied the statute. Plaintiff need not comply with TRCP 106 service requirements for expert reports.

- Common usage of "party" does not require service of process. Comports with TMLA deadline, which is measured from when suit is filed, not when defendant served. Effectuates purpose of TMLA: eliminate frivolous claims while preserving meritorious ones.

- Concurrence (Hecht, J.): Court's "common usage" discussion not convincing. "Party" must be interpreted to include a person named but not served, because that interpretation avoids defeating the statute and its purpose.

CHCA v. Lidji

- Does a claimant's nonsuit of a health care liability claim before the expiration of the 120–day period for serving Chapter 74 expert reports toll the expert-report period until suit is refilled?

- Lidji brought health care liability claims against Hospital, but nonsuited these claims 116 days after filing their original petition. Filed new suit two years later, and served expert report on Hospital on same day.

- Hospital: Deadline to serve the report expired on the 120th day after the Lidjis filed their original petition.

- Lidji: Nonsuit tolled the expert-report deadline; we had four days after filing the original petition in the second suit to serve the report.

CHCA v. Lidji

- Held: Expert-report period is tolled between the date nonsuit is taken and the date the new lawsuit is filed.
- Chapter 74 neither expressly allows nor prohibits tolling of the expert-report period in the event of a claimant's nonsuit.
- Tolling the expert-report period both protects a claimant's absolute right to nonsuit and is consistent with the statute's overall structure.
- Construing the TMLA to require service of an expert report in the absence of a pending lawsuit would give rise to a host of procedural complications.

PM Mgm't-Trinity v. Kumets

- Plaintiff's family alleged nursing home provided inadequate care that caused a second stroke
- Also alleged patient discharged in retaliation for complaints made by patient's family
- Trial court held 74.351 expert report inadequate and dismissed all claims except retaliation claim, concluding it was not a health care liability claim (HCLC)

- Court of appeals affirmed 2-1, finding retaliation claim asserted pure economic loss and did not fall within definition of HCLC (did not cause injury or death)
- TSC held, relying on *Yamada v. Friend*, when plaintiff asserts claim based on same facts as HCLC, claim is also HCLC
- 74.351 does not allow claim-splitting or artful pleading to avoid statutory requirements

Psych. Solutions v. Palit

- Opinion by Guzman, concurrence by Boyd
- Plaintiff was psychiatric nurse at Mission Vista (behavioral health center)
- P injured while trying to restrain psych. patient during "behavioral emergency," and he sued MV for personal injury
- When no 74.351 report served, MV moved to dismiss; trial court denied (not HCLC)

- Relying on *Texas West Oaks v. Williams*, TSC held P's allegations invoked safety and health care provisions of Chapter 74
- Mental health facilities exercise professional mental health judgment regarding what the standards of care should be and whether they were in place at the time of injury
- Also, claim would require expert testimony; thus, it is HCLC

- Boyd concurs in the judgment but writes separately to argue that a safety claim must be "directly related to health care" to be a HCLC
- Does not matter here or in *Rubio*, *St. Marks*, or *West Oaks* because court held claims in those cases were both safety and health care claims
- Just wants to preserve his place for future cases

EXPERT TESTIMONY

Natural Gas v. Justiss

- Several Homeowners Allege Noise & Odor Emanating From Gas Co's Compressor Caused Permanent Nuisance
- Two Issues: Limitations & Expert Testimony
- Court Applies Requirements for Expert Testimony to Property Owner Rule

- If Nuisance is Permanent, Landowner May Recover Property's Lost Market Value
- Requires Comparison of Market Value With and Without Nuisance
- Property Owner Qualified & May Testify to Value of His Property
- Owner's Valuation Fulfills Same Role that Expert Testimony Does

- Owner Testimony Subject to Same Standards as Expert Testimony
- Valuation Cannot Be
  - Mere *Ipse Dixit*
  - Conclusory: Cannot State MV w/o Substantiating Diminished Value with Factual Basis
- Evidence Can Be:
  - Price Paid, Nearby Sales, Tax Valuations, Appraisals, Online Resources

Elizondo v. Krist

- Legal Malpractice: Clients Sue Attys Complaining Attys Obtained Inadequate Settlement
- TC: Summary Judgment (Ps Did Not Present More than Scintilla of Evidence of Damages); CA Affirms
- BP Explosion, P Injured & Returned to Work Few Days Later; Hire Attys
- Atty Demand $2M to Settle; BP Offers $50K; Ps Accept

- Ps Presented Evidence of Atty Who Was Involved in BP Litigation Representing Claimants in Litigation and as Ct-Appointed Liaison Counsel
- Familiar with Settlement of Many Claims
- BP Focused on 10 Criteria to Determine General Value of Claim for Settlement
- S Ct: No Suit w/in Suit Req'ment to Establish Damages (Applies Alternative Method)
- Lay Testimony of Ps Not Adequate

- Here, Opinion Based on Factual Information and Experience with BP Litigation, Knowledge of General Settlement Values & Criteria and Protocol Relied on to Establish Value of Settlement Was in Range of Between $2 and $3 Million & BP's Settlement Offer was "Nuisance Value"
- Expert's Opinion Conclusory BC No Comparison with What Others Received with Comparable Injuries & Circumstances

DAMAGES

Hancock v. Variyam

- Majority opinion by Guzman (9-0)
- Defamation – letter accused P of lack of veracity and speaking in half-truths
- Claim for mental anguish – must establish a substantial disruption in daily routine or a high degree of mental pain and distress
- P's testimony that he was embarrassed, anxious, and could not sleep was not sufficient to prove compensable mental anguish

- P did not seek medical attention
- Alleged defamation did not affect his practice as a physician
- No outward manifestation of mental anguish or any details about impact of anxiety or depression on daily life
- Evidence not sufficient to meet *Parkway* standards

Strickland v. Medlen

- May a plaintiff recover non-economic damages for the wrongful death of a pet?

- Plaintiffs sued animal shelter worker after plaintiff's dog was mistakenly euthanized. Plaintiffs alleged "sentimental" and "intrinsic value." Trial court dismissed the case.

- CoA reverses: because an owner may be awarded damages based on the sentimental value of lost personal property, and because dogs are personal property, the trial court erred in dismissing the suit.

Strickland v. Medlen

- Held: Pets are personal property; non-economic damages rooted in an owner's subjective feelings not allowed.
- *Heiligmann v. Rose*: damages limited to dog's actual value—the economic value derived from its "usefulness and services," not from companionship or other non-commercial considerations
- Loss of companionship/consortium are personal-injury (not property) damages, available only for a few especially close family relationships; to allow them in pet cases would be inconsistent with these limitations.
- Policy: Such claims would give pet owners same legal footing as those losing a spouse, parent, or child. Uncertainty in damages. Legislature better suited to determine whether to allow such recovery, and its boundaries.

TRIAL & APPELLATE PROCEDURE

In re Toyota Motor Sales, USA, Inc.

- Supreme Court Holds Reasons Articulated in New Trial Order Subject to Merits-Based Review
- If Record Does Not Support TC's Rationale for Granting New Trial, Appellate Court May Grant Mandamus Relief

- Rules:
  - TC Must Explain With Reasonable Specificity Why It Set Aside Jury Verdict and Granted New Trial
  - TC's Reasons Superficially Sound
  - Reasonably Specific, Superficially Sound Reasons Must Be Supported By Examining Record Under Texas Law
- TC's Order Specific & Stated Legally Valid Reason
- Examined Merits of Grant

In re Nalle Plastics

- Majority opinion by CJ Jefferson (9-0)
- Law firm sued Nalle for breach of contract for failing to pay attorney fees
- Jury found for law firm, awarded $132K in fees as damages, plus $150K in fees for prosecuting case, plus costs and interest
- Nalle appealed, and issue arose as to whether Nalle had to include $150K in attorney fees in supersedeas bond

- Sec. 52.006 of CPRC requires bond to include compensatory damages, interest for duration of appeal, and costs
- TSC resolved conflict among courts of appeals and held the $150K attorney fees are not "compensatory damages" or "costs" and need not be included in bond
- Since 1876, Texas courts have distinguished damages from attorney fees

- Also, Legislature separates attorney fees from damages, per CPRC 38.001
- Cannot recover fees under 38.001 unless first recover damages
- Also, Ch. 41 of CPRC does not include attorney fees in definition of "compensatory damages"
- While fees can be damages (like the $132K award), the $150k fee award is neither damages nor costs

Phillips v. Bramlett

- Is post-judgment interest calculated from date of the original or remand judgment?
- Physician appealed jury verdict; case remanded to trial court. Trial court awarded plaintiffs actual damages capped plus post-judgment interest calculated from the date of the remand judgment.
- Plaintiffs appealed, arguing that post-judgment interest is calculated from the date of the original judgment. Court of appeals agreed.

Phillips v. Bramlett

- Held: When an appellate court remands a case to the trial court for entry of judgment consistent with the appellate court's opinion, and the trial court is not required to admit new or additional evidence, post-judgment interest begins on the date of the original judgment.

- Prior precedent on the predecessor to Finance Code s. 304.005 controls outcome

- Left open the question of whether post-judgment interest runs from the date of the original judgment in every remanded case, or particularly in cases in which the trial court is required to conduct a new trial or other evidentiary proceeding before entering the remand judgment.

THE END! THANKS!