Texas Supreme Court's 2011-2012 Term:

A Look at Some of the Big Cases

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2011-2012 Court Members

- Chief Justice Wallace Jefferson (2001)
- Justice Nathan Hecht* (1988)
- Justice Dale Wainwright (2002) (just resigned)
- Justice David Medina* (2004) (term ends 2012)
- Justice Paul Green (2004)
- Justice Phil Johnson (2005)
- Justice Don Willett* (2005)
- Justice Eva Guzman (2009)
- Justice Debra Lehrmann (2010)

* Seats up for re-election

Numbers

- No official stats for 2011-2012 yet
- But, from 9-1-11 to 8-31-12, approximately 765 petitions for review filed
- Approximately 191 petitions for writ of mandamus filed (same time period)
- Briefs on the merits requested in 254 cases
- Oral argument granted in 64 cases
- Opinions issued in 89 cases
  - 52 authored majority opinions
  - 37 per curiam opinions

In re XL Specialty Ins. Co.

- Held: in a bad faith action brought by an injured employee against a workers' compensation insurer, attorney-client privilege does not protect communications between insurer's lawyer and employer during underlying administrative proceedings
- XL was Cintas' worker's comp insurer. Employee Wagner sought WC benefits. XL's third-party administrator denied the claim. XL hired outside counsel (Strandwitz) to handle WC admin. proceedings. Strandwitz communicated with TPA and Cintas during proceedings.

- Court reviewed the various attorney-client privileges under evidence rule 503.
- Joint client privilege – when one lawyer represents multiple clients w/ consent = protected
- Joint defense privilege – when multiple clients represented by separate lawyers, communications relate to common defense strategy = protected
- Joint defense privilege – a/k/a "common interest" privilege; but, in Texas, only applies in pending litigation
- Also, in Texas, "common interest" or "joint defense" privilege not limited to defendants

- Thus, court holds that "joint defense" or "common interest" privilege in Texas is really an "allied litigant" privilege, TRE 503(b)(1)(C)
- Allied litigant doctrine protects communications made between a client, or the client's lawyer, to another party's lawyer, not to the other party itself
- Thus, in this case, allied litigant privilege does not apply:
  - XL is client for WC proceedings
  - Communications were between XL's lawyer and Cintas, who was not represented by XL's lawyer or any lawyer, and who was not a party to the litigation
- Court rejected public policy basis to recognize communications as privileged

- Court did not rule out that insurer could be "representative" of client in WC proceeding; just not proved here
- Court rejected other possible privileges under TRE 503
- Not privileged under any general insurer-insured privilege
- Because communications/documents between XL and Cintas not proved to fall with any attorney-client privilege, trial court did not abuse its discretion in compelling disclosure

United Scaffolding, Inc.

- Interpreting adequacy of trial court's order granting new trial
- Held: Announced two-part test for abuse of discretion in granting new trial. No clear abuse of discretion so long as stated reason is (1) legally appropriate and (2) specific enough to indicate trial court did not simply "parrot a pro forma template," but derived its reasons from particular facts and circumstances

- Ex: clear abuse of discretion if stated reason, specific or not, is not one for which a new trial is legally valid
- Ex: clear abuse of discretion if stated reason plainly states that trial court merely substituted its own judgment for the jury's
- Ex: clear abuse of discretion if reason is based on invidious discrimination
- Ex: clear abuse of discretion if reason provides little or no insight into judge's reasoning; mere recitation of legal standard not enough

- Order must indicate trial judge considered the specific facts and circumstances of the case at hand and explain how the evidence (or lack of evidence) undermines the jury's findings
- Trial court abuses discretion if order provides no more than "pro forma template" (jury's finding against great weight and preponderance of the evidence) rather than trial judge's analysis
- Trial court need not detail all the evidence in its order, as is required by courts of appeals

- Order at issue violates *In re Columbia* where 4 reasons stated preceded by "and/or"
- New order should resolve ambiguity created by use of "and/or" which leaves open possibility that stated reason is simply "in the interest of justice and fairness" is sole rationale
- Concurring Opin: Justice Wainwright
  - Trial court's lack of available record should not be basis for determining scope of sufficiency review of grant of new trial
  - Record may document incidents warranting new trial

- Trial court's reasoning should be valid and proper because of significance of right to trial by jury and respect due jury verdicts
- Broad discretion in granting new trial is not limitless
- *In re Columbia* requiring trial court's order be reasonably specific, valid, and proper reason for granting new trial because of significance of right to trial by jury
- *Columbia* points jurisprudence toward appellate review of merit of reasons for grant

- Facial review failing to confirm that record supports new trial does injustice to commitment and service of the jury
- Facial review inconsistent with constitutionally guaranteed right to jury trial
- Reasons may become meaningless formulas and verdicts reversed for pretextual or legally incorrect reasons, or reasons unsupported by the record
- Order's invalid reason just as insufficient as order failing to provide any reason at all

Sharyland v. City of Alton

- October 2011
- City's immunity waived for water supply corporation's (Sharyland's) suit for breach of water supply agreement based on allegedly negligent construction of residential sewer lines by city's contractors (contract for services)
- Sharyland's negligence claim against city's contractors not barred by economic loss rule
- Court gives detailed review of its past writings on economic loss rule

- Court had applied economic loss rule only in cases involving defective products or failure to perform contract
- In those situations, Court held the parties' economic losses were more appropriately addressed through statutory warranty actions or common law breach of contract suits, rather than tort claims
- But, Court has never applied economic loss rule to bar recovery between contractual strangers in a case not involving a defective product
- Thus, Sharyland could recover tort damages against City's contractors for repairs it made to the water lines
- Court appears to restrict application of rule; does not decide whether purely economic losses are recoverable in negligence or strict liability cases

El Apple I, Ltd. v. Olivas

- Interpreting TCHRA sex discrimination and retaliation and recovery of attorney's fees
- Held: Affidavits of attorneys insufficient to support lodestar determination of AF award
- Record must include proof documenting performance of specific tasks, time required for those tasks, person who performed work, and his or her specific rate

- Attorney's fees under TCHRA computed under lodestar method: number of hours worked multiplied by prevailing hourly rates
- If lodestar does not reflect reasonable fee, multiplier may be applied
- Evidence: 850 hours of attorney hours, 150 hours for trial, attorneys testified time was reasonable and necessary given nature of case and results obtained
- Evidence: number of hours required because of discovery, pleadings, depositions, witness interviews, quality of representation

- Evidence: attorneys refrained from taking additional clients b/c case
- Trial court used lodestar: rate x hours, and enhanced by 2.0 multiplier
- Lodestar requires:
  - Determine reasonable hours spent by counsel and reasonable hourly rate for such work
  - Multiply number of hours by applicable rate, the product is base fee, which is lodestar
  - Court may then adjust base fee up or down (apply a multiplier) if relevant factors indicate adjustment necessary to reach reasonable fee

- Factors
  - Time and labor required, novelty and difficulty of questions involved, skill requisite to perform legal service properly
  - Likelihood, if apparent to client, that acceptance of the employment will preclude other employment by lawyer
  - Fee customarily charged in locality for similar legal services
  - Amount involved and results obtained
  - Time limitations imposed by client or circumstances

- Factors (continued)
  - Nature and length of professional relationship with the client
  - Experience, reputation, ability of lawyer or lawyers performing services; and
  - Whether fee is fixed or contingent on results obtained or uncertainty of collection before legal services have been rendered
- Usually determination is discretionary, but burden requires documenting hours expended on litigation and value of those hours

- Proof should include basic facts:
  - Nature of the work
  - Who performed services and rate
  - Approximately when services were performed and
  - Number of hours worked
- Thus, if lodestar method applies, attorneys should document their time much as they would for their own clients, that is "contemporaneous billing records or other documentation recorded reasonably close to the time when work is performed"

- Applicant must provide sufficient details of the work performed before the court can make a meaningful review of the fee request
- Reverse and remand: if no documentation, attorneys should "reconstruct their work in the case to provide the minimum information the trial court requires to perform meaningful review" of the fee application

Arbitration

- *In re Service Corp. Int'l* - appointment of arbitrator
- Contract said app't by mutual agreement or, absent agreement, AAA will appoint
- Parties agreed, but arbitrator disqualified
- One month later, trial court appointed arbitrator
- SCI challenged; Supreme Court held parties could not involve trial court until sufficient time lapsed after impasse – one month not enough

Arbitration

- *Americo Life v. Myers* – removal of arbitrator
- Court of appeals held insurer had not made same arguments to AAA challenging arbitrator as it made in appeal; Texas Supreme Court disagreed
- Remanded case for court of appeals to rule on merits – whether AAA improperly removed insurer's chosen arbitrator

Arbitration

- *Bison Bldg. v. Aldridge* – jurisdiction to review arbitration award
- Trial court confirmed arbitration award in part, vacated award in part, recognized unresolved fact issues remained for arbitrator
- Supreme court held arbitration was not yet complete and judgment was not final
- Thus, non-final judgment could not be appealed; dismissed for lack of jurisdiction

Evanston v. Legacy of Life

- Certified questions from Fifth Circuit:
  - Does "personal injury" include coverage for mental anguish, unrelated to physical damage to or disease of the plaintiff's body?
  - Does "property damage" include coverage for the underlying plaintiff's loss of use of her deceased mother's tissues, organs, bones, and body parts?
- Legacy was organ donation charity; supposed to give mother's tissues to nonprofit agencies but allegedly transferred to companies that sold them for a profit

- No claim of physical injury, just restitution damages to estate and mental anguish to daughter
- Combined medical professional and CGL policy
- Evanston denied defense and filed dec suit in fed. ct.
- "Personal injury" defined as "bodily injury, sickness or disease including death resulting therefrom sustained by any person"
- Held: because "bodily" modifies "injury, sickness, and disease," a physical manifestation is required for sickness or disease to be covered
- Because no claim of physical injury, no duty to defend

- "Property damage" defined in part as "physical injury to or destruction of tangible property" and "loss of use of tangible property" not injured or destroyed
- Parties agreed human tissue is "tangible" but disagreed it is "property," and policy does not define "property"
- "Property" is a bundle of rights, under Texas law
- Daughter has some rights to mother's tissues (burial, gift, sue for misuse); but not the key rights to recover for loss of use of "property" (possession, use, transfer, exclude others)
- Estate has even fewer rights than next of kin (only pre-death rights); thus, not "property" of estate either

U-Haul Int'l, Inc. v. Waldrip

- Considering sufficiency and type of evidence required to sustain gross negligence finding
- Held: P failed to set forth clear and convincing evidence of gross negligence
- Injury while exiting truck that rolled backwards onto P, allegedly due to problems with parking brake and transmission
- Alleged problems due to gross negligence in inspection & maintenance program

- Judgment $45 million, including $23 million in punitive damages against U-Haul
- Detail of facts: policies for repair and maintenance, repair and maintenance of the 18-year old jumbo hauler with more than 233,000 miles, inoperable parking brake and damaged transmission
- Area Field Manager (AFM) safety certified truck as safe (parking brake passed inspection); did not check fluid levels in transmission because standard

- Customers returning this truck in past year testified they did and did not have certain problems, including problems with parking brake or transmission
- For this accident (rolling backwards with transmission in 1st gear w/parking brake set), both must have malfunctioned
- Expert Opined Neg: Failure to perform proper DOT inspection proximately caused accident b/c inspection would have detected parking brake problem

- Gross negligence: clear and convincing evidence (measure or degree of proof that will produce in the mind of the TOF a firm belief or conviction as to the truth of the allegations sought to be established)
- Objective & subjective elements required P to establish UH was aware that the truck posed extreme degree of risk and that UH had actual, subjective awareness that the truck's parking brake system not functional, but nevertheless proceeded to allow truck to be rented

- Court concluded that UH Intl's Director of Repair Analysis & Support was vice principal, but no evidence Director was employed in managerial capacity
- No evidence established UHI or Director had "actual awareness" of parking brake problems with the truck
- Court required evidence that UHI had knowledge of risk of truck rolling posed by brake and transmission problems
- Mere existence of federal regulations does not establish SOC or gross negligence per se

- UH Tex – Hiring of unfit technician who was untrained & without mechanical experience and reckless in hiring him
- Lack of experience does not prove unfit but jury could have inferred tech grossly negligence in performing inspection duties
- No evidence UHT subjectively aware of risk of hiring tech and consciously chose to disregard it
- Ch 41 requires clear and convincing evidence & without evidence of UHT's mental state in hiring tech jury's finding set aside

- Court concludes that a party cannot be liable for gross negligence when it actually and subjectively believes circumstances pose no risk to the injured party, even if they are wrong

Reinsurance?

- *Tex. Dep't of Ins. v. Am. Nat'l Ins. Co.*
- Stop-loss insurance sold to a self-funded employee health-benefit plan (HBP) is not "reinsurance," but rather "direct insurance" subject to regulation under the Insurance Code
- American contended that an employer who self funds HBP for its employees is an "insurer" in the "business of insurance" under the Insurance Code and, therefore, a reinsurer when purchasing stop-loss insurance (not subject to regulation).

- TDI contended that, although HBP may act like an insurer with respect to plan's participants, the Insurance Code does not regulate it as one
- Insurance purchased by the plan is therefore not reinsurance (because reinsurance is the redistribution of risk between sophisticated insurers in the business of insurance)
- Most private HBPs are ERISA plans, and ERISA prohibits state regulation of such plans as "insurers" or "insurance companies"

- Ins. Code Ch. 101 definitions of "insurer" and "business of insurance" did not apply
- Ins. Code did not define "reinsurance" or "stop-loss insurance"
- Thus, Court chose to follow past TDI interpretations, which had held HBPs are not "insurers" because of ERISA, and, thus, stop-loss insurance purchased from insurer by HBPs is not "reinsurance" because it is not between two insurers
- Instead, stop-loss insurance purchased by HBPs is direct insurance in the nature of health insurance because the stop-loss policies are purchased by HBPs ultimately to cover claims associated with their health-care expenses – thus, subject to regulation

Texas West Oaks Hosp. LP v. Williams

- Interpreting Chapter 74 CPRC and whether employee's claim for on-the-job-injury constituted "health care liability claim"
- Held: employee was a "claimant" under the Texas Medical Liability Act ("claimant" need not be a patient)
- Held: Claim based on departures from accepted standards of safety need not be directly related to health care

- Held: TMLA does not conflict with Texas Workers' Compensation Act
- Definition of HCLC in TMLA:
  - Health care liability claim' means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, or health care, or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

- Employee health care provider injured while attempting to restrain patient at private mental health hospital
- Ee alleged injuries arising out of inadequate training, supervision, risk-mitigation, and safety and urged claims as ordinary negligence against nonsubscriber to workers' compensation scheme
- TMLA intended to be broad

- Ee was "claimant" under definition:
  - Claimant' means a person, including a decedent's estate, seeking or who has sought recovery of damages in a health care liability claim. All persons claiming to have sustained damages as the result of the bodily injury or death of a single person are considered a single claimant
- Character of Claim was HCLC because concerned departure from standards of health care and safety
  - Required expert testimony
  - Safety does not have to be directly related to health care

- Interplay between TMLA & TWCA
- No conflict regardless of whether claim against subscriber or nonsubscriber
- If subscriber, Ees go through TWCA
- If nonsubscriber, subject to suits at common-law, such as negligence, and follow rules governing suit
- Rules governing this suit are TMLA, requiring expert report

Loaisiga v. Cerda

- Whether claims by patient against physician for misconduct during medical examination constitute HCLC under TMLA
- Held: Court recognizes rebuttable presumption that claim is HCLC
- Explains that "broad language of TMLA evidences legislative intent for statute to have expansive application"

- Court concluded that breadth of statute's text "essentially creates a presumption that a claim is an HCLC if it is against a physician or health care provider and is based on facts implicating the defendant's conduct during the course of a patient's care, treatment, or confinement"
- Presumption is rebuttable; in some cases where the only possible relationship between the conduct underlying a claim and the rendition of medical services or health care will be the setting or the defendant's status

- P alleged assault during physical examination to which patient consented
- Issue difficult because involves determination of scope of exam, what required in medical care and treatment at issue
- Court balanced rights and burdens on claimants and defendants, and concludes claim against medical or health care provider for assault is NOT HCLC if record "conclusively shows"

- (1) there is no complaint about any act of the provider related to medical or health care services other than the alleged offensive contact
- (2) the alleged offensive contact was not pursuant to actual or implied consent by the plaintiff, and
- (3) the only possible relationship between the alleged offensive contact and the rendition of medical services or healthcare was the setting in which the act took place

- Court concludes that whether claim is HCLC is based on whole record, and considers relevant documents and Dr. L's contentions
- Court concludes that because record did not contain documents other than P's pleadings to shed light on P's symptoms or complaints to Dr. L, substance of complaint is that Dr. L's conduct exceeded scope of medical examination to which she consented
- Record did not conclusively show that Dr. L's conduct "could not have been part of the examination he was performing"

- Burden on claimants to "conclusively establish" claim is not a health care liability claim to rebut the presumption?
- Justice Lehrmann (concurring and dissenting) says more than establish claim is "plausibly, or even likely, not HCLC, but majority's burden too onerous; would require standard of "clear and convincing"
  - Serve the report unless the record justifies a firm conviction or belief that the claims presented are not HCLCs

Tex. Mut. Ins. v. Ruttiger

- Interpreting impact of 1989 amendments to worker's comp statute
- Held: Injured employee has no claim for unfair settlement practices under Tex. Ins. Code, but can still assert claim for misrepresenting ins. policy under Ins. Code
- And, overrules *Aranda v. INA*, holding injured employee may not assert common-law bad faith claim against WC insurer

- Because worker's comp statute has its own procedures for WC claims handling w/ deadlines and penalties, allowing causes of action under Ins. Code secs. 541.060 and 542.003 would be incompatible w/ WC statute; overrules *Aetna Cas. & Sur. v. Marshall* (1987)
- WC statute's claims handling/settlement provisions intended to be exclusive of Ins. Code
- However, WC statute does not preclude claim for misrepresenting insurance policy under Ins. Code 541.061 because that section is not limited to claims handling/settlement context like sec. 541.060
- But, plaintiff presented no evidence of any misrepresentation

- Because plaintiff cannot recover under Ins. Code, also cannot recover under DTPA
- Court also denies claim for common-law bad faith, overruling *Aranda v. INA*, which had created claim missing under pre-1989 version of WC statute
- Court discusses numerous new provisions of WC statute that speed up and streamline the claims process, pay interim benefits, set deadlines, impose penalties
- Because Legislature substantially remedied deficiencies that led to Court's extending bad faith cause of action through *Aranda*, that cause of action is now at odds with WC statute, increases expenses, adds delays
- Thus, judicially created bad faith claim no longer needed

Freedom Comm. v. Coronado

- Unusual facts – defamation case based on ads placed during election campaign in Brownsville
- Case dismissed for lack of jurisdiction (*sua sponte*)
- Reason? Trial court judge (Abel Limas) pleaded guilty to accepting a bribe from plaintiffs to deny the media defendant's MSJ
- The bribe constitutionally disqualified the judge and rendered his MSJ order void
- Thus, neither court of appeals nor supreme court had jurisdiction to review void order

Ewing Construction Co., Inc. v. Amerisure Ins. Co.

- Accepted Two Certified Questions:
  - 1. Does a general contractor that enters into a contract in which it agrees to perform its construction work in a good and workmanlike manner, without more specific provisions enlarging this obligation, "assume liability" for damages arising out of the contractor's defective work so as to trigger the Contractual Liability Exclusions

- 2. If the answer to question one is "Yes" and the contractual liability exclusion is triggered, do the allegations in the underlying lawsuit alleging that the contractor violated its common law duty to perform the contract in a careful, workmanlike, and non-negligent manner fall within the exception to the contractual liability exclusion for "liability that would exist in the absence of contract."

Other Cases of (Potential) Interest

- *Etan Indus. v. Lehmann*: limitations accrual (trespass), fraudulent concealment, purpose of declaratory judgment statute
- *Lexington Ins. v. Daybreak*: interpreting relation-back statute for limitations – what is same "transaction or occurrence"?
- *Evans v. Unit 82 Jt. Venture*: whether bankruptcy stay applies is issue for trial court
- *Buck v. Palmer*: dissolution of partnership, waiver of right to disqualify attorney

- *Tex. DPS v. Caruana*: police report does not have to be sworn to be admissible in evidence
- *Ford Motor v. Garcia, Ford Motor v. Chacon*: attorney ad litem and guardian ad litem fees
- *Sutherland v. Spencer, Paradigm v. Retamco*: default judgment practice
- *Marsh USA v. Cook*: enforceability of non-compete agreement

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THE END