Recent Appellate Decisions Affecting the Transportation Industry

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By Michelle E. Robberson

This paper surveys a variety of recent federal and state court opinions from the last couple of years that either directly or tangentially affect various areas of the transportation industry. It is by no means exhaustive but meant to provide an update on areas of interest to litigants in transportation cases.

A. Coverage Issues Involving Transportation

1. *Tanner v. Nationwide Mut. Fire Ins. Co.*, __ S.W.3d __, 2009 Tex. LEXIS 127 (Tex., April 17, 2009).

The Tanners were involved in an auto accident with a driver insured by Nationwide. The driver struck the Tanners' car during a high speed chase with the police. Although the driver slammed on his brakes as he approached the Tanners' vehicle, he could not avoid the accident.

The Tanners obtained a default judgment against the driver in the underlying personal injury suit; but Nationwide refused to pay the damages, asserting that the intentional injury exclusion in the driver's auto liability policy barred coverage for the Tanners. The exclusion barred coverage for "property damage or bodily injury caused intentionally by or at the direction of an insured, including willful acts the result of which the insured knows or ought to know will follow from the insured's conduct."

In the coverage suit, Nationwide argued that the auto policy excluded coverage for the Tanners' damages because the driver intentionally fled from police and was traveling in excess of 100 miles per hour. However, the jury found that the driver did not intentionally cause the Tanners' injuries. The trial court disagreed and granted a judgment notwithstanding the jury's verdict, meaning the court found the issue of intent to injure had been established as a matter of law. The trial court then rendered judgment against the Tanners.

On appeal, the Texas Supreme Court reversed. The court said the plain language of the policy dictated the result in the case. Under that plain language, the policy required that the injury be intentional, not the conduct leading up to the injury. Because the evidence at trial showed that the driver, in an attempt to avoid the collision, slammed on his brakes so hard he left skid marks, a reasonable jury could have found the accident was unavoidable rather than intentional. Thus, the injury was not so inevitable that the court could say, as a matter of law, it was intended.

Also, interpreting the policy to bar coverage for intentional conduct rather than intentional injury would render insurance coverage illusory in many situations, such as when a driver intentionally runs a red light but never intends to cause a collision. Further, the second clause of the statement required the insured "ought to know" that an injury "will follow" from his conduct, and "will" was used to express inevitability. Although an earlier policy had excluded coverage for acts that could be reasonably expected to result in damage or injury, this language had been replaced by the more restrictive provision. Thus, the supreme court reversed and remanded for the trial court to reinstate the jury's verdict in favor of the Tanners.

2. OOIDA Risk Retention Group, Inc. v. Williams, 544 F. Supp.2d 540 (N.D. Tex. 2008).

The insured had a commercial motor carrier policy for his trucking business and was a federally regulated interstate motor carrier under the Motor Carrier Safety Act. Moses allowed Williams to drive his 18-wheeler while Moses slept in the sleeper berth. Williams ran the truck off the road, overturning the truck and crushing Moses to death.

Moses's wife sued Williams, and OOIDA intervened, seeking a declaratory judgment that

they did not owe Williams a duty to defend because of various coverage defenses. OOIDA reasoned the employee exclusion and the occupant hazard exclusion in the policy precluded any duty to defend or duty to indemnify as to Williams.

The policy's employee exclusion barred coverage for bodily injury to an employee arising out of the course and scope of his employment. The occupant hazard exclusion barred coverage for bodily injury, including death, sustained by a person while in or upon, entering, or alighting from the covered vehicle.

The district court first found that the underlying suit pleading did not aver whether Williams was an employee of the insured, so as to preclude coverage. The court held it would not consider extrinsic evidence of employment to decide the duty to defend. Thus, in absence of a pleading or proof that Moses was an employee, the employee exclusion did not apply as a matter of law.

As for the occupant hazard exclusion, the district court made a prediction about how the Texas Supreme Court would rule. It held this exclusion violated Texas public policy because it conflicted with Texas law requiring commercial motor carriers to carry minimum liability insurance to cover the bodily injury or death of an individual. Upholding this exclusion would make drivers like Williams uninsured for claims involving a person injured or killed while in, upon, entering, or leaving the vehicle, in spite of the mandatory state requirement such insurance coverage be maintained for just such situations.

3. *Employers Mut. Cas. Co. v. Bonilla*, 2009 U.S. Dist. LEXIS 27715 (N.D. Tex., April 1, 2009).

Employers insured Jolly Chef Express, Inc. under CGL, umbrella, and commercial auto policies. An employee of a party who leased a catering truck from Jolly Chef was badly burned while cleaning the inside of the leased vehicle. Another employee had poured a flammable liquid on the floor of the truck to "cut the grease" that had accumulated during the day. When the first employee turned on a pilot light, a flash fire occurred that badly burned the first employee. That employee sued and recovered judgment against the lessor of the catering truck.

Employers argued that Jolly Chef's CGL policy did not cover the lessor because he was not an employee of Jolly Chef. Employers also argued that the auto policy did not cover the incident because the accident did not result from the operation, maintenance, or use of the covered truck.

The court agreed with Employers on coverage under the CGL policy, finding that the lessor was not an employee, officer, or director of Jolly Chef. The court also agreed with Employers that the cleaning of the vehicle was not a "use" of the vehicle that would be covered because it was not being used as a vehicle at the time of the accident. The court relied on *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153, 156 (Tex. 1997), for this rule.

As for the umbrella policy, which contained an omnibus clause providing coverage for use of the vehicle, the court held it did not apply for the same reasons as the auto policy. The plaintiff must have been using the vehicle as a vehicle for coverage to exist.

B. Arbitration Issues Involving Transportation

1. *Shanks v. Swift Trans. Co., Inc.*, 2008 U.S. Dist. LEXIS 5503 (S.D. Tex. 2008).

Shanks, an employee of Swift Transportation, died from injuries after being ejected from a Swift truck being driven by a co-worker. Shanks's surviving family members sued for wrongful death damages but also brought survival claims against Swift on behalf of Shanks's estate and under an employee benefits plan between Shanks and Swift. The benefits plan subjected all claims related to an accident involving Swift to be submitted to binding arbitration. The Shanks brought suit in federal court.

The family sought to avoid arbitration under several theories. First, the district court agreed with the family that the Federal Arbitration Act did not apply because Shanks, a truck driver, was considered a "transportation worker," and the company's benefits plan was considered an employment agreement. Section 1 of the FAA exempts such persons from arbitration.

However, the district court then held that Texas law required the Shanks family to submit to arbitration, and the court dismissed the action. The survival claims brought on behalf of Shanks's estate were governed by the benefits plan that Shanks signed. The court also held that, while Shanks's family did not sign the benefits plan, they had to arbitrate their wrongful death claims because (a) they sued to get death benefits under the benefits plan and were bound by its terms, and (b) their claims arising out of Shanks's wrongful death were derivative of and factually intertwined with Shanks's estate's claims. Therefore, the family's claims had to be arbitrated together with Shanks' claims.

The Texas Supreme Court adopted this position under similar circumstances in *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640 (Tex. 2009). It held an arbitration provision between a decedent employee and his employer is binding on the decedent's wrongful death beneficiaries even though they did not sign the agreement. A wrongful death action is derivative of the decedent's rights and his survivors were bound by the agreement.

2. *Barker v. Halliburton Co.*, 2008 U.S. Dist. LEXIS 34244 (S.D. Tex. 2008).

The federal district court addressed whether the exemption in the Federal Arbitration Act for "transportation workers" applied to a worker who ordered and received goods that were transported in interstate commerce. The employee sought to avoid arbitration by arguing that she was, in fact, a "transportation worker" because she worked with transported goods.

Her employer, however, was not in the transportation industry and she was not responsible for the transportation of goods. Therefore, because the exemption was applied narrowly to "those workers who play a necessary role in the free flow of goods," she was not exempt from arbitration under the transportation worker exemption of the FAA.

C. Responsible Third Party Issues

This is becoming a hot area of the law as litigants use section 33.004 of the Texas Civil Practice & Remedies Code to add potential responsible third parties to the lawsuit to defray the potential proportionate responsibility and/or to circumvent statute of limitations issues.

1. *Flack v. Hanke*, __ S.W. 3d __, 2009 Tex. App. LEXIS 3639 (Tex. App.—San Antonio May 27, 2009, no pet. h.).

This case involved a settlement agreement between a plaintiff and a defendant that contained specific provisions about designating a number of other individuals and entities as responsible third parties to get around applicable statutes of limitations. Section 33.004 of the Civil Practice & Remedies Code allows a defendant to designate a non-party as a responsible third party up to 60 days before trial (and thereafter with leave of court). After being designated as a responsible third party, the plaintiff can then join the responsible third party as a party to the case, regardless of whether limitations might otherwise have run on plaintiff's claim against this individual or entity.

The settling defendant agreed to designate six to eight potential defendants as responsible third parties as part of the settlement. The plaintiff then joined the responsible third parties as defendants and dismissed the settling defendant from the case. The responsible third parties all cried "foul," as the tactic was an obvious effort by plaintiff to avoid limitations defenses. They claimed the action violated Texas public policy, but the appellate court found nothing in the statute that prevented the action. Thus, the trial court erred in granting a

summary judgment to all the new defendants on grounds of limitations.

Another question presented to the court was whether a responsible third party could move to strike its designation after it had been joined as a party to the action by the plaintiff. The court noted that the statute providing for a motion to strike would normally be utilized by a plaintiff seeking to remove a responsible third party that a defendant seeks to use to diminish its own liability. The court found that the defendant in this case was already a party when it filed its motion to strike, and therefore, was no longer allowed to strike itself as a responsible third party.

2. *Ruiz v. Guerra*, __ S.W. 3d _, 2009 Tex. App.—San Antonio (May 27, 2009, no pet. h.).

This case addressed a similar issue of using section 33.004 to avoid a limitations defense on a wrongful death claim. Ruiz, a dump truck driver, collided with the driver of an H.E.B. Grocery truck. As a result of the accident, the two trucks crashed into a car, killing one of the passengers of that car. The family of the deceased passenger and Ruiz sued H.E.B. and the estate of the H.E.B. driver. H.E.B. then designated two responsible third parties – the company that maintained the trucks and the truck manufacturer.

The family did not join all these responsible third parties as defendants, as permitted under section 33.004, nor did they assert a cross-claim against Ruiz and his employer. Yet the family claimed that certain pleadings filed by the truck manufacturer "effectively designated" Ruiz and his employer as responsible third parties. Ruiz and his employer argued that this was insufficient to invoke section 33.004 and just a tactic to avoid the statute of limitations.

The court interpreted the language of section 33.004 and its procedure for designating responsible third parties. The court held that the statute plainly requires a party to file a motion for leave to designate a person as a responsible third party and that only when the trial court grants a motion for leave to designate does the designation become effective. Once the party is "designated" under this procedure, the plaintiff then has the right to join the responsible third party as a defendant, without regard to whether limitations might have otherwise expired.

Because no one had filed a formal motion for leave or gotten an order designating Ruiz and his employer as responsible third parties, the family could not take advantage of the special joinder provision in section 33.004 to avoid the limitations bar. Therefore, their wrongful death claims against Ruiz and his employer were barred by limitations.

D. Summary Judgment Procedure and Experts

1. Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater, __ S.W.3d __, Tex. LEXIS 125 (Tex. 2009).

This case does not involve the transportation industry, per se, but will apply in those cases. The Texas Supreme Court held that the expert designation deadlines that apply to trial settings also apply in summary judgment proceedings.

Under the Texas Rules of Civil Procedure, evidence that is not timely provided to the other side or from experts not timely designated can be excluded from consideration. The plaintiff had not timely designated an expert under the parties' agreed scheduling order. When the defendant moved for summary judgment after the expert report deadline, the plaintiff got an affidavit from an expert witness in an effort to raise a fact issue and defeat summary judgment. But, because the plaintiff had not timely designated the expert, the trial court excluded his opinions and granted summary judgment.

The Texas Supreme Court affirmed by interpreting the relevant civil procedure rule (193.6) applied in summary judgment proceedings as well as trials. This case resolved a conflict among several Texas courts of appeals, who had split on the issue.

E. Expert Qualifications in a Transportation Case

1. *Dewbre v. Anheuser-Busch, Inc.*, 2008 Tex. App. LEXIS 9046 (Tex. App.—Waco 2008, pet. filed) (mem.op.).

Dewbre, an employee of Anheuser-Busch, was transporting beer when the load shifted and his delivery truck rolled over. Dewbre sued, alleging that the trailer of his truck was improperly loaded and caused the accident.

Anheuser-Busch moved for summary judgment on Dewbre's claims. Dewbre responded with expert testimony from himself and from a DPS trooper opining on the cause of the accident. Anheuser-Busch argued that Dewbre failed to present a qualified expert who could testify to whether the trailer was negligently loaded and whether that negligence caused the rollover. The trial court granted summary judgment to Anheuser-Busch.

On appeal, the court found that the DPS trooper, who had substantial experience in accident reconstruction (level two training), was qualified to opine that the shifting load caused the truck to roll over. The court also found that Dewbre, who had driven commercial vehicles for 20 years, had substantial experience in loading commercial vehicles, and had observed the load on the day of the accident, was qualified to opine that the load shifted because the cargo was improperly loaded. These opinions, taken together, were sufficient to raise a fact issue as to whether the accident resulted from Anheuser-Busch's negligence in loading the trailer. Therefore, summary judgment was improper.

F. Jury Charge in Transportation Cases

1. *Morales v. Dougherty*, 2008 Tex. App. LEXIS 5725 (Tex. App.—Tyler 2008, no pet.) (mem. op.).

This case involves a rather unique submission in the Court's Charge to the jury. Defendants sometimes argue an "inferential rebuttal instruction" to rebut a plaintiff's claim that the defendant proximately caused the harm at issue. For example, a defendant can argue that some third party's negligence was the "sole proximate cause" of an accident, thereby negating any causation by the defendant.

In this case, Dougherty, a truck driver, came to the crest of a small hill on a state highway having had no view over the hill. As he crested the hill, he saw several vehicles stopped in front of him because the front car was waiting to turn left. Dougherty slammed on his brakes in an attempt to avoid an accident, hitting Morales's car and flipping his truck in the process.

In defense of Morales's claim against him, Dougherty raised the inferential rebuttal defense of "sudden emergency" because he could not see the stopped traffic over the hill in time to avoid an accident. Submission of this instruction required proof that an emergency situation arose suddenly and unexpectedly, the situation was not caused by Dougherty's negligence, and, after the emergency situation arose, Dougherty acted as a person of ordinary prudence would have acted.

The court found that Dougherty submitted evidence on each of these elements and, thus, the trial court did not err in submitting the instruction of "sudden emergency" to the jury. An act of nature (such as a storm or ice or the like) was not required to establish a "sudden emergency" – other vehicles can cause it as well. Also, the court found that "sudden emergency" was not an affirmative defense that needed to be pleaded to be able to submit it in the jury charge.

G. Limits on Recovery of Past Medical Expenses

1. *Matbon, Inc. v. Gries*, 2009 Tex. App. LEXIS 268 (Tex. App.—Eastland 2009, no pet.).

A Matbon truck driver crossed a center line on a highway, causing a driver heading toward him to collide head-on with the Gries's car. The driver and her passenger died, and the Grieses suffered serious injuries.

The Grieses joined the driver's family's suit against Matbon and sought payment of their

medical bills as part of their damages. Section 41.0105 of the Texas Civil Practice & Remedies Code limits the recovery of past medical expenses to the amount "actually paid or incurred" by or on behalf of the claimant.

The court considered whether section 41.0105 limited a claimant to the amount of past damages that was actually paid (*i.e.*, after hospital write-offs) versus the gross amount of their medical bills. The court noted the statute limited the medical expenses to those "actually paid or incurred" and that "actually" modified both paid and incurred. The court held, therefore, that a claimant could not recover the gross amount billed by medical providers if a health care provider subsequently writes off a portion of the bill because, in that circumstance, the medical expense is never actually incurred.

2. Proposed Legislation

In its most recent session, the Texas Legislature proposed bills that would have limited the applicability of section 41.0105 solely to medical malpractice claims. However, the proposed bills died in committee during the regular session. Rumors persist that this bill may be revived if the Legislature calls a special session.

H. Governmental Immunity and Special Defects in Transportation Cases

Governmental entities typically enjoy sovereign immunity from suit in Texas. However, the Texas Tort Claims Act waives this immunity in certain instances, such as when a premises defect or a special defect exists in or on governmental property. A premises defect is present when an unreasonably dangerous condition exists on the property. A special defect is a defect that presents an unexpected or unusual danger to ordinary users of roadways and goes beyond a premises defect.

The key distinction between the two types of defects is the duty of care owed by the government in each instance. To prevail on a premises defect claim, the plaintiff must prove the governmental unit had actual knowledge of the condition that created the unreasonable risk of harm and the plaintiff, or licensee, did not have actual knowledge of that same condition. A special defect has a lower standard of proof – it requires proof only that the governmental unit should have known of a condition that created an unreasonable risk of harm.

Thus, many plaintiffs try to argue that a defect is a special defect to take advantage of this lesser burden. The trend in Texas has been against finding certain defects to be "special defects."

1. *Tex. Dep't of Transp. v. York*, __ S.W. 3d_, 2009 Tex. LEXIS 314 (Tex., May 22, 2009).

A woman lost control of her vehicle on a public road, wrecked, and died in the accident. The day before, Texas Department of Transportation workers had applied a spot seal coat to the road in the area where the accident took place. This process involved spraying liquid asphalt on the surface, spreading a layer of gravel, or aggregate, on top of the liquid, and rolling or pressing the aggregate into the liquid. The mixture then hardened to form a new road surface. At the time of the accident, however, the road was covered with a layer of loose gravel up to a ¾-inch thick.

The decedent's estate sued TxDoT, and it asserted the defense of sovereign immunity to the extent not waived by the Texas Tort Claims Act. The plaintiff asserted that the special defect duty applied, and the trial court submitted an instruction for a special defect. The jury found for the plaintiff.

On appeal, the Supreme Court held that loose gravel did not create a special defect because they are typically limited to excavations and obstructions on roadways, or unusual qualities outside the course of normal events, or things that unexpectedly and physically impair the ability to travel on a roadway. A layer of loose gravel on a roadway does not share these characteristics. Therefore, the trial court erred in submitting the case to the jury on this theory.

Moreover, the plaintiff could not recover under a premises defect because she failed to obtain a jury finding on the elements of an ordinary premises defect claim: that TxDOT knew of the loose gravel, and York did not know of the loose gravel. Thus, she was not entitled to recover against TxDoT.

2. *City of Dallas v. Giraldo*, 262 S.W.3d 864 (Tex. App.—Dallas 2008, no pet.).

The Dallas court reached a similar result to *York* in this case. 'The plaintiff was in the back seat of a car, whose driver was allegedly intoxicated, when it skidded off the road and collided with a bulldozer parked ten feet off the road. The passenger died. His family sued the city, alleging that mud and dirt excavated by the city in that area caused the driver of the car to lose control.

The city alleged, based on information gathered by the investigating police officer, that no dirt or mud had been on the road and that the road had been dry. The city asserted sovereign immunity under the Texas Tort Claims Act, but the trial court denied its plea to the jurisdiction.

The court of appeals reversed, holding the evidence did not prove a premises defect because the city showed it had no actual knowledge of a dangerous condition prior to the accident, and circumstances that might create an inference of such a condition were not sufficient to establish a premises defect. The court also found no special defect because (a) an "ordinary driver" under the statute would not include an intoxicated driver, and (b) an ordinary driver should expect some mud or dirt on the road when driving (*i.e.*, it was not an unusual quality outside the ordinary course of events).

I. Employment Law and Workers' Compensation Issues in Transportation Law

1. *Equal Employment Opportunity Comm'n v. Exxon Mobil Corp., 2008 U.S. Dist. LEXIS 35828 (N.D. Tex. 2008).*

Exxon has its own air fleet, and, at the time of the suit, had a corporate policy that mirrored the Federal Aviation Administration's policy that pilots had to retire at the age of 60. Exxon sent letters to two pilots, stating they were subject to the policy and would be forced to retire on their 60th birthdays.

The pilots filed complaints with the EEOC, and the EEOC filed an action to prohibit Exxon from enforcing its corporate policy. Exxon claimed that the mandatory retirement age was a "bona fide occupational qualification" and did not violate any statutes such as the Age Discrimination in Employment Act.

The federal district court agreed, holding that the FAA's identical policy provided support for Exxon's defense. Under the ADEA, an employer proves a "bona fide occupational qualification" defense by showing the age limit is reasonably necessary to the essence of the business. Exxon's planes were similar to commercial airliners subject to the FAA rules, the qualifications of Exxon's pilots were similar to those of commercial airline pilots, and the job responsibilities of corporate pilots were at least as significant as those of the commercial airline pilots. Therefore, Exxon's mandatory retirement rule did not violate the statute.

2. *Am. Prot. Ins. Co. v. Leordeanu*, 278 S.W.3d 881 (Tex. App.—Austin 2009, pet. filed) (op. on reh'g).

A woman who was employed by an insured of American Protection filed a workers' compensation claim after she was injured driving from a business dinner at restaurant (she was a pharmaceutical representative) to a storage unit where she kept work-related items. She claimed she was going to the storage unit for work purposes and then was continuing home to do job-related paperwork. A jury awarded her workers' compensation benefits.

Under the worker's compensation statute, however, the commission only owes benefits if the injury arises out of and in the course and scope of the injured party's employment. Generally, an employee is not in the course and

scope of employment when traveling to and from work. When the travel has a dual purpose – both business and personal – the commission only owes benefits if the injured party proves both that (1) she would have traveled to the place of the accident even if no personal purpose would have been served by the travel; and (2) she would not have made the trip but for the business purpose of the employer. This provision is in the Texas Labor Code.

The court of appeals reversed, finding that there was no evidence to support the two elements of the dual purpose rule. The plaintiff admitted that she had been planning to go home after the business dinner regardless of the fact she was going to stop at the storage unit or might do some work-related paperwork at home. The court rejected her request to consider the trip in two segments: the trip from dinner to the storage unit, which was for business purposes and was the segment in which the accident occurred, and the trip from the storage unit to home, which was not. Because the travel would have occurred even without the business purpose (*i.e.*, she would have gone home), she could not satisfy the dual purpose rule and she was not entitled to benefits.

3. *Tex. Mut. Ins. Co. v. Havard*, 2008 Tex. App. LEXIS 1614 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (mem. op.).

A truck driver employed by Pneu-Rock Transportation lost control of his truck, ran into a guardrail, was ejected from the cab of the truck, and fell 10-15 feet below. The driver told the first EMS responder that he had taken "no-doze, ephedra, and meth." A subsequent drug test in the hospital showed the driver tested positive for cocaine. Texas Mutual thus denied compensability on grounds the driver was intoxicated at the time of the accident, and the driver invoked administrative remedies.

At his contested case hearing, the worker's comp officer considered the evidence and determined that the driver was not intoxicated had sustained a compensable injury. Texas Mutual appealed, arguing insufficient evidence supported these findings.

Under the special rules for reviewing intoxication findings in worker's comp appeals, the driver is presumed sober, and the carrier must present evidence of intoxication to rebut that presumption. The burden then shifts to the driver to prove he was not intoxicated at the time of the accident or injury.

In this case, although the carrier presented evidence of the positive urine test and expert opinion evidence from a toxicologist, the driver presented evidence of a second urine test and a hair test that was negative for cocaine, as well as his own expert toxicologist. The driver also presented evidence of various complicated driving maneuvers he had performed that morning that tended to refute intoxication.

The appellate court concluded that the fact finder (the administrative judge) could have reasonably concluded from the evidence that the driver was not intoxicated. The fact finder was entitled to assess the credibility of the witnesses and the evidence and make its determination about the facts, and that assessment was entitled to deference on appeal.