TRANSPORTATION UPDATE 2012

Presented By:
William F. Allred
and Amy Agnew

HB 1535:

- This changed §545.352(b) of the Texas Transportation Code by eliminating a different speed limit at night. The speed will remain 70 mph on several highways at night instead of decreasing to 65 mph. Also, the maximum speed limits allowed in Texas changed on some highways from 70 mph to 75 mph.

HB 1201:

- This statute was enacted in June and amends the Texas Transportation Code by permitting speed limits up to 85 mph on certain designated highways.

No Idle Law:

- Texas Commission for Environmental Quality Idling Limitations Rule, Texas Administrative Code §114.510-517. The entire state is included in the enforcement area, however, only several cities and counties have agreed with Texas Commission for Environmental Quality to begin enforcement starting September 1, 2012.

Carmack Amendment Issues:

- The Carmack Amendment governs a motor carrier's liability to a shipper, to a consignor, and to a holder of a bill of lading. It also governs a motor carrier's liability to persons beneficially interested in the shipment, although the persons are not in possession of the actual bill of lading. It further extends it to buyers or consignees, or to assignees thereof for the loss of, or damage to, an interstate shipment of goods.

- Under the Carmack Amendment, a "carrier" or "motor carrier" is "a person providing motor vehicle transportation for compensation." *See* 49 U.S.C.A. §13102(14). The liability imposed under this paragraph is for the actual loss or injury to the property. *See* 49 U.S.C.A. §14706.

- In *Vaughn v. United Parcel Serv. of Am., Inc.*, the court held that the Carmack Amendment preempted the plaintiff's state law claims of breach of duty of trust, contribution and negligence. *Vaughn v. United Parcel Serv. of Am., Inc.*, 12-10-00272-CV, 2012 WL 2133594 (Tex.App.-Tyler 2012).

- In *Daybreak Exp., Inc. v. Lexington Ins. Co.*, the Texas two-year statute of limitation for injury to property, rather than the New Jersey six-year statute of limitations for injury to property, applied due to conference of law principles. Further, the four-year 'catch-all' limitations period for civil actions arising under acts of Congress does not apply to Carmack Amendment claims against carriers for loss or injury to property. *Daybreak Exp., Inc. v. Lexington Ins. Co.*, 342 S.W.3d 795 (Tex.App.-Houston [14th Dist] 2011).

Discovery Issues:

- In *Pilgrim's Pride Corp., v. Burnett,* a report issued by the Pilgrim Pride's accident review board regarding the accident stated that the driver was "chargeable" for the accident. This report was considered an admission of a party-opponent instead of hearsay. The court further stated that Pilgrim's Pride failed to reach the burden of showing that the investigative report was protected from disclosure due to the work product privilege. As a result, it was admissible. *Pilgrim's Price Corp. v. Burnett,* 12-10-00037-CV, 2012 WL 381714 (Tex.App.-Tyler 2012), reh'g overruled (March 2012).

- In *In Re Swift Transp. Co.*, the court of appeals held the trial court abused its discretion by ordering Swift to produce a corporate representative or representatives to testify about all injury and death claims asserted against it during the ten years prior.

- More than 1,000 auto liability claims related to accidents involving Swift vehicles were opened in 2010 alone. Swift had objected on the basis that the request was overbroad, unduly burdensome, and not sufficiently narrowed in time or scope to lead to the discovery of admissible evidence. The court of appeals agreed that the ten-year time span is overbroad for a national company, and quashed the deposition of Swift's corporate representative.

Legal Duty:

- The court held the employer had a legal duty to safely equip its tractor-trailer and to comply with the regulation requiring that reflective material on a tractor-trailer not be obscured by dirt.

Employment Issues:

- In *Omoruyi v. Grocers Supply Co., Inc.,* the court upheld the arbitration provision of the employee's contract. In reaching this decision, the court held that an employee's responsibilities of loading and unloading trucks at the warehouse and scanning products within the warehouse, were not so closely related to interstate commerce as to be in practical effect part of interstate commerce.

- In *Safeshred, Inc. v. Martinez,* an employee filed a wrongful termination claim based on his refusal to perform an illegal act during his trucking job. The court felt that the employer's conduct towards the employee was sufficiently reprehensible to support an award of punitive damages, consistent with due process, even though there were conflicting accounts regarding the basis of the employer's conduct, where the employee suffered physical harm, including stress and loss of sleep.

- The judgment was later affirmed, though the award for compensatory damages for mental anguish was reversed. In order to recover for mental anguish, a plaintiff must present evidence of ‘a mental sensation of pain resulting from such painful emotions as grief, severe disappointment, indignation, wounded pride, shame, despair or public humiliation.’ However, the court felt that evidence of loss of sleep and stress was not enough to support compensable mental anguish.

- In *In Re Swift Transp. Co., Inc.,* an employee, who broke his arm while placing chains on a truck's tires during the course of his employment, brought a negligence action against his employer. The employer moved to compel arbitration pursuant to the injury benefit plan's arbitration clause. Under the Federal Arbitration Act, truck drivers qualify as transportation workers by falling within the scope of the exemption for contracts of employment of workers engaged in foreign or interstate commerce. Here, the court held the Federal Arbitration Act did not apply to the arbitration provision in the employer's injury benefit plan. Also, the court held the Texas Arbitration Act also did not apply to require the arbitration of the employee's negligence claims.

Evidence:

- Plaintiffs filed suit against a trucking company, alleging wrongful death, survival, and loss of consortium claims. The case proceeded to trial and the jury found for the plaintiffs. The liability in this case was contested because the plaintiff had suffered from serious health problems that were unrelated to the accident.

- However, the appellate court held that the trial court erred in admitting evidence of two positive drug tests of the driver. The drug tests occurred four years prior to the date of the accident and the second drug test occurred eight months after the accident. Further, on the date of the accident, the driver took a drug test and passed. The appellate court found that the admission of the prior and subsequent test results of the driver likely resulted in the rendition of an improper judgment. As a result, the case was reversed and remanded for a new trial due to the error regarding the admittance of the drug tests into evidence.

Jurisdiction:

- In *Zinc Nacional, S.A. v. Bouche Trucking, Inc.*, the trucking company filed an action against the paper manufacturer seeking indemnity for the driver's claims that the negligent loading of paper rolls onto the trailer caused the accident. The accident occurred in Texas while the truck driver was in the process of delivering the paper to a customer in New Mexico. The Court's exercise of specific personal jurisdiction over the manufacturer, a Mexican corporation with its principal place of business in Mexico, did not offend the traditional notices of fair play with substantial justice as the manufacturer sent a representative through Texas to New Mexico on a regular basis. The driver was a Texas resident who worked for a Texas company and Texas had an interest in maintaining the safety of its roads and citizens.

Liability:

- The court held that absent a duty, a premises owner could not be held liable, as a matter of law, for injuries a transportation company employee sustained when a co-worker, driving the company eighteen wheeler, struck and injured the employee while the employee directed trucks at a waste transfer facility owned by the premises owner. The premises owner had no duty to see that independent contractors use reasonable care in performing their work unless they exercise control over the independent contractor's activity. The employee admitted the company was in control of the facility, however, the evidence did not show that the premises owner exercised control over the operative details of the company's work.

- In *Santana v. Arpin America Moving System, LLC,* the court held that the trucking company could not be held vicariously liable for an accident which occurred in a vehicle leased by an independent contractor but driven by a non-employee. The independent contractor hired two 'lumpers' to help him load and unload his truck, but allowed one of the 'lumpers' to drive the vehicle on the evening of the accident. Since the 'lumper' was not hired by the trucking company and was not considered an employee per the Federal Motor Carrier Safety Regulations, the statutory employee doctrine of vicarious liability was inapplicable.

Paid v. Incurred:

- Section 41.0105 of the Texas Civil Practice and Remedies Code governs evidence relating to economic damages. It states, “in addition to any other limitation under law, recovery of medical or health care expenses is limited to the amount **actually paid or incurred** by or on behalf of the claimant.”

- In *Haygood v. De Escabedo*, the term "actually paid or incurred" means expenses that have been or will be paid and excludes the difference between the amount and charges that the service provider bills but has no right to collect. As a result, evidence of unadjusted medical expenses is not relevant and not admissible at trial. Further, a trial court cannot adjust post-verdict because the amount, reasonableness and causation of medical expenses may be fact determination.

- In *Henderson v. Spann,* the court held the admission of unadjusted medical expenses and the exclusion of adjusted medical expenses constitutes an error. Further, a trial court cannot cure error post-verdict by reducing to the adjusted amount because the award involves factual determination.