



# 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.

### LEGISLATIVE UPDATE

Governor Perry Vetoes H.B. 3281 – “paid or incurred” legislation. According to the Governor, if passed into law, House Bill 3281 would reverse Texas’ lawsuit reforms passed in 2003. The 2003 legislation limited the amount of medical bills a plaintiff could recover to the amount actually paid or incurred by the individual or their insurer.

The Governor further stated that our civil justice system holds a defendant accountable for economic damages caused, including medical bills. If a defendant has caused damage in addition to medical

expenses, those damages should be addressed and recovered under the rules our civil justice system, rather than inflating medical bills to cover them.

H.B. 3281 contained a second provision that allowed a person to recover for damages for future medical bills caused by their injury. The Governor said this provision correctly restated Texas’ tort reform and would have been acceptable by itself.

**A COURT REVIEWING A SUMMARY JUDGMENT SHOULD NOT IGNORE UNDISPUTED EVIDENCE IN THE RECORD IN ITS EFFORT TO RESOLVE ANY DOUBTS IN FAVOR OF THE NON MOVANT.**

*Goodyear Tire and Rubber Company v. Mayes*, No. 04-0993 (Tex. June. 2007). At 3:00 AM on February 27, 1999, Corte Adams fell asleep at the wheel, crossed the center line, and hit Patrick Mayes head-on. Adams was employed by Goodyear Tire and Rubber Company as a tire alignment technician at its Bryan, Texas shop. Adams regularly commuted from his home in Houston, Texas to Bryan, worked an eight-to-ten hour shift and then commuted approximately two hours home. Adams made the drive in vehicles owned by Goodyear and would occasionally shuttle tires between the Bryan and Houston locations. On the day of the incident, Adams made the drive from Bryan to Houston with a tire delivery. He arrived in Houston with tires from the Bryan office but the office was closed so he went to his father's apartment with the tires still in the back of the truck. Adams slept at his father's apartment

for approximately five hours. Upon waking up, Adams drove to the convenient store to get cigarettes for his father. The collision with Mayes occurred on the way to the store. Mayes sued Goodyear for vicarious liability and negligent entrustment under a respondeat superior theory.

The trial court granted Goodyear's motion for summary judgment and severed Mayes suit against Goodyear from his suit against Adams. On appeal, a divided court of appeals reversed and remanded the case.

**Holding:** Reversed on both grounds. The Supreme Court stated that the court of appeals erred by considering only evidence favorable to Mayes. The court of appeals misinterpreted the Supreme Court's standard of review from *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006). In *Sudan*, the Court held that, "an appellate court reviewing a summary judgment must consider all the evidence in the light most favorable to the nonmovant, indulging every reasonable inference in favor of the nonmovant and resolving any doubts against the motion." The court of appeals used this rule for the basis of its decision to only consider evidence favorable to Mayes. The Supreme Court disagreed with this approach and explained that undisputed evidence in the record cannot be disregarded. In this case, the evidence pointed in favor of Goodyear's motion. Specifically, the Court noted that the accident occurred during Adams' personal errand. A personal errand is not an act in furtherance of the employer's business. Even though the errand was done in a Goodyear truck and with Goodyear tires in the back, the Court held there was no genuine issue of material fact over whether, at the time of the incident, Adams was acting for the accomplishment of the object for which Goodyear hired him.

In regards to the claim for negligent entrustment, the Supreme Court relied on its own precedent in *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex.1987) and stated that Mayes must show that: (1) Employer entrusted the vehicle to employee; (2) Employee was an unlicensed, incompetent, or reckless driver; (3) At the time of entrustment, employer should have known the employee was unlicensed, incompetent, or reckless; (4) Employee was negligent on the occasion in question; and (5) Employee's negligence proximately caused the accident. The Court held

that Goodyear's knowledge of Adams' previous minor traffic violations did not raise a genuine issue of material fact as to whether Adams was or Goodyear should have known that Adams was, an incompetent or reckless driver at the time he was entrusted with the truck. The Court further held that Goodyear's knowledge of Adam's lengthy commute and strenuous work schedule were not enough to raise a fact issue that he was, or that Goodyear knew he was, an incompetent driver due to insufficient sleep.

**A DISCOVERY REQUEST WAS OVERBROAD WHEN IT WAS NOT REASONABLY TAILORED TO THE INCIDENT IN QUESTION.**

*In Re Allstate County Mutual Insurance Company et al.*, No. 06-0878 (Tex. June 2007). Following a car accident, two plaintiffs, Jorge Karim and Teresita Manollo brought a single suit against the other driver, Sang Cho, her insurance carrier, Allstate County Mutual Insurance Company, and the Allstate adjuster, David Gonzalez. The plaintiffs alleged that the insurer reneged on its settlement offer and plaintiffs sent the insurer and adjuster 213 discovery requests. Allstate and Gonzalez objected to much of the discovery on the grounds that it was irrelevant and overly broad.

The trial court rejected the objections to discovery and ordered the defendants to respond to all requests. The Thirteenth Court of Appeals denied mandamus relief without explanation.

**Holding:** Writ of mandamus conditionally granted. The Supreme Court stated that reasonable discovery requires some sense of proportion. Here, the limited scope of plaintiffs' claim and the amount at issue did not warrant the extensive discovery requests. The requests made by the plaintiffs were overbroad as to time, location, and scope, and were not tailored to the dispute between the parties. Furthermore, the Court stated that with today's technology, it is easy to reissue every discovery request ever sent to an insurer. However, this practice is prohibited because it is by definition not reasonably tailored.

**A DRAM SHOP WAS NOT RESPONSIBLE FOR ALL DAMAGES CAUSED BY AN INTOXICATED PATRON**

*F.F.P. Operating Ptnrs., L.P. v. Duenez*, No. 02-0381 (Tex., Nov. 2006). After spending the day consuming a case and a half of beer while cutting firewood, Ruiz

drove to a Mr. Cut Rate owned by F.F.P. and purchased a twelve pack of beer. Ruiz then drove onto a nearby highway and swerved into oncoming traffic several times ultimately striking the vehicle in which the Duenez family was traveling. There was conflicting testimony whether Ruiz actually drank any of the beer which he purchased at Mr. Cut Rate. The trial court severed F.F.P.'s cross-action against Ruiz for contribution. Subsequently the jury returned a verdict for \$35 million against F.F.P. The court of appeals affirmed holding that in third party actions under the Dram Shop Act in which there are no allegations of negligence on the part of the plaintiffs, a provider is vicariously liable for damages caused by those it serves and such shop is not entitled to contribution for the portion of the intoxicated person's negligence.

**Holding.** Judgment of the court of appeals is reversed and remanded for a new trial. The Texas Supreme Court held that the Dram Shop Act does not make a provider vicariously liable for the conduct of an intoxicated person. Imposing vicarious liability in dram-shop cases conflicts with Chapter 33 of the Texas Civil Practice and Remedies Code and the Texas Proportionate Responsibility Act. The Court held that dram shops are responsible for the proportion of damages they cause or contribute to cause, as set forth in the Proportionate Responsibility Act. The Court noted that the Chapter 33 proportionate responsibility scheme includes exceptions for certain torts, but claims against providers of alcohol are not among those exceptions, therefore, dram shops are entitled to contribution from responsible third parties to the extent that such third party contributed to the damages. In so holding, the Court affirmed its previous holding in *Smith v. Sewell* that the proportionate responsibility statute includes claims under the Dram Shop Act.

The Texas Supreme Court next addressed the trial court's severance of F.F.P.'s claim against Ruiz, the intoxicated driver. The Court held that F.F.P.'s claim against Ruiz was not one for indemnification that could be properly severed, but it was instead a claim for contribution for Ruiz's proportionate share of the damages for which he is responsible. The Court held that the trial court abused its discretion in severing F.F.P.'s claim against Ruiz, proceeding to trial with F.F.P. as the only defendant, and refusing to submit jury questions for determination of Ruiz's

negligence and proportion of responsibility. Such abuse of discretion constituted reversible error.

In denying the motion for re-hearing, the Court withdrew its earlier opinion issued on November 3, 2006 and issued substituted opinions.

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