TEXAS SUPREME COURT UPDATE: 2022-23 TERM

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QUESTIONS??

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TSC STATISTICS

- No new Justices since Nov. 2021
- From last TSC fiscal year report (9-2020 to 8-2021):
  - 855 Petitions for Review filed; 112 granted (~13% grant rate)
  - 214 Mandamus Petitions filed; 11 granted (~5% grant rate)
  - Once PFR granted: 59% reversed, 11% affirmed, 9% modified, 21% other
  - Average time from filing to opinion with oral argument: 10.5 months
  - For per curiam opinion, without oral argument: 13.75 months

INSURANCE LAW

American Nat'l Ins. Co. v. Arce

- Life insurance policy case involving claim of misrepresentation in application
- Court had to construe sec. 705.051 of the Insurance Code in light of common law to determine requirements for proof of scienter under statute
- Statute provides: misrepresentation in application for life, accident, or health insurance policy does not defeat recovery unless misrepresentation: (1) is of a material fact; and (2) affects the risks assumed.

American Nat'l Ins. Co. v. Arce

- Under common law, insurer could not defeat recovery unless it proved, among other things, that insured intended to deceive or induce insurer to issue policy.
- ANIC's view of statute: insurer could avoid payment based on "innocent, unknowing, or careless misstatement in an insurance application," so long as it was:
  - (a) a material fact, and
  - (b) either induced the policy's issuance or affected the premium charged.

American Nat'l Ins. Co. v. Arce

- Trial court agreed with ANIC
- Amarillo Court of Appeals reversed, holding insurer still must prove insured had intent to deceive (common-law standard)
- TSC affirmed CA on this issue
- Section 705.051 dates back to 1909; it has "long functioned side by side with the common law."
- Statute reenacted and recodified without substantive change, most recently in 2003.

American Nat'l Ins. Co. v. Arce

- Held: section 705.051 does not displace common-law rule because statute prescribes necessary, but not exclusive or sufficient, conditions for denying recovery under a contestable policy.
- So construed, statute does not inherently or necessarily conflict with settled law requiring pleading and proof of intent to deceive, in addition to statutorily mandated conditions.

American Nat'l Ins. Co. v. Arce

- Thus, insurers must plead and prove intent to deceive to avoid liability based on misrepresentation in application for life insurance, whether policy is contestable or not.
- Proof of material inaccuracy—not enough.
- Notice provision (705.005), requiring 90 days' notice of insurer's refusal to be bound by policy because of misrepresentation, did not apply because policy had 2-year incontestability period and premiums paid.

ExxonMobil v. National Union Fire Ins. Co.

- Issue: whether umbrella insurance policy incorporated payout limits in an underlying service agreement (SA) between Exxon and its independent contractor, Savage.
- Fire at Exxon refinery severely burned two Savage employees.
- They sued Exxon and settled for more than $24 million. National Union did not pay under its umbrella policy. Exxon sued.

Exxon Mobil v. National Union Fire Ins. Co.

- Law of Texas since 1886: "The policy is the contract; and if outside papers are to be imported into it, this must be done in so clear a manner as to leave no doubt of the intention of the parties."
- Was Exxon an "insured"? Policy says:
  - Insured means: ... any person or organization, other than the Named Insured, included as an additional insured under Scheduled Underlying Insurance, but not for broader coverage than would be afforded by such Scheduled Underlying Insurance.

Exxon Mobil v. National Union Fire Ins. Co.

- "Scheduled Underlying Insurance" included National Union's primary policy.
- Primary policy covered any person/org. to which Savage was obligated to provide insurance.
- SA obligated Savage to provide insurance for Exxon.
- Thus, umbrella policy provided coverage for Exxon.
- Next, how much?

Exxon Mobil v. National Union Fire Ins. Co.

- Umbrella policy disclaimed "broader coverage" than primary policy offered.
- National argued this prohibited coverage for losses primary policy did not reach.
- Exxon said it sought only the same coverage as primary policy, but at umbrella policy's higher limits, given that primary policies exhausted.
- Court of Appeals held: "broader coverage" incorporated the payout limits of the SA.

Exxon Mobil v. National Union Fire Ins. Co.

- CA theory: umbrella policy incorporated primary policy, and limits of coverage for Exxon as additional insured under that policy, in turn, "were informed by" its incorporation of the SA.
- TSC: "Informed by" is not a "clear manifestation" of intent to incorporate SA.
- Plus, umbrella policy said NOTHING about SA's payout limits.
- In any event, SA has no limits that umbrella policy could adopt. SA set only *minimum* insurance, not *maximum*.

- Finally, "broader coverage" refers to risks and liabilities that primary policy reaches, which means umbrella policy's limiting language protects insurer from claims that are unlinked to primary policy.
- Therefore, text of umbrella policy did not require a departure from "settled understanding" that umbrella policies provide greater limits for risks already covered by primary policies.
- Exxon is "insured" under umbrella policy.

INSURANCE CASE TO WATCH

Rodriguez v. Safeco Ins.

- TSC accepted certified question from Fifth Circuit:
  - Whether an insurer's payment of full appraisal award, plus any possible statutory interest, precludes recovery of attorney's fees in action under 2017-amended Texas Prompt Payment of Claims Act (Ins. Code Ch. 542A).
- District court (N.D. Tex.) held the answer was "yes"—no fee award.

Rodriguez v. Safeco Ins.

- Fifth Circuit certified question because:
  - only one state appellate court had ruled on issue;
  - federal courts were split;
  - strong comity interests were at play (final arbiters of state law should have a say on important questions regarding state insurance law); and
  - practical considerations favored certification (TSC would be "speedy" to address).
- TSC oral argument set for Oct. 4, 2023.

HEALTH CARE LIABILITY CLAIMS

Collin Creek Assisted Living v. Faber

- TSC reverses en banc opinion of Dallas Court of Appeals—whether plaintiff asserted a health care liability claim (HCLC) and had to serve expert report.
- A facility employee was pushing plaintiff's mother to a vehicle while she was seated backward in a walker. They hit a crack in sidewalk, both fell, and mother later died.
- Family sued, pleaded only premises liability.

Collin Creek Assisted Living v. Faber

- Plaintiff did not serve expert report.
- CA focused solely on petition and how claim pleaded, instead of underlying facts:
  - TSC: "The en banc majority's analysis of this issue was skewed at the outset because it took an overly narrow view of the relevant facts rather than considering the record as a whole."
- TSC: Lower courts must consider "entire court record," including pleadings, motions and responses, and relevant evidence properly admitted.

Collin Creek Assisted Living v. Faber

- Facility asserted this was HCLC related to safety. CA ruled it was not.
- TSC considered case in light of factors articulated in *Ross v. St. Luke's Hospital*.
- Court clarified that the only analysis under *Ross* is whether safety standards with a "substantive nexus" to health care have a sufficient relationship for claim to constitute HCLC.
- Court gave further explanation regarding the scope of the seven *Ross* factors and situations they were intended to address.

Collin Creek Assisted Living v. Faber

- In addition to safety and health care claims, TSC said *Ross* factors apply to "alleged departures from standards for health care providers that implicate safety."
- Safety claims do not require physician-patient relationship.
- Opinion is quite fact-specific but TSC considered evidence that:
  - facility was licensed health care provider;
  - it was providing personal care services; …

Collin Creek Assisted Living v. Faber

- to the resident to protect her against a certain condition (history of falls), on recommendation of her personal physician;
- state law required facility to protect physical health and safety of residents; and
- employee was providing treatment at the time of incident by assisting mother with ambulating, part of her personal care plan.

- All the *Ross* factors demonstrated a substantive nexus between provision of treatment to patient on recommendation of her physician and alleged violations of safety standards that led to mother's death.
- Claim was HCLC; expert report required.

In re LCS SP, LLC

- Early 2022 case – dealt with scope of pre-expert report discovery allowed under CPRC Chapter 74.
- Husband of former skilled nursing facility resident sued and sought discovery of facility's operating policies and procedures (P&Ps) for prior 5 years. Facility objected.
- Trial court denied discovery; Dallas Court of Appeals reversed.

In re LCS SP, LLC

- TSC reversed, holding trial court did not abuse discretion in denying motion to compel P&Ps, particularly as to P&Ps that were publicly available (by law).
- Second, the discovery stay in 74.351(s) applied to this type of discovery before plaintiff served an expert report:
  - Facility's P&Ps did not "relate to patient's health care," so exception in statute did not apply
- Plaintiff had to serve expert report

Uriegas v. Kenmar Residential HCS Svcs.

- Technically this one is from the current term—issued Sept. 15, 2023
- Flag it because it is another opinion in which TSC concludes expert report is sufficient (reversing Amarillo CA)
- Very fact-specific, but Court held: while "reports may lack sufficient specificity with respect to initial monitoring and fall protection," when viewed together, they sufficiently describe standard of care for someone like plaintiff who requires thorough evaluation for injuries and increased staff monitoring after a fall.

EMPLOYER LIABILITY & WORKER'S COMP.

Houston Area Safety Council v. Mendez

- Mendez submitted to workplace drug testing by HASC. HASC took samples. First samples processed by Psychemedics came back positive for cocaine.
- Mendez had never tested positive in 25 years and denied cocaine use. Two subsequent tests came back negative.
- Mendez sued HASC and Psychemedics for damages from ultimate loss of his job.

Houston Area Safety Council v. Mendez

- Trial court granted summary judgment to defendants; court of appeals reversed.
- Issue before TSC:
  - As matter of first impression, whether a third-party entity hired by employer to collect and test employee's biological samples for drugs owes employee a common-law duty to perform its services with reasonable care.
- TSC answered "no."
- Court considered traditional factors for deciding whether common-law duty exists.

Houston Area Safety Council v. Mendez

- Declining to impose the requested duty on drug-testing companies conforms with the common law's treatment of similar conduct—like the qualified privilege afforded to former employers for disclosing information about employees.
- Also, Texas law bars recovery of purely economic damages (like loss of earnings) in actions for negligent performance of services, absent professional malpractice, which is not at issue here.

Houston Area Safety Council v. Mendez

- Therefore, considering these duty factors:
  - risk to employees if not tested,
  - public safety if employees not tested,
  - process already highly regulated,
  - possible burdens on third-party testing administrators, and
  - impact on the employment-at-will doctrine,
- TSC holds third-party testing entities hired by an employer do not owe a common-law negligence duty to their clients' employees. Judgment for defendants.

Cameron Int'l v. Martinez

- Issue: whether special-mission exception to general rule—that employer is not vicariously liable for employee's negligence during travel to and from work—applied.
- Mueller finished his oilfield work for Cameron.
- His Cameron supervisor asked him to stay on "voluntary standby" for another possible job the next day.

Cameron Int'l v. Martinez

- Mueller went to dinner with his Cameron supervisor. Mueller then bought personal food and drink, refueled his vehicle, and headed to his trailer near the jobsite for the night.
- En route, he was in a fatal accident that caused 2 deaths. Family sued and asserted Cameron vicariously liable based on special-mission exception.
- Under "coming and going" rule, employee is not within course and scope of employment when traveling to-from work.

Cameron Int'l v. Martinez

- Special-mission exception applies if travel involves performance of regular duties or specifically assigned duties for the benefit of employer.
- Here, TSC held Mueller's travel to obtain personal groceries and fuel at his choice—and not at Cameron's direction—was not a special mission on employer's behalf or for employer's benefit.
- Worker's travel for personal necessities does not arise from business of employer.

Texas Tech Univ. Health Sciences Ctr. v. Niehay

- Issue: whether medical resident's morbid obesity was an "impairment" for purposes of TCHRA disability discrimination claim.
- Held: as matter of apparent first impression, morbid obesity does not qualify as "impairment" under TCHRA absent underlying physiological disorder or condition.
- Resident presented no evidence she had such a disability as defined by TCHRA.

Fortenberry v. Great Divide Ins. Co.

- Dallas Cowboys football player sought judicial review in state court of worker's comp. decision for knee injury sustained during training camp in California.
- He started training in Dallas in May; traveled to California in July.
- Insurer argued Dallas was improper venue.
- Venue statute (Labor Code § 410.252) required judicial review suit to be filed in county where employee resided at time of injury.
- "Reside" not defined in Labor Code.

Fortenberry v. Great Divide Ins. Co.

- Fortenberry contended he resided in Dallas County at time of injury, although he lived in a hotel in Irving.
- Dallas Court of Appeals held hotel could not be residence for venue purposes.
- TSC said this was "too rigid" of a reading of case law and CA failed to credit facts.
- Fortenberry testified he lived and resided at the hotel at the time of his injury in CA. He also had a 3-year contract with Cowboys.
- This showed intent to remain in Dallas. Dallas was proper venue for judicial review.

QUICK HITS

In re Chef's Produce

- Trial court struck defendant's counter-affidavit from physician, submitted under CPRC 18.001 to contest plaintiff's medical expenses (nearly $20,000).
- Per statute, counteraffidavit need only provide "reasonable notice" of basis on which defendant intends to controvert reasonableness and necessity of proffered medical expenses at trial.
- If does so, plaintiff must present expert testimony of medical expenses at trial.

In re Chef's Produce

- "Reasonable notice" does not hinge on admissibility of counter-affiant's testimony.
- Only has to allow plaintiff to understand "nature and basic issues in controversy," so plaintiff can prepare response.
- Affidavit here did so. Expert qualified. Expert assessed treatment, identified pre-existing conditions, discussed which treatment was medically unnecessary, and which treatment done at highly inflated rates (based on national databases).

In re Sherwin Williams

- Issue: Whether defendant showed good cause for a medical examination of plaintiff. Tex. R. Civ. P. 204.1.
- Here, good cause focused on why defense expert needed in-person exam of plaintiff instead of mere records review.
- TSC considered that plaintiff had engaged two medical experts who had examined him.

In re Sherwin Williams

- Defense expert had not—but expert explained in affidavit the benefits of in-person exam over medical records review.
- Orthopedic tests are subjective, and in-person exam allows doctor to determine if plaintiff is truthful or "malingering."
- Not allowing exam could subject expert to attack on credibility in front of jury (i.e., for not examining plaintiff).
- This evidence showed exam was least intrusive means for defense expert to opine fully on cause of plaintiff's injuries and current condition, incl. limitations on ability to work.

In re Central Oregon Truck

- Discovery dispute in personal injury case where plaintiff claimed she suffered TBI.
- Trial court denied all discovery requests.
- TSC held, after *K&L Auto Crushers*, plaintiff's post-accident medical billing info is relevant and discoverable.
- May bear on reasonableness of the amount charged, and reasonableness is an established limitation on recoverability of medical expenses as damages.

In re Central Oregon Truck

- Also, given plaintiff's TBI claim and inability to remember prior accidents, etc., requests for pre-accident medical, education, and employment records, as well as insurance records pertaining to her prior accidents, included information relevant to damages.
- Physical and mental conditions at time of accident (including as documented in insurance records) relevant to damages.
- Employment and education records relevant to loss of earnings claim.

Gregory v. Chohan

- Issue here was size of noneconomic damages award ($15 million) and whether record contained evidence to support both:
  - The *existence* of compensable mental anguish and loss of companionship, and
  - a rational connection between the injuries suffered and the *amounts* awarded.
- Plurality opinion only—majority of Justices could not agree on reasons (only result).
- Only six Justices participated; 3 recused.

Gregory v. Chohan

- Amount awarded for noneconomics must be "fair and reasonable *compensation*," not punishment.
- Does more to explain what does *not* constitute a proper basis to determine amount of compensation than what does.
- References to the price of fighter jets, value of artwork, or number of miles driven by defendant's trucks were not proper bases for jury to compute amount of mental anguish damages.

Gregory v. Chohan

- These encouraged the jury to base an ostensibly "compensatory" award on improper considerations that have no evidentiary connection to the injuries or to rational compensation of the family.
- TSC reaffirmed: "Juries may not simply pick a number and put it in the blank."
- Court also rejected a "shocks the conscience" standard for deciding if amount is too much; "too elastic" for practical use, also vague and subjective.
- Reversed and remanded for new trial.

THE END

Thank you!