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Motion for Rehearing Granted in *USAA Texas Lloyds Co. v. Menchaca*

In [*USAA Texas Lloyds Co. v. Menchaca*](#), the court clarified when insurance policy proceeds could be recovered as damages for statutory or common-law bad faith conduct. In its original opinion, the court ruled that policy benefits, if lost or denied as the result of the conduct of the insurer in violation of the statute or common law “bad faith” prohibitions may recover those benefits as damages for the tortious bad faith conduct. However, if there were no policy benefits regardless of the insurer’s bad faith conduct, then the bad faith conduct does not in and of itself create recoverable contractual benefits that did not otherwise exist. On December 15, the court took the unusual step of granting rehearing to revisit this holding at the behest of several insurance companies and the Chamber of Commerce of the U. S.

December 15 Petitions Granted

The court granted review in [*Anderson v. Durant*](#) in which a divided Fort Worth court of appeals reversed a judgment based on the jury’s finding of fraudulent inducement when the jury failed to find that the parties ever entered the alleged agreement. The principal issue is whether a jury’s fraud-in-the-inducement finding supports recovery absent a finding that the parties ever reached an agreement. The case will be argued February 27.

On February 27, the court will also hear [*Old Republic Nat’l Title Ins. Co. v. Bell*](#).

The issue in *Bell* is whether a Texas court has personal jurisdiction over a Louisiana resident who got proceeds from the sale of a house in Texas in a fraudulent transfer.

December 15 Opinions

Scope of Judicial Review of Workers’ Compensation Decisions Includes All Issues Related to Whether Employee Sustained Injury in the Course and Scope of Employment.

[*State Office of Risk Management v. Martinez*](#) concerned the scope of review in an appeal from the decision of the Division of Workers’ Compensation Appeals panel. Martinez worked for the State Office of Risk Management. She fell while working at home to prepare for a hearing. The Workers’ Compensation appeals panel ruled that Martinez’s at-home fall occurred within the course and scope of her employment.

The employer sought judicial review of this administrative ruling, arguing that she was not in the course and scope because working from home violated the agency’s policy and state law. The employee argued that the only issues that could be presented in the judicial proceeding were those timely raised in the administrative proceedings and that whether the employee could be in the course and scope due to agency policy and state law prohibiting work from home was not such an issue.

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 court rejected this argument and held that the “issue” over which the judiciary enjoyed jurisdiction was the broader question of whether the claimant sustained injury in the course and scope of employment. As it does in other contexts, the court ruled that this includes consideration of subsidiary issues. The employer’s argument was essentially one that concerned whether the injury occurred in the course and scope of employment and, therefore, was appropriate for presentation during judicial review.

No Jurisdiction to Entertain Arguments that Employment Offers to Injured Worker Were Intended to Create a Pretext for Termination When Employee Failed to Exhaust Administrative Remedy.

[*In re Accident Fund General Insurance Co.*](#) was a mandamus proceeding arising from a plea challenging the court’s jurisdiction to hear claims alleging that an employer manufactured employment offers to an injured worker so that it could use the employee’s rejection as a pretext for firing him.

The Accident Fund asserted that the Division of Workers’ Compensation had exclusive jurisdiction over such claims. In a *per curiam* opinion, the Texas Supreme Court agreed and ruled that the employee’s claims should be dismissed because the employee failed to exhaust his administrative remedies before filing suit advancing those claims.

Trial Court Abused Discretion to Reject Designation of Responsible Third Party More than Sixty Days Before Current Trial Setting Without Opportunity to Amend.

In [*In re Coppola*](#), the court granted mandamus relief directing the trial court to entertain a motion to designate a responsible third party as part of Texas Civil Practice & Remedies Code chapter 33’s comparative responsibility scheme. Without a showing of good cause, §33.004 requires such motions to be filed more than sixty days before trial. In this case, the motion was filed *after* the initial trial setting, but more than sixty days before the current trial setting. By *per curiam* opinion, the court ruled that the trial court abused its discretion by refusing to entertain the motion and not offering the relator the opportunity to correct any deficiency in its motion.

Tort Claims Act Dismissal of Employees Mandatory On Motion of Governmental Employer Regardless of Later Amendments to Pleadings or Motions.

A public employee may be individually liable for his tortious conduct outside the general scope of employment, but section 101.106 of the Texas Tort Claims Act “requir[es] an irrevocable election when suit is filed between suing the governmental unit under the Tort Claims Act or proceeding against the employee alone. If both employee and employer are sued, §101.106(e) requires the employees’ immediate dismissal on the employer’s motion. In [*Univ. of Texas Health Science Center at Houston v. Rios*](#), the court held that the right to this dismissal accrues when the employer’s motion is filed and cannot be affected by later pleadings, motions, or amendments thereto. The court determined that individual defendants were state employees to whom §101.106(e) applied.

Measure of Damages for Slander of Title: Pending Contract Price Less Market Value with Unclouded Title.

In [*Pieroni v. Pieroni*](#), the former wife recorded an abstract of the judgment decreeing her divorce from her former husband ostensibly to secure payment of amounts due under the divorce decree. This abstract ostensibly created a lien on a home the former husband purchased after the divorce. The husband sued for slander of title when the wife refused to release the lien and thereby prevented a pending sale of the property. The trial court awarded the husband damages in the amount of the difference between the sales price and the outstanding mortgage along with out of pocket expenses incurred while the property was unoccupied. The court disapproved of this recovery, holding that the proper measure of damages for slander of title when the plaintiff still owns the property is the difference between the contract price in the frustrated sale and the property’s market value with an unclouded titled at time of trial.

Texas Medical Liability Act’s Adequate Expert Report Requirement May Be Satisfied Cumulatively by Multiple Reports

[*Miller v. JSC Lake Highlands Operations, LP*](#) holds by *per curiam* opinion that the requirement of an “adequate” expert report to support a medical liability claim may be satisfied by the cumulative effect of multiple expert reports. Indeed, the opinion notes that section 74.351(i) provides that any reporting requirement can be fulfilled “by serving reports of separate experts.” After reviewing the reports tendered by the plaintiff, the court deemed them adequate and remanded the case for further proceedings.

Possession of a Handgun Is Not Necessarily a “Use” Supporting Civil Forfeiture.

In [*Mark Ken Tafel v. Texas*](#), the court ruled in a *per curiam* opinion that a forfeiture proceeding under article 18.19 of the Texas Code of Criminal Procedure is a civil proceeding over which the Texas Supreme Court has jurisdiction. It also ruled that article 18.19 only authorizes forfeiture for the use of a weapon. In this case, a county commissioner who was licensed to carry brought two handguns to a meeting of the commissioner’s court in violation of Penal Code §46.035(c) which proscribes carrying a weapon to a meeting of a governmental entity. The Legislature provided two different forfeiture mechanisms. The one under which the State sought forfeiture provided for certain exceptions and conditions for civil forfeiture. The other allowed forfeiture for mere use of a weapon in committing the offense. The court reasoned that if it allowed mere possession to be considered “use” then the former forfeiture mechanism would have been rendered meaningless.

Case Became Moot Pending Appeal Due to Change in the Law

In [*City of Krum v. Rice*](#), a convicted sex offender challenged the general law city’s authority to enforce restrictions on where he could live after release. During the pendency of the appeal, the Legislature specifically authorized general law cities to impose such restrictions. The court in another *per curiam* opinion ruled that this change rendered the case moot and divested the court of subject-matter jurisdiction.

December 22 Opinions

Franchise Tax Apportionment

[*Graphic Packaging Corp. v. Hegar*](#) concerned apportionment of intrastate and out-of-state gross revenues for franchise tax purposes. At issue was whether the apportionment was governed by the formula specified in the Multistate Tax Compact embodied in [Tax Code Chapter 141](#) and applicable to “income” taxes, or by the formula in [Tax Code §171.106](#) as part of franchise tax laws. The court holds in a unanimous opinion by Justice Devine that the latter controls so that the franchise tax applies to that portion of gross revenues equal to the ratio of Texas gross receipts to total gross receipts.

Irrevocability of Voluntary Parental Rights Termination

[*In re KSL*](#) and [*In re MM*](#) involved orders for the voluntary termination of parental rights based on the parent’s voluntary relinquishment affidavit under [Family Code § 161.103](#). By unanimous opinion by Justice Willett and a “me too” *per curiam* opinion, the court ruled that the voluntary relinquishment could not be overturned on the basis that there was no clear and convincing evidence that termination was not in the child’s best interests. [Family Code §161.211](#) validly bars appeals by a parent that executes such an affidavit.

Law Firm Disqualification for Side-Switching Paralegal

[*In re Bertram Turner*](#) held that a law firm who hired a paralegal from the firm that represented an opposing party in the same litigation was disqualified from continuing its client’s representation. The qualification resulted from the irrebuttable presumption that the paralegal possessed confidences about the opposing party because the paralegal worked on the same litigation for the opponent while working for her former employer. The paralegal’s tenure with the previous firm was brief and was omitted from her resume. Once the hiring firm learned of the conflict, it took measures to wall off the paralegal. In a *per curiam* opinion, the court held that these corrective measures came too late to rebut the presumption that the paralegal divulged to her current employer the opponent’s confidences presumably obtained through her previous employment. The court ruled that the mere *threat* of disclosure was the object to be attained by isolating the paralegal from any matter involving the opposing party and her previous employer’s client. Because the hiring firm did not learn of her involvement until after the paralegal was in a position to have disclosed confidences, later measures to isolate the employee did not necessarily prevent the harm to be avoided. The paralegal’s new employer was, accordingly, disqualified from further representation of its client.