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## The Ninth Annual Texas Legal Update

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### Texas Tort Law Update *Presented by Don D. Martinson* *Written by Leslie Echols Pitts*

#### I. Arbitration

A. ***E. Tex. Salt Water Disposal Co. v. Werline*, 307 S.W.3d 267 (Tex. March 12, 2010).**

In *E. Tex. Salt Water*, the Court addressed whether an appeal could be taken under the Texas Arbitration Act from a trial court order that denied confirmation of an arbitration award, vacated it and directed that the dispute be re-arbitrated. The Texas Supreme Court held that because the trial court's judgment expressly denied confirmation of the arbitration award, it was appealable under a literal reading of the Act's provision permitting appeals of orders "confirming or denying confirmation of an award." Three justices dissented, arguing that such orders should be treated instead, for purposes of appeal, like new trial orders.

Motion for rehearing was denied in the case on May 7, 2010.

B. ***In re Rubiola*, 2009 Tex. App. LEXIS 1564 (Tex. App. - San Antonio Mar. 4, 2009), oral arguments on mandamus set, Case #03-0309 (Tex. April 9, 2010).**

On September 16, 2010, the Texas Supreme Court heard arguments in *In re Rubiola*, on Rubiola's petition for writ of mandamus seeking an order compelling arbitration of a dispute over the sale of their home. Although the real estate contract executed by the purchasers did not contain an arbitration agreement, subsequent financing documents did. After the transaction closed, the purchasers began experiencing problems with the home and sued the Rubiolas, arguing that the arbitration agreement signed in connection with the mortgage contract did not apply because (1) the Rubiolas were not signatories to the contract; or (2) if signatories, the terms of the arbitration agreement do not cover the claims involved.

Oral arguments were heard by the Court on September 16, 2010.

#### II. Damages

A. ***Minter v. Great Am. Ins. Co.*, 2010 U.S. App. LEXIS 17985 (5th Cir. Tex. Aug. 27, 2010).**

In *Minter*, the insurance issue before the Fifth Circuit was whether exemplary damages awarded in

an underlying personal injury lawsuit against an intoxicated truck driver and its owner were insurable under Texas law. Applying the “two-step process” announced in *Fairfield Ins. Co. v. Stephens Martin Paving, L.P.*, 246 S.W.3d 653 (Tex. 2008), the Court held that they were not, as a matter of general Texas public policy, given that the accident represented the driver’s third DWI conviction. The district court's judgment as to the excess insurer being liable for exemplary damages was reversed.

**B. *Bennett v. Reynolds*, 315 S.W.3d 867 (Tex. June 25, 2010).**

In *Bennett*, the Texas Supreme Court clarified the standards for reviewing exemplary damage awards in Texas. Litigation ensued between feuding neighbors over the improper conversion and auction by one of thirteen head of the other’s cattle. Although acquitted of felony theft, a civil jury assessed actual damages of \$5,327.11 (the cattle’s market value) against the defendant neighbor, together with exemplary damages totaling \$1,250,000 (against the defendant neighbor and his corporation).

The Court held that the evidence was legally sufficient to uphold the exemplary damages award under applicable state law, but that the award was unconstitutionally excessive because it violated due-process constraints. The case was remanded to the court of appeals for remittitur consistent with controlling exemplary-to-compensatory ratio analysis, holding further that the liable neighbor’s acts were chargeable to the defendant corporation and thus an award of exemplary damages against the same authorized under state law.

**C. *In re Columbia Med. Ctr. of Las Colinas*, 306 S.W.3d 246 (Tex. March 12, 2010).**

In this original proceeding, the issue was whether the trial court abused its discretion by refusing to enter an order reducing punitive damages after a portion of the economic damages were vacated. In the underlying suit, plaintiffs won a jury verdict on their medical malpractice claims against the hospital. The trial court and court of appeals awarded them economic and punitive damages. Before the reviewing court, the portion of the court of appeals' judgment awarding loss of inheritance damages was reversed and judgment was rendered that respondents take nothing on that claim. After the reviewing court issued its mandate, the hospital attempted to tender payment, subtracting the loss of inheritance damages amount, and reducing the punitive damages amount proportionately. When the payment was refused, the hospital moved for a modified final judgment that would effectuate the mandate by reducing the economic damages award appropriately, as well as by reducing the punitive damages award to twice the amount of the economic damages award the reviewing court affirmed, plus interest. The trial court denied the motion.

The Court held that trial courts must give effect to statutory caps on damages when the parties raise the issue, regardless whether an appellate court judgment expressly commands it, and thus the trial court abused its discretion by refusing to enter final judgment that reduced the punitive damages appropriately.

**III. Evidence**

**A. *Haygood v. Garza de Escabedo*, 283 S.W.3d 3 (Tex. App. – Tyler 2009), *pet. granted*, 2010 Tex. LEXIS 307 (April 9, 2010).**

At issue in *Haygood*, is whether Texas law limiting recovery to the amount actually paid or actually incurred by or on behalf of an injured party prohibits a plaintiff from introducing evidence of all past

medical expenses rather than only those expenses the plaintiff and his or her insurer actually paid to the health care provider.

Haygood sued Escabedo for injuries sustained in a car accident. Therein, he was allowed to present evidence of the amount that he was billed, despite the fact that most of that amount had been written off. On review, the court or appeals held that applicable state law – i.e., Tex. Civ. Prac. & Rem. Code §41.0105, is a measure of damage that not only limits the amount of damages recoverable but also affects the relevance of evidence offered to prove damages. Because the evidence allowed reflected only the amount “initially incurred” rather than that “actually incurred,” it was found both irrelevant and legally insufficient to support the trial court’s judgment. Haygood argues that the statute should be applied as a measure of damages to reduce a jury verdict, not to determine the relevance of the evidence a plaintiff may present.

The Texas Supreme Court granted review in the case on April 9, 2010, and the case was argued on September 16, 2010.

**B. *Speedy Stop Food Stores v. Reid Rd. Mun. Util.*, 282 S.W.3d 652 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2009), *pet. granted*, 2010 Tex. LEXIS 316 (April 9, 2010).**

*Speedy Stop Food Stores*, involves an appeal from a summary judgment entered in a condemnation suit. At issue is whether Texas’s longstanding rule that a property owner who is familiar with the market value of his property may testify regarding that market value, even if he is not qualified or designated as an expert witness, applies to corporate property owners. A matter of first impression in Texas, the court of appeals concluded that Property Owner Rule applies to all property owners, including corporate owners.

The Texas Supreme Court granted review in this case on April 9, 2010, and the case was argued on October 12, 2010.

**C. *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230 (Tex. March 12, 2010).**

In *TXI Trasnp.*, a dispute arose over the admission of immigration status evidence in a truck accident case. At trial, over forty references to the defendant driver’s immigration status and over fifty references to his misrepresentations concerning that status were allowed. Judgment was rendered against the driver and damages awarded. Admission of the immigration evidence was upheld by the court of appeals, finding that the same was relevant for impeachment purposes; or, alternatively, harmless error. The Texas Supreme Court disagreed, holding that the driver’s immigration status was a collateral matter not relevant to proving a material issue and that the evidence was not admissible impeachment evidence under the Texas Rules of Evidence inasmuch as the same had a prejudicial potential that substantially outweighed any probative value..

**IV. Procedure**

**A. *Travelers Ins. Co. v. Joachim*, 315 S.W. 860 (Tex. May 14, 2010).**

In *Joachim*, a procedural dispute arose over whether a trial court's erroneous dismissal of a suit with prejudice, following the plaintiff's filing of a non-suit, operates to bar a later suit because of *res judicata*. Concluding that it does, the Texas Supreme Court reversed the court of appeals judgment and ordered the

case dismissed.

The petitioner insurer had sought review of a the court of appeals judgment which reversed the trial court's take-nothing judgment in respondent insured's suit alleging that he was entitled to benefits under an auto insurance policy for damages caused by his accident with an underinsured driver. The insured had previously filed a voluntary non-suit of the same cause of action. The trial court entered a dismissal with prejudice. Unaware of the dismissal order, the insured did not contest it in the trial court or file an appeal. When he later re-filed the same cause of action in a different trial court, the insurer successfully filed a motion for summary judgment based on *res judicata*. The court held that a trial court's authority to dispose of a case following a non-suit included the authority to enter a dismissal with prejudice and that such an order, if mistaken, was not necessarily void but was merely voidable; thus, such an order had to be attacked directly in order to prevent the order from becoming final for purposes of establishing the affirmative defense of *res judicata*.

Because the insured failed to attack the trial court's order directly, it became a final judgment for purposes of *res judicata*. Although the insured alleged that he never received notice of the judgment dismissing his first action with prejudice, the court noted that the insured could have availed himself of the remedy of an equitable bill of review.

## V. Products Liability

### A. *Fresh Coat, Inc. v. K-2, Inc.*, 318 S.W.3d 893 (Tex. Aug. 20, 2010).

*Fresh Coat*, is an indemnity case concerning products-liability litigation in the residential construction industry. Specifically at issue is a synthetic stucco manufacturer's duty to indemnify a contractor under Chapter 82 of the Texas Civil Practice and Remedies Code. Over 90 homeowners sued the manufacturer, subcontractor, and builder relative to the synthetic stucco component applied to the exterior walls of their homes. After settlements with the plaintiff homeowners were reached, the subcontractor sought indemnity from the manufacturer. The trial court awarded judgment to the subcontractor. The court of appeals upheld the judgment except with regard to the settlement payment the subcontractor made to the builder. On review, the Court determined that the synthetic stucco was a "product" and the subcontractor was a "seller" under Chapter 82. Because the subcontractor was a "seller," indemnity from the manufacturer for the subcontractor's settlement with the builder was required. The manufacturer did not show that the subcontractor caused the loss via the type of act or omission contemplated in Chapter 82.

### B. *Bic Pen Corp. v. Carter*, 2008 Tex. App. LEXIS 9106 (Tex. App. - Corpus Christi 2008), *pet. granted*, 2010 Tex. LEXIS 145 (February 12, 2010).

In *Bic Pen*, the petitioner manufacturer appealed the judgment rendered in a products liability action awarding actual and exemplary damages to the mother of a child injured in a fire started with a disposable lighter. The mother claiming the child's injuries resulted from manufacturing and design defects in the lighter. The jury found for Carter, awarding three million dollars in actual damages and two million dollars in exemplary damages. The court of appeals affirmed as to the design defect claim, but did not address the manufacturing defect claim.

Finding that the lighter was subject to the federal standards for childproof lighters and had been certified as compliant by the U.S. Consumer Product Safety Commission, the Texas Supreme Court held that federal law preempted the design defect claim, because a claim of a higher standard of child resistance at common law was not compatible with the goals of federal regulation in that area. The Court found the manufacturing defect claim was not preempted, however, because it was separate from whether the design itself was faulty. That judgment of the court of appeals was reversed and the matter remanded to that court for further consideration of whether, among other things, there was sufficient evidence of a manufacturing defect and whether exemplary damages were appropriate.

On such issues, the court of appeals held (1) that the manufacturing defect claim was not preempted inasmuch as a common law rule requiring a manufacturer to construct its products in conformance with design specifications did not conflict with the federal regulatory scheme; and (2) that there was insufficient evidence that a reasonable trier-of-fact could have formed a firm belief or conviction that the corporation acted with malice. Accordingly, the trial court's award of actual damages was affirmed, and its award of exemplary damages reversed and remanded.

The Texas Supreme Court granted petition for review in the case on February 12, 2010, and arguments were heard on March 23, 2010.

## **VI. Worker's Compensation**

### **A. *Am. Prot. Ins. Co. v. Leordeanu*, 278 S.W.3d 881 (Tex. App. – Austin 2009), *pet. granted*, 2010 Tex. LEXIS 221 (Tex. March 12, 2010).**

In *Leordeanu*, the question was whether a traveling sales representative was in the course and scope of her employment when injured in a single-car accident. At the time of the accident, the sales representative was en route to a storage unit provided by her employer that just happened to be located next to her apartment complex.

Applying the Texas Labor Code's dual purpose rule, requiring the worker to show that she would not have made the travel that resulted in her injuries had there been no business of her employer to be furthered by the travel, the court of appeals concluded that there was not evidence to support a finding that the worker sustained a compensable injury entitling her to the worker's compensation benefits sought.

The Texas Supreme Court granted petition for review in the case on March 12, 2010, and arguments were heard on April 15, 2010.