

## FALL 2011 NEWSLETTER

### COMMERCIAL TRUCKING LITIGATION UPDATE

By Dean Foster

1. *Lancer Insurance Company v. Garcia Holliday Tours, 54 Tex. Sup. J., 1452 (Tex. 2011).*

The question in this appeal was whether the transmission of a communicable disease from a driver of a motor vehicle to a passenger is a covered loss under a business auto policy, which afforded coverage for accidental bodily injuries resulting from the vehicle's use. The Supreme Court noted that it was an issue of first impression in the State of Texas and perhaps nationally.

Garcia Holliday Tours operated a commercial bus company in South Texas. It contracted with the Alice ISD to provide a bus and driver for a field trip to Six Flags Fiesta Texas in San Antonio, Texas for members of the Alice High School Band. The assigned bus driver was coughing during the trip, and upon their return, the driver was hospitalized after being diagnosed with an active case of tuberculosis.

Tuberculosis is a bacterial infection that can live in a person's body without making the carrier sick. In the inactive state, it is not contagious. Active tuberculosis, on the other hand, is contagious and is commonly transmitted by the infected person coughing or sneezing. The vast majority of tuberculosis patients contract the infection by inhalation of the sputum coughed into the air, where it may float about in the form of tiny globules for a considerable time and distance.

After learning of the driver's diagnosis, the bus passengers were tested for tuberculosis and several tested positive for latent TB. These passengers subsequently sued the driver and the bus company asserting that they were negligently exposed to the disease as a result of being confined on the bus with the infected driver. The bus company notified its insurance carrier, Lancer Insurance Company, but Lancer refused to defend the claim maintaining that such claims were not covered under the policy. Left to defend itself, the bus company proceeded to trial where the jury found it and the driver liable and awarded over \$5,000,000.00 in damages to the passengers who had contracted the disease. After Judgment in the passenger's suit, the bus company and the driver sued Lancer, asserting contractual and extra contractual claims and seeking a declaration of rights under the business auto policy. The passengers, now Judgment creditors of the insured, intervened also seeking a declaration of Lancer's obligations under the policy.

The trial Court concluded that the policy covered this type of occurrence and rendered summary judgment that the insurance carrier owed a duty to indemnify the insured. The Court of Appeal agreed that the policy might provide coverage for such a claim but reversed the summary judgment and remanded the case to the trial Court to resolve a factual dispute about whether the passengers had contacted the disease while in the vehicle.

The Texas Supreme Court concluded that communicable diseases are not an insured risk under a business auto policy, and therefore, reversed and rendered judgment in favor of the insurance carrier. The Supreme Court concluded that the transmission of a communicable disease from a bus driver to his passengers was not a risk assumed by the insurance carrier because the passenger's injuries did not result from the vehicle's use, but rather from the bus company's use of an unhealthy driver. The bus, in its capacity as a mode of transportation, did not produce, and was not a substantial factor in producing the passenger's injuries.

2. ***Schultz v. Lester, No. 05-09-01549-CV; (Tex. App. – Dallas, July 29, 2011, No pet.), 2011 Tex. App. Lexis 5866.***

The Plaintiff's appealed from the court's take nothing judgment in favor of Melvin Lester and M & K Logistics, Inc. Among other issues, appellants alleged that the trial court erred by admitting expert opinion testimony of the investigating police officer.

Lester, an employee of M&K, was driving a tractor trailer West on I-30 in Garland, Texas. Sonya Schultz, appellant's daughter, was also driving West on I-30 at approximately 65-75 mph. Schultz passed Lester on his left, crossed in front of Lester's vehicle, and hit another truck. When Lester saw Schultz pass in front of him, he touched the brake, took his truck out of gear, and steered to the left to avoid a collision between Schultz and the other truck. After the initial impact, Schultz' vehicle spun out of control and shot back across the road directly in front of Lester. Lester collided with Schultz' vehicle as it was spinning in front of him. Schultz died at the scene from injuries sustained in the accident.

Appellants' sued Lester and M&K for negligence, and included claims for negligent hiring, training and supervision against M&K. After considering the evidence, the jury found Schultz 100% negligence for the accident. On appeal, the Plaintiffs contend that the trial Court erred in admitting into evidence, over objection, expert testimony of Officer Clark allowing him to testify "as an accident reconstruction expert and to give expert opinion testimony concerning the cause of the accident and who was at fault for the accident."

On appeal, the Court noted that Officer Clark had obtained his basic, intermediate, advanced and reconstruction certifications. As a result, the Court concluded Clark's qualifications were sufficient to give an expert opinion concerning the cause of the accident. The Plaintiffs also argued that Clark's opinions were not based on a reliable foundation because his opinions had never been tested, were solely based upon his subjective interpretations and observations, had never been published or peer reviewed, and contained analytical gaps. In the Court's review of Clark's testimony it was shown that he had visually observed the scene of the accident when he arrived. He contacted Officer Chris Byrd, who was the lead investigator on the accident and walked the scene with him while discussing the accident. Clark observed the debris on the roadway and took a laser measurement of the debris field. Clark also determined there were no skid marks due to the wet condition of the road. Clark spoke with Lester and the driver of the other 18 wheeler that struck Schultz' vehicle. The day following the accident he met with and took written statements of Lester, a witness to the accident, the driver of the other 18 wheeler that initially struck Schultz' car. He testified that both truck drivers described a white

car driven by Schultz passing them at a high speed prior to the accident. As a result of this investigation, Clark concluded there was nothing Lester could have done to avoid Schultz' car after it spun out of control. From the Court's review of Clark's testimony, it concluded there was no analytical gap between the data Clark collected and the data relied on in his investigation or in the formation of his opinion as to causation. The Court therefore concluded that the trial Court did not abuse its discretion in admitting Clark's expert testimony.