TEXAS SUPREME COURT UPDATE

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QUESTIONS??

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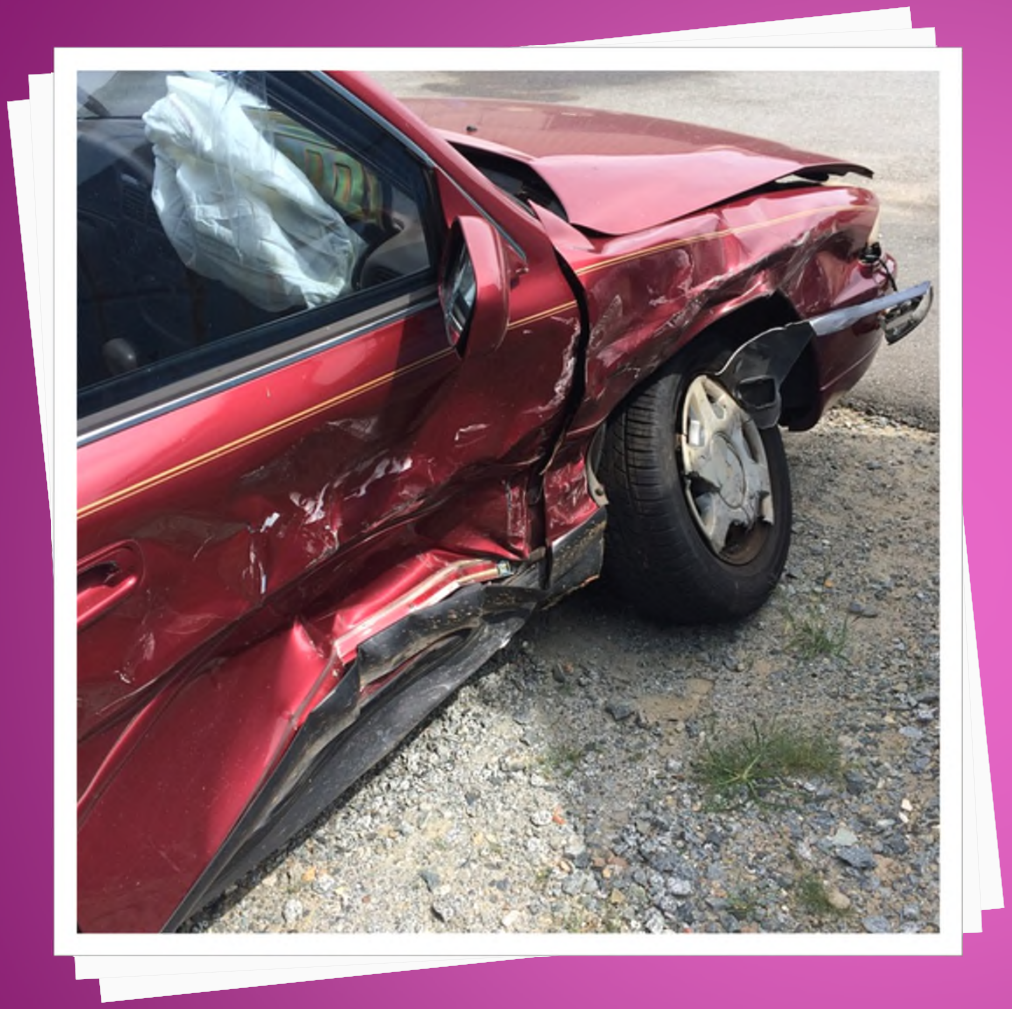
INSURANCE LAW



UNDERINSURED MOTORIST CASES

IN RE STATE FARM MUT. AUTO

- Suits by UIM policyholders seeking recovery following traffic accidents
- Insureds did not sue for breach of insurance policies – only extracontractual, Insurance Code claims
- Issue: whether bifurcation of trial is required where only statutory claims asserted
- Held: Insureds who bring only Insurance Code claims seeking policy benefits as damages must also succeed in an initial "car crash" trial to lay predicate for their statutory claim

- Nicastro and Dodds – Insureds
- Nicastro hurt in collision with Smith
  - N sought past and future medical of $438K, documentation of $11,747 incurred medical
  - SF approved N's acceptance of $30,000 settlement with Smith's insurer
  - SF took position N fully indemnified for medical expenses
  - Nicastro seeks UIM benefits ($100,000) from SF; SF refused

- Dodds injured in MVA with Cojchamale
  - Dodds sought past and future meds of $257K
  - SF approved Dodds' acceptance of settlement of $30K from Cojchamale
  - Dodds seeks UIM from SF; SF pays $18K; Dodds' policy limit $50K
- N & D sue SF and adjusters for amounts SF should have paid under their UIM policies
  - Failure to effectuate prompt, fair, equitable settlement of claim with respect to which SF liability had become reasonably clear (Tex. Ins. Code § 541.060(a)(2)(A))
  - Failure to promptly provide reasonable explanation of policy basis for denial (§ 541.060(a)(3)

- SF seeks bifurcated trial: before liability on Insurance Code claims can be determined, initial trial necessary to establish liability and underinsured status of other motorists
- N&D contend:
  - May recover UIM benefits as extracontractual damages without first establishing they are "legally entitled to recover" from underinsured motorists because did not allege breach of contract
  - *Menchaca* changed principles governing UIM claims

- SF: Not liable for Insurance Code claims unless Insured first establishes SF liability under UIM policy by obtaining judicial determination that other motorist is liable for crash and has insufficient insurance coverage to cover the Insured's damages
- N&D: SF liable irrespective of whether can prove entitlement to policy benefits and must show only:
  - SF failed to offer fair settlements when liability became "reasonably clear"
  - SF failed to provide reasonable explanation for denials of claims or offers to settlement

- TSC restated *Menchaca*'s only two paths an insured may take to establish damages caused by an insurer's violation of Insurance Code
- Right to recover benefits: if insured establishes, may recover benefits as actual damages under Ins. Code if insurer caused the loss of benefits
- If insurer's statutory violation causes injury independent of insured's right to recover policy benefits, insured may recover damages for that injury even if policy does not entitle insured to receive benefits.

- To establish injury independent of policy claim, must show damages truly independent of right to receive policy benefits
- N&D's only injury asserted is of inadequate payment of policy benefits
- Thus, *Menchaca* general rule applies and precludes recovery unless the policy entitles insureds to those benefits
- Issue is not whether *claims* are independent of right to receive policy benefits, but whether alleged *damages* are truly independent of insured's right to policy benefits

- Because no showing of injury independent of right to receive policy benefits, N&D must establish right to policy benefits
- Insurer's contractual obligation to pay benefits does not arise until liability and damages are determined
- N&D must first obtain determinations of third-party drivers' liability and amount of damages
- SF entitled to bifurcated trial for determination of underinsured motorists' liabilities under the UIM policies and if successful, then separate phased trial of Insurance Code claims

PROMPT PAYMENT OF CLAIMS ACT

HINOJOS V. STATE FARM LLOYDS

- State Farm accepted claim for hail damage and paid a sum, and insured contested valuation
- Eventually SF invoked appraisal clause, and paid additional sum after appraisal
- SF argued the timely appraisal award payment negated any PPCA liability
- Insured argued, even if partial payment timely, State Farm liable for delay in paying remainder of claim under PPCA
- TSC agreed with insured.

- As held in *Barbara Technologies* and *Alvarez*, payment of appraisal award is not an admission or determination of liability and has nothing to do with PPCA deadlines
- Thus, payment of appraisal award, after deadline for accepted claim expired, does not relieve SF of PPCA liability
- TSC also rejected Ct. App.'s ruling that the PPCA requires only a "reasonable payment" within the deadlines to avoid penalties
- Partial payment cannot discharge PPCA liability because it could induce insurers to make a nominal payment within the deadline just to avoid PPCA penalties

- The statute is worded in terms of a “claim” that “must be paid” to the insured, and this describes the full amount owed, not the amount the insurer agreed to pay.
- Thus, SF’s acceptance and partial payment of the claim within the deadline did not preclude PPCA liability for interest on amounts owed but unpaid when the statutory deadline expired.
- Partial payment only mitigates the damage resulting from PPCA violation.

EXTRINSIC EVIDENCE

LOYA INS. V. AVALOS

- Court adopts an exception to eight-corners rule:
- Courts may consider extrinsic evidence regarding whether the insured and a third party suing the insured colluded to make false representations of fact in that suit for the purpose of securing a defense and coverage where they would not otherwise exist
- Guevara, Flores, and Hurtados in accident; all agreed to say Guevara was driving
- Flores was expressly excluded from coverage under Guevara's policy

- Petition alleged Guevara was driving at time of accident
- Guevara recanted story in depo, admitted Flores was driving
- Loya sought summary judgment on coverage based on fraud, and trial court granted SJ
- Court of Appeals reversed, holding Loya had duty to defend based on eight-corners rule
- TSC reversed

- Evidence conclusively proved that excluded driver (Flores) was driving at time of accident
- Evidence conclusively proved parties conspired to lie to police and insurer to obtain coverage for accident
- Therefore, eight-corners rule does not bar extrinsic evidence to prove collusive fraud by insured in determining duty to defend
- When confronted with conclusive evidence of collusive fraud, the insurer does not have to file a dec suit on duty to defend and may terminate defense

MEDICAL REIMBURSEMENT

TEX. MUT. INS. V. PHI AIR MEDICAL

- This case has incredibly complicated issues resulting in a 60-page opinion!
- Basically, TSC held that the Americans with Disabilities Act did not preempt (replace) the Texas Worker's Comp Act's reimbursement schedules for air ambulance services
- Second, TSC held that the insurance companies were not required reimburse the full billed charges under Texas law and that Texas's general standard of fair and reasonable reimbursement applied to air ambulance services

DAMAGES AND BURDEN OF PROOF

GREAT AMERICAN V. VINES-HERRIN

- Petition for Review denied by TSC
- Construction of new home; defect claimed but defense denied (pre-*Don's Building*)
- Insureds arbitrate with homeowner without defense; arbitration awarded lump sum to insured/homeowner
- Coverage trial: determined three occurrences of separate property damage, one in each of three separate policy periods with total damages awarded in amount of lump sum arbitration award
- 1st policy period: Great American
- 2nd and 3rd policy periods: Mid-Continent
- No evidence presented by insured of allocation of lump sum arbitration award representing property damage for each individual occurrence

- 1st appeal: In absence of such evidence, duty to defend established
- 2nd appeal: Amount each insurer owed was a matter of damages, not coverage, but insurers were not jointly and severally liable for entire lump-sum award
- On remand: Neither the insured/homeowner nor the insurers presented evidence showing any type of allocation of the lump sum award – by carrier or by separate occurrence
- Trial court applied time-on-the risk allocation in first impression determination to apportion lump-sum award as damages
- Court of appeals concluded that by denying defense in arbitration, insurers lost the right to require complete allocation for each occurrence

WORKERS' COMPENSATION CASES

PATIENTS MED. CTR. V. FACILITY INS.

- Workers' compensation insurer sought review of SOAH decision that health care provider was entitled to more than carrier deemed due for surgical services for covered patient
- Held: burden of proof in contested case hearing is on party seeking review of initial medical fee dispute resolution decision of Division of Workers' Compensation
- Interpreting rules where provider initiated administrative process by requesting a medical fee dispute resolution (MFDR) but carrier, dissatisfied with Division's decision, continued process by requesting contested case hearing with SOAH
- The party requesting relief with SOAH carries burden of proof regardless of which party initiated MFDR

BERKEL V. LEE

- Workers' Compensation Act's exclusive remedy exception requires that D intend or know that its actions are substantially certain to injure a particular employee
- Skanska (general) subcontracts with Berkel to drill foundation pilings for large office tower and required Berkel to participate in uniform workers' compensation benefits
- Berkel used crane to drill 130' hollow auger into ground, supported by 150' steel rods (leads) that kept auger straight; crew pumps concrete grout through auger as it is removed

- DOA: crew begins new piling with insufficient grout in violation of company policy
- Grout hardens while waiting for more to arrive; auger is stuck
- Super instructs crane to bump auger; crane collapses during “bumping” and injures another worker’s (Lee) leg, requiring amputation
- Berkel determined to be Lee’s co-employer, claim fell within exclusive remedy provision

- COA determined that new trial required because jury charge improperly submitted the common-law intentional injury exception to the WC Act (i.e., that Berkel intentionally caused Lee's injury—that is, a Berkel crew member intended to injure Lee)
- TSC First Holds: legally insufficient evidence of intent (that Berkel believed its actions were substantially certain to result in a particular injury to a particular employee, not merely highly likely to increase overall risks to employees in the workplace)

- Lees request TSC apply doctrine of transferred intent to support the jury's finding because there was evidence that a Berkel employee knew that the acts would injure *someone*
- Court determined no evidence that Berkel knew or believed orders to continue bumping would *unavoidably* result in the crane or leads collapsing atop someone—so no evidence that Berkel believed its actions were substantially certain to injure any particular person

- Court next holds that no remand for new trial in the interests of justice is required
- Law upon which the case turns existed at time of trial
- No change or clarification of that law after trial
- Advocating for expansion of Texas law in the trial court without reliance on existing precedent that TSC later clarified or disavowed will not support remand in the interests of justice

CONSTRUCTION LAW

CPRC CHAPTER 95

LOS COMPADRES V. VALDEZ

- Accident at condos being built on S. Padre Island, owned by Los Compadres
- Workers working to build concrete pilings to support building; power line owned by AEP ran across back of property
- Subcontractor (Sub) and general contractor (GC) told workers to "work around" power line; but, while workers inserting a 25-foot piece of rebar, rebar contacted the power line and injured the workers
- Jury held Los Compadres, AEP, and Sub caused accident

- First, TSC held that evidence conclusively established owner Los Compadres was vicariously liable for actions of "GC" it hired, because GC controlled details of Sub's work:
  - Sub called GC for instructions on how to do work
  - Sub told by GC to work front to back of lot and keep working "around" power line
  - Sub owner testified GC "in charge" of project; similar testimony from workers
  - Los Compadres "hired" GC and paid him a salary to be project manager
  - GC signed building permit as "owner" or "agent of owner"

- Second, TSC held Chapter 95 applied to owner, Los Compadres, and plaintiffs had to prove it had actual knowledge of danger
- Ch. 95 applies when injury arises from the condition or use of an "improvement" that the contractor or subcontractor "constructs, repairs, renovates, or modifies."
- Issue: how broadly to define "improvement"
- "Improvement" cannot include the entire workplace (location where improvement being built)
- "Condition" is an "intentional or inadvertent state of being"

- If a dangerous “condition,” by reason of its proximity to “improvement,” creates a probability of harm to one who “constructs, repairs, renovates, or modifies” the improvement in an ordinary manner, it constitutes a “condition” of the improvement itself
- Thus, because power line was in close proximity to improvement on which plaintiffs were working (pilings), power line created a dangerous condition of improvement itself
- Plaintiffs had to prove Los Compadres had actual knowledge of dangerous condition

- Third issue – whether Los Compadres had no duty to warn because power line "condition" was open and obvious as matter of law
- TSC held presence of power line was open and obvious, and there is inherent danger working around electricity
- But, based on evidence, fact that power line was energized and, thus, dangerous, was not open and obvious as a matter of law
- Neither worker knew line was energized, and Sub's owner told them power was "cut off"
- Thus, Los Compadres still liable.

POLL:

EXISTENCE OF LEGAL DUTY TO PLAINTIFF

AEP TEXAS CENTRAL V. ARREDONDO

- Plaintiff fell in a hole left by an independent contractor hired to remove an electrical utility pole
- Sued both independent contractor (IC) and general contractor (GC)
- TSC held that GC did not retain a contractual right to control the IC's work:
  - Requirement for IC to have authorized rep on site at all times to whom GC can give instructions—was not enough because it says nothing about GC's control over specific means and methods of IC's work

- Provision requiring IC working on private property to do work as expeditiously as possible and the premises restored immediately—was not enough because it, too, said nothing about GC's control of IC's means, methods, or details of the work.

- Thus, GC did not owe any duty to plaintiff.
- Also, GC did not owe any duty based on inherently dangerous work
- Even if electrical work can be inherently dangerous, the job here was to remove a stub pole (one with all electric wires removed)

- Thus, the danger did not arise from inherently dangerous activity itself but rather from the manner of IC's performance
- In absence of any duty to plaintiff, GC could not be liable for IC's defective work

QUICK HITS

IN RE GILBERTO GONZALES

- Mandamus proceeding challenging trial court's allowing designation of "John Doe" responsible third party (RTP) in accident case
- Under CPRC 33.004(j), defendant designating an unknown person, or "John Doe," as RTP must timely satisfy pleading requirements
- Defendant never timely or adequately pleaded in compliance with 33.004(j)
- TSC also held 33.004(j) is only provision by which to designate unknown RTP; cannot use more lenient 33.004(a)

FLEMING V. WILSON

- TSC examined requirements for authenticating evidence under rule 901 of the Texas Rules of Evidence
- Rule 901 does not require extrinsic evidence to prove a document is authentic; the document itself can provide that evidence
- Trial court acted within its discretion to find copies of a jury verdict and final judgment from prior case, bearing clerk's office watermark and file-stamp, were authentic and, thus, valid summary judgment evidence

SPANTON V. BELLAH

- In a default judgment case, plaintiff must prove proper service of lawsuit on defendant that strictly complies with civil proc. rules
- Trial court's order authorized substituted service on defendants at a house on "Heather**s** Hill St."; but, process server stated he executed service at a house on "Heather Hill**s** St."
- This was not strict compliance, and nothing in record demonstrated defendants actually received service or that two streets were same street; default judgment reversed.

IN RE BROWN

- Interpreting the Tim Cole Act, which provides for compensation from the state for an inmate's period of wrongful imprisonment
- TSC held that, when judge of a proper court signs an actual-innocence order, the Comptroller must accept the court's legal and factual determinations
- Comptroller's duty to determine eligibility for compensation is "purely ministerial" and limited to facial review of verified copies of required documents

CASE TO WATCH

IN RE ALLSTATE INDEM. CO.

- No. 20-0071 - Involving CPRC 18.001 affidavits and counter-affidavits proving up plaintiff's medical expenses
- Issue: sufficiency of defense counter-affidavit challenging plaintiff's medical expenses, by registered nurse, who is medical coding and auditing expert
- Whether to extend *Gunn v. McCoy* to counter-affidavits, and whether trial court can strike for lack of reliability of expert's theory (not a ground in CPRC 18.001(f))
- Oral argument heard Feb. 24, 2021

THE END!
THANK YOU!