



CTH & 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.

RECENT SUPREME COURT DECISIONS

AN INSURER UNDER A COMMERCIAL GENERAL LIABILITY (“CGL”) POLICY HAD A DUTY TO DEFEND ITS INSURED, A HOME BUILDER, AGAINST A HOMEBUYER’S CLAIMS OF DEFECTIVE CONSTRUCTION. FAILURE TO DO SO CREATED A BREACH OF DUTY TO DEFEND UNDER THE TEXAS INSURANCE CODE.

Lamar Homes, Inc. v. Mid-Continent Cas. Co., 50 TEX. SUP. J. 1162, No. 05-0832 (Tex. Aug. 2007). Vincent and Janice DiMare purchased a

new home from Lamar Homes, Inc. and several years later encountered problems that they attributed to defects in their foundation. The DiMares sued Lamar complaining about these defects. Lamar forwarded the lawsuit to Mid Continent Casualty Company seeking defense and indemnification under a commercial general liability (“CGL”) insurance policy.

Mid-Continent refused to defend, prompting Lamar to seek a declaration of its rights under the CGL policy. Lamar also sought recovery under *article 21.55 of the Texas Insurance Code*. (The statute was recently recodified, without substantial change, as *sections 542.051-.061 of the Texas Insurance Code*)

Regarding the duty to defend, there is a disagreement among Texas courts about the application of a CGL policy under the circumstances of this case. Therefore, the Fifth Circuit submitted certified questions to the Texas Supreme Court in order to resolve the conflict.

The court submitted the following questions: (1) when a homebuyer sues his general contractor for construction defects and alleges only damage or loss of use of the home itself, do such allegations allege and “accident” or “occurrence” sufficient to trigger the duty to defend or indemnify under a CGL policy? (2) When a homebuyer sues his

general contractor for construction defects and alleges only damage to or loss of use of the home itself, do such allegations allege “property damage” sufficient to trigger the duty to defend or indemnify under a CGL policy? (3) If the answers to certified questions 1 and 2 are answered in the affirmative, do sections 542.051-.061 of the Texas Insurance Code apply to a CGL insurer’s breach of the duty to defend?

Holding: The Court concluded that under the first question submitted to the court, allegations of *unintended* construction defects may constitute an “accident” or “occurrence” under the CGL policy. In answering this question, the Court made a strong distinction between intentional and unintentional acts. The Court further stated that an intentional action is not an accident and thus not an occurrence regardless of whether the effect was unintended or unexpected. Regarding the second question submitted, the Court held that the allegations of damage to or loss of use of the home itself may also constitute “property damage” sufficient to trigger the duty to defend under a CGL policy. Accordingly, as to the duty to defend, the Court answered the first two questions in the affirmative. The Court did not reach the duty to indemnify, given that duty is not triggered by allegations, but rather by proof at trial. Finally, the Court concluded that sections 542.051-.061 of the Texas Insurance Code do apply to an insurer’s breach of the duty to defend and accordingly answered the third question, yes.

CONTRACTUAL SUBROGATION CLAUSES TRUMPED THE EQUITABLE “MADE WHOLE” DOCTRINE, ALLOWING INSURANCE COMPANIES TO RECOVER PAYMENTS MADE TO AN INSURED REGARDLESS OF WHETHER OR NOT THE INSURED WAS “MADE WHOLE.”

Fortis Benefits v. Cantu, 50 TEX. SUP. J. 965, No. 05-0791 (Tex. June 2007). Vanessa Cantu was involved in a severe car wreck, she sued several defendants, and accumulated past medical expenses in excess of \$350,000. Her insurer, Fortis Benefits, paid approximately \$250,000 of those past expenses. During the pretrial stage, Fortis had agreed with all the parties that they would only seek reimbursement from Cantu pursuant to the insurance policy.

Prior to trial, Cantu settled for \$1.445

million. Cantu and Fortis disagreed over what amount, if any, should then be paid to reimburse Fortis. According to Cantu, she had not been “made whole” and thus owed nothing to Fortis. To be made whole, Cantu argued, she would need compensation for her estimated \$7 million in future medical expenses, exclusive of pain and suffering. Because Cantu didn’t feel that she was “made whole”, she refused to pay Fortis anything as reimbursement for past medical expenses.

Fortis had included both “subrogation” and “reimbursement” clauses in the insurance policy that, on its face, would entitle Fortis to full reimbursement. Cantu argued that the “made whole” doctrine precluded Fortis’ contractual claims of subrogation and reimbursement. Both the trial and appellate courts agreed. The Texas Supreme Court, however, had a different opinion.

Holding: Reciting the history of the “made whole” doctrine, the Texas Supreme Court first made it very clear that the “made whole” doctrine was still alive and well in Texas. This case does not do away with that doctrine. There are differences, however, between “equitable subrogation” and “contractual subrogation.” The “made whole” doctrine only applies to the former.

In other words, the court will only impose the “made whole” doctrine in the *absence* of a valid agreement to the contrary. “Contractual subrogation clauses express the ‘parties’ intent that reimbursement should be controlled by agreed contract terms rather than external rules imposed by the courts.” Only when these agreements offend public policy will the court disapprove. Otherwise, the court concludes, “Parties are...free to negate the ‘made whole’ doctrine contractually, and to do so before an event occurs that triggers medical benefits under the policy.” Fortis was able to recover the \$250,000 paid out in past medical expenses.

EXPERT MEDICAL EVIDENCE WAS REQUIRED TO PROVE CAUSATION UNLESS COMPETENT EVIDENCE SUPPORTS A FINDING THAT THE CONDITIONS IN QUESTION AND THE NECESSARY MEDICAL TREATMENT FOR THE CONDITIONS ARE WITHIN THE COMMON KNOWLEDGE AND EXPERIENCE OF LAY PERSONS.

Guevara v. Ferrer, 50 TEX. SUP. J. 1182, No. 05-1100 (Tex. Aug. 2007). Arturo Labao was a

passenger in a vehicle involved in a collision. Arturo was injured and taken to a hospital emergency room by ambulance. Arturo died, and suit was brought by his heirs Pacifico and Corazon Labao Ferrer. The only testimony at trial regarding damages came from Pacifico and Corazon. Their testimony included Arturo's condition immediately after the accident, his subsequent surgery's, and the medical bills relating to those surgery's. The jury found damages in the amount over \$1.1 million for Arturo's medical expenses and \$125,000 for pain and suffering.

After the jury verdict, the trial court granted Judgment Notwithstanding the Verdict holding that there was no evidence that the conditions treated were caused by the accident. The Court of Appeals reversed and remanded by holding that there was legally sufficient evidence of causation. The Court of Appeals came to this conclusion by stating that a sequence of events provided a strong, traceable connection between the event and the condition.

Holding: In considering the causation evidence, the Texas Supreme Court looked to the general rule that expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of jurors. Further, proving that the event sued upon caused the plaintiff's alleged injuries is part of proving the amount of damages to which the plaintiff is entitled. The causal nexus between the event sued upon and the plaintiff's injuries must be shown by competent evidence. In relation to lay testimony, the court stated that lay testimony is adequate to prove causation in those cases in which general experience and common sense will enable a layman to determine, with reasonable probability, the causal relationship between the event and the condition.

In concluding, the Court held that non-expert evidence of circumstances surrounding the accident and Arturo's complaints was sufficient to allow a layperson to determine that Arturo's immediate post-accident conditions were causally related to the accident. On the other hand, the evidence was not legally sufficient to prove what conditions generated all the medical expenses or that the accident caused all of the conditions and

the expenses for their treatment. Therefore, the Court reversed the Court of Appeals' judgment.

PLAINTIFF'S COUNSEL OPENED THE DOOR DURING VOIR DIRE FOR PRIOR STATEMENTS MADE IN A SUPERSEDED PLEADING, THUS WAIVING OBJECTIONS TO THOSE ISSUES WHEN RAISED BY THE DEFENDANTS.

Bay Area Healthcare Group v. McShane, 50 TEX. SUP. J. 866, No. 05-1069 (Tex. June 2007). The McShane's sued several Bay Area hospitals and doctors for negligence after their daughter was born with a birth defect. Before trial, the McShane's non-suited two of the doctors and amended their pleadings to reflect that decision. Plaintiff's filed a motion requesting the court to prohibit mention of the fact that the doctors had been sued. This motion was denied. At trial, neither party attempted to introduce the superseded pleadings into evidence, but the attorneys for both sides discussed the status of the two non-suited doctors. Witnesses also testified, over objection, that the McShane's had previously sued the doctors. After a three week trial, the jury returned a 10-2 verdict in favor of the Bay Area hospitals. Subsequently, the trial court signed a take nothing judgment. The Court of Appeals reversed and remanded, concluding that the trial court abused its discretion by admitting evidence of the prior suit.

Holding: The Texas Supreme Court addressed whether the statements regarding the superseded pleadings were admissible at trial. On this issue, the court reasoned that evidentiary rulings are committed to the trial court's sound discretion. Even if a trial court errs by improperly admitting evidence, reversal is warranted only if the error probably caused the rendition of an improper judgment. Further, statements from pleadings, depending on their content, could potentially be excluded as irrelevant or unfairly prejudicial. But, the Supreme Court held the McShane's were not entitled to this argument because their attorney was the first to allude to the doctors' party status. The Court went on to state that testimony is not inadmissible on the sole ground that it is "prejudicial" because in our adversarial system, much of a proponent's evidence is legitimately intended to wound the opponent. Therefore, the

court concluded that the information regarding the superseded pleadings did not carry a probative value which was substantially outweighed by the danger of *unfair* prejudice.

“SOME” EXPOSURE RULED INSUFFICIENT TO UPHOLD JURY VERDICT IN FAVOR OF AUTO MECHANIC ASBESTOS PLAINTIFF; ASBESTOS MUST BE A “SUBSTANTIAL FACTOR” IN INJURY.

Borg-Warner Corporation v. Flores, 50 TEX. SUP. J. 851, No. 05-0189 (Tex. June 2007). Arturo Flores, a sixty six year old retired break mechanic, filed suit against Borg-Warner, a manufacturer of break pads, for asbestos exposure leading to asbestosis. During the week long trial, Flores presented two experts – a pulmonologist and an “independent consultant” holding a PhD in the field of toxic substance control. Plaintiff’s presented the obvious evidence: Flores was exposed to break pads containing asbestos for a few years, developed symptoms later in life, and is thus suffering from asbestosis. The jury returned a favorable verdict for Flores. Borg-Warner appealed the verdict. The Court of Appeals upheld the trial courts decision. Borg-Warner appealed to the Texas Supreme Court.

Holding: The Supreme Court set out a relatively new standard for asbestosis causation. The court held: “In asbestos cases...we must determine whether the asbestos in the defendant’s product was a *substantial factor* in bringing about the plaintiff’s injuries.” This was a deviation from the *Lohrmann* test normally cited in these cases, namely that of “frequency, regularity, and proximity.” The court then focused on the *dose* of asbestos Flores may have been exposed to during his employment as a break mechanic. There was no evidence presented as to what amounts of asbestos Flores inhaled while working as a break mechanic. The court held that this was simply insufficient to uphold a jury finding of causation. There was no evidence that the exposure was a *substantial factor* of Flores’ current problems; thus “the jury could not evaluate the quantity of respirable asbestos to which Flores might have been exposed or whether those amounts were sufficient to cause asbestosis.” The court went on: “In a case like this, proof of mere frequency, regularity, and proximity is necessary but not sufficient, as it

provides none of the *quantitative* information necessary to support causation under Texas law.”

The court did not, however, remove all hope from asbestos litigators. “Substantial-factor causation, which separates the speculative from the probable, need not be reduced to mathematical precision...Defendant specific evidence relating to the *approximate dose to which the plaintiff was exposed*, coupled with evidence that the dose was a *substantial factor* in causing the asbestos-related disease, will suffice.” That was not present in this case. Judgment was reversed and entered in favor of the defendant.

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