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C T H & G Quarterly

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WELCOME TO THE C T H & G QUARTERLY!

What decisions have Texas courts recently issued? Legal publications alert attorneys of new decisions, almost immediately. However, many professionals do not have quick access to the decisions or time to decipher how the rulings affect them. This quarterly newsletter contains discussions of recent decisions by the Texas courts and current trends in civil litigation.

If we have overlooked an area that may be of particular interest to you, please inform us! We welcome any comments, suggestions or questions that you might have regarding the newsletter.

EMPLOYER OWED NO DUTY TO WARN OF HAZARDS THAT ARE COMMONLY KNOWN OR ALREADY APPRECIATED BY THE EMPLOYEE.

Jack in the Box, Inc. v. Skiles, No. 05-0911 (Tex. Feb. 2007). Employee, Skiles, was employed by Petitioner as a tractor-trailer driver. Company trailers were equipped with automatic lift gates to assist drivers in loading and unloading food. Drivers were instructed to call the company's service center and report malfunctions. While Skiles was on a delivery, the lift gate would not operate. Skiles failed to call the service center immediately thereafter. Instead, Skiles decided to use a ladder to climb up and jump over the lift gate. Skiles was injured and as a result brought a negligence claim against Jack in the Box, Inc. The district court granted summary judgment in favor of Jack in the Box, Inc. The Fifth Court of Appeals reversed and the remanded the case. Jack in the Box, Inc. appealed to the Supreme Court.

Holding: Judgment reversed in favor of Jack in the Box, Inc. The Supreme Court stated that Petitioner owed no duty to warn Respondent of the obvious danger posed by his intended use of a ladder. The Court of Appeals relied on its own precedent in *Patino v. Complete Tire, Inc.,* 158 S.W.3d 655 (Tex. App.—Dallas 2005, pet. denied) to conclude that Petitioner had a duty to warn Respondent of a danger because the employment was dangerous and complex, and Petitioner was aware of the danger and had reason to know that Respondent was not. The Supreme Court disagreed and concluded that *Kroger Co. v. Elwood*, 197 S.W.3d 793 (Tex. 2006), not *Patino*, controlled in the case. In *Elwood*, the Supreme Court held that, "while the duty of ordinary care generally requires an employer to warn an employee of the hazards of employment and provide needed safety, equipment, or assistance, the employer owes no duty to warn of hazards that are commonly known or already appreciated by the employee." On appeal, Respondent relied on *Kroger Co. v. Keng*, 976 S.W.2d 882, 887 (Tex. App.—Tyler 1988), *aff'd*, 23 S.W.3d 347 (Tex. 2000), and argued that an employer has a duty to warn an employee of dangerous activities that are not normally a part of their duties. The Supreme Court distinguished this case from *Keng* reasoning that

Respondent was properly trained to unload food product as a regular part of his job and he voluntarily made a decision use the ladder. In this case, the dangers associated with using a ladder to jump over a lift gate were obvious to Respondent.

IT WAS IMPROPER TO IMPOSE STATUTORY PENALTIES FOR DELAYED PAYMENT AFTER INTERPLEADER IS FILED BY AN INSURER.

State Farm Life Ins. Co., v. Martinez, No. 05-0812 (Tex., Feb. 2007). In their Agreement Incident to Divorce, Ed Martinez agreed to pay Linda Martinez contractual alimony of $5,000 per month for ten years ($600,000). Ed also agreed to name Linda as irrevocable beneficiary on a $500,000 policy with State Farm providing that he could drop the policy or change beneficiaries so long as the unpaid alimony amount was covered.

In August 2002, shortly before he died, Ed signed a "Change in Beneficiary" form naming Respondent, Toni Wasson Martinez, as beneficiary. Petitioner refused to process the request because of the divorce decree and requested court documentation stating that Ed had the right to remove the former spouse. Ed died before acting on State Farm's request.

Shortly thereafter, State Farm received three conflicting claims to the policy proceeds. Respondent brought one of the claims. Two days later State Farm filed an interpleader depositing $506,061 in the courts registry. Respondent filed a cross-motion for summary judgment seeking the proceeds.

The trial court granted summary judgment in favor of Respondent. After final judgment, Respondent claimed that State Farm violated the Texas prompt payment of claims statute by failing to pay her within 60 days, thus entitling her to penalty interest and attorney's fees. State Farm appealed. The Court of Appeals affirmed judgment against State Farm, but reduced the penalty interest calculation. The Texas Supreme Court granted State Farm's petition to review the portion of the judgment assessing statutory penalties and attorney's fees against it.

Holding: Judgment reversed in favor of State Farm. While assessing penalties before interpleader is consistent with both the statutory and common-law rules, assessing them thereafter is not. The supreme court held that the lower courts erred in awarding penalty interest and attorney's fees for more than the 12 days of delay before interpleader was filed by State Farm.

The court reasoned that assessing penalty interest and attorney's fees after an interpleader is filed would punish insurers for doing exactly what Texas law encourages. The court also concluded that an insurer that tenders part of the proceeds must pay penalties only on the remainder, while an insurer that interpleads the entire policy proceeds owes nothing more, and should not have to pay penalties on the presumption that it does. Thus, once State Farm interpleaded the entire policy proceeds, it owed nothing more. Nothing in the Legislature's 1991 adoption of the 60-day deadline suggests its intent to discourage interpleader.

MODIFICATION OF A PROMISSORY NOTE TO INCREASE PRINCIPAL DID NOT INCREASE THE LIABILITY OF THE BORROWER SO LONG AS THE ORIGINAL GUARANTY WAS NOT CONTINUING AND BORROWER DID NOT GUARANTY THE MODIFICATION.

Beal Bank, SSB v. Biggers, 2007 Tex. App. LEXIS 1151 (Tex. App.—Houston [1st], Feb. 2007). In January 1993, Clark Warehouses executed a note to the SBA for $70,800. The note was singed by appellees in their capacities as president and secretary of the corporation. Each appellee also executed a SBA Guaranty as guarantor of the note.

In September 1993, appellees executed a Modification of Promissory Note that changed the principal amount of the loan to $130,800. The appellees signed the Modification twice: once in their corporate capacity (secretary or president) and once as "Borrower." Beneath these signatures, the Modification states: The undersigned endorsers, guarantors, and/or sureties on the above described Note hereby join in and consent to the above Modification Agreement. The signature lines under this statement were left blank.

Clark Warehouses filed for chapter 7 bankruptcy in 1997. The Bank sued appellees to collect on the note, and after a one-day bench trial, the trial court rendered judgment awarding the Bank $87,861.81 (principal and interest). In its sole issue, the Bank contends that the trial court committed error in failing to render judgment in favor of the Bank for the full principal and interest owning under the Note, including the increased principal

under the Modification. It argued that because the appellees agreed to the modification, they are not entitled to either a complete or partial discharge of their liability.

Holding: Texas case law recognizes that a guaranty may be continuing or specific. A continuing guaranty contemplates a future course of dealing between the lender and debtor, and the guaranty applies to other liabilities as they accrue. A specific guaranty applies only to the liability specified in the guaranty contract. The court found that the guaranties executed by the appellees granted the lender the power to modify or change the terms of the note or the interest rate on the loan. However, the guaranties specifically excluded the power "to increase the principal amount of the note of the Debtor to Lender." Thus, the appellees executed specific guaranties.

Although the appellees later sought to increase the principal amount of the loan, agreed and consented to that amount, and signed the note twice—once in their corporate capacities and once as "Borrower"—they did not sign in the spaces provided for "endorsers, guarantors, and/or sureties on the above described Note." Their consent to the additional $60,000 cannot be construed or implied to be a guaranty of the additional sum. Therefore, the court held that under the facts, appellees did not agree to be liable for the increased principal under the modified promissory note. Accordingly, the court overruled the Banks sole issue and affirmed the decision of the trial court.

THE DRAM SHOP ACT PREEMPTED COMMON LAW DUTY OWED UNDER PREMISES LIABILITY. FURTHER, UNDER THE SAFE HARBOR PROVISION OF THE DRAM SHOP ACT, ESTABLISHMENT DID NOT CONCLUSIVELY PROVE THAT IT DID NOT DIRECTLY OR INDIRECTLY ENCOURAGE EMPLOYEES TO SERVE ALCOHOL TO AN INTOXICATED CUSTOMER.

Parker v. 20801, Inc., 194 S.W.3d 556 (Tex. App.—Houston [14th] 2006). In November of 1999, appellant John Parker attended the grand opening of Slick Willie's Family Pool Hall, where he consumed alcoholic beverages throughout the evening. During the evening, appellant encountered Anthony Griffin, the son of appellant's ex-girlfriend. Appellant and Griffin eventually became intoxicated and began to argue inside the pool hall. As a result, the manager of the establishment told appellant to leave and escorted him out the door. Griffin followed the appellant to the parking lot where he suddenly punched appellant, causing him to fall and strike his head on the pavement. The fall fractured appellant's skull and caused permanent brain damage.

Appellant sued 20801 under Chapter 2 of the Texas Alcoholic Beverage Code, which is commonly known as the "Dram Shop Act." Appellant also pled a cause of action based on premises liability, alleging that the breach of 20801's duty to protect him from Griffin's intentional and criminal conduct was the proximate cause of his injuries.
The trial court granted 20801's motion for summary judgment on both issues stating that *Section 2.03* of the Dram Shop Act preempts appellant's common law causes of action. Additionally, 20801 argued—and the trial court agreed—that it had complied with the Safe Harbor defense which immunizes a commercial provider of alcoholic beverages from liability for its employees' provision of alcohol to an intoxicated customer if: (1) the employer requires employees to attend a commission-approved seller training program; (2) the employee has actually attended such a program; and (3) the employer has not directly or indirectly encouraged the employee to violate such law.

Holding: In regards to the appellant's first point of error, the appellant contended that he could simultaneously pursue both dram shop and premises liability causes of action, but the court disagreed. The court stated that a plain reading of *Section 2.03* provides only one meaning: the code preempts any common law action against a commercial provider of alcohol, therefore barring any premises liability claims against 20801.

Under the Safe Harbor Provision of the Dram Shop Act, the court agreed that 20801 established evidence of a policy prohibiting the employer's encouragement of direct or indirect violations of the Code. However, the Court found a fact issue existed as to whether 20801 actually enforced its policies on the night in question. The Court of Appeals held while policies and procedures were important, conclusive evidence of enforcement of the policies is of coequal importance in invoking the protection of the Safe Harbor defense. Accordingly, because the appellee did not satisfy this requirement, the

trial court improperly granted summary judgment on appellees Safe Harbor defense.

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