Texas Supreme Court Update: 2018-2019 Term

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Insurance

Barbara Tech. v. State Farm

- June 28, 2019
- 5-4 Opinion, Majority Green, Concur/Dissent Boyd, Dissent Hecht (60-page opinion)
- Issue: whether insured can prevail on claim for damages for delayed payment pursuant to the Prompt Payment of Claims Act (PPCA), when it is undisputed that insurer (a) investigated the claim, (b) rejected it, (c) invoked policy's appraisal provision, and (d) ultimately paid insured in full in accordance with the appraisal

- Date of loss: Mar. 31, 2013 (wind/hail damage)
- Claim made: Oct. 17, 2013
- Claim denied (after inspection, etc.) because amount of loss did not exceed deductible: Nov. 4, 2013
- Reinspection: Mar. 4, 2014 (no addt'l dmg)
- Lawsuit filed: July 14, 2014
- Appraisal invoked: Jan. 9, 2015
- Parties agreed to appraised value: Aug. 18, 2015
- State Farm paid appraisal less deductible/depreciation: Aug. 25, 2015

- Only claim prosecuted was PPCA claim
- Parties filed cross-motions for summary judgment
- Court recognized that PPCA does not address effect of invoking appraisal process on various deadlines
- But, Court says appraisal clause is "important tool" for resolving disputes and should be enforced

- If insurer already asked for all info, investigated, and rejected claim, invoking appraisal process does not restart PPCA clock (where only issue was amount of loss)
- Generally speaking, use of appraisal process to fully resolve a dispute as to amount of policy benefits due, if owed at all, does not subject insurer to PPCA damages
- But nothing excepts insurer from PPCA damages if insurer liable under policy and delays payment beyond deadline, regardless of use of appraisal process

- Under PPCA § 542.060, insured must prove:
  - Insurer liable under policy, and
  - Insurer failed to comply with one or more deadlines in processing or paying claim.
- If insurer rejects claim, insurer cannot be "liable under policy" and subject to PPCA damages unless:
  - It later accepts claim, thereby admitting liability, or
  - It suffers judgment that it wrongfully rejected claim
- Payment following appraisal is neither admission of liability nor determination of liability for PPCA purposes

- Use of appraisal process to resolve dispute as to value of loss/amount of benefits, and payment based on appraisal, has no bearing on PPCA's payment deadlines or enforcement of those deadlines
- SF never denied loss was covered, only disputed amount of loss and whether it met deductible
- Because Barbara's only complaint was about SF's determination of amount of loss (no other PPCA violation), SF was not subject to any payment deadline

- Insurer is not subject to PPCA damages for delayed payment unless it was subject to a payment deadline because it owed benefits under the policy
- State Farm's later payment of appraisal award did not supplant its earlier rejection of claim
- Held: State Farm's payment of appraisal value did not establish its liability under the policy
- However, payment of appraisal award also did not foreclose PPCA damages under section 542.060 as matter of law

- Held: Barbara also failed to conclusively establish SF was liable under 542.058 (for paying claim after 60 days) because there was no litigation over whether claim was valid and SF should have paid it
- Thus, because neither party established entitlement to judgment as matter of law, remanded for further proceedings

Ortiz v. State Farm Lloyds

- June 28, 2019
- Whether insurer's payment of appraisal award bars insured's breach of contract claim premised on failure to pay amount of covered loss
- Whether payment bars the insured's common-law and statutory bad faith claims, to the extent the only actual damages sought are lost policy benefits
- Whether, under *Barbara Tech.* opinion, insured may proceed on his claim under the Prompt Payment of Claims Act (PPCA)

- Facts very similar to *Barbara*
- Homeowner's claim for wind/hail damage
- SF determined amount owed was less than deductible
- Insured sued, SF invoked appraisal process
- SF paid appraisal award w/in 7 business days
- SF sought summary judgment that payment of appraisal amount barred insured's claims

- Appraisal awards do not establish liability; they only set the amount of loss
- Thus, insurer's payment of appraisal award, despite allegations of pre-appraisal underpayment, forecloses liability on a breach of contract claim for failing to pay amount of covered loss
- Having invoked agreed-upon appraisal process, and having paid binding amount, SF complied with policy obligations

- Applying *Menchaca*, insured's common-law and statutory bad faith claims are foreclosed because the only "actual damages" sought by insured are the policy benefits wrongfully withheld, and those benefits were already paid pursuant to the policy
- Attorneys' fees and costs incurred by insured in pursuing recovery of policy benefits are not "actual damages" that would support extra-contractual claims
- Per *Barbara Tech.*, SF's payment of appraisal award does not, as matter of law, bar PPCA claims

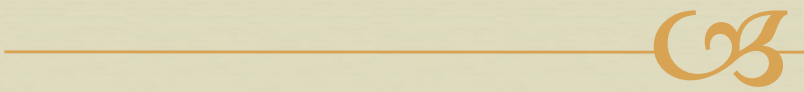
Anadarko Petroleum v. Houston Cas. Co.

- Jan. 25, 2019
- Dispute over coverage for Anadarko's legal fees and expenses in defending liability/enforcement claims for Deepwater Horizon
- Energy package policy required insurers to reimburse Anadarko for costs of defending itself
- $150 million policy limit
- Policy had joint venture endorsement, which limited recovery when "any liability" of Anadarko arises out of its operation of any joint venture

- Anadarko had 25% ownership in joint venture that operated the Deepwater Horizon
- Insurers argued that joint venture endorsement limited defense costs to 25% of $150 million
- Anadarko argued 25% cap applied only to its liability to third parties, not defense costs; thus, it was entitled to reimbursement up to $150 million
- Held: because policy consistently distinguished between "liability" and "expenses," liability meant only damages that Anadarko was held liable to pay to third parties

- Thus, although insurers were liable for only 25% of Anadarko's $4 billion liability to third parties, insurers were liable for Anadarko's defense costs up to the $150 million limit

Health Care Liability Claims



Baylor Scott & White Hillcrest Med. Ctr. v. Weems

- April 26, 2019
- Whether a claim that a nurse fraudulently recorded information in a patient's medical records is a health care liability claim governed by Chapter 74 and requiring an expert report under 74.351
- Suit asserted a claim for intentional infliction of emotional distress, alleging that Weems was indicted for aggravated assault of Bradshaw & use of deadly weapon because nurse "falsified" Bradshaw's medical record by fraudulently describing Bradshaw's injury as a "point-blank" "gunshot wound"

- Suit alleged there was no gunshot wound, a trained nurse performing physical exam should have known same
- Suit alleged nurse knowingly, intentionally and willingly falsely reported Bradshaw shot, was fully aware that information in medical record was being used in criminal investigation against Weems, that nurse was coerced into putting this information in MR by a police officer to cover up illegal search and seizure, that Bradshaw did not have injuries caused by gunshot, that MR was constructed with malicious intent and reckless disregard for the truth, to ruin his reputation and keep him incarcerated for life

- Weems served no expert report; asserted not HCLC
- Trial court dismissed; court of appeals reversed (split on issue of whether alteration/fabrication of MR is HCLC)
- Court: do not consider the labels of the claim as asserted
- When claim brought against HCP is based on facts implicating defendant's conduct during course of patient's care, treatment, or confinement, a rebuttable presumption arises that it is HCLC
- Weems' pleadings invoke presumption, Weems bears burden to rebut

- Focus is on whether claimed departure from accepted standards of medical care, health care, or safety or professional or administrative services directly related to health care
- Maintenance of accurate MR falls within definition of "professional or administrative services"
- Duty to maintain accurate MR is directly related to health care
- Expert testimony required to establish allegations
- Even if expert testimony not required, complaint that Bradshaw's MR was inaccurate is contrary to accepted standards of care
- Thus, is HCLC, even though Weems does not specifically allege a departure from the standard of care
- Because Weems failed to serve report, claim must be dismissed with prejudice

Abshire v. CHRISTUS Health Southeast Texas

- November 16, 2018 (Per Curiam)
- Whether the expert report was insufficient as to causation
- Abshire has five visits to CHRISTUS ER complaining of back and chest pain, only two of which documents her history of osteogenesis imperfecta ("OI" -- brittle bone disease)
- Admit to rehab, PT, failed to improve symptoms of weakness in legs, difficulty walking, electrical voltage shooting down her legs, returned to CHRISTUS for further evaluation & medically cleared
- Rehab facility refused to accept Abshire back and sent to Baptist Hospital
- Baptist immediately orders MRI of spine, which revealed compression fracture of T-5 vertebrae, surgery; Abshire rendered paraplegic and incontinent

- Causation element requires expert explain "how and why" alleged negligence caused injury
- Expert Opinion: injury was exacerbation of undiagnosed vertebral fracture that led to a spinal cord injury (paraplegia and incontinence)
- Nurses' failure to document complete and accurate assessment resulted in delay in proper medical care, ignored signs and symptoms of spinal injury and kept investigating potential cardiac element of pain rather than considering prior relevant medical history of OI
- Court held: the opinion "draws a line directly from the nurses' failure to properly document Abshire's OI and back pain, to a delay in diagnosis and proper treatment (imaging of back and spinal fusion), to the ultimate injury (paraplegia)"

- No need to explain how the nurses' alleged failure to document OI was a substantial factor in causing or exacerbating Abshire's injuries or that it would have changed the outcome, where even on visits where OI was noted, no physician orders for spinal tests
- This does not constitute an "analytical gap" or render report conclusory
- Court of Appeals "did not agree" with expert's conclusions, but weighing the report's credibility at this stage is not the court's job

Texas Health Presbyterian Hosp. of Denton v. D.A.

- December 21, 2018
- Whether 74.153's willful and wanton provision applies to claims arising from emergency medical care provided in hospital's obstetrical unit regardless of whether the patient was first evaluated or treated in a hospital emergency department
- Held: Section 74.153 applies
- Statutory interpretation principles examined and applied to plain language:

- In a . . . health care liability claim . . . **arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite** ***immediately following the evaluation or treatment of a patient in a hospital emergency department,*** the claimant . . . may prove that the treatment of lack of treatment by the physician or health care provider departed from accepted standards of medical care or health care only if the claimant shows by a preponderance of the evidence that the physician or health care provider, with willful and wanton negligence

- **arising out of the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite *immediately following the evaluation or treatment of a patient in a hospital emergency department***

- Held: Phrase "immediately following the evaluation or treatment of a patient in a hospital emergency department" modifies ONLY "in a surgical suite"

Attorneys' Fees

Rohrmoos Venture v. UTSW DVA Healthcare

- April 26, 2019
- Among other issues, addressed legal sufficiency of evidence to support $1 million attorneys' fees award
- Clarified that the "lodestar" method of awarding fees is the same as the method using the *Arthur Andersen* factors, and clarified "the law governing recovery of attorneys' fees in Texas courts"
- Analyzed federal law regarding proof of fees
- Then analyzed Texas law regarding proof of fees

- Generalities about an attorney's experience, the total amount of fees, and the reasonableness of the fees is not sufficient to support a fee award
- Starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate
- Fee claimant has the burden of proof
- Calculation should produce an objective figure that approximates the fee that the attorney would have received had he or she properly billed a paying client by the hour in a similar case

- At a minimum, this requires evidence of
  - (1) the particular services performed,
  - (2) who performed those services,
  - (3) approximately when the services were performed,
  - (4) the reasonable amount of time required to perform the services, and
  - (5) the reasonable hourly rate for each person performing such services
- This base lodestar calculation should reflect hours *reasonably* expended for services *necessary* to the litigation

- Clarifies that there is a presumption that the base lodestar calculation, when supported by sufficient evidence, reflects reasonable and necessary attorney's fees that can be shifted to the non-prevailing party
- Then, court may enhance or reduce the fee award based on other relevant considerations (not the *Andersen* factors or evidence used to establish base calculation)

Barnett v. Schiro

- April 26, 2019
- Held that the standards announced in *Rohrmoos* apply to a claim for attorneys' fees under Chapter 38 of the Civil Practice & Remedies Code (for suits on contracts)
- Remanded the case for redetermination of fees under new standards

Nath v. Texas Children's Hospital

- June 21, 2019
- Involved the fee-shifting provision that can be used as a sanction to a party for filing frivolous claims (Chapter 10 of CPRC)
- Held: party seeking fees under this provision must prove fees are reasonable (overruling several cases)
- Held: standards announced in *Rohrmoos* apply to fee-shifting sanctions

Construction

LaLonde v. Gosnell

- June 14, 2019
- Guzman (majority); Boyd (dissent)
- Under Chapter 150 CPRC Certificate of Merit Statute, whether in seeking dismissal of the suit for failure to contemporaneously file an affidavit with filing of suit, delay of 1,219 days after suit filed to file for dismissal (until eve of trial) constitutes waiver of the right to dismissal
- Held: Waiver

- Foundation problems; suit against engineers filed without certificate of merit
- 20 months later, engineers file answer
- Parties agree to scheduling order, participated in mediation
- Litigation begins – 18 months, new counsel for engineers, second scheduling order, discovery, resetting of trial, court-ordered mediation
- 2 days after mediation, engineers file motion to dismiss because Gosnells failed to include certificate of merit with filing of original petition 40 months earlier

- Trial court dismissed; court of appeals reversed holding implied waiver of 150.002's requirements through engaging in judicial process, indicating totality of circumstances showed intention to litigate
- Engineers argue waiver of statutory right (1) not determined under totality of circumstances test; (2) should not be reviewed de novo because involves question of intent; (3) always begins with presumption against waiver; and (4) requires showing of prejudice

- Held: (1) Is determined under totality of circumstances test; (2) is reviewed de novo; (3) undisputed evidence under this record satisfies burden of proof under intent-based waiver standard; and (4) need not decide whether prejudice—conceptually distinct from waiver—is required to effect a waiver because prejudice established on this record
- Dissent: At best, facts support estoppel, but not waiver of the right Chapter 150 actually grants

- Litigation conduct established waiver of right granted under statute: right to professional certification that any complain about services has merit before any litigation may be undertaken. Absent COM, professionals have right to avoid litigation entirely. Saves parties the expense of protracted litigation.
- Absence of statutory deadline does not mean dismissal can be sought at any point in the litigation process (as dissent concludes)

- Focus is on the degree to which the party has chosen to litigate despite the plaintiff's noncompliance with the statutory requirement of a threshold merits certification and the availability of a mandatory dismissal right. Conduct is considered cumulatively in light of the surrounding facts and circumstances.

- Seeking discovery when absolute right to dismissal clearly and unequivocally exists at the suit's inception would, ordinarily, be manifestly inconsistent with the right. Discovery is pointless unless D intends to waive right to dismissal.
- More developed the case is and close to trial at time dismissal sought, stronger implication becomes that D intended to abandon COM requirement and its remedy. Time elapsed must also be considered.

- Seeking affirmative relief (especially summary judgment) and electing to litigate to a merits-based disposition is conduct inconsistent with right to dismissal of the case without litigation.
- Case-by-Case analysis required because the standard is whether D "substantively invoked the judicial process" – whether D engaged in litigation conduct that is manifestly incompatible with the rights 150.002 affords.

Endeavor Energy Resources, LP v. Cuevas

- May 3, 2019
- Whether Chapter 95 of CPRC applies to contractor's employee's negligent-hiring claim against property owner
- Ct App: Chapter 95 applies only when owner's negligent activity occurs "on the premises at the time the claimant is injured." Chapter 95 does not apply here because "negligent hiring" is an act that occurs prior to the injury.
- Held: Chapter 95 applies.

- Chapter 95 applies to "claim for damages caused by negligence" against a "property owner" AND that "arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement"
- Parties dispute whether negligent-hiring claim "arises from the condition or use of an improvement" to Endeavor's real property

- Contemplates a claim for premises liability and based on negligent activities
- Negligent-hiring claim requires negligence by two separate parties (employer in hiring and employee's subsequent negligent act or omission) that proximately cause injury
- "Contemporaneous acts" on the property do not apply to both negligent acts in negligent-hiring claim; when one of the acts involves contemporaneous use of an improvement of real property, claim arises from that act

- Employee can recover if the property owner exercised or retained some control over the manner in which the work was performed on the "improvement to real property" and had actual knowledge of the danger or condition that ultimately results in injury.
- So, when property owner negligently hires a contractor and the contractor later negligently creates a risk through work over which the owner retains some control, P can recover for negligent hiring if the property owner has actual knowledge of that risk.

Nghiem v. Sajib (DTPA & Breach of Warranty of Workmanlike Repairs)

- February 17, 2019
- Held: Claim for breach of implied warranty is actionable under both DTPA and common law
- Passengers injured in small plane whose engine failed and crash-landed
- Suit against service company for plane who made repairs immediately before the crash
- Ct App: Implied warranty actionable only under DTPA and subject to its statute of limitations.

- Implied warranty of workmanlike repairs is creature of the common law. Can be asserted in an action for violation of DTPA (*since Melody Homes*), but can also be asserted in a common-law action.
- Because claim was not asserted under DTPA, its 2-year SOL did not apply.
- Court discussed and suggested 4-year residual SOL for contract may apply but did not reach that issue.

Trial Procedure

Medina v. Zuniga

- April 26, 2019
- Defendant had denied negligence in responses to numerous requests for admissions; then, at trial, defendant made strategic decision to admit liability for car accident
- Plaintiff asked trial court to sanction defendant for attorneys' fees and costs incurred in proving up negligence; trial court granted sanctions
- Supreme Court reversed—RFA requiring to admit liability had due process implications; RFA should not be used to try case on merits

Agar Corp., Inc. v. Electro Circuits Int'l, LLC

- April 5, 2019
- Courts generally have held that SOL for conspiracy claims is 2 years, as applied to suits for trespass under 16.003 CPRC
- Civil conspiracy is a derivative claim that takes the limitations period of the underlying tort that is the object of the conspiracy. Limitations run simultaneously.
- Held: Civil conspiracy is not an independent tort, and limitations is tied to the underlying tort; accrues as to each underlying tort when that tort occurs
- Texas Theft Liability Act (CPRC 134.005) Attorney's fees are recoverable by prevailing P or D

Musallam v. Ali

- Oct. 26, 2018
- Held that a defendant's request for a jury question to be included in the jury charge does not waive the defendant's right to later argue in a motion for JNOV that the evidence was legally insufficient to support the jury's answer
- Objection to charge and motion for JNOV are equivalent ways to preserve no-evidence challenge

In re City of Dickinson

- February 15, 2019
- Whether a client who testifies as an expert witness in the client's own case waives the attorney-client privilege with respect to the client's expert testimony
- Email communications between attorney and client about client's expert testimony are not discoverable because such communications are protected attorney-client communications that are not waived through TRCP 192, 194 allowing discovery of testifying expert communications

JBS Carriers v. Washington

- Dec. 21, 2018
- Pedestrian-truck accident that killed pedestrian
- Held: trial court abused its discretion in excluding evidence that plaintiff had prior mental health issues and, at time of accident, had alcohol, cocaine, and oxycodone in her system
- Such evidence is probative if it shows some effect on whether person acted with ordinary care
- TRE 403 – issue is whether evidence is *unfairly* prejudicial

Windrum v. Kareh

- January 25, 2019
- Where the court of appeals concludes the evidence is legally insufficient but also considers factual sufficiency of the evidence, the court of appeals must apply the factual sufficiency standard, detail the evidence, and explain its decision
- Because the court of appeals failed to explain how it reached its conclusion that P failed to present factually sufficient evidence, and analyzed only legal sufficiency, a reversal and remand to the court of appeals was required to consider and apply the factual sufficiency standard and analysis

The End

Thank you!