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***Insurance Law*: A cap on amounts the insurer will pay the insured for "liability" does not limit defense expenses when the policy consistently distinguishes between *liability* and defense costs.**

***Contract Interpretation*: The phrase "as regards" restricts the scope of a condition, whereas "if" or "when" identifies the condition itself.**

Anadarko Petrol. Corp. v. Houston Cas. Co. arose out a dispute over defense costs Andarko incurred in defending liability litigation arising out of the BP Gulf oil spill. Houston Casualty's policy was an excess indemnity policy that required the insurer to "indemnify" Anadarko for its "Ultimate Net Loss." Section III of the policy defined "ultimate net loss" as "the amount [Anadarko] is obligated to pay, by judgement or settlement, as damages resulting from a[covered] 'Occurrence' … and all 'Defen[s]e Expenses' in respect of such 'Occurrence.'" The policy also contained a joint venture endorsement that said:

> [A]s regards any [insured] *liability* … which arises … out of … any joint venture ... in which [Anadarko] has an interest, the liability … under this Section III shall be limited to the product of (a) the percentage interest of [Anadarko] in said Joint Venture and (b) the total limit afforded [Anadarko] under this Section III.

(Emphasis added).

Anadarko's alleged liability arose out of operation of the Macondo well – a joint venture in which Anadarko was a 25% participant. The insurer urged that the joint venture endorsement's limitation for "any … liability" applied not only to the sums paid to resolve Anadarko's liability to the claimants, but also to the amount Anadarko spent to defend that suit. The insurer's proposed interpretation would have limited its liability for defense costs to 25% of the difference between sums paid towards settlement and the $150 million policy limit.

Anadarko, on the other hand, urged that the "liability" referred to in the joint venture endorsement did *not* include defense costs. Under its reading of the policy, the insurer would have been liable to reimburse defense costs up to 100% of the difference between sums paid towards settlement and the $150 million policy limit.

In a unanimous opinion by Justice Boyd, the court agreed with Anadarko. The opinion's analysis began with the customary examination of the plain meaning of "liability," which the policy did not specifically define. When dictionary definitions failed to definitively resolve the issue, the opinion turned to how the term was used in the policy itself. The opinion detailed the policy provisions that consistently and constantly distinguished defense costs from liability by judgment or settlement. Accordingly, the joint venture endorsement's 25% limitation only applied to indemnity for liability – i.e., the amounts paid to settle the underlying suit – and not to the insured's defense expenditures.

[1] The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

The opinion rejected the insurer's fallback argument. The insurer insisted that even if liability and defense costs were distinct, the joint venture endorsement's percentage reduction applied to all "ultimate net loss" – *both* the amount of covered liability and defense costs. The opinion pointed out, however, that "as regards any [insured] *liability*" was explicitly limited to *liability*. To arrive at the insurer's result, it would have been necessary to rewrite the joint venture endorsement to say "*if*" or "*when*" liability arises out joint venture obligations, then liability for the ultimate net loss insured under Section III is reduced. The effect of "as regards any … liability" was to specify a particular subset of losses to which Section III applied. Anadarko was entitled to recover under the policy its defense costs up to 100% of the remaining balance of the $150 million policy limit.

***Mootness*: The capable-of-repetition exception does not apply if but for delays caused by the contestant the case could have been decided before becoming moot.**

***Frivolous Litigation Sanctions*: Even though the contestant's election challenge did not survive a no-evidence summary judgment motion, the suit was not frivolous where there was some statistical and circumstantial evidence consistent with her claim.**

Pressley v. Casar and *Rogers v. Casar* arose from the contest of a city council election. The trial court deemed the contest frivolous and sanctioned the contestant and her lawyer under chapter 10 of the Civil Practice and Remedies Code. The election winner completed the term of office before the contestant filed her petition for review. As to the elections contest itself, the court held in a *per curiam* opinion that the case was moot. The "capable-of-repetition-but-evading-review" exception did not apply to the contestant because she failed to show: (1) the challenged condition would have ceased before the challenge could be fully litigated and (2) it was reasonable to expect that the contestant would be subject to the same condition again. The opinion particularly noted that the contestant had postponed filing her briefs for nearly a year. Accordingly, it reasoned, she could hardly urge that it would have been impossible to resolve the elections contest before it became moot.

The trial court's sanctions order, however, was still a live controversy over which the court could exercise jurisdiction. Pressley argued in the trial court that election officials engaged in criminal conduct by certain election irregularities involving, among other things, the collection and analysis of electronic ballots. After granting a no-evidence summary judgment motion, the trial court sanctioned the contestant and her attorney on the basis that the claims for disenfranchisement, election irregularities and criminal violations lacked factual or legal bases.

The court vacated the sanctions award as to alleged election irregularities because the contestant's claims had some statistical basis, even though the statistical evidence did not make a *prima facie* case of the alleged irregularities. Further, some of those claims were supported by an expert witness. This was sufficient to immunize those claims from sanctions under chapter 10 for bad faith litigation. Even if the supporting evidence was not admissible, it should be considered when deciding whether there was a good faith basis for the claim or the contestant's claims about whether the alleged deficiencies violated election law were frivolous. A claim that is ultimately unsuccessful or rejected by an official is not, for this reason alone, frivolous or baseless. The perception that there was impropriety was enough to make the imposition of sanctions an abuse of discretion.

***Declaratory Judgment Suits* cannot be maintained to directly or indirectly advance liability defenses to threatened litigation. Denial of a rule 91a motion to dismiss such a declaratory judgment action as baseless is an abuse of discretion for which a conventional appeal is not an adequate remedy.**

In re Houston Specialty Ins. Co. is an original proceeding to challenge the denial of a motion to dismiss. The motion challenged as baseless a declaratory judgment suit filed by the insurer's coverage counsel in response to the insurer's demand that coverage counsel essentially reimburse the insurer for the sums it paid to settle an insured's breach of contract and bad faith claims. The insured's bad faith suit followed a partial summary judgment that the insurer had breached its duty to defend. The insurer's denial of defense and indemnify under the policy was based on coverage counsel's advice. Coverage counsel sought declaratory relief that it was not and could not be liable for the damages sought for an allegedly unreasonable settlement following an erroneous partial summary judgment ruling.

Generally, a potential tort defendant – here, coverage counsel on a threatened legal malpractice claim – may not seek declarations of non-liability on the tort claim. Instead, the tort defendant's liability should be litigated in the tort suit. Otherwise, the traditional plaintiff is deprived of the long-standing right to select the time and choose among appropriate venues for the suit. In a *per curiam* opinion, the court ruled that the trial court's refusal to adhere to this rule by refusing to dismiss coverage counsel's declaratory judgment suit was a clear abuse of discretion. The insurer's right to choose the time and place for litigating its legal malpractice claim is not undermined merely because the coverage lawyers also sought, in addition to a determination of non-liability, "declarations that do not expressly ask for a determination of liability."

The issue, the opinion explains, is not one of jurisdiction, but whether the declaratory judgment statute authorizes its use for anticipatory declarations of non-liability. It does not, and adding claims that may not directly involve a determination of non-liability does not "save" the unauthorized use of declaratory relief for a proscribed purpose. All of the declarations sought were direct or indirect efforts to establish defenses to the insurer's threatened malpractice claim. Thus, coverage counsel's declaratory judgment suit was without factual or legal foundation because it was not a permissible use of the declaratory judgment action.

The opinion also ruled that the insurer had no adequate remedy from the denial of the rule 91a motion by conventional appeal. The opinion explained that an appeal at the end of the litigation was no remedy for loss of the right to choose the time and place of its suit or for the time and money wasted in impermissible and unauthorized suits.

The *per curiam* opinion does not discuss the general rule that cost of litigation in and of itself not sufficient to establish that an appeal is not an adequate remedy. While it is possible to consider *Houston Specialty* as a "relaxation" of this rule, another way to look at it is that litigation costs *can* make a later appeal inadequate when the proceeding was not legally justifiable in the first place.

***Defamation*: The single publication rule applies to the accrual of causes of action based on information generally and freely available on the Internet even when the source of that information is anonymous.**

***Mootness*: Pre-suit discovery requests under rule 202 become moot notwithstanding a pending claim for attorney's fees under the Texas Citizen Participation Act if the underlying cause of action would be barred by limitations.**

In *Glassdoor, Inc. v. Andra Group, L.P.*, the respondent sought rule 202 pre-suit discovery from the operator of a website that posted anonymous employee reviews of their employers. The discovery concerned the employer's efforts to discover the source of negative reviews about the respondent as an employer. The website operator moved to dismiss under the Texas Citizen's Participation Act. Respondent contended that reviews on the site were defamatory causing damage to the business's reputation and also were disparaging causing loss of income. The trial court disagreed and an interlocutory appeal ensued. From the date of discovery, limitations for defamation is one year; for business disparagement, two years. While pending appeal, two years elapsed from the date the 202 petition was filed.

Texas applies the single publication rule that these causes of action accrue on when the publisher made the defamatory statement available to the intended audience, regardless of later re-publications of the same material. In *Glassdoor*, Justice Lehrmann ruled for a unanimous court reiterated that this rule applied to publications via the Internet, even if the host has the right and ability to control information posted by others. The court deemed inapplicable the exception to the single publication rule for information that was distributed on a restricted, for-charge, or confidential basis to particular users. In this case, such an exception could not apply. The reviews at issue were generally available free of charge to the website's visitors. Just because the website does not disclose the reviewer's identity did not postpone accrual of the cause of action. That happens when the plaintiff obtains actual or constructive knowledge of the injury, even if the identity of the wrongdoer is unknown.

Limitations barred the potential suit for the alleged derogatory reviews and, therefore, the action for pre-suit discovery concerning those claims was moot. The petitioner's claim for attorney's fees under the TCPA did not prevent the case from becoming moot because both the trial and appellate courts had refused to dismiss the suit so that the petitioner was not a "prevailing party" entitled to attorney's fees before the issue became moot.

Generally, claims for attorney's fees or sanctions prevent a case from being moot even if the underlying claim is mooted. Here, the mootness of the underlying claim is cited as *the* reason why the claim for attorney's fees was also moot. In other words, the claim for attorney's fees is moot because the underlying case became moot notwithstanding the pending attorney's fee claim.

Consider whether this reasoning is compelling or merely circular.

***Probative Value of Expert Opinion*: An opinion is not "conclusory" if the expert relates the opinion to and supports it with the facts and evidence in the case.**

***Proximate Causation* is satisfied if the act or omission is a "substantial factor" in causing the harm; "immediate cause" is not required.**

***Factual Insufficiency Evidentiary Review* must not only detail the evidence in the case but also explain why the court of appeals found the evidence factually insufficient to support the jury's conclusion.**

In *Windrum v. Kareh*, the court revisited whether expert testimony in a medical malpractice case lacked probative value because it was conclusory. It last addressed this issue in *Bustamante v. Ponte*, covered in the September 29, 2017 edition of the *Update.* The court also addressed application of the substantial factor analysis in such a case and whether the court of appeals failed to properly implement the factual insufficiency standard of review. In an opinion by Justice Green that was unanimous on the first two issues and that persuaded all but Justice Brown on the last, the court held that the court of appeals erred in treating expert medical testimony as conclusory and in holding that the evidence was not sufficient to establish that the alleged medical error was a substantial factor in causing the patient's death. Finding legally sufficient evidence of liability, the majority further vacated the decision of the court of appeals that the evidence was also factually insufficient to support liability.

The plaintiffs persuaded the jury that a neurosurgeon's medical malpractice in failing to insert a shunt to relieve intracranial pressure resulting from a blockage of the duct that allowed circulation of cerebrospinal fluid. On appeal, the neurosurgeon urged that plaintiffs' expert's testimony was conclusory and lacked probative value.

> *The expert opinion was more than mere unsubstantiated conclusion because the witness related the opinion to the facts of the case.*

The opinion begins its analysis by explaining that expert testimony is conclusory when an expert either: (1) offers no basis for his opinion or those bases fail to support the expert's conclusion; or (2) the expert's conclusion rests entirely on the expert's unexplained assertion that the proffered foundation for the conclusion exists or supports the expert's thesis. In all cases, this means that the expert must "link" conclusions to the facts. In medical malpractice cases, this linkage obliges the expert to explain how, within reasonable medical probability, how and why the error or omission caused the injury in question.

It then applies these tests to the testimony of the plaintiff's expert's testimony, noting that its review is limited to evidence appearing on the face of the record. The opinion also points out that, because expert testimony that does not exceed the "conclusory" threshold is not legally sufficient to support a verdict, a challenge that the opinion is conclusory does not depend on a predicate objection to admissibility at trial. Further, the opinion acknowledges that the line between probative and conclusory opinion testimony is not easily drawn and close questions must be resolved in favor of the trial court's resolution.

In this case, the opinion concluded that the medical expert's testimony did not fall into the probative abyss of mere conclusion. In considerable detail, the court described how the expert explained that the patient should have received a shunt based on his own experience and that of other neurosurgeons treating patients with similar conditions; the facts revealed by the patient's medical records and test results; and partially supported by medical literature. This explanation included an animated demonstration and explanation of how intracranial pressure increased from a blockage and how that pressure could have been alleviated had a shunt been implanted timely. The expert explained that this pressure adversely affected the brain stem and its ability to regulate autonomic functions such as respiration and heartbeat.

The court also explained that an opinion is not "conclusory" merely because it is disputed by other experts. Nor does the lack of citation to supporting medical literature deprive the opinion of probative value. In this case, the expert explained his conclusion based on his own experience with similar patients. The expert also bolstered his conclusion with supporting evidence in the patient's symptoms, medical records, test results, and the autopsy findings. The expert did not merely opine that the neurosurgeon failed to meet the standard of care, but rather explained how and why the neurosurgeon's diagnosis was incorrect and the resulting care was substandard. Once the expert's opinion surpassed the realm of unsupported conclusion, it was for the trier of fact to resolve the conflicts between that opinion and the opinion of the defense experts.

The evidence was legally sufficient to prove that the malpractice was a substantial factor in causing the patient's injury and death.

The opinion next tackled whether the evidence was legally sufficient to support the jury's finding that the neurosurgeon's failure to install a shunt was the cause of the patient's injury and death. To proximately cause a result, the act or omission must be a substantial factor in causing the harm and not just a factor in creating a condition making the negligent act or omission possible. The opinion acknowledged that an act or omission if "too attenuated" cannot be a proximate cause. However, it rejected as too strict the analysis of the court of appeals that effectively required the act or omission to be the immediate cause of the harm. However, the opinion does not provide a bright line test to distinguish substantial causative factors from those that are too remote to be deemed a proximate cause other than to say that there must be some evidence that makes an act, omission or circumstance, a cause that is more plausible than others for which the defendant was not responsible.

In this case, the causation dispute centered over the lack of evidence of herniation. The court noted that both testimony about previous experiences and test results showed that a blockage resulted in increased pressure and that herniation was not necessary for that pressure to cause a fatality. The opinion distinguished this case, being founded on previous experience of the likely outcome from the timely placement of a shunt, from a case in which there was no evidence to suggest that an omitted procedure would have avoided the harm ultimately suffered. Thus, in the opinion of the court, the plaintiff adequately proved that the neurosurgeon's decision not place a shunt was a substantial factor sufficient to be a proximate cause of the patient's death even if that failure was not the *immediate* cause. Once the jury decided that the neurosurgeon breached the standard of care, it could also "find that the breach constituted proximate cause because failure to properly diagnose and treat *can be* a substantial factor in causing injury." (Emphasis added).

Reversal for factual insufficiency of the evidence must explain why *the jury should not have been persuaded.*

Having decided the evidence was legally sufficient to support the jury's verdict, the opinion turned to whether the court of appeals properly reviewed factual sufficiency of the evidence. As a vouchsafe against simply substituting its judgment for that of the jury, to overturn a verdict for factual insufficiency requires the court of appeals to detail the evidence relevant to the issue in consideration and explain *why* the finding is manifestly wrong and unjust, shocks the conscience, or is the clear result of bias. Acknowledging that the Texas Supreme Court does not have the authority to conduct factual sufficiency review, the opinion held that the opinion of court of appeals did not show that it had applied the appropriate standard of review. According to the opinion, the decision of the court of appeals did not disclose the "mental process" and the reasons why it did not believe the evidence sufficient to support the jury's verdict. Accordingly, the court remanded the case to the court of appeals for reconsideration of its factual sufficiency analysis.